

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

In the Matter of:

JAMES E. McFREDERICK, : HUDBCA No. 89-4475-D27
GLOBE AUTO IMPORTS, INC., : Docket No. 89-1334-DB
and :
J & R DEVELOPMENT, :
Respondents :

For the Respondents:

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For the Government:

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DETERMINATION BY ADMINISTRATIVE JUDGE JEAN S. COOPER

September 28, 1989

Statement of the Case

By letter dated March 30, 1989, James E. McFrederick was notified that the U.S. Department of Housing and Urban Development ("HUD") had suspended him and his affiliates, Globe Auto Imports, Inc. and J & R Development, from participation as a principal or participant in primary or lower tier transactions throughout the Executive Branch of the U.S. Government from that date, based on his indictment for alleged violations of 18 U.S.C. §§371, 201(b), (c), and 2. The suspension was imposed pursuant to 24 C.F.R., Subpart D (53 Fed. Reg. No. 102, at 19189 (May 26, 1988), cited in this Determination in the form in which it will be codified in the Code of Federal Regulations. McFrederick made a timely request for a hearing on the suspension on behalf of himself and his affiliates. In a case of a suspension based on

an indictment, a hearing is limited to submission of briefs and documentary evidence. 24 C.F.R. §24.313 (b)(2)(ii). Briefs and documentary evidence were submitted on behalf of both the Government and Respondents.

Findings of Fact

1. James E. McFrederick is the owner of Globe Auto Imports, Inc. and is one of the two general partners of J & R Development, a Florida general partnership. Between late 1982 and mid-1985, J & R Development was awarded three Housing Assistance Payments (HAP) contracts by the Housing Authority of the City of St. Petersburg, Florida (HASP) under the Section 8 Moderate Rehabilitation Program (MRP). The Section 8 MRP is a HUD program under Section 8 of the United States Housing Act of 1937, as amended, 42 U.S.C. §1436, et seq., in which HUD funds rehabilitation and rental subsidies by entering into Annual Contributions Contracts (ACCs) with local housing authorities such as the HASP to administer the program through award of HAP contracts, among others. (Respondents' Brief; Resp. Exh. at 2.)

2. On or about November 20, 1987, a Federal Grand Jury convened by the United States District Court for the Middle District of Florida returned a six-count indictment against James E. McFrederick and J & R Development, among others, charging them with bribery of various public officials who were responsible for administering the MRP program and awarding HAP contracts in and around St. Petersburg, Florida.

Count One of the indictment charged McFrederick and J & R Development with conspiring to defraud the United States and hinder HUD in the impartial, fair and honest distribution of Federal funds by conspiring to bribe public officials in the HASP and the Economic Development Program (EDP) of the Collier County Board of Commissioners, in order to receive preferential treatment on MRP applications, in violation of 18 U.S.C. §371.

Count Two charged McFrederick and J & R Development with making promises to Harold A. Tabar to provide debt financing and payments, obtain an investor to purchase property, and obtain employment for a relative of Tabar's, all with the intent to influence Tabar in regard to consideration of applications for participation in the MRP, property inspections, and acceptance of a HAP contract, in violation of 18 U.S.C. §201(b) and 2. Tabar was the MRP coordinator for the HASP from 1980 until September 24, 1984, and MRP coordinator for the EDP from approximately September 22, 1984 until August 17, 1984. Count Three of the indictment charged Tabar with accepting the promised things of value from McFrederick and J & R Development, in return for being influenced in the performance of his official acts.

Count Four charged McFrederick and J & R Development with promising to David B. York, a commissioner of the HASP, the use of office and warehouse space and a vehicle trade-in and sale, with the intent to influence York in regard to his consideration of their applications for participation in the MRP, property inspections, and acceptance of the HAP contracts in violation of 18 U.S.C. §§201 (b) and (2). Count Five of the indictment charged York with demanding or accepting the things of value promised by McFrederick and J & R Development in return for being influenced in the performance of his official acts. Count Six charged McFrederick and J & R Development with offering a bribe to the acting MRP coordinator for the HASP, in violation of 18 U.S.C. §§201 (b) and 2. (Govt. Exh. 2.)

3. At a trial in March, 1989, the jury found McFrederick and J & R Development not guilty of Count Six. The jury was unable to agree on a verdict on the remaining counts, and a mistrial was declared. A retrial on Counts One through Five is rescheduled for September 11, 1989. (Resp. Brief at 1.)

Discussion

A suspension is a sanction that temporarily excludes a person, including a partnership, from participating in covered transactions, pending completion of an investigation and any legal or debarment proceedings as may ensue. 24 C.F.R. §24.400(d). A suspension may be imposed upon adequate evidence to support a suspicion that an offense listed at 24 C.F.R. §24.305(a) has been committed, or that a cause for debarment under 24 C.F.R. §24.305 may exist. 24 C.F.R. §24.405(a). An indictment constitutes adequate evidence for purposes of a suspension action. 24 C.F.R. §405(b). Suspension is a serious sanction to be imposed when it has been determined that immediate action is necessary to protect the Government's interest. 24 C.F.R. §24.405(c).

A suspension is applicable to any person, defined to include both individuals and partnerships as well as other entities, who is a participant, principal, or affiliate as defined in the regulation. See 24 C.F.R. §24.105(b), (m), (n), (p), and (u). Respondents admit that Globe Auto Imports, Inc. and J & R Development are affiliates of McFrederick, as defined at 24 C.F.R. §24.105(b). However, Respondents contend that none of them is a participant or a principal because they presently have no contracts with HUD, and the contracts they did have were with the HASP, not HUD. Therefore, they argue, HUD lacks the jurisdiction to sanction them.

Respondents are incorrect. The transactions in which J & R Development was involved with the HASP are precisely the type of lower tier transaction covered by the suspension regulation. The critical term in the regulation is "covered transaction," not "contract." "Covered transaction" is defined at 24 C.F.R. §24.110(a)(1) to include both primary and lower tier transactions. A lower tier transaction is defined to include both procurement and non-procurement contracts between a participant and a person under a primary covered transaction. I find that the relationship under the MRP program between HUD and the HASP constituted a primary covered transaction because HUD provided rental subsidies and payments for specified use to the HASP for the MRP program and the Section 8 rent subsidies given after rehabilitation was completed. See 24 C.F.R. §24.110(a)(1)(i). J & R Development was a developer involved in the rehabilitation of properties financed by HUD through ACCs with the HASP and a recipient of HAP contracts through the HASP. I find that each of these transactions between J & R Development and the HASP constituted a "lower tier transaction between a participant and a person other than a procurement contract for goods or services, regardless of type, under a primary covered transaction" between HUD and the HASP for contracts for assistance and subsidies. 24 C.F.R. §24.110(1)(ii)(A). Privity of contract between HUD and J & R Development is not a relevant consideration within this regulatory framework.

A "participant" is defined at 24 C.F.R. §24.105(m) as,

Any person who submits a proposal for, enters into, or reasonably may be expected to enter into a covered transaction. This term also includes any person who acts on behalf of or is authorized to commit a participant in a covered transaction as an agent or representative of another participant.

I find that J & R Development is a participant within the scope of the regulatory definition because it submitted a proposal for, and entered into, three HAP contracts, all covered transactions. Moreover, it is the manner in which those contracts were obtained that is the subject of the indictment. Furthermore, McFrederick is a principal as defined at 24 C.F.R. §24.105(p) because he is a general partner of J & R Development with primary management responsibilities. Globe Auto Imports is admitted to be McFrederick's affiliate and is named in the indictment as an alleged source of some of the things of value used to bribe the local housing officials. I therefore find that each of the Respondents is a person who is subject to a sanction under 24 C.F.R., Part 24.

Respondents contend that the version of 24 C.F.R., Part 24 currently in effect is inapplicable to them because the acts in question all arose prior to its effective date, October 1, 1988. This contention is without merit. The regulation presently in effect provides that "... this part shall apply to sanctions initiated after the effective date of these regulations regardless of the date of the cause giving rise to the sanction." 24 C.F.R. §24.110(e). I have no authority to decline to apply the regulation, as written. Furthermore, Respondents are not charged with any action that would not also have been a cause for suspension under the regulations in effect between 1982 and 1985. See 24 C.F.R., Part 24 (1977).

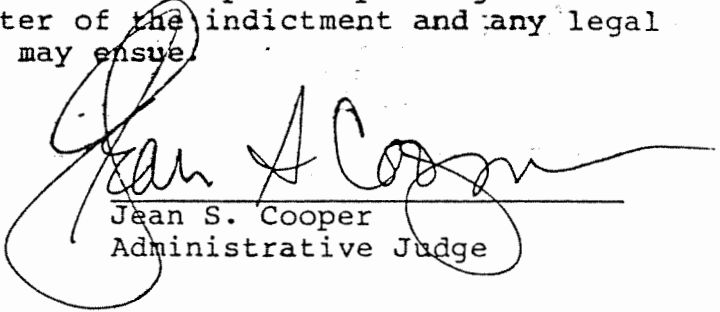
There is still an indictment in effect against McFrederick and J & R Development. They were only found not guilty of one count by the jury in their first trial. There was a mistrial declared on the remaining charges, and a new trial has been scheduled to begin on September 11, 1989, on Counts One through Five of the indictment. The outstanding indictment for conspiracy and bribery of public officials is adequate evidence to support a finding that a cause for suspension has been established in this case. 24 C.F.R. §24.405(a)(1) and (b).

Despite the fact that a cause for suspension has been established, Respondents are correct that a suspension is only warranted if it is determined that immediate action is necessary to protect the Government's interest. 24 C.F.R. §24.410(c). The charges in the indictment are very serious. The criminal acts cited in detail in the indictment are so threatening to the integrity of the Section 8 MRP and HAP programs that the HUD suspending official had little real choice but to protect the Government's interest by immediately suspending Respondents pending the outcome of the trial. An indictment provides a most credible evidentiary basis for taking immediate action because the information on which it is based has been evaluated and tested by a Grand Jury. The fact that the trial jury was not able to reach a verdict on most of the indictment does not lessen the reliability of the indictment as an indicator of the need for immediate action.

Respondents contend that they pose no immediate threat to the Government's interest because they are not presently engaged in any covered transactions. This suspension, however, is necessary to assure the Government that it will not have to take the risk of doing further business, directly or indirectly, with Respondents while their indictment and any other legal proceedings arising out of the same set of facts are being litigated. I find that the suspension of Respondents is necessary to protect the Government's interest.

CONCLUSION

Respondents JAMES E. McFREDERICK, J & R DEVELOPMENT, and GLOBE AUTO IMPORTS, INC. shall remain suspended pending resolution of the subject matter of the indictment and any legal or debarment proceedings that may ensue.



Jean S. Cooper
Administrative Judge