

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

In the Matter of:

JOHN CAMPBELL

Respondent.

HUDALJ 97-7118-DB(LDP)
Decided: January 20, 1998

James R. Witt, Jr., Esquire
For the Respondent

Gloria Aldridge, Esquire
For the Government

Before: CONSTANCE O'BRYANT
Administrative Law Judge

RECOMMENDED DECISION

STATEMENT OF THE CASE

This is an appeal of a Notice of Limited Denial of Participation ("LDP") issued on May 29, 1997, to John Campbell ("Respondent"), president and owner of "Modern Exteriors," by the Deputy Assistant Secretary for Single Family Housing for the U. S. Department of Housing and Urban Development ("HUD"). An informal conference to review this sanction was held on July 9, 1997, via telephone between Respondent and Morris Carter, Director of the Office of Lender Activities and Program Compliance. Mr. Morris affirmed the LDP.

Respondent appealed the decision to affirm the LDP on August 12, 1997. A hearing was held on the matter on October 29, 1997, in Houston, Texas. The testimony of several witnesses was taken and numerous exhibits were entered into evidence. At the conclusion of the testimony, parties were requested to submit written briefs by November 25, 1997. Both parties have complied. Accordingly, the case is now ripe for decision.

Pursuant to 24 C.F.R. § 24.713(b), I am to make findings of fact and a recommended decision.

FINDINGS OF FACT

1. Respondent is the president and owner of “Modern Exteriors,” a home improvement company. Respondent has been in the home improvement business and has participated in HUD loan programs for 45 years. (Tr.134-35; G-33)¹

2. Modern Exteriors began business in January 1972. (G-33)

3. Frances Traweek was employed by Modern Exteriors in October 1995 as a receptionist and loan processor. (Tr. 100-101) She left its employ at the end of November 1995 to take a better job. (Tr. 118)

4. On September 5, 1995, Modern Exteriors, through a recently hired sales agent, Donnie Myrick, prepared home improvement specifications for Mrs. Annie Mae Moore² at 949 Marion Anderson Avenue, Port Arthur, Texas. The proposed home improvements were described as follows:

Furnish & install solid vinyl siding (sage) including foamcore insulation; install (3) three exteriors doors; living room floor has 3 or 4 bad floor joists - repair as needed; install white soffit to garage ceiling (2)³. Do not cover overhang. (G-2).

5. Under the proposal, Modern Exteriors would furnish material and labor, and complete the job in accordance with the specifications for the sum of \$10,860.00. (G-2)

6. On October 10, 1995, Mrs. Moore completed a Credit Application for Property Improvement Loan under the provisions of Title I of the National Housing Act, for the amount of \$10,860.00. Mr. Campbell signed the document as contractor. (G-3A)

¹All references herein to the transcript of the hearing are designated “Tr.” followed by the referenced page numbers. Reference to Government exhibits are designated by “G-” and the exhibit numbers and references to Respondent’s exhibits are designated by “R-” and the exhibit numbers.

²Referred to in the specification document as Mrs. Lillie Mae Moore. (See G- 2)

³According to Respondent, this symbol means “2 squares.” (Tr. 138-39) Mr. Hadnot, HUD’s witness, understood it to mean “2 foot squares.” (Tr. 82)

The document described the improvements as “vinyl siding, 3 exterior doors, soffit for garage ceiling, repair living room floor joists, all according to contract.” By his signature, Respondent certified, *inter alia*, that: 1) I am the person who sold the job; 2) the contract contains the whole agreement with the borrowers; 4) the improvements have not been misrepresented; and 5) no promises have been made that are impossible of attainment.

7. Mrs. Moore also executed an FHA Title I Property Improvement Loan Retail Installation Contract, dated October 10, 1995, (G-3C), as well as a Contract for Labor and Materials and Trust Deed, FHA Title I Property Improvement Loan (G-3D, G-4). These documents contained the same description of the work to be done.

8. The loan for the improvements was financed by Statewide Mortgage Company (“Statewide”). (G-5, G-6)

9. The loan on the contract in this case was insured by HUD pursuant to regulations for Title I Property Improvement Loans issued at 24 C.F.R. Part 201.

10. Respondent first visited the improvement site after the loan had been approved. (Tr. 135) When he visited Mrs. Moore’s house, he saw that his salesman, Myrick, who was still in his probationary period, had made a mistake in describing work to be done with regard to the contract item: “install white soffitt to garage ceiling (2_). Do not cover overhang.” (Tr. 141-145) Mrs. Moore had no garage, but rather a carport. The carport had no ceiling. Without a ceiling, there was nothing to which a soffit could be attached. (Tr. 140-41; 145-46) Further, the wood on the carport top was rotted all around the front, sides and back and there was no other structure to which a soffit could be affixed. (Tr. 142-44; 146) Mr. Campbell talked to Mrs. Moore about what she had wanted done and what could be done with regard to this item. Together they orally agreed that Modern Exteriors would remove the rotten wood from the gable ends of the carport, replace it, and then put vinyl siding on the gable ends. The company would also install a band of siding, approximately 10" deep, around the top of all four sides of the carport. (Tr. 141-144) Respondent and Mrs. Moore agreed that this work would be in lieu of the “install white soffitt to garage ceiling” specification.⁴ There would be no

⁴ Mr. Myrick was working on a trial basis; he left after two to three months. (Tr. 210) Shortly after he wrote the specifications, and before Respondent reviewed the document and visited Mrs. Moore’s home, Mr. Myrick’s mother became ill and he left the area to attend to her. Respondent didn’t see him again until after this work had been completed. After talking to Mrs. Moore and viewing the site, Respondent “assumed that Donnie meant to do the doggone blue around the carport,” i.e., to install vinyl siding all around the carport, the agreement he subsequently reached with Mrs. Moore. (Tr.146) According to Mrs. Traweek, who spoke with Mrs. Moore a number of times, Mrs. Moore was confused

about what she wanted with regard to the “soffit” item, and that Modern Exteriors made every effort to satisfy her. (Tr. 104-106)

change in the cost estimate resulting from this modification. (Tr. 146). The other contract items were clear enough to Respondent and did not need modification. (Tr. 210-11)

11. Mrs. Moore agreed to the substitution. (Tr. 118; 141) The change was not reduced to writing. (Tr. 111) It was Modern Exteriors' practice not to document changes to specifications in writing unless the cost was substantially changed. (Tr. 122-124)

12. Respondent's practice in making an oral adjustment to the contract in this case was consistent with his practice during the course of his 45 years of doing business. (Tr. 212, 220)

13. Modern Exteriors installed the vinyl siding on the carport as orally agreed. Mrs. Moore expressed satisfaction with the work to Respondent (Tr.153, 157), as well as to his employees John Noethen, the foreman on the job, and to Frances Traweek. (G-27; Tr. 118)

14. The monetary cost of adding the vinyl siding to the gable ends and around the top of the sides of the carport was greater than that which it would have been to install two "squares of soffit." (Tr. 147-48)

15. Modern Exteriors completed the remainder of the contract to the extent that they were permitted to do so by Mrs. Moore. It furnished and installed solid vinyl siding on the house, including 1" foamcore insulation. (Tr. 163-164) There was a lot of rotten wood on the house. The workers had to find and remove the rotted wood, and replace it before installing the vinyl siding. (Tr. 155; 163-64) Modern Exteriors installed three exteriors steel doors. (Tr. 176-77) The entrance to the living room had two doors - an aluminum storm door and an inner door. Modern Exteriors installed a new inner door. (Tr. 181) It also installed a new exterior door to a bedroom, and a new exterior door at the back of the house. (Tr. 167) The company repaired or replaced 3 or 4 defective floor joists in the living room. (Tr. 176-77; 155)

16. Mrs. Moore had certain idiosyncracies which thwarted Modern Exteriors' ability to perform improvement work on her home in accordance with industry standards. Specifically:

a. Before installing the steel back door, Modern Exteriors' employees cut out a hole in the door, intending to install a doorknob. Mrs. Moore refused to allow the workers to put a doorknob on the door. The reason she gave was that a robber would not be able to kick the doorknob off if it was not there. The workers tried to persuade her

to change her mind, then reluctantly complied with her wishes, leaving the door knob with her, in case she later wanted it put on. The workers came to understand that what Mrs. Moore wanted was a lock without a doorknob, that is, a deadbolt. Although a deadbolt was not specified in the contract, Modern Exteriors purchased one and installed it to satisfy her. The deadbolt was installed in the hole that had been cut out for the doorknob. (Tr. 114; 167-68). The cost of the deadbolt and its installation was over and above the cost of installing the exterior doors. (Tr. 167)

b. Modern Exteriors intended to install a new back door with new door jamb or frame (Tr. 103); however, Mrs. Moore refused to allow the frame of the back door to be removed. (Tr. 103) Her refusal occasioned several conversations with Ms. Traweek. (Tr. 103) Mrs. Moore insisted that the old frame must not come down even after being told that there would likely be a problem with improper fitting of the door which could result in drafts and that her door might not even shut properly. (Tr. 103-04; 111-113) Her reason: she had cabbage all over the outside of the old door frame for good luck and it could not be removed. (Tr. 103-04, 111; 167-69) She did not care how the workers got the door to fit, the old frame simply had to stay. (Tr. 112). The door, as installed, left a gap at the bottom. (Tr. 165)

17. Modern Exteriors repaired or replaced 3 or 4 defective living room floor joists. This helped to stabilize the floor in that area. However, Mrs. Moore's house sat on blocks. (Tr.140) Respondent told Mrs. Moore that to cure the problem with the floor required changing the size of the blocks underneath the house. (Tr. 155) The blocks were "8x16" but should have been "24x24." (Tr. 178) Changing the size of the blocks underneath the house was not a specification in the contract.

18. Modern Exteriors also replaced a wooden stoop which led to Mrs. Moore's back door with concrete steps. The wooden stoop was termite infested. This was not part of the contract and was done at no extra cost to Mrs. Moore. (Tr. 144-45)

19. On October 20, 1995, in conversations with Frances Traweek, Mrs. Moore stated that she was satisfied with the work that Modern Exteriors had done. (Tr. 107-108) Ms. Traweek then requested that Mrs. Moore sign the Completion Certificate to allow the workers to be paid. (Tr. 108-109; 119-121) Mrs. Moore related no concerns to Ms. Traweek regarding work not being finished or not being finished satisfactorily. (Tr. 109-110)

20. On October 20, 1995, Mrs. Moore executed a Completion Certificate for Property Improvement (G-5). On this form is printed in bold: **Notice to Borrower: Do**

Not Sign this Certificate until the dealer or contractor has satisfactorily completed the Improvements in accordance with the terms of your contract or sales agreement.

Mrs. Moore signed the Certificate which stated, *inter alia*, that “the property improvements have been completed in accordance with the contract or cost estimate and to my (our) satisfaction.”

21. On October 26, 1995, Respondent, as owner of Modern Exteriors, executed the same Completion Certificate. By his signature, he certified, *inter alia*, that the property improvements had been completed in accordance with the contract or cost estimate and to the satisfaction of the borrower. (G-5)

22. Section 201.26(a)(5)(I) of 24 C.F.R. provides that the lender must comply with certain requirements before disbursing the proceeds of a property improvement loan. In the case of a dealer loan, the lender shall obtain a completion certificate, on a HUD-approved form and signed by the borrower and the dealer under applicable criminal and civil penalties for fraud and misrepresentation, certifying that the improvements have been completed in general accordance with the contract or cost estimate furnished to the lender.

23. On October 27, 1995, Mrs. Moore was interviewed by telephone by a representative of Statewide. The conversation was tape-recorded, and a summary was recorded on a “Predisbursement Interview Form.” (G-6) According to the transcript of the taped conversation, Mrs. Moore stated that all work had been completed to her satisfaction. (G-29)⁵ The interviewer noted no discrepancies in Mrs. Moore’s answers and signed the Predisbursement Interview Form indicating that the interview was satisfactory. (G-6)

24. Despite the Completion Certificate that was signed by both parties, Mrs. Moore later complained to Modern Exteriors, the Better Business Bureau and to Statewide, that work had either not been completed or had not been completed

⁵Mrs. Moore was asked the following questions and gave the following answers:

Question: “has all the work been completed to your satisfaction?”

Answer: “Yes”

Question: “do we have your permission to pay Modern Exteriors for the work that they have completed?”

Answer: “Yes”

Question: “And you are satisfied with the work they’ve done and everything?”

Answer: “Yeah”

Question: They’ve completed it all”

Answer: “Uh,huh.”

satisfactorily. Her complaints varied, but at different times included all of the following:

The car porch top have not been completed, (G-9); the car porch top and bottom still needed to be fixed (G-10); carport not painted on top (G-11, G-14);

The doors have air coming in under the bottom and sides, (G-9); the doors, the air is coming in still (G-10):

The facing of the doors is still off. (G-10)

2 front doors need weather stripping (G-11, 14); need weather stripping for living room door (bottom only). (G-13); Need weather stripping for front door (front only) (G-13); Back door needs weather stripping (G-11, G-14);

Knobs are falling off, (G-9); back door needs door knob (G-13, 14, 11); knobs have not been put on the door and are coming off the front doors. (G-10)

Steps where he put a piece are coming apart (G-9)

They did not leave and opening for the pipes (G-9)

Water pipe on side of house moved and not replaced (G-11, G-14).

Living room floor not supported securely from below, (G-11);

living room floor not properly repaired. (G-13). The floor is still shaking/moving when we walk. (G-9)

Paneling is hanging on back of house by back door. (G-13)

Supposed to leave opening at the bottom of bathroom window (G-13)

Air still coming in from the window. (G-9)

25. Mrs. Moore's complaints to the Better Business Bureau about Respondent were his first in over 20 years of doing business. (Tr. 161)

26. On November 30, 1995, Statewide, the original lending institution,⁶ obtained an inspection of the work performed by Modern Exteriors. (G-8A) This inspection is required under the regulations (24 C.F.R. § 201.40(c)).⁷

⁶On November 14, 1995, Statewide executed an Assignment of the loan to Remodelers National Funding Corp ("Remodelers"). By that document, it sold to Remodelers National Funding the loan note dated October 10, 1995, executed by Mrs. Moore for the benefit of Modern Exteriors. (G-7). On August 1, 1996, Remodelers executed a Transfer of Lien on the Note held in this case to First Trust of California, National Association. (G-15).

⁷Section 201.40 of 24 C.F.R. deals with post-disbursement loan requirements. Section 201.40(c) requires the lender or his agent to conduct an on-site inspection on any property improvement loan where the principal obligation is \$7,500 or more.

27. Rick Young, the inspector hired by Statewide, reported that the work contracted to be done on Mrs. Moore's home had been only 75% completed. (G-8A, B) Mr. Young did not testify at trial. The evidence of his report is limited to the listing of specific work items on the contract which he concluded had not been completed. They were:

floor joists not completed, no underfloor access, trim not completed, lock not installed on back door, garage ceiling not done, no soffit or fascia installed (G-8A).

There is no further description in the evidence of record as to the alleged deficiencies nor as to how Mr. Young reached his conclusions regarding what still needed to be done to satisfy the contract.

28. Thereafter, both Mrs. Moore and Statewide made several requests to Respondent to correct the numerous problems alleged. (G-10, 11, 13, 14, 18, 20)

29. Respondent answered the many complaints. He insisted either that the work had been satisfactorily performed (floor joists repaired), or that the work complained about was not work Modern Exteriors had contracted to perform, (install garage ceiling or fascia; paint carport; move water pipe; level the entire floor; repair paneling; repair opening at bathroom window), (Tr.169-171, 182-183), or that the work had not been done because the homeowner refused to allow the work to be done (complete trim and properly fit back door; install doorknob on the back door). (G-12, 16. Tr. 162; 178-79)

30. On October 24, 1996, Statewide hired a second contractor, Contemporary Home Improvements ("Contemporary") to complete the work allegedly left incomplete by Respondent for an estimated cost of \$2445.00. (G-19) The contract with Contemporary required the following:

- 1) To install new interior door casing trim for the two entry doors. Paint trim work white. Install new door handle for back room entry door. Insulate jambs as needed and seal back door from water leaks. Replace bad wood as needed.
- 2). Front living room floor to be shimmed and replace floor joist needed to secure floor in this area.
- 3). Secure PVC pipe on side of house.

- 4). Reinstall top course of new siding as to prevent the falling off from the home.
- 5) To finish out carport area to customer's satisfaction.

31. On March 17, 1997, Mrs. Moore signed a certificate attesting to the fact that all repairs to her home had been completed by Contemporary and to her satisfaction. (G-21-25)

32. On March 20, 1997, Statewide paid Contemporary \$1985.00 for repairs on Mrs. Moore's home. (G-22, 23) There is no evidence of record which shows what work, if any, was actually done by Contemporary to Mrs. Moore's property, nor the reason the contract price was reduced to \$1,985.00 from the proposed \$2,445.00. (G-25)

33. On May 29, 1997, Emelda P. Johnson, Deputy Assistant Secretary for Single Family Housing for the Department of Housing and Urban Development, issued a Notice of Limited Denial of Participation ("LDP") to Respondent, restricting his participation nationwide in HUD Single Family Programs for a period of 12-months from the date of the Notice. The Notice informed Respondent of the charge that he, as president and owner of Modern Exteriors, was responsible for submitting a completion certificate (HUD form 56002) dated October 26, 1995, stating that certain construction work was done at the home of Mrs. Moore, that this certificate was part of a home improvement loan under HUD's Title I Property Improvement and Manufactured Homes Loan Program, that it falsely stated that the work was completed in accordance with the contract with Mrs. Moore, and that Respondent, as president of Modern Exteriors, knew of, or had reason to know, that the work had not been completed. (G-1)

34. Despite Statewide's notices to Respondent regarding Mrs. Moore's contract, it continued to do business with him, including approving loans for home improvement, until he was suspended by HUD in May, 1997. (Tr. 203-05)

35. On July 8, 1997, two of Respondent's employees at the time of the performance of Mrs. Moore's contract signed written statements. John V. Noethen stated that he was the foreman of the work crew who completed the work on Mrs. Moore's home pursuant to her contract with Modern Exteriors and that he was present when Mrs. Moore stated she was satisfied that all the work had been fully completed. (G-27) Ms. Frances Traweek attested to the same. (G-26)

36. Respondent participated in a conference held on the matter. He maintained that he completed the improvements to Mrs. Moore's home in general accordance with

the contract and industry standards. (G-1C)

37. On August 5, 1997, after considering Respondent's claim, HUD officials affirmed the LDP. (G-2)

38. As a result of the LDP, Respondent went out of business as a home improvement contractor. As of the time of the hearing he was selling jewelry. (Tr. 206)

39. The record includes an April 1996 report of work complaints allegedly made by another Modern Exteriors' customer. (G-30). It also includes two letters dated in 1997 from the daughter of elderly homeowners for whom Modern Exteriors had allegedly performed home improvements. The daughter expressed dissatisfaction with the work done by Modern Exteriors as well as the company's alleged failure to respond to the family's complaints. (G-28)

40. In October 1997, the Better Business Bureau terminated Modern Exterior's membership in that organization for failure to answer one or more written customer complaints. (G-33) Modern Exteriors had been a member since 1993.

41. On October 10, 1997, Henry Hadnot, Director of Single Family Housing Division, and a 27-year employee of HUD, inspected Mrs. Moore's property. Home inspections for the purpose of Title I loans were not a part of Mr. Hadnot's job responsibilities and it was unusual for him to do them. (Tr.57)

42. Based on Mr. Hadnot's observations at the time of his visit to Mrs. Moore's home, in a letter to Respondent, dated October 14, 1997, the Government set out several still incomplete or undone areas of work relevant to the subject contract. According to the letter, the following still needed to be done:

1) Install additional weather-stripping at the three exterior doors to eliminate air and moisture penetration at top, bottom, and both sides

2) Repair floor joists at living room area to eliminate soft and spongy feeling when walking across floor. The floor should have solid feeling without bumping sounds.

3) Properly seal all cutout openings in vinyl siding. Secure siding below exterior beams. Siding seems to be too flexible in several locations on the walls as observed by touching. Assure vinyl siding is properly secured to solid materials in lieu of rotted and deteriorated materials. (R-24)

43. Mr. Hadnot was the Government's sole witness at trial. His testimony was that he had not seen a lot of Title I Home Improvement program specifications, so he couldn't tell what are considered to be typical specifications in that area, but that he knew about contract specifications in general. (Tr. 28) He was not aware of any minimum construction related specifications spelled out in Title I. All that was required, in his opinion, was that the construction be completed in accordance with either the manufacturer's recommended procedures, construction-related codes for the jurisdiction, or standard workmanship practices for the locality in question. (Tr. 65-66)

44. There was no evidence presented by the Government of manufacturer's recommended procedures, construction related codes for the jurisdiction, or standard workmanship practices for any of the work at issue.

45. Mr. Hadnot testified at trial that he did not go to Mrs. Moore's home to determine whether work had been done according to the contract, but rather whether the problems Mrs. Moore complained of had been resolved. (Tr. 77-78) Nevertheless, he testified that it was his opinion that the contract terms had not been completed because: (1), it was impossible to perform the item in the written contract pertaining to the "garage" because Mrs. Moore had no garage. She had a carport. Further, there was no structure on the carport to which soffits could be installed; (2) the external doors were not satisfactorily hung, in that the trim around the doors allowed air to invade the house; (3) the living room floor was still weak and showed "give" when he walked across it. (R-24); and (4) the vinyl siding had "some give" to it when touched. (Tr.77-79)

46. Respondent testified without rebuttal that proper inspection of repair of floor joists required the inspector to go under the house and look under the floor in question. (Tr.191)

47. Mr. Hadnot did not inspect the living room floor from beneath the house. (Tr. 78). He agreed that to determine whether floor joists had been repaired or replaced required looking at the floor area under the house. (Tr. 29)

48. Respondent testified that properly installed vinyl siding "will have some give" to it. (Tr. 163)

49. Mr. Hadnot testified that the "give" in the vinyl siding he noticed could have been consistent with the general characteristics of vinyl siding after proper installation. (Tr.80)

50. Mr. Hadnot believed that the specifications in this case did not meet industry standards in that they were very general in nature, made no reference to workmanship, or manufacturer's recommended procedure about the type of material to be used and didn't spell out clearly what was to be done. (Tr. 28) Further, he testified that generally, each individual item of the work is estimated and a cost set for the line item. This was not done in this case. (Tr. 29-30) It was his opinion that the specifications were not clear

enough for anyone to identify, without doubt, specifically what was to be done, and were not clear enough to identify when the work was completed. (Tr. 28)

51. Respondent testified without rebuttal that the agreement he entered into with Mrs. Moore was not significantly different in the specificity of its terms than others he had written over the course of his 45 years of work as a contractor. (Tr.210, 212, 220)

52. Respondent had never been subject to any disciplinary action by HUD prior to the current LDP. (Tr. 135)

Subsidiary Findings and Discussion

An LDP is a type of debarment. The purpose of all suspensions and debarments imposed by agencies of the Federal government, including debarments and LDPs imposed by HUD, is to protect the public interest by precluding persons who are not "responsible" from conducting business with the Federal government. 24 C.F.R. § 24.115(a). *See also Agan v. Pierce*, 576 F. Supp. 257, 261 (N.D. Ga. 1983); *Stanko Packing Co., Inc. v. Bergland*, 489 F. Supp. 947, 948-49 (D.D.C. 1980). The debarment process is not intended to punish; rather, it is designed to protect governmental interests not safeguarded by other laws. *Joseph Constr. v. Veterans Admin.*, 595 F. Supp. 448, 452 (N.D. Ill. 1984). In other words, the purpose of debarment is remedial, not punitive. *See* 24 C.F.R. § 24.115.

In the context of debarment proceedings, "responsibility" is a term of art that encompasses integrity, honesty, and the general ability to conduct business lawfully. *See* 24 C.F.R. § 24.305; *Gonzales v. Freeman*, 334 F. 2d 570, 573 & n.4, 576-77 (D.C.Cir. 1964). Determining "responsibility" requires an assessment of the current risk that the government will be injured in the future by doing business with a respondent. *See Shane Meat Co., Inc. v. U. S. Dept. of Defense*, 800 F. 2d 334, 338 (3d Cir. 1986). That assessment may be based on past acts. *See Agan*, 576 F. Supp. 257; *Delta Rocky Mountain Petroleum, Inc. v. U. S. Dept. of Defense*, 726 F. Supp. 278 (D. Colo. 1989).

The LDP imposed by the Government was based on the claim that Respondent

and his company, Modern Exteriors, had falsely certified that Modern Exteriors had completed the work contracted to be performed on Mrs. Moore's property. The specific bases asserted in the Complaint were that work had not been completed on floor joists, trim not completed, garage ceiling not installed and soffits and fascia not installed. In the Notice dated August 5, 1997, the false certification alleged was based on the allegations that "... the necessary floor joists were not replaced and the garage ceiling and fascias and soffits were not completed."

In his pretrial filings, and again at trial, Respondent asserted that he completed the work on Mrs. Moore's home in general accordance with the terms of the contract. He denied that the certification was false. Respondent did not dispute that he is a participant and a principal in the single family housing programs of the Department of Housing and Urban Development, as defined at 24 C.F.R. § 24.105.

ISSUE

The general issue in this appeal is whether the Respondent's actions or inactions in the performance of his contract with Mrs. Moore constitute adequate cause to justify issuance of an LDP. The specific issues are: (1) whether the contract Respondent entered into with Mrs. Moore was so general and lacking in specific information as to violate industry standards and thereby constitute an irregularity in Respondent's performance as a contractor in a HUD program; (2) whether Respondent failed to fully comply with the contract signed by Mrs. Moore; (3) whether Respondent falsely certified, or procured the false certification by others, that work under the contract had been completed; (4) whether Respondent's actions, or inactions regarding the subject contract violated HUD regulations and procedures relating to a Title I loan; and (5) whether Respondent's past actions indicated a lack of present responsibility to participate in HUD programs. After considering all of the testimony and the documentary evidence, I conclude that the Government has not provided adequate evidence of cause to sustain the LDP.

CAUSE FOR THE LDP

The Notice of the LDP cited the following subsections of 24 C.F.R. § 24.705(a) as causes for the LDP:

- (2) Irregularities in a participant's or contractor's past performance in a HUD program;
- (4) Failure to honor contractual obligations or to proceed in accordance with contract specifications or HUD regulation;

- (7) Falsely certifying in connection with any HUD program, whether or not the certification was made directly to HUD;
- (9) Violation of any law, regulations, or procedure relating to the application for financial assistance, insurance or guarantee, or to the performance of obligations incurred pursuant to a grant of financial assistance or pursuant to a conditional or final commitment to insure or guarantee; and
- (10) Making or procuring to be made any false statement for the purpose of influencing in any way an action of the Department.

A. Irregularities in a participant's or contractor's past performance in a HUD program.

The Government argues that Respondent's actions constituted irregularities in the performance of the subject contract as evidenced by his failure to accurately reflect contractual obligations and possible changes thereto. The specifications are not clear enough, it argues, for anyone to identify specifically what was to be done without doubt.

It argues that the contract was too general and failed to meet industry standards in that it did not specify which 3 or 4 joists were to be repaired in terms of specific living room floor area, nor did it state the brand name of vinyl siding material to be used, quality of material or workmanship, or quantities of vinyl siding, and it did not state the cost of the material or labor for each of the line items. Further, it argues that since one of the terms of the contract was impossible to perform, the contract violated industry standards and constituted an irregularity in Respondent's performance as a contractor in a HUD program. It argues, in addition, that it was irregular for a contractor to send an employee, still on a trial basis, to write up a contract for home improvements with an elderly homeowner.

The Government has failed to provide adequate evidence that the contract deficiencies in this case constitute sufficient irregularity in the performance of the contract as to constitute cause for LDP. Although the particular contract in question was written by Mr. Myrick, a new employee, Respondent, who had more than 45 years of experience as a contractor, actually visited the site and spoke with the homeowner before contract work was begun on the property. It was Respondent's un rebutted testimony that at the time the work was begun, both parties had a clear understanding of the work that was to be done and of estimated cost. Although the item "install white soffitt to garage ceiling" did not accurately reflect contractual obligations, according to Respondent, as soon as he became aware of that fact, he immediately corrected that problem, and to the customer's satisfaction.

Mr. Hadnot testified that Respondent's contract with Mrs. Moore was so general

and vague that on its face it did not conform with standard industry practice in terms of written specifications. However, the Government did not seek to have him qualified as an expert on the issue, and the record does not show that he had sufficient experience in the home improvement industry to qualify him as an expert in that field. Respondent denied Mr. Hadnot's claim. He testified that the specifications in the subject contract were no more general than those he had employed during his 45 years of doing contracting work with HUD, and that they conformed to standard industry practice. Indeed, the specifications in question had been reviewed both by Statewide as well as by an agent of HUD prior to approval of Mrs. Moore's loan. There is no evidence that any reviewer considered the contract to be irregular or not in conformance with industry practice. Further, the one other specification in the record, that of the second contractor, is in many respects more general than that which was submitted by Mr. Myrick. One of the items reads simply: "finish out carport area to customer's satisfaction," and, in no instance does that contract show line item costs of material or labor. (G-19)

Finally, regarding Respondent's failure to reflect oral changes made to the contract, Respondent testified that it is not unusual in the construction industry to orally modify the terms of contract and not reduce the changes to writing unless it requires an adjustment to cost. The Government produced no evidence to rebut his testimony.

B. Failure to honor contractual obligations or to proceed in accordance with contract specifications or HUD regulations.

The Government claims that Respondent failed to fulfill the terms of the home improvement contract, i.e., he failed to complete the required work on the floor joists, (replace the necessary floor joists); to complete trim; to "install garage ceiling, soffits and fascia;" and/or to properly install vinyl siding on the house. The Government argues that Respondent's failure to complete the contract as to any one of these terms constitutes cause for the LDP as outlined in 24 C.F.R. § 24.705(a) (2)(4) or (9). The Government need not prove each and every allegation to support imposition of the LDP. See 24 C.F.R. § 26.24.

After considering all of the testimony and the documentary evidence, I conclude that the Government has not provided adequate evidence of Respondent's failure to complete any term of the contract with Mrs. Moore. In reaching this conclusion, I gave consideration to the testimony and documentary evidence of record, to the amount of credible evidence which is available, to the existence or absence of corroboration as to important allegations, as well as the inferences which may properly be drawn from the existence or absence of affirmative facts. See *Stanko Packing Co. Inc. v. Bergland*, 489 F. Supp. 947, 949 (D. C. 1980).

My conclusion is based in significant part on the credible testimony of Respondent and Ms. Traweek and the lack of clear, unambiguous credible evidence contradicting Respondent's claim. The homeowner did not testify, nor did anyone else testify for the Government who had firsthand knowledge of the nature of the agreement between the parties or of the work performed by Respondent. Although there is a hearsay evidence of record, including statements by Mrs. Moore, a report prepared by an inspector, and report of payment to a second contractor for having performed itemized work, I do not find the hearsay evidence reliable based on the totality of the evidence in this case.

First, although there are numerous complaints from the homeowner alleging either that the work was not completed, or not completed satisfactorily, she signed the required certification, saying that the work had been done to her satisfaction. Further, many of the items about which she complains have not been shown by the Government to have been covered by the terms of the contract. In addition, she continued to complain about deficiencies even after she certified that the work of the second contractor had satisfactorily resolved the problems. Finally, the testimony of Ms. Traweek about her many conversations with the homeowner, which has not been contradicted, showed Mrs. Moore to be indecisive about what she wanted done and often generally confused.

Secondly, the inspector's report is conclusive in nature and provides no information to support its conclusions. As to the repairs allegedly made by Contemporary the second contractor, it cannot be determined based on the reports in the record what work, if any, was done by that company.

Finally, although there are photographs of the house and carport, these were taken two years after the work was done by Respondent and after work had been performed by a second contractor. There are no pictures of the property taken on or about October 1995.

Contract items:

1. Necessary floor joists were not replaced.

The specifications with regard to this item read as follows: "living room floor has 3 or 4 bad floor joists - repair as needed." (G-2) The Government alleges that work had not been completed on floor joists, in that "the necessary joists were not replaced."

Mrs. Moore's written complaint stated that the floor (room not specified) "still is

shaking when we walk” (G-9,10) When Statewide relayed Mrs. Moore’s complaints to Respondent, it claimed that the living room floor was not properly repaired and was not supported securely from below. (G-11, 13-14) Mr. Young, who inspected the property in November 1995, reported that the floor joists were not completed. (G-8A) The work order issued by Statewide to Contemporary in October 1996 to correct the problem required that the “front living room floor to be shimed, and replace floor joist needed to secure floor in this area.” (G-19, 22, 23) This was apparently based on Mr. Young’s report that the floor joists were not completed. However, according to the inspector’s own report, he did not have underfloor access, and the report contains no other basis for his conclusion.

Mr. Hadnot testified that when he visited the property on October 10, 1997, he experienced a “give” in the area of the living room floor where Mrs. Moore told him the work was supposed to have been done. But he, too, had not looked under the floor where the joists would have been installed. (Tr. 42-43) He could not tell if the areas needing repair related to the area covered in the contract at issue. (Tr. 43) He expressed the view that because the contract did not identify specific floor joists which were to be repaired (other than in the living room) but did state that joists would be repaired “as needed,” a reasonable interpretation of the term was that the contract required Modern Exteriors to do all work necessary to level the entire living room floor and put it in good order, and that this had not been done since on his inspection there was still “give” throughout the floor area of the living room. (Tr. 75-76)

Respondent testified that the contract term relating to floor joists had been satisfactorily performed, that is, 3 or 4 floor joists had been repaired. He testified that there was a weakness in Mrs. Moore’s floor that required more than the repair of a few floor joists, and that he had informed her of that fact at the time of the contract. She was told that to level the floors in her house she would need to have blocks installed under the house. Mrs. Moore could not afford to have the block work done at the time, and said she would consider it for later improvement. It was Respondent’s testimony that nothing was wrong with the living room floor, after his work, but that there was a problem with the leveling of the house. (Tr. 178, 232)

It is noted that despite the work done by Contemporary in March 1997, purportedly to complete the terms of the contract to “replace floor joist needed to secure the floor,” the floor was still “soft” and “spongy” upon inspection by Mr. Hadnot only seven months later. This gives credence to Respondent’s position that to level and stabilize the living room floor required work in excess of that called for in the contract. I agree with Respondent that it would be unreasonable to interpret the term of the contract

which called for the replacement of 3 - 4 floor joists, "as needed," as requiring Respondent to completely level the entire living room floor, regardless of what was required to level it. Finally, the Government presented no evidence which contradicted Respondent's assertion that he replaced 3 or 4 living room joists, as needed. No inspector checked underneath the floor for evidence that any joists in the living room floor area had been replaced or repaired, nor did any inspector observe the structural foundation of the house. The Government simply relies on the claim that two years later the floor was still "soft" and "spongy" to the walk. I find that the Government has not presented adequate evidence to support the charge that Respondent failed to perform that part of the contract that called for him to "repair 3 - 4 living room floor joists, as needed."

2. Garage ceiling not installed and fascias and soffits not installed.

As to this asserted basis for the LDP, an initial observation is that the written contract provided as follows: "install white soffitt to garage ceiling (2_)⁸. Do not cover overhang." The contract does not require installation of a ceiling or any "fascias." There is no evidence which shows that satisfactory completion of such a contract term would necessarily require installation of a ceiling and/or fascias. Yet, the failure to do both is alleged in the Complaint. Mrs. Moore's complaints did not show she expected a ceiling to be installed. She complained that "the car porch top have not been completed;" (G-9) "carport not painted on top."(G-14) And, the work order issued by Statewide to Contemporary was simply to "finish out carport area to customer's satisfaction." (G-19)

Finally, Mrs. Moore signed a certificate showing satisfaction after the work was done by Contemporary, and it is clear from the photograph of the carport that a ceiling was not installed in the carport by Contemporary. (G-31G) Indeed, the evidence fails to show what, if anything, Contemporary did to the carport to satisfy Mrs. Moore.

Respondent testified that one of his sales people prepared the contract. After he reviewed it and looked at the house, he realized that it was not possible to install the soffit as called for in the contract. He testified that he then spoke with Mrs. Moore, and they orally agreed that Modern Exteriors would do different work in lieu of that specific contract item. Modern Exteriors would, in lieu of the soffit, install vinyl siding on each gable end and approximately 10" deep around the carport below the gable ends. He

⁸Mr. Hadnot understood the symbol to mean 2 foot squares. Tr. 82.

testified that the substitute work was of equal or greater value than that specified in the written contract. He further testified that after its completion, Mrs. Moore expressed satisfaction with the work done on the carport. Finally, Respondent testified that oral modification of a written construction contract term of equal monetary value was not unusual in the home improvement business.

Without citing any evidence, the Government argues that there was never an oral agreement with Mrs. Moore to modify the written contract. It argues that Respondent's allegations that the contract was orally modified was a last-minute effort on the part of Respondent to rationalize his failure to install a ceiling and soffit and to claim he fulfilled this item of the contract. This argument is not persuasive. It fails to take into account the fact that vinyl siding was installed on the carport and during the time of the performance of the contract. Photographs of Mrs. Moore's property show the stand-alone carport with vinyl siding as described by Respondent. (G-31G) The siding is identical in color and appearance to the vinyl Respondent installed on Mrs. Moore's house, and gives credence to Respondent's unrefuted testimony that his company installed the vinyl siding on the carport. Since installing vinyl siding on Mrs. Moore's carport is not included as a term in the written contract, its installation supports Respondent's claim that Modern Exteriors installed the vinyl on the carport in lieu of soffit on the garage ceiling as called for in the written contract. Accordingly, I find that Respondent entered into an oral agreement with Mrs. Moore to install vinyl siding on the carport in lieu of fulfilling the written contract to "install white soffit to garage ceiling."

The remaining question regarding this contract item is whether an oral modification of the written contract is itself an irregularity in the performance of the contract which provides cause for LDP. The Government cites neither evidence nor law to support the contention that it was improper for Respondent to modify the contract orally. The only evidence on this point is Respondent's testimony that oral modifications with regard to an item of construction contract, of equal or similar monetary value to the written contract item, are a normal and customary practice in the home improvement business. Accordingly, I find that Mrs. Moore entered into an oral agreement to modify the contract with Respondent which was permissible by industry standards. This modification did not create cause for issuance of an LDP against Respondent.

3. Trim not completed.

The Complaint does not specify what trim was required under the contract and was not completed. There was no express provision of the contract relating to trim. However, testimony from Mr. Hadnot related this complaint to the failure to put trim around the outside of the doors and/or the need for weatherstripping to prevent air drafts around the doors. (R-24)

Mrs. Moore complained that the “doors have air coming in under the bottom and sides.” (G-9,10) “The facing of the doors is still off” (G-10); “back door needs weather stripping” (G-11) “need weather stripping for living room door (bottom only).” (G-13) Although the inspector’s report doesn’t identify trim as a problem, the work order issued by Statewide required Contemporary to “install new door casing trim for the 2 entry doors; paint trim white; insulate jambs as needed and seal back door from water leaks. Replace bad wood as needed.” (G-19, 22, 23) Despite this work order and certificate of satisfaction completed by Mrs. Moore and Contemporary, Mr. Hadnot testified these problems persisted and that additional weatherstripping was needed on the three exterior doors. (Tr.31-34; R-24)

As to the trim for the back door, Respondent explained that Modern Exteriors was not permitted to complete the trim according to industry standards by the homeowner who refused to allow the removal and replacement of the old door frames. According to Ms. Traweek, Mrs. Moore insisted that the old frame must not come down even after being told that there would likely be a problem with improper fitting of the door which could result in drafts and that her door might not even shut properly. Mrs. Moore’s reason: she had cabbage all over the outside of the old door frame for good luck and it could not be removed. She did not care how the workers got the door to fit, the old frame simply had to stay. The door, as installed, left a gap at the bottom.⁹ Ms. Traweek’s credibility has not been attacked by the Government. Thus, although Respondent admits that he did not install this door to industry standards, the homeowner made it impossible for him to do so. Accordingly, I find no evidence of Respondent’s lack of responsibility based on his failure to properly fit and trim the back door.

As to the two inner entry doors installed by Respondent, he explained that Mrs. Moore had storm doors on both entrances. Usually he did not put weatherstripping on inner doors. (Tr. 176-77) “The outer door is what you weatherstrip.” (Tr. 181) The Government produced no evidence that disputed Respondent’s testimony as to the standard practice in the industry with regard to the weatherstripping of inner doors.

⁹Respondent explained what happened as follows: the whole door comes as a frame. They bought a door in a frame and had to throw the frame away because Mrs. Moore wouldn’t let them put it in.” (Tr. 233) “They had to take the door off the hinges, take the hinges off the door and rework the whole thing. The doors are attached to the frame at the same height, and the two hinges meet. So they had to adjust the new door to fit the old hinge which is almost impossible to do with a steel door. They needed to put the whole jamb in with it, but the customer wouldn’t allow it.” (Tr. 233)

4. Vinyl siding not properly installed.

The Complaint does not allege any deficiency regarding the installation of vinyl siding and of a door knob. However, at hearing the Government introduced evidence raising the issues, without objection from Respondent. Therefore, the issues will be addressed here as though they had been properly raised in the Complaint.

Although Mrs. Moore made numerous complaints over a period of time, she never complained about the installation of the vinyl siding. There was not a problem with installation of vinyl siding reported by Mr. Young after his inspection in November 1995.

(G-8A) The subject of vinyl siding does appear as a work order item in Statewide's October 1996 contract with Contemporary, the second contractor. Included was the requirement to "reinstall top course of new siding as to prevent the falling off from the house." (G-19) Contemporary presumably completed that work order item prior to March 20, 1997, the date of the Certification. Yet, again, Mr. Hadnot testified that in October 1997, that the siding along the right side of the house on the bottom was loose and not secure. This could have been caused, he testified, by not being properly installed or by being secured to rotted wood or by the natural "give" of the vinyl siding. (Tr. 45-49) He observed that there was considerable deterioration in the wood on the house. (Tr. 48) His observation corroborates Respondent's testimony that much of the wood on the house was in a deteriorated condition. Respondent's company replaced a lot of rotten wood. There is no evidence that the continuing deterioration of the wood did not contribute to the "give" that Mr. Hadnot experienced when he touched the siding in October 1997. Finally, Respondent testified that sometimes with houses on blocks, shifting of the blocks occurs, causing the siding to shift. Modern Exteriors used HUD-approved siding. (Tr. 192) It is designed to give a little, to avoid buckling when the structure to which it is attached settles. (Tr. 192) Again, the Government produced no evidence that contradicted Respondent's testimony that he installed the siding properly.

5. Door knob not installed.

Mrs. Moore alleged that door knobs were falling off the front doors and that a knob was not put on the back door. (G-10, 13, 14) Mr. Hadnot testified that on his inspection two years later the hardware on the front door was insecure and "tended to move." (Tr. 51). The only reference to the door in inspector Young's report of November 1995 is "lock not installed on back door." The record contains no other evidence regarding failure to install or secure a lock on any door.

As to the back door, Respondent and Ms. Traweck testified that Mrs. Moore refused to allow Modern Exteriors workers to install a doorknob on the back door. The

reason she gave was that a robber would not be able to kick the doorknob off, if it was not there. The workers tried to persuade her to change her mind, then reluctantly complied with her wishes, leaving the door knob with her, in case she later wanted it put on. The workers later came to understand that what Mrs. Moore wanted was a lock without a doorknob, i.e., a deadbolt. Although a deadbolt was not specified in the contract, the company purchased one and installed it to satisfy her. The deadbolt was installed in the hole that had been cut out for the doorknob. Accordingly, I find that the Government has not provided adequate evidence for these charges.

Mrs. Moore made numerous other complaints regarding defects in her home. The Government introduced no evidence to show Respondent had a duty under the contract to rectify any of these defects.

C. Falsely certifying in connection with any HUD program. Making, or procuring to be made, false statements for the purpose of influencing in any way an action of the Department.

In the LDP Notice, the Government's stated basis for issuance of the LDP relating to false certification pertained only to Respondent's October 26, 1995 certification on HUD Form 56002, that work had been completed in accordance with the contract with Mrs. Moore. However, in its post-trial brief, the Government argues another basis for the LDP: Respondent's allegedly false October 10, 1995 certification in the Credit Application agreement. I have already found that there is insufficient evidence to support the Government's claim that Respondent failed to fully complete the terms of the contract; therefore, I find no basis for the false certification charge stated in the LDP Notice. I find insufficient cause, as well, for an LDP based on the arguments pertaining to the October 10, 1995 certification.

The Government contends that Respondent falsely certified in the October 10, 1995 Credit Application that: he had sold the job to Mrs. Moore when he did not, Mr. Myrick did; that the contract contained the whole agreement with the borrower; that improvements had not been misrepresented; and that no promises had been made that were impossible of attainment.

Although it is true that Mr. Myrick sold the job to Mrs. Moore, Mr. Myrick was acting as an agent for Respondent, the owner and principal of Modern Exteriors. Further, at the time of the October 10, 1995 certification, the written specifications represented the entire agreement with Mrs. Moore. Therefore, I do not find adequate evidence of false certification on these two grounds. As to Respondent's alleged false

certification that improvements were not misrepresented when, in fact, the company could not install soffit to the garage ceiling, the misrepresentation was not obvious on the face of the contract, and, it was not unreasonable for Respondent to have relied on his employee's contract preparation. More importantly, Respondent acted reasonably and responsibly when he discovered that this contract term could not be performed - he immediately took action to correct it. Accordingly, even though the certification was technically false, considering the extenuating and mitigating circumstances surrounding the soffit installation term of the contract, I conclude that the technically false certification is not sufficient cause to sustain an LDP in this case.

D. Violations of any HUD regulation, or procedure relating to the application for financial assistance, insurance or guarantee, or to the performance of obligations incurred pursuant to a grant of financial assistance or pursuant to a conditional or final commitment to insure or guarantee.

The Government contends that Respondent violated HUD regulations and procedures relating to this Title I loan insured by HUD by his failure to respond to requests to correct complaints on work performance. It asserts also that this failure represented a major irregularity in his performance of the contract. I find that the Government has not shown by adequate evidence that Respondent's responses to the complaint were inadequate. He responded promptly that either he had completed the work item, or that the list of complaints included numerous items that were not included in the contract, or that he was not allowed to perform the work by the homeowner. He testified to the effect that when the validity of his responses was ignored, he stopped responding to the complaints. There is sufficient basis in the evidence to support the validity of his responses. His failure to do work he had no duty to perform, cannot, therefore, be considered violative of the terms of the contract. Accordingly, I do not find adequate cause for LDP based on Respondent's alleged failure to respond to complaints.

E. Past actions indicating a lack of present responsibility to participate in HUD programs.

The Government contends that Respondent's past actions in this case and others referenced indicate a present lack of responsibility to participate in HUD programs. (G-28, 30, 33) It is noted that despite Mrs. Moore's complaints to Statewide about Respondent, the undisputed evidence is that Statewide continued to do business with Respondent, including providing home-improvement loans, until the LDP was issued in this case. As to the evidence of the complaints against Respondent from other homeowners (see Finding #39), these are merely complaints. There is no evidence showing that the complaints were valid. An LDP cannot be issued on the basis of

unproven complaints. Considering all the evidence in this case, I find inadequate evidence which shows Respondent's lack of present responsibility to participate in HUD's program.

CONCLUSION

The Government has failed to provide adequate evidence that Respondent as president and owner of Modern Exteriors failed to fully comply with the terms of the contract entered into with Mrs. Annie Moore on October 10, 1995, in violation of HUD regulations governing Title I Home Improvement Loans codified at 24 C.F.R. Part 201. Further, the Government failed to provide adequate cause for LDP based on the claim that Respondent submitted false certifications regarding the contract with Mrs. Moore.

RECOMMENDED DECISION

Accordingly, upon careful consideration of the record, I recommend that the LDP action against Respondent be vacated.

CONSTANCE T. O'BRYANT
Administrative Law Judge