

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

In the Matter of:

REGINALD B. HAYES,

Respondent.

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Docket No. 12-3900-DB

DEBARRING OFFICIAL'S DETERMINATION

INTRODUCTION

By Notice of Proposed Debarment dated July 31, 2012 ("Notice"), the Department of Housing and Urban Development ("HUD") notified Respondent REGINALD B. HAYES that HUD was proposing his debarment 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 period of three years from the date of the final determination of this action. The Notice further advised Respondent that his proposed debarment was in accordance with the procedures set forth in 2 C.F.R. parts 180 and 2424. In addition, the Notice informed Respondent that his proposed debarment was based upon his conviction in the United States District Court for the District of Columbia for violating 18 U.S.C. § 208(a) and 216(a)(1) (Acts Affecting a Personal Financial Interest).

A telephonic hearing on Respondent's proposed debarment was held in Washington, D.C. on November 27, 2012, before the Debarring Official's Designee, Mortimer F. Coward. Respondent was represented by Marlon C. Griffith, Esq. Respondent was not present at the hearing. David R. Scruggs, Esq. assisted by Ana I. Fabregas, Esq. appeared on behalf of HUD.

Summary

I have decided, pursuant to 2 C.F.R. part 180, to debar Respondent 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 3 years from the date of this Determination. My decision is based on the administrative record in this matter, which includes the following information:

1. The Notice of Proposed Debarment dated July 31, 2012
2. Respondent's Opposition to Proposed Debarment and Request for Informal Hearing dated August 30, 2012, addressed to the Director of the Compliance Division.
3. Respondent's Pre-Hearing Brief in Opposition to Three-Year Debarment filed October 31, 2012.
4. The Government's Pre-Hearing Brief in Support of Three-Year Debarment, filed October 5, 2012 (including all exhibits and attachments thereto).

Government Counsel's Arguments

Counsel states that Respondent was employed by HUD as the Director of Employee and Career Development. In March 2007, Respondent sought the advice and guidance of HUD's Ethics Office with respect to his engaging in outside employment as a business consultant. HUD's Ethics Office responded to Respondent's inquiry by informing him that while he may engage in outside consulting activities, such activities were limited to those that did not involve any HUD program, activity, mission, or interest. Soon thereafter, Respondent incorporated a business, Innovative Ventures, Inc., which listed him as the President, CEO, and director. Respondent then proceeded to engage in certain business activities, discussed in more detail below, which resulted in his being charged with Acts Affecting a Personal Financial Interest in violation of 18 U.S.C. §§208(a) and 216(a)(1). In May 2011, Respondent pleaded guilty and later was convicted on one count of a misdemeanor violation of the aforementioned statute. Respondent was sentenced in September 2011 to 24 months' probation.

As counsel relates the facts, in September 2007, Respondent offered to assist a business, Company A, which was pursuing a contract with HUD that covered a review of predatory and fair lending practices. On September 29, 2007, HUD awarded Company A the contract valued at \$100,000.00 from which Respondent's company, Innovative Ventures, Inc., received a fee of \$2000.00. Innovative's invoice sent to Company A described the services rendered as "Federal Contracting Technical Assistant" (sic). Respondent also advised Company A that he would send a "separate invoice for the up-front cost of 2%". Company A responded that "[w]e will use this invoice with no reference to HUD." In February 2008, HUD awarded another contract to Company A valued at \$1,711,750.00 to establish a call center. Respondent, prior to the award of the contract, and at the request of Company A's president, had edited and reviewed the proposal the company was planning to submit to HUD. On behalf of Innovative, Respondent billed and received a total payment of \$34,002.00 from Company A, representing approximately 2 percent of the value of the contract, for "Federal Contracting Technical Assistant."

Counsel adds that in addition to Respondent's involvement in the contracts noted above, Respondent, responding to a request from the president of Company A, reviewed and commented on a Power Point presentation that the company intended to make to HUD to secure another contract for another call center. Respondent's response to the president included his official HUD title and HUD telephone number. Also in June 2008, Respondent, acting in his official HUD capacity, recommended to HUD officials that Company A's president be the featured speaker at an official HUD function. Respondent

also forwarded an HUD email regarding “Contracting Opportunities at HUD” sent to Respondent’s personal email from the president of Company A to Respondent’s official HUD email. Further, in July 2009, Respondent wrote a letter using his official HUD title and contact information acknowledging support for a Minority Business Enterprise Award for Company A’s president. In 2009, Innovative’s website also listed Company A as one of Innovative’s four sample clients.

Counsel argues that Respondent’s provision of paid consultant and technical services to Company A with respect to the contracts noted above, which were covered transactions, made him a participant and principal in a covered transaction. *See* 2 C.F.R. §180.200. Thus, counsel contends, Respondent is subject to debarment pursuant to 2 C.F.R. part 180 because he has been and may reasonably be expected to be involved in a covered transaction. *See* 2 C.F.R. §180.120(a).

Respondent’s business dealings with Company A on no fewer than four occasions ultimately led to his criminal conviction. The conviction, counsel notes, was for “an offense in connection with obtaining, attempting to obtain, or performing a public or private agreement or transaction” and provides cause for debarment under 2 C.F.R. §180.800(a)(1). Additionally, counsel argues that Respondent’s conviction provides cause for debarment under 2 C.F.R. §180.800(a)(4) “because such a conviction indicates a lack of business integrity or business honesty that seriously and directly affects his present responsibility.” Counsel specifically notes that Respondent violated the directives of HUD’s Ethics Office with respect to his outside business dealings by rendering advice relating to a contract in which he had a financial interest. Respondent’s conduct thus “demonstrated his lack of honesty and business integrity.”

Counsel reviews the mitigating and aggravating factors under 2 C.F.R. §180.860 as they apply to this case. Counsel argues that Respondent’s actions in using his official position to assist Company A in winning certain contracts compromised the HUD procurement process. As counsel views it, the “resulting impact of Respondent’s actions is such that the procurement process was tainted.” Counsel notes that Respondent’s misconduct was not an isolated incident but involved four separate improper actions over a period of more than two years. Moreover, counsel notes that Respondent’s assertion that he terminated his relationship with Company A when he learned that Company A had been awarded a contract “is directly contradicted by the facts underlying his conviction.” Counsel notes further that “Respondent’s repeated contacts with and efforts on behalf of Company A [which continued as late as July 31, 2009] establish a pattern of wrongdoing.” “Respondent planned, initiated, and carried out the wrongdoing,” counsel asserts, from seeking the advice of HUD’s Ethics Office, then disregarding it, to his submission of invoices on behalf of Innovative. Counsel finds no evidence of Respondent’s accepting responsibility for his misconduct, nor of his recognition of the seriousness of his actions.

Counsel points out that although Respondent continues to assert that he terminated his relationship with Company A in April 2008, the facts show that on June 3, 2008, Respondent reviewed a Power Point presentation for Company A; on June 12, 2008, Respondent recommended Company A’s president as the featured speaker at a HUD event; on August 18, 2008, Respondent received from Company A a Performance Work Statement for review; and on July 31, 2009, Respondent acknowledged in an email his support for Company A to be considered for a Minority Business Award. Other

aggravating factors advanced by Government counsel was the lack of evidence that Respondent had offered to reimburse the Government for investigative and administrative costs related to his criminal case; the fact that Respondent held a high-ranking position at HUD when he engaged in his criminal conduct; and the fact that Respondent ignored the Ethics Office advice to restrict his outside consulting activities to matters that did not involve HUD program activity. Counsel cites the response from Company A to Respondent's invoice dated October 5, 2008, stating that "we will use the invoice with no reference to HUD" as an indication that "both Respondent and Company A knew what they were doing was wrong and sought to conceal their wrongdoing."

Counsel concludes that Respondent's criminal conviction and the facts underlying his conviction provide cause for his debarment, and demonstrates that he lacks integrity and present responsibility to do business with the federal government. Accordingly, the public interest warrants Respondent's debarment for three years.

Respondent's Arguments

Respondent argues, through counsel, that his interpretation of the guidance provided by HUD's Ethics Office was that he "could not work on any HUD contracts or with companies that had HUD contracts while still an employee at HUD." Respondent insists that at the time in 2007 when he was engaged by Company A to provide federal contracting technical assistance, i.e., proposal writing and review of budget forecasts, he did not realize that it was a conflict of interest to be compensated by the company. When Respondent learned in April 2008 that HUD had awarded Company A a contract (a contract in which he had performed consulting services), he terminated his business relationship with the company.

Respondent reviews the provisions at 2 C.F.R. §§180.120(a), 180.980, and 180.995 and concludes that he was not and is not involved in covered transactions. Respondent admits that while he worked with Company A on the projects that ultimately resulted in the award of contracts to Company A, he was a HUD director. Respondent argues, however, that he was not in a position to control or influence the use of federal funds or the contract selection process. *See* 2 C.F.R. §180.995(b). Respondent's official duties, he argues, were "completely separate from the work performed for Company A."

Respondent "acknowledges that it was a conflict to be compensated for the work he performed for Company A." Respondent contends, however, that he "did not perform work on any HUD contract and the conduct for which he was convicted does not fall within the scope of a criminal offense connected with obtaining, attempting to obtain, or performing a public or private agreement or transaction, as 2 C.F.R. §180.800(a) requires. Respondent continues that he "did not use his position to help Company A secure HUD contracts, nor did he attempt to deceive anyone involved." Respondent argues further that his conviction does not provide cause for his debarment under 2 C.F.R. §180.800(a)(4), although he is guilty of a conflict of interest and making a mistake as a result of his misunderstanding the advice given him by HUD's Ethics Office. As Respondent sees it, his behavior does not indicate a lack of business integrity only his misinterpretation of HUD's ethics advice.

Respondent relies on 2 C.F.R. §180.845 in arguing that even if cause for his debarment exists, he need not be debarred, and on 2 C.F.R. §180.865 for a lesser period of debarment than the three years proposed, if the Debarring Official finds that debarment is appropriate. Respondent reviews the mitigating factors in 2 C.F.R. §180.860 and finds that they “weigh heavily in favor of Respondent and demonstrates that a debarment is not an appropriate action in this case.” Respondent analyzes the applicable mitigating factors that Respondent considers present in this matter. Respondent concludes that he played no role and had no influence in the awarding of the contracts to Company A. In Respondent’s view, HUD was not harmed by his forwarding the expert’s resume nor by his reviewing and editing the proposed contract. Respondent notes that in his thirty years of Government service, “there have only been these two isolated and related instances of wrongdoing” and that he terminated his relationship with Company A as soon as he “discovered that Company A had received a contract with HUD.” Respondent notes that he has no prior history of wrongdoing, has never been excluded or disqualified by a Federal agency nor prohibited from participating in state or local contracts. Additionally, Respondent argues in mitigation that he did not plan or initiate the wrongdoing, but “misunderstood the parameters of what his company was allowed to do.” Further, Respondent states that he fully accepts responsibility for his wrongdoing and “now understands the conflict of interest that was violated” and has cooperated fully in the investigation of this matter. Respondent seeks to be given 15 months’ credit, from May 2011 when he entered his plea to July 31, 2012, when he learnt of his proposed debarment, if a period of debarment is to be imposed.

Respondent concludes that although it was a conflict of interest to be compensated for the work performed for Company A, his criminal conviction did not involve “commission of fraud, nor did it reflect lack of integrity or business honesty.” Respondent adds that he did not participate in a covered transaction and his conviction does not provide cause for debarment.

Findings of Fact

1. Respondent was at all relevant times the Director of Employee and Career Development at HUD.
2. Respondent requested advice of HUD’s Ethics Office on March 2, 2007, with respect to whether he could engage in outside employment as a business consultant.
3. In an email transmitted to Respondent on March 5, 2007, the responsible HUD official responded advising Respondent, *inter alia*, of the statutory and regulatory provisions that limit the scope of a federal employee’s outside employment.
4. Respondent thereafter on March 10, 2007, incorporated a business, Innovative Business, Inc., listing himself as president, director, and CEO.
5. In an email message transmitted on September 28, 2007, to the president of a company that sought to do business with HUD, Company A, with whom Respondent was acquainted, Respondent offered his assistance with a contract that Company A was seeking to close with HUD. As an attachment to the email was the resume of an individual with experience in

predatory and fair lending, subject matters that were directly relevant to the HUD contract under consideration.

6. HUD awarded Company A on September 29, 2007, a contract valued at \$100,000.00.
7. Respondent on October 5, 2007, submitted an invoice for \$2,000.00 to Company A for Federal Contracting Technical Assistant (sic), which Company A paid, and advised Company A that he would invoice the company separately for the up-front cost of 2%.
8. Company A responded to Respondent's invoice with the statement that Company A "will use this invoice with no reference to HUD."
9. Company A later secured another contract with HUD worth \$1,711,750.00, which, at the request of the president of Company A, had been reviewed and edited by Respondent before its submission to HUD.
10. Respondent later submitted three invoices for "Federal Contracting Technical Assistant" (sic) to Company A totaling \$34,002.00 (representing approximately 2% of the contract's value), which were duly paid by Company A to Innovative Ventures, Inc., Respondent's company.
11. In June 2008, responding to a request from the president of Company A, Respondent reviewed a Power Point presentation that Company A intended to exhibit to HUD in its quest to secure another contract with HUD. In his response to the president of Company A, Respondent used his official title and phone number.¹
12. Respondent also used his official position to recommend to HUD officials Company A's president as the featured speaker at a HUD event.
13. Respondent again used his official title in an email acknowledging support of a Minority Business Enterprise Award for Company A's president.
14. Respondent pleaded guilty to a one-count information charging him with committing Acts Affecting a Personal Financial Interest in violation of 18 U.S.C. 208(a) and (216)(a)(1). Respondent was convicted and sentenced to 24 months' probation.
15. Respondent acknowledges that his accepting compensation from Company A for the work he performed on the contracts at issue in this proceeding constituted a conflict of interest.
16. Respondent's relationship with Company A did not terminate in April 2008, as claimed by Respondent. For example, Respondent submitted an invoice in October 2008 to Company A for payment and reviewed a Performance Work Statement submitted to him by Company A in August 2008.
17. There is no evidence that Respondent has a history of prior wrongdoing.

¹ In the HUD email of March 5, 2007, responding to Respondent's request for advice and guidance on permissible outside business activities, Respondent specifically was cautioned that "you may not use your public office for you (sic) own public gain Additionally, it would be impermissible for you to include your official HUD title or any reference to your official position when conducting your outside business activities."

Conclusions

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

1. As a CEO and president of a company that performed services for a recipient of HUD funds, Respondent is subject to the debarment regulations as a “person who has been, is, or may reasonably be expected to be, a participant or principal in a covered transaction.” See 2 C.F.R. § 180.120(a).
2. Respondent’s conviction for Acts Affecting a Personal Financial Interest provides cause for his debarment pursuant to 2 C.F.R. §§ 180.800(a)(1) and (a)(4).
3. Specifically, 2 C.F.R. § 180.800(a)(1) provides that a person may be debarred if convicted for “Commission of . . . a criminal offense in connection with obtaining or performing a public or private agreement or transaction.” Respondent’s conviction for acts affecting a personal financial interest certainly relate to the acts he performed in connection with obtaining or performing the transactions for Company A and for which Company A paid him. Accordingly, Respondent’s assertion that he “did not perform work on any HUD contracts and the conduct for which he was convicted does not fall within the scope of a criminal offense connected with obtaining, attempting to obtain, or performing a public or private agreement or transaction as 2 C.F.R. § 180.800(a)(1) requires” is belied by the facts, the record, and the regulations.
4. Respondent’s attempt to redefine his criminal conduct, including his assertion that it was a conflict of interest, if accepted, would be tantamount to allowing a relitigation of and a collateral attack on his conviction. Respondent’s attempt must be rejected because it has been repeatedly held that HUD’s “regulations do not permit a collateral attack upon a conviction.” *In the Matter of Richard Scarbrough*, HUD/BCA No. 90-4885-D5, 1990 HUD BCA LEXIS 4 (February 13, 1990)
5. The regulation at 2 C.F.R. §180.800(a)(4) countenances debarment of a person who is convicted for the “[c]ommission of any other offense,” i.e., other than the offenses enumerated in paragraphs (a)(1) through (a)(3). The “other offense,” the regulation makes plain, is only actionable if it “indicat[es] a “lack of business integrity or business honesty.” The acts underlying Respondent’s conviction as discussed here and as more fully detailed in the record of Respondent’s criminal proceeding² clearly leave little doubt with respect to Respondent’s lack of business integrity and honesty. The courts have held that debarment is a sanction, which may be invoked by HUD as a measure of protecting the public by ensuring only those qualified as “responsible” are allowed to participate in HUD programs. *In re. Buckeye Terminix Co., Inc.*, citing *Stanko Packing Co. v. Bergland*, 489 F. Supp. 947, 949 (D.D.C. 1980) and *Roemer v. Hoffman*, 419 F. Supp. 130, 131 (D.D.C. 1976).

² See, e.g., Gov’t Ex. 5 “Information” and Ex. 10 Statement of Offense.

6. The contracts awarded to Company A, and for which Company A paid Respondent for services rendered therewith, are covered transactions,³ Respondent's protestations notwithstanding. See 2 C.F.R. §180.200, which provides that "a covered transaction is a non-procurement or procurement transaction that is subject to the prohibitions of [2 C.F.R. part 800]. It may be a transaction at- (b) A lower tier, between a participant in a covered transaction and another person." In this matter, Company A was the participant⁴ and Respondent the other person.
7. Even assuming *arguendo* that the contracts at issue here are not covered by HUD's debarment regulations, because they are nonprocurement contracts, as Respondent's argument seems to imply, Respondent would still be subject to the debarment regime. The very nature of the work undertaken by Respondent, and Respondent's professional experience and knowledge, would qualify him as a person who has been or may reasonably be expected to be a participant in a covered transaction. See 2 C.F.R. § 180.120. Accordingly, as provided in the regulations at 2 C.F.R. § 180.150, "[g]iven a cause that justifies an exclusion under this part, a Federal agency may exclude any person who has been, is, or may reasonably be expected to be a participant or principal in a covered transaction." In the instant matter, the cause that justifies Respondent's exclusion is his criminal conviction. See 2 CFR § 180.800.
8. The regulations at 2 C.F.R. § 180.125(a) provide that "to protect the public interest, the Federal Government ensures the integrity of Federal programs by conducting business only with responsible persons." Thus, it is well established that lack of present responsibility can be based upon past acts. See *In re Buckeye Terminix Co., Inc.*, HUDALJ 89-1402-DB (August 31, 1990), holding that "Responsibility encompasses the projected 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." (Citations omitted)
9. In light of the very clear guidance given Respondent in HUD's email of March 5, 2007 (Gov't Ex. 8), responding to Respondent's request for guidance with respect to his proposed outside business activities, I find Respondent's assertion that he made "a mistake resulting from misunderstanding the advice that he was given" or any "suggestion of ignorance or naiveté [as] neither credible nor reasonable." *In the Matter of James J. Wannemacher*, HUDBCA No. 81-585-D14, 1981 HUD BCA LEXIS 14 (December 2, 1981). Respondent functioned at a senior level at HUD and could not have misinterpreted a simple instruction such as, for example, "it would [be] impermissible for you to include your official HUD title or any reference to your official position when conducting your outside

³ The contracts at issue in this proceeding ordinarily would be considered procurement contracts, thus not covered by the nonprocurement regulations. However, pursuant to 48 C.F.R. § 2409.7001, and notwithstanding 2 C.F.R. § 180.220(a)(1), the debarment regulations at 2 C.F.R. part 180 apply to procurement contracts.

⁴ See 2 C.F.R. § 180.980 defining 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."

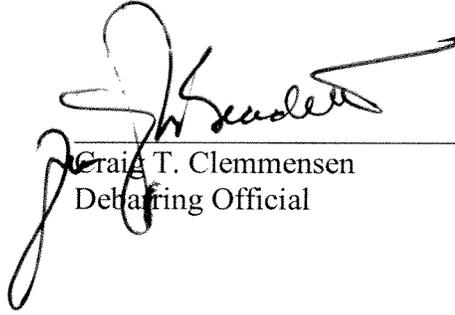
business activities.” As the record shows, Respondent violated this simple, unambiguous instruction.

10. HUD has established a cause for Respondent’s debarment by a preponderance of the evidence based upon Respondent’s criminal conviction. *See* 2 C.F.R. § 180.850.
11. Pursuant to 2 C.F.R. § 180.860, the following mitigating and aggravating factors were considered in imposing an appropriate period of debarment: Respondent’s formerly clean record and thirty years of federal government service; his acceptance of responsibility for and recognition of his misconduct; and his cooperation with the criminal investigation. As aggravating factors, I considered the following: the fact that Respondent’s misconduct was motivated by pecuniary gain; the role that his involvement in the procurement process may have played in giving his client, Company A, an advantage over its competitors; the fact that his misconduct occurred over an extended period and involved more than one transgression; the fact that he planned and initiated his impermissible actions while employed in a senior capacity at HUD.
12. I did not consider Respondent’s plea that he be given 15 months’ credit (in the event a period of debarment is to be imposed) retroactive to the date of his retirement from HUD in May 2011 to the date of his proposed debarment, July 31, 2012. Retroactive debarment, it has been held, “is contrary to the intent of the debarment regulations which is a prospective and protective sanction.” *In the Matter of Louis Johnson*, HUDBCA No. 79-392-D34, 1979 HUD BCA LEXIS 38 (November 26, 1979).
13. In considering a period of debarment in this matter, I find the aggravating factors far outweigh the mitigating factors and am guided by the provisions of 2 C.F.R. § 180.865.
14. After careful consideration of the entire record in this proceeding, including especially the facts presented and arguments raised by Respondent, I conclude that Respondent has failed to demonstrate that he is presently responsible. *See* 2 C.F.R. § 180.855.
15. Respondent’s actions described here raise grave doubts with respect to his business integrity and personal honesty.
16. HUD has a responsibility to protect the public interest and take appropriate measures against participants whose actions may affect the integrity of its programs.
17. 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 C.F.R. §§ 180.870(b)(2)(i) through (b)(2)(iv), to debar Respondent for a period of three years from the date of this Determination. Respondent's "debarment is effective for covered transactions and contracts that are subject to the Federal Acquisition Regulation (48 C.F.R. chapter 1), throughout the executive branch of the Federal Government unless an agency head or an authorized designee grants an exception."

Dated: 1-9-2013



Craig T. Clemmensen
Debarring Official

CERTIFICATE OF SERVICE

I hereby certify that on this 9TH day of January 2013, a true copy of the DEBARRING OFFICIAL'S DETERMINATION was served in the manner indicated.



Deborah Valenzuela
Debarment Docket Clerk
Departmental Enforcement Center (Operations)

HAND-CARRIED

Mortimer F. Coward, Esq.
Debarring Official's Designee

David R. Scruggs, Esq.
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FIRST CLASS MAIL

Reginald B. Hayes


FIRST CLASS MAIL and ELECTRONIC MAIL

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