Appeal of:

S.D. CARRUTHERS SONS, INC.	:	HUDBCA No. 95-A-124-D17
GERALD R. CARRUTHERS,	:	Docket No. 95-5031-DB

Respondents

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DETERMINATION BY ADMINISTRATIVE JUDGE DAVID T. ANDERSON

June 28, 1996

Statement of the Case

By letter dated January 4, 1995, Nicolas P. Retsinas, Assistant Secretary for Housing-Federal Housing Commissioner, U.S. Department of Housing and Urban Development ("HUD," or "Department"), notified S.D. Carruthers Sons, Inc. ("SDC") that the Department was considering debarring SDC and its affiliate, Gerald R. Carruthers ("Carruthers," collectively "Respondents"), 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 period of five years. The notice also informed SDC and Carruthers that they were suspended from participating in such transactions pending a resolution of the issues related to their proposed debarment. The basis for the debarment is the conviction of SDC in the United States District Court for the Eastern District of Pennsylvania for conspiracy to violate the Sherman Act, a violation of 15 U.S.C. § 1.

By letter dated January 31, 1995, Respondents filed a timely appeal of the proposed debarment. 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. SDC is a New York corporation, exclusively performing commercial roofing contracts. Carruthers is the president of SDC. Most of SDC's public contracts are with the State of New York, including New York school districts. Prior to the conviction on which this action is based, SDC, Carruthers, or any of SDC's shareholders, officers, or employees had never been

convicted of any crime. The income from SDC is the primary source of support for Carruthers and his family. (Resp. Exh. A; Resp. Brief at 2.)

2. Beginning in late 1986, SDC was repeatedly approached by Urethane Applications, Inc. ("UAI"), a competitor, who asked SDC to "cooperate" on, rather than compete for, urethane roofing contracts. SDC resisted the advances of UAI until July 1987 when UAI threatened SDC with economic harm. From July 1987 to August 1990, SDC had an oral agreement with UAI and other roofing contractors to submit collusive, noncompetitive and rigged bids for public and private polyurethane foam roofing contracts in New York and Massachusetts. Under this scheme, SDC and its co-conspirators submitted complimentary bids against each other, or refrained from bidding against each other on urethane roofing projects. Under this scheme, SDC was awarded contracts in the amount of approximately $490,000. (Govt. Exhs. 4 and 5; Resp. Exh. E.) SDC did not inflate its prices or attempt to take advantage of its customers during SDC's involvement in the conspiracy. (Resp. Exh. F.)

3. On November 17, 1992, SDC entered into a plea agreement with the Mid-Atlantic Office, Antitrust Division, U.S. Department of Justice to plead guilty to one count of conspiracy to violate the Sherman Act, a violation of 15 U.S.C. § 1. The plea agreement provided for a joint sentencing recommendation of the imposition of a $100,000 fine, payable in four installments. The agreement also required the full cooperation of SDC and Carruthers, and if full cooperation was given, the U.S. Department of Justice would not prosecute SDC or Carruthers further for their involvement in the bid rigging scheme. (Govt. Exh. 6; Resp. Exhs. B and F.)

4. On February 3, 1993, SDC waived indictment, and pled guilty to a one-count information, charging SDC with conspiracy to violate the Sherman Act. (Govt. Exhs. 3 and 4; Resp. Exh. F.)

5. On February 4, 1993, the United States District Court judge for the Eastern District of Pennsylvania signed a Judgment of Conviction of SDC, and sentenced SDC to a fine of $100,000, payable in equal installments with interest, and a mandatory special assessment of $200. Under the applicable sentencing guidelines, the fine range was $98,000 to $245,000. (Govt. Exh. 2; Resp. Exh. G.)

6. The State of New York filed a similar action against SDC and its co-conspirators in the United States District Court for the Eastern District of New York. SDC entered into a Partial Settlement Agreement and Consent Decree with the State of New York. Under the consent decree, SDC was to pay a fine of $19,500, and SDC was to cooperate in the prosecution of SDC's co-conspirators. (Resp. Exh. L.)

7. Respondents fully cooperated with the U.S. Department of Justice, and provided information that resulted in the conviction of UAI, the most culpable of SDC's co-conspirators. Respondents have submitted a letter from the Department of

Justice prosecutor in that case, noting Respondents' cooperation. The prosecutor further stated that:

> S.D. Carruthers's relative culpability in the captioned matter was low. . . . S.D. Carruthers involvement was sporadic in nature and its role was largely a passive one. None of the misconduct occurred on federal work. . . . Since [the conviction,] the company has done everything in its power to demonstrate to this office that it once again is conducting itself as a responsible contractor.

The prosecutor made similar statements at a hearing when SDC entered its guilty plea on February 3, 1993. (Resp. Exhs. C, and F, at 22-27; Resp. Brief at 3.) SDC has also paid in full the fine assessed by the United States District Court for the Eastern District of Pennsylvania, as well as the fine agreed to in the consent decree. (Resp. Brief at 10-11.)

8. The Prosecutor also urged the United States District Court for the Eastern District of Pennsylvania to treat SDC in a manner similar to two of its co-conspirators, F.J. Dahill, a Connecticut company, and Highway Insulators, a New Jersey company, which had "cooperated and entered into plea agreements, virtually identical . . . to the agreement that the Government has with S.D. Carruthers." (Resp. Exh. F at 25.) HUD instituted debarment proceedings against F.J. Dahill Co., Inc., and its affiliate James L. Dahill. That debarment action was dismissed after the parties reached a settlement agreement, by which the suspension was terminated and the proposed debarment was withdrawn. The proposed debarments of two other co-conspirators were terminated without sanction by the United States Coast Guard and the General Services Administration. (Resp. Exh. K.)

9. Respondents have submitted six sworn affidavits from New York school district officials who have contracted with SDC to perform roofing work. The affiants state that SDC was found to be the lowest responsible bidder through a competitive bidding process, and that SDC and its employees are "reputable and of good character and [the school districts] have been satisfied with all of our business dealings with them." The six affiants signed these statements in November and December, 1995. (Resp. Exh. I.)

10. On December 5, 1995, SDC's Board of Directors resolved to implement revised ethics policy to prevent any further antitrust violations by SDC and its employees. The Board's resolution states as follows:

> 1. All employees of the corporation shall be educated on a timely and ongoing basis concerning potential antitrust violations with respect to bidding processes and the conduct of operations of the corporation.
>
> 2. All employees shall be required to report to Gerald R. Carruthers any instances or suspected instances of violations of the Sherman Antitrust Law or

any associated matters or issues which they suspect might be illegal.

3. Gerald R. Carruthers shall immediately convene the Board of Directors for the purpose of addressing the potential violations and for taking immediate action to rectify or prevent the occurrence of any violation of law.

4. The Board of Directors shall record within the minutes of the corporation the action which they have determined to address the potential problems.

(Resp. Exh. N.)

Discussion

It is uncontested that SDC is a "participant" as defined at 24 C.F.R. § 24.105(m). Carruthers has admitted to being an "affiliate" as defined at 24 C.F.R. § 24.105(b). Therefore, 24 C.F.R. Part 24 applies to both SDC and Carruthers. 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 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;

(4) Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly effects the present responsibility of a person;

* * *

(d) Any other cause of so serious or compelling a nature that it affects the present responsibility of a person;

Underlying the Government's authority not to do business with a person or entity is the requirement that agencies only do business with "responsible" persons and entities. 24 C.F.R. § 24.115. The term "responsible," as used in the context of suspension and debarment, 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). The test for whether a debarment is warranted is present responsibility, although lack of present responsibility may be inferred from past acts. Schlesinger v. Gates, 249 F.2d 11 (D.C. Cir. 1957); Stanko Packing Co. v. Bergland, 489 F. Supp. 947, 949 (D.D.C. 1980). In gauging the adequacy of the evidence in favor of suspension, various factors must be considered, including how much information is available, the credibility of the evidence, whether or not the allegations have been corroborated, and what inferences may reasonably be drawn from the evidence. 24 C.F.R. §§ 24.400(c) and 24.410(c). A debarment shall be used only to protect the public interest and not for purposes of punishment. 24 C.F.R. § 24.115(b).

The Government bears the burden of demonstrating by a preponderance of the evidence 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 debarment is based on a conviction, that evidentiary standard is deemed to have been met. 24 C.F.R. §S 24.313(b)(3) and 24.405(b).

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). Respondents bear the burden of proving the existence of mitigating circumstances. 24 C.F.R. § 24.313(b)(4).

Respondents have submitted the transcript of SDC's arraignment and sentencing proceedings in the United States District Court for the Eastern District of Pennsylvania, in which the prosecutor stated that SDC was coerced into the bid rigging scheme, and that SDC was the least culpable of the co-conspirators. The prosecutor also wrote a letter on behalf of Respondents in which he states that Respondents have cooperated fully with the authorities, and SDC is conducting itself as a responsible contractor. In that same letter, the prosecutor noted that the actions for which SDC was convicted occurred several years ago. The conspiracy ended in August 1990, almost six years ago.

This Board has viewed a substantial passage of time following alleged misconduct leading to the imposition of an administrative sanction as being a potentially mitigating factor. ARC Asbestos Removal Co.. Inc., HUDBCA No. 91-5791-025 (Apr. 12, 1991). However, the passage of time, ipso facto, does not establish present responsibility. Howard L. Perlow, HUDBCA No. 92-7131-05 (Dec. 3, 1992); Carl W. Seitz and Academy Abstract Co., HUDBCA No. 91-5930-066 (Apr. 13, 1992). 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 cases where passage of time is viewed as a mitigating factor, it has been coupled with adequate evidence of present responsibility, rehabilitation, and/or remorse for causing injury to the integrity of Federal programs. See, Kenneth Lange, HUDBCA No. 92-A-7594-D56 (Oct. 23, 1992) (where Respondent expressed remorse and submitted evidence of rehabilitation); 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). Such evidence abounds in the record before me, and I find it to be a credible and persuasive mitigating factor.

The circumstances surrounding the actions for which SDC has been convicted show that SDC and Carruthers were threatened with the economic survival of SDC, as well as the economic survival of the Carruthers' family. However, economic adversity does not justify engaging in criminal conduct. Nevertheless, it is noteworthy that SDC and Carruthers, although unable to resist the nefarious advances of UAI, at least refrained from the conspiratorial act of charging higher prices to its customers.

Respondents have shown that, since the cessation of their criminal conduct, SDC has conducted its business in a responsible manner. Respondents have submitted sworn affidavits of six New York school districts attesting to SDC's present responsibility. These affidavits were executed in November and December, 1995, and state that SDC is "currently" under contract with the school districts. In the performance of SDC's contracts with the New York school districts, the school officials have found SDC to be responsible, and SDC has performed those contracts satisfactorily.

Indicative of Respondents' present responsibility is the fact that Respondents have taken steps to ensure that the actions for which SDC was convicted do not occur in the future. While there is no evidence of the impact of the resolution passed by SDC's Board of Directors, the resolution should lay the groundwork for a training program and reporting policy for antitrust violations.

Respondents have also submitted evidence demonstrating that three of its co-conspirators were not debarred. HUD terminated the suspension and withdrew the proposed debarment of F.J. Dahill, which entered into an identical plea agreement with the Government as SDC. Other agencies have also withdrawn proposed debarments of two other co-conspirators. The Government argues that Respondents' statements regarding the debarment of other co-conspirators should be ignored because the circumstances of those debarment decisions are not known. While this argument has merit, the absence of these reasons from the record of this proceeding does little to convince me that the disparate manner in which Respondents were sanctioned is justifiable.

Debarment proceedings are subject to the same standards of basic fairness as other judicial and administrative proceedings. Gonzales v. Freeman, 334 F.2d 570 (D.C. Cir. 1964). It may well be fundamentally unfair to permit one contractor to do business with this Department, and debar another contractor when both contractors were convicted of the same offense and both contractors received the same sentence. This is especially true when there is a preponderance of evidence which shows that the contractor now facing debarment was not only less culpable, but cooperative with law enforcement authorities as well. Debarment and suspension are serious actions which shall be used only in the public interest and for the Federal Government's protection and not for purposes of punishment. 24 C.F.R. §24.115(b). The imposition of a debarment under the circumstances of this case, and in light of Respondents' conduct subsequent to August 1990, appears to be, if not punitive, then certainly unwarranted and unfair.

Respondents also state that they have been suspended for a longer period than their co-conspirators. While this assertion appears to be true, there is at least one valid reason for the length of Respondents' suspension, i.e., the extended course of this proceeding during which Respondents have requested and received five separate extensions of time, and leave to file a sur-reply brief. Respondents' sur-reply brief, the last document filed prior to closure of the record, was received on March 20, 1996. The record of this proceeding indicates that this case remained constantly in an active litigation mode. I do not find that Respondents' suspension during the course of this proceeding was unreasonable. In any event, Respondents' suspension from participation in HUD programs for nearly eighteen months has given the Department undeserved protection from a contractor with which it should now have no reluctance to do business.

Conclusion

For the reasons set forth above, I find that Respondents are presently responsible. It is my determination that Respondents' suspension shall be immediately terminated and that no period of debarment be imposed because no debarment of Respondents is warranted.

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David T. Anderson
Administrative Judge