

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

In the Matter of:

JAMES E. McFREDERICK,

Respondent.

HUDBCA No. 92-G-7585-D52
Docket No. 92-1852-DB

Respondent, *Pro Se*

Philip A. Kesaris
Office of General Counsel
U.S. Department of Housing
and Urban Development
Room 10251
Washington, D.C. 20410

DETERMINATION BY ADMINISTRATIVE JUDGE TIMOTHY J. GRESZKO

October 7, 1992

Statement of the Case

By letter dated April 14, 1992, Arthur J. Hill, the Assistant Secretary for Housing, Federal Housing Commissioner, of the U.S. Department of Housing and Urban Development ("Government," "Department," or "HUD") notified James McFrederick ("Respondent") that HUD had proposed debarring him from further participation in primary covered or lower tier covered transactions as either a participant or principal at HUD and throughout the Executive Branch of the Federal Government and from participating in procurement contracts with HUD for a period of three years. The proposed debarment was based upon McFrederick's conviction for extortion in violation of Fla. Stat. § 836.05 (1987). The notice further provided that pending the outcome of the proposed debarment, McFrederick was suspended, pursuant to 24 C.F.R. § 24.110(a), from participation in the above-mentioned transactions and contracts. McFrederick, pursuant to 24 C.F.R. § 24.313, requested an opportunity to appeal the Government's suspension and proposed debarment.

The proposed debarment is based solely on a conviction; therefore, a hearing is limited by regulation to the consideration of briefs and documentary evidence.

24 C.F.R. § 24.313(b)(2)(ii). This determination is based on the written submissions of the parties.

Findings of Fact

1. James McFrederick is a partner in J.R. Development Company ("JRD"), an entity engaged in the development of real estate in the St. Petersburg, Florida area. (Govt. Exh. A, at 7; Resp. Reply Exh. 5).

2. In 1983-84, pursuant to the Moderate Rehabilitation Program established under Section 8 of the U.S. Housing Act of 1937, 42 U.S.C. § 1434, the St. Petersburg Housing Authority ("SPHA") awarded three contracts to JRD to rehabilitate forty-six housing units. Following rehabilitation of the units, the contract called for JRD to rent the units to low-income families. (Govt. Exh. A, at 7; Resp. Reply Exh. 5).

3. In 1986-87, after the units had been rehabilitated and occupied, [REDACTED] White, [REDACTED] ("White"), Executive Director of SPHA, cancelled the contracts with JRD because he believed that two of the contracts had been obtained as the result of bribery. (Govt. Exh. A, at 8; Resp. Reply Exh. 5). White also believed that the third contract was improperly awarded. (Govt. Exh. A, at 8).

4. A five-year dispute between McFrederick and White resulted from the cancellation of the contracts. During this period, McFrederick's efforts to have the contracts reinstated escalated to unlawful activities. McFrederick hired a private investigator, [REDACTED] Reale, and entered into a scheme designed to intimidate and blackmail White. Between March 22 and March 29, 1988, McFrederick and Reale verbally accosted White at his home and at work. McFrederick and Reale threatened to publicly disgrace White and to ruin his reputation unless White reinstated the contracts. (Govt. Exh. A, B and C).

5. Reale offered an SPHA employee \$500 for derogatory information about White. Subsequently, the employee reported this offer to White and the St. Petersburg Police Department. In response to McFrederick's and Reale's activities, the St. Petersburg Police Department implemented an undercover "sting" operation. Reale was notified that White would be at a specified motel at a certain time with a woman other than his wife. When White appeared at the motel with a woman, who actually was an undercover police officer, Reale photographed them entering the motel. McFrederick and Reale later telephoned White and threatened to reveal the photographs to his wife, neighbors, and SPHA's Board of Directors if he failed to reinstate the contracts. The threats were monitored with electronic surveillance by the St. Petersburg Police Department. (Govt. Exh. A and D; Resp. Reply Exh. 6).

6. McFrederick was arrested on March 29, 1988, and charged with the crime of extortion in violation of Fla. Stat. § 836.05 (1987). (Govt. Exh. B and C). On January 16, 1992, following a jury trial, McFrederick was convicted of the charged crime. (Govt. Exh. E). He subsequently was sentenced to five years probation, ordered to pay \$4,739 in costs, and directed to cease contact with White or members of his family. (Govt. Exh. F).

Discussion

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 regulations at 24 C.F.R. §§ 24.105(m) and (p). McFrederick asserts that the suspension and proposed debarment are invalid because: (1) he is not a "participant" or "principal" as defined at 24 C.F.R. § 24.105; (2) he has not entered into a contract with the Federal Government since 1986; and (3) he does not have any contracts pending. A "participant" is defined at Section 24.105(m) as:

[a]ny 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.

In the instant case, McFrederick, through JRD, participated in the Section 8 Moderate Rehabilitation Program by entering into three contracts with the SPHA to rehabilitate forty-six units of housing and then rent them to low-income families. 24 C.F.R. § 24.105(m) defines a participant as: "[a]ny person who submits a proposal for, enters into, or reasonably may be expected to enter into a covered transaction." Because McFrederick has participated in covered transactions in the past, it is reasonable to assume that he may be expected to participate in covered transactions in the future. He is clearly a "participant" as that term is defined at 24 C.F.R. § 24.105(m). McFrederick is also a "principal" because he has exercised substantive control over a covered transaction as a contractor involved in the rehabilitation of properties financed by HUD. 24 C.F.R. § 24.105(p)(14). Since McFrederick is a "participant" and "principal" pursuant to 24 C.F.R. § 24.105, I find his assertions to the contrary to be without merit.

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:

(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

(4) [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)(1) and (4).

HUD suspended McFrederick and proposed his debarment on April 14, 1992 based on his conviction of extortion in the Circuit Court, Pinellas County, Florida. The cause for debarment must be established by a preponderance of the evidence. Since the suspension and proposed debarment are based upon McFrederick's conviction, the standard is deemed to have been met. 24 C.F.R. § 24.313(b)(3).

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). The existence of a cause for debarment does not require that a contractor be debarred. 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). The seriousness of the contractor's acts and any mitigating factors are considered in determining whether the sanction is necessary to protect the public interest and the interests 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). In determining whether debarment is warranted, HUD has the burden of proof for establishing cause for debarment. Since HUD has established a cause for debarment, McFrederick has the burden of proving the existence of mitigating factors. 24 C.F.R. § 24.313(b)(4).

McFrederick asserts, among other things, that the debarment action cannot be brought against him and should be dismissed because the action does not meet the requirements mandated by Executive Order 12549; the action violates provisions in the United States Constitution; and because the regulations are overbroad and in excess of HUD's statutory authority. My jurisdiction in this case is limited to "a review of the administrative action to determine if it is supported by a preponderance of the evidence" See 24 C.F.R. § 26.24(a). As these allegations are outside of this jurisdictional limitation, they cannot be considered in rendering this determination.

McFrederick also asserts that 24 C.F.R. Part 24 is inapplicable to him because he entered into the contracts and committed his criminal offense prior to the effective date of the regulations. 24 C.F.R. Part 24 provides that it:

shall apply to sanctions initiated after the effective date of these regulations (October 1, 1988) regardless of the date of the cause giving rise to the sanction. 24 C.F.R. § 24.110(e) (emphasis supplied).

Since this sanction was initiated on April 24, 1992, it is timely under the cited regulation.

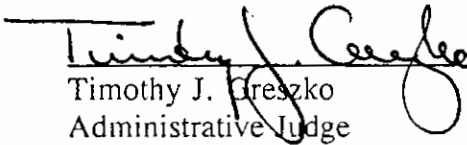
McFrederick asserts that a Limited Denial of Participation was improperly issued to him on two prior occasions by HUD's Jacksonville Office. There is no evidence in this record that these other administrative actions bear any relationship to the suspension and proposed debarment at issue. I accordingly find any consideration of previous limited denials of participation irrelevant to this determination.

In mitigation, McFrederick has submitted a number of documents, including: depositions of SPHA employees which attack White's veracity; a letter Respondent wrote to ██████ Chaplin, the HUD Field Manager in Jacksonville, Florida, detailing the events he perceived as causing the cancellation of the contracts; a letter from ██████ Hastings, Director of the Moderate Rehabilitation Division of HUD, finding that there was insufficient evidence for White to cancel the "third" contract; and transcripts of taped conversations between White and Respondent. (Resp. Exh. 1-9). Respondent argues that these documents bolster his assertion that the suspension and debarment action is the product of "conspiracy and fraud" perpetrated by Chaplin and White. This evidence is not persuasive because it does not contradict the fact that a Florida jury convicted him of criminal conduct, the sole basis for this action. Moreover, the decision of a state court is not subject to collateral attack in this forum, and that decision is binding on this forum, unless and until it is overturned. While this evidence may have been relevant to the criminal action brought against McFrederick, it is not relevant to this determination.

Determining present responsibility requires an assessment of the current risk that the Government might be injured by doing business with the Respondent. The crime that McFrederick committed is totally repugnant to any notion of present responsibility. Such criminal action has the potential to destroy the integrity of HUD programs. Even if McFrederick had proven that the cancellation of his contracts by White was improper, and he has not, his actions against White were completely reprehensible and demonstrative of a complete absence of any notion of responsibility and propriety. Instead of showing remorse for his behavior, McFrederick has continuously attempted to transfer blame to others for his past acts and current predicament. The record is devoid of evidence that McFrederick has more integrity and honesty than he did four years ago when he blackmailed White. This fact leads me to conclude that the public would be at risk if it did business with McFrederick. For the foregoing reasons, I find that the suspension and debarment of McFrederick is appropriate.

Conclusion

Based on the record in this case I find that a three-year debarment of McFrederick is warranted and necessary to protect HUD and the public. It is my determination that McFrederick shall be debarred from this date until April 14, 1995, credit being given for the time during which McFrederick has been suspended from eligibility to participate in HUD programs.


Timothy J. Greszko
Administrative Judge