

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

In the Matter of:

MICHAEL MACARUSO

And

OCEAN STATE ENVIRONMENTAL CO., INC.

Respondents.

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**DOCKET NO. 09-3564-DB(S)
09-3565-DB(S)**

SUSPENDING OFFICIAL'S DETERMINATION

INTRODUCTION

By separate Notices dated October 1, 2008 ("Notice"), the Department of Housing and Urban Development ("HUD") notified Respondents MICHAEL MACARUSO and OCEAN STATE ENVIRONMENTAL CO., INC. that HUD was proposing their immediate suspension from participation in procurement and nonprocurement transactions as a participant or principal with HUD and throughout the Executive Branch of the Federal Government. The Notice further advised Respondent Macaruso that the proposal to suspend him was in accordance with the procedures set forth in 2 CFR parts 180 and 2424. In addition, the Notice informed Respondent Macaruso that his immediate suspension was based upon an Information filed in the United States District Court for the District of Rhode Island charging him with violating 18 U.S.C. 874 (Kickbacks from Public Works Employees) and 26 U.S.C. 7206(1) (Filing a False Tax Return). Respondent Ocean State Environmental Co., Inc. (OSE) was advised that its suspension was based upon information that OSE was an affiliate of Macaruso's.¹

A hearing on Respondents' suspension was held in Washington, D.C. on February 4, 2009, before the Suspending Official's Designee, Mortimer F. Coward. Fred J. Volpe, Esq. appeared for Respondents by phone. Respondent Macaruso, according to his counsel, elected not to appear based on his counsel's advice. Stanley E. Field, Esq. appeared on behalf of HUD.

¹ Both Respondents were advised in their respective Notices that their suspension was for a temporary period pending the outcome of the criminal proceedings or any related debarment action.

Summary

I have decided, pursuant to 2 CFR part 180, to sustain the suspension of Respondents. My decision is based on the administrative record in this matter, which includes the following information:

- (1) The respective Notices of Suspension issued to Respondents dated October 1, 2008.
- (2) Two letters dated October 29, 2008, from Respondents' attorney addressed to the Docket Clerk requesting a hearing for Respondents in this matter.
- (3) Respondents' Pre-Hearing Brief in Opposition of Suspension dated January 22, 2009.
- (4) The Information filed June 26, 2008, charging Respondent Macaruso with accepting kickbacks from employees and filing a false tax return.
- (5) The Plea Agreement entered into by Respondent Macaruso on June 16, 2008.
- (6) The Department's Pre-Hearing Brief in Support of the Suspension of the Respondents filed January 7, 2009 (including all exhibits and attachments thereto).

Government Counsel's Arguments

Government counsel states that Respondent Macaruso is the president and sole shareholder of OSE. OSE contracted to perform asbestos removal services at properties operated by the Providence Housing Authority and for other governmental agencies. Respondent Macaruso, during the period July 2003 to December 2006, certified to the housing authorities and other governmental agencies that OSE employees who worked under the various contracts between OSE and the agencies were being paid at the prevailing wage rates in accordance with the Davis-Bacon Act. The governmental agencies paid the invoices presented by Macaruso and OSE. Macaruso then would pay his employees from the proceeds of the contracts, but retain a portion of the employees' paychecks for himself. Through this scheme, Macaruso realized income of approximately \$283,392.00, which he did not report for the applicable tax years 2005 and 2006. As a consequence of his actions, Macaruso was charged with, and later pleaded guilty to, one count of filing a false tax return and one count of inducing kickbacks from public works employees.

Government counsel surveys the suspension regulations and concludes that Respondents Macaruso and OSE are subject to the suspension regulations because they have been participants or principals in a covered transaction as defined in 2 CFR 180.² Specifically, OSE was a participant in a covered transaction because it entered into contracts valued at over \$25,000.00 with HUD-funded housing authorities. Respondent Macaruso was a participant in covered transactions because of his position as president and sole shareholder of OSE. Additionally, counsel argues that OSE is also subject to suspension because it is an "affiliate" of Macaruso's, as defined in 2 CFR 180.905. Counsel also contends, rejecting Respondents' arguments, that the nature of Respondent

² See Gov't Brief at 5-7.

Macaruso's acts "did not change his relationship with Ocean State. Mr. Macaruso still controlled, or had the power to control, Ocean State, and it is his relationship, not any acts taken by Mr. Macaruso, that determines his affiliation with Ocean State."³

Counsel argues that Respondent Macaruso's guilty plea to the two offenses in the Information provides adequate cause for his suspension. Counsel continues that the two offenses are forms of theft and indicate a lack of business integrity. Additionally, because the offenses involved federal funds and federal programs, the immediate need to suspend Respondent Macaruso is clear. OSE's suspension is warranted, counsel contends, because it is the affiliated company that facilitated Macaruso's commission of his crimes. Counsel adds that in a case such as this involving the misuse of public funds, it is in the public interest to suspend the respondent pending the outcome of the criminal case. Counsel states that Respondent's admission of his criminal violation should disqualify him from performing public contracts and from the administration of public funds, "[n]or should his alter ego corporation be allowed to perform [the] contracts."

Counsel submits that Respondent Macaruso's statement of his intention to make restitution before his sentencing is immaterial to the decision to suspend him. Macaruso has provided no evidence that he has made restitution. Further, Macaruso's making restitution does not demonstrate that he is responsible or of good character, because "his failure to comply can subject him to incarceration or other penalty." Counsel concludes that the suspension of both Respondents should continue until Macaruso's sentencing hearing and any further legal or debarment proceeding.⁴

Respondent's Arguments

Respondent Macaruso, through his counsel, admits to the facts as set forth by the Government. Counsel states that his client has a gambling addiction, which he offers as an explanation for some of Respondent's actions.⁵ Counsel notes that Macaruso has made partial restitution of the back wages he owes his employees and a payment to the IRS for back taxes. Macaruso also has accepted responsibility for his actions in his guilty plea. Additionally, as of January 6, 2009, Respondent Macaruso is no longer a director or officer of OSE, thus he can no longer affect the workings of OSE. Counsel also adds that OSE operations are labor intensive and requires on-site labor participation. For that reason, OSE operations cannot be influenced by Respondent Macaruso who will be in prison.

Counsel for Respondents, in submitting that OSE should not be suspended, argues that 2 CFR 180.905, which defines an affiliate, "paints with a very broad brush." Counsel added, however, that he was not challenging the regulation. OSE is a "corporation that has a legal existence separate and apart from its director, offices [sic]

³ See *id.* 9.

⁴ At the hearing on February 4, 2009, counsel indicated that Respondent Macaruso was sentenced on January 20, 2009, to a term of imprisonment of twenty-four months, supervised release of three years, ordered to make restitution of \$117, 840.55, and fined \$50,000.00.

⁵ Gov't counsel, in his rebuttal, argued that Respondent's gambling addiction evidenced his irresponsibility.

and stockholders. Further, Respondent Ocean State is not an affiliate, in that Respondent Macaruso's actions do not rise to the level of control but are in fact 'ultra vires,' and are not condoned nor accepted by Respondent Ocean State."⁶ Counsel contends that there is a "lack of symmetry" in the regulation with respect to affiliates in that only closely held companies would be affected as opposed to large companies. Counsel also argues that because OSE was not indicted "this reflects the lack of culpability of the legal entity, Respondent Ocean State."⁷

Counsel concludes that any suspension of Respondent Macaruso should be limited because of his accepting responsibility and making restitution for his wrongful actions. There should be no suspension of OSE, counsel adds, because it "is a separate legal entity, which was not indicted in this matter and which is not an affiliate of Respondent Macaruso."⁸

Findings of Fact

1. Respondent was, at all relevant times, the president and sole shareholder of a company, OSE, which performed asbestos removal services for governmental agencies and housing authorities.
2. The housing authorities received their funding from HUD and entered into separate contracts with OSE that exceeded \$25,000.00.
3. Respondent Macaruso, during the period July 2003 to December 2006, certified and submitted payrolls from OSE to the housing authorities and governmental agencies that showed his employees were being paid the prevailing wage rate for the work they performed at various properties controlled by the governmental agencies and housing authorities.
4. The governmental agencies and housing authorities paid the invoices presented by Respondents.
5. Respondent Macaruso induced employees of his company, OSE, to return to him, or to acquiesce in his retaining, a portion of their wages.
6. Respondent Macaruso, by expropriating a portion of his employees' wages, effectively paid them less than the prevailing wage rate pursuant to the Davis-Bacon Act.
7. Respondent failed to report his ill-gotten gains on his or OSE's tax return.
8. Respondent Macaruso was charged with receiving Kickbacks from Public Works Employees and Filing a False Tax Return.
9. Respondent pleaded guilty to the two charges and was convicted and sentenced to two years' imprisonment, three years' supervised release, fined \$50,000.00, and ordered to make restitution of \$117,840.55.
10. Respondent accepts responsibility for his wrongful actions.

⁶ Resp. Brief at 2.

⁷ *Id.* at 3.

⁸ *Id.*

Conclusions

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

1. Respondents were “participants” in a covered transaction, as defined in 2 CFR 180.980. *See also*, 2 CFR 180.915.⁹
2. Respondent Macaruso’s criminal conviction provides the basis for his suspension. *See* 2 CFR 180.700.¹⁰
3. Respondent Macaruso’s criminal violations of filing a false tax return and taking kickbacks from public works employees are serious offenses that reflect on his personal and business integrity.
4. Respondent OSE is an “affiliate” of Macaruso’s pursuant to 2 CFR 180.905, to the extent Macaruso as the sole shareholder of OSE has the power to control OSE.
5. Even assuming *arguendo* that Respondent Macaruso’s actions were *ultra vires* his legitimate role with OSE, it is still indisputable that Macaruso had control of OSE, thus establishing OSE’s affiliate status in accordance with 2 CFR 180.905.
6. Pursuant to 2 CFR 180.905, an affiliate does not have to be found culpable in its principal’s misdeeds to subject it to a suspension. The test is control, and Respondent Macaruso satisfied that test with respect to OSE.
7. OSE as an affiliate of Macaruso’s is properly subject to this suspension action, as provided in 2 CFR 180.625.
8. Respondent’s claim of a gambling addiction, even if it were a proper factor for consideration in this matter, played no role in this Determination in light of the absence of any evidence or proof in the record of his addiction. *See* 2 CFR 180.720.
9. Respondent’s efforts towards making the court-ordered restitution do not, standing alone, prove that he is presently responsible. Respondent Macaruso has an incentive to make restitution in the criminal matter, because of the possible penalties he may face for his failure to comply with the court’s order.
10. Respondent Macaruso’s resignation from the presidency and board of OSE, and even his imprisonment, is of little effect with respect

⁹ 2 CFR 180.915 defines an agent or representative as “any person who acts on behalf of, or who is authorized to commit, a participant in a covered transaction.” 2 CFR 180.980 defines a participant as “any person who submits a proposal for or who enters into a covered transaction, including an agent or representative of a participant.”

¹⁰ 2 CFR 180.700 provides that “the suspending official may impose suspension only when that official determines that (a) There exists an indictment for, or other adequate evidence to suspect, an offense listed under 180.800(a), or (b) * * * and (c) Immediate action is necessary to protect the public interest. Under 180.800(a)(1), a federal agency may debar a person for committing tax evasion or under paragraph (4) for “Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects your present responsibility.” At the time HUD issued the Notice of Suspension, October 1, 2008, Respondent had entered into the Plea Agreement and was adjudged guilty in a proceeding held on July 18, 2008. *See* Gov’t Ex. 4.

- to his potential for continuing to have influence over OSE because there is no evidence that he is still not the sole shareholder of OSE.
11. Respondent's actions that led to his criminal conviction raise grave doubts with respect to his business integrity and personal honesty.
 12. HUD has a responsibility to protect the public interest and take appropriate measures against participants whose actions may affect the integrity of its programs.
 13. 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 to sustain the action to suspend Respondents Michael Macaruso and Ocean State Environmental Co., Inc. As stated in the respective Notices of Suspension dated October 1, 2008, Respondents continue to be barred from participation in procurement and nonprocurement transactions as a participant or principal with HUD and throughout the Executive Branch of the Federal Government.

Dated: 23 March 2009


Henry S. Czauski
Suspending Official