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

In the Matter of: MELVIN SMITH, JET-IT SYSTEMS, INC., Respondents.	HUDBCA No. 90-5320-D81 Docket No. 90-1437-DB

For the Respondent:

Melvin Smith, Pro Se
[redacted]

For the Government:

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DETERMINATION BY ADMINISTRATIVE JUDGE DAVID T. ANDERSON

October 20, 1992

Statement of the Case

By letter dated July 18, 1990, Michael B. Janis, General Deputy Assistant Secretary of the Department of Housing and Urban Development ("Department," "Government," or "HUD") notified Melvin Smith that he and his affiliate, Jet-It Systems, Inc. ("Jet-It") (collectively "Respondents") were temporarily suspended from participating in covered transactions with the Department and throughout the Executive Branch of the Federal Government. The suspension was based on an indictment returned by a Federal Grand Jury convened for the United States District Court for the Eastern District of Louisiana charging Smith with violation of 18 U.S.C. § 4 and 21 U.S.C. § 841(a)(1). On August 30, 1990, Smith filed "an official complaint" which was deemed a request for a hearing on the suspension. The Board issued a stay of proceedings on October 22, 1990, pending consideration by the Department of a proposed debarment of Respondents.

By letter dated January 9, 1991, Respondents were notified by Assistant Secretary Janis that consideration was being given to debar them from participating in covered transactions with the Department and throughout the Executive Branch of the Federal Government. The proposed debarment was to remain in effect for three years, and was based on Smith's conviction on the two counts contained in the indictment. Respondents did not timely appeal the proposed debarment, and a Final Determination upholding the proposed three year debarment was issued on March 26, 1991.

On May 6, 1991, Respondents moved to dismiss the Final Determination of March 26, 1991, asserting that it violated their due process rights. They argued that they never received the Notice of Proposed Debarment and were, therefore, denied their right to appeal the proposed sanction. The Government also filed a Motion to Dismiss, arguing that the Notice of Proposed Debarment complied with the notice requirements found at 24 C.F.R. § 24.312, and that the Final Determination by Assistant Secretary Janis foreclosed Respondents' right to request a hearing on the proposed debarment.

On June 21, 1991, the Board issued a ruling on the cross-motions to dismiss in which the Final Determination of Debarment was ordered held in abeyance, and Respondents were granted leave within which to file an appeal of the proposed debarment. Respondents filed a request for a hearing on the proposed debarment on July 15, 1991. The Government filed a brief in support of debarment on August 6, 1991, and Respondents filed a reply on September 3, 1991. This Determination is based on the written submissions of the parties, as Respondents are not entitled to an oral hearing on this matter. 24 C.F.R. § 24.313(b)(2)(ii).

Findings of Fact

1. At all relevant times, Smith was the operator of Jet-It, a New Orleans, Louisiana corporation engaged in the construction business. (Govt. Exh. 1, Resp. Exh. 4)

2. In March 1989, the Housing Authority of New Orleans ("HANO") issued purchase orders to Smith for the renovation of HANO apartments. Smith contacted [redacted] Bailey ("Bailey") and Bailey's company, Imperial Point Development ("Imperial"), who assisted Smith in performing the HANO renovations. (Resp. Exh. 4)

3. On May 4, 1989, Jet-It and Imperial submitted a joint proposal to repair a fire-damaged HANO apartment, and the proposal was approved on May 4, 1989. Two subsequent proposals were submitted and approved on May 31, 1989. Both proposals were approved by [redacted] Sanders ("Sanders"), HANO Deputy Executive Officer. Upon completion of these three renovation projects, Jet-It and Imperial submitted change orders requesting additional money. (Govt. Exh. 3)

4. On July 14, 1989, Jet-It and Imperial submitted proposals for four more apartment renovation projects. The HANO Director of Maintenance sent the proposals to

Sanders along with a memorandum indicating that the prices in the proposals far exceeded HANO's initial cost estimate for the work. (Govt. Exh. 3)

5. As a result of meetings held on July 21, July 24, and August 9, 1989, a kickback scheme was put in place whereby Sanders was paid $700 by an individual named [redacted] Pennington ("Pennington"), who was acting in concert with Bailey. The purpose of the kickback arrangement was to influence Sanders in awarding contracts to Jet-It and Imperial for the renovation of HANO apartments and projects. (Govt. Exh. 3)

6. On October 11, 1989, Pennington met with Smith, and in a recorded meeting, Smith sold Pennington four rocks of crack cocaine. In an interview on October 25, 1989 with FBI special agents, Smith admitted that he sold the crack cocaine to Pennington. At the same interview, Smith also admitted his knowledge of the kickback scheme which had been arranged by Bailey, Pennington and Sanders. (Govt. Exh. 3)

7. A two-count indictment was issued by a grand jury convened by the United States District Court for the Eastern District of Louisiana. The indictment, reciting the above facts, charged Smith with violation of the Federal Controlled Substance Act, 21 U.S.C. § 841(a)(1), and misprision of a felony, 18 U.S.C. § 4. (Govt Exh. 3)

8. On April 25, 1990, Smith entered a guilty plea to the two counts contained in the indictment. The U.S. Attorney's Office, on Smith's behalf, filed a Motion and Incorporated Memorandum for Departure from the Federal Sentencing Guidelines in which the U.S. Attorney requested that the judge impose a shortened sentence as a result of Smith's substantial cooperation in a continuing investigation of HANO. Smith was subsequently placed on probation for a period of five years. Smith was also ordered to pay a Special Assessment of $100. (Resp. Answer to Govt. Motion to Dismiss, Exhs. C & E)

9. Smith has submitted letters of support from numerous organizations including the U.S. Attorney's Office, the Probation Office of the U.S. District Court for the Eastern District of Louisiana, and HANO. Each states that Smith is a man of fine character who has made substantial contributions to his community both personally and professionally. (Resp. Exhs. 13, 14, 21, 22 and 23; Resp. Answer to Govt. Motion to Dismiss, Exhs. B & C)

Discussion

It is uncontested that Smith is a "participant" in a covered transaction with the Department because he has previously entered into a covered transaction with the Department and may reasonably be expected to do so in the future. 24 C.F.R. §§ 24.105(m) and 24.110(a)(1)(ii). He is also a "principal" as defined at 24 C.F.R. § 24.105(p) because he owned, operated and exercised control over Jet-It at the time the offenses were committed. He is also a "contractor" by virtue of the purchase orders which he and Jet-It were issued by HANO. 24 C.F.R. § 25.105(x). Because of Smith's ownership of and control over it, Jet-It is an "affiliate" as defined at 24 C.F.R. § 24.105(b).

Applicable regulations state that a debarment may be imposed for conviction of or civil judgment for:

> (1) [c]ommission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public or private agreement or transaction [or];
>
> * * *
>
> (3) [c]ommission of embezzlement, theft, forgery, or bribery . . . .
> 24 C.F.R. §§ 24.305(a)(1) and (3)

The Government bears the burden of demonstrating by a preponderance of the evidence that cause for suspension and debarment exists. When the proposed suspension and debarment are based on an indictment and conviction, that evidentiary standard is deemed to have been met. 24 C.F.R. §§ 24.405(b) and 24.313(b)(3). However, existence of a cause for debarment does not automatically require imposition of a debarment. In gauging whether to debar a person, all pertinent information must be assessed, including the seriousness of the alleged acts or omissions, and any mitigating circumstances. 24 C.F.R. §§ 24.115(d), 24.314(a) and 24.320(a). Respondents bear the burden of proving the existence of mitigating circumstances. 24 C.F.R. § 24.313(b)(4).

Underlying the Government's authority not to do business with a person is the requirement that agencies only do business with "responsible" persons and entities. 24 C.F.R. § 24.115. The term "responsible," as used in the context of suspension and debarment, is a term of art which includes not only the ability to perform a contract satisfactorily, but the honesty and integrity of the participant as well. 48 Comp. Gen. 769 (1969). The test for whether a debarment is warranted is present responsibility, although a lack of present responsibility may be inferred from past acts. Schlesinger v. Gates, 249 F.2d 111 (D.C. Cir. 1957); Stanko Packing Co. v. Bergland, 489 F.Supp. 947, 949 (D.D.C. 1980). A debarment shall be used only to protect the public interest and not for purposes of punishment. 24 C.F.R. § 24.115(d).

Smith's conviction is based on the illegal distribution of a controlled substance and his failure to disclose his knowledge of a felony. Either charge alone would be ample cause for debarment; combined, the two counts raise very serious and troubling questions concerning his "probity, honesty and uprightness." 48 Comp. Gen. 769 (1969). In mitigation, Smith basically argues that he should not be debarred because his involvement in the two incidents was minimal, a three-year debarment would be punitive, and his debarment is not necessary to protect the public.

In the averments in his brief, which is supported by an affidavit, Smith goes to great lengths to explain the circumstances surrounding his conviction. With respect to the misprision felony count, Smith asserts that he advised Bailey not to proceed with the

kickback plan. He also states that he informed two HANO officials of Bailey's involvement in the plan, but admits that he did not reveal his knowledge to any Federal or state law enforcement official. (Resp. Brief, at 5). I have no reason to question the accuracy of these assertions. However, even if Smith's version of these events is accepted as true, it demonstrates only that Smith did not actively participate in the kickback scheme. Smith's version of the facts does not diminish the gravity of the charge of misprision for which he was convicted. The pertinent HUD regulation states that a conviction alone is a sufficient cause for debarment. 24 C.F.R. § 24.305(a). It does not provide exceptions for individuals who violate the law unknowingly, nor does it exempt individuals who act without malice or ill-will. See Barbara Elaine King, HUDBCA No. 91-5881-D38 (Jul. 3, 1991).

Respondent's conduct, as described in Respondent's own Reply Brief, is replete with indecision, uncertainty, complaisance, and compromise, actions which hardly justify an investment of business confidence by HUD. Smith's attempts to notify HANO officials of the kickback scheme are not, per se, sufficient evidence that Respondent is presently responsible, particularly in light of his statement that he "became fearful of losing his newly formed company and employment for the residents who had come to depend on [him]." (Resp. Brief, at 6). Rather than displaying remorse, this statement suggests that Smith chose to place a higher value on his own financial security rather than on the need to uphold the integrity of the government progams in which he was involved. The events leading to the kickback scheme illustrate that, despite the flurry of illegal activity surrounding him, Respondent failed to report the details of these improprieties to any law enforcement official. Under the circumstances, I find Smith's reliance upon his lack of direct involvement in the kickback scheme to be of little weight as a mitigating factor.

Similarly, I do not find Smith's description of the circumstances surrounding the sale of crack cocaine to be persuasive evidence of mitigation. Smith states that Pennington asked him where he (Pennington) could purchase some drugs. The two of them then went for a drive, and Smith approached an individual and a sale of crack cocaine was completed. Smith states that, "[n]eedless to say, Respondent wishes he could make [the decision to accompany Pennington] again, but the fact is, I did take that ride[.]" (Resp. Brief, at 7). While I find this statement to be some evidence of contrition, I do not find it sufficiently mitigating to overcome the need for the Government to protect itself against individuals involved in such misconduct. The purpose of this proceeding is not simply to verify that Smith feels remorse for his misconduct, but to ensure that he is presently responsible. The fact that Smith might respond differently under identical circumstances does not, per se, provide assurances that he is an individual in whom the Government can place its trust.

Smith also asserts that imposition of a three-year debarment would be punitive. In particular, he points to the fact that he cooperated with federal officials in an investigation of corruption within HANO. In support of this, Smith has submitted letters from various individuals within the U.S. Attorney's Office, including Albert J. Winters, Jr., the First Assistant U.S. Attorney for the Eastern District of Louisiana, who writes that Smith's cooperation led to numerous indictments and convictions of individuals involved with

HANO. The fact that Smith cooperated in the investigation does not, however, mitigate the seriousness of his misconduct. The "cooperation" offered by Smith was entirely self-serving and came only after the nefarious kickback scheme and Smith's role in purchasing cocaine had been exposed. The purpose of this hearing is not to "penalize [Smith] in any way for cooperating with the Federal Government" as First Assistant U.S. Attorney Winters has written. Its purpose is to ascertain whether Smith is presently a responsible contractor with whom HUD should conduct its business. Smith's cooperation with Federal authorities in the prosecution of criminal conduct was admirable, but also prudent. It resulted in a diminished penalty in a criminal court proceeding. However, his assistance to the U.S. Attorney's office in corralling other wrongdoers is not, per se, evidence that Respondent is now a responsible contractor. REA Construction Company, HUDBCA No. 81-550-D6 (Apr. 14, 1981); Sidney Spiegel, HUDBCA Nos. 91-5908-D53, 91-5920-D62 (Jul. 24, 1992).

The letters of recommendation submitted by Smith are complimentary descriptions of the personal and professional contributions he has made to his community. None of the letters, however, describe Smith's present business conduct, which would be helpful in determining whether Smith is presently responsible and capable of transacting business with HUD at a minimum of risk. Louis Ferris, Jr., HUDBCA No. 92-G-7590-D54 (Sep. 1, 1992). Smith has also failed to submit any sworn statements or affidavits containing assurances that he will perform in a responsible manner in the future. Carl W. Seitz and Academy Abstract Co., HUDBCA No. 91-5930-D66 (Apr. 13, 1992).

With respect to the suspension and debarment of Jet-It, applicable HUD regulations specifically provide that a "debarment action may include any affiliate of the participant that is specifically named and given notice of the proposed debarment and an opportunity to respond." 24 C.F.R. § 24.325(a)(2). It is uncontested that Jet-It has been specifically named and notified of these Departmental sanctions. In instances where a company's debarment is based upon its affiliate status and the misdeeds of its owner or one of its employees, that company must demonstrate that it is presently responsible. See Irving Winter, Colony Realty Company, HUDBCA No. 90-5909-D54 (Nov. 5, 1991). Jet-It has made no such showing. The most compelling evidence which a company with affiliate status could provide would be proof that the transgressors who committed the wrongful acts have since left the company or have otherwise been sufficiently "walled off" from the company's operations. Such evidence would indicate that the risk of a company's involvement in its employee's misconduct has been all but eliminated. Novicki v. Cook, 743 F.Supp. 11 (D.D.C. 1990), rev'd, 946 F.2d 938 (D.C. Cir. 1991). However, there is no evidence which would indicate that Smith is no longer in control of Jet-It. Furthermore, Smith has offered no independent evidence which would prove that his affiliate is now a responsible contractor free from Smith's influence.

Conclusion

For the foregoing reasons, I find that a three-year debarment of Smith and Jet-It is warranted by the record in this case. It is therefore **ORDERED** that Melvin Smith and Jet-It Systems, Inc. shall be debarred through July 18, 1993, credit being given for the time during which Respondents were suspended.

David T. Anderson
Administrative Judge