UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

| In the Matter of: | |
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| BUCKEYE TERMINIX COMPANY, INC., | HUDALJ 89-1402-DB |
| Respondent. | |

John J. Chester, Esquire
For the Respondent

Andrea Q. Bernardo, Esquire
For the Department

Before: Robert A. Andretta
Administrative Law Judge

# INITIAL DETERMINATION

## Introduction

This case is on remand pursuant to a Secretarial Designee's Determination reversing an initial determination which had vacated the suspension and proposed debarment of Buckeye Terminix Company, Inc. ("Respondent"). The unusually complex procedural history of this case follows.[1]

Enforcement action related to this matter began on March 18, 1988, when the HUD Columbus Office issued a Limited Denial of Participation ("LDP") against Respondent. The LDP was based on allegations that Respondent made false certifications, in

[1]The United States District Court for the Southern District of Ohio in its opinion which resulted in this most recent phase of the adjudicatory process said that this matter "may be an administrative law professor's dream, [and] has caused much confusion between both parties from the outset." *See Buckeye Terminix Co., Inc. v. U.S. Dept. of Housing and Urban Development,* Case No. C2-89-461, Opinion dated July 11, 1990 at 2. While one person's dream is another person's nightmare, it is apparent that a good deal of the confusion has been caused unnecessarily.

connection with HUD's FHA-insured single family housing program, that termite soil treatments had been completed on three properties in December 1987. Under the LDP, Respondent was prohibited from participating in that HUD program for one year pending correction or dismissal of the grounds for denial or demonstration that it was in the government's best interest to resume business with Respondent.

As a result of an informal conference held on March 25, 1988, the HUD Columbus Office advised Respondent by letter dated March 30, 1988, that, under certain conditions, it had decided to modify the 1988 LDP to allow Respondent to provide pest control services within the jurisdiction of that office. Those conditions included that Respondent certify only those treatments that were actually accomplished and that each month the HUD Columbus Office randomly select a certain number of properties from all properties for which FHA-insured and/or HUD direct loans had been issued and on which Respondent had performed treatment for the performance of soil analyses by a laboratory selected by the HUD Columbus Office. Such testing was to continue for the original period of the 1988 LDP unless terminated sooner.

Respondent conducted its business under the terms of the modified LDP. During that period, in October 1988, the results of a joint investigation conducted by the Ohio Department of Agriculture ("ODA") and the HUD Office of Inspector General were referred to the Franklin County, Ohio Prosecutor's Office. The LDP period ended on March 18, 1989, and neither the HUD Columbus Office nor the Department through HUD Headquarters took any action to further sanction Respondent at that time.

On May 12, 1989, Respondent pled guilty to 15 counts each of fraud and forgery in the Court of Common Pleas, Franklin County, Ohio. The counts involved false certifications of termite treatments on various properties within the Columbus Field Office jurisdiction. The court imposed a fine of $150,000.

Based upon the guilty plea, the HUD Columbus Office issued an LDP against Respondent on May 22, 1989 ("1989 LDP"). Following issuance of that LDP, Respondent sought and, on June 28, 1989, was granted a limited permanent injunction in the United States District Court for the Southern District of Ohio, enjoining HUD from "not participating with [Respondent] on HUD contracts pending all administrative appeals being taken." Gov't. Ex. 10 (*Buckeye Terminix Co., Inc. v. U.S. Dept. of Housing and Urban Development*, Case No. C-2-89-461). The District Court found that it had jurisdiction because Respondent was not required to exhaust its administrative remedies under *Mathews v. Eldridge*, 424 U.S. 319 (1976), and *Nagle v. Thomas*, 666 F. Supp. 1002 (W.D. Mich. 1987). The District Court further found that: the issues and circumstances surrounding the 1988 and 1989 LDPs were "substantially the same"; the Department had already achieved "coercive compliance" as a result of the modified 1988 LDP; imposition of the 1989 LDP was punitive; and the existence of mitigating factors precluded imposition of the 1989 LDP. The Department appealed the District Court's decision to the United States Court of Appeals for the Sixth Circuit on September 1, 1989.

On September 1, 1989, the Department suspended and proposed the debarment

of Respondent based on its conviction in Ohio state court. That action sought to prohibit Respondent from further participation in primary covered transactions and lower tier covered transactions, either as a participant or principal at HUD and throughout the Executive Branch of the federal government, and from participating in procurement contracts with HUD for three years from May 22, 1989. *See* 24 CFR 24.110(a)(1). Pursuant to 24 CFR 24.713, the suspension and proposed debarment action superseded the 1989 LDP. *See* Notice of Suspension and Proposed Debarment, dated Sept. 1, 1989. The Department stayed the effect of the suspension pending the outcome of the appeal before the Sixth Circuit. *Id.*

On September 28, 1989, Respondent requested an administrative hearing on the suspension and proposed debarment action. Because the action was based upon a conviction, the matter was decided based upon documentary evidence and written briefs. *See* Notice of Hearing and Order of October 19, 1989; 24 CFR 24.313(b)(2)(ii). On March 7, 1990, this forum issued an Initial Determination vacating the suspension and proposed debarment. That Determination was based upon an application of the principle of collateral estoppel which precluded relitigation of the issues litigated and decided by the District Court.

The Department appealed the Initial Determination on March 23, 1990, and Respondent filed an opposition to the appeal on April 4, 1990. On April 18, 1990, the Sixth Circuit reversed the District Court, finding that Respondent was required to exhaust administrative remedies before seeking judicial review. The Secretarial Designee was informed of the Circuit Court's opinion on April 23, 1990, and she accepted the Department's request for review on that date. Subsequently, the period for review was extended to June 1, 1990.

On May 30, 1990, the Secretarial Designee issued a Determination reversing the March 7, 1990, Initial Determination. The Secretarial Designee's Determination reinstated the suspension that had been voluntarily stayed by the Department and remanded the case for further proceedings "not inconsistent with this determination, on the matter of the proposed debarment." On May 31, 1990, the Department advised Respondent that, based upon the Circuit Court's decision and the Secretarial Designee's Determination, Respondent's suspension was no longer stayed and Respondent would be placed on the GSA Lists of Parties Excluded from Federal Procurement and Non-Procurement Programs.

Respondent filed motions for a Stay Pending Judicial Review and for a Temporary Restraining Order, as well as an Amended Complaint, with the District Court on June 4, 1990. On June 6, 1990, the District Court issued an order temporarily restraining HUD from placing Respondent on suspension, and on June 26, 1990, the District Court issued an order preliminarily enjoining HUD from placing Respondent on suspension. The June 26 Order stated that: the preliminary injunction would remain in effect until the appeal in the District Court on this matter is resolved; any appeal on the suspension would be held in abeyance and consolidated with any appeal from the Secretarial Designee on the

proposed debarment which might be filed in the District Court; upon any proper appeal being taken after a final agency ruling on the proposed debarment, the two cases would be consolidated; and, a formal written decision on this matter would be forthcoming. In that written decision issued on July 11, 1990, the District Court held that: the Determination issued by the Secretarial Designee is a final and appealable order in terms of the suspension, thereby invoking the court's jurisdiction; Respondent established the elements needed for a preliminary injunction so as to warrant a stay of the suspension; and, the only matter before this administrative forum is the proposed debarment, *i.e.*, whether Respondent is "presently responsible and one which the government can safely enter into contracts with [sic]."[2]

On July 20, 1990, the Department filed with the HUD Office of Administrative Law Judges a Submission of Additional Evidence "to rebut Respondent's contention that it is presently responsible." According to the Department, "in light of the concern expressed by the Federal District Court that there was no more recent evidence that Buckeye was not presently responsible, the Government represented to the Federal Court that it would obtain information to rebut Respondent's argument that it is presently responsible."

On August 8, 1990, Respondent filed a Motion to Strike and a Memorandum in Support which constituted its reply to the Government's Submission of Additional Evidence. In its Motion to Strike and Memorandum in Support, Respondent argued that an order should be issued striking the Department's additional "evidence" filed on July 20, 1990, because, *inter alia*, under 24 CFR 26.8 and the Federal Rules of Evidence, the "evidence" is irrelevant, immaterial, erroneous, and improper.[3] On August 20, 1990, the Department filed the Government's Opposition to Respondent's Motion to Strike. In that pleading, the Department, *inter alia,* reiterated its argument that the additional information relates to Respondent's "present business practices, which Respondent ha[s] brought into issue in its pleadings."

Having considered the pleadings submitted by the parties, and finding that no further pleadings are needed to resolve the issues presented by this case, this matter is ripe for determination.

## Substantive Findings and Conclusions

Under the direct endorsement method used for processing single-family mortgage applications, closing must occur before HUD reviews applications for mortgage insurance and issues a commitment. *See* 24 CFR 200.163(a). The mortgagee reviews and

[2]Counsel for the Department has represented that the Department has appealed the District Court's decision to the Sixth Circuit. *See* Government's Submission of Additional Materials (July 17, 1990).

[3]A ruling on Respondent's Motion to Strike is incorporated into the substantive findings and conclusions which follow.

approves the mortgagor's application, and after the closing, HUD reviews the package of documents for its final FHA insurance endorsement. *Id*. at 200.163(b)(5). Those documents include a property appraisal. *Id*. at 200.163(b)(5)(i).

A component of the property appraisal is termite treatment or inspection, the performance of which is reported by the treating or inspecting company on HUD-prescribed forms. Those forms are attached to the appraiser's report and are submitted to HUD as part of the mortgagee's analysis of the value and quality of the property subject to the insured mortgage. The appraiser's report form also presents a checkoff block for the required termite treatment or inspection. The cost of termite protection is charged to either the buyer or the seller and is ordinarily set forth on the HUD-1 Settlement Statement. *See* Government's Brief in Support of Suspension and Debarment at 6-8. Thus, termite control assurances constitute part of the basis of the appraisal on which HUD relies as evidence that the property meets its requirements in the FHA mortgage insurance program. *See* Gov't. Ex. 15 (FHA Form No. 2052, Termite Soil Treatment Guarantee).

Respondent's business is divided into several departments, including termite treatments, inspections, and pretreatments. The conduct involved in this case occurred in Respondent's pretreat department which performs preventative applications of termiticide done in connection with the building of HUD-financed housing.[4] *See* Gov't. Ex. 9 at Tr. Vol. I, pp. 36-37, 40-41, 107-08.

ODA initiated its investigation of Respondent in August 1987 based on allegations that pretreats were not being performed. *Id.* at Tr. Vol. I, pp. 40-41, 107-08, 133; Tr. Vol. II, p. 27. Upon learning of the allegations, Respondent conducted an internal investigation, during which two of its employees admitted that they had failed to perform the pretreats during certain periods of 1985 through August 1987. Respondent had no prior knowledge that its employees had not performed the pretreats.[5] *Id.* at Tr. Vol. I, pp. 54-55, 107-08, 112.

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[4]Respondent's argument that the Department lacks the authority to enforce HUD's suspension and debarment regulations against it because it is not a participant or contractor was disposed of in the March 7, 1990, Initial Determination. In that Determination, it was held that Respondent is a participant and contractor within the definition of 24 CFR 24.105(m) and (x). That holding and discussion is incorporated by reference herein.

[5]The Department asserts that it is "in serious doubt" that John G. Breen, Respondent's general manager and president, lacked prior knowledge of his employees' failure to perform the pretreats. *See* Government's Reply Brief at 6. That assertion is unsubstantiated and, indeed, is contrary to the record evidence which includes Mr. Breen's testimony during the District Court's hearing on the preliminary injunction. *See* Gov't. Ex. 9 at Tr. Vol. I, pp. 107-08, 112.

In August 1987, Respondent fired one of the two employees involved and the other employee resigned.[6] *Id.* at Tr. Vol. I, pp. 41-42, 112-13, 135-36. In response to the incidents involving the two employees, Respondent implemented a program to treat the homes that had not been treated and to offer extended guarantees. *Id.* at Tr. Vol. I, pp. 109-112, 131. Respondent also reorganized the pretreat department.[7] *Id.* at Tr. Vol. I, pp. 42-43. In the fall of 1987, ODA contacted HUD concerning the investigation which was subsequently conducted jointly. *Id.* at Tr. Vol. I, pp. 93-94.

The HUD Columbus Office issued the 1988 LDP on March 18, 1988, and it was later modified on March 30, 1988. *See* Gov't. Exs. 6, 7. That LDP concerned allegations that Respondent had given false certifications of work having been done insofar as guarantees had been issued before the work had been performed. As part of the modification to the 1988 LDP, Respondent was permitted to continue business with HUD provided, *inter alia,* that: (1) in the event pretreats were not performed prior to closing, an escrow account was to be established and released when the treatment was performed; (2) Respondent submit weekly reports to the HUD Columbus Office, which included chemical application records and HUD guarantees; and (3) Respondent bear the expense of the monthly soil analyses to be performed by the laboratory selected by the HUD Columbus Office. *See* Gov't. Ex. 7; Gov't. Ex. 9 at Tr. Vol. I, pp. 33-34, 44-45. In contrast, the criminal counts to which Respondent plead guilty on May 12, 1989, and for which it was convicted, involved not only instances of pretreat work for which guarantees had been issued before the work was purportedly performed but instances of pretreat work that had never been performed. *See* Govt. Ex. 8, Gov't. Ex. 9 at Tr. Vol. II, pp. 7-14. That conviction was the basis for the 1989 LDP and the proposed debarment. *See* Gov't. Ex. 1; Notice of Suspension and Proposed Debarment (Sept. 1, 1989).

The primary issue in a debarment action is whether the respondent is presently responsible. Debarment is a sanction which may be invoked by HUD as a measure of protecting the public by ensuring that only those qualified as "responsible" are allowed to participate in HUD programs. *Stanko Packing Co. v. Bergland*, 489 F. Supp. 947, 949 (D.D.C. 1980); *Roemer v. Hoffman*, 419 F. Supp. 130, 131 (D.D.C. 1976).

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[6]Their supervisor had been fired shortly before, based on other instances of misconduct. *See* Gov't. Ex. 9 at Tr. Vol. I, pp. 41, 112-13.

[7]In conjunction with this reorganization, Respondent: hired new servicemen to do pretreat work and trained them in HUD minimum property standards; developed special detailed pretreat records for the sevicemen's completion; implemented management review of all work and records; required two levels of management's review and the president's signature on all HUD documents; created a new job position to coordinate HUD work; placed HUD work into a computer; developed weekly reports for review by high-level management; and implemented a "zero tolerance" disciplinary policy under which an employee will be fired if he or she deviates from the company's code of ethics, regulations or directives. *See* Gov't. Ex. 9 at Tr. Vol. I, pp. 42-43.

"Responsibility" is a term of art used in government contract law. It encompasses the projected business risk of a person doing business with HUD. This includes his integrity, honesty, and ability to perform. The primary test for debarment is present responsibility although a finding of present lack of responsibility can be based upon past acts. *Schlesinger v. Gates*, 249 F.2d 111 (D.C. Cir. 1957); *Roemer, supra*.
The Department argues that Respondent's past acts and conviction for fraud and forgery are grounds for debarment because they demonstrate a lack of present responsibility. Respondent, on the other hand, argues that it has done everything possible to show that it is presently responsible and poses no risk to the government.

Debarment is a serious action and one which can be used "only in the public interest and for the Federal Government's protection and not for purposes of punishment." *See* 24 CFR 24.115(b). Moreover, HUD's regulations provide that the totality of the circumstances must be considered in determining whether a respondent should be debarred, and if so, for what period:

> [t]he existence of a cause for debarment ... does not necessarily require that the person be debarred; the seriousness of the person's acts or omissions and any mitigating factors shall be considered in making any debarment decision.

24 CFR 24.115(d). *See also id.* at 24.300. The regulations further provide that cause for debarment must be established by a preponderance of the evidence and that if the debarment is based upon a conviction, "the standard shall be deemed to have been met." *Id*. at 24.313(b)(3). The Department has the burden of establishing cause for debarment while the respondent has the burden of establishing mitigating circumstances. *Id*. at 24.313(b)(4).

Respondent's conviction for fraud and forgery is cause for debarment under 24 CFR 24.305(a)(3). As explained below, despite the fact that cause for debarment exists and despite the seriousness of Respondent's acts, the Department has not met its burden of proving by a preponderance of the evidence that Respondent presently lacks responsibility.

Respondent has neither attempted to make light of nor condone the actions of its employees which resulted in its certifying that termite pretreats had been performed when the work had never been done. Indeed, upon learning that its employees had not performed certain pretreats, Respondent recognized the seriousness of the employees' conduct, accepted full responsibility for their actions, and took steps immediately to remedy the situation, including firing one of the employees involved who had not resigned, changing the system to preclude future occurrences, and undertaking measures to treat the affected properties.

Subsequently, Respondent performed soil treatments on over 1,500 HUD-financed homes during the year its performance was monitored by the HUD

Columbus Office. During that year, the HUD Columbus Office recorded no problems with Respondent's performance or integrity. *See* Gov't. Ex. 9 at Tr. Vol. I, pp. 45, 81-82. Indeed, at the hearing on the preliminary injunction, Counsel for the Department not only stipulated that Respondent had complied with the terms of the modified 1988 LDP and that the results of soil sampling tests conducted by the laboratory selected by the HUD Columbus Office pursuant to the modified LDP had been satisfactory to HUD, but admitted that there was no evidence of "continuing conduct." *Id.* at Tr. Vol. II, pp. 36-37, 82-84.[8]

[8]The Department asserts that although there is no evidence that Respondent failed to comply with the terms of the modified 1988 LDP,

> compliance with the modified LDP indicates that Respondent is not so brazen as to violate HUD requirements while under intense scrutiny. This does not mean that Respondent has proven itself responsible, rather it means that as long as HUD continues to closely monitor Respondent's business practices, Respondent will be sure to comply with HUD requirements.

Government's Reply Brief at 3.

Not only is the Department's argument disingenuous, but it is faulty, since the evidence supports the finding that both during HUD's supervision of Respondent pursuant to the modified 1988 LDP, and at all times thereafter, there have been no problems with the performance of Respondent's pretreat department which bear negatively on Respondent's present responsibility.

The Department asserts that a negative inference regarding Respondent's present responsibility should be drawn from Mr. Breen's testimony given during the proceeding in District Court that Respondent sent the guarantees and bills to the builder on the day the order was received, regardless of whether or not the work had been done, for "[a]s long as I can remember." *Id.* at Tr. Vol. I, p. 137. According to the Department, Mr. Breen "testified...that it had been company practice for as long as he could remember to submit false statements to HUD." *See* Government's Reply Brief at 6. Mr. Breen's testimony, however, when read in context, refers to Respondent's practice of issuing guarantees before the work had been performed. It does not refer to the two employees' failure to perform pretreats. Indeed, Mr. Breen further testified that he never thought of guarantees as "false certifications", that in his opinion, "it was a guarantee and it was my word that the house was guaranteed for five years", and that he "never once ever considered it as a certification that the house was treated." *See* Gov't. Ex. 9 at Tr. Vol. I, p. 137.

The Department also asserts that Respondent did not terminate its "irresponsible business practices" when it terminated the employees. *See* Government's Reply Brief at 6. According to the Department, "[t]he conduct which formed the basis of the 1988 LDP occurred in December of 1987 and January 1988, after the employees were allegedly fired, and after the Chief Architect of the [HUD] Columbus office had instructed Respondent not to maintain this practice." *Id.*

Not only is this proceeding an inappropriate forum for consideration of the factual underpinnings of the 1988 LDP and its modification, but even if such an inquiry were entertainable, there is evidence to refute the depiction of events proffered by the Department. The 1988 LDP was the subject of an informal conference held on March 25, 1988.[9] That conference was attended by representatives of Respondent, ODA, and the HUD Columbus Office and concerned the three alleged instances of Respondent having given pretreat certifications before the treatments had been completed. The transcript of that conference, as well as the testimony of Mr. Breen and Debra Finelli, Respondent's office manager, given during the District Court proceeding, reveals that Respondent has taken the position that insofar as the dates cited in the LDP are correct, the certifications had been given by Respondent in accordance with a practice that had been suggested to it in August 1987 by Robert C. McAdams, a criminal investigator with ODA, and subsequently approved in October 1987 by Daniel F. Lane, Jr., the Chief Architect of the HUD Columbus Office. Pursuant to that practice, Respondent's guarantees were amended to state that the work was to be completed within 90 days of the effective date of the guarantee.[10] *See* Resp. Ex. marked Plaintiff's Ex. 8. *See also*

[9]The transcript of that conference is dated April 25, 1988, but a review of its content, when read in conjunction with the 1988 LDP and modified 1988 LDP, results in the finding that the conference was held on March 25, 1988. *See* Resp. Ex. marked Plaintiff's Ex. 8; Gov't. Exs. 6, 7.

[10]Mr. Breen and Ms. Finelli stated at the conference that the practice was instituted to address a backlog problem, and that since the end of January 1988, the amended guarantee was no longer used. *See* Resp. Ex. marked Plaintiff's Ex. 8 at 28.

Gov't. Ex. 9 at Tr. Vol. I, pp. 62-66, 115-119.

Although Mr. McAdams stated at the conference that he did not suggest or have any other knowledge of Respondent's practice, Mr. Breen and Ms. Finelli vehemently disagreed. Furthermore, although Mr. Lane stated at the conference that he did not recall a discussion of Respondent's practice at the October 1987 meeting, he stated that the practice "ought to be acceptable to us, provided the money for the treatment is held until you do the treatment" and that those present may have "passively concurred" in the practice. *See* Resp. Ex. marked Plaintiff's Ex. 8 at 9-12, 19. Therefore, the evidence is inconsistent with the Department's assertion that the Chief Architect had instructed Respondent in October 1987 not to maintain the practice at issue in the 1988 LDP, and it serves to explain why the conduct at issue in the 1988 LDP occurred after August 1987 when the employees either were terminated or resigned.

The Department recently submitted evidence which it acknowledges does not, by itself, constitute cause for debarment, but which it believes, in conjunction with Respondent's conviction, "rebut[s] Respondent's assertion that it is currently a presently responsible company." *See* Government's Submission of Additional Evidence at 5. *See also* Government's Opposition to Respondent's Motion to Strike at 1. That evidence concerns several incidents that allegedly occurred since the acts for which Respondent was convicted and that involve inadequate performance by Respondent's termite inspection and treatment departments.[11] According to the Department, the evidence demonstrates that Respondent "continues to maintain business practices which reflect that it is not presently responsible." *See* Government's Submission of Additional Evidence at 2. The Department also argues that the evidence demonstrates that "all wrongdoing" on the part of Respondent did not cease in 1987 as was asserted by Respondent. *See* Government's Opposition to Respondent's Motion to Strike at 1.

[11]Specifically, the evidence consists of: (1) an affidavit given to an ODA investigator by one of Respondent's customers in which the customer asserted, *inter alia,* that Respondent inadequately performed a December 1989 termite inspection; (2) pleadings filed in an action initiated in state court by a home buyer against several parties including Respondent, which alleged, *inter alia,* that in March 1989, Respondent negligently performed a termite inspection before she purchased the property, including three affidavits filed in that action, on behalf of the home buyer, which were given by two workmen and an inspector unrelated to Respondent, and the decision of the state court denying Respondent's motion for summary judgment based on the finding that the affidavits created a material issue of fact; and (3) pleadings filed by Respondent and a homeowner in an action regarding Respondent's claim of failure to pay and the homeowner's counterclaim of negligent performance of termite inspection and treatment beginning in January 1989. *See* Government's Submission of Additional Evidence and Exhibits attached thereto.

Evidence must be relevant and material to be admissable. *See* 24 C.F.R. 26.23(a) ("[i]rrelevant, immaterial, privileged, or unduly repetitious evidence shall be excluded).[12] The cause relied upon by the Department for proposing Respondent's debarment is Respondent's conviction for fraud and forgery for falsely certifying that pretreat work had been performed. The evidence recently submitted by the Department under the guise of demonstrating a lack of present responsibility, however, does not involve Respondent's pretreat department, nor does it involve any allegation of nonperformance of work and falsification thereof. Thus, the Department on the one hand seeks to base the debarment on Respondent's conviction for acts of nonfeasance committed by Respondent's pretreat department, but on the other hand, supports its position with an untenable extrapolation. The Department would have this tribunal divine, from several isolated instances of misfeasance which allegedly occurred in departments of Respondent's business other than the pretreat department, that the current business practices of Respondent's entire operation, including the pretreat department, reflect a lack of present responsibility.[13]

[12]The conclusion that the additional evidence proffered by the Department is irrelevant and immaterial to this proceeding, and is therefore not admissable, is consistent with the Federal Rules of Evidence, which serve as a guide for the conduct of this proceeding. *See* 24 CFR 26.23(a); Fed. R. Evid. 401 ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."), 402 ("Evidence which is not relevant is not admissible.")

[13]In so doing, the Department has also mischaracterized the nature and scope of the position taken by Respondent regarding its present responsibility. Mr. Breen acknowledged during the proceeding in District Court that, like any similar business, he has over time received customer complaints with regard to work done by the pretreat department. Mr. Breen further explained that those complaints are routinely handled and resolved. *See* Gov't. Ex. 9 at Tr. Vol. I, pp. 139, 144-45. Indeed, the testimony elicited by two pretreat customers called as witnesses for the Department during the District Court proceeding in an attempt to demonstrate their lack of satisfaction with Respondent's performance of remedial measures after the employees' failure to performs certain pretreats was discovered in August 1987 is unpersuasive, and does not successfully refute Mr. Breen's testimony. *Id.* at Tr. Vol. I, pp. 158-95.

The Department has not demonstrated any cognizable connection between this evidence and the acts which led to Respondent's conviction.[14] The evidence, therefore, bears no relationship to and is not probative of the cause relied upon by the Department. Because a demonstration of lack of present responsibility must relate to the cause relied upon by the Department in proposing the debarment action, the evidence is not relevant or material to this proceeding. A decision to debar Respondent based upon consideration of this evidence would improperly result in a debarment for reasons other than those for which debarment was proposed. The evidence recently submitted by the Department is, therefore, not admissable, and Respondent's Motion to Strike is hereby GRANTED.[15]

Any inference of a lack of present responsibility based on Respondent's past acts has been dispelled by the remedial measures taken by Respondent when it learned of the actions of its employees who had failed to perform certain pretreats, and by the subsequent performance of Respondent's pretreat department, under the terms of the modified 1988 LDP, which was monitored and found acceptable by HUD. Furthermore, the Department failed to produce any evidence which demonstrates that despite Respondent's remedial measures and subsequent acceptable performance, Respondent nonetheless lacks present responsibility.

This decision is not intended to relieve Respondent of its accountability for the actions which underlie its guilty plea and conviction. Nor is it intended to send the message to persons who do business with the Department that sanctions necessarily will

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[14]In arguing that the evidence is neither relevant nor material, Respondent states, *inter alia,* that "HUD has absolutely no connection at all to any of these situations." *See* Respondent's Motion to Strike at 3. In refuting that assertion, the Department relies on the pleadings in the case brought in state court by the home buyer, discussed *supra* n. 11, which, according to the Department, demonstrate that Respondent made the allegedly negligent termite certification on a HUD form. *See* Government's Opposition to Respondent's Motion to Strike at 4. According to the Department, use of the HUD form "enhanced [Respondent's] own credibility with the purchaser", and HUD "has very vested interest [sic] in a matter where a home buyer is lulled into a false sense of security because Respondent has given it a HUD-sanctioned certification." *Id.*

Whether the additional evidence submitted by the Department directly or indirectly involves HUD is not the basis upon which it is deemed irrelevant and immaterial, and therefore inadmissable. Had the evidence concerned the pretreat department and acts substantially similar to those for which Respondent plead guilty and was convicted, the lack of any involvement with a HUD program would not have been dispositive in ruling upon the admissability of the evidence.

[15]Having ruled that this evidence is not admissable on grounds of relevancy and materiality, the other arguments raised by Respondent in its Motion to Strike as to why the evidence should be excluded need not be reached. However, it is noteworthy that, even if the evidence were considered as being properly filed and admissable, the evidence would not be of sufficient weight to result in a decision debarring Respondent. As discussed above, the evidence does not bear upon a determination of Respondent's present responsibility in this proceeding.

be avoided in all cases simply by virtue of agreeing to take or having taken corrective action. The result in this case is dictated by the fact that the Department failed to prove that Respondent, under the particular facts of this case, lacks present responsibility. Accordingly, because the Department has failed to prove that the government would be at risk if it continues to do business with Respondent, debarring Respondent would be punitive and contrary to law.[16]

## Conclusion and Determination

Upon consideration of the public interest and the entire record in this matter, I conclude and determine that good cause does not exist to debar Respondent Buckeye Terminix Company, Inc., from further participation in primary covered transactions and lower tier covered transactions (*see* 24 CFR 24.110(a)(1)) 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 any period. Accordingly, the proposal to debar Respondent Buckeye Terminix Company, Inc. is VACATED. *See* 24 CFR 26.24(a).

SO ORDERED.

/s/

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Robert A. Andretta
Administrative Law Judge

Dated: August 31, 1990

[16]In addition to arguing that it is presently responsible and that debarment would be punitive, Respondent raised additional defenses to the Department's debarment action, including breach of a written settlement agreement, laches, estoppel, fundamental unfairness, taking of an action contrary to the public interest, unconstitutionality, and unlawful attempt to extract money in settlement. In light of the disposition set forth in this Initial Determination, however, it is unnecessary to reach those arguments.