

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF TRANSPORTATION

In the Matter of the Debarment
of Larry V. Nurre from Entering
into a Department of
Transportation Contract or
Receiving a Subcontract

FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION

The above-entitled matter came on for hearing before Bruce D. Campbell, Administrative Law Judge from the Minnesota Office of Administrative Hearings, on May 4, 5, and 27, 1988. By stipulation, the depositions of Douglas Wallace taken on June 15, 1988 and Larry LaPoint taken June 27, 1988, were treated as the record of the testimony of each person.

Appearances: William A. Caldwell, Special Assistant Attorney General, 515 Transportation Building, St. Paul, Minnesota 55155, appeared on behalf of the Department of Transportation (Department or DOT); and Bruce H. Hanley, Attorney at Law, Suite 1400, 701 Fourth Avenue South, Minneapolis, Minnesota 55415, appeared on behalf of Larry V. Nurre (Mr. Nurre or Respondent).

The record herein closed on September 13, 1988, with the receipt by the Administrative Law Judge of the final post-hearing memorandum of counsel.

This Report is a recommendation, not a final decision. The Commissioner of Transportation will make the final decision after a review of the record which may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations contained herein. Pursuant to Minn. Stat. sec. 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Leonard W. Levine, Commissioner of Transportation, 411 Transportation Building, St. Paul, Minnesota 55155, (612) 296-3000, to ascertain the procedure for filing exceptions or presenting argument.

STATEMENT OF ISSUE

The issue to be determined in this proceeding is whether the Respondent, Larry V. Nurre, is properly debarred as an individual from entering into a Department of Transportation contract or receiving a subcontract pursuant to Minn. Rules pt. 1230.3000 - 1230.4300 (1987), and, if so, the appropriate term of that debarment.

RULINGS ON EVIDENTIARY OBJECTIONS

1. Evidence of Respondent's cooperation in state and federal criminal prosecutions for acts unrelated to the conduct or behavioral incidents that

gave rise to the contract crime for which the debarment is proposed are not relevant in determining the term of debarment under Minn. Rule pt. 1230.3500 (1987).

2. The testimony of Dr. Douglas Wallace, reflected in his deposition of June 15, 1988, concerning the ethical concepts inherent in the words "responsible" and 'responsibility' is received. Deposition of Douglas Wallace, pp. 16-21, line 19. That testimony, however, is not binding on the Administrative Law Judge as the legal definition of the term "responsible bidder".

3. The testimony of Dr. Wallace, contained in his deposition of June 15, 1988, which reflects his understanding of the five factors contained in Minn. Rule pt. 1230.3500 (1987), is excluded as reflecting legal conclusions beyond the subject matter expertise of the witness. Deposition of Douglas Wallace, June 15, 1988, pp. 21-37 and associated cross-examination.

DISCUSSION

As will be reflected in the Findings of Fact, Mr. Nurre pled guilty in 1984 to a single count of bid rigging based on territorial allocation amongst bidders. That criminal conduct was totally unrelated to the business relationship between Lundin Construction and Kathy's Kranes which gave rise to the criminal conviction for which his debarment is now sought. The State has not relied in any manner on the prior criminal conviction or consensual debarment in asserting that the 1988 conviction for an unrelated contract crime justifies a term of debarment in this proceeding. The prior conviction was initially raised by Mr. Nurre to show that he had cooperated with state and federal authorities in that earlier multistate bid rigging investigation. Although the 1984 conviction was raised in the 1988 criminal proceeding, it was used solely for the purpose of establishing Mr. Nurre's intent and the absence of mistake. The Judge's instruction to the jury specifically stated that it could not rely upon the 1984 conviction to establish the 1988 criminal act. Resp. Ex. 19.

Mr. Nurre asserts that his cooperation with state and federal authorities in the 1984 multistate bid rigging investigation should be used by the Administrative Law Judge as evidence of cooperation to reduce any term of present debarment being considered. He relies on Minn. Rule pt. 1230.3500 (1987), which requires the Administrative Law Judge, in recommending a term of debarment to the Commissioner of Transportation, to consider "whether the

debarred person cooperated in civil or criminal lawsuits

The Administrative Law Judge has ruled that evidence of cooperation in the 1984 bid rigging investigations and prosecutions is not a relevant factor to consider in fixing a term of debarment for the unrelated behavioral incidents which culminated in the 1988 criminal conviction. Since that prior conviction itself may not be relied upon to establish grounds for a present debarment, cooperation as respects that conviction is irrelevant.

The Administrative Law Judge does not hold that the only evidence of cooperation which is relevant is cooperation in the criminal proceeding which resulted in the conviction in this case. At a minimum, however, the cooperation must be in civil or criminal lawsuits which are related to the contract crime for which present debarment is sought or arise out of the same behavioral incidents.

Dr. Douglas Wallace testified through deposition as an expert witness on the subject of business ethics. Dr. Wallace's area of expertise is business ethics. He has no legal training and virtually no experience or training in the public contracting process. Dr. Wallace is not qualified to render a legal opinion. Testimony by expert witnesses is governed by Rule 702 of the Minnesota Rules of Evidence. That rule provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in a form of an opinion or otherwise.

The Administrative Law Judge has determined that Dr. Wallace's testimony about the ethical concepts inherent in the term "responsible" or "responsibility" are within his area of expertise. The testimony of Dr. Wallace which the Administrative Law Judge has excluded, however, is an evaluation of Minn. Rules pt. 1230.3500 (1987). That testimony is, in essence, a legal opinion or interpretation of the rule, beyond Dr. Wallace's area of expertise. Although the Respondent argued that the testimony objected to was not offered as a legal opinion, it can have no other purpose. Since the testimony excluded is beyond the area of the witness's expertise, it is inadmissible. *Hestad v. Pennsylvania Life Insurance Co.*, 295 Minn. 306, 204 N.W.2d 433 (1973).

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. On January 19, 1988, Larry V. Nurre was convicted in the United States District Court, District of Minnesota, after a jury trial, of one criminal felony count of knowingly and intentionally conspiring to defraud the United States by impeding, impairing, obstructing and defeating the administration of the "8a Program" of the Small Business Administration in violation of Title 18, United States Code, Section 371. State Ex. 3, 4 and 12.

2. Lundin Construction Co., Inc. (Lundin Construction) was convicted of the same criminal violation and one additional count of making false statements. State Ex. 3, 5.

3. Between June of 1980 and July of 1988, the Respondent was the operations manager for Lundin Construction. Tr. 32-34. In that position, the

Respondent actively engaged in the operation and management of the business.

Tr. 41. He was employed in a significant decision-making capacity. At the time of the commission of the acts which resulted in the 1988 conviction, Mr.

Nurre was also a vice-president of Lundin Construction.

4. Lundin Construction is a regional general contractor, headquartered in Mankato, Minnesota. Lundin Construction has a history of participation as a bidder on public construction contracts at the local, state and federal level.

5. The "8a Program" of the Small Business Administration is a minority contractor set-aside program for federally assisted construction projects. The criminal violation found was a felony crime associated with a federal contracting program. Tr. 38.

6. The felony crime arose out of the relationship between Kathy's Kranes, a purported minority business that had been certified as eligible to participate as a minority contractor in federal contracts, and Lundin Construction. Count I of the felony indictment, State Ex. 3, 3-18, charges that a number of persons, including, among others, the Respondent, Lundin Construction Co., Inc., Richard Lundin and an SBA official, conspired to allow Kathy's Kranes to receive government contracts which were negotiated rather than competitively bid under the 8(a) program despite the fact that it did not qualify as a minority contractor under the program. Kathy's Kranes was largely a shell corporation with its work performed by nonminority contractors, including Lundin Construction, by contract or subcontract. The convicted SBA official, through his spouse, had a financial interest in Kathy's Kranes, as did Lundin Construction. Mr. Nurre characterized the relationship between Kathy's Kranes and Lundin Construction as a "protegee-mentor" relationship.

7. The conspiracy indictment out of which the 1988 conviction referenced in Finding 1, supra, arose specifies and dates each of the conspiratorial acts committed by Mr. Nurre. State Ex. 3, paragraphs 24, 37, 48, 50, 54, 57, 59, 73, 74, 75, 80 and 84. The most recent conspiratorial act committed by Mr. Nurre personally occurred on March 29, 1984. State Ex. 3, paragraph 84.

8. The indictment states that the conspiracy in which Mr. Nurre participated was in existence between August 30, 1979 and December 14, 1984. State Ex. 3, 2. The last overt act in furtherance of the conspiracy by any conspirator occurred on September 15, 1984.

9. The statute authorizing the adoption of rules relating to the debarment of one convicted of a contract crime from participation in state

contracts, Laws of 1984, ch. 654, art. 2, S 8, became effective on August 1, 1984.

10. Laws of 1984, ch. 654, art. 2, sec. 8 was not self-executing; it required the adoption of implementing rules by the Commissioner of Administration. Those rules, codified as Minn. Rules pt. 1230.3000 - 1230.4300, were published in the State Register on November 26, 1984. 9 S.R. 1186. They became effective, therefore, on December 3, 1984. Minn. Stat. 14.18 (1986).

11. As a consequence of Findings 7-10, supra, the overt acts in furtherance of the conspiracy personally committed by Mr. Nurre occurred before the effective date of either the implementing statute or the governing rules. A portion of the period of the conspiracy, however, occurred after the effective date of the statute and rules and his conviction for the conspiracy crime happened in 1988, well after the effective date of both the statute and governing rules.

12. Minn. Stat. sec. 161.315 (1986), which relates to debarment and suspension from participating in government contracts generally, became effective on June 1, 1985, well after the period of the criminal conspiracy but before Mr. Nurre's conviction in 1988. The statute, however, applies only

to contract crimes in which the "violations* occurred after June 30, 1985.
Minn. Stat. sec. 161.315, subd. 5 (1986). State Ex. 2. Minn. Stat. sec 161.315 (1986), was adopted after Minn. Rules pt. 1230.3000 - 1230.4300 became effective and, by its terms, does not apply to the Respondents illegal 1984 conduct.

13. On July 10, 1986, Mr. Nurre was interviewed by Agent Richard M. Salomon of the Federal Bureau of Investigation. Resp. Ex. 4. Ms participation in this and other meetings with the FBI was voluntary. Mr. Nurre discussed with Mr. Salomon the relationship between Lundin Construction and Kathy's Kranes. He also discussed his relationship to Kathy's Kranes in the "mentor-protegee" contract between Lundin Construction and Kathy's Kranes. The Respondent discussed projects and meetings involving Lundin Construction, Kathy's Kranes and others involved in particular government contracts. Mr. Nurre was told by Agent Salomon that he was not an active target of the FBI investigation. On May 28, 1987, a second meeting with the FBI took place. At that meeting in Mankato, Mr. Nurre provided additional information about Lundin Construction and his relationship to Kathy's Kranes. Finally, on July 2, 1987, Agent Salomon contacted Mr. Nurre by telephone. They discussed the paychecks that the Respondent had received from Kathy's Kranes. Resp. Ex. 4.

14. Subsequent to his final contact with the FBI, Mr. Nurre was subpoenaed to appear before a federal grand jury. At that point, he discontinued his discussions with the FBI and hired an attorney. Tr. 397-399. When criminal charges were ultimately filed, Mr. Nurre pled innocent and received a full jury trial. He is currently appealing his conviction.

15. At no time during the criminal trial or the hearing herein did Mr. Nurre admit the criminal violation or demonstrate remorse. He maintains that his and Lundin Construction's relationships with Kathy's Kranes were entirely appropriate from both a legal and moral standpoint under the Small Business Administration's minority contractor set-aside program. Tr. 463.

16. Mr. Nurre did not have a financial interest in Lundin Construction during the period of the conspiracy. State Ex. 10. Any profits received by

Lundin Construction or Mr. Lundin were not shared with Mr. Nurre. He received his normal salary as an employee of Lundin Construction whether or not he was assisting Kathy's Kranes.

17. At his sentencing for the federal conspiracy crime, both the federal prosecutor and the presiding judge stated in the record that Mr. Nurre was somewhat less culpable than other defendants, including Mr. Lundin. Resp. Ex. 16, 4-5. The presiding judge also stated that restitution was neither required nor possible.

18. Subsequent to their federal felony convictions, Lundin Construction and Mr. Lundin stipulated to a 24-month state debarment. State Ex. 14. The term of debarment was set to commence on the date of the Notice of Suspension and Proposed Debarment. State Ex. 14.

19. The stipulated settlement between the State and Mr. Lundin and Lundin Construction was not joined in by Mr. Nurre. The attorney representing Lundin Construction and Mr. Lundin made no claim to represent Mr. Nurre's rights and

he was not consulted in the formulation of the settlement agreement.
Mr.

Nurre was never told by Lundin Construction, their attorney or the State of Minnesota that the settlement agreement could in any way affect his interests.
Tr. 421-22.

20. Subsequent to his criminal conviction, Mr. Nurre offered, through his counsel, to testify in Congressional hearings about problems that exist in the SBA's minority contractor set-aside program and to discuss the program with members of the Small Business Administration. There is no evidence in the record, however, that Mr. Nurre's testimony was ever solicited by federal authorities. Moreover, the offer by his counsel was made six days after Mr.

Nurre was suspended by the DOT pending a hearing in this case. State Ex. 6.

The offer of federal cooperation was also made at a time when the federal district court judge was considering the severity of the sentence to be imposed. The jury's verdict of guilty was rendered on January 19, 1988.

State Ex. 4. Mr. Nurre was sentenced on March 25, 1988, Resp. Ex. 16, the date the formal judgment of criminal conviction was signed. State Ex. 12.

His offer to provide Congressional testimony was made by letter dated February 3, 1988. Resp. Ex. B.

21. Lundin Construction was convicted of the same offense as Mr. Nurre and an additional count of knowingly and willfully making a false, fictitious and fraudulent statement and representation to the Small Business Administration and the Veterans Administration, in an attempt to conceal its relationship with Kathy's Kranes. State Ex. 13; State Ex. 5.

22. By letter dated April 6, 1988, the division administrator of the U.S. Department of Transportation, Federal Highway Administration, suspended Mr.

Nurre indefinitely and announced the initiation of proceedings for his debarment to participate in United States Department of Transportation financial assistance programs for a period of three years. State Ex. 7.

That proceeding is currently pending and no debarment decision has issued.
Mr.

Nurre is also under indefinite suspension by the United States Department of the Army. State Ex. 9. No final federal debarment of Mr. Nurre has occurred.

23. Although the contracts Kathy's Kranes received from the federal

government were not on a bid basis, there is no evidence in the record that other minority contractors would have undertaken the same projects for a lower amount or that the government paid funds above the negotiated price for the completed work.

24. Kathy's Kranes defaulted on a project that was relevant for purposes of the indictment. Lundin Construction and Mr. Lundin had personally guaranteed the construction responsibilities of Kathy's Kranes on that Veterans Administration project. Its guarantee was to be secondary, behind that of the primary obligor. In 1985, Lundin Construction performed under its guarantee and completed the VA project at a cost to it of approximately \$200,000. Tr. 406-07. This action by Lundin Construction avoided any litigation between the participating parties, the government and the bonding company.

25. Mr. Nurre, as an employee and principal of Lundin Construction, personally worked on the completion of the VA project. While he was doing so, however, he was acting as an employee of Lundin Construction and received a normal salary for his work. His oversight of the VA project completion was requested by Mr. Lundin, president of his employer, Lundin Construction.

26. Since 1984, Lundin Construction has been the successful low bidder on approximately \$15,000,000 of state and federal construction contracts. Its lowest responsible bids on those projects were approximately \$1,500,000 lower in the aggregate than the next lowest responsible bidders. Tr. 408. Lundin Construction has not defaulted on a state or federal contract that it has participated in since 1984 and there is no evidence in the record that its performance has, in any respect, been unsatisfactory.

27. In 1984, Mr. Nurre and his employer, Lundin Construction, pled guilty to a state bid rigging felony charge in violation of Minn. Stat. sec. 325D.53 (1982). That criminal conviction involved contractors conspiring amongst themselves to divide geographic areas for the receipt of government construction contracts. One contractor within an agreed-upon geographic area would enter a bid and other "competitors" would enter "complementary" bids. State Ex. 16; State Ex. 19. That bid rigging conviction and contemporaneous multistate bid rigging investigations arose from conduct totally distinct from the conduct involved in the criminal violation of which Mr. Nurre was convicted in 1988.

28. As a condition of being placed on probation for the collusive bidding offense in 1984, Mr. Nurre agreed to cooperate fully with state and federal prosecutors. He was placed on probation for a three-year period. In addition to the community service required by the probation agreement, Mr. Nurre was required to pay a \$5,000 fine and attend a business ethics seminar that was arranged by the probation department for all the convicted bid riggers. Resp. Ex. 9.

29. Mr. Nurre attended a two-day seminar on business ethics in 1984, as a condition of his probation. The course outline for the ethics seminar is contained in Resp. Ex. 23. Attendance at the seminar was checked and probation officers were present. While Mr. Nurre attended the seminar, he was paid his normal salary by Lundin Construction.

30. As part of the plea bargain that resulted in the probation arrangement for the 1984 conviction, Mr. Nurre agreed to cooperate in the pending investigations and to accept a six-month personal debarment from participating in Mn/DOT contracts. State Ex. 16; Resp. Ex. 20. That personal

debarment was imposed prior to the effective date of Minn. Rules pt. 1230.3000 - 1230.4300 (1987).

31. Mr. Nurre has a reputation in the construction business as being an effective, aggressive construction contract manager who will complete performance in a timely manner. A number of persons familiar with Mr. Nurre's professional qualifications, including local, state and federal contracting officials, do not believe that the felony conviction reflects adversely on the Respondent's character or his ability to secure timely performance on government contracts. They would have no hesitancy in dealing with him on the administration of government construction contracts in the future.

32. On March 8, 1988, the Commissioner of Transportation sent by certified mail to Mr. Nurre a Suspension Order in accordance with Minn. Rules pt. 1230.4200 (1987). State Ex. 6. That Suspension Order disqualified Mr. Nurre from entering into or receiving a Minnesota Department of Transportation contract or from serving as a subcontractor or supplier under such a contract

for a period of 60 days from its date. State Ex. 6, Tr. 116-17. By stipulation of counsel, that suspension was extended until the Commissioner renders his decision in this contested case.

33. The ground for suspension stated in the March 8, 1988 Suspension Order was as follows:

. . . because you were convicted of knowingly and intentionally conspiring to defraud the United States by impeding, impairing, obstructing and defeating the administration of the "8(a) program" of the Small Business Administration in violation of Title 18, United States Code, Section 371, in the United States District Court, District of Minnesota on January 19, 1988.

State Ex. 6. There is no statement in the Suspension Order that the conviction of Lundin Construction was to be attributed to the Respondent as a principal of Lundin Construction under the appropriate rule.

34. On March 8, 1988, a Notice of Proposed Debarment and a Notice of Opportunity for Hearing was sent by certified mail to Mr. Nurre. State Ex. 6; Tr. 116-17. The stated ground for the proposed debarment of 24 months was identical to that contained in the Suspension Order. There is no statement in the Notice of Proposed Debarment and Notice of Opportunity for Hearing that any conviction other than the personal conviction of Mr. Nurre was relied upon to establish the propriety of a personal debarment. State Ex. 6.

35. By letter of counsel, Mr. Nurre timely requested a contested case hearing on the propriety of his personal debarment.

36. On April 19, 1988, a Notice of and Order for Hearing, appropriate in all respects, was issued by Leonard W. Levine, the Commissioner of Transportation. That Notice of and Order for Hearing did not contain a specific statement of the basis for the proposed debarment, but generally cited the debarment rules, Minn. Rules pts. 1230.3000 - 1230.4300 (1987), and advised that testimony about all relevant factors would be elicited.

37. At the hearing herein, Respondent objected to any attempt to impute to him the conduct of Lundin Construction under Minn. Rule pt. 1230.3600 (1987).

Based on the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of the Minnesota Department of Transportation have jurisdiction herein and authority to take the action proposed pursuant to Minn. Stat. sec. 14.50 (1986) and Minn. Rules pts. 1230.3000 - 1230.4300 (1987).

2. Proper notice of the hearing was timely given and all relevant

substantive and procedural requirements of law or rule have been fulfilled.
The matter is, therefore, properly before the Administrative Law Judge.

3 . The Respondent was convicted of a contract crime as defined in Minn. Rule pt. 1230.3100, subp. 5 (1987), on January 19, 1988.

4. The debarment provided for by Minn. Rules pt. 1230.3000 - 1230.4300 (1987), may be based upon the Respondent's criminal conviction. So doing involves neither a retroactive application of the rules or the ex post facto increase of a penalty subsequent to the commission of a crime.

5. Minn. Rules pt. 1230.3000 - 1230.4300 (1987), authorize the debarment of an individual who, himself, has committed a contract crime.

6. It is not appropriate to attribute to Mr. Nurre, as an affiliate, the debarment of Lundin Construction under Minn. Rule pt. 1230.3600, subp. 1, subp. 4 (1987).

7. The contract crime of which Mr. Nurre was convicted is a serious contract crime, directly affecting the integrity of the public contracting system. His personal culpability was, however, less than that of Richard Lundin or Lundin Construction.

8. The offense did not involve a matter in which restitution was either possible or appropriate.

9. Mr. Nurre cooperated only minimally in civil or criminal lawsuits involving the same behavioral incidents which gave rise to the criminal conviction in 1988.

10. Mr. Nurre has not currently been debarred in another jurisdiction. A suspension pending a debarment hearing is not equivalent to a debarment.

11. In determining the State's need to preserve the competitive bidding process, it is appropriate to consider rehabilitative factors to determine whether repeat contract crimes involving the public contracting process are likely.

12. A debarment is in no sense an additional punishment of the individual. The length of any debarment should be consonant with the need of the public authority to protect the integrity of the public contracting process.

13. Respondent does not concede that his or his employer's relationship

with Kathy's Kranes was illegal or in any sense improper.

14. As a consequence of Conclusions 3-13, supra, an 18-month debarment of the Respondent is appropriate.

15. Any Finding of Fact more properly considered a Conclusion, or any Conclusion more properly considered a Finding of Fact is hereby expressly adopted as such.

Based on the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

The Administrative Law Judge hereby recommends to the Commissioner of the Department of Transportation that he enter an Order debarring the Respondent, Larry V. Nurre, from receiving Minnesota Department of Transportation (Mn/DOT) contracts and from serving as a subcontractor or supplier of materials or services under such a contract for a period of 18 months.

Should the Commissioner apply Minn. Rule pt. 1230.3600, subp. 1 and subp. 4 (1987), to the Respondent and attribute to him the term of debarment imposed on Lundin Construction Co. as a former principal, the date of that debarment should run from the date of the suspension herein, March 8, 1988, as was the case with the debarment of Lundin Construction Co. State Ex. 14.

Dated this 13th day of October, 1988.

BRUCE D. CAMPBELL
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

Reported: Court Reported - Transcripts Volume 1 - 3
Jeffrey J. Watczak
Duluth, Minnesota

Deposition of Douglas Wallace and
Deposition of Larry LaPoint
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MEMORANDUM

Debarment is the exclusion of a contractor from government contracting for a reasonable, specified period of time. Debarment is intended to protect the government, not to punish the debarred contractor. Shane Meat Co., Inc. v. United States Department of Defense, 800 F.2d 334, 338 (3d Cir. 1986); Joseph Construction Co. v. Veterans Administration, 595 F. Supp. 448 (D.C.N.D. Ill.

1984). Debarment is designed to protect the government by ensuring full and open competition by granting awards only to 'responsible contractor SH. Caiola v. Carroll, 851 F.2d 395, 398 (D.C. Cir. 1988). Debarment reduces the risk of harm to the system by eliminating unethical or incompetent contractors. Caiola v. Carroll, 851 F.2d at 399. The Department of Transportation seeks to debar the Respondent in this proceeding under Minn. Rules pt. 1230.3000 - 1230.4300 (1987). The authority for the adoption of the

DOT suspension and debarment rules was contained in Laws of 1984, ch. 645, art. 2, sec. 8.

The Respondent initially argues that no debarment is appropriate in this proceeding because his substantive acts committed in furtherance of the 1984 conspiracy predate the effective date of the rules. As indicated in Finding 7, supra, the final act in furtherance of the conspiracy personally committed by the Respondent occurred on March 29, 1984. The rules under which debarment is being sought did not become effective until December 3, 1984. See, Finding 10, supra.

The State argues that the rules speak of a conviction of a contract crime as the grounds for debarment and notes that the conviction occurred on January 19, 1988, well after the effective date of the rules.

The Administrative Law Judge has concluded that Minn. Rules pt. 1230.3000 - 1230.4300 (1987), are properly applied to the 1988 conviction of Mr. Nurre for the federal conspiracy crime. Initially, the Administrative Law Judge agrees with the State that the rules focus on the time of the conviction rather than the date of the illegal acts. Under that analysis, the conviction occurred well after the effective date of the rules, and applying the rules to Mr. Nurre's conduct would not involve a retroactive application of the rules. Even if the date of the criminal act were the appropriate time period for considering the issue of retroactive application of the rules, again, there is no retroactive application to Mr. Nurre. The crime of which he was convicted was one of conspiring to violate a federal criminal statute involving contract administration. As noted in Finding 11, supra, the conspiracy was still extant when the rules became effective.

Although not directly discussed by the Respondent in this proceeding, a stronger argument against application of the rules to Mr. Nurre may be found in the concept of ex post facto application of a punitive statute or rule. It has been recognized, both by the Supreme Court and the state courts, that one class of invalid ex post facto laws consist of statutes and rules which impose a punishment in addition to or greater than that prescribed when the illegal acts were committed. The punishment may be lessened, but never increased, for

a crime already committed. 16 Am. Jur.2d, Constitutional Law, sec. 643; Beazell v. Ohio, 269 U.S. 167 (1925). Courts have applied the concept of an ex post facto addition to punishment to disqualification from public office and the practice of certain professions. See, Ex Post Facto Laws, 53 L.Ed.2d 1146.

A statute does not impose a prohibited ex post facto punishment, however, merely because it draws to some extent upon facts antecedent to enactment for its operation. Holt v. Morgan, 274 P.2d 915 (Cal. App. 1954); Earle v. Froedtert Grain & Malting Co., 197 Wash. 341, 85 P.2d 264 (1938).

In the seminal case involving a state's attempt to disqualify an individual who had earlier been convicted of a crime from holding office in a waterfront labor union, the United States Supreme Court held that the purpose of the regulation was not to punish an individual for past criminal conduct but to assert the State's interest in fixing qualifications for a position affecting the public interest. De Veau v. Braisted, 363 U.S. 144 (1960). In Braisted, supra, the individual had been convicted of a felony crime 36 years before the passage of the state disqualification statute. Since the purpose of the enactment was not to impose an additional punishment for that crime but

to ensure that waterfront unions functioned without corruption in the future, the court held that the statute was not a prohibited ex post facto law.

The holding in Braisted, supra, has been directly applied to government contracting by several state courts. In Gilbert Central Corp. v. State, 716 P.2d 654 (Okla. 1986), the court determined that a state statute which precluded an entity convicted of or pleading guilty to a felony from selling real or personal property to the state was not an ex post facto law, even though the criminal conviction preceded the effective date of the statute. The court held, partially relying on Braisted, supra, that the state had a present interest in protecting the integrity of the public contracting system and the debarment was imposed to secure that state purpose, without increasing past punishment for criminal acts. The court noted that the statute did not attempt to affect past public contracting decisions or contracts but operated entirely in the future as respects future awards.

Similarly, in Polyvend, Inc. v. Puckorius, 395 N.E.2d 1376, 7 ALR4th 1185 (1979), app. dismd. 444 U.S. 1062 (1980), the Illinois Supreme Court held that the debarment of a person or business which had, prior to the effective date of the debarring statute, engaged in the bribery of a state official or employee, did not involve prohibited retroactivity or ex post facto consideration. It noted that the statute operated entirely in the future with respect to procurement decisions occurring after the effective date of the statute and did not seek to disturb vested rights. It relied on the general rule, previously noted, that a statute does not become a prohibited ex post facto law or involve considerations of retroactive application merely because it looks to past events as an operative current condition. Like the Oklahoma Supreme Court, the Illinois Supreme Court specifically applied the reasoning of Braisted, supra, to government contracting debarments.

Hence, the Administrative Law Judge rejects the argument of the Respondent that the rules may not be properly applied to him because of their effective date. The rules speak of a conviction and that conviction occurred after the effective date of the rules. Apart from that consideration, under the

caselaw, the rules are neither retroactive nor prohibited ex post facto legislation merely because they look to past events to determine present eligibility to participate as a contractor in Mn/DOT undertakings. The operation of the debarment would be entirely prospective. Minn. Rules pt. 1230.3000 -1230.4300 (1987), may, therefore, be fully applied to the Respondent in this proceeding.

The Respondent next argues that he is not a "contractor" or "business" subject to debarment under the rules. He asserts that the rules only authorize the debarment of a contractor or business and not the personal debarment of an individual for his or her own conduct. Minn. Rule pt. 1230.3200 (1987). The state responds that the defined term "business" and the words "principal" and "person" are used interchangeably throughout the rules. By implication, therefore, it is argued that the rules authorize the personal debarment of a person for his or her own individual conduct. The State also concludes that Minn. Rule pt. 1230.3600, subp. 1 (1987) would authorize the personal debarment of a principal by imputation when the business itself was debarred. Hence, it is argued that the State may impute to Mr. Nurre as a principal of Lundin Construction the conviction of Lundin Construction under Minn. Rule pt. 1230.3600, subp. 1 (1987) and fix his debarment at 24 months under Minn. Rule pt. 1230.3600, subp. 4 (1987).

The Administrative Law Judge concludes that an individual may be personally debarred for his or her own conduct under Minn. Rules pt 1230.3000 - 1230.4300 (1987). Authority for the debarment of an individual who has, himself, been convicted of a contract crime is found in Minn. Rule pt. 1230.3700 (1987). That section provides that a person may not be debarred for more than three years for conduct which gave rise to the grounds for debarment. Minn. Rule pt. 1230.3100, subp. 10 (1987), defines a "person" as a "natural person or a business". By necessary implication then, a person may be debarred for a period of less than three years. Minn. Rule pt. 1230.3200 (1987), dealing with the debarment of a business, concerns only situations of mandatory debarment for a "business". Further evidence that Minn. Rule pt. 1230.3700 (1987), authorizes the present debarment of a natural person convicted of a contract crime may be found in Minn. Rule pt. 1230.3600, subp. 4 (1987), which provides: 'The period of debarment must be the same as that of the debarred former principal or business.' That rule, then, contemplates that a principal of a business may himself be the subject of a personal debarment. The brief of the Department contains other instances in which the language of the rules clearly contemplates that an individual may be personally debarred for his or her own conduct for a period of not to exceed three years. Memorandum of the Staff, pp. 2-6.

Construing Minn. Rule pt. 1230.3700 (1987) to authorize the present debarment of a natural person also accords with the administrative history of the rules. Prior to the adoption of the rules, the Commissioner had inherent authority to debar individuals and businesses who were not "responsible bidders". *Gonzales v Freeman*, 334 F.2d 570 (D.C. Cir. 1964). See, *Copper Plumbing & Heating Co. v. U.S.*, 290 F.2d 368 (D.C. Cir. 1961). That authority to debar was exercised by the Commissioner before the effective date of the rules as to both individuals and businesses. Mr. Nurre, himself, consented to a personal six-month debarment prior to the effective date of the rules. There is nothing in the Statement of Need and Reasonableness for the 1984 rulemaking that indicates the Commissioner intended by the rules to abdicate the authority previously exercised to debar a natural person who was not himself the contractor. State Ex. 11.

This result is also consonant with the purpose of debarment. As

previously discussed, debarment from participating in State Mn/DOT contracts is in no sense a punishment. It only prohibits an individual or business from bidding on Mn/DOT contracts. If an individual were to bid on a Mn/DOT contract, that individual, as a sole proprietor, would be within the definition of "business" contained in Minn. Rule pt. 1230.3100, subp. 3 (1987), and, if successful, within the definition of the word "contractor" contained in Minn. Rule pt. 1230.3100, subp. 6 (1987). No issue of authority to debar would arise because that individual, as a business, would be subject to debarment under Minn. Rule pt. 1230.3200, subp. 1 (1987). Moreover, Minn. Rule pt. 1230.3600, subp. 2 (1987), would prevent a second business from employing a principal of a debarred business as a principal. When a debarment imposes no additional punishment, to distinguish between the debarment of an individual at the time of the bid or the debarment of a second business that hires him as a principal and a personal debarment imposed at an earlier time serves no rational purpose.

The State argues that if the rules do not authorize the individual debarment of Mr. Nurre for his conduct, they may apply Minn. Rule pt.

1230.3600 (1987) to impute to him the conviction of the Company and impose upon the Respondent the same 24-month debarment that was agreed to by Mr. Lundin and Lundin Construction. The Administrative Law Judge does not accept that construction of Minn. Rule pt. 1230.3600 (1987). That rule, when properly read, allows the conviction of a business to be imputed to a principal under certain circumstances. Here, there is nothing to impute since Mr. Nurre was himself convicted. Under subpart 2 of that rule, a business must be debarred if it has a significant affiliation with a principal in a debarred corporation or a business that has been debarred. If the prohibited relationship exists, that second business must, itself, be debarred. Minn. Rule pt. 1230.3600, subp. 4 (1987), which provides that the period of debarment must be the same as that of the "debarred former principal or business", merely means that if the debarment is attributed to a second business under Minn. Rule pt. 1230.3600, subp. 2, (1987), that debarment must be equal in length to the original debarment attributed to the second business. The rule does not authorize a personal debarment of Mr. Nurre by affiliation or attribution if he may not, himself, be individually debarred for his own illegal conduct.

Minn. Rule pt. 1230.3500 (1987), requires that the Administrative Law Judge recommend to the Commissioner of Transportation a proposed term of debarment. The factors for consideration are also stated in that rule. In recommending a proposed term of debarment, the Administrative Law Judge is not reviewing the recommendation of the Department for reasonableness, as would a reviewing court; he is recommending a proposed term of debarment based upon the hearing record. See, *Shane Meat Co., Inc. v. United States Department of Defense*, 800 F.2d 334, 336 (3d. Cir. 1986). In recommending a proposed term of debarment, the Administrative Law Judge must weigh the factors contained in Minn. Rule pt. 1230.3500 (1987), with the purpose for which debarment is imposed. As previously discussed, debarment is not designed to punish the past wrongdoer; the term of debarment must be that appropriate to protect the public interest in the integrity of the governmental contracting system. *Joseph Construction Co. v. Veterans Administration*, 595 F. Supp. 448 (D.C.N.D. 111. 1984).

The Department has argued that Mr. Nurre's present circumstances are

irrelevant to this proceeding. It asserts that the Respondent's present responsibility or rehabilitation should not be a concern of the Administrative Law Judge. If, however, the only purpose of debarment is to protect the government's interest in the reliability and honesty of persons bidding on public contracts, evidence of rehabilitation and present responsibility is significant. To the extent that future misconduct is unlikely, the government's interest in imposing a significant period of debarment is reduced. The Rules label that factor the "State's need to preserve the competitive bidding process" Minn. Rule pt. 1230.3500 (1987). To the extent that rehabilitation has occurred or present responsibility exists, the State's need to impose a significant period of debarment to protect the integrity of its public bidding process is materially lessened or eliminated.

As stated in the Findings and Conclusions, the Administrative Law Judge has determined that an 18-month debarment of Mr. Nurre is appropriate. The first factor to be considered is the seriousness of the offense. The testimony at the hearing indicates that the offense is one of gravity. Not only is the conviction for felony fraud, but it involves the violation of a program specially designed to assist the disadvantaged in becoming contractors

able to participate in the public bidding process. Both the United States Government and the Department of Transportation itself consider these set-aside programs as being of crucial importance to the contracting industry. Tr. 141; Tr. 142-46.

When the activity of Lundin Construction Company, Mr. Lundin and the Respondent are compared to the activities of other defendants, including Don Showalter and Kathy Anderson, their overt acts are not as serious so as to place all defendants in the same debarment time period category. Clearly, the acts and number of guilty counts for which Dan Showalter and Kathy Anderson were responsible would be sufficient to place them in the most serious three-year category.

The Department concluded that Mr. Nurre and Mr. Lundin and Lundin Construction were all engaged in similar conduct and, hence, should receive the same period of debarment. The Administrative Law Judge agrees with the statement of the federal prosecutor and the federal judge that the personal acts for which Mr. Nurre was responsible were less culpable than Lundin Construction Company. Initially, Lundin Construction Company and Mr. Lundin had a significant financial interest in Kathy's Kranes. They stood to benefit monetarily from the illegal relationship. There is no evidence in the record that Mr. Nurre had the same financial motive. He was not a shareholder in Lundin Construction or Kathy's Kranes. There is no evidence that he received monies in excess of his usual salary as an officer of Lundin Construction Company while he worked with Kathy's Kranes. Finally, Lundin Construction Company and Mr. Lundin were convicted of an additional felony count. They lied about and attempted to conceal the relationship with Kathy's Kranes. Under those circumstances, a base penalty period for Mr. Nurre should be less than that of Lundin Construction and Mr. Lundin. Their term of debarment was 24 months. Based on a comparison of the culpability and number of acts for which the Respondent was convicted with those of Mr. Lundin and Lundin Construction, the Administrative Law Judge finds that a base debarment period of 18 months, as a consequence of the gravity of the offense, is the appropriate starting point for determining a recommended period of debarment.

The next factor to be considered is restitution. The Department did not consider restitution in this proceeding because, apparently, the crime was such that restitution was neither required nor possible. The Administrative Law Judge agrees with the witnesses for the Department that the making of restitution is simply not a factor in this case. It does not increase the gravity of the offense or lengthen the base period. But, since there has been no restitution, the base debarment period should not be shortened. It is,

simply, irrelevant.

The next factor is whether the debarred person cooperated in civil or criminal lawsuits. In his ruling on evidentiary objections, the Administrative Law Judge determined that evidence of cooperation regarding the 1984 bid rigging and territorial allocation conviction was not relevant in this proceeding. The Administrative Law Judge did so because cooperation as an ameliorative factor can, logically, only relate to the same behavioral incidents which give rise to the criminal conviction for which debarment is considered. Unless the same behavioral incidents are somehow related, there can be neither a showing of rehabilitation, present responsibility or a significant saving to the government. For that reason, the Administrative Law Judge has made no Findings related to the asserted cooperation of the Respondent in the 1984 bid rigging investigations.

Even if that evidence had been received, however, it would not ameliorate the base debarment period. As previously discussed, the "cooperation" of Mr. Nurre in 1984 was the result of a plea bargain and that plea bargain resulted in a lenient, probationary sentence. That is not the type of cooperation which either mitigates the seriousness of the offense or indicates present responsibility. Rea Construction Co., HUD BCA No. 81-550-D6, 81-2 BCA paragraph 15,320. Hence, it is not appropriate to consider asserted cooperation in 1984 with state and federal authorities on bid rigging matters as ameliorative conduct in this proceeding.

For much the same reason, the Administrative Law Judge discounts the offers of Nurre's counsel to have the Respondent testify in federal proceedings about minority contractor set-aside programs. That offer was made at a time when the appropriate federal sentence for Mr. Nurre was being considered. There is no evidence in the record that anyone at the federal level had ever sought Mr. Nurre's input on that subject. Moreover, Mr. Nurre still believes that he was erroneously convicted and that the relationship between Kathy's Kranes and Lundin Construction was legally and morally appropriate. The Administrative Law Judge presumes that Mr. Nurre would use the federal investigatory forum to advance his view of the law. Again, that does not mitigate the seriousness of the offense nor demonstrate present responsibility. At most, it goes to vindicate Mr. Nurre's view of the law and, perhaps, undermine his conviction or sentence.

The only semblance of cooperation in proceedings affecting the acts culminating in Mr. Nurre's 1988 conviction was the Respondent's voluntary discussion with the FBI. The notes of those conversations, however, do not indicate that Mr. Nurre's "cooperation" was material to the investigation or subsequent prosecutions. The Respondent initially participated when he was told he was not a suspect and did not cooperate further when it became apparent he was at risk.

The Administrative Law Judge must also consider any terms of debarment imposed by other jurisdictions. Although federal suspensions and proposed debarments of Mr. Nurre exist, no final debarment has been imposed by any other jurisdiction. The rule speaks of current debarments. A debarment is legally distinct from a suspension. The rule does not indicate that the Administrative Law Judge may consider suspension in other jurisdictions. Hence, since no jurisdiction has imposed a debarment, this factor is

irrelevant.

The final relevant factor is the 'State's need to preserve the competitive bidding process." Minn. Rule pt. 1230.3500 (1987). The Administrative Law Judge construes that factor, as related to the length of a debarment, to include the present responsibility and rehabilitation of Mr. Nurre. To the extent that the Respondent is presently a responsible bidder, the State's need to impose a significant period of debarment is lessened. The present responsibility of a contractor or business is a matter to be considered in imposing any term of debarment. Mathew J. Waskelo, HUD BCA No. 80-483-028, 81-1 BCA paragraph 14,955 (1980); Carol E. Patterson, HUD BCA No. 78-325-D54, 80-1 BCA 1 14,224 (1979); Roemer v. Hoffman, 419 F. Supp. 130 (D.C.D.C. 1976). In this regard, the Administrative Law Judge has considered the evidence introduced by Mr. Nurre asserting that he is presently a 'responsible bidder" and that

rehabilitation has occurred. A significant number of private persons and government officials testified to Mr. Nurre's current responsible character.

The Administrative Law Judge does not accept Mr. Nurre's assertion that he has been rehabilitated or is, presently, a responsible contractor or bidder as regards public minority set-aside contracts. In proceedings in which the government has determined that an individual convicted of a serious contract crime has been rehabilitated and is presently a responsible bidder, the individual admitted his prior illegal act, fully cooperated in all government prosecutions and took internal measures to prevent the reoccurrence of the illegal conduct. See, Mathew J. Waskelo, *supra*; Carol E. Patterson, *supra*; John F. Azzarelli, HUD BCA No. 82-671-D12, 82-1 BCA 1 15,677 (1982); Norman D. Wilhelm, HUD BCA No. 82-679-015, 82-2 BCA paragraph 16,002 (1982).

As noted in the Findings, the Respondent argues to this day that the relationship between Lundin Construction and Kathy's Kranes was both legally and morally appropriate. In other words, he disputes the jury verdict finding him guilty of the felony of intentionally conspiring to defraud the United States Government in connection with a Small Business Administration minority set-aside program. It is difficult to argue on the one hand that a conviction was erroneous and maintain one's innocence, and, on the other, to assert rehabilitation and present responsibility. Since the Administrative Law Judge is "learned in the law", it would be abhorrent to him to impose an additional punishment on an individual for fully and fairly pursuing his legal rights. The purpose of debarment, however, is to protect the public interest, not to impose additional punishment. One cannot correct one's attitude or eliminate the likelihood of inappropriate conduct when no change is deemed appropriate.

The Respondent introduced evidence that states the appropriate standard for determining present responsibility. In Respondent's Exhibit 14, offered by Respondent to show his cooperation in the 1984 bid rigging investigations, Sue Halverson, Assistant Attorney General, states that the action of Mr. Nurre and Lundin Construction:

demonstrates that they have acknowledged the wrongful nature of their past connections with bid rigging and they fully intend to comply with the antitrust laws in the future. Thus, it seems to us that the company and its officers can be viewed as responsible bidders on public contracts.

When that same test is applied to Mr. Nurre as respects the 1988 conviction, it is apparent that no change in his opinion or attitude regarding minority

set-aside contracts has occurred. What he considers to be legally and morally appropriate, a federal jury has determined to be knowing fraud.

The Administrative Law Judge is aware that Mr. Nurre is appealing his criminal conviction. He may be entirely correct that the conviction was inappropriate. As he recognizes, however, the venue for testing that conclusion is the federal appeal process and not this debarment proceeding. That does not involve Mr. Nurre in a 'Catch 22". If the 1988 conviction was improper and that conviction is set aside on appeal, his debarment will cease automatically.

Hence, the Administrative Law Judge discounts the evidence introduced by Mr. Nurre in this proceeding to demonstrate his present responsibility. He

was convicted of a serious crime involving programs to assist disadvantaged persons and he has not evidenced that he understands that the conduct was inappropriate. Under those circumstances, no decrease in a debarment period based on rehabilitation or present responsibility is appropriate. The Department should impose the full term consistent with the gravity of the offense, 18 months, to protect the integrity of the public contracting process.

The Administrative Law Judge makes no recommendation with regard to the date of commencement of the debarment period. The Commissioner has the discretion of commencing the debarment on the date of his final Order or crediting the debarment period with the previous period of suspension. There is authority for commencing the debarment retroactively on the date the Notice of Suspension was issued. Hue Chemical Sales, Inc., GSBCA No. 5661-0, 80-2 BCA paragraph 14,679 (1980). A factor to be considered in determining whether to exercise that discretion is the existence, if any, of a history of misconduct. William R. Absalom, HUD BCA No. 82-746-D45, 83-1 BCA paragraph 16,390 (1983); Marvin B. Awayi, HUD BCA No. 84-834-D6, 84-2 BCA 1 17,320.

B.D.C.