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

In the Matter of:

COASTAL INSULATION, INC.,

Respondent

HUDALJ 90-1557-DB(LDP)

Decided: May 13, 1991

Steve A. Allen, Esquire
For the Respondent

Lisa K. Wright, Esquire
For the Department

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 Maxine S. Saunders, the Manager of the Baltimore Office of the U.S. Department of Housing and Urban Development ("the Department" or "HUD") on August 14, 1990, and affirmed on September 18, 1990, imposing a twelve-month Limited Denial of Participation ("LDP") upon Coastal Insulation, Inc. ("Respondent").[1] Pursuant to the LDP, Respondent was excluded immediately from direct and indirect participation in all programs under the jurisdiction of the Department's Assistant Secretary for Housing (*see* 24 C.F.R. Sec. 24.705(a)(8)) within the geographic area of the state of Maryland, excluding Montgomery and Prince Georges counties (*see* 24 C.F.R. Sec. 24.710(a)(3)). The LDP was based on an indictment filed against Respondent on April 20, 1990, in the Circuit Court for Baltimore City charging violation of the Maryland Antitrust Act, Md. Com. Law. Code Ann. Secs. 11-204 (a)(1) and 11-212.

On September 19, 1990, Respondent appealed the imposition of the LDP and requested a hearing (*see* 24 C.F.R. Sec. 24.713). Because the LDP is based upon a

[1]Respondent was first notified of the LDP in a letter dated August 14, 1990, that also advised Respondent it could request a conference for reconsideration of the action. A conference was held on August 29, 1990, and on September 18, 1990, the Manager of the Baltimore Office affirmed her initial decision of August 14, 1990.

conviction, the hearing is limited to the submission of documentary evidence and written briefs (*see* 24 C.F.R. Sec. 24.313(b)(2)(ii)). The Department filed its brief on October 22, 1990, and Respondent filed its brief on November 5, 1990.

Based upon a review of the parties' briefs, an Order was issued on January 18, 1991, requiring the Department to file a supplemental brief addressing several specific questions. Pursuant to that Order, Respondent was given the discretion to file a brief addressing any or all of those questions. The Department and Respondent each filed a supplemental brief on February 1, 1991.

Findings of Fact

1. On April 30, 1990, the Circuit Court for Baltimore City, Maryland, indicted Respondent with charges of rigging bids on contracts with the State of Maryland for asbestos abatement services in violation of the "Maryland Antitrust Act," Md. Com. Law Code Ann. Secs. 11-204(a)(1), 11-212 (1983). The indictment alleged that from approximately April 1986 through July 1986 Respondent and others conspired to rig bids on five asbestos abatement contracts with the State of Maryland valued at $233,160.[2] (Department's brief, exhibit A)

2. Pursuant to a plea agreement between Respondent and the State of Maryland, on August 23, 1990, the State of Maryland filed a one-count criminal information which charged Respondent and others with conspiring to rig the bidding on a July 1986 asbestos abatement contract regarding the University of Baltimore Air Force Building. On August 24, 1990, Respondent pleaded guilty to the criminal information and the indictment was dismissed. In accordance with the terms of the plea agreement, Respondent was fined $25,000 and placed on probation for two years. (Respondent's brief, exhibit 3D)

3. Based on Respondent's indictment by the Baltimore Circuit Court grand jury, on August 10, 1990, the Department of the Army ("DOA") suspended Respondent from future contracting with any agency in the executive branch of the United States government pursuant to the authority granted by the Federal Acquisition Regulations ("FAR"; 48 C.F.R. Subpart 9.4). Thereafter, DOA conducted an on-the-record hearing on September 25, 1990, that addressed the facts and circumstances surrounding Respondent's indictment and subsequent misdemeanor conviction by the State of Maryland for bid rigging. On October 29, 1990, DOA issued a memorandum decision concluding that Respondent was not "presently responsible" and debarring the company from contracting with any executive agency of the Federal government for a period of

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[2]Respondent's president, Mr. Edwin J. Hayes, was also charged at the same time with two counts of perjury in connection with the submission of affidavits in which he allegedly falsely swore that he had not colluded in bidding on Maryland State contracts, in violation of the State perjury statute, Md. Ann. Code, Art. 27, section 435. This indictment was later dismissed. HUD has not sought to debar Mr. Hayes personally in this proceeding. (Respondent's brief, exhibit 6)

two months ending December 31, 1990. (Respondent's brief, exhibits 2, 4, and 6)[3]

Subsidiary Findings and Discussion

An LDP is a type of debarment. The purpose of all debarments imposed by agencies of the Federal government, including debarments, suspensions and LDPs imposed by HUD, is to protect the public interest by precluding persons who are not "responsible" from conducting business with the Federal government. 24 C.F.R. Sec. 24.115(a). *See also Agan v. Pierce*, 576 F. Supp. 257, 261 (N.D. Ga. 1983); *Stanko Packing Co., Inc. v. Bergland*, 489 F. Supp. 947, 948-49 (D.D.C. 1980). The debarment process is not intended to punish; rather, it is designed to protect governmental interests not safeguarded by other laws. *Joseph Constr. Co. v. Veterans Admin.*, 595 F. Supp. 448, 452 (N.D. Ill. 1984). In other words, the purpose of debarment is remedial, not punitive. *See* 24 C.F.R. Sec. 24.115.

In the context of debarment proceedings, "responsibility" is a term of art that encompasses integrity, honesty, and the general ability to conduct business lawfully. *See* 24 C.F.R. Sec. 24.305; *Gonzalez v. Freeman*, 334 F.2d 570, 573 & n.4, 576-77 (D.C. Cir. 1964). Determining "responsibility" requires an assessment of the current risk that the government will be injured in the future by doing business with a respondent. *See Shane Meat Co., Inc. v. U.S. Dep't of Defense*, 800 F.2d 334, 338 (3d Cir. 1986). That assessment may be based on past acts, including a previous conviction. *See Agan*, 576 F. Supp. 257; *Delta Rocky Mountain Petroleum Inc. v. U.S. Dep't of Defense*, 726 F. Supp. 278 (D. Colo. 1989).

In the instant case, Respondent's indictment and subsequent conviction for bid rigging unquestionably show a lack of "present responsibility." *See* 24 C.F.R. Secs. 24.705(a)(8), (b) and 24.305(a)(2). The DOA decision succinctly and accurately explains why:

> Respondents' misconduct was intended to adversely affect the fair and impartial award of asbestos abatement contracts administered by the State of Maryland, thereby denying the State the benefits of open and free competition in the provision of asbestos removal services. Such misconduct by respondents reveals an absence of business integrity and honesty. Therefore, respondents lack the present responsibility to be government contractors, pursuant to FAR, subsection 9.406-2(a)(4).

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[3]Even though the Department was made aware on August 29, 1990, that the indictment had been dismissed on August 24, 1990, the Department's brief submitted in October of 1990 relies solely on the indictment as cause for the LDP. If Respondent had not submitted evidence of its conviction and subsequent debarment by DOA, there would be no evidence in the record to support HUD's LDP beyond August 24, 1990.

Respondent's brief, exhibit 6. Section 9.406-2(a)(4) of 48 C.F.R. provides that the debarring official may debar a contractor for "[c]ommission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a Government contractor or subcontractor." This language is nearly identical to 24 C.F.R. Sec. 24.305(a)(4), which authorizes debarment for "[c]ommission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a person." In fact, most of the provisions of FAR at 48 C.F.R. Subpart 9.4 are so similar to the HUD provisions governing issuance of LDPs at 24 C.F.R. Sec. 24.100 *et seq.* that these two sets of regulations must be read in *para materia.* Both serve the same purpose: to protect the Federal government by ensuring that the government deals only with persons who are "presently responsible." In other words, both regulatory schemes apply the same legal standard to persons conducting business with agencies of the Federal government. *See* 48 C.F.R. Sec. 9.402 and 24 C.F.R. Sec. 24.115.

Although the indictment and subsequent conviction of Respondent clearly demonstrate sufficient cause to debar Respondent under 24 C.F.R. Sec. 24.305, debarment is discretionary, not mandatory. As stated in 24 C.F.R. Sec. 24.115(d),

> The existence of a cause for debarment, however, does not necessarily require that the contractor be debarred; the seriousness of the contractor's acts or omissions and any mitigating factors should be considered in making any debarment decision.

The same language appears in FAR at 48 C.F.R. Sec. 9.406-1. *See also* 24 C.F.R. Sec. 24.700 regarding LDPs specifically.

Respondent argues (as it did before DOA) that it should not be debarred by HUD because the unlawful conduct that led to its conviction occurred in 1986, more than four years ago. Since then, the company has successfully and lawfully completed some 360 projects for local, state, and Federal governments. (Respondent's brief, exhibit B) However, debarment may be based on past acts even in the face of evidence tending to show a present ability to perform a government contract satisfactorily. *See Joseph Constr.*, 595 F. Supp. 448. For example, the Third Circuit Court of Appeals in *Shane Meat*, 800 F.2d at 38, refused to overturn an agency decision debarring a company convicted of criminal activity even though the company had demonstrated satisfactory contract compliance subsequent to the conviction. The Court found that the debarring official in the agency decision under review had properly discounted evidence of current contract compliance because the contractor had failed to prove changes in company operations that would preclude recurrence of criminal activity. Similarly, in *Peter Kiewit Sons' Co. v. U.S. Army Corps of Eng'rs*, 714 F.2d 163, at 167 n.18 (D.C.Cir. 1983), the United States Court of Appeals for the District of Columbia stated in *dictum* that a "finding of present responsibility for performance of a particular contract does not preclude a contemporaneous finding that a contractor should be debarred." In short, assessing whether or not a respondent is "presently responsible" requires an examination of both the past as well as the present conduct of the respondent.

According to Respondent, Respondent's conviction arose primarily out of the activities of one of Respondent's employees, Mel Petrochko, who in 1986 secretly formed his own insulation company, M & M Insulation, to compete with his employer.[4] Mr. Petrochko purportedly supplied an agent of a third insulation company, ARC, with blank, pre-signed, Coastal Insulation bid forms to curry favor with ARC in return for a commitment from ARC to use the services of M & M Insulation in the future. Respondent asserts that without Respondent's knowledge ARC used these pre-signed, blank bid forms to submit rigged bids on behalf of Respondent. The president of Respondent testified before DOA that Mr. Petrochko was fired in October 1986 when he was discovered stealing from Respondent. (Respondent's brief, exhibit 4, pp. 32-34)

All of these contentions were submitted to DOA, as well as evidence that Respondent was in the process of implementing several procedural and educational measures designed to preclude recurrence of any activities that could give rise to charges of bid rigging. In the face of this evidence and argument, all of which has been submitted into the record in the instant proceeding,[5] DOA decided to debar Respondent, stating:

> Notwithstanding the extenuating and mitigating circumstances cited by respondents, an appropriate period of debarment is necessary. Debarment is necessary to afford the respondents adequate time, following the conviction of [Coastal

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[4]Respondent concedes the conviction also rests on unlawful conduct by its president but argues that the president's conduct was in fact innocent and harmless.

[5]In addition to its briefs, Respondent submitted the following:

1. A letter from the Assistant Attorney General of Maryland indicating that as of August 28, 1990, his office had no evidence of any unlawfully collusive activity following July of 1986 (Respondent's brief, exhibit 1);
2. The August 10, 1990, letter from DOA suspending Respondent and its president pending completion of investigation and any legal proceedings (Respondent's brief, exhibit 2);
3. The written argument submitted to DOA by counsel for Respondent arguing that suspension should be lifted (Respondent's brief, exhibit 3);
4. A list of state, local and Federal projects completed by Respondent between 1986 and 1990 (Respondent's brief, exhibit 3B);
5. The State of Maryland indictments of Respondent and its president (Respondent's brief, exhibit 3C);
6. The plea agreement between the State of Maryland and Respondent and its president (Respondent's brief, exhibit 3D);
7. The State of Maryland criminal information against Respondent (Respondent's brief, exhibit 3E);
8. The transcript of the September 25, 1990, hearing before DOA regarding Respondent's debarment (Respondent's brief, exhibit 4);
9. Correspondence between counsel for Respondent and DOA regarding remedial measures being adopted by Respondent together with affidavits and instructional materials designed to preclude recurrence of bid rigging by Respondent (Respondent's brief, exhibit 5); and
10. The October 29, 1990, DOA memorandum decision debarring Respondent and its president, with cover letters. (Respondent's brief, exhibit 6)

> Insulation, Inc.], to ensure that the underlying circumstances leading to the conviction have been eliminated. Further, any corrective programs which have been or will be implemented must be in place for a sufficient period and working effectively to allow respondents to demonstrate their present responsibility.

Respondent's brief, exhibit 6. In sum, after considering the same evidence presented in this proceeding in light of the same legal standard applicable in this proceeding, DOA found on October 29, 1990, that Respondent was not "presently responsible" and debarred the company for two months from November 1 through December 31, 1990.

Because debarment can be justified only on the basis of a finding that a respondent is not "presently responsible," it necessarily follows from the DOA decision imposing a two-month period of debarment that DOA also found, albeit implicitly, that Respondent would become "presently responsible" by January 1, 1991. In order to affirm the LDP that HUD has imposed on Respondent beyond December 31, 1990, I would have to find, contrary to DOA's finding of October 29, 1990, that Respondent was not "presently responsible" after December 31, 1990. There is no evidence in this record upon which to base such a conclusion.

In the Order of January 18, 1991, the parties were specifically asked to consider what effect, if any, should be given to the DOA decision. In response, Respondent argues, *inter alia*, that:

> Absent irregularity in the first proceeding and/or new facts arising from intervening events and/or conduct of the Respondent since the debarment proceeding, the findings from the first debarment proceeding should not be disturbed.

Supplemental brief, p. 6. In contrast, the Department argues:

> This Court should consider that the DOA determined that Respondent's actions were so serious that in order to protect the public interest Respondent was debarred. However, this Court should not focus on the length of debarment because DOA's interests are different from HUD's interests. This Court should determine, in light of HUD's interests to protect decent, safe and sanitary housing, how long the public and HUD should be protected from doing business with a company that has participated in criminal activities that threaten the Department's interest.

Supplemental brief, unnumbered page 3. In other words, the Department contends that the DOA decision is irrelevant and should be ignored except insofar as it shows Respondent was not "presently responsible." This contention rests on the argument that the "interests of DOA are different from the much broader interest of HUD in assuring

safe housing" (Supplemental brief, unnumbered page 2), and the fact that DOA debarred Respondent from engaging in procurement activities with any executive agency of the Federal government, whereas HUD's LDP debarred Respondent from engaging in *both* procurement and nonprocurement activities with HUD within the State of Maryland (excepting Prince Georges and Montgomery counties). *See* 24 C.F.R. Sec. 24.710(a)(2). These arguments miss the mark.

The purpose of any debarment action brought by any Federal agency is to protect the public interest, broadly defined, not just the specific interests of the agency bringing the action. 24 C.F.R. Secs. 24.115(b) and 24.700. It does not advance the Department's argument in this case to call its self-evident interest in housing "vital" or to imply that no other Federal agency can properly protect the public interest regarding housing. HUD's own regulations acknowledge that another agency may vindicate HUD's interests. Section 24.115(c) of 24 C.F.R. states:

> When more than one agency has an interest in the proposed debarment or suspension of a person, consideration shall be given to designating one agency as the lead agency for making the decision. Agencies are encouraged to establish methods and procedures for coordinating their debarment or suspension actions.[6]

DOA has already debarred Respondent in an action that prohibited Respondent from entering into procurement contracts with any Federal agency throughout the United States for two months. The Department seeks affirmation of an LDP that prohibited Respondent from engaging in both procurement and nonprocurement activities with HUD within a limited geographic area. The different jurisdictional scope of HUD's action justifies maintenance of the action. However, that there are different jurisdictional scopes to the two actions does not render the DOA findings in the first action irrelevant and unworthy of credit. Because DOA has evaluated the same evidence under the same legal standard, DOA's findings are clearly relevant. The issue is what weight should be given to those findings. More specifically, the issue is whether or not DOA's finding regarding the proper term of debarment is binding and conclusive in this forum. I hold that the October 29, 1990, DOA decision debarring Respondent constitutes nonpreclusive evidence that after December 31, 1990, Respondent was "presently responsible." In other words, the DOA decision is not binding and conclusive; rather, it raises a presumption that HUD has the burden to rebut. *See* 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure*: Jurisdiction, sec. 4416, pp. 144-48; *Napper v. Anderson, Henley, Shields, Bradford & Pritchard*, 500 F.2d 634, 637 (5th Cir. 1974), *cert. denied*, 423 U.S. 837 (1975) (where Arkansas Federal district court had held that it lacked diversity jurisdiction because plaintiffs and defendants were all citizens of Texas on July 12, 1971, plaintiffs had burden of proving, in order to sustain Federal jurisdiction in Texas Federal district court, that between July 12 and August 23, 1971, they had changed their citizenship); *Anderson v. United States*, 126 F.2d 169 (3d

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[6]There is no indication in the record that HUD has complied with the terms of this provision.

Cir. 1942) (verdict permitting recovery of total permanent disability benefits does not settle question of future disability; rather, it contains a finding that the presently existing disability has a reasonable certainty of continuing, thereby creating a presumption to that effect which shifts burden of proof to government that insured was not totally disabled). *Cf. In re Jafree*, 759 F.2d 604, 608 (7th Cir. 1985) (although Federal disbarment does not automatically follow a state disbarment, state disbarment proceedings are entitled to great weight and should be relied upon unless certain specified conditions exist).

DOA's finding that Respondent should not be debarred past December 31, 1990, cannot be given more weight than a rebuttable presumption because that finding amounts to a prediction that time could have proved wrong. If Respondent had engaged in any conduct demonstrating a lack of "present responsibility" after the DOA debarment hearing, or if Respondent had failed to fully implement the promised remedial measures, HUD should be permitted to introduce evidence on these points. Furthermore, if relevant and material evidence was not presented to DOA during the course of its proceeding, HUD, which did not participate in the DOA proceeding, should be able to introduce such evidence in this subsequent debarment proceeding. According DOA's finding the status of a rebuttable presumption protects the interests of the parties as well as the public interest in general.

HUD has failed to meet its burden to rebut the presumption created by the DOA decision. No evidence has been submitted to demonstrate that DOA was wrong when it concluded Respondent needed only two months to become "presently responsible." Nor has the Department articulated any specific reasons why, in order to protect HUD's self-evident interest in housing, an LDP of greater duration than the sanction already imposed by DOA is necessary or appropriate. That the jurisdictional scope of the DOA action is different from the jurisdictional scope of this action does not explain why the temporal scope of the sanction to be imposed in this action should be different from the temporal scope of the sanction imposed in the DOA action. Furthermore, the power to impose a 12-month LDP does not require its imposition. Section 24.710 of 24 C.F.R. says "the sanction *may be imposed for a period not to exceed 12 months....*" (Emphasis added) Simply describing the cause for debarment as "serious" does not justify imposing the longest LDP permitted by law. HUD's regulations require the Department to recognize that there are degrees of seriousness and to exercise discretion in the imposition of LDPs. Section 24.700 of 24 C.F.R. provides in part:

> In each case, even if the offense or violation is of a criminal, fraudulent or other serious nature, the decision to order a limited denial of participation shall be discretionary and in the best interests of the Government.

See also 24 C.F.R. Sec. 24.115. In the instant case, the Department has not recognized that there are degrees of seriousness in the causes for debarment, that Respondent's multi-count felony indictment was more serious than Respondent's conviction of a one-count misdemeanor criminal information. Nor has the Department recognized the evidence in extenuation or mitigation submitted by Respondent that warrants a

reduction of the sanction period. Although asked specifically to justify a 12-month LDP in a January 18, 1991 Order, the Department did not even mention Respondent's mitigation evidence in its response.[7] In short, the record reveals no rational basis for extending the LDP issued on August 14, 1990, beyond December 31, 1990. Accordingly, a 12-month LDP would be punitive and unlawful.

Conclusion and Determination

Upon consideration of the entire record in this matter, I conclude and determine that good cause exists to affirm the imposition upon Respondent of a Limited Denial of Participation by the Baltimore, Maryland, office of HUD for the period beginning August 14, 1990, and ending December 31, 1990.

Thomas C. Heinz

THOMAS C. HEINZ
Administrative Law Judge

Dated: May 13, 1991

[7]The Department was asked the following question:

> The Department's original case, as set out in its October 5, 1990, brief, seeks affirmation of a 12-month LDP solely on the basis of an indictment. That indictment has been dismissed, and the Respondent stands convicted of a one-count misdemeanor offense. Does the Department nevertheless remain committed to a 12-month LDP? If so, why?