

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
Washington, D.C.

In the Matter of:

**FRANK GIANNOCCARO
and
GIANNOCCARO PLUMBING and
CONSTRUCTION, INC.,**

Respondents.

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Docket No. 08-3506-DB

Docket No. 08-3507-DB

DEBARRING OFFICIAL'S DETERMINATION

INTRODUCTION

By separate Notices dated March 12, 2008 ("Notice"), the Department of Housing and Urban Development ("HUD") notified Respondents FRANK GIANNOCCARO and GIANNOCCARO PLUMBING and CONSTRUCTION, INC. that HUD was proposing their debarment and immediate suspension from future participation in procurement and nonprocurement transactions as a participant or principal with HUD and throughout the Executive Branch of the Federal Government for a three-year period from March 12, 2008, the date of their suspension. The Notices further advised Respondents that the proposal to debar and suspend them was in accordance with the procedures set forth in 2 CFR parts 180 and 2424. In addition, the Notice to Respondent Frank Giannoccaro informed him that his proposed debarment was based upon his conviction in the United States District Court for the Western District of New York, for violating 18 USC 641 (Theft of Government Money). Giannoccaro Plumbing and Construction, Inc. (GP&CI) was notified separately that its immediate suspension and debarment was based on information that it was an affiliate of Respondent Frank Giannoccaro.¹ For Respondent Frank Giannoccaro's conviction on the one count in the five-count Indictment to which he pleaded guilty, Respondent was sentenced to probation for two years and ordered to make restitution of \$10,838.00, and fined \$1,000.00.

A telephonic hearing on Respondents' proposed debarment was held in Washington, D.C. on August 6, 2008, before the Debarring Official's Designee, Mortimer F. Coward. Respondent was present by phone along with his attorney, Paul J. Vacca, Esq. Lisa Saunders, Esq. appeared on behalf of HUD.

¹ The two cases were consolidated for this hearing.

Summary

I have decided, pursuant to 2 CFR part 180, to debar Respondents from future participation in procurement and nonprocurement transactions, as a participant, principal, or contractor with HUD and throughout the Executive Branch of the Federal Government, for a period of three years from the date of their suspension, March 12, 2008. My decision is based on the administrative record in this matter, which includes the following information:

- (1) The Notices of Proposed Debarment dated March 12, 2008.
- (2) An indictment filed May 17, 2007, in the United States District Court for the Western District of New York, charging Respondent Frank Giannoccaro with five counts involving his commission of various offenses.
- (3) The Judgment in a Criminal Case filed December 12, 2007, finding Respondent guilty of one count of Theft of Government Money.
- (4) A Plea Agreement entered into by Respondent dated September 4, 2007.
- (5) Respondents' Pre-Hearing Brief (with all attachments thereto) filed June 11, 2008.
- (6) The Government's Pre-Hearing Brief filed May 20, 2008 (including all attachments and exhibits thereto).

Government Counsel's Arguments

Government counsel argues that as a contractor for Rochester Housing Authority (RHA), an entity that was funded by HUD, Respondent has been a participant or principal in covered transactions. Moreover, even if Respondent is not currently participating in non-procurement transactions, under applicable regulations he may be excluded as a person who was previously involved in covered transactions. *See* 2 CFR 180.150.

Government counsel recites that Respondent was engaged in a scheme in which he submitted false requests for payment to RHA. Respondent, through GP&CI, was awarded \$25,000.00 bulk bids by RHA to perform work as needed on RHA housing units until the \$25,000.00 was exhausted. According to the Plea Agreement, from about April 2004 to December 2004, Respondent, through GP&CI, submitted to RHA, on twenty-two separate occasions, fraudulent work invoices.

Counsel argues that Respondent's conviction provides cause for his debarment pursuant to HUD's debarment regulations. In the first place, counsel argues, the standard of proof to establish a cause for debarment in this case has been met because the proposal to debar Respondent is based on his conviction. *See* 2 CFR 180.850(a) and (b). Further, the Government has met its burden of demonstrating cause for debarment because Respondent's conviction provides cause for debarment. *See* 2 CFR 180.800(a)(1) and (3). Additionally, cause for debarment also is established because Respondent's fraudulent acts indicate a lack of business integrity or business honesty that seriously affects his present responsibility. *See* 2 CFR 180.800(a)(4). Government counsel also

contends that because Respondent's criminal acts indicate a lack of honesty, his continued participation in the program would place Government funds at risk. Accordingly, Respondent's misconduct clearly demonstrates that his proposed debarment is necessary to protect the public interest. *See* 2 CFR 180.125.

In arguing for Respondent's debarment, counsel points out that Respondent's misconduct was not an isolated incident. Through his company, Respondent knowingly submitted the fraudulent invoices, thus he was the one who carried out the fraud. Counsel also dismisses Respondent's plea that he has made restitution, arguing that it is not sufficient to ensure that federal funds will not be placed at risk in the future. Additionally, Respondent made restitution only after being prosecuted, "therefore the restitution payment . . . is not mitigating." Accordingly, based on the "seriousness and type of criminal offense committed by Respondent, a three-year debarment is appropriate." Counsel concludes that, pursuant to 2 CFR 180.905, GP&CI is an affiliate because it is controlled by Respondent Giannoccaro. Thus, any period of debarment imposed on Respondent Giannoccaro also should be imposed on GP&CI. *See* 2 CFR 180.625(b).

Respondent's Arguments

Respondent admits that he is subject to HUD's debarment and suspension regulations, and that he was a participant in covered transactions. Respondent argues, however, that his "conviction does not provide cause for a suspension and debarment." Respondent acknowledges that by signing the Plea Agreement and pleading guilty, he accepted full responsibility for his misconduct. Respondent notes that he "immediately paid within one week the fine [sic] of \$10,838.00 plus the special assessment." Respondent adds that he was sixty-two years old at the time of sentencing and had no prior contacts with the law. Thus, his sentence, based on the sentencing guidelines, was below the sentence he could have received.

Respondent cites caselaw for the proposition that "suspension and debarment are to be used to protect the public and not for punitive purposes." Respondent asserts that, if this proposition is read in conjunction with 2 CFR 180.860, the Debarring Official must conclude "that the request of the Government is unreasonable and debarment is not necessary or the extent of the debarring period requested by the Government is too extensive to accomplish the ends of justice."

Respondent argues a mitigating factor the Debarring Official should consider is that his wrongdoing covered a short period of time from April 2004 to December 2004, almost four years ago. Additional mitigating factors are that he has no pattern or prior history of wrongdoing; no other state or federal agency has made a finding that he has engaged in similar wrongdoing or disqualified him from receiving contracts, nor has he agreed not to participate in federal or state contracts. Additionally, Respondent argues in mitigation that he has accepted responsibility for his wrongdoing, recognizes the seriousness of his misconduct and has paid all penalties related thereto, and cooperated

fully with authorities. Further, Respondent offers that he is a one-man operation and he has effective standards and an internal control system currently in place in his business.

Respondent requests that the Debarring Official take all these mitigating factors into consideration and not debar him, but if debarment is to be imposed, it should be for a minimum period of time.

Findings of Fact

1. Respondent was a contractor for a housing authority, RHA, funded by HUD.
2. Respondent engaged in a fraudulent scheme through his company, GP&CI.
3. GP&CI submitted on twenty-two separate occasions fraudulent work invoices to RHA for payment.
4. Responded, through his scheme, defrauded RHA in excess of \$10,000.00.
5. Respondent's scheme spanned a nine-month period, ending in December 2004.
6. Respondent pleaded guilty to one count of Theft of Government Money and was sentenced to two years' probation and ordered to pay a fine of \$1,000.00 and make restitution of \$10,838.00.

Conclusions

Based on the above Findings of Fact, I have made the following conclusions:

1. Respondent was a participant in a covered transaction as defined in 2 CFR part 180.
2. Respondent's criminal conviction serves as the basis for his debarment.
3. Pursuant to 2 CFR 180.800, a conviction for theft, *inter alia*, is a cause for debarment.
4. Respondent's criminal conduct, i.e., his fraudulent scheme, stretched over a period of nine months, ending in December 2004.
5. Respondent's scheme involved the commission of approximately twenty-two fraudulent acts.
6. Respondent's company, GP&CI, was an affiliate of Respondent's, and may be subjected to the same period of debarment, if any, as Respondent. *See* 2 CFR 180.905 and 2 CFR 180.625(b).
7. Respondent has made restitution as ordered by the court.
8. The mitigating factors raised by Respondent have been carefully considered by the Debarring Official, as discussed below.
9. Respondent's acceptance of responsibility for his wrongdoing is a mitigating factor that was favorably considered in determining the appropriate period of debarment, if any, to be imposed.
10. The relatively short duration of Respondent's misconduct and the passage of time since the wrongful acts were committed are factors that have been considered favorably in determining whether Respondent should be debarred, and, if so, the appropriate period of debarment.

11. Respondent's making restitution, because it was part of his sentence for his criminal conduct, was accorded less weight than other factors that were favorably considered.
12. Respondent's prior history that shows no wrongdoing, nor negative findings nor disqualification by other federal or state agencies also was considered favorably in weighing the mitigation factors.
13. The seriousness of Respondent's acts, the repeated commission of those acts, and the clear violation of the trust placed in him are aggravating factors considered in imposing the period of debarment on Respondent. These aggravating factors, on balance, clearly outweigh the mitigating factors. *See* 2 CFR 180.865.
14. Pursuant to 2 CFR 180.850, HUD has "establish[ed] the cause for debarment by a preponderance of the evidence." And under 2 CFR 180.855, HUD has met the "burden to prove that a cause for debarment exists."
15. Respondent provided no independent evidence that he is presently responsible. *See* 2 CFR 180.855.
16. Respondent's actions that led to his criminal conviction raise grave doubts with respect to his business integrity and personal honesty.
17. Respondents' exclusion is not punishment, but is intended to protect the public interest. *See* 2 CFR 180.125.
18. HUD has a responsibility to protect the public interest and take appropriate measures against participants whose actions may affect the integrity of its programs.
19. HUD cannot effectively discharge its responsibility and duty to the public if participants in its programs or programs that it funds fail to act with honesty and integrity.

DETERMINATION

Based on the foregoing, including the Findings of Fact, Conclusions, and the administrative record, I have determined, in accordance with 2 CFR 180.870(b)(2)(i) through (b)(2)(iv), to debar Respondents for a period of three years from the date of their suspension, March 12, 2008. Respondent's "debarment is effective for covered transactions and contracts that are subject to the Federal Acquisition Regulation (48 CFR chapter 1), throughout the executive branch of the Federal Government unless an agency head or an authorized designee grants an exception."

Dated: _____

9/19/08



Henry S. Czauski
Debarring Official