In the Matter of:	:	
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MICHAEL C. KANTROW,	:	HUDBCA No. 95-A-109-D7
	:	Docket No. 95-A-5014-DB
Respondent	:	
	:	

For the Respondent:

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For the Government:

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DETERMINATION BY ADMINISTRATIVE JUDGE DAVID T. ANDERSON

August 2,1995

Statement of the Case

By letter dated October 31,1994, Michael B. Janis, General Deputy Assistant Secretary of the U.S. Department of Housing and Urban Development ("HUD", "Department", or "Government"), notified Michael C. Kantrow ("Kantrow" or "Respondent") and his affiliates, Premier Management, Marvin C. Gold Construction Company, Inc., ("Gold Construction") and Kantro Construction Co., Inc. ("Kantro Construction"), that, based on the conviction of Kantrow for violation of 18 U.S.C. § 286, the Department was considering debarring Respondent and his affiliates 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 three-year period commencing from the date of Respondent's suspension, February 24, 1993. The notice also informed Respondent that the suspension of Respondent and his affiliates from further participation in covered transactions and procurement contracts with the Government was to continue until such time as a final determination is made on the proposed debarment.

By letter dated November 10, 1994, Kantrow requested a review of the proposed debarment on his own behalf and on behalf of his affiliate, Premier Management. Respondent states that Kantro Construction Company, Inc. no longer exists. This assertion is not disputed by the Government. No appeal was made on behalf of Gold Construction. Inasmuch as this proposed debarment is based on a criminal conviction, a hearing is limited to consideration of briefs and documentary evidence only. 24 C.F.R. § 24.313(b)(2)(ii).

Findings of Fact

1. At all times relevant to this proceeding, Respondent was part owner of, and was employed by, Gold Construction, and had management responsibility within the company. (Superseding Indictment, ¶ 2). He was the owner of Kantro Construction, and is the owner of Premier Management.

2. On or about September 7, 1982, Gold Construction entered into a contract with the New Haven Housing Authority ("Housing Authority") to construct 151 units of low- income housing, known as the Westville Manor project. Gold Construction was the owner, developer and general contractor of the Westville Manor project at that time. (Superseding Indictment, ¶ 5). The contract was a turnkey contract, whereby upon the completion of the Westville Manor project, Gold Construction would exchange the project with the Housing Authonty for $11,175,497.00. The funds for the development and construction of the project were provided by HUD. (Superseding Indictment, ¶¶ 6, 7).

3. Marvin C. Gold, owner of Gold Construction, died on or about February 29, 1984. On or about November 16, 1984, ownership of the Westville Manor project was assigned to the New Haven Turnkey Construction Co., Inc. ("New Haven Turnkey"), a corporation owned by Arthur Greenblatt. Greenblatt hired Respondent's company, Kantro Construction, to act as general contractor to complete the Westville Manor project. (Resp. Brief, ¶¶ 13, 14).

4. In December, 1984, Respondent and Greenblatt jointly decided to submit a change order request. (Resp. Brief, ¶ 15). On or about December 31, 1984, Respondent "caused a false and fraudulent change order request to be submitted [by New Haven Turnkey to the New Haven] Housing Authority seeking additional funding in the amount of $1,013,095 for the Westville Manor project." (Superseding Indictment, ¶ 26 (a)). Respondent's brother, Richard Kantrow, who worked for Kantro Construction, authorized the change order request on behalf of Kantro Construction. (Resp. Brief, ¶ 20). False and fictitious records in support of the change order request were also submitted to the New Haven Housing Authority. (Superseding Indictment, ¶ 22). The basis of the requested increase was to pay for actual costs incurred as a result of unknown subsurface soil conditions. (Resp. Exh. I).

5. The New Haven Housing Authority denied the change order request by letter dated March 6, 1985, claiming it had no liability for the condition of the site, which was sold to the Housing Authority by HUD as "free of all debris from the previous development". (Resp. Exh. J). The HUD Hartford Office denied the change order request by letter dated March 20, 1985, on the grounds that the developer assumed responsibility for subsurface conditions at the development site. (Resp. Exh. K). New Haven Turnkey, at the direction of Greenblatt and Respondent, appealed to the HUD Boston Regional Office. (Resp. Exh. M). The change order request was also denied by the HUD Boston Regional Office, by letter dated July 18, 1985, for the same reason. (Resp. Exh. N). The change order request was thereafter submitted to the HUD Central Office. Respondent "took the lead" in appealing to the HUD Central Office the denial of the change order request. (Resp. Brief, ¶ 19). By memorandum dated October 23, 1985, a change order increasing the contract price by $813,295.00 was approved by Warren T. Lindquist, then Assistant Secretary for Public and Indian Housing. (Resp. Exh. G). HUD provided the additional contract funds at the closing of the Westville Manor project "in part on the basis of the false and fraudulent change order request that had been submitted by [Respondent]." (Superseding Indictment, ¶ 26 (g)).

6. On a date undeterminable from the record of this proceeding, Respondent, along with his brother, Richard Kantrow, was indicted in the United States District Court for the District of Connecticut for Conspiracy to defraud the United States with respect to claims in violation of 18 U.S.C. § 286. (Govt. Exh. A). A similar superseding indictment was issued on January 19, 1994, which also charged Respondent, along with his brother, with violation of 18 U.S.C. § 286. (Govt. Exh. B). The indictments charged that Respondent caused a false change order request to be prepared and submitted to HUD in order to obtain additional funding for the completion of the Westville Manor Project. (Superseding Indictment, ¶¶ 18-20).

7. Respondent entered into a plea agreement with the U.S. Attorney for the District of Connecticut. (Resp. Brief, ¶ 1). Under the terms of the agreement the government dropped the indictment against Respondent's brother, Richard Kantrow, in exchange for Respondent's guilty plea. Respondent pled guilty in the U.S. District Court for the District of Connecticut to one count of Conspiracy to defraud the United States with respect to claims in violation of 18 U.S.C. § 286. On July 15, 1994, he was sentenced to be placed on probation for a period of two years, to pay restitution to HUD in the amount of $50,000 and a fine of $75,000, and to perform 200 hours of community service. (Govt. Exh. C).

8. Several letters submitted in connection with Respondent's criminal proceeding by Respondent's friends, family, and business associates attest to Respondent's dedication to the community of New Haven, and his support of educational programs, a health facility, a community center, and programs aimed at providing educational opportunities to lower income students. The letters also detail Respondent's generous donations to schools and youth programs in the community, and Respondent's commitment to providing quality low-income housing through his management and development of HUD-regulated properties. (Resp. Exh. T).

Discussion

Respondent admits that Premier Management Company and Kantro Construction Company, Inc. are his affiliates. (Answer, ¶¶ 4, 6). Respondent argues that Gold Construction is not his affiliate under HUD regulations. (Resp. Brief, ¶ 5). Applicable HUD regulations provide that "persons are affiliates of each other if, directly or indirectly, either one controls or has the power to control the other . . . Indicia of control include, but are not limited to: interlocking management or ownership . . ." 24 C.F.R. § 24.105 (b). The superseding indictment, to which Respondent pled guilty, states that "at all times relevant... Michael C. Kantrow was part owner of, and was employed by, M.C. Gold, and had management responsibility within the company." (Superseding Indictment, ¶ 2). Because the facts in the record of this proceeding clearly show that Respondent exercised management authority within Gold Construction, this evidence of Respondent's control brings Gold Construction within HUD's definition of an affiliate. Therefore, I find that Gold Construction is Respondent's affiliate under applicable HUD regulations. It is uncontested that Respondent is a "participant" as defined at 24 C.F.R. § 24.105(m) because he has previously entered into multiple covered transactions with HUD and may reasonably be expected to do so in the future. He is also a "principal" as defined at 24 C.F.R. § 24.105(p) because he exercised control over Gold Construction and Kantro Construction Co., Inc. at the time the offenses were committed. 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 of 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 affects the present responsibility of a person.

The Government bears the burden of demonstrating 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 BCA ¶ 15,716. When the proposed suspension and debarment are based on an indictment and conviction, that evidentiary standard is deemed to have been met. 24 C.F.R. §§ 24.405(b) and 24.3 13(b)(3). However, 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). Respondent bears the burden of proving the existence of mitigating circumstances. 24 C.F.R. § 24.3 13(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 if responsible" persons or entities. 24 C.F.R. § 24.115. The term "responsible" 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). A debarment shall be used only to protect the public interest and not for purposes of punishment. 24 C.F.R. § 24.115(d).

Respondent's conviction for conspiracy to defraud the United States with respect to contract claims raises legitimate concerns with respect to Respondent's fitness to participate in HUD programs. The offense involves dishonesty, which impacts directly upon the question of Respondent's present responsibility. "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).

The Government argues that Respondent's conviction is indicative of a lack of present responsibility and demonstrates that Respondent is a risk to Government programs. Respondent does not deny that false change order requests were submitted to HUD by and on behalf of his company, Kantro Construction. He maintains, however, that he should not be held responsible for the false change order requests because "he has done nothing wrong. (Resp. Brief, p. 11). Respondent submits that he pled guilty to conspiring to defraud the Government in order "to avoid the expense and turmoil of a second trial, and in order to save his younger brother, and both of their families, from the same situation, and not because he believed himself to have been guilty of the charges contained in the indictment." Id. Respondent claims that, based on his professional conduct before and after the commission of the acts which led to his conviction, imposition of debarment is not warranted. Respondent notes his "unblemished past" as mitigating evidence. While past professional conduct is a

mitigating factor, it, per se, does not establish present responsibility. Furthermore, Respondent's stated reasons for pleading guilty to the acts which led to his suspension and conviction, and which serve as the basis of this debarment proceeding, are, in my view, insufficient bases for mitigation. I give little weight to the motives of respondents which underlie a guilty plea because such motives are essentially self-serving and irrelevant to the established fact that a respondent committed a criminal act. See Melvin Smith, Jet-It Systems, Inc., HUDBCA No. 90-5320-D81 (Oct. 20, 1992).

Respondent submits that the passage of ten years since he committed the acts which led to his conviction and suspension in 1994, coupled with the absence of recent misconduct, makes the imposition of debarment unwarranted. (Resp. Brief ¶¶ 33, 34). This Board has viewed a substantial passage of time following misconduct leading to the imposition of an administrative sanction as being a potentially mitigating factor. ARC Asbestos Removal Co., Inc., HUDBCA No. 91-579 1-D25 (Apr. 12, 1991). However, the passage of time, ipso facto, does not establish present responsibility. Howard L. Perlow, HUDBCA No. 92-713 1-D5 (Dec. 3, 1992); Carl W. Seitz and Academy Abstract Co., HUDBCA No. 91-5930-D66 (Apr. 13, 1992); cf, Fed. R. Civ. P. 609 (evidence of conviction involving dishonesty or false statement may be admissible even if more than ten years has elapsed since the date of conviction where a court determines that probative value outweighs prejudicial effect). The appropriate test for present responsibility does not focus merely on the number of years which have passed since Respondent's misconduct occurred, but rather on current indicia of Respondent's professionalism and business practice which the Government must consider before it again assumes the risk of conducting business with Respondent. Carl W. Seitz, supra.

In the several cases Respondent has cited for the proposition that the substantial passage of time should be a mitigating factor, the passage of time was coupled with sufficient mitigating evidence. See, e.g., Kenneth Lange, HUDBCA No. 92-A-7594-D56 (Oct. 23, 1992) (where Respondent expressed remorse and submitted evidence of rehabilitation); Douglas A. Hauck, HUDBCA No. 92-A-7582-D49 (March 4, 1994) (where Board refused to impose further debarment after Respondent voluntarily agreed to a three-year debarment). Respondent has neither adequately explained nor provided evidence of remorse for the submission of the fraudulent change order requests on behalf of his company. Nor has Respondent provided evidence that, during the passage of time between the commission of the criminal conduct and his indictment, he acted responsibly by bringing his criminal conduct to light and accepting responsibility for his injury to the integrity of a federal program. Absent such a showing, the mere passage of time, in this case, does not assure me that Respondent does not presently pose a threat to the integrity of HUD programs.

Respondent argues in his brief that he no longer participates in activities which would give rise to the conduct for which he was convicted and suspended. This argument does not persuade me that Respondent will conduct himself responsibly in other activities in which he may be a HUD participant, especially since he has failed to show an understanding of the seriousness of the offense for which he was convicted. See The Mayer Company, Inc., and Carl A. Mayer, Jr., HUDBCA No. 81-544-Dl (Dec. 1, 1981) (where Respondent's statement of remorse and understanding of his irresponsible management was found to be a significant mitigating factor).

Respondent has submitted a number of letters which attest to his character and integrity. While the letters establish that Respondent is a valued member of his community and has successfully managed HUD properties in the past, they

provide only limited insight into Respondent's past or present responsibility as a developer of HUD-regulated properties, and are, therefore, deficient in probative value. See Jose M. Ventura Alisis, HUDBCA Nos. 87-2956-D6, 87-3403-D24 (Sept. 22, 1988). Respondent has, however, submitted a letter from Robert S. Donovan, Acting State Coordinator for the HUD Hartford Office, which attests to Respondent's success in developing and managing HUD-involved properties, as evidence of his present responsibility. (Resp. Exh. T). Nevertheless, the attestations of Donovan regarding Respondent's ability in this area do not outweigh the seriousness of Respondent's acts enough to convince me that a debarment of Respondent is not necessary to protect the public interest. While the mitigating effect of the letters appears to have convinced the sentencing judge not to impose a period of incarceration, but instead a sentence of probation, restitution, community service, and fine upon Respondent, the letters do not provide persuasive evidence that Respondent presents no future risk to public programs. A mild penal sentence, ipso facto, does not demonstrate that a prospective sanction is not warranted.

I remain disturbed by Respondent's insistence, notwithstanding his guilty plea, that he did "nothing wrong" by submitting the fraudulent change order requests to HUD essentially because he did not prepare them. Respondent claims that another company, C&M Paving Corp., which was independent of Respondent, "had been engaged by the Gold estate." (Resp. Brief, ¶ 20). Respondent states that he "assumed that the change orders were prepared by C&M", and that he "had no reason for questioning the accuracy or the authenticity of the change orders." (Resp. Brief, ¶ 21). Yet, Respondent admits that he and Greenblatt `determined that it would be appropriate to put together a change order request in light of the problems, costs and delays caused by the surface debris." (Resp. Brief, ¶ 15).

Respondent further admits that he "took the lead" in appealing the denial of the change order request to the HUD Central Office after the request was denied by three other HUD offices. (Resp. Brief, ¶ 19). I find it extremely difficult to excuse Respondent from his obligation to make sure that the public interest and the Department are not put at risk by inattention to accuracy and reliability.

Even if I were to accept Respondent's argument that he was not personally involved in the preparation of the false change order request, as a principal of Kantro Construction, Respondent can be held ultimately responsible for change order requests submitted on its behalf. See The Mayer Company, Inc. and Carl A. Mayer, Jr., supra. Respondent submits that he is an experienced participant in HUD's housing programs, and has acted as a general contractor, turnkey contractor, developer and project manager. (Resp. Brief, ¶¶ 28, 29). Respondent's claim that he was not aware that the change order request which was submitted on his company's behalf was false does not completely exculpate him from accountability. Clearly, someone with Respondent's experience and authority should know or have reason to know if a false change order request is prepared and submitted by employees under his supervision. The Mayer Company, inc. and Carl Mayer, supra. Yet, Respondent maintains his innocence regarding his role in allowing a fraudulent change order request to be prepared and submitted on behalf of his company to several HUD offices. Because of Respondent's managerial acquiescence, indifference, and inattention, the Department could well remain at risk in future dealings with Respondent and his affiliates.

Conclusion

The debarment regulations provide, in pertinent part, that debarment for causes such as those at issue here generally should not exceed three years, except where circumstances warrant a longer period of debarment. 24 C.F.R. § 24.230(a). The offense for which Respondent was convicted and suspended is serious and demonstrates a lack of integrity. Respondent has not demonstrated sufficient evidence of mitigating circumstances which would show that Respondent is presently responsible. Consequently, I conclude that the Government's proposal to debar Respondent for a period of three years is well-founded.

Therefore, for the foregoing reasons, I find that the suspension of Respondent and his affiliates, Marvin C. Gold Construction Company, Kantro Construction Co., Inc., and Premier Management, is warranted, and that a three year debarment of Respondent and his affiliates is necessary to protect HUD and the public. Respondent and his affiliates shall be debarred from this date up to and including February 24, 1996, credit being given for the Period of time since February 24, 1993, during which Respondent and his affiliates have been excluded from participation in the programs of this Department.

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David T. Anderson
Administrative Judge

August 2, 1995