



Board of Contract Appeals
U.S. Department of Housing and Urban Development
Washington, D.C. 20410-0001

In the Matter of:	:		
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Sidney Spiegel	:	HUDBCA No.	91-5908-D53
	:		91-5920-D62
	:	Docket No.	91-1662-DB(s)
	:		91-1676-DB
Respondent	:		
	:		

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DETERMINATION BY ADMINISTRATIVE JUDGE JEAN S. COOPER

July 24, 1992

Statement of the case

By letter dated March 13, 1991, Arthur J. Hill, Assistant Secretary for Housing - Federal Housing Commissioner, notified Sidney Spiegel ("Respondent" or "Spiegel") that the United States Department of Housing and Urban Development ("HUD" or "Government") had suspended him under the provisions of 24 C.F.R. § 24.405 excluding him from primary covered transactions as either participant or principal at HUD and throughout the Executive Branch of the Federal Government and from participating in procurement contracts with HUD. Spiegel's suspension was issued pursuant to 24 C.F.R. § 24.110(a). The suspension was supported by an Information filed in the United States District Court for the District of Columbia charging Spiegel with a violation of Title 15, United States Code § 1, as well as violations of Title 18, United States Code § 2314 and 2.

Spiegel subsequently plead guilty to the Information, which resulted in a conviction judgement. By letter dated May 2, 1991, Arthur J. Hill notified Spiegel that HUD intended to debar him for a period of three years based on his conviction in the United

States District Court for the District of Columbia. Spiegel appealed the proposed debarment by letter dated May 10, 1991. A motion to consolidate the suspension and debarment proceedings was granted by this Board on May 16, 1991.

The suspension and proposed debarment are based solely on an indictment and conviction. Therefore a hearing is limited by regulation to the consideration of briefs and documentary evidence only. 24 C.F.R. § 24.313(b)(2)(ii). The mitigating factors, which must be considered in any sanction case, must also be presented in documentary form when the cause for the sanction is established by a conviction. This determination is based on the written submissions of the parties.

Findings of Fact

1. Spiegel is a Maryland real estate speculator doing business in the District of Columbia. (Resp. Exh. 1).

2. Bid rigging was a common, although illegal, practice at public real estate auctions in the District of Columbia. Beginning as early as 1983, and continuing thereafter at least until May 10, 1989, Spiegel and others engaged in a conspiracy to rig bids at public real estate auctions in the District of Columbia, in violation of Section 1 of the Sherman Antitrust Act (15 U.S.C. § 1). Spiegel participated in thirty-six transactions with "rigged" bids over a five year period. (Resp. Answer page 4, Resp. Exh. 1).

3. On July 26, 1990, Spiegel was charged by Information with one count of bid rigging in violation of the Sherman Antitrust Act (15 U.S.C. § 1), and one count of interstate transportation of property taken by fraud in violation of 18 U.S.C. §§ 2314 and 2. On December 10, 1990, he pled guilty to both counts in the United States District Court for the District of Columbia. On December 13, 1990, Spiegel was sentenced to a four month period of incarceration, and a \$65,000 fine. (Govt. Exhs. 1, 2 and 3).

4. Letters have been submitted by Spiegel which attest to his character. Spiegel states that his involvement in the offense was an aberration and not representative of his character. He further avers that his background, when viewed with other factors in the case, demonstrates that he is a responsible person who would not be a risk to the public or the Federal Government if permitted to act as a participant or principal. (Resp. Exh. 4).

5. Spiegel first learned that the Federal Government was investigating bid rigging when he was issued a subpoena to appear before a Grand Jury on October 5, 1988. He contends that from that point he cooperated and assisted with the Federal

investigation by answering all questions asked of him by the investigators and agreeing to testify at trials of other defendants if necessary. (Resp. Answer at p.3).

Discussion

Introduction

HUD may not apply the sanctions of suspension or debarment unless the individual or entity to be sanctioned is a "participant or principal," as defined by the applicable departmental regulation at 24 C.F.R. §§ 24.105(m) and (p). Spiegel is a "participant" because he has participated in covered transactions for the sale and/or refinancing of HUD properties. 24 C.F.R. § 24.105(m). Moreover, Spiegel may be expected to participate in covered transactions in the future. Spiegel is also a "principal" because he has substantive control over a covered transaction as a realtor licensed in the District of Columbia. 24 C.F.R. § 24.105(p)(11).

Underlying the Government's authority not to do business with a person is the requirement that agencies need only do business with "responsible" persons and entities. 24 C.F.R. § 24.115. Debarment and suspension are discretionary actions that are appropriate means to ensure that the Federal Government is conducting business with "responsible persons." 24 C.F.R. § 24.115(a). 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). Furthermore, debarment and suspension are serious measures to be used to protect the public interest and are not to be used for punitive purposes. 24 C.F.R. § 24.115(b).

I. Suspension

The applicable regulation provides that a suspension may be imposed when "cause for debarment under [24 C.F.R.] § 24.305 may exist." 24 C.F.R. § 24.405(a)(2). Debarment may be imposed for conviction or civil judgement for, among other acts:

[v]iolation of Federal or State antitrust statutes, including those proscribing price fixing between competitors, allocation of customers between competitors, and bid rigging. 24 C.F.R. § 24.305(a)(2);

or

[c]ommission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a person. 24 C.F.R. § 24.305(a)(4).

HUD suspended Spiegel on March 13, 1991 based on an Information issued by the United States District Court for the District of Columbia, charging him with violations of the Sherman Antitrust Act. Suspicion of violation of Federal antitrust statutes arising out of bids and proposals is a ground for suspension if adequate evidence exists. Furthermore, it is a charge so serious that it warrants an immediate suspension to protect the public interest if the acts alleged occurred in the recent past. An Information is adequate evidence to warrant imposition of suspension pending debarment. 24 C.F.R. §§ 24.405, 24.305(a). I find that the suspension imposed on Spiegel was necessary to protect the public, and was supported by adequate evidence. 24 C.F.R. § 24.400(b)(1) and (2).

II. Debarment

The test for whether 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. 949 (D.D.C. 1980). Moreover, the existence of a cause for debarment does not necessarily require that the contractor be debarred. The seriousness of the contractor's acts and any mitigating factors are considered in determining the seriousness of the offense, and present responsibility must be evaluated in determining whether the sanction is necessary to protect the public interest and is in the best interest of the government. Roemer v. Hoffman, 419 F.Supp. 130 (D. D.C. 1976) 24 C.F.R. §§ 24.115(d), 24.314(a) and 24.320(a).

HUD has the burden of proof for establishing cause for debarment. Spiegel has the burden of proof of establishing mitigating circumstances. 24 C.F.R. § 24.313(b)(4). The cause for debarment must be established by a preponderance of the evidence. However, since the proposed debarment is based upon Spiegel's conviction, the standard is deemed to have been met pursuant to 24 C.F.R. § 24.313(b)(3).

Spiegel is subject to debarment under the provisions of 24 C.F.R. Part 24. If debarment is warranted, Spiegel would be excluded from participating in covered transactions defined under 24 C.F.R. § 24.110(a)(1). 24 C.F.R. § 24.105(f). An action taken by HUD under these regulations shall also exclude a participant from participating in procurement contracts with HUD, and shall exclude a contractor from participating in covered transactions with HUD and throughout the Federal Government. 24

C.F.R. § 24.105(f)(1) and (2).

The record in the instant case establishes a cause for debarment under 24 C.F.R. § 24.305(a)(4). That section provides that a participant or principal may be debarred for a conviction under the Federal Antitrust statutes arising out of the submission of bids or proposals. Spiegel's conviction for violating the Sherman Antitrust Act is indeed a most serious cause for debarment.

Spiegel asserts that none of the thirty-six transactions in which he admits to having conspired to rig bids involved HUD properties. He also contends that this Board should not sanction him because his conduct, in his view, has not harmed the Federal Government. Spiegel fails to recognize that collusive bidding undermines the two basic foundations of government procurement: competition and limitation of costs. Norman D. Wilhelm, HUDBCA No. 82-679-D15 (August 27, 1982). Rigged bids also tend to set the cost of procurement at a level in excess of that which would be established in a competitive market. It also adversely affects the state and federal governments charged with effective administration of procurement policy. REA Construction Company, HUDBCA No. 81-550-D6 (April 14, 1981). This interferes with the public interest in a competitive procurement system.

Bid rigging was a regular practice in public real estate auctions in the District of Columbia. Spiegel avers that those who did not join in the bid rigging system were forced out of the market. He contends that as a result of the acceptance of these practices over time, it was not readily apparent to the participants involved in the bid rigging scheme that they were breaking the law.

The fact that bid rigging was an established practice in the District of Columbia does not in any way excuse or mitigate the seriousness of the practice itself. Spiegel was a very active participant in what he knew or should have known was an illegal practice. Spiegel's self-interested cooperation with the investigation cannot be considered mitigation of the seriousness of the Spiegel's offense, nor a conclusive demonstration that Spiegel is presently a responsible contractor. REA Construction Company, HUDBCA No. 81-550-D6. (April 14, 1981). Although Spiegel learned of the F.B.I. investigation on October 5, 1988, he continued to participate in bid rigging until at least May 10, 1989. I find this to be a shocking instance of willful lawbreaking. It is not mitigating. Rather, it is evidence of exacerbation of the problem.

Nonetheless, Spiegel contends that this Board should look past his pattern and practice of illegal actions, and should instead focus on his "exemplary track record" in dealing with HUD transactions. Spiegel also insists that his lack of specific

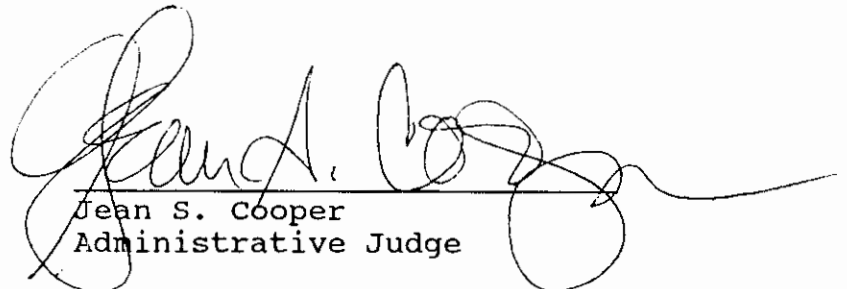
intent in violating the Sherman Antitrust Act should be a mitigating factor in these proceedings. Spiegel does not seem to realize that his actions have imposed real costs on the public.

The lack of specific intent to violate a statute is not as relevant as whether Spiegel intended to engage in bid rigging. Bid rigging constitutes an organized series of fraudulent activities, which require the participation of persons lacking business integrity and honesty. To protect the public, it is paramount that individuals who contract with the government are forthright and responsible in their dealings. 24 C.F.R. Part 24 was specifically designed to serve this purpose. Without the assurance that those who do business with the government are honest and have integrity, there is no guarantee that government funds are being properly spent. It is irrelevant that Spiegel's bid rigging did not occur within a HUD program, because it certainly could have. Spiegel's argument in this regard is disingenuous.

I cannot find sufficient mitigating evidence in this record to convince me that Spiegel is presently responsible to participate in covered transactions with HUD or with the Federal Government. His actions over a five year period were so lacking in responsibility and respect for the public fisc, that I find he still lacks the present responsibility based on those past acts. He in no way understands why bid rigging is illegal, or the impact that it has on a competitive system of procurement. Based on the record, the lack of mitigating factors, and the purpose of 24 C.F.R. Part 24, HUD's desire not to do business with Spiegel is well-founded. I find that a period of debarment for Sidney Spiegel, from this date until March 14, 1994, is necessary and appropriate in order to protect HUD and the public. Spiegel has been suspended since March 14, 1991. I have taken this period into consideration in setting the period for his debarment.

Conclusion

Based on the record of this case, Respondent Sidney Spiegel shall be debarred until March 14, 1994, in accordance with the conditions set forth in 24 C.F.R. Part 24.


Jean S. Cooper
Administrative Judge