



United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240



APR 1 2010

CERTIFIED MAIL
RETURN RECEIPT

James E. McMahon
Murphy, Goldammer & Prendergast, L.L.P.

Sioux Falls, South Dakota 57104

Re: Proposed Debarment of John Michael Nystrom, and
Nystrom Electrical Contracting, Inc.

Dear Mr. McMahon:

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 John Michael Nystrom (Nystrom) and Nystrom Electrical Contracting, Inc., (NECI). Debarment of Nystrom and NECI from federal procurement and non-procurement activities for one (1) year is presently warranted based upon consideration and balancing of all information presented for the administrative record.

I. Brief Procedural History.

DOI proposed to debar Nystrom and NECI under 48 C.F.R. Subpart 9.4, by separate Notices dated November 20, 2009. The Notices proposed debarment from Federal procurement and non-procurement program activities for a three (3) year period. Each Notice relied upon information provided in an Action Referral Memorandum (ARM) from the DOI Office of Inspector General (OIG).

DOI proposed debarment of Nystrom based on the fact of his July 20, 2009, criminal conviction, in the United States District Court for the District of South Dakota, Central Division, on a count of Misprision of a Felony, in violation of 18 U.S.C. § 4. DOI proposed debarment of NECI based upon imputation to the corporation of Nystrom's criminal conduct under 48 C.F.R. § 9.406-5(a), and based upon NECI's status as Nystrom's affiliate, under 48 C.F.R. §§ 9.403 and 9.406-1(b).

On behalf of Nystrom and NECI (Respondents), you timely contested the Notices by written submission dated January 21, 2010. On February 26, 2010, Stanley Stocker, the OIG case representative, provided for the record a reply to the Respondents January 21st submission.

By March 4, 2010, case scheduling e-mail David Sims, DOI Debarment Program Manager, accorded Respondents the opportunity to provide documentation to statements in their January 21, 2010, letter offered to address the factors at 48 C.F.R. 9.406-1(a). In particular, the March 4th case schedule e-mail requested copies of the character testimonial letters mentioned in Respondents contest letter as being submitted to the District Court on behalf of Mr. Nystrom in his criminal proceeding; any correspondence from the prosecuting authorities to document assertions that Mr. Nystrom cooperated fully in the investigation; the tape or transcript of the sentencing hearing testimony; the pre-sentencing report; and documentation of the restitution and criminal fine payments ordered by the court.

Respondents replied by letter dated March 15, 2010. Respondents provide for the record, a letter from Nystrom to the Tribal School dated July 16, 2009, attempting to repay the School the \$20,514.64 on that date; documentation of payment of the court ordered fine and restitution on July 20, 2009; copies of testimonial letters sent to the District Court at the time of his criminal sentencing; and a copy of the criminal conviction order, a document already present in the record as an attachment to the ARM. The letter does not provide any supporting documentation regarding Nystrom's degree of cooperation with the prosecuting authorities in the criminal case. Nor does it forward a transcript of the criminal sentencing hearing or the pre-sentencing report.

Respondents do not request a meeting to make an oral presentation of matters in opposition to the debarment official, under 48 C.F.R. § 9.406-3(b). Accordingly, the matter proceeds upon the basis of the written information submitted for the record. 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 is the purview of other forums. Rather, debarment addresses present responsibility with regard to participation in federally funded work.

A. Cause for Debarment.

The existence of past misconduct is the requisite starting point for evaluation. On May 22, 2008, the United States as part of a multi-defendant indictment charged Nystrom with seven counts of bribery of an official of the Crow Creek Sioux Tribal Schools, a felony offense under 18 U.S.C. § 666(a). However, on April 7, 2009, Nystrom waived prosecution by indictment and was charged by Information with, and pled guilty to, the lesser offense of Misprision of A Felony, under 18 U.S.C. § 4. The Court convicted Nystrom upon his guilty plea, of the offense as charged, on July 20, 2009.

Nystrom's criminal conduct of record occurred between 2005 and 2006. In 2005 the Crow Creek Sioux Tribal Schools contracted with Nystrom for electrical work at the tribal school. Subsequent to project initiation Nystrom at the request of the then Tribal Schools Chief Executive Officer, paid a subcontractor for work at the Tribal School dormitory. In October 2005 Nystrom learned that the subcontractor was also being paid for the identical work by the Tribal Schools. Nystrom did not then or nor when subsequently interviewed by a DOI investigator in July 2006, inform the government of the double payment misapplication of tribal funds.

The ARM's information presents a clear and rational basis for concern. Nystrom stands convicted of a felony offense adversely reflecting upon business honesty and integrity. The fact of the conviction against him, as a matter of regulation, establishes the existence of cause for debarment under 48 C.F.R. §9.406-2(a) (5).

The criminal pleadings in the case recite that the contracting of the electrical work for the Tribal school and the payments relevant to the criminal conduct occurred through NECI. NECI was not charged as a defendant. But, Nystrom's offense arose in connection with, and in the course of his operation, as owner and officer, of NECI as his business entity. Accordingly, imputation of Nystrom's conduct to NECI is proper under 48 C.F.R. §9.406-5(a).

Respondents January 21, 2010 written submission acknowledges, that Nystrom owns and operates, NECI. Nystrom controls NECI. Therefore, NECI is an affiliate of Nystrom under 48 C.F.R. §§ 9.403 and 9.406-1(b) and debarment is properly extended to NECI.

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 the misconduct, its nature and duration, and the apparent level of relative culpability as well as the other information provided by Respondents, together with that provided by OIG, is considered in reaching a decision regarding the need for, and period of, debarment. The information received careful review and evaluation against the relevant criteria at 48 C.F.R § 9.406-1(a).

4.

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

The criminal offense of misprision of a felony is itself a felony and therefore a serious offense, even if considered to fall at the lower end on an escalating scale of serious offenses. However, Nystrom's level of relative culpability, based upon the record, is given consideration in reaching the decision on debarment.

Nystrom is one of several individuals prosecuted and convicted in connection with a scheme to defraud the Tribal School and the Federal government. Nystrom was initially charged with bribery. That charge was not litigated. Nystrom, as a consequence of his plea, was recharged only with the misprision of a felony. That offense as the adjudicated offense establishes the criminal conduct of record by Nystrom.

The information of record indicates that Nystrom was an ancillary, lesser, participant in a scheme conceived and directed by others, principally the former Tribal School official. Other defendants, also the subject of DOI debarment notices, were convicted of more serious offenses including theft and bribery concerning programs receiving federal funds, and money laundering. Additionally, the information of record on the adjudicated offense indicates Nystrom's criminal conduct was limited in time.

Nystrom's sentence by the District Court indicates a lower level of relative culpability. The court did not impose incarceration. The Court sentenced him to two years probation, 100 hours of community service, payment of a \$5000 fine and payment to the Tribal School of restitution in the amount of \$20,514.64. Nystrom received, relatively, one of the least severe sentences out of the group of defendants, the principals of which received jail time. Nevertheless, while relatively less severe, two years probation, a \$5,000 fine and payment of over \$20,000 in restitution is not an insignificant sanction.

The record contains no indication of any previous civil or criminal prosecutions in Nystrom's business career which spans over a thirty three year period from creation of NECI in 1977 to the present. 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. On the record presented, the criminal conduct appears in the overarching time frame to be an isolated occurrence.

Nystrom submits for consideration in this forum copies of numerous testimonial letters provided to the court for impact consideration in the criminal sentencing process. These letters, many from prominent business and professional members of his community, including business competitors, a former state governor, and a former state attorney general, consistently characterize Nystrom as demonstrating strong ethical standards in the conduct of both his

business and personal affairs. However, notwithstanding these character testimonials, the personal characteristics described did not operate to preclude commission of the criminal offense. The information presented regarding level of relative culpability does not persuasively support a conclusion that a period of debarment is not necessary. However, the numerous consistent testimonials are collectively given weight in considering the appropriate length of debarment.

2. Fulfillment of the Court Imposed Sanctions.

The information regarding Nystrom's actions to date to fulfill his criminal sentence is considered in reaching a decision on debarment. The July 20, 2009, Conviction Order sentenced Nystrom to two years of probation, performance of 100 hours of community service, a fine of \$5, 000 and a repayment to the Tribal School of \$20, 514.64, representing the amount of interest NECI charged the Tribe for paying subcontractors on behalf of the Tribe.

It appears that Nystrom is in process of fulfilling his two year probation period. Respondents January 21, 2010 written submission stated that prior to conviction Nystrom repaid the Tribe the \$20,514. 64. Respondents' March 15, 2010 submission clarifies that Nystrom attempted to repay \$20, 514.64 to the Tribe on July 16, 2009, but the Tribe refused acceptance at that time. The March 15th submission documents that Nystrom paid fully both the fine and the restitution amount on July 20, 2009, the same day as the imposition of judgment by the Court.

A degree of ameliorative impact may attach to the experience of criminal or civil prosecution and the fulfillment of court imposed sanctions when viewed in conjunction with the overall record. Nystrom does appear to be fulfilling his criminal sentence and this information is considered with the rest of Respondents information in reaching the decision in this matter. However, the mere fact of compulsory completion of a court imposed judgment, absent sufficient additional buttressing mitigation information, is not of itself dispositive of an affirmatively altered present attitude regarding business honesty and integrity such as to assure voluntary adherence to appropriate standards of business conduct.

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

The actions of voluntary self-disclosure of misconduct and, or, extraordinary cooperation with an investigation and legal proceedings can speak to a contractor or individual's present conformance to ethical standards of business conduct. Self-disclosure of misconduct did not occur in this case. To the contrary, the essence of Nystrom's offense is a failure to disclose knowledge of criminal conduct on the part of others.

As to the level of cooperation, Respondents' written submission dated January 21, 2010, states that Nystrom: "cooperated fully with the Government and its investigation when he was first approached. [He] voluntarily sat down with FBI agents for a long, taped interview. [He] voluntarily told the FBI exactly what had transpired and offered to give them whatever documents they wished to look at." This statement is not backed by a letter from the prosecutor describing the presence of a level of cooperation above what is to be expected as a matter of self interest.

Respondents were given an opportunity to provide supporting documentation for the record. Respondents March 15, 2010 response letter appended no documentation. Instead, the letter merely suggests that full cooperation assertion was based upon the fact that Nystrom gave a three and a half hour interview to the Federal Bureau of Investigation (FBI) on August 22, 2007 and that a copy of the August a 2007 agent interview with Nystrom may be available directly from the FBI. Respondents carry the burden in these conviction based debarment proceedings to submit supporting documentation to persuasively demonstrate to the debarment official the presence of mitigating information and, or, effective remedial actions. On March 29, 2010, however, the case representative provided a copy of the report of the Nystrom August 22, 2007, interview by Federal Bureau of Investigation agents referenced by Respondents.

The interview report appears to indicate that Nystrom at that time was voluntarily cooperative during the interview, agreeing to proceed with the interview without an attorney present, and was even forthcoming of information which could potentially be construed adversely against him. It appears then that following his initial non-disclosure of knowledge of a felony when questioned in 2006, Nystrom freely provided information to investigators at least during his 2007 interview. But, it is not clear from this limited information whether his cooperation reached an ongoing level so as to materially aid investigators in his prosecution and advance the overall criminal prosecution of the fraud scheme and convictions of the principals. The information regarding cooperation is given value but also is balanced against the rest of the record in reaching the decision on a period of debarment.

The record does show that Nystrom consented to enter a guilty plea to resolve the criminal case without trial. This fact also is given consideration 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. But, again, without 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 on the original charges of bribery.

7.

4. 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 significantly into the decision on whether a potential business risk presently remains. Nystrom pled guilty to a criminal felony offense under 18 U.S.C. 4. The Information to which he pled recites, in part, that "...Nystrom, having knowledge of the actual commission of a felony cognizable by a court of the United States, to wit, the Misapplication of An Indian Tribal Organization's Funds, by Edwin Patzer in violation of 18 U.S.C. 1163, did conceal the same by not informing federal officials who were interviewing contractors concerning the validity of payments made under these funds..."

Respondents January 21st letter acknowledges that upon review counsel and the court concluded the elements of the offense were present to support Nystrom's guilty plea and conviction. But, the letter at the same time seeks to negate the fact of criminal conduct. The letter states on page 1, that "...Nystrom did not realize there was any criminal conduct occurring. In hindsight, he should have at least raised the question that perhaps subcontractor, Ed Patzer, was double billing even though [he] didn't know whether or not that was occurring." The thrust of Respondents contention is that a crime really did not happen here. Whether Nystrom did or did not actually commit a crime may not be second guessed in this forum. The Court had to have sufficient supporting facts presented in order to accept Nystrom's plea. The plea recites knowledge of actual commission of a felony. The criminal conduct established by the plea and conviction is the operable fact of record.

The assertion Nystrom did not realize there was criminal conduct occurring or that he was committing a crime in not disclosing what he knew, is inconsistent with his criminal plea. It militates against a conclusion that Nystrom truly acknowledges the seriousness of his conduct and accepts responsibility. Respondents offer no direct personal statement from Nystrom to otherwise express or clearly indicate his present individual understanding of the seriousness of the past misconduct and the threat posed to the integrity of government procurement and non-procurement program activities, and his current commitment to altered standards of ethical business conduct.

Based on the information presented, as discussed above, I cannot prudently conclude that Nystrom now truly understands and acknowledges the seriousness of, and accepts responsibility for, his past criminal conduct it, so as to demonstrate a present 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. This factor

III. Conclusion.

The record establishes that cause for debarment of Nystrom and NECI exists. The information presented by Respondents, discussed above, does not persuasively show that debarment is unnecessary. Accordingly, imposition of a period of debarment is warranted. Prescribing the appropriate length of time of that debarment is not a precise science. The Notices proposed a three (3) year debarment, the general period under the rules. The case representative's February 26, 2010 memorandum evaluating Respondents contest information and focusing on Nystrom's level of relative culpability offers a revised recommendation of one year period of debarment.

Balancing the information presented for the record, including the relative level of culpability, the substantial number of consistent character testimonials, and the case representative's assessment, I conclude that a one year coterminous period of debarment for Nystrom and NECI 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 one year debarment measures from November 20, 2009, the date of the Notice of Proposed Debarment, and terminates close of business, November 19, 2010.

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, Respondent(s) 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
Stanley Stocker, OIG/AIU
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