GOVERNMENT OF THE DISTRICT OF COLUMBIA

CONTRACT APPEALS BOARD

APPEAL OF:

THE PRINCIPALS of FORT MYER CONSTRUCTION CORPORATION JOSE RODRIGUEZ, President and LEWIS SHRENSKY, Executive Vice President Decision of the Debarment and Suspension Panel To Debar Messrs. Rodriguez and Shrensky	)	CAB No. D-1235

For the Appellant: Joe Robert Caldwell, Jr., Esq., and O. Kevin Vincent, Esq., Baker Botts L.L.P. For the Government: Keith D. Coleman, Esq., Assistant Attorney General.

Opinion by Administrative Judge Matthew S. Watson with Chief Administrative Judge Jonathan D. Zischkau, concurring.

OPINION

(*LexisNexis Filing ID 4664236*)

This matter is an appeal from a final decision dated April 2, 2004, of the Debarment and Suspension Panel ("Panel") created by the Debarment Procedures Emergency Act of 2003, (D.C. Act 15-153, 50 D.C. Reg. 8730), debarring Appellants Jose Rodriguez and Lewis Shrensky, president and vice president, respectively, of Fort Myer Construction Corporation[1] ("Fort Myer" or "the Company") for a period of six months[2] on the basis of a conviction of the Company of a scheme to defraud the District. Appellants contend first, that the debarment decision is defective because the Appellants were not given notice as to the grounds for their proposed debarment

[1] The decision also debarred the company; however, that portion of the decision has not been appealed.

[2] The decision provided that the debarred parties be given credit for the time they were suspended during the pendency of the debarment procedures, thus resulting in the parties' immediate eligibility to receive contract awards. Although, as to being eligible for awards, the debarment is now moot, the fact of a past debarment may have a continuing detrimental effect on the reputation of the parties and their success in carrying on their business and may therefore be appealed notwithstanding that the disqualification from receiving contracts has expired. *Caiola v. Carroll,* 851 F.2d 395, 401 (D.C. Cir. 1988).

prior to the Panel's hearing of the matter; and second, that the District failed to meet its burden of proof that the Appellants participated in, knew of, or had reason to know of the company's unlawful scheme. The Board finds that, in the particular circumstances of this matter, sufficient notice was given to the Appellants, however, the Board further finds that the Panel's decision as to the Appellants is not supported by adequate evidence. Accordingly, the Panel's debarments of Jose Rodriguez and Lewis Shrensky are vacated.

BACKGROUND

By letter dated April 25, 2003, the District proposed debarring Fort Myer based on its March 14, 2003 guilty plea to "conspiracy to commit bribery in connection with [the Company's] role in distributing cash bribes to District Department of Public Works (DPW) officials in exchange for the DPW officials agreeing to accept inflated job tickets for asphalt materials that were never provided to the District." (Complaint, Ex. 8). Neither of the Appellants was charged or otherwise named in the criminal action. The notice of proposed debarment advised the Company that it was suspended immediately. The Company appealed the suspension to the Board on the basis that it was not afforded an opportunity to respond before the suspension was imposed. The Board denied the appeal holding that a contractor may be suspended without a hearing. *Fort Myer Construction Corp.,* CAB No. D-1206, June 6, 2003, 50 D.C. Reg. 7505.

The April 2003 notice of proposed debarment to the Company advised that "[a]ccording to D.C. Official Code §2-308.04(f), the debarment or suspension of any person or business shall constitute a debarment or suspension of any affiliate of that person or business." (Complaint, Ex. 8). Although principals are defined as affiliates by the cited code section, separate notice was not given to Fort Myer's principals, Mr. Rodriguez and Mr. Shrensky, as required by 27 DCMR §§ 2213.3 and 2214.1. On July 8, 2003, after a hearing, the Chief Procurement Officer ordered the debarment of Fort Myer and its two principals. On appeal of the July 8 debarment order, the Board held the debarments of the individual principals to be void *ab initio* for failure to have given written notice to each principal by certified mail. *Fort Myer Construction Corp.,* CAB No. D-1223, Dec. 9, 2003. The Board further vacated and remanded the debarment of the Company for failure of the CPO to make a finding supported by substantial evidence that the company lacked "present responsibility." *Fort Myer Construction Corp.,* CAB No. D-1223, Jan. 16, 2004.

In October 2003, a temporary Debarment and Suspension Panel was authorized with jurisdiction over pending debarments. (D.C. Act 15-153). On remand, the debarments of the Company and its principals were heard by the newly established panel. Separate notice of the Panel hearing was sent by certified mail to the Company and each of the two individual affiliated principals on December 24, 2003. (Complaint, Ex. 2). The notice by the Debarment and Suspension Panel incorporated the cause for proposed debarment by reference to the notice given by the CPO in the initial debarment proceeding:

> The reasons for the proposed debarment and the causes relied upon for the proposed debarment are set forth in the attached letter dated April 25, 2003 from

Jerry Carter to [Fort Myer], the letter dated May 30, 2003 from [the CPO] to [Fort Myer] and the letter dated June 24 2003, from [the CPO] to [FMC Civil].[3]

In a final decision dated April 2, 2004, the Debarment and Suspension Panel debarred the Company and its principals, Mr. Rodriguez and Mr. Shrensky, for a period of six months. (Complaint, Ex. 1). The individual principals have appealed their debarments.

DISCUSSION

We exercise jurisdiction over the appeal of these debarment actions pursuant to D.C. Code § 2-308.04(d).

Notice of cause for debarment

While admitting that the District gave notice of the rehearing by certified mail addressed individually to each of the Appellants as required by the regulations, Appellants assert that the notices did not meet the complete requirements of the regulations because the notices failed to advise the Appellants of the grounds upon which their individual debarments were proposed. 27 DCMR § 2214.1(a). The December 23, 2003 Panel notices (directed separately to the Company and each of the principals individually) incorporated by reference the causes stated in the notice letter of April 25, 2003. The grounds for debarment were stated in the earlier notice as follows:

> The CPO is proposing the debarment of Fort Myer for conviction for bribery and for submitting false tickets to facilitate payment for asphalt materials not provided to the District. Such actions provide a significant indication of Fort Myer's lack of business integrity. Moreover, Fort Myer's action was sufficiently serious and compelling to affect Fort Myer's responsibility as a District government contractor.

Notice of proposed debarment need only be given "in sufficient detail to put the [party] on notice of the conduct or transaction(s) upon which the proposed debarment is based." 27 DCMR § 2214.1(a). "Sufficient detail" is a matter of due process.

> The content of the due process requirement in a particular instance is determined on the facts specifically involved. The adequacy of the procedures are not to be based on the validity of general regulations, but upon the facts of the case. *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 903, 47 L. Ed. 2d 18 (1976). Due process, unlike some legal rule, is not a technical conception with a fixed content unrelated to time, place and circumstances. *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895, 81 S. Ct. 1743, 1748, 6 L. Ed. 2d 1230 (1961). Due process is flexible and calls for such procedural protections as the particular situation demands. *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S. Ct. 2593, 2600, 33 L. Ed. 2d 484 (1972).

[3] FMC Civil Construction, LLC, is a company formed by the Fort Myer principals and certain of their family members. FMC Civil was subsequently reorganized to remove Mr. Rodreguez and Mr. Shrensky from any management, ownership or control. Final Decision of the Panel, 14.

Electro-Methods, Inc. v. United States, 3 Cl. Ct. 500, 509 (1983), *quoted with approval, but reversed on other grounds*, 728 F.2d 1471, 1476 (Fed. Cir. 1984).

Although better practice would be to specifically state the grounds for the proposed individual debarments of the affiliated principals, the Board believes that the only reasonable interpretation of the notices sent specifically to the individuals, although referring only to the Company's criminal conviction and without any reference to any specific action of the individuals, is that the notices advise the individuals that they may be debarred if they had reason to know of the Company's criminal conduct referenced in the notice as provided in 27 DCMR § 2217.3. As such, the individuals were on notice of the grounds being considered for their possible debarment.

Evidence supporting debarment

A corporation acts only through the individuals who are its officers, employees or agents. With regard to debarment, a corporation is vicariously liable for the actions of the individuals who act in its behalf. 27 DCMR § 2217.2 provides:

> The fraudulent, criminal, or other seriously improper conduct of any officer, director, shareholder, partner, employee, or other individual associated with a contractor may be imputed to the contractor when the conduct occurred in connection with the individual's performance of duties for or on behalf of the contractor, or with the contractor's knowledge, approval, or acquiescence. The contractor's acceptance of the benefits derived from the conduct shall be evidence of knowledge, approval, or acquiescence.

A corporation clearly may be debarred if persons controlling the corporation are involved in or have knowledge of and acquiesce to the wrongdoing. But knowledge by those in control of a corporation is not an essential element to proceed with debarment of a corporation. To debar a corporation, it is only necessary that the suspect action have been taken in the course of performance of corporate duties by any individual acting for the corporation. No person other than the wrongdoer is required to have had knowledge of the wrongdoing. To support the debarment of a corporation, it is only necessary to show that the wrongful act was taken on behalf of the corporation. Liability, and indeed knowledge, will be imputed to the corporation if the corporation accepts benefits derived from the wrongful action. *Dowling Group v. Williams*, 1982 U.S. Dist. LEXIS 18121 (D.D.C. 1982). (Parent corporation debarred as an affiliate of a subsidiary whose general manager submitted false claims to the government.)

Similarly, an individual affiliated with a corporation may be subject to debarment based on the actions of others acting on behalf of the corporation. The evidence, however, necessary to support debarment of an individual based on actions of others within a corporation is significantly different than the evidence necessary to debar a corporation based on conduct of its agents. To debar an individual based on affiliation with a culpable corporation, however, requires a showing that the individual "participated in, knew of, or had reason to know of" the wrongful conduct. 27 DCMR § 2217.3 provides:

> The fraudulent, criminal, or other seriously improper conduct of a contractor may be

> imputed to any officer, director, shareholder, partner, employee, or other individual associated with the contractor who participated in, knew of, or had reason to know of the contractor's conduct.

The Panel did not find that either of the Appellants participated in, or had actual knowledge of, the conduct which led to the Company's guilty plea. (Final Decision of Panel 16-17). Nevertheless, the District argues that the Appellants had reason to know of the unlawful conduct because of their official positions in the Company. The District's answer to the complaint states:

> Messrs. Rodriguez and Shrensky had reason to know of the false tickets produced by Fort Myer for asphalt never provided to the District. Messrs. Rodriguez and Shrensky were managing members of Fort Myer during the time of Fort Myer's misconduct. Mr. Rodriguez was responsible for field operations and Mr. Shrensky was responsible for the financial and administrative operations of the company. Messrs. Rodriguez and Shrensky had reason to know of the misconduct because they became aware of certain activities that raised their suspicions. See Appellants Ex. 1. p.16. "These activities included the provision of vehicles to District government officials in the course of performance of contracts, use of Fort Myer gas pumps by [District] inspectors, and [District] inspectors [improperly] being on the premises of the Fort Myer plant." Id. As such, the [Debarment and Suspension Panel] found that Messrs. Rodriguez and Shrensky had reason to know of the improper conduct occurring at Fort Myer. Resolution of this issue requires a full hearing on the merits. Therefore, to the extent Appellants seek to reverse and vacate the DSP's debarment decision based on this issue, the District respectfully requests a hearing on the merits

Answer, 7.

Essentially, the Panel relied on Rodrequez' and Shrensky's status as officers in concluding that the Appellants had reason to know of the specific unlawful conduct for which the Company plead guilty and was debarred. Even accepting that the Appellants, because of their knowledge of some other improper conduct by their employees,[4] should have been wary of other unlawful schemes, it cannot logically be concluded that this constitutes evidence that they had reason to know of the specific bribery scheme which resulted in the Company's conviction. In order to hold an individual liable for specific wrongdoing by fellow employees, there must be some evidence connecting the individual proposed to be debarred to the wrongdoing, or some showing that the individual had information from which wrongdoing could reasonably be inferred. Status is an impermissible basis for an imputation of knowledge to an individual. *Novicki v. Cook*, 946 F.2d 938, 942 (D.C. Cir. 1991). In *Novicki*, the court held that a connection to the wrongdoing more than Mr. Novicki's merely being president of the corporation was required to support his personal debarment and vacated the debarment of Mr. Novicki as an individual. (*Id.*)

We now address the District's request for a hearing before the Board on the merits of whether the principals had reason to know of the bribery scheme. Although it is not clear that

[4] It should be noted that the Company was not prosecuted for the alleged separate misconduct, nor did it form the basis of the Company's debarment.

the Board, even in a *de novo* review, has authority to receive new evidence from the District which was not presented to the debarring authority to support a debarment, the District requested a hearing on the merits. (Answer, 7). Without determining the extent to which the District may supplement the debarment record, the Board requested a proffer of evidence, other than the status of the Appellants, which might be presented at a hearing showing any relationship of the Appellants to the Company's misconduct or any reason for the Appellants to have known of the misconduct. Such evidence could have been, for instance, a showing that Company funds over which the officer had control were used in furtherance of the unlawful scheme or that the officer had received complaints relating to the unlawful conduct.

In a telephone conference with the parties held by the Board on October 15, 2004, the District advised the Board that there was no evidence supporting debarment of the Appellants other than the inferences referenced in the Panel decision. As a result, there is no basis to hold an evidentiary hearing because the District has no additional evidence. Because we have concluded that those inferences relied upon by the Panel alone do not constitute substantial evidence that the Appellants had reason to know of the bribery scheme for which the Company pled guilty, we vacate the Panel's debarments of Jose Rodriguez and Lewis Shrensky.

November 23, 2004

/s/ *Matthew S. Watson*
MATTHEW S. WATSON
Administrative Judge

CONCURRING:

/s/ *Jonathan D. Zischkau*
JONATHAN D. ZISCHKAU
Chief Administrative Judge