

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

In the Matter of:)
)
 IRENE G. HERRAN,) HUDBCA No. 88-3448-D57
) (No. 88-1256-DB)
 Respondent)

For the Respondent:

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Washington, D.C. 20410

DETERMINATION

Opinion by Administrative Judge David T. Anderson

May 5, 1989

Statement of the Case

By letter dated April 22, 1988, Irene G. Herran ("Respondent") was notified that the U.S. Department of Housing and Urban Development ("HUD") proposed to debar her from participation in Departmental programs for a period of three years from the date of the notice, based on Respondent's conviction of violation of Title 18, Sections 1012 and 2, U.S.C. Respondent was temporarily suspended pending determination of debarment. Respondent made a timely request for an opportunity to submit documentary evidence and a brief in opposition to the proposed debarment pursuant to 24 C.F.R. §24.13. This Determination is based on the briefs and documentary evidence submitted by the parties.

Findings of Fact

1. During all pertinent times, Respondent was employed as a real estate broker by Fred Hathaway (Resp. Answer, at 2).

2. On November 4, 1987, a Bill of Information was filed in the U.S. District Court for the District of South Carolina charging Respondent with violation of 18 U.S.C. §§ 1012 and 2, knowingly and willingly making and causing to be made, false statements to the Department of Housing and Urban Development on a HUD Form 92900.4, "Certificate of Commitment." On that form, Respondent certified that she was the occupant of three different dwellings, whereas in fact, Respondent was not the occupant of the dwellings as she had certified. Respondent was also charged with aiding and abetting. (Exhs. attached to Govt. Brief.)

3. On November 4, 1987, Respondent pled guilty to Counts 4, 5 and 6 of the Bill of Information. Respondent agreed to make restitution as directed by the U.S. Probation Office with interest. (Exhs. attached to Govt. Brief.)

4. On November 5, 1987, Respondent was adjudged guilty as charged as to counts 4, 5, and 6 and was sentenced to one year imprisonment. The imprisonment sentences were suspended and Respondent was placed on probation for five years. The probation on all three counts was to run concurrently. (Exh. attached to Govt. Brief.)

Discussion

Under the definitions set forth at 24 C.F.R. §24.4(g)(m), 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. Participant is defined as, "any person who directly or indirectly participates, or who may be reasonably expected to participate in HUD programs"; a "'participant' encompasses a recipient of HUD benefits, either directly or indirectly" 24 C.F.R. §24.4(a); Stanko Packing Company, Inc. v. Bergland, 489 F. Supp. 927, 949 (D. D.C. 1980); 46 Comp. Gen. 651, 658-59 (1967). Respondent, as an employee of a builder who applied for mortgage insurance during the period she made the false statements, is a "participant" within the meaning of 24 C.F.R. §24.4(a).

Pursuant to 24 C.F.R. §24.6(a), the Department may debar a participant for a conviction for any offense indicating a lack of business integrity or honesty which affects the present responsibility of a participant. 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 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). From Respondent's conviction, one may infer a lack of present responsibility. 24 C.F.R. §§24.6(a)(2) and (c)(3)(13).

Respondent falsely certified that she lived at addresses where in fact she did not reside. Respondent's active participation in a scheme to submit false statements to HUD, statements upon which HUD relied to make a financial commitment, undermined the integrity of a Government program and placed public funds at increased financial risk. Respondent argues that Hathaway had convinced her that the housing market was tight and that selling to a qualified buyer followed by a resale to an unqualified buyer was a "gray area" of the law, and that, while technically illegal, was a generally accepted practice. However, even if such industry activities existed, Respondent's engagement in such practices does not constitute a valid excuse which would absolve Respondent of her illegal conduct or promote confidence in Respondent's business judgment.

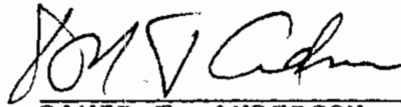
A contractor doing business with HUD is expected to be responsible. Under the debarment standard of present responsibility, a contractor or grantee may be excluded from HUD programs for a period based upon projected business risk. 24 C.F.R. §24.1. Roemer v. Hoffman, 419 F. Supp. 130 (D.C. D.C. 1976); 49 Comp. Gen. 139 (1969); 39 Comp. Gen. 468 (1959); 34 Comp. Gen. 86 (1954). However, any mitigating circumstances affecting responsibility must be considered. Respondent offers as mitigating factors for consideration only self-serving assertions unsupported by sworn statements or documentary evidence which would either mitigate the seriousness of the offenses she committed or support the premise that she is presently responsible.

Respondent believes that because "she and her Co-Respondent are in the process of paying over \$300,000 in restitution" to the Department, consideration should be given to this act as a factor in mitigation. Making restitution which is a part of a plea agreement is not evidence of present responsibility, nor does it mitigate the seriousness of the acts that led to her conviction. Restitution is an equitable remedy used to prevent the unjust enrichment of an undeserving party and to secure for the injured party that to which that party may in good conscience be entitled. 77 C.J.S. Restitution (1952). Such a repayment of illegal gains carries little weight in this proceeding where the primary issue is the protection of the public interest.

Counsel's argument that "the punishment should fit the crime" misses entirely the point of this proceeding. 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. Debarment is not for punitive purposes, but for protecting the public interest. 24 C.F.R. §24.5(a). Respondent's actions constituted a serious scheme to defraud HUD into insuring mortgages based upon false information, and I am unconvinced that the Government does not need protection from an individual with such a business ethic.

Conclusion

I conclude, based on the record before me, that Respondent is not presently responsible and that a debarment of three years is necessary and appropriate in this case. I find that it is in the public interest that Respondent be debarred from this date up to and including April 21, 1991, credit being given for the period of Respondent's suspension.



DAVID T. ANDERSON
Administrative Judge