

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

In the Matter of:

LUTHER D. WHITE d/b/a
B&G Enterprise,

Respondent

HUDBCA No. 87-2463-D57
(Activity No. 87-1155-DB)

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For the Respondent

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For the Government

DETERMINATION

Statement of the Case

By letter dated March 27, 1987, Jack R. Stokvis, General Deputy Assistant Secretary, U.S. Department of Housing and Urban Development ("HUD" or "Department"), notified Luther D. White d/b/a B&G Enterprises ("Respondent"), that pursuant to 24 C.F.R. §24.6(a)(1) and (4), HUD was considering debaring Respondent for a period of five years from further participation in HUD programs. The proposed debarment was based on a conviction entered by the United States District Court for the Western District of Missouri, for violations of 18 U.S.C. §§371, 1001 and 1010. Respondent was notified in the letter that, pending a final determination on the proposed debarment, he was being suspended from further participation in HUD programs. By letter dated July 24, 1987, Respondent, through his counsel, made a timely request for a hearing on the proposed debarment. Since the proposed debarment is based upon Respondent's conviction, this hearing is limited under 24 C.F.R. §24.5(c)(2) to the submission of documentary

evidence and briefs. This determination is based on the record considered as a whole.

Findings of Fact

1. Respondent, during all pertinent times, was the owner of a construction company, B&G Enterprise, and was also a member of the loan committee of the Douglas State Bank. Respondent admits that between 1982 and 1983, he received funds from a real estate development company known as MBI, which were provided to MBI under a HUD Community Development Block Grant Program. MBI was the direct recipient of the grant funds as the prime developer of the Citadel Center Project, which was a new housing division in a minority neighborhood in Kansas City, Missouri. (Resp. Brief.)

2. On April 4, 1986, the United States District Court for the Western District of Missouri, returned a six-count indictment against Respondent. Count I alleges that Respondent and others willfully conspired to defraud the United States and conspired to impair, obstruct and defeat HUD in the lawful implementation and execution of its Community Development Block Grant Programs. Count II charges Respondent with making and causing to be made false, fictitious, and fraudulent statements of material facts in an "Application for Advance of Funds from Citadel Center Site Improvement Construction Fund," all in violation of 18 U.S.C. Section 1001. Count III charges Respondent with making, passing, uttering, and publishing as true a HUD Form 1422 (6-75) "Subcontractor's Certification Concerning Labor Standards and Prevailing Wage Requirements," knowing the same to be false, for the purpose of influencing the action of HUD, all in violation of 18 U.S.C. Section 1010. Count IV charges Respondent with making and using, and causing to be made and used, a false waiver of lien dated November 1, 1983, in a matter within the jurisdiction of HUD, knowing that the document contained false, fictitious and fraudulent statements of material facts, all in violation of 18 U.S.C. Section 1001. Counts V and VI charge Respondent with making and using, and causing to be made and used, false documents; namely, a letter dated November 4, 1983 from B&G Enterprise, and a Subcontract Agreement between MBI corporation and B&G Enterprise dated January 7, 1982, in a matter within the jurisdiction of HUD, knowing that the document contained false, fictitious, and fraudulent statements of material facts, all in violation of 18 U.S.C. Section 1001. (Govt. Exh. 2; Resp. Brief.)

3. On September 23, 1986, the jury returned verdicts of guilty against Respondent and a co-conspirator on all six counts. A sentencing hearing was held on January 28, 1987. Respondent was sentenced to three years incarceration on each of Counts I, II, IV and V, to be served concurrently, and ordered to pay a \$2,500 fine on each count pursuant to 18 U.S.C. Section 3565. On Counts III and VI, the sentence of imprisonment was suspended and Respondent was placed on probation for five years and ordered to pay \$35,5000 restitution to Kansas City, Missouri and to perform community service for 20 hours a week during the probationary period.

A Notice of Appeal of Respondent's conviction in the U.S. District Court was filed with the U.S. Court of Appeals for the Eighth Circuit, on February 6, 1987. (Govt. Exh. 3; Resp. Brief.)

4. The unlawful conduct for which Respondent was convicted involved, inter alia, Respondent's aid in obtaining a letter of credit for MBI Corporation from the Douglas State Bank; the submission of false invoices of B&G Enterprise to MBI for work which had not been performed by B&G; the submission of a HUD labor standards form which falsely stated that B&G was owned by someone other than Respondent; and making and utilizing a false subcontract between B&G and MBI. (Govt. Exh. 2.)

5. In late January, 1984, an article was published in a Kansas City newspaper relative to the Citadel project, questioning one of the payments made to B&G. Such adverse publicity caused buyers to refrain from purchasing homes in Citadel. (Resp. Brief.)

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 not to be used for punitive purposes, but for protecting the public interest. 24 C.F.R. §24.5(a). "Responsibility" is a term of art in Government contract law. It has been defined to include not only the ability to satisfactorily complete a contract, but the integrity and honesty of the contractor or grantee. 49 Comp. Gen. 139 (1969).

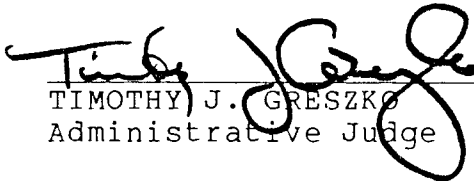
Under the debarment standard of present responsibility, a contractor or grantee may be excluded from HUD programs for a period based upon projected business risk. Roemer v. Hoffman, 419 F. Supp. 130 (D. D.C. 1976). Any mitigating circumstances affecting responsibility must be considered. Roemer v. Hoffman, supra. Debarment is not appropriate if the affected participant demonstrates that, notwithstanding any past non-responsible conduct, he no longer constitutes a business risk. 24 C.F.R. §§24.0 and 24.6(b)(1).

As an indirect recipient of HUD funds, Respondent is clearly a "contractor" or "grantee" within the scope of HUD regulations. 24 C.F.R. §24.4(f). Respondent's convictions for conspiring to make false statements to HUD in order to obtain payment of funds clearly constitutes cause for debarment under the Department's regulations, 24 C.F.R. §24.6(a)(1) and (4), as it establishes a lack of present responsibility. It also shows an utter lack of honesty and integrity. The course of conduct for which Respondent stands convicted constituted not only a serious assault on the public fisc, but served to erode public confidence in a housing program developed to meet urgent community needs. This evidence clearly justifies the imposition of a lengthy period of debarment.

Respondent has submitted no evidence that would prove that he is presently responsible. Respondent's sole submission in this matter is his brief to the appellate court, which asserts at some length that the trial court erred on several issues during the course of the trial. Respondent's conviction and the underlying facts are not subject to attack in this proceeding. Washburn v. Shapiro, 409 F. Supp. 3 (S.D. Fla. 1976); Tempo Trucking and Transfer Corp. v. Dickson, 405 F. Supp. 506 (E.D. N.Y. 1975); Agan v. Pierce, 576 F. Supp. 257 (N.D. Ga. 1984). The fact that Respondent is appealing his conviction has no effect upon this proceeding. Should he prove ultimately successful in his appeal, or should he meet certain other criteria as set forth at 24 C.F.R. §24.11, he may seek reinstatement to eligibility to participate in programs of this Department. The record, therefore, establishes the necessity and appropriateness of a five-year period of debarment of Respondent to protect the public interest.

Conclusion

Respondent shall be debarred from participation in HUD programs from this date through March 26, 1992, credit being given for the period of Respondent's suspension from March 27, 1987.


TIMOTHY J. GRESZKO
Administrative Judge

June 17, 1988