

December 14, 2015

DEBARMENT DETERMINATION

CERTIFIED MAIL
RETURN RECEIPT

Terry L. Pechota
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Re: (Respondent) and d/b/a Creative and Creative, Inc., DOI Case No. 15-0001-00D; and
(Respondent) DOI Case No. 15-0002-00D

Dear Mr. Pechota:

This is to provide you with my written determination as Debarring Official for the U.S. Department of the Interior (DOI) regarding the captioned proposed debarments. After considering the information provided for the official record, I conclude that debarment of the Respondents from Federal non-procurement and procurement activities for a two year period is presently warranted.

I. **Brief Procedural History.**

The instant actions commenced with the suspension of (Respondents) by notices issued on March 31, 2015. The notices were issued under the provisions of 2 C.F.R Part 180, implemented by DOI through 2 C.F.R. Part 1400. By these notices DOI suspended the Respondents based on the fact of their January 23, 2015, Indictment in the Federal District Court for the District of Montana, Great Falls Division charging failure to file a Federal income tax return, and three counts of Federal income tax fraud/filing of false returns. The Respondents did not contest these suspension notices. Subsequently, DOI proposed to debar the Respondents, with inclusion of the captioned d/b/a, by Notices issued on May 19, 2015, based on the fact of the Respondents' entrance of a guilty plea to the charge of Federal income tax fraud through the filing of a fraudulent return for the 2012 tax year.

The May 19 Notices proposed debarment from Federal non-procurement and procurement program activities for a three (3) year period. The Notices relied upon information provided in an Action Referral Memorandum (ARM) from the DOI Office of Inspector General (OIG) Administrative Remedies Division (ARD) regarding the Respondents' guilty pleas.

The Respondents, through counsel timely contested their Notices of Proposed Debarment by letter from attorney Terry Pechota, dated June 30, 2015. By email correspondence to counsel dated July 9, 2015, David Sims, DOI Debarment Program Director, established a case schedule for proceeding on the consolidated debarment actions. The schedule accorded the Respondents the opportunity to submit supplemental written information including any information addressing the mitigation and remedial factors considered in reaching a decision on imposition of debarment, found at 2 CFR 180.860. The ARD was accorded the opportunity to provide written observations regarding the Respondents submissions.

The Respondents provided supplemental written information by correspondence dated August 9, 2015. The Respondents' letter included a request for an oral presentation of matters in opposition (PMIO) as a part of the proceeding. ARD provided a response to the Respondents' submission by email correspondence dated September 3, 2015. The PMIO was initially set for September 19. However due to participant availability scheduling issues, the PMIO was tape recorded for the proceedings record, which took place on October 5. Respondent and counsel participated in the PMIO by telephone conference. (Respondent) did not participate at the PMIO due to his incarceration at the time. (Respondent) and counsel spoke for and provided information on behalf of Respondent). Following the PMIO the Respondents provided additional information in the form of the judicial presentencing report from their criminal trial, by email communication dated October 19.¹ On the same date the ARD provided final written observations. With receipt of these submissions the record closed for review and 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 Federal funded procurement and non-procurement activities. The remedy focuses on a person's "present responsibility" to participate in Federal funded procurement and non-procurement program awards. To be presently responsible, among other factors, a person must have business honesty and integrity.

A. Participant and Contractor Status.

Debarment excludes from participation in new Federal awards a person who is or may reasonably be expected to be a participant or contractor. Under 2 C.F.R. § 180.980, "participant" is defined as "any person who submits a proposal for or enters into a covered transaction, including an agent or representative of a participant." The provisions of 2 C.F.R. § 180.120 make it clear that application is not limited to matters arising under an actual award. The scope of "participant" is also prospective. § 180.120(a) states that the provisions of Part 180 are applicable if one is a "person who has been, is or may reasonably be expected to be a participant or principal in a covered transaction."

¹ At the PMIO Respondents indicated a desire to provide character testimonials submitted to the Court in the criminal proceeding along with the presentencing report as part of their post PMIO submission. However, Respondents submitted only the presentencing report.

The Government is a funder and consumer of an extremely broad range of goods and services. The record indicates that both Respondents possess business experience including, or relevant to, performance on Federal funded projects. The Stone Child College (SCC) is a Chippewa Cree Tribe tribal college located in Box Elder, Montana. SCC is a recipient of Federal funds from DOI, the Department of Education, the Department of Health and Human Services and the Environmental Protection Agency. At relevant times SCC employed (Respondent) as its President and (Respondent) as its Facilities Department Manager.

Questions posed during the PMIO elicited information regarding the Respondents' work experience. (Respondent) served in several capacities at SSC. She served as SCC president for approximately 9 years. Prior to becoming president she served in capacities including Student Services Director and Dean of Student Services. These various positions included contractual, financial, managerial, and educational responsibilities. After departing SCC, (Respondent) for a time undertook business using the name "Creative" a "d/b/a", which she described as engaging in construction, consulting, computer work and catering. (Respondent) also stated at the PMIO that in 2015 she was a tribal case worker under the Temporary Assistance to Needy Families Program (TANF). The TANF program is funded by the U.S. Department of Agriculture.

(Respondent), during his tenure at SCC, served as the Facilities Division Director and taught building trades courses. At the same time he owned and operated a construction company as a sole proprietorship. Information elicited at the PMIO indicates that in this latter capacity he acted as a subcontractor to Hunter Burns Construction Company (HBC) on Chippewa Cree Tribe (CCT) Reservation construction projects and the tribal construction corporation. I take cognizance of the facts that HBC's construction contracts at the CCT Reservation and CCT tribal construction corporation contracts were for tribal projects and CCT funds its tribal projects utilizing discretionary non-procurement assistance from DOI and other Federal agencies.²

Considering the Respondents' past work experience it is reasonable to anticipate that the Respondents may seek to participate in federally funded work, directly or indirectly, or as an agent or representative of another contractor or assistance recipient. Accordingly, the Respondents properly fall within the broad ambit of "participant" at 2 C.F.R. §§ 180.820 and 180.980, and that of "contractor" under Federal Acquisition Regulation debarment rules at 48 C.F.R. § 9.403.

B. Cause for Debarment.

The presence of past misconduct is the requisite starting point for evaluation. The ARM's information presents a clear and rational basis for concern. The Respondents through counsel, in their written submissions and at the PMIO, essentially contend that cause for debarment is not present, urging that their tax offense is unrelated to the capabilities and integrity of the (Respondents) to engage in Government awards.

The Respondents pled guilty to and are convicted of Federal income tax fraud/filing a false tax return, in violation of 26 USC § 7206(1). As the ARD accurately observes in its October 19

² HBC is a business debarred by DOI based upon the fact of its criminal conviction for conspiracy to violate the False Claims Act, under 18 U.S.C. § 286.

memorandum, tax fraud by definition is a criminal offense showing lack of honesty and integrity. The Respondents willingness to defraud the Government under the tax code, whether on personal taxes or business taxes, directly bears on their individual honesty, integrity, and prospective fitness to engage in business with the Government.

Debarment is a prospective remedy by nature. It is designed to preclude in the first instance entrance into transactions with those lacking honesty and integrity. The causes are couched in terms of broad categories of improper conduct rather than violations of specific laws. For example, under §180.800(a)(3), cause is established based upon the fact of conviction of or civil judgment for “*Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, receiving stolen property, making false claims, or obstruction of justice.*” These types of misconduct are not keyed to, and need not have arisen during, performance of a Federal procurement or non-procurement award in order to properly be of concern. Under §180.800(a)(4), debarment may be imposed for “Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects...present responsibility.” Under §180.800(d) a Federal agency may debar a person for “Any other cause of so serious or compelling a nature that it affects your present responsibility.”

Tax fraud against the Government by an individual unquestionably reflects adversely on the person’s individual and, by extension, entrepreneurial honesty and integrity. Tax fraud is an express cause for debarment at 2 C.F.R. § 180.800(a)(3). The offense also readily falls within the more broadly worded scope of §§ 180.800(a)(4) and (d). The Respondents’ guilty pleas and subsequent convictions are a matter of record. The fact of the guilty plea relied upon by the Notices of Proposed Debarment issued prior to conviction established the existence of cause for debarment under 2 C.F.R. § 180.800(d). With the entrance of the conviction orders, cause for debarment also exists under 2 C.F.R. §§ 180.800 (a)(1), (3), and (a) (4).

C. Mitigation Factors and Remedial Measures.

Debarment, both by its nature and as a matter of regulation, is not an automatic result of establishing the existence of cause for debarment. The remedy is used to protect Government procurement and non-procurement program interests only where truly warranted, rather than additional punishment for past misconduct. Consequently, in reaching a decision the Debarring Official considers along with the seriousness of the past misconduct any information presented by a Respondent persuasively indicating mitigating factors, altered circumstances, remedial measures, or other actions taken that address present responsibility.

The mitigating factors and remedial measures generally considered in reaching a decision on whether to debar under 2 C.F.R. Part 180 appear at § 180.860. It is the Respondents’ burden in these proceedings to persuasively demonstrate the presence of mitigating factors or remedial measures sufficient to show debarment is not presently appropriate. The information of record is given careful review and evaluation against the applicable criteria.

1. Fulfillment of 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 record establishes that the Court imposed a sentence of five months incarceration with no supervised release to follow and restitution in the amount of \$47,301. The record indicates the Respondents are currently fulfilling the incarceration portion of their sentences. (Respondent) stated at the PMIO that the restitution payment portion of the sentence is still being worked out.

The limited information of record is considered and weighed for value in light of the overall information presented in this debarment proceeding. Generally, the mere fact of involuntary completion of a judicially imposed sentence, absent buttressing mitigation information, fails to provide persuasive evidence of an altered present attitude regarding business honesty and integrity.

2. 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 person's present conformance with ethical standards of business conduct. The record here is devoid of information indicating self-disclosure. The Respondents asserted at the PMIO that full cooperation with the prosecuting officials occurred. However, the record is devoid of information, such as a letter from the prosecutors to indicate and corroborate an extraordinary level of cooperation with the investigative and prosecuting authorities once the investigation began that could be weighed in terms of evidencing a present altered standard of business ethics and honesty.

3. Acknowledgement of the Seriousness of the Misconduct, Acceptance of Responsibility and Remedial Measures.

Whether a person truly accepts responsibility for and acknowledges the seriousness of the misconduct which resulted in cause for debarment factors heavily into the decision on whether a potential business risk presently remains. Similarly, evidence of appropriate remedial measures undertaken may carry significant weight. Because the debarment remedy is about accountability and responsibility, these are perhaps the most significant factors assessed with regard to whether imposition of debarment is warranted.

The information presented for the record in this proceeding concerning this factor is mixed. As noted previously, to resolve the criminal case without trial, the Respondents consented to enter a guilty plea to the offense of Federal income tax fraud through the filing of a fraudulent return for the 2012 tax year. A Court may only accept a plea if evidence exists to support it. As part of the plea process the Respondents stipulated to the factual conduct establishing guilt on the charge of tax fraud – which they knowingly and willfully made and signed a tax return that contained false information as to a material matter. The admissions of guilt and convictions are facts of record. The debarment forum does not extend a respondent the opportunity to in effect re-litigate guilt or innocence in the absence of the prosecutors.

The fact of the decision 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.

Considering the information presented in the debarment proceedings, the Respondents decision to plead guilty to resolve the criminal prosecution of itself is insufficient to show a definitive true acceptance of responsibility and recognition of the seriousness of the misconduct that led to the cause for debarment. Both in the written submissions and at the PMIO, the Respondents endeavor to explain away the misconduct as a mere mistake stemming from confused reliance on a computer tax preparation software program regarding deductions. Good faith confusion or lack of expertise regarding deductions or amounts properly claimable may conceivably result in a tax payment deficiency on tax day or following audit. However, the fact of record here is criminal conduct rather than mere tax preparation confusion or innocent calculation errors. The Respondents attempted characterization is inherently inconsistent with the fact of their convictions. It directly poses a question about whether the Respondents indeed truly accept responsibility for and understand the seriousness of their illegal conduct.

At the PMIO, (Respondent) indicated that once criminal proceedings against the Respondents commenced an accountant was retained to review records connected to (Respondent) sole proprietorship construction business.³ However, it is not clear whether this step was merely to aid in their criminal defense or also intended to put in place an ongoing relationship to ensure proper tax accounting for their construction business. At the PMIO, (Respondent) in responding to the question “what have you learned from the experience,” provided a somewhat unfocused response prompting counsel to speak for her. (Respondent) then endorsed the posits of counsel that she would secure knowledgeable help in future tax preparation and if holding contracting award approval authority avoid awards to family members. It is unclear whether the statements of (Respondent) were truly her own or merely reflected the prompting of counsel. (Respondent) did subsequently directly state, with apparent sincerity that for her part she wants in the future to be a law abiding citizen and not do anything again to jeopardize her life. No statements direct, by way of written declaration, or indirect by way of representations from (Respondent) or counsel were offered on behalf of (Respondent).

On balance, I cannot satisfactorily conclude from the overall information that the Respondents at this time fully recognize the seriousness of the criminal conduct and the threat such conduct poses to the integrity of Government program operation and public confidence in them so as to provide assurance of altered attitude and future conduct. This assessment factors heavily into the determination that debarment is warranted.

³ Prior to their 2015 Indictment for tax fraud, Respondents were charged in 2014 with conspiracy to embezzle Federal grant and contract funds, theft from an Indian tribal government receiving Federal funding, accepting a bribe, and theft and aiding and abetting theft from an Indian tribal organization. Respondents were found not guilty of those charges following trial. The present DOI debarment action is based solely on the fact of Respondents tax fraud convictions.

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

The debarment remedy serves different objectives than that of the criminal justice process. Debarment, an administrative remedy, focuses on responsibility and accountability as to the potential for assessment of business risk to Government transactions posed by potential award participants rather than liability and punishment for criminal conduct.

The maximum penalty for Tax Fraud under 26 U.S.C § 7206(l), is three years imprisonment, \$100,000 fine, one year supervised release and costs of prosecution. In this instance, the Court utilizing Federal criminal sentencing guidelines imposed a sentence at the lower end of the penalty scale. The Court imposed only five months incarceration with no fine, and restitution payment to the Government of monies to account for the tax fraud.⁴

The sentencing information may indicate an assessment by the Court under the Federal criminal law sentencing guidelines of a relatively lower level of culpability, at least for purposes of criminal liability. It appears that the Respondents have no prior history of criminal conviction, imposition of debarment or suspension, or entrance into an administrative agreement to avoid or resolve a debarment or suspension action. However, the offense committed is a felony and thus inherently serious misconduct. Also, the Respondents were the principals in committing the offense rather than ancillary participants. On balance this information about the offense and degree of relative culpability presents a mixed picture. Some ameliorative value attaches here, but not enough to outweigh the most significant information addressed above, in reaching the decision to debar.

III. Conclusion.

The DOI action notices proposed a three (3) year debarment, the general maximum time period contemplated under the rules. The record establishes the presence of cause for debarment. The Respondents have urged that debarment from being able to work for any entity receiving Federal funds may have serious adverse economic consequences for them. I am not unmindful of this possibility. However, my obligation as Debarring Official is one of stewardship to protect Federal program award interests. The Government engages in award transactions only with “presently responsible” persons. The record here does not contain information to persuasively show the presence of mitigating factors or remedial measures sufficient to preclude the need for the protection accorded by the remedy. Accordingly, in the exercise of prudent discretion, imposition of a period debarment is warranted.

However, prescribing the appropriate length of time of that debarment is not a precise science. Upon balancing the information presented, but most significantly the information pertaining to acceptance of responsibility for and understanding the seriousness of, their misconduct, and a two year period of debarment provides the appropriate degree of remedial protection for the Government’s non-procurement and procurement program interests. Under 2 C.F.R. § 180.865(b), the period of debarment imposed will measure from the March 31, 2015, date of imposition of preliminary suspension of the Respondents in the instant actions.

⁴ Respondents’ conviction orders indicate imposition of an initial minimum repayment amount of \$25 dollars per quarter during their incarceration periods.

As stated previously in this decision, debarment is a present, protective, remedy. In the event of changed circumstances, reversal of the criminal convictions upon which debarment is based, or other new relevant information about remedial or mitigation actions, the Respondent may at any time petition in writing for reinstatement, as provided under 2 C.F.R. § 180.880.

Sincerely,

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/signed/

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

cc: David M. Sims, PAM
Jim Weiner, SOL
Lori Vassar, OIG
Stanley Stocker, OIG
Official Case Files