UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

United States Department of Housing and Urban Development, Plaintiff, v. Patrick J. Borello and Vincent A. Sorena, Defendants.	HUDALJ 94-0072-PF Decided: June 6, 1995

Patrick J. Borello, pro se

Brett D. Gilbert, Esquire
For Respondent Sorena

Dane Narode, Esquire
For the Plaintiff

Before: Constance T. O'Bryant
Administrative Law Judge

INITIAL DECISION AND ORDER

On July 18, 1994, the U. S. Department of Housing and Urban Development ("Plaintiff" or "HUD" or "the Department") filed a Complaint against Augusto Aufiero, Patrick J. Borello, and Vincent A. Sorena, ("Defendants"), seeking civil penalties pursuant to the Program Fraud Civil Remedies Act of 1986, ("the Act" or "PFCRA") 31 U.S.C. §§ 3801 - 3812 (1988) and HUD's implementing regulations at 24 C.F.R. Part 28. HUD's Complaint includes 25 Counts and seeks 25 civil penalties of $5,000 each for a total of $125,000 against Defendants, jointly and severally. The Complaint relates to alleged falsification by the named Defendants in failing to include material information on 25 separate HUD Forms 2530, Previous Participation Certifications ("PPCs") in

violation of 31 U.S.C. § 3802 (a)(2). This Court has jurisdiction pursuant to 31 U.S.C. § 3803 and 24 C.F.R. Part 28.21.

A hearing in the above-entitled case was scheduled for January 24, 1995, in New York, New York. At that time, Plaintiff proceeded against Defendants Borello and Sorena only, having sought and been granted a stay in the case against Defendant Aufiero.[1] Plaintiff also moved for partial summary judgment as to liability of the remaining two Defendants - Borello and Sorena. Summary judgment was granted as to liability against Mr. Borello for all 25 Counts in the Complaint, and against Mr. Sorena as to Counts 23, 24, and 25. Testimony was taken with regard to liability of Mr. Sorena for Counts 1 - 22 and with regard to the assessment of civil penalty as to both Defendants.

At the conclusion of the hearing, the undersigned, over Plaintiff's objection, left the record open to allow Defendant Sorena opportunity to submit a document Securities and Exchange Commission ("SEC") Form 10-K for consideration. That document was subsequently received on January 31, 1995. Plaintiff's opposition to its admission was received on February 22, 1995. Plaintiff did not object on the basis that the Form 10K was not a true copy of that previously filed with the SEC, but objected for the sole reason that it was the Government's understanding that the Form 10-K filed with the SEC and proffered by the Defendant is materially false and misleading. Plaintiff attached an SEC document entitled "Complaint for Permanent Injunctive And Other Relief filed on August 22, 1994, in the case of SEC v. Atratech, Inc., Anthony Gurino, Vincent Sorena, Patrick Borello, *et al,* 94 Civ. 5016" to its opposition and requested that if Defendant's SEC Form 10-K were to be admitted, that the document showing the civil complaint by the SEC against Defendant Sorena alleging, *inter alia,* that the Form 10K filed with the SEC by Defendants for the year 1990 was materially false be admitted as well. Defendant has not responded to that request. I conclude that Plaintiff's arguments in opposition to the admission of the Form 10-K go more to the weight it should be given as opposed to its admissibility. Accordingly, pursuant to authority of 24 C.F.R. § 28.67 and Rule 902, Federal Rules of Evidence, I have admitted the document into evidence. It has been designated Defendant's exhibit 2 (D-2).[2] The document is relevant to the fact that in the Form 10-K filed with the SEC it was reported that Mr. Sorena became part-time CEO in

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[1]By motion dated January 20, 1995, Plaintiff sought a stay in the proceeding against Mr. Aufiero on the basis that a settlement agreement had been reached with Mr. Aufiero. Subsequently, a settlement agreement was signed and at Plaintiff's request, the above-entitled case against Mr. Aufiero was dismissed.

[2]The following reference abbreviations are used in this decision: "Tr." for Transcript; "G-#" for Plaintiff's exhibits; and "D-#" for Defendant Sorena's exhibits.

May 1990. Since no objection was lodged by Defendant Sorena against admitting the civil complaint by the SEC against Mr. Sorena, I have admitted the document as Plaintiff's exhibit 5 (G-5). I conclude that the document is relevant to determining what weight, if any, should be given to the facts reported in the Form 10-K.

Both Plaintiff and Defendant Sorena submitted a post-hearing brief. Mr. Borello did not submit a brief.

Statement of the Case

The Complaint in this case includes 25 Counts. They allege falsifications by Defendants in failing to name Anthony Gurino as a principal in the project on 25 HUD Forms 2530, PPCs in violation of 31 U.S.C. § 3802(a)(2). Plaintiff asserts that the Defendants, who were alleged to be officers of Hi Tech Mechanical ("Hi Tech") and who were seeking to contract with HUD for performing repair and modernization work at the New York City Housing Authority ("NYCHA"), either caused, or acquiesced in, the submission to HUD of each of the 25 PPCs. The Complaint further alleges that Defendants purposely failed to identify Anthony Gurino as a principal on the PPCs because they knew Mr. Gurino had been precluded from participating in HUD programs and believed that identifying his participation in Hi Tech would result in HUD's refusal to approve the contracts with Hi Tech.

31 U.S.C. § 3802 - False claims and statements provides for liability for the making of false statements and for imposition of a civil penalty. It provides at § 3802 (a)(2), for the liability of:

> (2) Any person who makes, presents, or submits, or causes to be made, presented or submitted, a written statement that -
> (A) the person knows or has reason to know -
> (ii)(I) omits a material fact; and
> (II) is false, fictitious, or fraudulent as a result of such omission;
> (B) in the case of a statement described in clause (ii) of subparagraph (A), is a statement in which the person making, presenting, or submitting such statement has a duty to include such material fact; and
> (C) contains or is accompanied by an express certification or affirmation of the truthfulness and accuracy of the contents of the statement.

Much of the alleged facts in this case are not in dispute. These include the general

allegations in the Complaint in paragraphs 1-30 that are supported by documents filed in the criminal case against both Defendants. The documents include the Criminal Information (G-1), the Plea Agreement (G-2) and the Statement of Facts in Support of the Guilty Plea ("Statement of Facts") (G-3) that was made by Defendant Sorena. These documents show the following:

In or about 1969, Anthony Gurino incorporated a business entity named ARC Plumbing and Heating ("ARC") in New York. Anthony Gurino was the sole shareholder of ARC. ARC's primary business was to contractually provide plumbing services, especially to the City of New York. In or about May 1986, Anthony Gurino and ARC were debarred by the City of New York from obtaining New York City agency contracts for three years, until May 29, 1989, based on Mr. Gurino's failure to disclose that he had been indicted on charges of obstruction of justice.

In or about June 1986, Defendant Borello and former Defendant Aufiero created Hi Tech. Mr. Borello was the President of Hi Tech, and Mr. Aufiero was the Vice President. Prior to the creation of Hi Tech, both Mr. Borello and Mr. Aufiero had worked for ARC and Mr. Gurino. After ARC's debarment by the City of New York, Hi Tech took over the completion of ARC plumbing contracts with the City of New York. However, in or about 1987, Hi Tech was debarred by the City of New York until May 1989, after a finding by the New York Board of Professional Responsibility that Hi Tech was the "alter ego" of ARC.

In or about February 1988, HUD's New York Regional Office imposed a Limited Denial of Participation ("LDP") upon ARC. The LDP prohibited ARC's participation in HUD programs for a limited geographic area including New York City. On or about June 10, 1988, HUD debarred ARC from participation in HUD programs for a period of three years from the date of the LDP. On or about May 6, 1988, HUD suspended Anthony Gurino from participation in HUD programs, and on June 14, 1991, HUD debarred Anthony Gurino from participation in HUD programs until May 5, 1993.

After HUD's debarment of ARC and suspension of Mr. Gurino, the Defendants participated in causing certain corporate mergers which obscured Hi Tech's continuing association with Anthony Gurino and ARC. In or about 1989, Hi Tech merged with Endres Plumbing. At the same time, Hi Tech also became a wholly owned subsidiary of a public company known as Atratech.

In or about 1989, Atratech/Hi Tech/Endres hired Anthony Gurino as the "Chief Consultant." As the Chief Consultant, Anthony Gurino, along with Defendants Borello Aufiero, and Sorena controlled the day-to-day operational decisions of Hi Tech/Endres.

Mr. Gurino's duties included supervisory authority over most employees, reviewing authority of bank deposits and expenditures of Hi Tech/Endres, approval authority of

invoices, involvement in coordination and estimating of jobs for Hi Tech/Endres, and the basic structuring of the company.

In or about 1989 through 1992, Hi Tech submitted bids on 25 NYCHA contracts, all of which were funded through HUD's Comprehensive Improvement Assistance Program ("CIAP"). Pursuant to 24 C.F.R.§ 200.217, Hi Tech was required to submit, and did submit, a Form HUD 2530, PPCs to HUD. These PPCs ranged in date submitted from June 2, 1989 to December 3, 1991. (*See Complaint* ¶23; G-4, A-Y).

The PPCs required Hi Tech to furnish information to HUD concerning the principals of Hi Tech and its affiliates and a certification that all the names of the parties, known to be principals (a term which includes any affiliate of a principal) in each project proposed, be listed on the form. 24 C.F.R. § 200.215(e)(2). An "affiliate" is defined in 24 C.F.R. § 200.215(a) as "[a]ny person or business concern that directly or indirectly controls policy of a principal or has the power to do so . . . . Persons and business concerns controlled by the same third party are also affiliates."

The PPCs submitted identified as principals Hi Tech Mechanical, Patrick Borello as President and Augusto Aufiero as Vice President. Plaintiff alleges that Defendants violated 31 U.S.C. 3802(a) in that they failed to identify Anthony Gurino as a principal on the forms.

The Complaint alleges that each Defendant caused or acquiesced in the submission to HUD of each of the PPCs. It further alleges that each PPC was false because Defendants purposely failed to identify Mr. Gurino or his position with Hi Tech and that each Defendant knew that each PPC was false in that way. Finally it alleges that each Defendant purposely failed to identify Mr. Gurino on each PPC because Mr. Gurino had been precluded from participating in HUD programs, and they believed that identifying his participation in Hi Tech would result in HUD's refusal to approve Hi Tech's participation as a contractor performing repair and modernization work at the NYCHA.

As previously indicated, Plaintiff's motion for partial summary judgment was granted with respect to the liability of Defendant Borello as to all Counts, and with respect to the liability of Defendant Sorena as to Counts 23, 24 and 25. Both Defendants entered a plea of guilty of, and were subsequently convicted for mail fraud, in the United States District Court for the Eastern District of New York. The identical facts alleged in HUD's Complaint were included in the written Plea Agreement and Statement of Facts,

with the exception that the 28 PPCs referred to in the Statement of Facts (see ¶14) were not specifically identified in the Plea Agreement as in the current Complaint[3]. (See G-3).

Sorena - Counts 1 - 22

Mr. Sorena admits that the copy of the Plea Agreement and of the Statement of Facts, as shown in Plaintiff's G-3, is a true and correct copy (see Sorena's Response to Plaintiff's Request for Admissions ¶¶ 26 & 27). However, he maintains that notwithstanding his plea of guilty, he should not be held accountable for all 25 false statement Counts. He asserts that the Statement of Facts is ambiguous as to when his participation in the scheme began. He denies responsibility for the filing of the PPCs alleged in Counts 1-22 which were submitted during the period from June 1989 through sometime in 1991 before he became a full-time officer of Atratech. He claims that he was not in a position to influence the filing of these PPCs because: (1) he was never an officer of Hi Tech; and (2) he did not become an officer in Atratech until May 1990, when he became a part-time officer (50% involvement), and did not become a full-time officer until about a year later.[4] He alleges that as a part-time officer he did not have sufficient control to prevent the false statements in question.

The Plaintiff argues that Defendant Sorena should be precluded by collateral estoppel from denying involvement as to all 25 Counts based on his guilty plea. Plaintiff argues in the alternative that even if Mr. Sorena is not estopped from denying his involvement at all relevant times, he has failed to carry his burden of showing that he was not involved in the operation of Atratech and in the scheme to defraud during the period the PPCs were submitted in Counts 1-22.

After having considered all the evidence, I find liability against Defendant Sorena for all Counts (1 - 25). In making this determination, considerable weight is given to the fact that Defendant Sorena, acting with the benefit of counsel, plead guilty to a felony

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[3]Although there are 28 PPCs referenced in the Statement of Facts, the Complaint alleges falsification in only 25 PPCs.

[4]A year later than May 1990 would be on or about May 1991. However, Mr. Sorena did not admit responsibility for the submission of the PPC filed on July 9, 1991, for the Whitman/Ingersoll Houses alleged in Count 22.

criminal offense based on a plea agreement and a statement of facts which admitted his involvement and culpability from 1989 through February 1992, the relevant time period in question. I find that, although the specific PPCs named in the complaint were not identified in the Statement of Facts which supported his plea, the time period of his involvement identified in the Statement of Facts is clear enough to find his liability for the false claims in question. Further, I find that although the preponderance of the evidence shows that Mr. Sorena was never an officer of Hi Tech, and that he did not officially become a full-time officer in Atratech until about May 1991, having served in a part-time capacity from May 1990 through about May 1991, the preponderance of the evidence shows that Hi Tech was a wholly owned subsidiary of Atratech and that Mr. Soreno was, in fact, in a position of power to control the operations at Atratech, even if not officially, at all relevant times, an officer. The basis for these findings are discussed below.

In his Plea Agreement in the criminal case, Defendant Sorena adopted the Statement of Facts in Support of Guilty Plea and agreed that "had the matter proceeded to trial, the United States would have proved each of the facts beyond a reasonable doubt." (G-2, ¶13). The Statement of Facts shows, in pertinent part, the following:

> 8. *In or about 1989*, Atratech/Hi Tech/ Endres hired Anthony Gurino as a consultant. As the "Chief Consultant," Anthony Gurino, along with the defendants BORELLO, AUFIERO, and SORENA, controlled the day-to-day operational decisions of Hi Tech/Endres. His duties included supervisory authority over most employees, reviewing authority of bank deposits and expenditures of Hi Tech/Endres, approval authority of invoices, involvement in coordination and estimating of jobs for Hi Tech/Endres, and the basic structuring of the company. (emphasis added).
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> 9. *In or about 1989 and until on or about February 1992*, Atratech/Hi Tech/Endres submitted bids on several New York City Housing Authority (NYCHA) plumbing contracts, most of which were funded through the Comprehensive improvement Assistance Program (CIAP) sponsored by HUD. (emphasis added).
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> 12. *In or about 1989 and throughout 1990 and 1991*, defendants BORELLO, AUFIERO, AND SORENA did in fact submit the required questionnaires and participation certificates to NYCHA and HUD through the U. S. mails. The defendants purposely failed to identify Anthony Gurino or his position with Atratech/Hi Tech/Endres on any of the NYCHA Questionnaires or the HUD Participation Certificates. The defendants failed to disclose

> Anthony Gurino's ongoing business relationship with Atratech/Hi Tech/Endres because Anthony Gurino had been suspended from any participation in HUD contracts, and they believed that disclosure of Anthony Gurino's participation in Atratech/Hi
>
> Tech/Endres could result in NYCHA/HUD's refusal to award to them any contracts. (emphasis added).
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> 13. *In or about 1989 and 1990,* the defendant's, AUGUSTO AUFIERO, PATRICK BORELLO, and VINCENT SORENA for the purpose of executing, and attempting to execute the scheme and artifice did place and caused to be placed in an authorized depository for mail matter, pre-award contracting documents and certifications, as well as invoices, requests for change orders, cost breakdowns, and other general correspondence relating to NYCHA/HUD contracts, including a letter describing the progress of plumbing work completed on the "Gowanus Houses" NYCHA/HUD contract date May 14, 1990, addressed to NYCHA from Hi Tech Mechanical to be sent and delivered by the Postal Service. (emphasis added)
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> 14. *In or about 1989 and throughout 1990, 1991 and 1992,* NYCHA and HUD awarded to Atratech/Hi Tech/Endres twenty-eight contracts worth approximately $18 million. Such awards were based on the documentation submitted by the defendants including the "Business Entity Questionnaires" and the "Previous Participation Certificates." (emphasis added).

These paragraphs from the Statement of Facts plainly describe Mr. Sorena's involvement in a fraudulent scheme beginning in or about 1989 through at least February 1992. Although it does not state with specificity when Mr. Sorena's participation began, paragraphs 8 and 13 expressly relate to his involvement in the years 1989 and 1990. According to paragraph 8, *in or about 1989* Mr. Sorena, along with Mr. Borello and Mr. Aufiero, "controlled the day-to-day operational decisions of Hi Tech/Endres." Paragraph 13 identifies Mr. Sorena as involved in the scheme to defraud *in 1989 and 1990.* Thus, his claim that he was not in a position to influence the decisions of the company until after he became a full-time officer sometime in 1991, and his claim that he cannot he held responsible for the scheme to defraud until sometime in 1991, are not credible, being contradicted by the statement of facts in support of his plea of guilty. Finally, paragraph 12 relates his responsibility for submitting false PPCs in 1989 and throughout 1990 and 1991. The testimony shows that the PPCs in question are those identified in Count 23 of the Complaint. Tr. 33-35.

Contrary to Mr. Sorena's contentions, Mr. Borello's testimony does not support his lack of power and influence at Atratech in 1989 and 1990. Mr. Borello's testimony does support finding that Mr. Sorena's did not become an officer of Atratech until May 1990, and then on a part-time basis. (See also Exhibits D-1 and D-2 (Form 10-K)). However, such fact is not dispositive of the issue of his culpability during the entire period in question. The testimony of Mr. Borello supports finding that Mr. Sorena, as of June 1989, was significantly involved in the day-to-day operations of Atratech.

Mr. Borello testified that he (Mr. Borello) became involved with Hi Tech in 1986 and that Hi Tech became affiliated with Atratech in June of 1989. Tr. 89. He testified that Mr. Sorena was responsible for introducing Hi Tech and Atratech companies to each other, and that it was Mr. Sorena who, in fact, negotiated Atratech's purchase of Hi Tech. Tr. 92. In this regard, the SEC filing by Defendant Sorena shows that Mr. Sorena was elected a director of Atratech on June 24, 1986, and that he served as Secretary of Atratech from June 24, 1986, until June 6, 1989. (D-2). Mr. Borello testified that he and Defendant Sorena communicated directly concerning the acquisition of Hi Tech by Atratech in June 1989 and that it was decided prior to the acquisition that Defendant Sorena was to become the CEO of Atratech after the takeover. Moreover, according to Mr. Borello, "right after the acquisition" Mr. Sorena advised Mr. Borello and Mr. Aufiero with regard to financial matters, such as how to get bonding, how to get better rates on insurance and as to matters of public relations, and that Defendant Sorena was apprised of all the bidding work with respect to the NYCHA contracts. Most importantly, according to Mr. Borello it was Mr. Sorena who made the decision to make Anthony Gurino (described as a personal friend of Mr. Sorena G-3, ¶7), the "Chief Consultant" of Atratech. Tr. 93-94. The Statement of Facts shows that Mr. Gurino was hired as consultant in or about 1989 (*id*, at ¶8). The fact that Mr. Sorena had the authority to make the decision to hire a person who had the responsibilities assigned to Mr. Gurino (who virtually ran the company), shows that he was in a position of considerable power even before he was officially named CEO.

Considering all the evidence of record, including the fact that Defendant Sorena plead guilty to a felony offense based on a Plea Agreement and a Statement of Facts which admitted his position of power and influence over Hi Tech beginning in 1989 right after the merger with Atratech, and the testimony of Mr. Borello, I find that there is ample evidence to establish Mr. Sorena's liability for the making of all 25 false certifications in this case. Even if he were not officially an officer at all times, he was a de facto officer from June 1989, making important decisions as to Atratech's operation. He exercised that control when he made the decision to hire Mr. Gurino in 1989. I find that Defendant Sorena was involved in the scheme to omit the identification of Anthony Gurino or his

position with Atratech on the 25 HUD PPCs in question because he knew that Mr. Gurino had been suspended from participation in HUD programs, and because he believed that disclosure of Mr. Gurino's participation in Atratech could result in HUD's refusal to award contracts to Atratech. Thus, he presented to HUD, or caused to be presented to HUD, the 25 false PPCs in question, knowing them to be false.

I find that the Government has met its burden of proving that both Defendants Patrick Borello and Vincent Sorena made or caused to be made the 25 statements identified in the Complaint, in violation of 31 U.S. C. § 3802(a) and 24 C.F.R. § 28.5.

Civil Penalty

Plaintiff asserts that Defendants' submission of the false PPCs in question warrants the imposition of the maximum civil penalties, i.e., $5,000 for each false statement or $125,000. See 31 U.S.C. § 3802 (a). It asserts that the role of each Defendant in this fraud, their culpability, and the need to deter others warrant severe treatment.

Defendant Sorena argues that any fine imposed against him should be minimal in light of the circumstances in his case and that imposition of the maximum penalty would be unfair and inappropriate. He asks that I consider that his involvement was limited, that he admitted guilt for violating HUD rules and has already suffered very real and substantial penalties, that he is a convicted felon, having been convicted for the federal crime of Mail Fraud, and that this conviction will affect him for his entire life. He states that he is forever barred from becoming an officer of a public corporation as a result of his conviction and that this source of income is now foreclosed to him. He claims that he lost over one million dollars in shares of Atratech stock that he received for merging his own company, National Teleview, into Atratech because Atratech has essentially dissolved and that he is essentially left penniless after his recent divorce from his wife. He claims further that the Securities and Exchange Commission has instituted an action against him seeking hundreds of thousands of dollars in damages for making a false filing with the SEC and he is unable to pay these damages. Finally he states that consideration should be given to the fact that the Government lost no money from these contracts, and also that he has never before been involved with any criminal activity before the instant case.

Defendant Borello admits that he completed all the forms in question and that he entered a plea of guilty in the criminal case. He does not deny liability for all of the 25 false statements in this case. However, he argues that the imposition of the maximum penalty would be unfair and not warranted in his case for the reason that he, not being a lawyer, had done what he thought was proper based on verbal guidance he received in

completing business entity questionnaires from the NYCHA. He testified that he submitted two forms to the NYCHA sometime in 1988 pertaining to the first two PPCs (G-4, E and Y). At that time Hi Tech was not a subsidiary of Atratech. On those two forms Mr. Borello did not identify Mr. Gurino as a participant, but did identify ARC. Hi Tech was determined to be an alter ego of ARC and suspended for 1 year by the NYCHA. The proposal was held until the 1-year had expired, but was finally approved in May 1989. Mr. Borello believed the NYCHA held his proposal for a year because they wanted Hi Tech to have the contract. He testified further that when he submitted the first two HUD forms he completed them consistent with the guidance he got from the NYCHA, and thereafter he continued to do the same, changing only the project information. Tr. 103-111. Mr. Borello also urges in mitigation the fact that the work performed under the contracts was done in a satisfactory manner and that no monetary loss occurred to the Government as a result of the transactions. Tr. 111.

Having considered the reasons for mitigation advanced by both Defendants Borello and Sorena, I conclude that a substantial civil penalty is warranted. Based on the degree of culpability of both Defendants, and on the need to assess a penalty that would deter others who might be motivated to take similar actions, I conclude that a civil penalty of $40,000 is appropriate as to each Defendant.

The purpose of providing for civil penalties in program fraud cases serves two goals: (1) to provide a remedy to recompense the Government for its losses; and (2) to deter the making, presenting and submitting of false statements to the Government. Pub. L. 99 -509, § 6102(b). In considering the False Claims Act, the Supreme Court in *U. S. v. Halper*, 490 U.S. 435 at 446 (1989) stated: "the Government is entitled to rough remedial justice, that is, it may demand compensation according to somewhat imprecise formulas, such as reasonable liquidated damages or a fixed sum plus double damages . . . ." In addition to the actual amount of the false claim, the Government is entitled to consider other factors relative to a financial loss such as incalculable damage to the agency's programs as well as investigative and prosecutorial costs. *Id.*

HUD regulations at 24 C.F.R. § 28.61(b) identify 16 factors to be considered for determining the amount of the penalty. These factors are:

1. The number of false, fictitious, or fraudulent statements;

2. The time period over which such statements were made;

3. The degree of the defendant's culpability with respect to the misconduct;

4. The amount of money or the value of the property, services, or benefit falsely claimed;

5. The value of the Government's actual loss as a result of the misconduct, including foreseeable consequential damages and the cost of investigation;

6. The relationship of the amount imposed as civil penalties to the amount of the Government's loss;

7. The potential or actual impact of the misconduct upon national defense, public health or safety, or public confidence in the management of Government programs and operations, including particularly the impact on the intended beneficiaries of such programs;

8. Whether the defendant has engaged in a pattern of the same or similar misconduct;

9. Whether the defendant attempted to conceal the misconduct;

10. The degree to which the defendant has involved others in the misconduct or in concealing it;

11. Where the misconduct of employees or agents is imputed to the defendant, the extent to which the defendant's practices fostered or attempted to preclude the misconduct;

12. Whether the defendant cooperated in or obstructed an investigation of the misconduct;

13. Whether the defendant assisted in identifying and prosecuting other wrongdoers;

14. The complexity of the program or transaction, and the degree of the defendant's sophistication with respect to it, including the extent of defendant's prior participation in the program or in similar transactions;

15. Whether the defendant has been found, in any criminal, civil or administrative proceeding, to have engaged in similar misconduct or to have dealt dishonestly with the Government of

the United States or of a State, directly or indirectly; and

16. The need to deter the defendant and others from engaging in the same or similar misconduct.

In the instant case, the Defendants caused 25 false statements to be submitted to HUD over the course of 30 months. Based upon their admissions in the criminal proceedings, it is clear that these were not actions based on mistake or negligent oversight, but rather actions orchestrated as part of a well thought out scheme, conceived and implemented by Mr. Gurino and these defendants, to allow Mr. Gurino to continue to do business with HUD, despite his debarment.

Mr. Sorena's arguments that any fine imposed should be minimal are not persuasive. I reject his contention that his involvement was limited, and consider instead that he has refused to admit full responsibility for his conduct. Despite his protestations, his plea statement is unambiguous as to significant involvement by him beginning in 1989. The testimony of Mr. Borello confirms the same. Mr. Sorena's other claims for leniency do not warrant such treatment in light of the degree of culpability that is seen in this case.

As to Defendant Borello, his claim of mistake and lack of intent to deceive, despite his plea of guilty to participating in the scheme to defraud, and to knowingly and intentionally omitting Mr. Gurino's name on the PPCs, is simply not credible. As a former employee of ARC and of Mr. Gurino he was aware of Mr. Gurino's debarment. Moreover, he admits that Hi Tech was denied a contract with NYCHA when he identified ARC, a debarred entity, on the form. Hi Tech was suspended as an alter-ego of ARC as a result of this identification. It was only after the suspension was lifted that the contract was approved. Thus, in June 1989 when he submitted the first two PPC at issue, he was not a person unsophisticated about the certification process or unaware of the likely consequence of identifying as a participant, a debarred or suspended person. His plea of guilt to making false claims supports finding this observation.

While both Defendants point to the fact that the Government did not lose any money from contracting with them in these 25 instances, I accept the Plaintiff's assertion that the Government lost a great deal. As a result of these false statements, HUD unknowingly paid out nearly $18,000,000 to a company controlled, at least in significant part, by Anthony Gurino, whom they had debarred. HUD debarred Mr. Gurino for a purpose. It is important that the Government do business only with responsible participants -- those who demonstrate honesty and business integrity. This is important to the mission of HUD as well as to the public confidence in the management of

Government programs and operations. Defendants' scheme to circumvent HUD's decision made a mockery of that purpose. Defendants' actions likely contributed to the erosion of confidence by the public that HUD programs are free of fraud and abuse.

Further, Defendants' conduct deprived other companies, which had not been determined to be irresponsible, from sharing in the funds paid improperly to them. In this regard, the fact that Defendants' were the lowest bidders and that it might have cost the Government more money to contract with another company, is not a mitigating factor. In addition, the evidence shows that the Federal and local governments expended vast sums of money to investigate and prosecute the fraud that was involved in this case. Tr. 27, 42. Although most of it was expended with regard to the criminal prosecution, the underlying conduct investigated was the same. Thus, this is a factor that can be properly considered. Finally, the fact that Defendants have been subjected to other penalties does not make a penalty in this case unwarranted. The need to deter others who may be motivated to carry out similar schemes and the need to restore confidence in the public that HUD programs are free of fraud and abuse are compelling reasons to impose a significant penalty.

CONCLUSION AND ORDER

Having concluded that Defendants Borello and Sorena falsified 25 separate HUD Previous Participation Certifications and that a $40,000 civil penalty as to each Defendant is warranted pursuant to Program Fraud Civil Remedies Act of 1986, 31 U.S.C. §§ 3801 - 3812 (1988), it is hereby **ORDERED** that:

1. Within ninety (90) days of the date on which this Order becomes final, Defendant Patrick Borello shall pay a civil penalty of $40,000 to the Secretary, United States Department of Housing and Urban Development.

2. Within ninety (90) days of the date on which this Order becomes final, Defendant Vincent Sorena shall pay a civil penalty of $40,000 to the Secretary, United States Department of Housing and Urban Development.

This Order is entered pursuant to 24 C.F.R. § 28.73 and will become final upon the expiration of thirty (30) days or the affirmance, in whole or in part, by the Secretary within that time.

Any Defendant determined herein to be liable for civil penalty has the right to file a motion for reconsideration with the administrative law judge within twenty (20) days of receipt of this decision (24 C.F.R.§ 28.75), or to file a notice of appeal to the Secretary within thirty (30) days after the issuance of this decision (24 C.F.R. § 28.77).

CONSTANCE T. O'BRYANT
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of this ORDER issued by CONSTANCE T. O'BRYANT, Administrative Law Judge, HUDALJ 94-0072-PF, were sent to the following parties on this 6th day of June, 1995, in the manner indicated:

Chief Docket Clerk

REGULAR MAIL:

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