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

In the Matter of:	:	
CHESLEY J. DOAK and **W.J. (JACK) FORTENBERRY**; Chesley Doak and Jack Fortenberry Associates, Inc.; C&J Associates,	:	HUDBCA NO. 89-4364-D12 Docket No. 88-1310-DB
Respondents	:	

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DETERMINATION BY ADMINISTRATIVE JUDGE TIMOTHY J. GRESZKO

May 24, 1989

Statement of the Case

By separate letters dated October 17, 1988, as amended on February 17, 1989, Jack Fortenberry, Chesley Doak, and their affiliates, Chesley Doak and Jack Fortenberry Associates, Inc., and C&J Associates ("Respondents"), were notified by the U.S. Department of Housing and Urban Development ("HUD"), that the Department proposed to debar them from further participation in primary covered transactions and lower tier covered transactions, as either participants or principals at HUD and throughout the Executive Branch of the Federal government, and from participation in procurement contracts with HUD, for a period of three years from the date of their original suspension, May 29, 1987. The proposed sanction is based upon the convictions of Respondent Fortenberry and Respondent Doak in the United States District Court for the Northern District of Georgia, for violation of 18 U.S.C. §§ 1001 and 2. Respondents were also notified that they were temporarily suspended pending final determination of the issues in this matter.

On November 23, 1988, Respondents filed a timely appeal and also requested an evidentiary hearing. This determination is based upon written submissions of the parties, as Respondents are not entitled, under applicable HUD regulations, to an oral hearing in this matter. 24 C.F.R §24.313(b)(2)(ii). See also Roy C. Markey/The Roary Company/Be-Mark Homes, HUDBCA No. 82-712-D33, 82-2 BCA ¶16,120 (motion for oral hearing denied).

Findings of Fact

1. Respondents Chesley J. Doak and Jack Fortenberry are owners, officers and operators of Chesley Doak and Jack Fortenberry Associates, Inc., a Georgia corporation, doing business as C&J Associates. The primary purpose of the corporation is the construction and sale of single family attached townhomes and detached houses. The corporation constructed and sold residential properties upon which HUD/FHA mortgage insurance was obtained. (Govt. Exh. 3).

2. On December 10, 1985, the Department informed Respondents by letter that it was in receipt of adequate evidence of irregularities in their participation in the Single Family Mortgage Insurance Programs of the Department, and that on the basis of these irregularities, a decision had been made to issue Temporary Denial of Participations. (TDPs). As a result of the TDPs, Respondents were denied participation in the Single Family Mortgage Insurance Program for a period of twelve months. The irregularities involved sales of property which were financed with FHA mortgage insurance to:

[redacted] Bledsoe - FHA Case No. [redacted]
[redacted] Mulcahy - FHA Case No.
Mulcahy - FHA Case No. [redacted]

These transactions involved Respondents' provision of payments to the purchasers that were not shown on the closing statements and which had the effect of reducing the purchasers' investments in the properties below the required amount, in contravention of HUD requirements. 24 C.F.R. §203.119. (Finding of Fact No. 2, Jack Fortenberry, Chesley Doak; Jack Fortenberry and C&J Associates, HUDBCA 87-2455-D49 and 87-2456-D50 (April 14, 1988).

3. Respondents and the Department subsequently entered into an agreement which settled the Department's December 10, 1985 TDPs. Effective July 1, 1986, the Department withdrew the TDPs upon Respondents' representations that they were "fully informed of HUD policies and regulations and have discontinued the practices cited in HUD's complaint dated December 10, 1985, and agree to refrain from any further violations as determined by HUD of HUD policies and regulations." (Finding of Fact No. 3, Id.)

4. In 1987, a Federal grand jury convened for the United States District Court for the Northern District of Georgia and returned an indictment charging Respondents and others with multiple violations of Sections 2 and 1001 of Title 18, United States Code. (Govt. Exh. 3).

5. On March 11, 1988, Respondent Doak entered a plea of guilty to Count 214 of the indictment, which charged Doak and other defendants with violations of 18 U.S.C. §§ 2 and 1001. Count 214 of the indictment alleged specifically that Doak, C&J Associates, and other defendants, made and used, or caused to be made and used, for the purpose of obtaining insurance from the Federal Housing Administration (FHA) on a mortgage for a single family housing unit, a false document containing: (i) an affidavit from the mortgagor which falsely stated that no additional agreements or kickbacks with the seller had been made that had not been disclosed and which falsely stated that the mortgagor was not then considering any proposals to sell the subject property to third persons, and (ii) an affidavit from the seller which falsely stated that there was not, nor would there be, any refund of any portion of the equity payment, whereas in truth and in fact, as the defendants then knew, the purchaser and seller had an undisclosed additional agreement that the seller would pay the purchaser a fee for obtaining the FHA-insured mortgage. The total payment from the seller to the borrower under Count 214 was $13,636.40. (Govt. Exhs. 2(a), 3)

6. On March 11, 1988, Respondent Fortenberry entered a plea of guilty to Count 191 of the indictment, which charged Fortenberry and other defendants, with violations of 18 U.S.C. §§ 2 and 1001. Count 191 of the indictment alleged in relevant part, that the defendants made and used or caused to be made and used, for the purpose of obtaining insurance from the FHA on a mortgage for a single family housing unit, a real estate housing contract which falsely stated that the contract constituted the sole and entire agreement between the seller and purchaser, whereas in truth and in fact, as the defendants then knew, the seller and purchaser had also agreed that the seller would refund all of the purchaser's downpayment and expenses incurred in obtaining the FHA-insured mortgage for the housing unit. (Govt. Exhs. 2(b), 3).

7. A partial transcript of the Doak/Fortenberry guilty plea proceeding indicates that the presiding judge had personal reservations concerning whether Respondents should have been indicted, and he stated that Respondents had been punished enough. The judge nonetheless admitted that he did not have the authority to dismiss the indictment, accepted Respondents' guilty pleas, and imposed a sentence as to each defendant, of three months in the custody of the Attorney General and a fifty dollar special assessment, execution of custody suspended. (Govt. Exhs. 2(a), 2(b); Resp. Exh. C).

8. James O. Wilson, an attorney/developer who was a named defendant/co-conspirator in the indictment, and who Respondents contend assured them that the transactions were "legal," made a statement concerning his role in the procedures in question to investigators for the Equitable Mortgage Company. The transcript of this statement indicates, in relevant part, that Wilson informed the investigators that he took "full responsibility for whatever consequences resulted from actions taken by those who relied on his legal advice and opinions." (Resp. Exh. D).

9. Respondents have submitted the affidavit of J. Robin Harris, Chief Executive Officer of Decatur Federal Savings and Loan Association, Decatur, Georgia, in testament to their character. Harris avers that he is aware of the circumstances which underlie Respondents' convictions, and that he has known Respondents for many years. Harris indicates in laudatory terms that Respondents are highly regarded in their community and are well respected builders of integrity. (Resp. Exh. B).

Discussion

Sanctions such as suspension and debarment are to be used to protect the public, and not for punitive purposes. Gonzalez v. Freeman, 334 F.2d 570, 577 (D.C. Cir. 1964); 24 C.F.R. §24.115(d). The purpose of debarment is to protect the public interest by ensuring that the Federal Government only does business with responsible persons. 24 C.F.R. §24.115(a). 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 as well. Roemer v. Hoffman, 419 F. Supp. 130 (D.C. D.C. 1976); Paul Grevin, HUDBCA No. 85-930-D16 (July 10, 1986). "Responsibility" as used in the Department's regulations connotes probity, honesty, and uprightness. Arthur H Padula, HUDBCA No. 78-284-D30 (June 27, 1979). Although the judicially imposed test for debarment is present responsibility, it is well established that a finding of a lack of present responsibility may be based on past irresponsible acts. Schlesinger v. Gates, 249 F.2d 111 (D.C. Cir. 1957), cert. denied, 355 U.S. 939 (1958).

It is uncontested that Respondents are participants in a covered transaction under HUD's nonprocurement programs and are principals as defined in 24 C.F.R. §105(p). Covered transactions encompass, inter alia, participation in the insurance programs of the Department. 24 C.F.R. §24.110(a)(1)(i). Respondents' activities as builders and sellers of residences mortgaged with HUD-FHA financing fall clearly within these definitions.

The applicable regulations also provide at 24 C.F.R. §24.305, that a debarment may be imposed for:

> (a) Conviction of or civil judgement for:
>
> (1) Commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public or private agreement or transaction:
>
> * * * * *
>
> (3) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements...or
>
> (b) Violation of the terms of a public agreement or transaction so serious as to affect the integrity of an agency program....
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> * * * * *
>
> (f) In addition to the causes set forth above, HUD may debar a person from participating in any programs or activities of the Department for material violation of a statutory or regulatory provision or program requirement applicable to a public agreement or transaction including applications for...insurance or guarantees...or final commitment to insure or guarantee.

The burden is on the Government to prove by a preponderance of the evidence that cause for debarment exists. 24 C.F.R. §§24.313(b)(3), (4); James J. Burnett, HUDBCA No. 80-501-D42, 82-1 BCA ¶15,716. If the debarment is based upon a conviction, a civil judgement, or debarment by another Federal agency, this evidentiary standard shall be deemed to have been met. 24 C.F.R. §24.313(b)(3). The term "conviction" is defined in the applicable regulations as a "judgement of conviction of a criminal offense by any court of competent jurisdiction, whether entered upon a verdict or a plea, including a plea of nolo contendere." 24 C.F.R. §24.105(e).

Respondents argue that their convictions do not evidence a lack of present responsibility, because they entered guilty pleas while maintaining their innocence, asserting that they could not withstand the stress, strain, and expense of an 8-10 week trial. Respondents characterize their pleas as "Alford" pleas pursuant to the Supreme Court case North Carolina v. Alford, 400 U.S. 25 (1976). Under the Federal Rules of Criminal Procedure, a

defendant may plead guilty, not guilty, or nolo contendere. Fed. R. Crim. P. 11(a)(1). The judgement records of the U.S. District Court with respect to these Respondents contain an "X" in a box labeled "guilty" - the boxes therein for pleas of "not guilty" and "nolo contendere" are blank. Notwithstanding the motives underlying the entry of Respondents' pleas, I find their assertions with respect to the nature of their pleas to be unsupported in the record and irrelevant. Even if Respondents maintained their innocence throughout their criminal proceedings, the Department's regulations provide that such a conviction based upon a plea is a "conviction" for purposes of debarment. 24 C.F.R. §24.105(e). I find accordingly that the Government has established cause for the debarment of Respondents under 24 C.F.R. §24.313(b)(3).

Under the debarment standard of present responsibility, the existence of a cause for debarment does not necessarily require that the contractor be debarred; the seriousness of the contractor's acts or omissions and any mitigating factors must be considered in making any debarment decision. 24 C.F.R. §24.115(d); Gonzalez v. Freeman, 344 F.2d 570 (D.C. Cir. 1964).

There is nothing minor about the nature of the offenses to which Respondents pleaded guilty. The utilization of a straw buyer and the failure to reflect such an arrangement in a loan application, was not a mere technical violation of a HUD regulation. When viewed in light of the numerous false statements underlying these transactions, such transactions can be characterized at best as involving a blatant and total failure to accurately state the relevant facts. This failure is compounded by the fact that Doak was the straw buyer on the count of the indictment to which Fortenberry pleaded guilty. (See Govt. Exh. 3, Indictment, Count 1, p. 20; Count 191, p. 44). These transactions constitute serious and flagrant violations of the law, calculated fraudulent activity, and a lack of responsibility and business integrity. Jay D. Morrow, HUDBCA No. 86-1612-D17 (August 15, 1986).

The Government's evidence is not contradicted nor significantly mitigated by other evidence in this record. Respondents contend that they were the victims of bad legal advice from their lawyer, Wilson. A mistake of law generally will not excuse the commission of a criminal offense. U.S. v. Barker, 546 F.2d 940,946 (D.C. Cir. 1976), citing 1 Wharton's Criminal Law, §162. The mistake of law defense is extremely limited, and the mistake must be objectively reasonable. U.S. v. Moore, 627 F2d. 830 (7th Cir. 1980), cert. denied 450 U.S. 916 (1981). Respondents have given no detailed explanation of the advice that was allegedly provided to them by Wilson, and the circumstances under which it as given. The evidence in the record indicates that either Wilson or Wilson's partner was an active participant in the real estate transactions in question.

Under these circumstances, there is a question as to whether Wilson gave Respondent's legal advice or business advice. In any event, I do not find Respondents' alleged reliance on Wilson's advice in the making of patently false statements to be either objectively reasonable or mitigating. Typically, the fact that one relied upon the erroneous advice of another is not an exculpatory circumstance. Barker, supra, citing Perkins on Criminal Law, pp. 926-27 (2d ed. 1969).

Respondents also argue that the views of the sentencing judge with respect to their indictment and punishment are substantially mitigating. With all due respect, I do not find the remarks of the sentencing judge to be relevant to the issue of Respondents' present responsibility. The interests of the U.S. District Court on sentencing a convicted felon are essentially punitive. However, it is well established that the purpose of sanctions such as debarment and suspension is not punitive, but that such sanctions are a means to protect the interests of the public and the Federal government, and to assure the accomplishment of the Government's statutory goals. See Janik Paving & Construction Co. v. Brock, 828 F.2d 84 (2d Cir. 1987), and cases cited therein; 24 C.F.R. §115.(b). Moreover, the record is devoid of any objective explanation for the judge's remarks, and Respondents have not submitted into the record a complete transcript of the plea proceeding. I have no knowledge of the documents and argument presented to the court on sentencing, nor will I consider those remarks beyond the context in which they were made. I would observe, however, that straw buyer schemes and evasion of the investment requirements for HUD-insured mortgages not only interferes with the administration of a Federally-funded program, but also impacts upon the public fisc directly and indirectly. That is of great interest to HUD and to the public, if not to the sentencing judge in the criminal proceeding.

Respondents assert that the averments in Harris' affidavit provide proof that they are not a present business risk to the Government. While I find this affidavit probative, it is not sufficiently persuasive to overcome the strong inference of a lack of present responsibility that flows from Respondents' convictions for these serious offenses. In addition, Respondents have not submitted affidavits or statements that they are remorseful or that they now understand that it is wrong to commit objectively dishonest acts even upon the advice of counsel. Respondents' experience in this field convinces me that they knew or should have known the wrongfulness of their acts at the time of the commission of those acts. The fact that they blame the poor advice of another for their commission of these criminal acts does not engender faith in their business judgement nor does it give credence to their position that the Department should now feel inclined to do business with them.

Conclusion

The record establishes the necessity and appropriateness of a substantial period of debarment of these Respondents to protect the public interest. HUD has proposed a debarment of not less than three years. The nature of the conduct in question and the lack of mitigating evidence warrant the debarment of Respondents and their affiliates for a period of three years.

It is my determination that Respondents and their affiliates shall be debarred from participation in the procurement contracts of HUD, as participants or principals, and shall be excluded from primary covered transactions and lower tier covered transactions throughout the Executive Branch of the Federal government through November 7, 1989, credit being given for the time Respondents have been temporarily suspended. Since the 1985 TDPs were imposed for the same misconduct which constituted a substantial part of the criminal conduct underlying Respondents' convictions, credit is also given for the 27 weeks during which Respondents were excluded from participation in the Single family Mortgage Insurance Program. Respondents' debarment through November 7, 1989 reflects credit given for that period of exclusion. 24 C.F.R. §24.320(a).

Timothy J. Greszko
Administrative Judge