

In the Matter of:

JAMES MYERS : HUDECA No. 96-A-104-D1
J&M CONSTRUCTION CO., INC., : Docket No. 96-0003-DB

Respondents

In the Matter of:

TERRY MYERS HUDBCA No. 96-A-105-D2
J&M CONSTRUCTION CO., INC., Docket No. 96-0004-DB

Respondents

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DETERMINATION BY ADMINISTRATIVE JUDGE DAVID T. ANDERSON

September 12, 1996

Statement of the Case

By letters dated July 6, 1995, Michael B. Janis, General Deputy Assistant Secretary, U.S. Department of Housing and Urban Development ("HUD," or "Department"), notified James and Terry Myers (the "Myerses") that the Department was considering debaring them and their affiliate, J&M Construction Company, Inc. ("J&M"; collectively, "Respondents"), from participating in primary covered transactions and lower-tier covered transactions as either participants or principals at HUD and throughout the Executive Branch of the Federal Government, and from participation in procurement contracts with HUD for a period of three years. The notices also informed Respondents that they were suspended from participating in such transactions pending a resolution of the issues related to their proposed debarments.

The bases for the debarments are the convictions of the Myerses in the United States District Court for the District of Maryland for conspiracy to commit Federal program bribery, a violation of 18 U.S.C. § 371.

By letters dated August 15, 1995, Respondents separately filed timely appeals of the proposed debarments. Inasmuch as the proposed debarments are based on the criminal convictions of the Myerses, a hearing is limited to consideration of briefs and documentary evidence only. 24 C.F.R. § 24.313(b) (2) (ii). James and Terry Myers, on behalf of themselves and J&M Construction, have submitted separate briefs and documentary evidence. Because the submissions in these separate cases were virtually identical, a single citation will be used to refer to the identical, although separate, submissions filed by

James Myers and Terry Myers in the two cases. As the issues and underlying facts of these two cases are also identical, this joint Determination is appropriate.

Findings of Fact

1. James Myers is the President and owner of J&M. Terry Myers, son of James Myers, is the Secretary/Treasurer of J&M. (Resp. Exh. A; Govt. Exh. A.)

2. In 1983, the Housing Authority of Baltimore City ("HABC") implemented the Vacancy Special Funding Program, which was designed to renovate vacant housing units. HABC received federal funds from HUD during the years pertinent to this matter. Contracts for renovation were to be awarded without competitive bidding. Respondents participated in the renovation program as contractors. (Govt. Exh. A; Resp. Exh. A.)

3. The Myerses contacted Charles Morris ("Morris"), a Management Analyst with the Housing Management Division of the HABC, for assignments under the renovation program, but were told that there was not enough work or money, despite earlier promises that there was a sufficient amount of work to keep all contractors busy. (Govt. Exh. A; Resp. Brief at 4.)

4. Morris requested financial assistance from the Myerses on several occasions. On four separate occasions between December, 1992 and October, 1993, the Myerses gave Morris a total of approximately \$10,000 for various purposes, such as a down payment on real estate, a computer, and a trip to Florida. The Myerses felt that they would not receive work assignments from the HABC for the renovation program unless they acceded to Morris' requests for financial assistance. (Govt. Exh. A; Resp. Exh. A; Resp. Brief at 5-6.)

5. By agreements signed by the Myerses on March 20, 1995, the Myerses pled guilty to a one-count information charging them with conspiracy to commit Federal program bribery, a violation of 18 U.S.C. § 371. (Govt. Exh. A; Resp. Exhs. A and B.) Terry Myers was sentenced to two years probation, four months home detention, 50 hours of community service, and a \$5,000 fine. (Govt. Exh. A; Resp. Exh. C.) Terry Myers has successfully completed his home detention, and has performed 21 hours of community service. (Affidavit of Terry Myers, Dec. 20, 1995.) James Myers was sentenced to two years probation, six months home detention, 100 hours community service, and a \$6,000 fine. The Myerses were each required to pay a \$50 special assessment. (Govt. Exh. A; Resp. Exh. C.) James Myers has successfully completed his home detention and his community service requirements. (Affidavit of James Myers, Dec. 20, 1995.)

6. The City of Baltimore Contractors Qualification Committee denied requalification to J&M for a period of 18 months beginning on June 30, 1995. (Govt. Exh. C; Resp. Exh. G.) The Maryland State Board of Public Works has debarred Respondents for an indefinite period beginning October 13, 1995. (Govt. Exh. B; Resp. Exh. H.)

7. The Myerses have submitted numerous letters from friends, family, and business associates attesting to their character. These letters describe the Myerses as loving, devoted family men, generous with their time and money, conscientious, and charitable. These letters were originally submitted to the United States District Court for the District of Maryland in connection with the sentencing of the Myerses. (Resp. Exhs. D, E, and F.) The Myerses also submitted affidavits in which they express remorse and regret for their actions, profess an understanding of the seriousness of their criminal conduct, and vow

never to break the law again. (Affidavit of James Myers, Dec. 20, 1995; Affidavit of Terry Myers, Dec. 20, 1995.)

8. Respondents "acknowledge . . . the wrong committed by [them] through the offense to which [they] plead guilty. [They] fully understand . . . that [they] will be debarred by the Department for some period of time, as a result." (Resp. Brief at 2.)

Discussion

The Myerses do not contest that they are principals and participants as defined by the pertinent HUD regulations and are subject to the sanctions set forth in the Department's debarment regulations at 24 C.F.R. Part 24. They also do not contest J&M's status as an affiliate. 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 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 effects the present responsibility of a person;
* * *
- (d) Any other cause of so serious or compelling a nature that it affects the present responsibility of a person;

The Government bears the burden of demonstrating by a preponderance of the evidence that cause for suspension and debarment exists. 24 C.F.R. § 24.313(b) (3), (4); James J. Burnett, HUDBCA No. 80-501-D42, 82-1 BCA II 15,716. When the proposed debarment is based on a conviction, that evidentiary standard is deemed to have been met. 24 C.F.R. §§ 24.313(b) (3) and 24.405(b).

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 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 lack of present responsibility may be inferred from past acts. Schlesinger v. Gates, 249 F.2d 11 (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).

The Myerses contend that "a debarment for three years . . . is excessive, in light of [their] past job performance as . . . contractor[s], [their] good character and the circumstances of this offense." (Resp. Brief at 2.) The Myerses submit that they are deeply remorseful and accept full responsibility for their actions, and that they are caring, hard-working individuals. The Myerses have submitted numerous letters from family members, personal friends, and business associates which were originally submitted to the judge in the criminal proceeding. These letters evidence the Myerses' deep commitment to family, friends, and a willingness to help others in need, and demonstrate, without evidence to the contrary, that the Myerses conducted their business in a responsible manner prior to the commission of their criminal conduct. While these letters, along with the Myerses' affidavits, provide evidence that the Myerses are truly sorry for their criminal actions and remain in high esteem among their friends and associates, they provide an insufficient basis upon which a determination can be made that they are presently responsible. Joseph A. Strauss, HUDBCA No. 95-G-113-D11 (May 19, 1995); Philip D. Winn, HUDBCA No. 95-G-108-D6 (June 9, 1995)

A similar submission of letters was made in Howard L. Perlow, HUDBCA No. 92-7131-D5 (Dec. 3, 1992). In that Determination, I stated:

I do not question the sincerity of the individuals whose supportive letters are part of this record, and it should be comforting to Respondent that so many of his current and former business associates think so highly of him that they would have no hesitation in continuing in a business relationship with him. However, these private declarations of confidence, some from individuals who have profited from doing business with Respondent in the past, do not persuade me that programs financed by the nation's taxpayers should be exposed to Respondent's participation at the present time. I find it difficult to accept the premise that a criminal pattern which continued for several years can be characterized as a mere aberration. When contrasted with the seriousness of Perlow's activities, these attestations simply do not convince me that Respondent is at present an individual with whom the Government should conduct its business.

While Respondents' criminal conduct occurred over a 10-month period, it, like Perlow's, cannot "be characterized as a mere aberration." I consider the Government's concern well-founded that another deviation by Respondents from responsible business practices could occur.

Upon review of Respondents' submissions and arguments, I cannot conclude that the Myerses, although admittedly contrite, sense the full ramification of their criminal behavior on the Departmental program which made their contract with the HABC possible. Nor do they appear to grasp the wider implications of their failure to demonstrate the trust which the Department and the public must place in participants in a HUD activity. While the letters from family members, friends, and business associates may have been sufficient to urge leniency from the sentencing judge, these letters fail to show (1) the extent to which the Department may be at risk in future dealings with the Myerses; (2) the knowledge of the Myerses of pertinent HUD rules, regulations, and guidelines applicable to participants in HUD programs; and (3) relevant mitigating evidence, e.g., specific evidence of any business activity of the Myerses since the commission of the criminal conduct from which it might be inferred that the Myerses would conduct their business affairs in a responsible manner, even in the face of "explicit or implicit coercion by a government official," as characterized by Respondents' counsel.

Respondents submit that the Myerses' "offense resembles an extortion by a public official, coupled with voluntary compliance with the official's extortionate demands, more than it resembles a classic bribery." (Resp. Reply at 2). Although this proposition may illustrate an arguable distinction when discussed in a criminal law context, this argument misses the point with respect to the issue of what is expected of those who do business with a governmental entity.

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)

Both the crime for which the Myerses were convicted and the "classic bribery" as characterized by Respondents' counsel place the integrity of a federal program equally at risk because of the absence of a contractor's honest and trustworthy code of business conduct which can resist both temptation and greed. If the Myerses had in place such a principled code of business conduct, they might have either reported Morris' solicitations to appropriate law enforcement authorities rather than acceding to his requests, or revealed their involvement in the conspiracy to commit federal program bribery to the authorities well before their criminal conduct was uncovered.

Based upon the record before me, I find that a significant period of debarment is warranted. The Myerses gave Morris money on four separate occasions over a ten-month period with the expectation of receiving work and profiting from their contractual relationship with the HABC. Even though Morris may have initiated these transactions, this illegal activity could not have been completed without the Myerses' complicity. The Myerses, by participating in these illegal transactions, undermined the integrity of the Department's programs and placed these programs at serious financial risk. The Department is clearly justified in seeking protection from these contractors for a reasonable period of time.

While the Myerses acknowledge that a period of debarment by HUD is warranted, they contend that the Department should only debar them for a period of 18 months essentially because the City of Baltimore Contractors Qualification Committee denied requalification to J&M for only 18 months. (Resp. Brief at 2, 9 and 10.) However, I note that the Board of Public Works of the State of Maryland has debarred Respondents indefinitely. Nevertheless, it is my determination that a period of debarment longer than eighteen months, but less than indefinite, is necessary to protect the Departmental and public interests under the circumstances of this case. The Myerses have expressed great remorse and vow never to break the law again. Hopefully, they will remain true to this resolve.

Conclusion

For the reasons set forth above, it is my determination that a three-year debarment is warranted in this case. Respondents shall be debarred through July 6, 1998, credit being given for the period during which Respondents' eligibility to participate in the programs of the Department has been suspended.

David T. Anderson
Administrative Judge