

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

In the Matter of:)
)
 FRED HATHAWAY,) HUDBCA NO. 88-3449-D58
) (No. 88-1257-DB)
 Respondent)

For the Respondent:

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DETERMINATION

Opinion by Administrative Judge David T. Anderson

May 5, 1989

Statement of the Case

By letter dated April 22, 1988, Fred G. Hathaway ("Respondent") was notified that the U.S. Department of Housing and Urban Development ("HUD") proposed to debar him 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. Respondent was employed as a contractor for nine years prior to the incident in question (Resp. Answer, at 2(a)).
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 in HUD Form 92900.4 "Certificate of Commitment," wherein Respondent certified that he was the occupant of three different dwellings whereas in fact, Respondent was not the occupant of the dwellings as he 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. Respondent also 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. (Exhs. 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 any 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 a builder who applied for mortgage insurance during the period the false statements were made is thus 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 that 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, 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). In this instance, Respondent's conviction is evidence of conduct which demonstrates a serious, flagrant violation of the law, and a lack of present responsibility and business integrity. From this 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 he lived at addresses where in fact he did not reside. False statements concerning owner occupancy are evidence of a serious lack of business integrity and honesty. Because Respondent actively participated in a scheme to submit false statements to HUD, statements which HUD relied upon to make a financial commitment, the integrity of a Government program was undermined and public funds were placed at increased financial risk. The excuse that Respondent offers is that the housing market was tight and that others in the industry assured him that selling to a qualified buyer followed by a resale to an unqualified buyer was an acceptable, although technically illegal, practice. The existence of illegal industry customs is not a valid excuse which justifies Respondent's offensive conduct; Respondent's acceptance of such customs hardly engenders confidence in his 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). Any mitigating circumstances affecting responsibility must be considered. Respondent offers as mitigating factors for consideration assertions unsupported by sworn statements or documentary evidence which neither mitigate the seriousness of the offenses Respondent committed nor support the premise that he is presently responsible.

Respondent submits that because he "is now in the process of paying over ... \$300,000 to the Federal Government" as restitution, consideration should be given to this act as a factor in mitigation. 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 is justly and in good conscience entitled. 77 C.J.S. Restitution (1952). Restitution as a condition of probation is not evidence of present responsibility nor does it mitigate the seriousness of his criminal conduct. Respondent's pleas that he "has suffered for his wrongs and is now being punished," misses the point of this proceeding. 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 for punitive purposes, but for protecting the public interest. 24 C.F.R. §24.5(a).

Conclusion

I conclude that Respondent is not presently responsible based on the record before me, and that a debarment of three years is warranted by the circumstances of 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