UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
Washington, D.C.

In the Matter of:	*	
OFORI & ASSOCIATES and CHARLES N. OFORI,	*	**DOCKET NO. 16-0006-DB**
Respondents.	*	

DEBARRING OFFICIAL'S DETERMINATION

INTRODUCTION

By Notice of Suspension and Proposed Debarment dated October 15, 2015 ("Notice"[1]), the Department of Housing and Urban Development ("HUD") notified Respondents OFORI & ASSOCIATES and CHARLES N. OFORI that HUD was proposing their debarment from future participation in procurement and nonprocurement transactions as a participant or principal with HUD and throughout the Executive Branch of the Federal Government for a three-year period from the date of the Notice.

The Notice advised Respondents that their proposed debarment was in compliance with 2 C.F.R parts 180 and 2424. Additionally, the Notice advised Respondents that, pending the outcome of the proposed debarment, and pursuant to 2 C.F.R. §§180.700 and 705, they were immediately suspended from future participation in procurement and nonprocurement transactions as a participant or principal with HUD and throughout the Executive Branch of the Federal Government. The Notice informed Respondents, too, that there was cause for their suspension and debarment based on Respondents' submission of a false certification to HUD.

A hearing on Respondent's proposed debarment and suspension was held in Washington, D.C. on May 3, 2016 before the Debarring Official's Designee, Mortimer F. Coward. Constantinos G. Panagopoulos, Esq., along with Amy Glassman, Esq. and Theodore Flo, Esq. appeared on behalf of Respondents. Brian A. Dupre, Esq., Ana L. Fabregas, Esq., and Jennifer Lake, Esq. appeared on behalf of the Government.

[1] Each Respondent was issued a separate, though substantively identical, Notice. Accordingly, reference to "Notice" may include both Notices without need for distinction.

SUMMARY

I have decided, pursuant to 2 CFR part 180, to debar Respondents from future participation in procurement and nonprocurement transactions, as a participant, principal, or contractor with HUD and throughout the Executive Branch of the Federal Government for a period of 18 months from the date of issuance of this Determination with credit given for their period of suspension. My decision is based on the administrative record in this matter, which includes the following information:

(1) The Notice of Proposed Debarment dated October 15, 2015.
(2) A letter from Respondents' counsel to the Director of the Compliance Division dated November 30, 2015, responding to the Notice.
(3) The Government's Brief in Support of Suspension and Three-Year Debarment for Ofori & Associates, PC and for Charles N. Ofori filed March 7, 2016 (including all exhibits and attachments thereto) ('Government's Pre-Hearing Brief").
(4) Respondent's Motion to Consolidate Dockets Numbered 16-0006-DB, 16-0007-DB and 14-0054-DB filed March 30, 2016.
(5) Respondent's Motion to Refer to a Hearing Officer for Resolution of Factual Issues filed April 4, 2016.
(6) Respondent's Hearing Statement filed April 4, 2016 (including all exhibits and attachments thereto).
(7) Respondents' Motion for Leave to File Reply in Support of Their March 30, 2016 Motion to Consolidate Dockets Numbered 16-0006-DB, 16-0007-DB and 14-0054-DB filed April 8, 2016.
(8) Government's Opposition to Respondent's Motion to Refer to a Hearing Officer for Resolution of Factual Issues dated April 11, 2016.
(9) Government's Response to Respondent's Motion for Leave to File Reply in Support of Their March 30, 2016 Motion to Consolidate Dockets Numbered 16-0006-DB, 16-0007-DB and 14-0054-DB filed April 12, 2016.
(10) Order Denying Respondents' Motion to Consolidate Dockets Numbered 16-0006-DB, 16-0007-DB and 14-0054-DB filed April 28, 2016.
(11) Order Denying Respondent's Motion to Refer to a Hearing Officer for Resolution of Factual Issues filed April 28, 2016.
(12) Order Granting Respondents' Motion for Leave to File Reply in Support of Their March 30, 2016 Motion to Consolidate Dockets Numbered 16-0006-DB, 16-0007-DB and 14-0054-DB filed April 28, 2016.
(13) Respondents' Praecipe with exhibits attached filed May 2, 2016.
(14) Government's Post-Hearing Brief in Support of Suspension and Three-Year Debarment for Ofori & Associates, PC and for Charles N. Ofori filed May 24, 2016 (including all exhibits and attachments thereto).
(14) Respondents' Post-Hearing Statement filed May 24, 2016 (including all exhibits and attachments thereto).

GOVERNMENT COUNSEL'S ARGUMENTS

Counsel summarizes the issue in this proceeding as Respondents' certifying in the System for Award Management (SAM)[2] that they were not proposed for debarment. In fact, at the time of the certification in February 2015, Respondents, HUD contractors since 2003, were proposed for debarment in a Notice issued July 1, 2014, later supplemented by another Notice dated April 15, 2015.[3] Counsel also summarizes the "material facts," described as "simple and uncontested," that gave rise to the October 15, 2015 Notice, as follows: As of March 19, 2014, Respondent O & A had registered in SAM; Respondents failed to update their profile in SAM when they were notified in July 2014 of their proposed debarment; and in February 2015 when Respondents certified in SAM that they were not proposed for debarment, Respondents knew that they were proposed for debarment. Counsel adds that Respondents now acknowledge that the Responsibility Matters Certification was "erroneous when made" and that "no changes were made to O & A's certification" even after Respondents' receipt of the October 15, 2015 Notice informing them of the false certification in SAM.[4]

Respondents are subject to debarment, counsel argues, because they have been participants in covered transactions, namely Federal contracting and other Government work. *See* 2 C.F.R §180.980. Respondent Charles Ofori, as a director and president of O & A, also is a principal in a covered transaction, based on the contracts O & A had with HUD. *See* 2 C.F.R §180.995.

The submission of the erroneous Responsibility Matters Certification provides cause for Respondents' debarment under 2 C.F.R. §§ 180.800(b)(1) and (3) because it was a willful act.[5] Counsel also cites to 2 C. F. R. § 180.800(d) as providing a further basis for Respondents' debarment.[6] Counsel adds that, at the time Respondents submitted the erroneous Certification, O & A had an M & M contract with HUD. Certain provisions of FAR were incorporated into the contract, including a provision that required Respondents to enter data accurately into the CCR, the Federal Government's database that evolved into SAM. The Responsibility Matters Certification was a term of the M& M Contract. By submitting a false certification in SAM, Respondents violated the terms of the M & M Contract thereby providing cause for their debarment under 2 C. F. R.§ 180.800(b)(1). Similarly, the submission of the false certification gives cause for debarment under 2 C.F.R. § 180.800(b)(3) as a violation of the Federal

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[2] SAM is the "primary database for the U.S. Federal Government to manage information on potential government business partners." All entities that would like to be "eligible to be awarded contracts by the Federal Government' must be registered in SAM."

[3] That matter was referred for fact-finding to the HUD Office of Hearings and Appeals, which will issue a Recommended Decision."

[4] Government's Pre-Hearing Brief at 6-7.

[5] 2 C. F.R. § 180.800(b)(1) provides for debarment of a person for a "willful failure to perform in accordance with the terms of one or more public agreements or transactions." And 2 C.F.R. § 180.800(b)(3) provides for debarment for a "willful violation of a statutory or regulatory provision or requirement applicable to a public agreement or transaction."

[6] Under 2 C.F.R. § 180.800(d), a person may be debarred for "[a]ny other cause of so serious or compelling a nature that it affects your present responsibility."

Acquisition Regulations and related requirements."[7] In particular, the SAM User Guide instructs entities that their registration information must be updated as it changes.[8]

The violations described here were willful, counsel contends. Respondents were aware since July 2014 when they received the Notice that HUD was proposing their debarment. Additionally, Respondents were on notice as contractors of their obligation to make changes and update O & A's information in SAM, including the Responsibility Matters Certification. Respondents, however, failed to do so. Respondents, instead, fully aware in February 2015 that O & A and Charles Ofori were proposed for debarment submitted the Certification in SAM attesting that neither O & A nor its principals were proposed for debarment. Accordingly, the submission of the false certification was willful. O and A's willful conduct can be imputed to Charles Ofori pursuant to 2 C. F. R. § 180.630(b) because he allowed his password and username to be used to complete the SAM certification. Further, Respondents failed to correct the Certification even after receiving the October 15, 2015 Notice which detailed the erroneous filing. Respondents' failure to correct the erroneous certification after receipt of the October 15, 2015 Notice of Proposed Debarment indicates, as counsel sees it, "not just recklessness but a willful endorsement of the erroneous Responsibility Matters Certification."[9] Respondents' defense of honest mistake, counsel argues, does not generate confidence that Respondents are presently responsible. Pursuant to FAR 52.209-5(e), the erroneous Certification is a "material representation of fact."[10]

Counsel argues that Respondents' interpretation of the SAM Guide is wrong because HUD does not enter in SAM a party proposed for debarment as an excluded party. Respondents' misinterpretation of the SAM Guide stems from Respondents' confusing the debarment regulations at 48 C.F.R. part 9 with HUD's debarment regulations at 2 C.F.R. part 180. Under HUD's regulations, a proposed debarment, though not an exclusion, must be disclosed in SAM by the entity proposed for debarment. Respondent Charles Ofori had a duty, after receiving the Notice of Proposed Debarment in July 2014, to disclose in SAM the proposed debarment. Accordingly, because a person proposed for debarment under HUD's regulations is not an excluded party, HUD could not legitimately enter Respondents' names in SAM as an excluded party. However, when the October 15, 2015 Notice was issued, Respondents became excluded parties because of their suspension. *See* 2 C.F.R. § 180.710. HUD then had the authority to enter Respondents' names in SAM, and HUD did so that very day. Counsel finds it "inexplicable" that, in light of the three sources that Respondents had for guidance that a HUD proposed debarment is not an exclusion, i.e., the Notices of Debarment, the definition of excluded parties in 2 C.F.R. § 180.940, and the HUD OIG evaluation cited by Respondents, Respondents still would argue that their names should have been entered by HUD into SAM before October 15, 2015.

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[7] Government's Pre-Hearing Brief at 11.
[8] *See id.*, Ex. 5.
[9] *Id.* at 14.
[10] *Id.* at 16.

Counsel rejects Respondents' argument that the SAM User Guide by referring only to "proposed debarment" (not "proposed for debarment under 48 C.F.R. part 9, subpart 9.4" as does 2 C.F.R. § 180.940, defining "Excluded or exclusion") means just that – without any distinction or qualification. See Table 7.3: *CT Codes to Exclusion Type Mapping* in Government Post-Hearing Brief at 9. In this regard, counsel argues that the SAM User Guide does not "override the obligation imposed on Federal agency officials by the applicable suspension and debarment regulations, but instead provides guidance to agencies regarding *how* to enter an excluded party into the SAM Exclusions . . . . The SAM User Guide merely instructs on the mechanism and correct coding for an agency to use." (emphasis in original)[11]

In responding to arguments raised by Respondents at the hearing and in their submissions, counsel notes that, intent aside, Respondent Charles Ofori is held "strictly accountable " for the submission of a false certificate, "given that the certification imposed a duty on him to read it and attest to its truthfulness."[12] Counsel adds that the integrity of an agency program is affected by a false certification, a certification is material, and a false certification is grounds for criminal prosecution.[13]

In reviewing the aggravating and mitigating factors in 2 C.F.R. § 180.860, counsel observes that HUD may not have been harmed financially from Respondents' actions; however, harm to the Government comes from its inability to rely on Respondents to submit truthful information. Other aggravating factors raised by counsel include the duration of Respondents' wrongdoing, beginning in July 2014 with Respondents' failure to update O & A's profile in SAM after receiving the July 2014 Notice of Proposed Debarment, continuing through their failure even after receipt of the February 27, 2015 Notice, the April 2015 Notice, and the October 2015 Notice; Respondents' "perfunctory expressions" accepting responsibility; Respondents' failure to take "meaningful corrective action" to prevent recurrence of filing another erroneous Responsibility Matters Certification; Charles Ofori's tolerating the filing of the erroneous Certification; Respondents' failure to bring the false Certification to the Government's attention or to correct it even now or to identify any disciplinary action taken against Charles Ofori; and Respondents' lack of effective standards of conduct and internal control systems.[14] Counsel also dismisses Respondents' claim of bias, bad faith, and personal animus towards Respondents by the Government, arguing that such allegations have no bearing on whether there is cause for debarment.

Counsel concludes that, based on the filing of the erroneous Responsibility Matters Certification and the issues set forth above, the public interest supports Respondents' immediate suspension and their three-year debarment.

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[11] Government Post-Hearing Brief at 8.
[12] *Id.* at 18.
[13] *Id.* at 20.
[14] With respect to the factor that seeks to determine whether "there is a pattern or prior history of wrongdoing," the arguments posited by the Government will not be considered in arriving at a decision in this matter. The Government refers to matters here that are *sub judice* in another forum. Until those matters in that proceeding are finally resolved, it would be inappropriate to consider the allegations in that proceeding here.

RESPONDENT'S ARGUMENTS

Respondents, through counsel, argue that HUD brought this action against them in furtherance of a "vendetta" and as "part of a calculated effort by HUD to destroy this family business, its principals, and businesses owned by its principals."[15] The false certification in SAM, as alleged in the Notice, resulted from Respondents' "honest and inadvertent mistake." Nonetheless, the Government, based on its "own unproven assertions" and "without actual evidence" contends that the false submission was "intentional or willful." In attempting to establish a case for Respondents' suspension and debarment, the Government, Respondents argue, relies on limited denial of participation (LDP) case law, not case law related to debarment. As such, because HUD could find only cases involving the imposition of a LDP, which, by definition, is a less severe sanction than debarment, to impose a debarment in this case would be "punitive and excessive in scope."[16] Counsel notes that it took HUD seven years from the time HUD began its pursuit of Respondents "to take [them] out of the game completely, plus they have a reputation issue," citing an email exchange between two directors in the Office of Housing.[17]

Respondents explain in further detail that the SAM certification was completed by a staff member.[18] In completing the certification in February 2015, the staff member, who had completed it in the preceding years, and so testified, recertified the prior year's certification. The form recorded that Respondents were not proposed for debarment. The certification was therefore erroneous, since Respondents already had been proposed for debarment in July 2014. The staff member, however, was "unaware that any changes were necessary or required and made the honest mistake of recertifying the prior year's certification."[19] O & A, Respondents note, at the time the SAM certification was made, was not submitting any proposals to HUD, but, rather, was included as a potential subcontractor in the proposal submitted to HUD by an unsuccessful bidder, Twin Assets LLC.[20] Twin Assets bid expired on January 21, 2015. At HUD's request, the offer was extended for an additional 120 days. Twin Assets did not give Respondents written notification of the extension. Respondents add that they were not offerors (as the term is used in the SAM Certification). Also, the Certification "was inapplicable to a bid that was never rejected nor accepted by HUD."[21]

In challenging HUD's basis for their suspension, Respondents argue that it took HUD nearly eight months - from submission of the SAM Certification in February 2015 to issuance of the Notice of Suspension and Proposed Debarment on October 15, 2015- to take action. The passage of time – eight months – and HUD's later exception of Respondents from the suspension so that they could continue performing on a contract in

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[15] Respondents' Hearing Statement at 5.
[16] *Id.* at 2.
[17] *Id.* Ex. B.
[18] In her unsworn testimony at the hearing, the staff member described her actions in completing the SAM certification.
[19] Respondents' Hearing Statement at 6.
[20] Twin Assets LLC's managing member is Otis Ofori, a son of Respondent Charles Ofori.
[21] Respondents' Hearing Statement at 8.

place since 2010 show HUD's determination that "immediate action . . .was necessary to protect the public interest" was unfounded.

In their Hearing Statement, their Post-Hearing Statement, and at the hearing, Respondents argued that, contrary to the Government's position, it was not possible at the time of the annual renewal and recertification process in February 2015 to make changes to the SAM Certification. Respondents argue that "[f]ollowing an annual certification, they were unable to make any changes or updates to this certification in SAM." Further, after HUD suspended Respondents, "they were completely locked out of the SAM system." For these reasons, HUD's claim that Respondents refused to correct deficiencies is "disingenuous" as is HUD's failure to mention that the SAM portal "prevented any such updates." Accordingly, Respondents' failure to update their information cannot be "deemed knowing and willful" and provides no grounds for their suspension and proposed debarment.[22] Similarly, Respondents argue that HUD cannot establish that their "alleged false certification" was so "serious as to affect the integrity of an agency program," 2 C.F.R. § 180.800(b), nor can HUD demonstrate, as required by 2 C.F.R §180.800(d), that the "factual predicate for debarment [of] 'serious or compelling' is present here.[23]

In this regard, Respondents challenge HUD's claim that FAR 209-5(e) establishes the materiality of the Responsibility Matters Certification, citing the language of the regulation as making it plain that the certification is only material if the parties enter into a contract. (The certification "is a material representation of fact upon which reliance was placed when making the award."). Because HUD made no award to Respondents, the certification was not material to HUD. Likewise, under § 209-5(e), the government "can cancel a contract on the basis of a false certification if it could show that the certifier 'knowingly' made a false certification." Respondents conclude that the "higher scienter requirement" to cancel a contract under the referenced regulation "shows that the false certification at issue here is less serious than other issues." Because HUD cannot prove the seriousness element of its claim . . . , it cannot debar Respondents.[24] Respondents also argue that no harm came to anyone as a result of "HUD's egregious error and reckless violation of the regulation" in not timely updating the information in SAM. Respondents view this as "strong evidence that the same is true of the exact same error made by" them.

Respondents contend that, under 2 C.F.R. § 180.520, HUD was required to enter information about Respondents in SAM Exclusions within three business days after taking exclusion action. HUD, however, took from July 7, 2014 (i.e., three working days from July 1, 2014, the date of issuance of the first Notice of Proposed Debarment (NOPD)) and as late as February 27, 2015[25] still had not entered the information. In this

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[22] *Id.*at 9.

[23] Respondents' Post-Hearing Statement at 4.

[24] *Id.* at 9.

[25] February 27, 2015 is the date on which Respondents entered the disputed information in SAM. Although the system prepopulates the answers for the Responsibility Matters Certification based on stored information, the person completing the certification is advised to make the necessary changes, if any.

connection, Respondents note that HUD did not log the information in SAM regarding their proposed debarment until October 15, 2015 – "326 working days from issuance of the NOPDs against Respondents, [which] shows that the accuracy of Respondents' SAM account is not serious to HUD "[26] Also, under 48 C.F.R. § 9.404(b), "[t]he SAM exclusions contain the [n]ames and addresses of all contractors debarred, suspended, **proposed for debarment** . . . under the nonprocurement common rule."[27](Emphasis added) Respondents refer also to the SAM Guide under which, "a party may become preliminarily ineligible 'based upon initiation of proceedings to determine final ineligibility". Respondents refer further to a table in the SAM Guide (Table 7.3: CT Codes to Exclusion Type Mapping) that maps the exclusion codes from the EPLS to the SAM exclusion codes that, Respondents assert, "demonstrates that 'proposed debarment' and 'suspension' both render a party 'preliminarily ineligible.'"[28]

Respondents argue that, based on the language of the SAM Certification,[29] "neither O & A nor Charles Ofori was the offeror or bidder; to the contrary Twin Assets was." Additionally, the prohibition in FAR 52.209-6 that a contractor may not enter into a subcontract in excess of $35,000.00 with an entity that is proposed for debarment would have rendered O & A ineligible for consideration. As it is, HUD did not award the contract to Twin Assets, having not accepted Twin Assets bid, thus the SAM ratification was unnecessary. Also, because HUD rejected Twin Assets bid, Respondents could not reasonably be expected to be participants in a covered transaction.[30] Respondents reason that their previous participation in covered transactions does not necessarily make them participants subject to the debarment regulations.[31]

Both HUD legal and program staff involved in this matter, Respondents allege, had constructive and actual notice that HUD was considering enforcement action against Respondents. In support of their allegation, Respondents note that O & A's 2014 financial statements to HUD disclosed this fact. Also, on March 16, 2016, HUD attorneys were in contact with the administrator for Respondents' sole contract with HUD regarding the "debarment litigation" against Respondents.[32] Respondent reiterate that, although they could not update O & A's certification in SAM.gov, they did make the responsible HUD officials aware of the other debarment action against them.[33]

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[26] Respondents' Post-Hearing Statement at 7.

[27] Respondents quote Dane Narode, described as the corporate designee of HUD (Mr. Narode's title is Associate General Counsel for Program Enforcement), as acknowledging in his deposition that "a 'proposed debarment is the same as a suspension' which undoubtedly must be reported on." *Id.* at 5.

[28] *Id.* at 6.

[29] The SAM Certification provides, at 48 CFR 52.209-5(a)(1), that "The offeror certifies to the best of its knowledge and belief, that - (1) The Offeror and/or any of its Principals – (A) Are not presently debarred, suspended, proposed for debarment, or declared ineligible for the award of contracts by any Federal Agency."

[30] Respondents Pre-Hearing Statement at 10.

[31] *Id.* at 10.

[32] *Id.* Exs E and F.

[33] That matter was referred to the Office of Hearings and Appeals (OHA) for findings of fact pursuant to 2 C.F.R. 180.845(c). See HUDOHA No. 15-AM-0032-DB-001, HUD Docket no. 14-0034-DB. OHA has not yet issued a Recommended Decision.

Respondents review the mitigating factors in 2 C.F.R. §180.860 and conclude that no harm was caused by O & A's "inadvertent mistake." Nor has HUD shown that Respondents' actions were "so serious as to affect the integrity of an agency program." Moreover, HUD's taking almost eight months to issue the Notice of Suspension and Debarment suggests that there was no harm caused by Respondents' inadvertent mistake. Respondents note that the "wrongdoing" was a singular action and question HUD's importing of the matter before the OHA into this proceeding. Respondents assert that their alleged actions in the referenced fact-finding hearing should not be used to establish a pattern or history of wrongdoing.[34]Respondents also assert in mitigation that they have not been subject to another exclusion; they did not plan the "wrongdoing," but that their action resulted from an "inadvertent and honest mistake"; Respondents acknowledge their mistake and Respondent Ofori has expressed his professional and personal remorse; that there is no allegation of pervasive wrongdoing in Respondent company; Respondent Charles Ofori is president of O & A and has taken appropriate steps to avoid similar mistakes in the future; and, Respondent Ofori has taken an appropriate training course and now requires employees to take suitable training courses and receive prior supervisory approval before finalizing entries in the SAM system.

Accordingly, Respondents request that they should be held presently responsible and not be debarred.

FINDINGS OF FACT

1. Respondents, at all relevant times, performed contract work for HUD. Respondent also performed contract work for other federal agencies.
2. Respondent Charles Ofori was the owner and president of O & A.
3. Respondent Charles Ofori was registered in SAM, the federal government's primary database "to manage information on potential government business partners."
4. Registration in SAM is required of all entities before they can become eligible for award of contracts by the federal government.
5. As part of the registration process, an entity must complete, as appropriate, certain sections in SAM, including the Representations and Certifications section.
6. One of the Representations and Certifications, Responsibility Matters Certification, requires the entity to state whether the entity or any of its principals are currently debarred, suspended, proposed for debarment, or declared ineligible for the award of a contract by any Federal agency.
7. Entities registered in SAM are required to update their profile if there is a change in their status.
8. On July 1, 2014, HUD issued a Notice of Proposed Debarment to Respondents.
9. On February 27, 2015, Respondents completed the Responsibility Matters Certification certifying that they were not proposed for debarment.

[34] Because the Office of Hearings and Appeals has yet to decide that matter, the allegations in that action will not be considered here.

10. Respondents acknowledge that the Certification was erroneous, but that it resulted from a mistake.
11. Respondents express remorse for the erroneous certification.

CONCLUSIONS

Based on the above Findings of Fact, I have made the following conclusions:

1. Respondents were participants or principals in a covered transaction based on the M & M contract they entered into with HUD. *See* 2 CFR §§ 180.200, 180.970 and 180.995.
2. Respondents are subject to the debarment regulations as persons who have been, are, or may reasonably be expected to be, a participant or principal in a covered transaction. *See* 2 CFR § 180.120.
3. It is not to be doubted that Respondents had an obligation to submit a correct Certification and that an erroneous certification could provide cause for debarment.[35]
4. Respondents argue that HUD had a duty to ensure that the prepopulated user information in SAM was correct. That is undoubtedly true. However, the fact that the user information with respect to Respondents' exclusion status was wrong would not necessarily absolve Respondents of their obligation to ensure that a correct certification was submitted.
5. While the decision issued today does take note of the competing arguments of the parties, and the time devoted to their explication, with respect to the timelines that should have been met in updating information in SAM and related issues, it is not necessary to settle them and other issues to resolve this dispute. It is undisputed that the certification submitted by Respondents was erroneous. However, because all errors are not *ipso facto* intentional nor unintentional, it behooves us to examine the facts and evidence to determine whether the violation at issue was intentional or not.
6. The testimony from Respondents' witness was that she completed the updating of O & A's information in SAM. Respondent Charles Ofori, although his name and user id. were used, played no role in the completion or submission of the erroneous information. In fact, the testimony of the witness suggested that, based on her prior years' experience in submitting the required information, the update for the disputed year was treated as a routine matter almost done as an exercise by rote. As it was, the information related to O & A's exclusion situation was wrong, but the witness failed to correct or update the erroneous information. Accordingly, I conclude, after careful examination of all the evidence adduced on this issue, that Respondents did not willfully complete or submit the false certification in SAM. This conclusion, however, only begins the inquiry of what is the appropriate finding and response regarding culpability for the admittedly erroneous certification.

[35] Pursuant to 2 C.F.R. § 180.630, the actions of Respondent Ofori are imputed to O & A.

7. First, it is immaterial who submitted the erroneous certification. Respondent Charles Ofori is the user registered in SAM, thus the person responsible for the submission of information in SAM. That is not disputed or disputable. As already determined, the erroneous information was submitted under his name. The language of the certification is fairly absolute and admits of little, if any, ambiguity.[36] Charles Ofori had a duty and a responsibility, which could not be transferred to anyone else as long as he was the registered user in SAM, to ensure the absolute correctness and accuracy of the certification. This, however, he failed to do. Charles Ofori's failure here amounts to negligence, not to willfulness.
8. It is no defense that Charles Ofori entrusted the task of updating O & A's information in SAM to a long-time assistant.[37] The language of the Certification allows for no such excuse. It is not particularly helpful also for Respondents to urge this tribunal to consider the violation as an "inadvertent mistake." Again, if Charles Ofori or his assistant had paid close attention to the categorical language of the Certification, as the Certification demands, he would have recognized that the prepopulated information was wrong.[38] Failure to read a document, the accuracy of which one is certifying, is less a mistake than negligence if the certificate turns out to be incorrect. See, e.g., HUD v. Nelson, 2007 HUD ALJ LEXIS 87 (June 1, 2007) (holding that "although lack of knowledge of the [Fair Housing] Act's requirements and/or reliance on [professionals] is not a legal excuse for noncompliance, . . . [Respondents'] conduct is more fairly described as negligent rather than as showing a reckless and willful disregard for the requirements of the Act.") In *Nelson*, the court reasoned that the "mitigating factors weigh[ed] against the imposition of a maximum penalty." *Id.* at *36.
9. Respondents allege that HUD is pursuing a vendetta against them in an effort to destroy them and their business. As evidence thereof, Respondents point to an email exchange between two HUD directors who described Respondents' actions as demonstrating their "moral turpitude"[39] and seeing this matter as an opportunity to "take [them] out of the game completely" and Respondents' having

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[36] The Certification read thusly: "I have read each of the FAR and DFARS provisions presented below. By submitting this certification, I, Charles Ofori, am attesting to the accuracy of the representations and certifications contained herein, including the entire NAICS table. I understand that I may be subject to penalties if I misrepresent Ofori & Associates PC in any of the below representations or certifications to the Government."

[37] Even if credit is given to Respondents' argument with respect to their inability to access SAM after HUD had taken action against them, that would not alter the result reached today.

[38] The conclusion here is not meant to ignore the parties' differing views, in part centered on the applicability of the debarment regulations in 2 C.F.R. part 180 versus the FAR, on when HUD was obligated to enter Respondents' exclusion or ineligibility status in SAM. As alluded to above, whether HUD should have entered the information on Respondents as "proposed for debarment" **before** Respondents' submission of the Certification as Respondents contend or, as HUD argues, not before October 15, 2015, when Respondents were suspended, does not have to be settled here. It is enough, in the view taken of this dispute in the decision issued today, that Respondent had a responsibility to submit an accurate certification. The Certification submitted on February 27, 2015 could not be accurate because Respondents were proposed for debarment on July 1, 2014.

[39] The term "moral turpitude" is usually associated with criminal law and involves crimes that exhibit an inherent quality of vileness and depravity. Nothing in Respondents' conduct reflects any such quality, thus rendering the email comment unworthy of consideration in this decision.

a "reputation issue." First, the two HUD employees had no decision-making role in whether HUD should pursue a debarment action against Respondents. These decisions are made at a level well above that occupied by the two employees involved in that email exchange. This matter was prosecuted based on the evidence of Respondents' wrongdoing and no decision was influenced by the inflammatory and inappropriate comments of the two employees referenced here. Accordingly, allegations of bias against responsible HUD employees are unfounded and unsupported by the available evidence.

10. The regulation at 2 C.F.R. §180.125 paragraph (a) provides that "[t]o protect the public interest, the Federal Government ensures the integrity of Federal programs by conducting business only with responsible persons." Paragraph (b) limits the application of the debarment regulations to "exclude from Federal programs persons who are not presently responsible." And paragraph (c) cautions that "[a]n exclusion is a serious action that a Federal agency may take only to protect the public interest. A Federal agency may not exclude a person or commodity for the purposes of punishment." Under 2 C.F.R. § 180.865 (a), a respondent's "period of debarment will be based on the seriousness of the cause(s) upon which your debarment is based."
11. In mediating the competing interests the above-cited regulations were enacted to serve, the courts have held that "a finding of present lack of responsibility can be based upon past acts." *Schlesinger v. Gates*, 249 F.2d 111 (D.C. Cir. 1957). Accordingly, Respondents' negligent conduct at issue here justifies a finding that they are not presently responsible, thus leading to their exclusion.[40]
12. A finding that a respondent lacks present responsibility then requires a determination of what period of debarment, if any, is appropriate. This determination requires not only a recognition of the "seriousness of the causes(s)" that may justify debarment but that concomitantly consideration be given to the aggravating and mitigating factors present in each case.
13. It is inarguable that negligently submitting a certification that is erroneous provides a "cause of so serious or compelling a nature that it affects [Respondents'] present responsibility," 2 C.F.R. § 180.800(d), and requires a period of debarment "long enough to demonstrate that the government takes the conduct at issue seriously and that it will refrain from doing business with [debarred persons] until they have had sufficient time to reflect on the cause for their debarment and to conform their conduct to the standard of present responsibility." *In the Matter of Richard Duane Widler*, HUDALJ 91-1706-DB (June 18, 1992).
14. Respondents submitted the erroneous certification in February 2015 and were suspended from October 2015 to date, which, I conclude, has not given them sufficient time to "reflect on the cause for [their] debarment and to conform [their] conduct to the standard of present responsibility." *Widler, supra.* Accordingly, a period of debarment must be imposed, but it should not be so excessive in light of all the factors present in this case that the period of exclusion

[40] The facts and rationale discussed here also support the decision to suspend Respondents. *See* 2 C.F.R. §§ 180.700(b) and (c).

imposed would violate the regulatory admonition that persons not be excluded "for the purposes of punishment." 2 C.F.R § 180.1215(c).

15. Pursuant to 2 C.F.R. §180.860, the debarring official may consider certain aggravating and mitigating factors in determining whether to debar a respondent and the length of the debarment period. As aggravating factors, I considered, among others, (1) the harm that could have been done to the integrity of HUD's programs by HUD's relying on an erroneous certification in conducting business with an entity proposed for debarment and (2) the lack of diligence displayed by Respondents in ensuring that an accurate certification was submitted to SAM. As mitigating factors, I considered Respondents' expressions of remorse and regret for their wrongdoing and attempts to improve the efficiency of their operation to avoid a recurrence of the violation at issue here.
16. The mitigating and aggravating factors and the relative seriousness of the violation at issue here, *inter alia*, however, do not support the proposed three-year debarment. See 2 C.F.R. §§ 180.845(a) and 180.865(a) and (b). Additionally, because today's decision holds that the Government's evidence does not meet the preponderance of the evidence test, as required by 2 C.F.R. § 180.850, to prove that Respondents acted willfully in submitting the erroneous Certification, the case for a three-year debarment is severely vitiated.
17. The Government generally relied on Limited Denial of Participation (LDP) cases to support its contention that the seriousness of Respondents' wrongdoing warranted a three-year debarment. Although the cases cited by the Government[41] are not dispositive of the instant issue, reliance on LDP cases, in which, for the most part, the sanctions are less severe than in debarment cases, is in itself instructive in viewing the seriousness along with the willfulness allegations.
18. Accordingly, based on all the foregoing, Respondents are debarred, pursuant to 2 C.F.R. § 180.800(d) for eighteen months with credit given for the period they were suspended, i.e., from October 15, 2015 to the date of issuance of this Determination.
19. HUD has a responsibility to protect the public interest and take appropriate measures against participants whose actions may affect the integrity of its programs. *See generally*, 2 CFR § 180.125.
20. HUD cannot effectively discharge its responsibility and duty to the public if participants in its programs or programs that it funds fail to act with integrity.

DETERMINATION

Based on the foregoing, including the Findings of Fact, Conclusions, and the administrative record, I have determined, in accordance with 2 CFR §§ 180.870(b)(2)(i) through (b)(2)(iv), to debar Respondents for a period of eighteen months from the date of issuance of this Determination with credit given for their period of suspension from

[41] *See, e.g., CKJ Realty & Management, Inc.*, 1998 HUD BCA LEXIS 4 (December 16, 1998) (Alleged false certification regarding adequacy of a bond.). *In re Brooks*, 2000 HUD APPEALS LEXIS 79 (September 15, 2000) (LDP imposed for submitting false certification); and,1997 HUD BCA LEXIS 12 (November 6, 1997) (LDP imposed for submission of false certification)

October 15, 2015 to the date of issuance of this Determination.[42] Respondent's "debarment is effective for covered transactions and contracts that are subject to the Federal Acquisition Regulation (48 CFR chapter 1), throughout the executive branch of the Federal Government unless an agency head or an authorized designee grants an exception."

Dated: 12/16/16

Craig T. Clemmensen
Debarring Official

[42] Pursuant to 2 C.F.R. § 180.865(b), "If a suspension has preceded your debarment, the debarring official must consider the time you were suspended."

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of December, 2016 a true copy of the DEBARRING OFFICIAL'S DETERMINATION was served in the manner indicated.

Tanya Domino
Debarment Docket Clerk

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