

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

In the Matter of:

**JIMMY RAY SUTTON, d/b/a
SUTTON CONSTRUCTION CO.,
and SUTTON INSURANCE &
REALTY CO.,**

Respondents.

HUDBCA No. 92-G-7614-D63
Docket No. 92-1868-DB

Mr. Jimmy Ray Sutton
Sutton Construction Co.
Sutton Insurance & Realty Co.
415 Broad Street
Monticello, Mississippi 39654

Pro Se

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Office of General Counsel
U.S. Department of Housing
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Washington, D.C. 20410

For the Government

DETERMINATION BY ADMINISTRATIVE JUDGE TIMOTHY S. GRESZKO

December 17, 1992

Statement of the Case

By letter dated December 6, 1991, Jimmy Ray Sutton and his affiliates, Sutton Construction Co. and Sutton Insurance and Realty Co. (collectively "Respondents") were notified by Sandra S. Freeman, Manager, Jackson, Mississippi Office, U.S. Department of Housing and Urban Development ("HUD," "Department," or "Government"), that a twelve month Limited Denial of Participation was being imposed on them because of Sutton's conviction in the United States District Court on one count of 18 U.S.C. § 1012, submitting

false statements in order to receive HUD Community Development Block Grant funds. Respondents did not appeal the LDP sanction.

On April 29, 1992, Anna Kondratas, HUD Assistant Secretary for Community Planning and Development, notified Respondents that consideration was being given to debarring Respondents from participation in covered transactions with HUD and throughout the executive branch of the Federal government. The proposed debarment was to remain in effect for three years, and was based upon Sutton's conviction for the offense set forth above. The notice further provided that pending the outcome of the proposed debarment, Respondents were suspended, pursuant to 24 C.F.R. § 24.110(a), from participation in the above-mentioned transactions and contracts. This action superseded the LDP pursuant to 24 C.F.R. § 24.713.

Respondents appealed the proposed debarment by letter dated May 28, 1992. The Government filed a brief in support of debarment on September 9, 1992. Respondents filed an answer but have not filed a responsive brief or documentary evidence. 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, Sutton was the owner and operator of Sutton Construction Co. and Sutton Insurance and Realty Co. in Monticello, Mississippi. These companies were engaged in the construction and real estate business. (Govt. Exh. C-1, pp. F-7 and F-8; Respondents' Answer dated August 21, 1992.).

2. On January 19, 1990, Sutton signed an agreement on behalf of Sutton Construction Co. for the construction of a new residence in Hazlehurst, Mississippi, for ██████ Norrells in the sum of \$36,190.00, payable in three progress payments. Construction was funded with the proceeds of a Community Development Block Grant for Small Cities (Govt. Exhs. A; C1, pp. F-7).

3. On April 14, 1990, Sutton signed an agreement on behalf of Sutton Construction Co. for the construction of a new residence for ██████ Stovall in the sum of \$36,190.00. Construction was funded with the proceeds of a Community Development Block Grant for Small Cities. (Govt. Exh. C1, pp. F-7).

4. On May 8, 1990, Sutton signed a Contractor's Affidavit in which he stated that he had been paid in full under his contract, and that all subcontractors, materialmen, and laborers had been paid in full under the Norrells contract. At the time this Contractor's Affidavit was signed, Bill Coker, Planning and Grant Management Consultant, Office of the Mississippi Department of Economic Community Development, had no knowledge of any outstanding indebtedness on the part of Sutton relative to the Norrells contract. (Govt. Exh. C1, pp. F-8).

5. On July 10, 1990, Sutton signed a Contractor's Affidavit, in which he stated that he had been paid in full under the Stovall contract and that all subcontractors, materialmen, and laborers had been paid in full for the amount due under this contract. At the time this Contractor's Affidavit was signed, Bill Coker, Planning & Grant Management Consultant, Office of the Mississippi Department of Economic Community Development, had no knowledge of any outstanding indebtedness on the part of Sutton relative to the Stovall contract. (Govt. Exh. C1, pp. F-8).

6. On October 31, 1990, Winson L. George, Jr., President of the Dixie Lumber Co., Inc., advised Special Agent [REDACTED]. Sylvester, of the HUD Atlanta Regional IG office, that Sutton, d/b/a/ Sutton Construction Co., owed Dixie Lumber Co. \$6,365.55, and that no payments had been made since May 1990. Some of the materials Sutton purchased from Dixie Lumber Co., Inc., were used to construct the Stovall and Norrells houses. (Govt. Exh. C1, pp. F-9).

7. On November 1, 1990, [REDACTED] Dickson, Credit Manager of Jackson Redi Mix, informed Sylvester that Sutton Construction Co. had an outstanding balance due Jackson Redi Mix of \$4,434.70. Sutton incurred some of this indebtedness for construction materials used in the Norrells and Stovall houses. (Govt. Exh. C1, pp. F-11).

8. On November 1, 1990, [REDACTED] McLain, Executive Vice President of McLain Building Supply, informed Sylvester that Sutton Construction Co. had an outstanding balance due McLain Building Supply of about \$54,000. Included in the outstanding balance on billings was material Sutton purchased for the construction of the Stovall and the Norrells houses. The materials Sutton purchased from McLain Building Supply for the Stovall job and service charges totalled \$9,497.32, none of which had been paid. All materials Sutton purchased from McLain Building Supply for the Norrells job and service charges totalled \$12,052.10, none of which had been paid. (Govt. Exh. C1, pp. F-12).

9. On November 2, 1990, [REDACTED] Richardson, Manager, Southern Pipe & Supply Co., Inc., informed Sylvester that Sutton Construction owed Southern \$1,022.09 on the Norrells job. Richardson could not locate any billing reflecting any balance due from Sutton Construction for material supplied for the Stovall job. (Govt. Exh. C1, pp. F-14).

10. On November 2, 1990, Don Wallace, d.b.a. Air Master, Brookhaven, Mississippi, informed Sylvester that Sutton owed him \$925.00 for work performed on one of the two houses Sutton built in Hazlehurst. (Govt. Exh. C1, pp. F-15).

11. On May 30, 1991, pursuant to his plea of guilty to a one-count information, Sutton was convicted of "knowingly and willfully" receiving compensation from HUD "with the intent to unlawfully defeat the purposes" of HUD "by the submission of false certifications." Sutton was placed on probation for a term of three years, and ordered to pay a \$1000.00 fine. (Govt. Exhs. A & B).

12. Respondent asserts in mitigation that he mistakenly made the false certifications "innocently and without design of fraud or malice," that he has satisfied all debts arising from the construction contracts, and that he has reformed. (Resp. Answer dated August 21, 1992).

Discussion

A "covered transaction" is one which applies "to all persons who have participated, are currently participating or may reasonably be expected to participate in transactions under Federal procurement programs." 24 C.F.R. § 24.110(a). It is uncontested that Sutton 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 Sutton Construction Co. and Sutton Insurance and Realty Co. at the time the offenses were committed. He is also a "contractor" by virtue of the contracts which he executed on behalf of Sutton Construction Co. Because of his ownership and control over Sutton Construction Co. and Sutton Insurance & Realty Co., they are his "affiliates" as defined at 24 C.F.R. § 24.105(b).

The Government bears the burden of demonstrating 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" 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).

Sutton's conviction for "knowingly and willfully" receiving compensation from HUD "with the intent to unlawfully defeat the purposes" of HUD "by the submission of false certifications," raises profoundly disturbing questions with respect to Sutton's fitness to participate in the programs of this Department. The offense for which Sutton stands

convicted constitutes a frontal assault on HUD's Community Development Block Grant program. The false statements at issue were made for the purpose of obtaining payment from the Government of sums of money to which Sutton was not entitled, and the statements were made under oath. These false statements not only put the Government at risk of loss of its funds, but also exposed the beneficiaries of HUD's programs, the homeowners, to the risk of financial liability if materialmen and subcontractors placed liens on these homes. These facts establish gross irresponsibility, a high degree of dishonesty, and compelling cause for the imposition of a lengthy sanction.

Sutton makes a number of arguments in mitigation. Sutton argues that he made the false statements at issue solely for the purpose of facilitating the occupation of the constructed home by the owner, that he made these false statements innocently and without fraud and malice, that he has satisfied any and all debts arising from the construction projects and that, since the imposition of the LDP and proposed debarment, he has operated in a professional manner in other construction contracts unrelated to the Department. Whatever Sutton's understanding of the offense, he was convicted of a knowing and willful action, not a mistaken one. Sutton's contention that he did not "knowingly and willfully" make the false certifications, while probative of his guilt, does not change the fact that he pleaded guilty, and he may not collaterally attack his conviction in this proceeding. *Jose M. Ventura Alisis*, HUDBCA No. 87-2956-D6 (Sep. 22, 1988). I also do not find the act of facilitating occupation of these homes through the making of false statements to be mitigating, especially in light of the potentially adverse impact that Sutton's actions might have had on the innocent homeowners.

Sutton also asserts that he has made restitution and that he has reformed. I do not find these arguments compelling. Sutton has not provided any evidence in support of these assertions, and even if he had, the payment of restitution would not, *ipso facto*, establish present responsibility. While restitution can be accepted as evidence of mitigation, the circumstances under which the restitution is made should also be scrutinized to ascertain how the restitution was undertaken. *Howard I. Perlow*, HUDBCA No. 92-7131-D5 (Dec. 3, 1992), and cases cited therein. In the absence of any evidence explaining how and when restitution was made, I do not find Sutton's self-serving statements of any value in assessing his degree of present responsibility.

Sutton also requests that the scope of the debarment be limited to construction matters so that he may continue to engage in real estate appraisal and brokerage, allegedly his principal means of support. Departmental hearing officers do not have authority to modify the scope of a debarment, *Ted Dalton*, HUDBCA 90-5246-D23 (Jan. 14, 1991). Nor do the financial consequences of a debarment constitute grounds for modification of the sanction. *Richard I. Hayley*, HUDBCA 91-5364-D90 (Sep. 4, 1991).

Sutton finally asserts that other contractors in his geographical area frequently make false certifications when involved in construction projects. The fact that other contractors may make a practice out of violating the law is not a basis for excuse or for mitigation of the

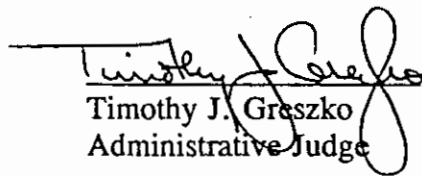
commission of the unlawful act. *Sidney Spiegel*, HUDBCA 91-5908-D53 (Jul. 24, 1992). Moreover, this argument demonstrates that Sutton has little, if any, understanding of the gravity of his misconduct; the fact that he makes this argument aggravates his offense. This type of argument is troubling, indicates a lack of contrition, and constitutes persuasive evidence for the imposition of a sanction. *Carl W. Seitz and Academy Abstract Co.*, HUDBCA No. 91-5930-D66 (Apr. 13, 1992).

Sutton makes no arguments on behalf of his affiliates. HUD regulations 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. *Irving Winter, Colony Realty Co.*, HUDBCA No. 90-5909-D54 (Nov. 5, 1991). 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). Sutton Construction Co. and Sutton Insurance and Realty Co. have presented no evidence that Sutton has terminated his status as an owner or employee of those companies. In the absence of such evidence, I find that the debarment of Sutton's affiliates is also warranted.

The charge to which Sutton pleaded guilty is indeed serious and shows a flagrant disregard for the law and the programs of this Department. Respondent has submitted no documentary evidence in this case and has not met his burden of proving mitigating circumstances. Under the circumstances, I find no basis for reducing the period of the proposed debarment.

Conclusion

Based on the record in this matter, and for the foregoing reasons, I find that a three year debarment of Sutton and his affiliates is warranted. It is therefore **ORDERED** that Jimmy Ray Sutton, Sutton Construction Co. and Sutton Insurance and Realty Co. shall be debarred through December 6, 1994, credit being given for the time during which Respondents have been precluded from participation in programs of this Department.


Timothy J. Greszko
Administrative Judge