



United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240



DEC 15 2009

CERTIFIED MAIL
RETURN RECEIPT

John D. Winninghoff, President
Winninghoff Boats, Inc.

Rowley, Massachusetts 01969

Dear Mr. Winninghoff:

This is to provide you with my written decision as Debarring Official for the U.S. Department of the Interior (DOI) regarding the proposed debarment of you, and of Winninghoff Boats, Inc. (hereafter, "you" or "your"). I find that your debarment from Federal procurement and nonprocurement activities for three (3) years is presently warranted based upon consideration and balancing of all information presented for the administrative record.

I. Brief Procedural History.

DOI proposed to debar you by Notice dated August 19, 2009, under the provisions of 48 C.F.R. Subpart 9.4. 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) from the DOI Office of Inspector General (OIG). DOI based the action on the fact of the March 11, 2009, civil judgment against you, in the United States District Court for the District of Minnesota, on a charge of unjust enrichment in violation of 28 U.S.C. § 2412.

You timely contested the Notice of Proposed Debarment, by two page letter dated September 17, 2009. Your letter did not request a meeting with the debarring official under 48 C.F.R. § 9.406-3(c). You have submitted no further written information in opposition to debarment.

Upon review of the record, the information provided does not raise a genuine dispute over facts material to 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 to be used as punishment. Rather, debarment addresses present responsibility.

A. Cause for Debarment.

The existence of past misconduct is the requisite starting point for evaluation. In early 2003, the DOI National Park Service (NPS) solicited proposals from shipyards to design and construct a bio-diesel fuel sightseeing tour boat for Voyageurs National Park in Minnesota. You responded to the solicitation and were the low bidder. The NPS awarded you a fixed price contract in the amount of \$475,000 on or about September 1, 2003. The NPS contract provided for six progress payments and a boat delivery date of on or before May 15, 2005.

Between September 12, 2003, and October 19, 2004, you submitted three invoices to NPS for work claimed to be performed. The invoice dated September 12, 2003, claimed \$47,500. The invoice dated December 16, 2003, claimed \$142,500. Finally, the invoice dated October 19, 2004, claimed \$95,000. NPS paid you amounts totaling \$285,000. The NPS modified the contract on or about June 2, 2005, to establish a new boat delivery date. NPS learned about one month later in or about July 2005 that you had not in fact performed any work on the tour boat with the monies paid to you by NPS.

You admitted in response to NPS inquiries that other than \$12,000 expended as a part payment for vessel plans and drawings, you used the monies paid under the contract for unrelated debts. NPS issued a cure order. An exchange of correspondence followed. You first offered to build the boat as specified in the contract for an additional \$310,000. You then offered to build one or two smaller boats. On December 27, 2005, the NPS terminated the contract for failure to make satisfactory progress and for misrepresentation.

A civil complaint on behalf of the NPS was filed against you and the corporation in the United States District Court for the District of Minnesota, on December 24, 2008. The complaint alleged false claims in violation of 31 U.S.C. § 3729 -3733, common law fraud, and unjust enrichment in violation of 28 U.S.C. § 2412. Subsequently, you agreed to a Stipulation Regarding Consent to Judgment on the count of unjust enrichment. The Stipulation was entered with the Court on March 9, 2009. Based on the Stipulation, the District Court entered a Judgment on March 11, 2009, ordering repayment to the government of \$273,000.

The ARM's information presented a clear and rational basis for concern. You are adjudicated of unjust enrichment, a civil offense adversely reflecting upon business honesty and integrity. The fact of the civil judgment against you, as a matter of regulation, establishes the existence of cause for debarment under 48 C.F.R. §9.406-2(a) (1), (a) (3), (a) (5), and/or (c).

B. Mitigation Factors and Remedial Measures.

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 is a remedy for use to protect government procurement and nonprocurement program interests only where truly warranted. 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.

The information of record regarding the seriousness of your misconduct, its nature and duration, and the apparent level of relative culpability as well as the other information you provide in your contest letter is taken into consideration and balanced in reaching a decision regarding the need for, and period of, debarment in this matter. Your information, together with that provided by OIG, received careful review and evaluation under the relevant criteria at 48 C.F.R. § 9.406-1(a).

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

The civil offense of unjust enrichment is a serious one. The conduct for which you were adjudicated, and consequently the illegal acts of record, extended over at least two years. During that time you claimed and received payments from NPS exceeding \$285,000, for a boat you did not build. This is not a mere contract dispute over questioned claimed contract costs. You submitted fraudulent payment invoices. You consented to judgment on a civil charge of unjust enrichment. However, your actions under the contract are essentially tantamount to theft of government funds. This misconduct evidences a serious lack of business honesty and integrity, demonstrating that you pose a serious potential business risk to the government.

There is no indication of previous civil or criminal prosecutions in your business career, which by your report spans more than twenty-five years. There is no information showing previous exclusions or disqualifications from Federal non-procurement or procurement programs, or any administrative agreements with the government based on conduct similar to that underlying your civil adjudication. The misconduct appears in the overarching time frame to be an isolated occurrence.

The record, however, indicates that you initiated and continued the illegal conduct. You were not an ancillary, or minor, participant in a scheme conceived and directed by others. The misconduct extended over a substantial time period with the submission of at least three false invoices totaling a significant amount. The repeat conduct occurred notwithstanding the passage of time for reflection on your part that you had engaged in misconduct.

You offer for mitigation consideration the assertion that you, as an individual, devoted a significant portion of your working life to U.S Government service both in the military and civilian defense contracting industry. Military service is commendable. It may often serve to

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form or enhance individual values, character, and conduct reflecting business honesty and integrity. In this instance, however, it is evident that past experience did not serve to preclude commission of the illegal acts giving rise to the cause for debarment.

You additionally note that you ended your military service as a contracting officer with the United States Air Force Air Research and Development Command at Wright Patterson Air Force Base in Ohio, and upon return to civilian life held senior marketing and project management positions with several defense contractors. Your government contracting officer and defense contractor experience should, if anything, have fostered knowledge and an enhanced awareness of the requirements and standards of conduct attaching to the performance of government contracts and the necessity to avoid illegal conduct in performing them. This contextual background information indicates the presence of a significant level of relative culpability which factors into my decision to debar.

2. Fulfillment of the Court Imposed Sanctions.

An inherent degree of ameliorative impact may attach to the experience of criminal or civil prosecution and the fulfillment of court imposed sanctions. The Stipulation Regarding Consent to Judgment requires that you repay to the government \$273,000, plus costs and post-judgment interest. A lump sum payment of \$20,000 was due within sixty days of entrance of the Consent to Judgment. The schedule for repayment of the remaining amount of \$253,000 of the Judgment is unclear. You state that you are in the process of repaying the judgment. This is considered and weighed for value in light of the information presented for the record. However, the mere fact of proceeding towards involuntary completion of a court imposed judgment, without more buttressing mitigation information, does not provide persuasive evidence of an altered present attitude regarding business honesty and integrity to assure voluntary adherence to appropriate standards of business conduct.

3. Self-Disclosure of Misconduct and the Level of Cooperation with the Prosecution.

The act of voluntary self-disclosure of misconduct and extraordinary cooperation with an ensuing investigation and legal proceedings can speak to a contractor or individual's present conformance with ethical standards of business conduct. The NPS awarded the boat contract to you on or about September 1, 2003. The NPS contract set a delivery date of on or before May 15, 2005. You submitted payment invoices dated September 12, 2003, for \$47,500; December 16, 2003, for \$142,500; and October 19, 2004, for \$95,000. The last invoice contained the statement: "20% - Start of Hull Construction..." On or about June 2, 2005, the NPS modified the contract to provide a new delivery date of on or before February 15, 2006. Shortly thereafter in July of 2005, NPS learned that you had not started any work on the tour boat or purchased associated supplies with the payments made by NPS.

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You state in your September 17, 2009, contest letter that you “voluntarily brought to the attention of the [NPS] the lack of financial capacity to build the boat.” You provide no corroborating documentation or context as to how and when this occurred. The statement on its face indicates a notification to NPS of financial difficulties in completing the contract, rather than a self-disclosure of fraudulent invoice submission. The information of record indicates that the fraudulent payments and unjust enrichment came to light only after the boat delivery was due under the contract and you produced no boat.

You assert that in the spring of 2005 you attempted to sell the business but were unsuccessful. No documentation is provided. But, even if true, an attempt to sell the business in 2005 does not indicate a disclosure of the earlier submission of fraudulent invoices in 2003 and 2004. In summary, it does not appear that you self-disclosed the misconduct to the NPS.

You did consent to entrance of Judgment without trial. This fact is weighed with respect to potential mitigation value. Taken in context with other information of record, such an action can indicate acceptance of responsibility for illegal conduct and commitment to changed future conduct. But, without other supporting indicia of altered business attitude, such an action may merely reflect self-interest in limiting the potential for greater liability attendant on proceeding to trial.

Your submission in opposition does not present a picture of self-disclosure of misconduct or consistent and extraordinary cooperation with the prosecuting authorities that would indicate a current, post offense, altered attitude towards business honesty and integrity.

4. An Acknowledgement of the Seriousness of the Misconduct and Acceptance of Responsibility.

Whether a contractor acknowledges the seriousness of past misconduct and truly accepts responsibility factors into the decision on whether a potential business risk presently remains. Your letter of September 17, 2009, focuses on your corporate financial difficulties in 2005. You assert, in essence, that the NPS should have continued to do business with you after the default. You contend that prior to the civil prosecution you were excluded from any opportunity to make redress through a modified contract with NPS. You state that in the course of seeking a replacement contractor the NPS contracted for a larger boat, and thereby “tacitly admitted that the original budget was too low, and the original boat contract would not have produced a boat meeting the [NPS] needs.”

Your assertion is unsupported by documentation. But, even if your statement regarding NPS actions were accurate, it does not excuse or mitigate against your actions in both comprehensively failing to perform under the contract and claiming payments, exceeding \$285,000, for work not in fact performed. The issue in this proceeding is the question of your present inherent business integrity and honesty rather than past contract award decisions by NPS.

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You contend that being proposed for debarment this year has reduced your ability to secure new contracts and reimburse the government the monies you owe under the civil judgment. The premise that given the demonstrated business risk the government should continue to consider you for new awards absent a persuasive showing of present responsibility, simply in order to aid you to repay your unjust enrichment debt owed to the government under the civil judgment, is unpersuasive as a basis not to impose debarment.

Debarment may have adverse personal and business economic consequences, in terms of the potential to participate in future federally funded work. However, the mere possibility of such an impact cannot justify non-use of the remedy where the record supports it. The first and foremost purpose of the remedy is stewardship of the integrity of federally funded programs and use of taxpayer dollars.

In sum, your letter contains no statements demonstrating that you acknowledge the seriousness of your prior illegal conduct and recognize the business threat such conduct poses to the integrity of government procurements. Nor do you offer any statement affirmatively accepting responsibility for the misconduct. Based on the information presented I cannot prudently conclude that you now truly understand and acknowledge the seriousness of your misconduct and accept responsibility for it, demonstrating that you now possess an altered attitude towards business conduct sufficient to mitigate against the necessity for a period of debarment.

5. Implementation of Remedial Measures, Practices, and Procedures and Other Measures.

Whether or not the contractor has instituted, or committed to institute new or revised business practices and procedures to preclude recurrence of the misconduct giving rise to the cause for debarment is an important factor in deciding whether debarment is warranted. The conduct for which you were prosecuted occurred relatively recently, between 2002 and 2005. The civil prosecution occurred in 2008.

The record is silent as to whether prior to the offense you had standards of conduct and internal control systems in place to guard against the kind of misconduct which gave rise to the offense. The fact that the offense occurred indicates that if standards existed they were not effective.

You offer no information to show that since the offense, the start of prosecution or, ultimately, following judgment, you instituted procedures and controls or took any other appropriate individual or corporate actions to preclude the recurrence of the type of misconduct that led to the civil prosecution. There is no indication of undertaking appropriate disciplinary actions. You were individually prosecuted together with the corporation as a principal actor in the misconduct. You remain at the helm of the company. The information of record does not provide assurances regarding your present attitude towards business ethics such as to support a decision that debarment is unnecessary.

III. Conclusion.

Weighing the information of record, as discussed above, imposition of a period of debarment is warranted. Prescribing the length of time is not a precise science. The Notice proposed a three (3) year debarment, the general period under the rules. Considering and balancing the information presented and discussed above, the general three year period of debarment provides the appropriate degree of remedial protection for the government's procurement and non-procurement program interests.

You request in your September 17th letter that if debarment is imposed, "please make the starting date retroactive." Debarment, by nature as a remedy and by regulation, is not retroactive. Under the FAR at 48 C.F.R. §§ 9.405(a) and 9.406-4, award ineligibility is effective upon the date of the Notice of Proposed Debarment. The period of debarment imposed runs from that date of any initial award ineligibility. Accordingly, the three year debarment runs from August 19, 2009, the date of the Notice of Proposed Debarment. As stated earlier in this decision, debarment is a present, protective, remedy. In the event of changed circumstances, reversal of the civil judgment upon which debarment is based, or other new relevant information about remedial or mitigation actions, you 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
Ed Woo, OIG
James Smith, OIG/AIU
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Official Case File