

the hearing, appearing pro se and on behalf of Respondent LODGEBUILDER, INC. Travis Farris, Esq. appeared on behalf of HUD. The record was kept open until April 10, 2008, for Respondents to submit further documentation in support of their defense and for any response from the Government.

Summary

I have decided, pursuant to 24 CFR part 24, to debar Respondents 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 November 14, 2006, the date of their suspension. My decision is based on the administrative record in this matter, which includes the following information:

- (1) The Notices of Proposed Debarment and Continuing Suspension dated November 13, 2007.
- (2) A letter (with attachments) from Respondent Aubrey addressed to the Docket Clerk dated December 7, 2007, contesting Respondents' proposed debarment.
- (3) A letter (with attachments and exhibits) from Respondent Aubrey addressed to Government Counsel dated February 17, 2008, which also serves as Respondents' brief in opposition to the proposed debarment.
- (4) A letter from Respondent Aubrey (with attachments) dated March 17, 2008, to the Debarment Docket Clerk, in which Respondent Aubrey writes that "the 12 months suspension is adequate punishment."
- (5) A binder submitted by Respondent with twenty-seven exhibits identifying the exhibits as part of the record in the Chapter 11 Bankruptcy proceedings involving Fort Defiance Housing Corporation (FDHC) (Case No: 2:05-bk-04534-TRB).
- (6) A letter from Respondent Aubrey to the Debarment Docket Clerk dated March 28, 2008.
- (7) A letter from Respondent Aubrey to the Debarment Docket Clerk dated April 9, 2008.
- (8) The Government's Submission In Support Of A Three-Year Debarment filed February 6, 2008 (including all attachments and exhibits thereto).
- (9) The digital recording of the March 5, 2008, hearing.

HUD's Arguments

HUD argues that, pursuant to 2 CFR 180.150, Respondent, as a contractor and owner of a major subcontractor participating in activities funded under the Indian Housing Block Grant (IHBG) and Native American Housing and Self-Determination Assistance programs, was involved in covered transactions. HUD alleges that large amounts of IHBG funding to the Navajo Housing Authority (NHA) for housing construction were provided to Fort Defiance Housing Corporation (FDHC), a

subrecipient of Respondent Lodgebuilder. Lodgebuilder performed FDHC's activities and administered the funds received from the NHA.²

During the period at issue here, Chester Carl was the Chief Executive Officer of NHA. Respondent Aubrey served as president of Lodgebuilder. HUD alleges that Respondent Aubrey provided gratuities in the form of casino chips to Chester Carl and also performed unpaid work on Chester Carl's house. HUD argues in its brief that Respondent Aubrey's actions "demonstrated a complete disregard for NHA's conflict of interest policies as well as for the IHBG program requirements under which those policies were adopted."³ HUD acknowledges that because Respondent Aubrey did not keep records of every gratuity he gave to Carl, the Government cannot identify the exact amount of the gratuities Carl received. Nonetheless, HUD argues that the provision of the gratuities, a fact that neither Carl nor Respondent denies, "affected the integrity of HUD's IHBG program by creating an improper relationship between"⁴ Carl and Respondent. As such, Respondent's improper conduct "seriously affects the integrity of government programs and demonstrates a lack of present responsibility."⁵

The Government further argues that Respondent Aubrey's conduct is cause for debarment under 2 CFR 180.800(b) and (d). Additionally, Respondent's debarment is necessary to protect the public interest. *See* 2 CFR 180.125. In arguing for a three-year debarment, with credit given for the time Respondent Aubrey and his acknowledged affiliate, Lodgebuilder, Inc.,⁶ have been suspended, the Government notes that this case "is aggravated by the fact that the Fort Defiance Housing Corporation, the organization through which Lodgebuilder received IHBG funds from NHA, is in bankruptcy, and the bankruptcy trustee running FDHC has sued Mr. Aubrey and Lodgebuilder for fraud, breach of fiduciary duties and other fiscal violations."⁷ According to the Government, "[t]he veil of suspicion created by [this] case and [the] bankruptcy court finding is a sufficient aggravating factor under 2 C.F.R. 180.860(s)" and that "[g]iven the totality of the circumstances present in this case, a three-year debarment is appropriate."⁸

Respondent's Arguments

Respondent Aubrey argues that while his relationship with Chester Carl "gives the appearance of wrongdoings, . . . Mr. Carl never accepted gratuities, favors, or

² *See* Gov't. Ex. 8, an itemization of the millions of dollars of NAHASDA funds received by FDHC, and Ex. 11, copies of several contracts between Lodgebuilder, Inc. and FDHC.

³ Gov't Brief at 6. Under 24 CFR 85.36(b)(3), IHBG recipients are required to include conflict of interest provisions in their procurement policies. Specifically, 24 CFR 85.36(b)(3)(iv) provides that the "grantee's or subgrantee's officers, employees, or agents will neither solicit nor accept gratuities, favors or anything of monetary value from contractors, potential contractors, or parties to subagreements." NHA has adopted these policies in its "Procurement Policy and Procedures". *See* Ex. 7A of Gov't Brief.

⁴ *Id.* at 5.

⁵ *Id.* at 7.

⁶ Pursuant to 2 CFR 180.905, because Respondent Aubrey as president of Lodgebuilder, Inc. has direct or indirect power to control Lodgebuilder, Lodgebuilder is an affiliate of Aubrey's. *See also*, 2 CFR 180.625(b).

⁷ Gov't Brief at 10.

⁸ *Id.* at 11.

anything of value" from him or Lodgebuilder.⁹ Respondent testified that his gambling chips that Carl was allowed to use were not intended to influence Carl. According to Respondent, he gave Carl chips on more than ten occasions and not more than \$500.00 to \$1000.00 in chips per occasion. Respondent challenges the credibility of the OIG Special Agent and the veracity of the OIG claim that OIG had evidence Carl cashed in over \$100,000.00 from Respondent's credit lines at several casinos. Respondent also challenges HUD's claim that the amount Carl repaid to Respondent is unknown. Respondent argues that Gov't. Exhibits 12 and 13 "clearly state that Lodgebuilder or Aubrey were [sic] repaid in full."¹⁰

Respondents take issue with the Government's charge that their alleged wrongdoing affects their present responsibility. Respondents argue that their record of quality home construction projects and cost savings is unequalled by any other builder of NHA homes during the same time period. Thus, Respondents argue they demonstrated a "very high degree of responsibility and integrity regarding proper administration of IHBG funds."¹¹ Respondent Aubrey rejects HUD's charge that his conduct showed a complete disregard of NHA's conflict of interest policies. In Respondent's view, he considered his activities with Mr. Carl "more in the realm of generating 'general business goodwill.'"¹²

Respondent Aubrey denies that he or his company did uncompensated work, as the Government alleges, at Chester Carl's home.¹³ According to Respondent, the invoice at issue¹⁴ "includes many items that [he] understand[s] were not used regarding Mr. Carl's home." Respondent further argues that had HUD investigators reviewed the procedures with respect to the selection process, "they would have known that Mr. Carl never provided any influence for the annual funding to the FDHC projects that Lodgebuilder performed." Respondent argues that Carl played no part in the six-step selection process "nor is he a Board of Commissioners member of NHA, nor is he a member of any of the Navajo Nation Commissioners in this review and approval process, thereby having no influence over the selection or the funding of any of the sub-recipient entities."¹⁵

Respondent argues that Carl actually cost Lodgebuilder hundreds of thousands of dollars by requiring Lodgebuilder¹⁶ to meet certain standards in the work it performed.

⁹ See Respondent's unpaginated February 13, 2008, response submitted by him on behalf of himself individually and on behalf of Lodgebuilder at 2.

¹⁰ *Id.*

¹¹ *Id.* at 3.

¹² *Id.*

¹³ As proof of the falsity of this charge, Respondent submitted as an attachment to his April 9, 2008, letter, a copy of a bank record for the period August 5, 2004, through October 13, 2005, showing a deposit of \$2209.29 from Chester Carl on 8/18/2005. Respondent speculates in his letter that "it would appear that it's a payment from Mr. Carl for some work as the amount is detailed to the penny and, surely, has no personal relationship."

¹⁴ See Gov't. Ex. 13A

¹⁵ See Respondents' February 13, 2008, Response at 4.

¹⁶ Respondent Aubrey states that he does not contest that Lodgebuilder is his affiliate.

In that regard, Respondent testified that “responsibility was absolutely maintained by Carl” and him.

Respondents question the applicability and relevance of the cases cited by the Government in support of a three-year debarment, concluding that the cases are not “analogous” to his case. Similarly, Respondent argues that using the bankruptcy matter involving his company FDHC, which is still *sub judice*, as an aggravating factor to support a three-year debarment is a violation of due process.

Respondent Aubrey concludes by admitting the appearance of impropriety in his relationship with Chester Carl, and reiterating that he would never let his judgment “be impaired this way again,” but argues that “the suspension period is a more than adequate exclusionary time.”

Findings of Fact

1. Respondent Aubrey was president of Lodgebuilder, a company that built homes funded under the Indian Housing Block Grant (IHBG) program.
2. FHDC was a sub-recipient of IHBG funds from the Navajo Housing Authority (NHA).
3. FDHC received millions of dollars in NAHASDA funds from NHA.
4. In the contracts entered into between FDHC and Lodgebuilder, Inc., which Respondent Aubrey executed as president of Lodgebuilder, Inc., the parties obligated themselves to comply with HUD and the Navajo Nation’s rules and regulations.
5. Pursuant to 24 CFR 85.36(b), grantees and subgrantees’ procurement procedures must “conform to applicable federal law and the standards identified in” §85.36.
6. Respondent entered into a contractual arrangement with FHDC whereby Lodgebuilder would develop NHA-funded housing.
7. Chester Carl was Executive Director of NHA during the relevant period when Respondents were involved in developing NHA housing with IHBG funds.
8. Respondent Aubrey gave Chester Carl thousands of dollars in gambling chips.
9. Respondent supplied materials to and performed repair work on Carl’s house.
10. Respondents have been suspended since November 14, 2006.

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 part 180.
2. Respondent Aubrey served as president of Lodgebuilder.
3. Respondent Lodgebuilder is an affiliate of Respondent Aubrey’s pursuant to 2 CFR 180.905.
4. Respondents along with FDHC, with whom they have a business relationship, received funds either directly or indirectly through grants or contracts from NHA.

5. The exact amount of gaming chips Carl received from Aubrey is undetermined as is the amount repaid by Carl for use of Respondent's chips.
6. The cost of the work performed on Carl's house and the exact amount paid by Carl therefor remain undetermined.
7. NHA receives its funding pursuant to NAHASDA and the IHBG program for the benefit of the Navajo nation.
8. The NHA has adopted, in accordance with 24 CFR 85.36, and published a handbook on Procurement Policy and Procedures, which, among other things, sets forth a Code of Conduct for its employees and persons providing services to NHA.
9. Respondent's provision of gaming chips to the then-incumbent NHA Executive Director, which by his own admission amounted to between \$5,000.00 and \$10,000.00, cannot be deemed "not substantial" nor an appropriate gift "under the circumstances as a matter of normal business practice." ¶2.4 NHA Procurement Policy and Procedures.
10. Respondent Aubrey's actions created more than his acknowledged "appearance of impropriety."
11. Respondents are subject to ¶ 2.6 Sanctions of the NHA Procurement Policy and Procedures, which provide that
 - a. Any agent, contractor, subcontractor, officer or employee of a business doing contract work for the NHA who violates the rules of this part may be subject to sanctions ranging from a written warning to debarment from doing business with the NHA or revocation of a contract with NH, depending upon the severity of the conduct. This part constitutes notice to contractors, subcontractors, and others both the standards of conduct and potential sanctions under this part by means of the power contained in 24 CFR Sec. 85.36 (b) (3) and the promulgation of these rules.
12. The improper relationship created by Respondent Aubrey's allowing Chester Carl, the CEO of NHA, to use Respondent's chips was inconsistent with the intent and purpose of the conflict of interest provisions in the NHA Procurement Policy and Procedures and HUD's regulations. *See generally*, 24 CFR 85.36(b)(3)(iv).
13. Respondent Aubrey's actions, particularly in light of the large amount of funding received by Lodgebuilder, Inc., either directly or through FHDC, was a violation, pursuant to 2 CFR 180.800(b), of the terms of the Development/Consultant Agreement between FDHC and Lodgebuilder, Inc. (executed by Respondent Aubrey on July 30, 1996 on behalf of Lodgebuilder, Inc.). *See generally*, ¶7 Compliance of the Development/Consultant Agreement in which Respondent Lodgebuilder, Inc. and FDHC "warrant that all law, rules, regulations . . . established by agencies with jurisdiction over development activities shall be fully complied with," including HUD and the Navajo Nation. The violation was so serious as to affect the integrity of the IHBG program.
14. Respondent's provision of chips to Carl created a conflict of interest "so serious as to affect the integrity of" the IHBG program and affected his "present responsibility." *See* 2 CFR 180.800(b). *See also*, 2 CFR 180.800(d).
15. Respondent Lodgebuilder, Inc, as an affiliate of Aubrey's, in accordance with 2 CFR 180.625(b) is "included in [this] debarment action."

16. There are no aggravating factors to consider in determining the appropriate period of debarment. *See* 2 CFR 180.860.
17. No adverse inferences or conclusions are drawn from Respondents' involvement in the FDHC bankruptcy matter. The allegations against Respondent Aubrey or his company in the bankruptcy proceedings, to the extent they have not been finally adjudicated, are not considered an aggravating factor in this debarment action.
18. HUD has a responsibility to protect the public interest and take appropriate measures against participants whose actions may affect the integrity of its programs.
19. 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 24 CFR 24.870(b)(2)(i) through (b)(2)(iv), to debar Respondents for a period of three years from November 14, 2006, the date of their suspension. 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: 23 May 2008



Henry S. Czauski
Debarring Official