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

In the Matter of	
SALVADOR DOUCETTE	HUDALJ 86-1066-DB(TDP)
Respondent	

William P. Quigley, Esquire
For the Respondent

Odessa F. Vincent, Esquire
For the Department

Before: ALAN W. HEIFETZ
Administrative Law Judge

INITIAL DETERMINATION

Statement of the Case

This is an appeal from a Temporary Denial of Participation ("TDP") imposed on Respondent Salvador Doucette by the New Orleans office of the U.S. Department of Housing and Urban Development ("the Department" or "HUD") pursuant to 24 C.F.R. § 24.18 et seq. The TDP was imposed upon Respondent because of his firm's failure to perform its responsibilities in accordance with the terms, conditions and specifications in the contracts for the rehabilitation of properties financed with Community Development Block Grant ("CDBG") funds allocated to the City of New Orleans and administered by the Community Improvement Agency ("CIA").

On January 10, 1986, a letter from the manager of HUD's New Orleans office notified Respondent that the TDP was to take effect as of that date and would be in effect for a period of six months. Following an informal hearing held on February 27, 1986, the duration of the TDP was shortened to three months. The TDP was also limited to the denial of participation in housing rehabilitation activities financed with CDBG funds falling under the jurisdiction of the HUD New Orleans office. Respondent was notified of these modifications by letter dated March 21, 1986, upon receipt of which he appealed the decision and requested a formal hearing in accordance with 24 C.F.R. § 24.7(b).

A hearing was held in New Orleans on May 14, 1986, at which the Department presented its case. At the hearing it was agreed that Respondent would present his case in writing at a future date. Respondent submitted a brief and affidavits on

September 25, 1986, and the Department timely filed a response on October 24, 1986. Upon consideration of the evidence presented and oral argument, I make the following findings and conclusions:

Findings of Fact

Respondent Salvador Doucette is a partner in Doucette Builders, a construction business that operates under the laws of the State of Louisiana. Respondent has done renovation and repair work in the New Orleans area for several years and has done rehabilitation work for CIA in the past. Govt. Brief at 2; Respondent's Affidavit at 1.

Respondent contracted with CIA to rehabilitate the property located at 1453 N. Prieur Street, New Orleans, Louisiana. Respondent also contracted with CIA to rehabilitate the property located at 2220 Gordon Street, New Orleans, Louisiana. These rehabilitations were financed with CDBG funds issued by HUD to the City of New Orleans and administered by the CIA. Govt. Brief at 2.

An inspection of the N. Prieur Street property conducted by HUD Inspector John Johnson revealed that the rehabilitation had not proceeded according to the terms of the contract. Six items paid for had not been completed. Nine items had been "scratched off" the contract without approval. Three items not in the contract had been completed. Eight items were not completed in a manner that conformed to the quality standard set in the contract. Finally, five contract items that had been completed were not properly listed on the payment page. Govt. Ex. 7; Tr. 107.

The Gordon Street property was inspected by HUD Inspector James Pipps. The report revealed a number of items in the contract were not done, yet Respondent had been paid for the work. The report also revealed that some items that had been completed were of low quality. Govt. Ex. 8; Tr. 139.

Conclusions of Law

Department regulations provide that a TDP may be invoked upon adequate evidence of irregularities in a contractor's or grantee's past performance in a Department program. 24 C.F.R. § 24.18(a)(2)(ii). "Contractor" is defined to include "[i]ndividuals, state and local governments . . . or those in a business relationship with such recipients . . . ." 24 C.F.R. § 24.4(f). Respondent is a "contractor" within the meaning of the regulation's application to the TDP sanction because he contracted with the CIA to rehabilitate properties as part of the Housing Rehabilitation Program. The program is financed with Community Development Block Grant funds issued from HUD.

Prior to objecting to the substantive basis for the imposition of the TDP, Respondent claims that the Department's actions during the informal stages of the TDP were arbitrary and therefore violative of his constitutional right to due process. He also claims that he did not receive adequate notice of the reasons for the issuance of the TDP. Although an administrative proceeding is not the appropriate forum to consider or decide Respondent's constitutional arguments, Califano v. Sanders, 430 U.S. 99 (1977), it is clear that Respondent was given notice "reasonably calculated . . . to apprise [him] of the action and an opportunity to present [his] objections." Mullane v. Central Hanover Trust Co., 339 U.S. 306, 315 (1950). The January 10, 1986, TDP letter informed Respondent of the basis for the action and of his right to a hearing. He exercised that right and made known his objections which were considered in the determination to reduce the duration of the TDP. Informed of his right to a de novo hearing, he requested and was granted one.

The basis for the TDP imposed on Respondent was the Department's assertion that Respondent's firm, Doucette Builders, failed to perform its responsibilities in accordance with the rehabilitation contracts' terms, conditions and specifications. In support of this position, the Department points to irregularities in Respondent's rehabilitation of the properties located at 1453 N. Prieur Street and 2220 Gordon Street, New Orleans, Louisiana.

Respondent admits that a number of changes were made during the course of those renovations. He claims it is these changes that the HUD inspectors reported as work contracted for but not done, or done in a manner that differed from the method specified. He further admits that some of these changes were made without first seeking the written authorization required in the CIA General Conditions of the Contract for Rehabilitation. Although he asserts that in each case he had the owner's approval, Respondent argues that he did not know that written change orders were required before all contract modifications, and that since CIA did not actively enforce their own requirements, he cannot be held responsible for failing to follow them. Respondent's argument is not persuasive, especially in light of Respondent's prior experience performing rehabilitation work for CIA which shows that he was familiar with CIA contracts and requirements. Respondent signed pre-construction conference reports which stated:

> The Owner and Contractor understand and agree (1) any contract change must be approved in advance, (2) any work done that is not included in the contract or authorized by approved change orders will not be paid for . . .

Respondent also certified that he had received and thoroughly understood the CIA General Conditions of the Contract for Rehabilitation Work, section 2.2 of which contains the following language:

> No modification or change of any of the contract documents shall be made except by written instrument signed by the contractor, accepted by the owner and approved by the CIA.

Thus, Respondent's claim that he did not know that written change orders were required is specious. Further, CIA's arguably insufficient enforcement procedures do not excuse Respondent from his affirmative obligation to perform the rehabilitation work according to the terms of the contract, and to modify the contract solely in the manner agreed upon.

Respondent argues that since the homeowners were satisfied with his performance, whatever impropriety resulted from his failure to follow established procedure was not significant enough to justify the imposition of a TDP. This argument is not persuasive because permitting such verbal modification of the rehabilitation contract affords neither the parties to the contract nor HUD the necessary protection to assure that public funds are properly and prudently expended. Should there be a problem with the substituted work in the future, there are no contract specifications against which to assess the quality of that work. If approval is not required for each modification, contractors and homeowners are free to contract for certain high-priced construction items, privately agree to substitute items of lesser value, and then collect the original amount from HUD. The requirement of submitting written change orders is not insignificant, for it provides HUD with a means to protect the government from this type of abuse.

The Temporary Denial of Participation is the least severe sanction the Department can impose against a contractor or grantee. Its purpose is to impress upon that contractor or grantee the importance of complying with the rules, regulations and criteria governing the federal housing program in which he or she participates. HUD has provided adequate evidence that with respect to the properties located at 1453 Prieur Street and 2220 Gordon Street, New Orleans, Louisiana, Respondent did not secure the necessary approval before performing rehabilitation work that differed substantially from that agreed to in the rehabilitation contract. Since Respondent failed to counter the Department's evidence with reliable, probative evidence to the contrary, the TDP should be upheld as imposed.

ORDER

For the foregoing reasons, the imposition of the Temporary Denial of Participation, as subsequently modified, is affirmed.

Alan W. Heifetz
Chief Administrative Law Judge
U.S. Department of Housing and
Urban Development
451 7th Street, S.W., Room 2156
Washington, D.C. 20410

Dated: November 26, 1986