

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

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In the Matter of: \_\_\_\_\_

SPENCER H. KIM AND KAMEX : HUDBCA No. 87-2468-D58  
CONSTRUCTION CORPORATION, : Docket No. 87-1161-DB

Respondents \_\_\_\_\_

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DETERMINATION

Statement of the Case

By letter dated July 2, 1987, Respondents, Spencer H. Kim and his affiliate, Kamex Construction Corporation ("Kim," "Kamex") were notified by the U.S. Department of Housing and Urban Development ("HUD" or the "Department") that it was suspending them from participation in Departmental programs pursuant to 24 C.F.R. §§24.13(a)(1)(iii), 24.13(a)(2)(i) and 24.13(c), based on Kim's conviction in the U. S. District Court for the Western District of Kentucky for violations of Section 1001 of Title 18 of the United States Code. The letter also indicated that a debarment action had been initiated against Kim and Kamex by the U.S. Department of Labor ("DOL"), and that Kim and Kamex were temporarily suspended from participation in HUD programs pending resolution of the DOL debarment proceeding. Respondents made a timely request for a hearing on the propriety of the suspension.

In cases of suspension based upon a conviction, a hearing is limited by the Department's regulations to submission of documentary evidence and written briefs. 24 C.F.R. §24.5(c)(2).

Respondents filed a brief and a reply brief in support of their position, asserting that: (1) HUD lacks jurisdiction in this matter because DOL possesses exclusive jurisdiction over matters relative to the enforcement of Federal labor law; (2) the misconduct in question is too remote in time to demonstrate a lack of present responsibility; (3) the imposition of the suspension was improper because it was invoked in violation of HUD administrative regulations; and (4) Kim's conviction may be overturned by a Federal court on a jurisdictional issue, and hence should not be the basis for the imposition of a suspension. The Government filed a brief, a reply brief, and documentary evidence in support of its position that the suspension is warranted and in accordance with law.

#### Findings of Fact

1. On November 18, 1985, a Grand Jury convened by the United States District Court for the Western District of Kentucky at Louisville returned an indictment charging Spencer Kim with eight counts of making false statements to the U.S. Department of Labor with respect to the wages that had been paid to a number of his employees on the Bishop Lane Plaza Project between November 21, 1980 and January 13, 1981, in violation of 18 U.S.C. §1001. (Govt. Exh. 2.)

2. Kim subsequently pled guilty to all eight counts. On April 10, 1986, Kim was found guilty and convicted by the court for making false statements to an agency of the United States in violation of 18 U.S.C. §1001. Kim was sentenced to a term of eighteen months incarceration on each count, to be served concurrently. The court suspended the sentence and Kim was placed on probation for a period of three years. Restitution was ordered by the court in the amount of \$10,000, to be paid within two years, and to be disbursed to the victims in the case. (Govt. Exh. 3.)

3. Kim acknowledges that he is a contractor or grantee subject to the Department's suspension regulations (Resp. Brief, p. 2).

4. In an undated memorandum addressed to the Assistant to the Secretary of HUD for Labor Relations, the HUD General Counsel's Office recommended that Respondents be suspended on the basis of their conviction pending any DOL debarment action. The memorandum provides, inter alia, that:

The Department has on two previous occasions issued TDPs [Temporary Denials of Participation] against Kim. They were related to other projects and did not contain any false certifications of Davis-Bacon wage rates. In both cases, the TDPs were dismissed by decision of the hearing officer.

The concurrence line on the memorandum indicates that the HUD Assistant to the Secretary concurred with the suspension recommendation on June 8, 1987. (Govt. Exh. 6.)

5. By letter of April 16, 1987, the Director of HUD's Participation and Compliance Division "transferred this matter" to the U.S. Department of Labor and informed DOL that Respondent had been convicted on eight counts of violation of Title "28" (sic), Section 1001, United States Code. The letter requested DOL to inform HUD of any action taken against Kim. (Govt. Exh. 4.)

6. By letter of November 19, 1987, DOL informed HUD that it was prepared to initiate an administrative debarment proceeding against Kim, but would not proceed until HUD provided DOL with certain additional information (Govt. Exh. 5).

### Discussion

Respondents contend that HUD lacks jurisdiction in this matter, asserting that the U.S. Department of Labor possesses exclusive jurisdiction over all civil, criminal and administrative matters relating to the enforcement of the Davis-Bacon Act, 40 U.S.C. §276a-276c. HUD does not question DOL's exclusive authority to remedy wrongs committed against workers under the labor standards provisions applicable to contracts covering Federally financed and assisted construction, but HUD contends that it has authority to determine who is responsible to participate in its own programs.

Under applicable HUD regulations, a conviction of a "contractor" or "grantee" is deemed to be adequate evidence to warrant imposition of a suspension pending debarment. 24 C.F.R. §24.13(c). Respondents admit that they are "contractors" or "grantees" within the ambit of 24 C.F.R. §24.4(f), and as such, Respondents are subject to the sanction of suspension if applicable, if the sanction is determined to be in the public interest and is otherwise effected in conformity with law. The purpose of the suspensions in this case is not to enforce the Davis-Bacon Act or any other provision of statutory law, but to protect the Department from the risk of present and future business dealings with contractors who are not presently responsible. The Secretary possesses inherent authority to establish regulations authorizing and governing the administration of HUD programs, Gonzalez v. Freeman, 334 F.2d 576, 577 (D.C. Cir. 1964), including regulations that make a conviction for violation of the Davis-Bacon Act a ground for suspension or debarment.

However, a suspension must be based on adequate evidence of a contractor's lack of present responsibility. Horne Brothers, Inc. v. Laird, 463 F. 2d 1268 (D.C. Cir. 1972). Respondent's suspensions appear to be based solely on a 1986 conviction for acts which occurred over seven years ago, and the conduct in question is quite remote.

It is undisputed that HUD may suspend a contractor upon adequate evidence of a contractor's lack of present responsibility. While it is clear, as a general rule that a criminal conviction will comprise adequate evidence of lack of present responsibility, criminal convictions do not always automatically result in debarment-type sanctions, nor can they, or there would be a penalty rather than a sanction. See e.g., Roemer v. Hoffman, 419 F. Supp. 130 (D.D.C. 1976)

The record indicates that the offenses in question occurred on eight days commencing on November 21, 1980 and ending on February 10, 1981. There is no evidence in the record of any Davis-Bacon Act violations by Respondents since that time, and the record reveals that the Department has had considerable experience with these Respondents, as evidenced by their appearances before the Board in two prior TDP proceedings. Despite the noticeable staleness of this evidence of misconduct, the Government argues that it is necessary to suspend Respondents in order that the Government may carry out its mandate of protecting the public by deterring Respondents from further violations of Federal labor laws. In support of its position, the Government cites the seminal decision, L. P. Steuart & Bro. v. Bowles, Price Administration, 332 U.S. 398 (1943), and also cites Copper Plumbing & Heating Co. v. Campbell, 290 F. 2d. 368 (D.C. Cir. 1961), and the 1987 pronouncements of the U.S. Court of Appeals for the Second Circuit in Janik Paving & Const. Inc. v. Block, 828 F. 2d 84. The facts in the above-cited cases are distinguishable, however, in one important respect from the facts in the case at bar --the actions by the debaring officials in Copper Plumbing and Janik Paving were taken within two years of the violations of law. In Steuart Bro. supra, the suspension action was taken to stop an ongoing and repetitive course of misconduct.

Sanctions such as debarment and suspension are extraordinary remedies which may only be used for the purpose of protecting the public and are not for punitive purposes. 24 CFR §24.5(a). As the Government aptly states in its Reply Brief, HUD suspension and debarment regulations implement the Department's policy of protecting the public interest by ensuring that only those qualified or "responsible" be allowed to participate in the HUD program. 24 CFR §24.0. Responsibility is a term of art which in the instant context speaks to the projected business risk of a contractor or grantee, including his integrity, honesty and ability to perform. Roemer v. Hoffman, supra.

While Respondents' violation of Federal labor laws in 1980-81 were serious, there is neither evidence nor suggestion in the record that the illegal conduct was prolonged, repeated, or recent. It is clear that these Respondents have participated in the programs of the Department for a number of years, and there is no other evidence in the record of noncompliance with Federal labor laws and regulations. I am accordingly not convinced that the suspension of Respondents is relevant to ensuring compliance

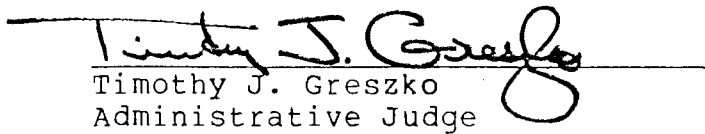
with the goals of the Davis-Bacon Act. Moreover, HUD has not demonstrated at this late date, why a suspension of Respondents is a necessary sanction in addition to the sanctions now under consideration by the Department of Labor. If Respondents' misconduct was sufficiently proximate in time to the imposition of the HUD suspension, HUD's position would be more colorable, as evidence of recent misconduct could be deemed to give rise to an inference of lack of present responsibility. See, Schlesinger v. Gates, 249 F.2d 2d111 (D. C. Cir. 1957). However, the evidence is too remote to support an inference that Respondents constitute a present business risk to this Department, and I find accordingly that the Department has not shown that the suspension is necessary to protect the public interest. See, e.g. Solomon Sylvan, HUDBCA 87-2432-D40, (Apr. 13, 1988) (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 Servalli, Jr., et al., HUDBCA 84-880-D37 (May 30, 1985) and Paul Grevin, HUDBCA 85-930-D16 (Jul. 10, 1986).

The Department has proffered evidence which would show, that, as part of Respondents' plea agreement, the Government agreed not to prosecute Kim, Kamex, and one [REDACTED] Kim with respect to certain transactions involving [REDACTED] Porterfield, Amway Corporation Products, the Landing Pad of Louisville, Minority Enterprise Development and Coordinating Agency, Inc., [REDACTED] Palmer, [REDACTED] Crocker and [REDACTED] Crocker. The Department asserts in its Reply Brief that transactions involving Porterfield, a former employee of HUD, were investigated to determine whether there had been any "wrongdoing" with respect to Kamex purchases of Amway Products from Porterfield, and with respect to the performance of construction work by Kamex at a video game parlor at the Louisville Airport, in which Porterfield had a financial interest. The Department further asserts that another former HUD employee, Crocker, also had business dealings with Kim while Crocker was employed at the HUD Louisville Office (Govt. Reply Brief, Exh. 1) Government counsel argues in its Reply Brief that this evidence of wrongdoing rebuts Respondents' assertion that, but for the Davis-Bacon Act violations in question, Respondents' conduct has been above reproach. There is no evidence in the record sufficient to prove "wrongdoing" in any of the transactions referred to, nor is there evidence indicating whether the Government intended to indict Respondents or to take any other adverse action relative to these transactions. Under the circumstances, I find this evidence to be entitled to no weight with respect to the issue of Respondents' present responsibility.

#### Conclusion

For the above reasons, it is my determination that Respondents' suspension from participation in the programs of this Department is not warranted. The suspension of Respondents

prohibiting their participation in the programs of this Department shall be lifted immediately.

  
Timothy J. Greszko  
Administrative Judge

Date: June 21, 1988