

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

In the Matter of:	*	
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JOHN HYERS, SR.,	*	DOCKET NO. 13-0045-DB
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	*	
Respondent.	*	
	*	

DEBARRING OFFICIAL'S DETERMINATION

INTRODUCTION

By Notice dated January 3, 2013¹ ("Notice"), the Department of Housing and Urban Development ("HUD") notified Respondent JOHN HYERS, SR. that HUD was proposing his 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. Respondent was advised that his suspension was based upon an Information filed in the United States District Court for the Eastern District of New York charging him with violating 18 U.S.C. 1349 (Conspiracy to Commit Mail and Wire Fraud). The Notice advised Respondent also that the Information constituted adequate evidence on which to base his suspension under 2 C.F.R. §§ 180.700 and 180.705. Subsequently, by notice dated April 8, 2013, HUD notified Respondent of his Proposed Debarment and Continuation of Suspension (Notice) based on his conviction for violation of 18 U.S.C. 1341, 1343, and 1349 (Conspiracy to Commit Mail and Wire Fraud). The Notice advised Respondent, *inter alia*, that his conviction was cause for debarment under 2 C.F.R. §§ 180.800(a)(1) and (4) for a three-year period, and that his suspension from participation in procurement and nonprocurement transactions would continue pending completion of the debarment proceedings.

A hearing on Respondent's suspension and proposed debarment was held in Washington, D.C. on July 9, 2013,² before the Debarring Official's Designee, Mortimer F. Coward. Respondent was represented by Marvelle L. Butler, Esq. Terry L. Roman, Esq. appeared on behalf of HUD.

¹ The Notice erroneously shows the issuance date as "JAN 12, 2012."

² The parties were given the opportunity to submit post-hearing briefs limited to the issue of the mitigating factors present in this case and the appropriateness of their treatment, if at all. Both parties submitted timely briefs.

Summary

I have decided, pursuant to 2 CFR 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 three years from the date of his suspension, January 3, 2013. My decision is based on the administrative record in this matter, which includes the following information:

- (1) The Notice of Suspension dated January 3, 2013.
- (2) The Notice of Proposed Debarment and Continuation of Existing Suspension dated April 8, 2013.
- (3) Respondent's Memorandum in Opposition to HUD's Suspension dated March 1, 2013 (including all exhibits and attachments thereto).
- (4) The Government's Pre-Hearing Brief in Support of Three-Year Debarment filed June 4, 2013 (including all exhibits and attachments thereto).
- (5) Respondent's Pre-Hearing Brief in Opposition to Government's Request for Three-Year Debarment filed June 24, 2013 (including all exhibits and attachments thereto).
- (6) Respondent's Post-Hearing Brief in Opposition to Government's Request for Three-Year Debarment filed July 23, 2013 (including all attachments thereto).
- (7) The Government's Post-Hearing Brief Further Addressing the Factors Set Forth at 2 C.F.R. §180.860 filed July 23, 2013.

Government Counsel's Arguments

Government counsel states that during the period 1999 through 2009, Respondent was Director of Field Operations and General Superintendent in New York of a large company that provided construction services on various large projects, including construction of major federal buildings. During this period, Respondent and others devised a scheme to defraud federal and other governmental agencies as well as private clients by making false representations in billing requisitions, certified payrolls and other documents submitted to these agencies and others in connection with work performed by the company on construction projects. The fraudulent payrolls represented that that all of the hours for which the company billed its clients and paid its labor foremen were for hours actually worked when, in fact, the foremen had not worked all of the hours billed.

The fraudulent scheme followed a practice (known as "8 + 2") in which one to two hours of unworked overtime per day was added to the time sheets of labor foremen. Additionally, the scheme allowed foremen to be absent from work for sick days, major holidays, and one or two weeks of vacation per year. The time sheets submitted to the company's clients billed those hours as worked, however, when, in fact, the foremen had not worked those hours. The company also billed its clients for unearned extra lump sum and stipend payments it paid to a group of select foremen.

Respondent pleaded guilty to one count of conspiracy to commit mail and wire fraud for his role in the scheme of directing his subordinates to fraudulently over-bill his company's clients. Respondent was sentenced to one-year of probation and fined \$15,000.00.

Counsel argues that Respondent is subject to the debarment regulations at 2 CFR part 180 because he is a person who "has been, is, or may reasonably be expected to be, a participant or principal in a covered transaction," 2 C.F.R §180.150, based on his employment with a company that contracted with federal agencies. Specifically, Respondent was a lower-tier participant employed by a primary-tier participant in a position in which he, among other things, personally supervised the day-to-day field operations of federally funded projects, i.e., covered transactions, and was granted access to and control over federal agencies' funds. *See* 2 CFR § §180.200, 180.980, and 180.985.

Counsel argues that Respondent's wrongdoing is cause for his debarment under 2 CFR §§ 180.800(a)(1) and (a)(4). Specifically, Respondent's conviction of a crime that involved fraud is a cause for debarment pursuant to 2 CFR § 180.800(a)(1). Additionally, Respondent's conviction provides cause for his debarment under 2 CFR § 180.800(a)(4), "because the criminal offenses for which he was convicted indicates a lack of business integrity or business honesty that seriously and directly affects Respondent's present responsibilities [sic]."³ Counsel adds also that cause for Respondent's debarment must be established by a preponderance of the evidence and that standard of proof is met when the debarment is based on a conviction. *See* 2 C.F.R. § 180.850.

Government counsel states that Respondent's conviction for mail fraud demonstrates his lack of present responsibility, and his "fraudulent conduct through submission of false timesheets to clients is contemptible and reprehensible and warrants a period of debarment that is commensurate with the seriousness of his conduct." Counsel continues that Respondent participated in the fraudulent scheme for ten years, that week after week for ten years, Respondent had the opportunity to reflect upon his actions and decide whether to submit timesheets that truthfully reported the number of hours worked by the foremen or to submit inflated timesheets" nonetheless "despite this opportunity to reflect upon his actions, Respondent continued with his criminal conduct until a criminal investigation was initiated." Counsel continues that "[s]uch deliberate conduct demonstrates a disturbing lack of honesty, integrity and responsibility and justifies precluding him from doing business with the Federal government for, at a minimum, the proposed three-year period." Gov't Brief at 12-13.

³ The regulation at 2 C.F.R. § 180.800 provides that "A Federal agency may debar a person for – (a) Conviction of or civil judgment for * * * (4) Conviction of any **other** offense indicating a lack of business integrity or business honesty that seriously and directly affects your present responsibility." Respondent, as set forth above, was convicted of one offense – conspiracy to commit mail and wire fraud. Thus, there is no "other" offense, which, under the plain meaning of the regulation, is a *sine qua non* to for the applicability of (a)(4). Any other reading would render the word "other" a mere superfluity, and engraft an interpretation on the regulation that this official is without authority to do. For this reason, if debarment were to be imposed on Respondent today, his exclusion will not be based on 2 C.F.R § 180.800(a)(4).

Counsel argues further that Respondent continues to demonstrate a lack of present responsibility by making the “perverse argument” made in his Memorandum of Opposition that his “[a]ctions actually benefited many decent individuals.” As counsel sees it, Respondent’s “self-satisfying justification of his actions” shows that even now Respondent still fails to “understand the nature and scope of his wrongdoing.” Respondent’s actions, counsel submits, may have been beneficial to some, but the federal government and others were harmed. Respondent’s ignoring of the harm his conduct caused to his company’s clients demonstrates that “the federal government is still in need of protection” from Respondent.

Counsel reviews the mitigating and aggravating factors in 2 C.F.R. § 180.860, noting that Respondent’s submission of false bills in connection with “massive [federal and private] construction projects” resulted in clients’ paying for work that was not done, which represents “actual harm.” Respondent’s admitted participation in the fraudulent scheme lasted for over ten years, thus he engaged in “approximately 520 instances of fraud.” In determining whether Respondent has acted responsibly for his actions, counsel looks at Respondent’s Presentencing Report and Memorandum in Opposition, concluding that Respondent “vacillates wildly between justifying his fraudulent actions and accepting responsibility.” In considering other factors, counsel notes, *inter alia*, that Respondent paid the \$15,000.00 fine; that he cooperated with the criminal investigation of the fraudulent scheme, though counsel observes that such cooperation, because it began after the criminal investigation commenced “does not demonstrate genuine remorse or a change in his character”; that Respondent personally participated in the fraud while holding a senior position in the company; that Respondent did not bring the wrongdoing to the attention of the authorities, nor did he investigate the wrongdoing, but was personally responsible for the wrongdoing and did not act to “eliminate the circumstances within [the company] that led to the fraud.”

Counsel concludes that Respondent’s conviction for fraud demonstrates that he is not presently responsible and that a three-year debarment is warranted.

Respondent's Arguments

Respondent, in his brief, acknowledges that, during the relevant period, he continued the “long standing practice” of his company of paying foremen for unworked overtime and for unearned vacation and holiday hours. According to Respondent, many companies in the construction industry engaged in the practice. Respondent also admits that he used poor judgment in continuing the practice. Respondent does not dispute that the Information charging him with the wrongdoing discussed here provides a basis for his immediate suspension. Similarly, Respondent acknowledges that his conviction provides a basis for his debarment.

Counsel urges the Debarring Official to consider “the totality of the circumstances” present in this matter before making his decision. According to counsel, Respondent’s “actions derived from his misguided impression that he was obligated to follow his company’s long standing practice” with respect to paying foremen for

overtime not worked and for unearned vacation and holiday pay. Respondent now expresses his remorse and disappointment concerning his role in the fraudulent scheme, thus counsel argues Respondent's "misconduct then should not be a complete reflection of his present responsibility now." Counsel continues that Respondent "did not personally benefit or receive any pecuniary gain from his actions," and that Respondent's "actions actually benefited many decent individuals." Counsel notes that Respondent fully cooperated with the investigation and disclosed to the investigators his knowledge of the practices and the people involved in the scheme. Counsel argues that Respondent committed no acts of wrongdoing prior to the one at issue here, which shows that Respondent is presently responsible and debarment is not warranted.

Counsel contends that although Respondent pleaded guilty to fraud, it does not follow that he should be debarred; instead he should be given a second chance to redeem himself. Counsel notes that Respondent "received no pecuniary gain from his misconduct," and that the "acts that led to his conviction were an isolated incident and not consistent with his true character." Counsel cites from the many letters of support for Respondent from friends, family, colleagues and others who attested to Respondent's good character and other worthy qualities.

Counsel specifically refers to some of the mitigating factors in 2 C.F.R § 180.860, including those already discussed above and to Respondent's honorable service in the army during the Vietnam War. Among the factors mentioned are Respondent's payment of the court fine of \$15,000.00, Respondent's completion of an ethics course, no prior history of wrongdoing by Respondent, Respondent's "substantial assistance" during the criminal investigation, and also asserting that Respondent did not plan or initiate the wrongdoing. Additionally, counsel cited liberally from Respondent's letter to the sentencing judge in which Respondent expressed his deep regret and remorse for his wrongdoing and accepted responsibility for his actions.

Further, Respondent testified at the hearing that, on learning of the investigation, he sought advice from a labor lawyer who opined that the unearned payments to the foremen were a stipend. Respondent so advised his superiors. Additionally, when Respondent attempted to disclose the scheme to the US Attorney, that office put him off for a year. Respondent testified with conviction and candor concerning his despair at the harm that he had caused to his family, his company, and others.

Counsel notes that the public interest will be protected while Respondent is on probation because any violation of the conditions of his probation "will subject him to incarceration."

Counsel concludes that for all the foregoing reasons, Respondent's suspension should not be terminated and debarment not be imposed.

Findings of Fact

1. Respondent, at all relevant times, was a General Superintendent and Director of Field Operations of a construction company that provided construction services on buildings being constructed for federal government agencies and other entities
2. Respondent was responsible for certifying timesheets of workers employed by the construction company in the construction of these buildings.
3. Included in the workers' timesheets that Respondent certified were timesheets of foremen.
4. These foremen were regularly paid for overtime work that they had not performed and also for vacation and sick days to which they were not entitled.
5. The practice predated Respondent's tenure as General Superintendent and Director of Field Operations and was fairly common in the industry in the New York area.
6. Respondent was charged by Information and pleaded guilty to one count of conspiracy to commit mail and wire fraud.
7. Respondent was sentenced to probation for one year and ordered to pay a fine of \$15,000.00, which he has paid.
8. Respondent acknowledges his wrongdoing and expresses remorse for his actions.

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 by virtue of his supervisory role in his company's performance of contracts with federal agencies.
2. Respondent's criminal conviction serves as the basis for his debarment.
3. Respondent's wrongdoing provides cause for his debarment pursuant to 2 CFR § 180.800(a)(1).
4. HUD has met its burden of proving that cause for debarment exists on the basis of Respondent's conviction. *See* 2 CFR § 180.850(b).
5. Respondent's forthrightness in his testimony and expressions of remorse for his wrongdoing and acceptance of responsibility for his actions is a mitigating factor in determining the appropriate period of debarment to be imposed.
6. The overwhelmingly favorable comments attesting to Respondent's honesty and good character from friends and family members, veterans with whom Respondent served in Vietnam, Respondent's formerly unblemished record, the high regard for his work ethic and accomplishments expressed by his colleagues, the relative leniency of the criminal sentence imposed on him are all mitigating factors that were considered in arriving at a just and appropriate period of debarment.
7. I considered also that Respondent did not gain financially from the fraudulent scheme and the absence of evidence that he was motivated by cupidity or greed.

8. I considered further the fact that there is no evidence in the record that Respondent has engaged in any wrongdoing since his involvement in the fraudulent scheme came to light.
9. As aggravating factors, I considered the length of time that Respondent participated in the scheme and the financial harm Respondent's actions caused his company's clients and his company, including the large restitution payment that his company, though not Respondent, must make to overbilled clients.
10. The regulation at 2 C.F.R. §180.125 paragraph (a) provides that "[t]o protect the public interest, the Federal Government ensures the integrity of Federal programs by conducting business only with responsible persons." Paragraph (b) limits the application of the debarment regulations to "exclude from Federal programs persons who are not presently responsible." And paragraph (c) cautions that "[a]n exclusion is a serious action that a Federal agency may take only to protect the public interest. A Federal agency may not exclude a person or commodity for the purposes of punishment." Under 2 C.F.R. § 180.865 (a), a respondent's "period of debarment will be based on the seriousness of the cause(s) upon which your debarment is based."
11. In mediating the competing interests the above-cited regulations were enacted to serve, the courts have held that "a finding of present lack of responsibility can be based upon past acts." *Schlesinger v. Gates*, 249 F.2d 111 (D.C. Cir. 1957). Accordingly, Respondent's participation in the fraudulent scheme at issue here justifies a finding that he is not presently responsible, thus leading to his exclusion.
12. A finding that a respondent lacks present responsibility then requires a determination of what period of debarment, if any, is appropriate. This determination requires not only a recognition of the "seriousness of the causes(s)" that may justify debarment but that concomitantly consideration be given to the aggravating and mitigating factors present in each case.
13. It is inarguable that fraud is a serious crime that requires a period of debarment "long enough to demonstrate that the government takes the conduct at issue seriously and that it will refrain from doing business with [debarred persons] until they have had sufficient time to reflect on the cause for their debarment and to conform their conduct to the standard of present responsibility." *In the Matter of Richard Duane Widler*, HUDALJ 91-1706-DB (June 18, 1992).
14. Respondent's involvement in the fraudulent scheme spanned a period of approximately ten years, ending in 2010.⁴ Respondent was convicted in December 2012, which, I conclude, has not given him sufficient time to "reflect on the cause for his debarment and to conform his conduct to the standard of present responsibility." *Widler, supra*. Accordingly, a period of debarment must be imposed, but it should not be so excessive in light of all the factors present in this case that the period of exclusion imposed would violate the regulatory admonition that persons not be excluded "for the purposes of punishment." 2 C.F.R. § 180.1215(c).

⁴ The Judgment in a Criminal Case (Gov't Ex. 2) indicates that "the offense ended May 3, 2012."

15. In weighing the aggravating and mitigating factors, the aggravating factors, on balance, influence the period of debarment to be imposed in this case such that the proposed three-year debarment should be affirmed. *See* 2 C.F.R. §§ 180.845(a) and 180.865(a) and (b).
16. Respondent's actions that led to his criminal conviction raise doubts with respect to his business integrity and personal honesty.
17. HUD has a responsibility to protect the public interest and take appropriate measures against participants whose actions may affect the integrity of its programs. *See generally*, 2 CFR § 180.125.
18. 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 Respondent for a period of three years from January 3, 2013, the date of issuance of his suspension.⁵ 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: _____

9/17/13

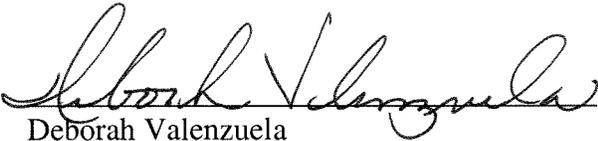


Craig T. Clemmensen
Debarring Official

⁵ Pursuant to 2 C.F.R. § 180.865(b), "If a suspension has preceded your debarment, the debarring official must consider the time you were suspended."

CERTIFICATE OF SERVICE

I hereby certify that on this 17TH day of September, 2013, a true copy of the DEBARRING OFFICIAL'S DETERMINATION was served in the manner indicated.



Deborah Valenzuela
Debarment Docket Clerk

HAND-CARRIED

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

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VIA CERTIFIED MAIL and EMAIL

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