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

In the Matter of:	:	
CARROLL R. DUNTON AND DUNTON CONTRACTING, INC.,	:	HUDBCA No. 92-7392-D10 Docket No. 92-1767-DB
Respondents.	:	

Carroll R. Dunton
[redacted]
For the Respondents

Bryan Parks Saddler, Esq.
Office of General Counsel
U.S. Department of Housing
and Urban Development
Washington, D.C. 20410
For the Government

DETERMINATION BY ADMINISTRATIVE JUDGE DAVID T. ANDERSON

May 19, 1992

Statement of the Case

On September 23, 1991, Michael Janis, General Deputy Assistant Secretary of the U.S. Department of Housing and Urban Development ("HUD", "Government," or "Department") notified Carroll R. Dunton ("Dunton") and Dunton Contracting, Inc. ("DC") (collectively "Respondents") that consideration was being given to debaring Respondents from participation in covered transactions with the Department and other agencies within the Executive Branch of the Federal Government. The proposed debarment was to remain in effect for three years, and is based on Dunton's conviction in the United States District Court for the District of Maryland for violations of 18 U.S.C. §§ 666(2), 201(c)(1).(A) and (2). The letter also advised Respondents that they were temporarily suspended pending determination of the proposed debarment.

Respondents filed a timely request for a hearing on the suspension and proposed debarment on October 1, 1991. The Government filed a brief in support of debarment on December 18, 1991, and a reply brief was filed by Respondents on January 7, 1992. 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 the time of the improper conduct which is the subject of this proceeding, Dunton was president and owner of DC, a firm located in Annapolis, Maryland, specializing in general contracting. (Govt. Exh. B). Dunton claims that he is not currently an officer or stockholder of DC. (Resp. Reply, at 1)

2. At all relevant times, the Housing Authority of the City of Annapolis ("HACA") operated as a local public housing agency engaged in the development or operation of housing for lower-income families. The Department was responsible for providing funding to HACA to assist HACA in maintaining low-income housing developments, and in monitoring certain projects to ensure that applicable laws and Departmental regulations were followed. (Govt. Exh. B)

3. At all relevant times, [redacted] Strissel was the Executive Director of HACA. In that capacity, Strissel acted as HACA's contracting officer, and had authority to award contracts, approve changes, request additional funding, and authorize the expenditure of HUD funds. Strissel was also responsible for supervising the bid procedure through which contracts were awarded to the lowest responsible bidder, and for ensuring that contract specifications and all applicable regulations were followed. (Govt. Exhs. B & C)

4. At all relevant times, [redacted] Weston, U.S. Navy (Retired), was the Public Works Officer stationed at the U.S. Naval Academy in Annapolis, Maryland ("USNA"). As Public Works Officer, Weston was responsible for contracts dealing with construction and repairs at USNA. (Govt. Exh. B)

5. On August 20, 1990, a two-count information was filed by the U.S. Attorney for the District of Maryland. Count 1 of the information charged that, from on or about December 1984 to July 1987, Dunton gave, offered, or agreed to give building and plumbing supplies, equipment and labor in connection with the renovation of Strissel's residence in Annapolis. The supplies, equipment and labor were given to Strissel "in connection with the Gas Checkmeter Contract, M-81-7(b), a HACA transaction [of approximately $559,333.00]," in violation of 18 U.S.C. §§ 666(2) and 2. (Govt. Exh. B)

6. Count 2 of the information charged that, from July 1985 to July 1986, Dunton knowingly gave, directly and indirectly, a washing machine, dryer, trash compactor, and air conditioners to Weston. These items were allegedly given to Weston with the purpose of influencing the award and administration of USNA contracts, in violation of 18 U.S.C. §§ 201(c)(1)(A) and 2. (Govt. Exh. B)

7. On May 16, 1991, Dunton was convicted, upon entering a plea of guilty, of both counts contained in the indictment. Dunton was committed to the custody of the Attorney General for a period of six months in a "Jail-Type work release center" with respect to Count 1. A one year sentence as to Count 2 was suspended, but Dunton was placed on probation for three years, was ordered to perform 200 hours of community service, and was ordered to pay a fine of $25,000. (Govt. Exh. A)

8. Respondents have submitted letters of appreciation and commendation from [redacted] Coxe, District Public Works Officer, Severn River Naval Command, USNA; [redacted]. Weigle, President, St. John's College; [redacted] Wittschiebe, Commanding Officer, Naval Facilities Engineering Command, Dept. of the Navy; [redacted] Drucker, Judge Advocate Generals Corps, Leadership and Law Department, USNA; [redacted] McCann, Director of Department of Recreation and Parks, Anne Arundel County, Maryland; [redacted] Finglass, Vice President, Finglass Construction Co., Inc.; [redacted] Corrigan, Resident Officer in Charge of Construction, Naval Facilities Engineering and Housing, Headquarters, Fort Meade, Dept. of the Army; and [redacted] Jones, Jr., Commander, Naval Facilities Engineering Command, Dept. of the Navy. Each letter, in general, is a complimentary testament to Respondents' favorable performance on various construction projects. (Resp. Exh. A)

Discussion

It is uncontested that Dunton 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)(i). He is also a "principal" as defined at 24 C.F.R. § 24.105(p) because he owned, operated and exercised control over DC at the time the offenses were committed. Because of Dunton's ownership of and control over it, DC 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;
>
> * * *
>
> (3) [c]ommission of embezzlement, theft, forgery or bribery . . . . 24 C.F.R. §§ 24.305(a)(1) & (3).

The Government bears the burden of demonstrating by a preponderance of the evidence that cause for suspension and debarment exists. When the suspension and proposed 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 or nor 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). The 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(b).

Dunton's conviction is based on bribery, on offering gratuities to a public official, and on aiding and abetting a criminal scheme in order to obtain contracts with the Department. This conviction raises serious and troubling questions concerning his "probity, honesty and uprightness" and raises a reasonable presumption that he lacks present responsibility. 48 Comp. Gen. 769 (1969). In mitigation, Dunton argues that his thirty-year business record is otherwise unmarked by misconduct, submits that his commitment to a work-release program and his payment of fines are sufficient punishment for his misdeeds, and states that he "did not defraud the U.S. Government of anything[.]" (Resp. Reply, at 2).

Dunton asserts that, during his thirty years in the contracting business, he has established a reputation for quality work, responsibility, and professionalism. In support of this assertion, he has submitted eleven letters of commendation, praise, and thanks from individuals for whom he has completed projects. The letters date from 1972 to 1987; none make any reference to Dunton's criminal activity which is the subject of this proceeding. These letters, while supporting Dunton's assertion with respect to his history as a competent contractor, are insufficient evidence of his present responsibility. They do not address Dunton's present business conduct or practices, and are inadequate, per se, to rebut the presumption that Dunton lacks present responsibility. The test

for present responsibility is designed to insure that the Department's conduct of business with a specific individual will involve a minimum of risk. See Irving Winter, Colony Realty Company, HUDBCA No. 90-5909-D54 (Nov. 5, 1991). To the extent that all but one of the letters Dunton has submitted fail to address the issue of his professional behavior since his misconduct, I find them to be insufficient evidence of mitigation. Ron Overby, HUDBCA No. 91-5933-D68 (Oct. 16, 1991). The one letter which was written in 1987, after Dunton's misconduct occurred, does not persuade me that Dunton is an individual with whom the Department should now feel comfortable conducting business.

Dunton further states that the sentence and fines imposed upon him pursuant to his conviction are adequate remedies for his misdeeds. Contrary to Dunton's belief, the Department is not seeking to "extract that last pound of flesh" from him. HUD regulations provide that debarment and other administrative sanctions are to be imposed to protect the public, and are not to be used for punitive purposes. 24 C.F.R. § 24.115(d). The relevant focus of this proceeding is to determine whether HUD can conduct business with Respondents without risk to the integrity of Departmental programs, not whether Dunton has been sufficiently punished for his wrongdoings.

Dunton appears to both recognize and trivialize the gravity of his misconduct. In his brief, Dunton states, "I admit, I spent my money and corporate money to try and satisfy people that had control over my contracts." (Resp. Reply, at 2). However, Dunton also states, "[w]hatever mistakes I made, I did not cheat on my contracts. I did not defraud the U.S. Government of anything, nor was I accused of that. I was not required to make restitution to anyone." (Resp. Reply, at 2). The fact that Dunton did not cheat on his contracts has little merit as a mitigating circumstance, since the relevant point of this proceeding focuses on what improper actions Dunton committed, not what improper acts he refrained from doing. Nowhere in Dunton's statement is there any recognition that his wrongdoing placed the integrity of the HACA and USNA procurement processes at risk, or that his misconduct deprived the Government of its obligation to insure that its contracts are awarded fairly. Dunton has expressed regret, but no remorse, contrition, or understanding of the impact of his misconduct on the integrity of the Federal programs from which he has profited. He has failed to offer persuasive evidence which would indicate that he is now a responsible contractor whose ethical judgment can be relied upon. I find that Dunton's conviction for bribery, offering gratuities, and aiding and abetting, in the absence of relevant mitigating evidence, indicates a lack of trustworthiness so seriously appalling that a three year debarment is amply justified in this case.

Dunton also contends that, even if he is debarred, DC should not be subject to any administrative sanctions because it was not

found guilty of any crime, and because "[DC] is its own entity." To the contrary, DC was under Dunton's control during the time that his misconduct occurred, and there is no evidence which would indicate that Dunton and DC have parted company, or that DC is operating independently, free from Dunton's influence. 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). 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). DC has made no such showing. The most compelling evidence which a company with affiliate status could provide that it is no longer influenced by miscreants, 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). DC has offered no such evidence.

In his reply, Dunton does state that he is no longer "an officer or stockholder of [DC]." However, this statement, standing alone, is insufficient evidence on which to base a finding that Dunton is neither an officer nor owner of DC. The record contains no sworn affidavits from Dunton or other DC employees in support of this assertion, and no company records have been submitted which would indicate that the corporation that bears Dunton's name is no longer his affiliate as defined by 24 C.F.R. § 24.105(b). Nor has it been demonstrated that DC has taken appropriate steps which could insure that similar episodes of wrongdoing will not recur. In the absence of evidence demonstrating that DC has taken sufficient corrective action to protect itself from potentially improper actions of its owner, officers, or other employees, a debarment of DC would appear to be in the public interest.

Dunton's final argument is that, assuming a debarment is imposed upon him, he should receive credit for the time during which he was subject to a Limited Denial of Participation ("LDP"). Before the notice of suspension and proposed debarment was issued by the Assistant Secretary on September 23, 1991, an LDP was issued on August 21, 1991 by St. George I.B. Cross, Manager, HUD Baltimore Office. The LDP was based upon initial information received by the Department concerning Dunton's activities with Strissel. Dunton apparently did not contest the LDP, which excluded Dunton and DC from participating in programs located in the State of Maryland (excepting Montgomery and Prince George's Counties), within the jurisdiction of the Assistant Secretary for Public and Indian

Housing of HUD.[1] The Government notes that the LDP was not based on Dunton's conviction for either offense. However, since the LDP was based upon the same criminal conduct which led to Dunton's conviction, Respondents should be credited with the brief period prior to the suspension during which Dunton was prohibited from participating in a limited group of HUD programs, because the Department was afforded adequate protection from Respondents' conduct during this period. See 24 C.F.R. §§ 24.713 and 24.320.

Conclusion

For the foregoing reasons, I find that a three-year debarment of Dunton and DC is warranted by the record in this case. It is therefore **ORDERED** that Carroll R. Dunton and Dunton Contracting, Inc. shall be debarred through August 20, 1994, credit being given for the time during which Respondents were suspended, and for the additional 33 days during which Respondents were precluded from participating in certain HUD programs.

David T. Anderson
Administrative Judge

[1]Contrary to the Department's assertion, DC appears to have been subject to the terms of the LDP. Dunton was told in the LDP notice that "[i]ssuance of this sanction excludes you and your company immediately from any direct or indirect participation" in the programs specified. (emphasis added) (Resp. Exh. B)