

**UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
BOARD OF CONTRACT APPEALS
WASHINGTON, DC**

In the Matter of:

TERENCE J. MCCARTHY,

Respondent.

HUDBCA No. 93-G-D50
Docket No. 93-2023-DB

For the Respondent:

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DETERMINATION BY ADMINISTRATIVE JUDGE TIMOTHY J. GRESZKO

November 19, 1993

Statement of the Case

By letter dated April 1, 1993, James E. Schoenberger, Associate General Deputy Assistant Secretary for Housing - Federal Housing Commissioner, U.S. Department of Housing and Urban Development ("HUD", "Department", or "Government"), notified Terence J. McCarthy ("McCarthy" or "Respondent") and his affiliate, Southside Contractors, Inc. ("Southside"), that, based on the conviction of McCarthy for violation of 18 U.S.C. § 1001, the Department was considering debarring Respondent and Southside from participating in primary covered transactions and lower-tier covered transactions as either a

participant or principal at HUD and throughout the Executive Branch of the Federal Government, and from participation in procurement contracts with HUD for a five year period commencing from April 1, 1993. The notice also informed Respondent and Southside that their suspension was continuing pending a resolution of the issues relating to their proposed debarment.

By letter dated May 7, 1993, McCarthy requested a hearing in regard to the suspension and proposed debarment pursuant to 24 C.F.R. § 24.412. No request for a hearing or appeal was made on behalf of Southside. The Government filed a brief in support of debarment on July 16, 1993. Respondent's brief was filed on August 23, 1993.

This determination is based on the written submissions of the parties, as Respondent is not entitled to an oral hearing on this matter. 24 C.F.R. § 24.313(b)(2)(ii).

Findings of Fact

1. In July, 1992, an Information was issued by the U.S. Attorney for the United States District Court for the Middle District of Florida, alleging that in or about June and September of 1987, McCarthy did knowingly and willfully engage in a scheme against HUD by aiding and assisting buyers in making false statements to HUD on applications for insurance under the National Housing Act ("NHA"). The Information alleged that McCarthy assisted in making false representations regarding down payments and assets of two potential borrowers of the NHA insurance. (Gov't Exh. 4/Information at 1-3).

2. On July 2, 1992, McCarthy entered a plea of guilty and was convicted on two counts by the U.S. District Court for the Middle District of Florida of making false statements to the U.S. Government in violation of 18 U.S.C. § 1001. On December 4, 1992, he was sentenced to be placed on probation for a period of three years, and was ordered to pay restitution to HUD in the sum of \$100,000 within three years. (Gov't Exh. 3/*United States v. Terence J. McCarthy*, Judgment dated December 10, 1992).

3. At all relevant times, Respondent, doing business as Southside Contractors, Inc., was a participant and a principal in HUD programs as defined by 24 C.F.R. § 224.105(m) and (p). (Resp. Answer, ¶ 2; Gov't Brief at 5-6). Respondent participated in programs of this Department by purchasing HUD-owned homes, rehabilitating them, and then selling the homes to buyers who obtained HUD/FHA-insured mortgages. (Gov't Exh. 5/Plea Agreement dated July 10, 1992).

4. Respondent has submitted an affidavit admitting his commission of a crime and asserting that he is currently responsible. (Affidavit of Terence J. McCarthy).

5. Several letters have been submitted by McCarthy which attest to his character. The majority of these letters were submitted by individuals who are friends of McCarthy.

These letters generally seem to express the opinion that his actions upon which the conviction was based were aberrations and not representative of his character. The writers of these letters also indicate that they have confidence in his ability to comply with legal practices, because they feel McCarthy is remorseful for his actions and will act responsibly in the future. (Affidavits of [REDACTED], [REDACTED], [REDACTED], [REDACTED], and [REDACTED]).

Discussion

It is uncontested that Respondent is a "participant" as defined at 24 C.F.R. § 24.1 because he has previously entered into multiple covered transactions with HUD and may reasonably be expected to do so in the future. He is also a "principal" as defined at 24 C.F.R. § 24.105(p) because he exercised control over Southside Contractors, Inc. at the time the offenses were committed. Under applicable HUD regulations, at 24 C.F.R. § 24.305, a debarment may be imposed for:

- (a) Conviction of or civil judgment for:
 - (1) Commission of fraud or of a criminal offense in connection with obtaining, attempting to obtain, or performing a public or private agreement or transaction;
- * * *
- (3) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, receiving stolen property, making false claims, or obstruction of justice;
 - (4) Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a person.

The Government bears the burden of demonstrating that cause for suspension and debarment exists. 24 C.F.R. §§ 24.313(b)(3), (4); *James J. Burnett*, HUDBCA No. 80-501-D42, 82 BCA ¶ 15,716. 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 or entity, 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 or entity is the requirement that agencies only do business with

"responsible" persons or 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). A debarment shall be used only to protect the public interest and not for purposes of punishment. 24 C.F.R. § 24.115(d).

Respondent's conviction for knowingly and willfully making or causing to be made false statements and representations to HUD raises legitimate concerns with respect to Respondent's fitness to participate in the programs of this Department. The offense involves dishonesty, which impacts directly upon the question of Respondent's present responsibility. "To protect the public, it is paramount that individuals who contract with the government are forthright and responsible in their dealings Without the assurance that those who do business with the government are honest and have integrity, there is no guaranty that government funds are being properly spent." *Sidney Spiegel*, HUDBCA Nos. 91-5908-D53, 91-5920-D62 (July 24, 1992).

Respondent asserts that he should not be debarred because the offense for which he was convicted is not evidence of present irresponsibility, and because it is not cause for debarment under 24 C.F.R. §§ 24.305 (a)(3), (4), and (d). I disagree. 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) (lack of present responsibility inferred from contractor's default in performance of a contract); *Stanko Packing Co. v. Bergland*, 489 F. Supp. 947, 949 (D.D.C. 1980) (lack of present responsibility inferred from evidence that contractor had supplied unwholesome meat and was affiliated with suspended contractor). Respondent's conviction clearly establishes cause for debarment under applicable HUD regulations. 24 C.F.R. §§ 24.305(a)(1), (2) and (4).

Respondent also asserts that he is presently responsible, as evidenced by his affidavit and the affidavits of others submitted on his behalf. In his affidavit, Respondent asserts that, "[a]s a result of procedural, educational and administrative measures . . . a reoccurrence of the events which led to the crime giving rise to this case is precluded." Respondent does not, however, discuss these measures. These declarations, which are self-serving and unsupported conclusions, do not persuade me that programs financed by the nation's taxpayers should be exposed to Respondent's participation at the present time, and do not establish any facts demonstrating that Respondent is presently responsible. Moreover, there is no explanation in the record from Respondent with respect to his criminal activity, nor any declaration of remorse from him for these acts. Under the circumstances, I do not find Respondent's affidavit persuasive evidence of present responsibility.

Respondent has also submitted a number of letters from individuals who appear to be close acquaintances who believe that his criminal conduct was essentially an aberration, that he is now a responsible person who has shown remorse for his crimes. While the authors of these letters expound on Respondent's virtues as a social companion, family man, and professional, these submissions do not address in any detail the issue of present responsibility

of Respondent as a contractor, and are therefore unpersuasive. *Jose M. Ventura Alisis*, HUDBCA Nos. 87-2956-D6, 87-3403-D24 (Sept. 22, 1988). When contrasted with the seriousness of Respondent's actions, these attestations do not establish that Respondent is at present an individual with whom the Government should conduct its business. In the absence of such evidence, I cannot assess of Respondent's character in a positive light. I, accordingly, do not find these declarations sufficient to rebut the presumption of a lack of present responsibility which flows from Respondent's conviction for submitting false statements to HUD.

Respondent also asserts that the passage of six years since he committed the acts which led to the issuance of the LDP and formed the basis for Respondent's conviction in 1992, coupled with the absence of recent misconduct, makes the imposition of a debarment unwarranted. This Board has viewed a substantial passage of time following misconduct leading to the imposition of an administrative sanction as being a potentially mitigating factor. *ARC Asbestos Removal Co., Inc.*, HUDBCA No. 91-5791-D25 (Apr. 12, 1991). However, the passage of time, *ipso facto*, does not establish present responsibility. *Howard L. Perlow*, HUDBCA No. 92-7131-D5 (Dec. 3, 1992); *Carl W. Seitz and Academy Abstract Co.*, HUDBCA No. 91-5930-D66 (Apr. 13, 1992); *cf.*, Fed. R. Civ. P. 609 (evidence of conviction involving dishonesty or false statement may be admissible even if more than ten years has elapsed since the date of conviction where a court determines that probative value outweighs prejudicial effect). The appropriate test for present responsibility does not focus merely on the number of years which have passed since Respondent's misconduct occurred, but rather on current indicia of Respondent's professionalism and business practice which the Government must consider before it again assumes the risk of conducting business with Respondent. *Carl W. Seitz, supra*. I find the passage of six years since the misconduct occurred, without a showing by a preponderance of the evidence that Respondent is presently responsible, insufficient to negate the inference of lack of present responsibility which flows from Respondent's conviction for knowingly and willfully engage in a scheme against HUD by aiding and assisting buyers in making false statements to HUD on applications for insurance under the National Housing Act.

The charge to which Respondent pleaded guilty is serious, germane to the issue of continued participation in HUD programs because it involved fraud committed against HUD. Respondent has not cited any circumstances which mitigate his wrongdoing and has not submitted sufficient evidence of his character as a businessman. *Compare James Webb*, HUDBCA No. 92-G-7709-D60 (Oct. 1, 1992) (where a proposed period of debarment was reduced because of substantial mitigating evidence establishing to Respondent's present responsibility through exemplary performance in rehabilitating low income housing projects). In the absence of such evidence in this case, I cannot conclude that Respondent is presently responsible, and I find that a reasonable period of time of debarment is necessary before HUD does business with Respondent again.

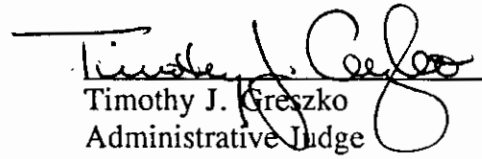
The debarment regulations provide, in pertinent part, that debarment for causes such as those at issue here generally should not exceed three years, except where circumstances warrant a longer period of debarment. 24 C.F.R. § 24.230(a). The Government argues that a five-year debarment is warranted because of the seriousness of the crimes, and because the crimes involved property of this Department. I disagree. There is no evidence that Respondent has been convicted of other crimes or has been the subject of other investigations beyond the investigation and conviction regarding the two acts for which he was convicted. The circumstances in this case fit precisely within the causes which the regulation sets forth as calling for no more than a three year debarment. Compare *David M. Cunningham*, HUDBCA No. 84-874-D33 (Jan. 23, 1985) (petition for reinstatement denied where Respondent was debarred for a period of five years after pleading guilty to 16 counts of embezzlement); *Jay D. Morrow*, HUDBCA No. 86-1612-D17 (Aug. 15, 1986) (where Respondent was debarred for a period of five years after pleading guilty to a variety of criminal conspiratorial acts including fraud and bribery). Moreover, the record in this case, when compared with the facts considered in analogous decisions by this Department's judicial officers, does not support a need to impose a debarment in excess of three years. See, e.g., *Solomon Sylvan*, HUDBCA No. 87-2432-D40 (Apr. 13, 1988), citing *Marvin B. Awaya*, HUDBCA No. 84-834-D6 (May 8, 1984) (where Respondent was debarred for a period of three years after pleading guilty to five counts of fraud); *Robert H. Vogue and Richard Campbell*, HUDBCA No. 85-946-D23 (July 2, 1986) (where Respondents were debarred for a period of three years for pleading guilty to two counts of fraud in order to obtain a larger HUD-insured mortgage loan).

Respondent asserts that credit should be given for an LDP which was imposed upon him on November 2, 1989, and which expired on November 1, 1990, because the LDP was based on the misconduct which underlies his conviction. The Government does not deny that the LDP involved the same misconduct, but asserts that it should not be credited for a number of reasons, including the fact that an LDP sanction is more limited in scope than a suspension or debarment. I disagree for the simple reason that an LDP is a severe sanction and, as such, is a circumstance which generally warrants the reduction of a period of debarment.

Respondent also contends that the period of debarment should reflect a credit for Respondent's "self imposed four year exile". While this period of inactivity arguably gave HUD some protection relative to Respondent's participation in the FHA program, this fact is not sufficiently mitigating to present responsibility. Moreover, Respondent admits that he continued to participate in the Department's Section 8 program since that time. Under that circumstance, Respondent was not, in effect, under a severe constructive sanction. Respondent's claim that his voluntary suspension of activity in HUD programs should be credited toward the suspension and debarment at issue carries no merit, and no credit shall be given for Respondent's voluntary withdrawal from participation from the HUD/FHA program.

Conclusion

Based on the record in this matter, and for the foregoing reasons, I find that the suspension of Respondent was warranted and that a three year debarment of Respondent is warranted and necessary to protect HUD and the public interest. It is therefore ORDERED that Respondent shall be debarred from this date until April 1, 1995, credit being given for the period of suspension, and for the previously imposed LDP.


Timothy J. Greszko
Administrative Judge