



United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

DEC 22 2010

CERTIFIED MAIL
RETURN RECEIPT

Jon W. van Horne
Law Offices of Jon W. van Horne

Gaithersburg, Maryland 20879-5300

Re: Proposed Debarment of Jack A. Abramoff, DOI Case No. 10-0007-00.

Dear Mr. van Horne:

This is to provide you with my written determination as the U.S. Department of the Interior (DOI) Debarring Official, regarding the proposed debarment of Jack A. Abramoff (Respondent). Based upon the information presented, on balance, imposition of a three year period of debarment provides the appropriate protection for Federal procurement and nonprocurement program award activities.

I. Brief Procedural History.

DOI proposed to debar Respondent by Notice dated September 17, 2010. The Notice proposed debarment from Federal procurement and non-procurement program activities for a three (3) year period. The Notice relied upon information provided in an Action Referral Memorandum (ARM), dated September 13, 2010, from the DOI Office of Inspector General Acquisition Integrity Unit (AIU). The ARM provided information about Respondent's September 9, 2008, criminal conviction by the United States District Court for the District of Columbia on one count of conspiracy to defraud the United States, in violation of 18 U.S.C. § 371; one count of honest service mail fraud in violation of 18 U.S.C. §§ 1341 and 1346; and one count of tax evasion in violation of 26 U.S.C. § 7201.

Respondent, through counsel, timely contested the DOI Notice by letter dated October 25, 2010. Respondent's letter offered written information against debarment and requested an oral presentation of matters in opposition (PMIO) meeting with the Debarring Official. By email correspondence on October 26, 2010, DOI Debarment Program Manager, established a schedule for the debarment proceeding, including setting the date for a PMIO on November 17, 2010. Under the schedule Respondent provided supplemental written information dated, November 8, 2010.

By email dated November 15, 2010, Respondent withdrew the request for a PMIO. On November 16, 2010, a copy of the Government's Sentencing Memorandum in the Abramoff criminal case, quotes from which were included in Respondent's November 8th supplemental written submission in opposition to debarment, was made a part of the administrative record. AIU provided a written response to Respondent's information by memorandum dated November 22, 2010.

Respondent's October 25th contest letter requested the opportunity to also make an oral presentation of matters in opposition (PMIO). The case schedule set a date of November 17, 2010, for the requested PMIO. However, Respondent by email from counsel dated November 15, 2010, withdrew the request for a PMIO. The matter proceeds on the basis of the written submissions.

Upon review of the record, the information does not raise a genuine dispute over facts material to the existence of cause for debarment that would necessitate additional fact-finding proceedings. The matter is ready for final decision.

II. Discussion.

Debarment is an administrative action taken to shield the government from individuals and entities who, because of waste, fraud, abuse, noncompliance or poor performance, threaten the integrity of federally funded procurement and non-procurement activities. Debarment is not employed as punishment for misdeeds. That function is the purview of other forums. Rather, debarment addresses present responsibility with regard to participation in federally funded work. Respondent in his letters of October 25th and November 8th raises several arguments in opposition to the proposed debarment under 48 C.F.R. Subpart 9.4.

A. Preliminary Issues.

1. Contractor Status.

Respondent preliminarily asserts that the debarment rule at 48 C.F.R. Subpart 9.4 applies only to contractors and that Respondent is not a past or present government contractor. Debarment is a prospective remedy to avoid future business risk by precluding eligibility for future awards. The misconduct need not arise in performance under a Federal award. It is well established that when presented with information indicating a lack of business honesty or integrity the government need not wait until it is actually harmed in the course of performance of a Federal contract or assistance award before acting to exclude a person from future award eligibility. It is incumbent on the debarring official when presented with information indicating the presence of past conduct indicating a lack of business integrity, honesty or poor performance to evaluate the necessity for protection of Federal procurement and nonprocurement award program activities.

Under the definition of "contractor" at 48 C.F.R. § 9.403, a person falls within the definition either where business is directly conducted under a Government contract or subcontract, or where the person "may reasonably be expected" to conduct such business. Considering

Respondent's many years of experience in the area of Native American tribal issues it is reasonable to anticipate that he may seek to participate in federally funded work, directly or indirectly, or as an agent or representative of another contractor or assistance recipient. Accordingly, Respondent properly falls within the regulatory definition of "contractor" at 48 C.F.R. § 9.403. It is also noted that based upon his work experience Respondent also may reasonably be expected to be a "participant" in Federal assistance, loan and benefit award programs, under the nonprocurement debarment rule at 2 C.F.R. §§ 180.820 and 180.980.

2. Time Passage from the Offense to the Notice Issuance.

Respondent urges in his October 25th written submission that debarment is presently unwarranted because no proceedings were initiated at the time of his misconduct and subsequent conviction. However, the mere passage of time from the date the cause for debarment arose does not moot the question as to present responsibility or otherwise bar debarment consideration. As Mr. Stanley Stocker, the AIU case representative, observes in his November 22, 2010, memorandum, in *Shane Meat Co., Inc., and H. Roland Shane v. United States Department of Defense and Defense Logistics*, 800 F.2d 334 (3rd Cir. 1986), the court upheld a three year debarment of the company even though the offenses were then over five years old. In that debarment action, the government imposed debarment notwithstanding the passage of time because the company failed to persuasively demonstrate that it had implemented operational changes that would preclude recurrence of the criminal conduct. See *Id.*, at 337.

Respondent's criminal conduct of conspiracy to defraud the government, wire and mail fraud and tax evasion, occurred over several years. Respondent did not plead guilty to the criminal charges until 2008. He was adjudicated guilty with the entrance of his conviction on September 4, 2008. Respondent subsequently was incarcerated until this year. In June of 2010 he was released to a halfway house.

Respondent does not indicate that subsequent to his offense and conviction he has participated in federally funded work from DOI or other agencies. Respondent is now, or soon will be, in a position to seek work grounded in his areas of experience. The September 18, 2010, Notice of Proposed Debarment issued approximately a month after Respondent's release from incarceration and followed promptly upon receipt of the September 13, 2010, Action Referral Memorandum from AIU which first presented the matter for debarment consideration. Consideration at this time of Respondent's present responsibility to perform under a Federal contract or assistance award is timely and most certainly appropriate.

B. Action Basis and Mitigating Factors Consideration.

1. Cause for Debarment.

The existence of cause for debarment is the requisite starting point for evaluation. On September 9, 2008, the United States District Court for the District of Columbia convicted Respondent, upon a guilty plea, on one count of conspiracy to defraud the United States, in

violation of 18 U.S.C. § 371; one count of honest services mail fraud in violation of 18 U.S.C. §§ 1341 and 1346; and one count of tax evasion in violation of 26 U.S.C. § 7201. Respondent's public corruption, fraud and tax evasion offenses conduct occurred in the course and/or furtherance of activities as a lobbyist in Washington D.C., representing Native American tribal organizations among other principal clients.

The DOI Notice of Proposed Debarment states that cause for debarment exists under 48 C.F.R. §§ 9.406-2(a) (3), and/or (a) (5). Section § 9.406-2(a) (3) states that a debaring official may debar a contractor for a conviction of or civil judgment for "commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, violating Federal criminal laws, or receiving stolen property."

The cause section of Subpart 9.4 broadly encompasses a spectrum of conduct evidencing a lack of business honesty and integrity or poor performance providing a basis for debarment. Section 9.406-2(a) includes a wide range of types of offense based misconduct broadly keyed to categories of misconduct rather than itemized violations of specific statutes.

Section 48 C.F.R. § 9.406-2(a) (5) provides that the debaring official may debar for a conviction of any other offense indicating a serious lack of business integrity or business honesty. This subsection is designed to serve as a catch-all provision to ensure inclusion for cause purposes of any types of misconduct showing a lack of business honesty or integrity, which may not fall within the generic categories set forth at § 9.406-2(a) (1) through (a)(4).

The felony offenses of conspiracy, theft of honest services mail fraud, and tax evasion of which Respondent stands convicted unquestionably reflect adversely upon business honesty and integrity. These offenses readily fall within the broad parameters of Section 9.406-2(a) (3). Alternatively, assuming that Respondent's offenses could somehow be viewed as falling outside of the ambit of the Section 9.406-2(a) (3) categories, the offenses fall within the ambit of the broad catch all offense provision of Section 9.406-2(a)(5). Respondent in his submissions does not contend that the offenses fail to constitute cause for debarment within the cited sections.

The ARM's information presents a clear and rational basis for concern regarding conduct by Respondent indicating a lack of business honesty and integrity. Respondent's conviction is a fact of record. The conviction establishes the existence of cause for debarment under FAR § 9.406-2 (a) (3) and (a) (5).

2. Mitigating Factors Assessment.

Debarment, both by its remedy nature and as a matter of regulation, is not an automatic result of establishing the existence of cause for debarment. Debarment is first and foremost about the present rather than the past. It well established that it is a remedy for use to protect government procurement and nonprocurement program interests only where truly warranted. It is not

punishment. The seriousness of the past misconduct and any information presented by a contractor that persuasively indicates mitigating factors, altered circumstances, remedial measures, or other actions taken that address present responsibility is evaluated in reaching a decision on debarment.

Respondent contends that the Debarring Official erred in not analyzing the factors at § 9.406-1 before notice issuance. Respondent misperceives the process. As stated at § 9.406-1 the factors pertain to the information which the Debarring Official should consider "in making a debarment decision." The Debarring Official's determination to debar is the ultimate one made on the completed administrative record. It follows notice issuance, and, where an action is contested, receipt of information from the respondent regarding mitigating factors in connection with the misconduct or remedial measures taken by the respondent to address and preclude recurrence of the conduct giving rise to cause for action.

The information provided for the record by AIU and Respondent in contesting the notice is considered in reaching a final determination on whether to impose debarment. The focus in this proceeding is on the business honesty and integrity of Respondent as an individual. The information received careful review and evaluation against criteria at 48 C.F.R § 9.406-1(a) as applicable to an individual, rather than organization.

a. Fulfilling Court Imposed Sanctions.

Whether a respondent has fulfilled court imposed sanctions is a factor considered in reaching a determination on debarment. The Court sentenced Respondent to forty eight months imprisonment followed by three years supervised probation, and payment of restitution in an amount ultimately determined to exceed \$39,000,000. The record indicates Respondent has completed his period of imprisonment. Respondent provides no information regarding fine payment or restitution payments scheduling. While this information is considered it does not of itself speak definitively to Respondent's current business honesty and integrity as fulfillment of the court imposed sanctions is compulsory rather than voluntary. The information provide does not support a conclusion that a period of debarment is now unwarranted.

b. The Seriousness of the Offense and Level of Relative Culpability.

Respondent's level of relative culpability, based upon the record, is considered in reaching the decision on debarment. Although not stated in the ARM, the Government's Sentencing Memorandum, offered by Respondent for the record, indicates that Respondent's conviction by the D.C. District Court was preceded by a March 29, 2006, conviction by the Federal District Court for the Southern District of Florida on charges of conspiracy to commit mail fraud, and commission of wire fraud in a separate fraud prosecution. That Court sentenced Respondent to seventy months in prison followed by three years supervised probation and restitution ultimately determined to exceed \$39,000,000. There is no information showing previous exclusions or disqualifications from Federal non-procurement or procurement programs, or any administrative agreements with conduct similar to that underlying this debarment action.

Respondent stands convicted of multiple serious felony offenses. Respondent was the initiator and prime mover of the criminal conduct. His misconduct included concealment, duplicity, and the corruption of high placed public officials. Respondent compounded his conspiracy with tax evasion. The DC District Court sentenced respondent to a substantial prison term and restitution.

The corruption set in motion by Respondent's criminal conduct constituted a serious assault on the integrity of, and public confidence in, the workings of government programs. The prosecution has resulted to date in the convictions of one Member of Congress, five high-level Legislative Branch officials, one high level Executive Branch official, and two other mid -to low level public officials. The record indicates a very high level of relative culpability on Respondent's part.

c. Voluntary Disclosure and Level of Cooperation with Government Agencies During the Investigation and Legal Proceedings.

The actions of voluntary self-disclosure of misconduct and, or, the degree of cooperation with an investigation and legal proceedings can speak to a contractor or individual's present conformance to ethical standards of business conduct. Respondent did not self disclose his misconduct prior to initiation of investigation.

Respondent does urge, however, that he provided an extraordinary level of cooperation with the prosecuting authorities and that this level of cooperation should support the conclusion that debarment is not necessary. Respondent points to the August 27, 2008, Government's Sentencing Memorandum in his criminal proceeding in the District Court for the District of Columbia as support for his characterization of his level of cooperation. The Sentencing Memorandum does in fact indicate a high degree of cooperation. The Department of Justice characterized Respondent's cooperation as "extraordinary." The report states at page 19 that Respondent's "statements to investigators have been truthful and complete...Likewise his cooperation has been extensive in that he has been debriefed dozens of times, and he has performed many hours of his own research to help investigators locate important emails and documents." The Sentencing Memorandum recommended reduction of jail time.

It is evident that Respondent's cooperation was instrumental in the public corruption investigation in leading to the conviction of several individuals, including high level public officials. The record shows that Respondent cooperated materially with the prosecutors and consented to enter a guilty plea to resolve the criminal case without trial. These facts are considered with respect to potential mitigation value in this debarment proceeding. Taken in context with other information of record, such an action can contribute to indices of acceptance of responsibility for illegal conduct and commitment to changed future conduct. However, absent other persuasive supporting indicia of altered business attitude, particularly as discussed below, the action may reflect no more than self-interest in limiting the potential for significantly greater liability attendant on proceeding to trial. The information of record in this action, as discussed below, is not sufficient to show debarment is unnecessary.

d. Recognition of the Seriousness of the Misconduct and Acceptance of Responsibility.

The record shows that Respondent consented to enter a guilty plea to resolve the criminal case without trial. The fact Respondent chose to plead guilty is considered with respect to its potential mitigation value in this debarment proceeding. Taken in context with other information of record, such an action can contribute to indices of acceptance of responsibility for illegal conduct and commitment to altered future conduct. However, without other persuasive supporting indicia of altered business attitude the action may reflect no more than self-interest in limiting the potential for significantly greater liability attendant on proceeding to trial. Accordingly, limited weight attaches to the fact itself.

Respondent's submissions in this matter focus on contentions that he is not a "contractor;" that the passage of time from his offense should preclude consideration of his present responsibility; and that his significant level of cooperation with the prosecution into the criminal conspiracy he initiated in and of itself should be sufficient to conclude debarment is not necessary. However, Respondent provides no personal statement, written or verbal in this proceeding, expressing remorse for, and recognition of, the seriousness of his criminal conduct and the threat such conduct poses to the integrity of government program operation and public confidence in them, and true acceptance of responsibility.

Two days before the scheduled PMIO, Respondent advised DOI that he believed the written information provided for the record was sufficient and had decided to forgo the meeting. The debarment rule at 48 C.F.R. 9.406-3 provides that a person may contest in person, in writing or through a representative. The rule does not contain authority to compel the appearance of individuals. While the respondent may elect to proceed solely through written information, the PMIO nevertheless provides a useful opportunity, in a process which is inherently about business risk, for the direct assessment by the Debarring Official of an individual's demeanor and sincerity and question Respondent directly about his or her present attitude towards ethical business conduct. Since debarment deals with the potential for business risk, in the case of individuals, hearing from a person directly and evaluating a person's demeanor and credibility in the course of a presentation can provide a useful benchmark aid in determining whether or not to impose the protection of debarment, particularly where the written information provides a mixed picture.

The facts of Respondent's decision to plead guilty and his level of material cooperation with the Department of Justice in the criminal prosecution are acknowledged. This information is balanced against the very serious nature of the past criminal conduct with its elements of conspiracy, fraud, concealment, duplicity, tax evasion and corruption of public officials. Also considered is the practical recognition that even a significant cooperation with the prosecution may be driven by the objective of minimizing or reducing the degree of punishment rather than by an altered attitude towards business ethics and integrity. Absent the opportunity to hear directly from Respondent and gain a sense of whether his experience has promoted an altered attitude on business ethics, a question remains as to whether the fact of his level of cooperation with the prosecution supports a conclusion that his attitude towards business honesty and integrity is presently altered such that debarment is unnecessary.

In these proceedings it is the Respondent's obligation to persuasively demonstrate to the Debarring Official the presence of effective mitigating factors or remedial measures to establish that debarment is unnecessary to protect the Government's procurement and nonprocurement program interests. Where, as here, the record presented leaves remaining doubt, the exercise of prudent stewardship of the public fisc dictates imposition of a period of debarment to protect the public interest in the integrity of Federal procurement and nonprocurement program award activities.

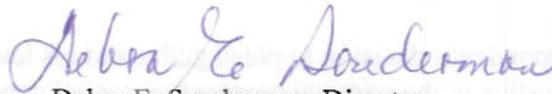
III. Conclusion.

The Notice proposed a three (3) year debarment, the general time period provided under the rules. The record establishes the presence of cause for debarment. The record also contains limited mitigation information. Based on the information presented, as discussed above, imposition of a period of debarment is warranted.

Prescribing the appropriate length of time of that debarment is not a precise science. Balancing the information presented for the record, as discussed above, the ordinary three year period of debarment contemplated under the regulation provides the appropriate degree of remedial protection for the government's procurement and non-procurement program interests. Under the FAR at 48 C.F.R. § 9.405(a), award ineligibility is effective upon the date of the Notice of Proposed Debarment. Consistent with 48 C.F.R. §§ 9.405(a) and 9.406-4(a) (2), the period of debarment imposed measures from that date of initial ineligibility. Accordingly, the period of debarment measures from the date of the July 28, 2010, Notice of Proposed Debarment. The debarment terminates at close of business, on July 27, 2013.

As stated earlier in this decision, debarment is a present, protective, remedy. In the event of changed circumstances, reversal of the criminal conviction upon which debarment is based, or other new relevant information about remedial or mitigation actions, Respondent may at any time petition in writing for reinstatement, as provided under 48 C.F.R. § 9.406-4(c).

Sincerely,



Debra E. Sonderman, Director
Office of Acquisition and Property Management

cc: David M. Sims, PAM
Jim Weiner, SOL
James Smith, OIG/AIU
Stanley Stocker, OIG/AIU
Official Case File