

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

In the Matter of:

ARC PLUMBING AND HEATING
CORPORATION,

Respondent

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HUDBCA No. 88-3459-D68
Docket No. 88-1273-DB

For the Respondent:

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For the Government:

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DETERMINATION BY ADMINISTRATIVE JUDGE DAVID T. ANDERSON

February 2, 1990

Background of the Case

By letter dated June 10, 1988, James E. Baugh, General Deputy Assistant Secretary for Public and Indian Housing, U.S. Department of Housing and Urban Development ("HUD") notified ARC Plumbing and Heating Corporation ("ARC" or "Respondent") that, pursuant to 24 C.F.R. §§24.6(a)(2) and (c)(12), HUD intended to debar Respondent "from further participation in HUD programs for a period of three years from the date of [its] Limited Denial of participation by the New York Regional Office, February 29, 1988." The proposed debarment was based on Respondent's conviction in the Supreme Court of the State of New York, County of Kings, for "Offering a False Instrument for Filing in the First Degree" in violation of New York Penal Law, Section 175.35. The letter also stated that pending final determination of

debarment, Respondent was suspended from further participation in HUD programs. Respondent has made a timely request for a hearing on the suspension which, in the case of an administrative sanction based upon an indictment or suspension, is limited to a determination based upon the submission of written briefs and relevant documentary evidence. 24 C.F.R. §24.13(b)(3).

Findings of Fact

1. On or about May 23, 1986, the District Attorney for the State of New York, County of Kings, charged in a one-count indictment that ARC submitted an Application for Registration as a Responsible and Eligible Bidder for General Construction, Mechanical Trades and Miscellaneous School of Construction Contracts which contained a false statement and false information. The indictment also charged Respondent with the intent to defraud the State and any political sub-division thereof. The fraudulent document was offered by ARC to the Board of Education of the City of New York on or about July 19, 1985 in the knowledge and belief that it would be filed, registered and recorded in, and otherwise become a part of, the records of that public office. (Govt. Exh. 2.)

2. The application affected the decision-making processes of the Board of Education of the City of New York in their awarding and monitoring of Board of Education construction contracts. Respondent knowingly intended that its application have this particular effect. (Govt. Exh. 2.)

3. On January 13, 1987, Respondent was convicted of the crime of offering a false instrument for filing, first degree, a Class E felony. On March 19, 1987, the court sentenced Respondent to pay a five thousand dollar fine. (Govt. Exh. 4.)

4. On September 12, 1988, the concurrent conviction of Anthony Gurino, president and sole shareholder of ARC, for offering a false instrument for filing in the second degree was reversed by the Supreme Court of the State of New York, Appellate Division. (Exh. attached to letter from counsel for Resp., Sept. 15, 1988.)

Discussion

Respondent has directly or indirectly done business with HUD, or was "reasonably expected to participate in HUD programs," as a contractor for the New York City Public Housing Authority under the Comprehensive Improvement Assistance Program of the U.S. Housing Act of 1937, and, as such, is a "participant" in a HUD program. 24 C.F.R. §24.4(u). The Government asserts correctly that pursuant to 24 C.F.R. §24.6, the Department may debar a participant as a result of a conviction or for falsification of records. Respondent was convicted of filing a

false document. It is uncontroverted that cause for the debarment of Respondent has been established under 24 C.F.R. §§24.6(a)(2) and (c)(13).

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. Responsibility is a term of art in Government contract law, defined to include not only the ability to perform a contract, but the honesty and integrity of the contractor or grantee, as well. Roemer v. Hoffman, 419 F.Supp. 130 (D.C. D.C. 1976); 48 Comp. Gen. 769 (1969); Paul Grevin, HUDBCA No. 85-930-D16 (July 10, 1986). Present responsibility is the critical test of whether debarment is necessary, and a lack of present responsibility may be inferred from past acts. Schlesinger v. Gates, 249 F.2d 111 (D.C. Cir. 1957). However even if cause for debarment is established, mitigating evidence must be considered in determining whether debarment is necessary. Roemer v. Hoffman 419 F.Supp. 130 (D.C. D.C. 1976); 24 C.F.R. §24.6(1). Chesley J. Doak and W.J. Fortenberry, HUDBCA No. 89-4863-D12 (May 24, 1989), citing Gonzalez v. Freeman, 344 F.2d 570 (D.C. Cir. 1964).

Respondent basically argues that the gravity of its criminal conduct is mitigated since it was a clerical employee of Respondent who "answered a question incorrectly on a Board of Education Contractors Enrollment Form and then forged the signature of Anthony Gurino and notarized the forged signature." (Resp. Brief, at 2.) Generally, a principal is liable for the acts of his agent if those acts are within the scope of that agent's employment. 3 CJS Agency 391 (1955). Accepting Respondent's allegation regarding the acts of its employee as true, ARC would still remain responsible for its clerical employee's criminal conduct. Indeed, in its decision affirming Respondent's conviction, the Appellate Division of the Supreme Court of the State of New York stated:

However, we do find that the jury could properly conclude that the activities of the corporate employee, who completed the questionnaire [inaccurately] and filed it with the Board of Education, were chargeable to the corporate defendant. (Exh. attached to letter from counsel for Respondent, September 15, 1989; People v. Gurino and Arc Plumbing & Heating Corp., N.Y. App. Div., 3959E/3959AE (Ind. No. 2780/86), September 12, 1988)

Furthermore, the fact that the employee's criminal actions were not prevented would appear to demonstrate that ARC lacked effective management, control, and supervision of its employees. The alleged termination of this employee and Respondent's advice to its employees not to forge signatures, while averred by Respondent's counsel, are not supported by any documentary evidence. Nor is there persuasive evidence in the record before

me that Respondent's managerial deficiencies which contributed to Respondent's conviction have in fact been corrected.

The Government contends that, in addition to the standard of present responsibility, its interests are protected by the deterrent effect of a debarment. A debarment imposed upon a contractor has a meaningful impact on the contracting community at large well beyond one contractor's inability to participate in HUD programs. Debarment can be imposed for "the deterrence of irresponsible conduct in Department programs, [but] not for punitive purposes." 24 C.F.R. 24.1. Nevertheless, the inadvertent punitive effect of the debarment does not "transform it into a purely punitive sanction." Janik Paving and Construction, Inc. v. Brock 828 F.2d 84, 91 (2d Cir. 1987).

Evidence of mitigation may result in an amelioration of the need for a debarment, especially when, as in this case, the criminal conduct occurred over four years ago. Spencer H. Kim and Kamex Construction Corporation, HUDBCA No. 87-2468-D58 (June 21, 1988). Although the criminal conduct occurred in 1985, Respondent has offered no evidence which would show that it is any more responsible now than it was in 1985, or that it now has a better understanding of the regulations of the Department. Respondent's arguments do not sufficiently address the issue of the present responsibility of Respondent as a contractor. As such, grounds for mitigation of debarment are lacking. Lee Phelps, HUDBCA No. 87-6559-D65 (March 4, 1988), citing Michael F. Koury and Maxine Koury, HUDBCA Nos. 81-618-D30, 81-619-D31 (September 18, 1981). Consequently, there is no need to consider the impact of other criminal proceedings in which Respondent may be involved.

Respondent submits that the public was not harmed by his actions. I disagree. The crime for which Respondent was convicted involved knowingly falsifying documents that a public official would rely on in the awarding of a contract. Such crimes erode public confidence in important Government social policy programs. Based on the serious nature of Respondent's crime and the lack of persuasive mitigating evidence, I find that a three-year debarment is warranted to protect the interests of the Department and the public.

Conclusion

It is my determination that Respondent be debarred from participation in the programs of this Department for three years

until February 28, 1991, credit being given for the time since the imposition of the Limited Denial of Participation from February 29, 1988.

A handwritten signature in black ink, appearing to read "D. Anderson", written over a horizontal line.

David T. Anderson
Administrative Judge