

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

In the Matter of:

SOLOMON SYLVAN,

Respondent

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HUDBCA No. 87-2432-D40
(Docket No. 87-1137-DB)

Mr. Solomon Sylvan

Respondent, Pro se

William L. Johncox, Esquire
Office of General Counsel
U.S. Department of Housing
and Urban Development
Washington, D. C. 20410

For the Government

DETERMINATION

OPINION BY ADMINISTRATIVE JUDGE DAVID T. ANDERSON

Statement of the Case

By letter dated May 7, 1987, Thomas Demery, Assistant Secretary for Housing - Federal Housing Commissioner of the U.S. Department of Housing and Urban Development ("HUD") notified Solomon Sylvan ("Respondent") that consideration was being given to debar Respondent and his affiliate, S&M Construction, Inc., from participation in HUD programs for a period of five years. The letter stated that it would serve as the Department's Complaint in the event that Respondent requested an opportunity to submit written briefs and documentary evidence in opposition to the proposed debarment. The proposed debarment was based on Respondent's guilty plea in the U.S. District Court for the Eastern District of Washington, to charges of violating 18 U.S.C. §§1012 and 2. Respondent was also advised in the letter of May 7, 1987 that pending a final determination of the debarment

issue, he and his affiliate, S&M Construction, Inc., would be suspended from further participation in HUD programs.

By letter dated May 21, 1987, Respondent requested an opportunity to submit evidence in opposition to the proposed debarment. No similar request was made in that letter on behalf of S&M Construction, Inc.

Findings of Fact

1. Solomon Sylvan is President of S&M Construction, Inc. ("S&M"), a real estate development corporation (Attachment to Respondent's Correspondence dated June 15, 1987).

2. On January 16, 1987, the Assistant United States Attorney for the Eastern District of Washington filed an Information charging Respondent with four counts of violating Federal laws. The Information charged Respondent with making, and aiding and abetting others in making false statements to HUD in 1982 regarding the amounts paid by mortgagors as down payment on property being considered for HUD mortgage insurance. (Govt. Exh. 3.)

3. On January 29, 1987, a Judgment and Probation/Commitment Order was entered by the U.S. District Court for the Eastern District of Washington which indicated that Respondent had pled guilty to all four counts of the Information. Pursuant to that order, Respondent was sentenced to a five-year period of probation, which would prematurely terminate upon the payment of \$124,253.45 in restitution and \$4,000 in fines. (Attachment to Respondent's Correspondence dated June 15, 1987; Govt. Exh. 2.)

Discussion

In his defense against the proposed debarment, Respondent claims that he was only responsible for the construction operations of S&M and that Tommy Magleson, his "corporate partner," was primarily responsible for sales. Respondent also refers to his previously unblemished record of participating in HUD programs as a mitigating factor. Finally, Respondent contends that the restitution and fine are sufficient punishment for his admitted wrongdoings.

In order to assure the Government that it only does business with responsible parties, HUD is authorized to debar contractors and grantees it finds to be lacking in present responsibility. 24 C.F.R. §24. It is uncontested that Respondent, as President of S&M, is a "contractor" as an indirect beneficiary of HUD funds. 24 C.F.R. §24.4(f).

24 C.F.R. §24.6(a) enumerates various causes for the debarment of HUD contractors. Among these is the conviction for a criminal offense in connection with the performance of a public

contract. 24 C.F.R. §24.6(a)(1). Another cause for debarment is the conviction for "any other offense indicating a lack of business integrity and honesty, which seriously and directly affects the question of present responsibility." 24 C.F.R. §24.6(a)(9). Respondent was convicted for making false statements to HUD in his attempt to secure mortgage insurance for property S&M developed and sold. The record firmly establishes cause for debarment pursuant to 24 C.F.R. §24.6(a)(1) and (9).

Debarment is not to be used as a punitive measure, but to provide a means by which the Government can effectuate its statutory obligation to protect the public. See, L.P. Steuart & Bros., Inc. v. Bowles, Price Administrator, et al., 322 U.S. 398, 406 (1944); Gonzales v. Freeman, 334 F.2d 570, 577 (D.C. Cir. 1964). The purpose of debarment is to assure the Government that it does business only with responsible contractors and grantees. 24 C.F.R. §24.0. "Responsibility" is a term of art in Government contract law, defined to include not only the ability to successfully perform a contract, 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); 34 Comp. Gen. 86 (1954); 39 Comp. Gen. 468 (1959); Old Dominion Dairy Products, Inc. v. Secretary of Defense, *supra*, at 957; Stanko Packing Company, Inc. v. Bergland, 489 F. Supp. 947, 949 (D.C. 1980); 46 Comp. Gen. 651, 658-59 (1967). The establishment of a cause for debarment does not mandate that the sanction be applied. 24 C.F.R. §24.6(b). However, a debarment action is justified if it is in the best interests of the Government and the public after due consideration of all mitigating circumstances.

Respondent pled guilty to charges that he had submitted false documents to HUD. Although Respondent alleges that the responsibility for submitting documents to HUD fell to a corporate officer other than himself, the information filed by the Assistant United States Attorney named Respondent personally as the defendant. (Govt. Exh. 3.) Respondent's guilty plea and conviction on the criminal charges are further indications that he either submitted the documents personally or that he assumed personal responsibility for their submission by another officer. Since Respondent has admitted criminal guilt and the matter has been fully adjudicated in the proper forum, this Board will neither re-examine the facts nor make findings with respect to Respondent's criminal culpability. Roy C. Markey/The Roary Company/Be-Mark Homes, HUDBCA No. 82-712-D33, 82-2 BCA ¶16,119.

The fact that Respondent agreed to restate any losses suffered by the Government does not, *per se*, alleviate the gravity of his wrongdoings. Rea Construction, HUDBCA 81-550-D6 (March 18, 1983). Respondent has displayed a serious lack of responsibility as a Government contractor by knowingly making false statements to the Government, statements on which the Government relied in determining whether to provide mortgage

insurance. Respondent's complicity in the making of false statements adversely affected HUD's ability to make informed decisions and to exercise sound financial judgment in the administration of its programs. Respondent's motivation to make restitution can be viewed as being prompted less by an appreciation of the wrongfulness of his actions than by the realization that doing so would lessen the criminal penalties imposed against him. Respondent's statement that the payment of the restitution and fine is "punishment enough" reinforces the perception that Respondent fails to understand that the imposition of debarment is designed to protect the integrity of a HUD program, and that the payment of a restitution and fine is not persuasive evidence of mitigation.

In any event, the charges to which Respondent pled guilty demonstrate Respondent's blatant disregard for the truth and lack of understanding of HUD regulations. Respondent's present responsibility may be inferred from his failure to exercise integrity in the performance of Government contracts. Schlesinger v. Gates, 248 F. 2d 111 (D.C. Cir. 1957). There being insufficient evidence in the record to override this inference, I find that Respondent's debarment is clearly warranted.

The Government contends that Respondent's "intentional and flagrant violation of the law evidences a serious business risk which warrants the imposition of a five-year debarment." (Govt. Brief, at 6.) Although the Government has clearly established cause for debarment, I am not persuaded that the record in this case, when compared with the facts considered in analogous decisions by this Department's judicial officers, supports a need to impose a five-year period of debarment. Cf. Marvin B. Awaya, HUDBCA No. 84-834-D6 (May 8, 1984) (where Respondent was debarred for a period of three years after pleading guilty to five counts of fraud (violation of 18 U.S.C. §§371, 1341, 1342, 1001, 1002)); Robert H. Vogue and Richard Campbell, HUDBCA No. 85-946-D23 (July 2, 1986) (where Respondents were debarred for a period of three years for pleading guilty to two counts of fraud in order to obtain a larger HUD-insured mortgage loan (violation of 18 U.S.C. §1010, 2)); David M. Cunningham, HUDBCA No. 84-874-D33 (January 23, 1985) (petition for reinstatement denied where Respondent was debarred for a period of five years after pleading guilty to 16 counts of embezzlement (violation of 18 U.S.C. §641, 1010)); Jay D. Morrow, HUDBCA No. 86-1612-D17 (August 15, 1986) (where Respondent was debarred for a period of five years after pleading guilty to a variety of criminal conspiratorial acts including fraud and bribery). In view of these decisions, I find that the offenses committed by Respondent do not demonstrate so serious a business risk as to require the protection of the public interest from Petitioner's future conduct for a term of five years.

Furthermore, Respondent's criminal conduct occurred over five years ago, yet the Government has offered no evidence, other

than documents relating to the facts surrounding this 1982 criminal conduct, which pertains to the issue of Respondent's present responsibility. See Thomas G. Fiorica, HUDBCA No. 85-929-D15 (September 24, 1985) (where a six-year passage of time since criminal acts occurred was the basis for reducing a three-year proposed debarment to a two-year debarment). While present responsibility can be inferred from past acts, the passage of time diminishes the probative weight which should be given to prior criminal conduct as that conduct relates to the issue of present responsibility. John Seravalli, Jr., et al., HUDBCA No. 84-880-D37 and HUDBCA No. 84-881-D37 (May 30, 1985); Paul Grevin, HUDBCA No. 85-930-D16 (July 10, 1986).

Conclusion

For the foregoing reasons, it is my determination that only a two and one-half year debarment of Petitioner is warranted under the circumstances of this case. SOLOMON SYLVAN shall be debarred from participation in HUD programs from May 7, 1987 until November 7, 1989, credit being given for the period of Respondent's suspension. In the interest of administrative consistency and fundamental fairness, Respondent's affiliate, S&M Construction, Inc., shall also be debarred from May 7, 1987 until November 7, 1989.



DAVID T. ANDERSON
Administrative Judge

April 13, 1988