

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of:

ANTONIO MASSIMO AND
MASSIMO CONSTRUCTION
CORP.,

Respondents.

HUDALJ 90-1512-DB (LDP)

Roger H. Hausch, Esquire
For the Respondent

Louis Smigel, Esquire
For the Government

Before: Thomas C. Heinz
Administrative Law Judge

INITIAL DETERMINATION

Statement of the Case

This proceeding arose pursuant to 24 C.F.R. Sec. 24.700 *et seq.* as a result of action taken by the Department of Housing and Urban Development ("the Department" or "HUD" or "the Government") on April 23, 1990, imposing upon Respondent Antonio Massimo and his affiliated corporation, Massimo Construction Company, Inc.,¹ a twelve-month Limited Denial of Participation ("LDP") in all HUD programs within the geographic jurisdiction of the New York Regional Office. The action was based upon Respondents' indictment by the Grand Jury of Nassau County, New York, for the crime of

¹The case style on some documents in the record reads, "Antonio Massimo d/b/a Massimo Construction Company." However, the original LDP is addressed to two entities, Antonio Massimo, and "Massimo Construction Corp." Likewise, the Nassau County indictment charges Respondent Massimo and "Massimo Construction Co., Inc.," with criminal violations. Those documents in the record which do not recognize a corporate respondent are therefore inaccurate.

Offering a False Instrument for Filing in the First Degree. This is a felony punishable by up to four years in prison under New York law.

Respondents timely requested a hearing on June 27, 1990. Because the action is based upon an indictment, the hearing is limited under 24 C.F.R. Sec. 24.313(b)(2)(ii) to the submission of documentary evidence and written briefs.

Discussion

According to the Government in its brief, Respondents have been charged by the Nassau County Grand Jury with submitting sham bids in connection with building facade improvements on a project financed in part with HUD Community Development Block Grant funds. Respondents and one Salvatore Pizzolo² purportedly agreed among themselves in 1987 that Respondent Massimo through the corporate Respondent and Mr. Pizzolo through his company would bid on a \$230,000 public project in Elmont, New York, but that Mr. Pizzolo would submit the lower bid. The HUD Regional Office of Inspector General assisted in an investigation which revealed these two intentionally non-competitive bids were the only bids on the contract. Respondents are also charged with submitting an improperly altered bid bond.

The Department asserts and Respondents do not deny that by virtue of their involvement in projects financed with HUD funds they have participated as "principals" in "covered transactions" within the meaning of and subject to HUD regulations. (24 C.F.R. Secs. 24.105(m)(p), 24.110(1)) Likewise, the Department asserts and Respondents do not deny that an LDP may be issued against a principal for any of the causes listed in 24 C.F.R. Sec. 24.305. Those causes include the following:

- (1) Commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public or private agreement or transaction;
- (2) Violation of Federal or State antitrust statutes, including those proscribing price fixing between competitors, allocation of customers between competitors, and bid rigging;
- (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; or

²Mr. Pizzolo and his affiliate corporation, Top-Siding Contracting Corp., are the subject of another LDP action, HUD ALJ 90-1513-DB (LDP).

(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.

For purposes of issuing an LDP, HUD regulations provide that an indictment constitutes adequate evidence that the charged offenses in fact have been committed. (24 C.F.R. Secs. 24.313(b)(3), 24.705(a)(8) and (b)) In other words, an indictment standing alone is enough to support an LDP; conviction based on the indictment is unnecessary. The Nassau County indictment of Respondents constitutes adequate evidence that Respondents have committed the offenses charged. The indictment describes conduct which satisfies all four of the categories of causes listed above. Respondents are charged with: (1) a criminal offense in connection with obtaining and performing a public agreement or transaction; (2) bid rigging; (3) falsification of records; and (4) offenses indicating a lack of business integrity or business honesty that seriously and directly affects their present responsibility. In short, the record reveals ample cause to issue an LDP against Respondents.

Respondents have submitted no documentary evidence for consideration on their behalf, and their brief contains just five sentences of argument contending that they are innocent of the charges, that there is no showing that the Government has been harmed in any way, and that continuing the LDP would cause Respondent Massimo "substantial financial hardship". Respondents' argument is meritless. Since an indictment is enough in itself to support issuance of an LDP, Respondents' "not guilty" plea is immaterial. Since proof of harm to the Government is not a predicate to issuance of an LDP, this argument also falls far from the mark.

As for the mitigating argument that Respondent Massimo will suffer "substantial financial hardship" if the LDP is continued, even assuming that argument could be credited in the proper case, this is not the case to do so. Respondents have the burden of proving mitigating circumstances. (24 C.F.R. 24.313(b)(4)) The record contains no evidence to support Respondents' argument. It must therefore fail.

Conclusion and Determination

Upon consideration of the entire record in this matter, I conclude and determine that good cause exists to affirm the twelve-month Limited Denial of Participation issued against Respondent Antonio Massimo and Respondent Massimo Construction Corp. on April 23, 1990, by the Acting Regional Administrator for the New York Regional Office of HUD.

/s/

THOMAS C. HEINZ
Administrative Law Judge

Dated: October 23, 1990.

