

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

In the Matter of:

ARC ASBESTOS REMOVAL CO., INC.
Respondent

HUDBCA No. 91-5791-D25
Docket No. 91-1590-DB(LDP)

For the Respondent:

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For the Government:

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DETERMINATION BY ADMINISTRATIVE JUDGE TIMOTHY J. GRESZKO

April 12, 1991

Statement of the Case

By letter dated August 14, 1990, Maxine Saunders, Manager of the Baltimore Office of the U.S. Department of Housing and Urban Development ("Department", "Government," or "HUD"), notified ARC Asbestos Removal Company, Inc. ("Respondent" or "ARC"), that the Department had imposed a one year Limited Denial of Participation ("LDP") which precluded Respondent from further participation in all programs under the jurisdiction of the Department's Assistant Secretary of Housing within the State of Maryland, except those HUD programs operating in Montgomery and Prince George counties. Respondent's LDP is based upon Respondent's conviction in the Circuit Court for Baltimore City, Maryland for violation of the Maryland Antitrust Act. The letter stated that the indictment filed against ARC, No. 19012022, constituted adequate evidence under 24 C.F.R. §§ 24.305(a) and 24.705(b) for the imposition of an LDP.

On September 7, 1990, an informal conference was held in the Baltimore Office of the Department at which Respondent provided additional information to be reviewed by HUD. Subsequent to this conference, Maxine Saunders affirmed her initial decision to continue the LDP. On October 25, 1990, Respondent timely filed an appeal and requested a hearing on the LDP. This determination is based upon written submissions of the parties, as Respondent is not entitled, under applicable HUD regulations, to an oral hearing in this matter. 24 C.F.R. § 24.313(b)(2)(ii).

Findings of Fact

1. At all relevant times, Respondent was a company involved in asbestos abatement services in Maryland. These services include replacement, removal, containment, storage, and disposal of asbestos. (Govt. Exhs. A and D).

2. On June 18, 1990, the Circuit Court for Baltimore City issued two indictments which separately charged Respondent and Nicholas Thrappas, ARC's Secretary/Treasurer, for violations of the "Maryland Antitrust Act," Md. Com. Law Code Ann. §§ 11-204(a)(1) and 11-212 (1983). These violations occurred in the period from April 1986 to July 1986. The indictment charged Respondent with entering into a bid rigging conspiracy on five sealed bid competitions for asbestos abatement services by submitting "complimentary" bids. These complimentary bids were false bids submitted to increase the number of bids so as to give an appearance of competition in the sealed bid process for contract award. (Govt. Exh. A).

3. By letter dated August 14, 1990, Respondent and Nicholas Thrappas entered into an agreement with the State of Maryland to plead guilty to a misdemeanor violation of the Maryland Antitrust Statute. Respondent was assessed a total of \$80,000 in fines, restitution, and damages. (Govt. Exhs. B and C).

4. On October 24, 1990, Major General William K. Suter, Suspension and Debarment Official, U.S. Army, issued a Decision Memorandum in which Respondent and Nicholas Thrappas were suspended and debarred from August 10, 1990 until December 31, 1990. This decision states that the debarment was:

necessary to afford the respondents adequate time, following the convictions, to ensure that the underlying circumstances leading to these convictions have been eliminated. Further, any corrective programs which have been or will be implemented must be in place for a sufficient period and working effectively to allow respondents to demonstrate their present responsibility. (Govt. Exh. D).

5. In her sworn declaration dated January 8, 1991, Maxine Saunders, Manager of the HUD Baltimore Office, states that Nicholas Thrappas resigned his position as Secretary/Treasurer of Respondent on October 16, 1986 and that Respondent is a small company owned and operated by persons with family ties to Nicholas Thrappas. (Govt. Exh. E).

6. In her affidavit dated March 27, 1991, Patricia Thrappas, wife of Nicholas Thrappas and President of ARC, also states that Nicholas Thrappas resigned his position on October 16, 1986 and has had no official or unofficial position with ARC since 1986. Patricia Thrappas attests that Nicholas Thrappas does not have and will not have any influence or involvement with the management of ARC because she and Nicholas Thrappas are obtaining a divorce and the settlement agreement provides that Patricia Thrappas is the sole owner and stockholder of ARC. This evidence is corroborated by a letter from Patricia Thrappas's divorce lawyer. (Affidavit of Patricia Thrappas; Respondent's Exh. A and Exh. D, para. 12).

7. Kenneth Bielecki and Charles Reed are two former ARC employees whose improper discussions of bid information with ARC competitors led to the submission of complimentary bids. Respondent's indictment and conviction resulted from this improper conduct. Kenneth Bielecki was fired by ARC in 1986 and Charles Reed resigned from ARC on September 15, 1987. (Affidavit of Patricia Thrappas; Respondent's Exh. B).

8. Respondent took remedial measures after its criminal indictment and conviction by creating an "Employee's Antitrust And Unfair Competition Law Compliance" program in which all employees of Respondent must certify that they have read and will comply with Respondent's "Antitrust and Unfair Competition Guidelines." (Respondent's Exhs. 2 and D). Respondent has provided copies of the certification forms which have been signed by those employees responsible for managing ARC's bid submission process. Moreover, Patricia Thrappas and John Thrappas are presently taking an active role in the oversight of ARC's bidding process to ensure compliance with procurement and antitrust laws. (Affidavit of Patricia Thrappas; Respondent's Exh. D).

Discussion

It is uncontested that Respondent is a participant in a covered transaction under HUD's nonprocurement programs and that Respondent is a principal as defined in 24 C.F.R. § 24.105(p). Under applicable HUD regulations, at 24 C.F.R. §§ 24.705(a)(8) and 24.305(a)(2), an LDP may be imposed for the commission of a:

[v]iolation of Federal or State antitrust statutes, including those proscribing price fixing between competitors, allocation of customers between competitors, and bid rigging;

The burden is on the Government to prove by a preponderance of the evidence that cause for a limited denial of participation exists. 24 C.F.R. §§ 24.313(b)(3), (4). If the sanction is based upon an indictment, conviction, 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), 24.705(b).

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 a LDP, suspension, or debarment, is a term of art which includes not only the ability to perform a contract satisfactorily, but the honesty and integrity of the contractor as well. 48 Comp. Gen. 769 (1969). The test for whether a sanction is warranted is present responsibility. It is well established that 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.C. D.C. 1980). In deciding whether to impose a sanction, all pertinent information must be assessed, including the seriousness of the alleged acts or omissions, and any mitigating circumstances. See 24 C.F.R. §§ 24.314(a), 24.320(a).

The indictment and subsequent conviction underlying this matter is based on Respondent's participation in a bid rigging conspiracy to obtain contracts for asbestos abatement services. This conviction raises serious doubts as to the Respondent's "probity, honesty and uprightness" and connotes lack of responsibility. See 48 Comp. Gen. 769 (1969). Respondent asserts, however, that the continuation of the LDP sanction is not necessary given: (1) the passage of time since the improper conduct, and (2) the corrective action taken by Respondent.

This Board has viewed a substantial passage of time following the improper conduct which leads to the imposition of Departmental sanctions as a mitigating circumstance. ARC Plumbing and Heating Corp., HUDBCA No. 88-3459-D68 (Feb. 2, 1990); Spencer H. Kim and Kamex Construction Corp., HUDBCA No. 87-2468-D58 (June 21, 1988). In the present case, over 4 - 1/2 years have passed since Respondent's improper conduct occurred in 1986. Furthermore, the record discloses not only the absence of evidence of any misconduct during those 4 - 1/2 years, but also that the company took corrective action by ensuring that ARC no longer employed the three individuals, Nicholas Thrappas, Kenneth Bielecki, and Charles Reed, involved in the bid rigging scheme. Respondent has provided documentary evidence, which the Government does not dispute, that Nicholas Thrappas, Kenneth Bielecki and Charles Reed no longer participate in Respondent's business dealings. An LDP, debarment or suspension is to be used only to protect the public interest and not for purposes of

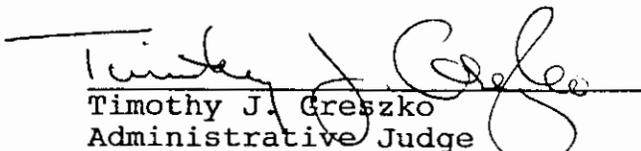
punishment. See Gonzales v. Freeman, 334 F.2d 570, 577 (D.C. Cir. 1964); 24 C.F.R. § 24.115(b). The absence of those individuals responsible for ARC's improper conduct indicates that Respondent is no longer burdened with the miscreants who directed ARC along the path of criminal behavior and that continuation of the sanction would appear to be punitive.

The evidence also demonstrates that Respondent has taken corrective action by instituting an "Employee's Antitrust And Unfair Competition Law Compliance" program to ensure that employees understand and abide by antitrust and unfair competition laws. The signed certification forms provided by Respondent demonstrate that the compliance program is in place, and Respondent's documentary evidence establishes that the program is being carefully monitored by Patricia and John Thrappas.

I find that Respondent's corrective action has provided HUD with a significant degree of protection from future improper conduct and demonstrates a proper understanding and a recognition of the seriousness of past acts. See Chesley J. Doak, HUDBCA No. 89-4364-D12, at 7 (May 24, 1989). Given the passage of time, the substantial amount of evidence that Respondent is now conducting its affairs in a responsible manner, and the corrective action taken by Respondent, I find that the justification for the LDP no longer exists. See 24 C.F.R. § 24.710(b).

Conclusion

For the foregoing reasons, I find that the LDP imposed on ARC Asbestos Removal Company, Inc. is no longer in the interests of the Department and the public. It is my determination that the LDP should be terminated immediately.


Timothy J. Greszko
Administrative Judge