

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: :

LEE PHELPS, :

Respondent :

HUDECA No. 87-2669-D65
(Docket No. 87-1170-DB)

Mr. Lee Phelps

Respondent, Pro se

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

For the Government

DETERMINATION

Statement of the Case

By letter dated August 24, 1987, Thomas T. Demery, Assistant Secretary for Housing, U.S. Department of Housing and Urban Development ("HUD"), notified Lee Phelps ("Respondent") that, pursuant to 24 C.F.R. §24.6(a)(1), (4) and (9), HUD was considering debarring 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 Northern District of Texas, Fort Worth Division, for violation of 18 U.S.C. §§1012 and 2. 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. Respondent, made a timely request for a hearing on the proposed debarment by undated letter. 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 as a whole.

Findings of Fact

1. In early 1980, Respondent was employed as a real estate salesman by Allied Realty, Inc., Fort Worth, Texas, and in the course of his employment was involved in the sale of real property subject to HUD/FHA insured mortgages (Govt. Brief; Resp. Answer).

2. On February 23, 1987, a Bill of Information was filed in the U.S. District Court for the Northern District of Texas, charging Respondent with 4 counts of violations of 18 U.S.C. §§1012 and 2 (Govt. Exh. 3).

3. The Information charged that on various dates in 1981 through 1984, Respondent made a number of statements to HUD, including statements that certain individuals (1) would occupy residences; (2) had made repairs or improvements to residences and were entitled to credit therefor; (3) had no liabilities; and (4) had made downpayments or deposits of earnest money; when, in fact, Respondent knew such statements to be false (Govt. Exh. 3).

4. On April 24, 1987, Respondent plead guilty to all counts (Govt. Exh. 2).

5. On April 28, 1987, Respondent was sentenced to one year imprisonment on each count with the sentences to run concurrently. The sentence of imprisonment was suspended and Respondent was placed on probation for four years and ordered to pay a fine of \$1,000. (Govt. Exh. 2.)

Discussion

The purpose of debarment is to assure the Government that it does business with responsible contractors and grantees only. 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 to also include, as well, the integrity and honesty of the contractor or grantee. A lack of present responsibility may be inferred from past acts. Schlesinger v. Gates, 284 F.2d 111 (D.C. Cir. 1957).

Under the definition set forth at 24 C.F.R. §24.4(f), individuals and private organizations that receive HUD funds directly or indirectly or who have a business relationship with such recipients are "contractors or grantees" subject to HUD's debarment regulations. Respondent is a contractor or grantee within the meaning of 24 C.F.R. §24.4(f) because he participated in the sale of real property subject to mortgages insured by HUD/FHA.

The Government has proposed a five-year debarment. (Govt. Exh. 1.) Respondent does not challenge either the authority of the Government to bring, or the basis for, the instant action, but asserts as his sole defense to debarment his belief that the embarrassment and humiliation surrounding his conviction has been punishment enough. (Resp. Answer.)

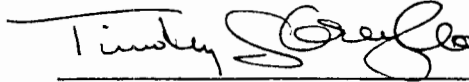
While the conduct of a contractor convicted of a serious crime may form the basis of the Department's imposition of a lengthy period of debarment, this is true only to the extent that the seriousness of the crime may involve conduct which demonstrates a more manifest lack of personal responsibility and professional integrity. The record reveals no evidence of business ignorance on the part of Respondent. In his submissions, Respondent admits that he knew his conduct was illegal, but he asserts that such conduct had become an accepted part of doing business. Clearly, the Respondent knew the probable consequences of his criminal acts but nevertheless, chose to violate the law.

24 C.F.R. §24.4 authorizes the imposition of a debarment "for a specified period of time commensurate with the seriousness of the offense ... generally not to exceed five years" and for an indefinite period, "because of egregious and willful improper conduct." Respondent has submitted no documentary evidence which would mitigate the seriousness of the offenses he committed and it appears that a lengthy period of debarment is warranted.

Respondent has submitted several character reference letters in mitigation. This evidence is unpersuasive in respect to the imposition of a debarment, as none of the references are germane to Respondent's character as a real estate professional, and as the references do not mitigate the offenses for which Respondent was convicted. Michael F. Koury and Maxine Koury, HUDBCA Nos. 81-618-D30, 81-619-D31 (Sept. 18, 1981). Respondent states, however, that he is no longer working in the real estate field, and has submitted documentary evidence which tends to demonstrate that he has sought retraining as an automobile technician and that his performance in automotive school and as an apprentice technician has been commendable in all respects. (Attachments to Resp. Submission.) This evidence has some bearing on present responsibility to the extent it indicates that Respondent is responsibly pursuing a new career in a field that has no impact on HUD. Although HUD has proposed a debarment of not less than five years, a three-year debarment is normally proposed based upon a contractor's conviction. Respondent's record and reputation in the time-frame since the offense occurred tends to partially mitigate the Department's risk in dealing with Respondent in the future. Under the circumstances, it is my opinion that a three-year debarment is warranted.

Conclusion

Respondent shall be debarred from participation in HUD programs through August 23, 1990, credit being given for the period of Respondent's suspension from August 24, 1987.



TIMOTHY J. GRESZKO
Administrative Judge

March 4, 1988