

UNITED STATES OF AMERICA  
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT  
BOARD OF CONTRACT APPEALS  
Washington, D. C.

In the Matter of:

HOBERT CURNUTTE	:	Docket No. 80-471-D19
d/b/a A-1 HOME MAINTENANCE	:	(Activity No. 79-684-DB)
COMPANY,	:	
Appellant	:	

Appearances:

For the Appellant: Eugene P. Weiss, Esquire

For the Government: Patricia M. Black, Esquire  
HUD Office of General Counsel

DETERMINATION

Statement of the Case

By letter dated October 12, 1979, appellant Hobert Curnutte, doing business as A-1 Home Maintenance Company, was notified by Syl Angel, Ohio Area Manager, Department of Housing and Urban Development, that he was temporarily denied participation in the Property Disposition Rehabilitation Program involving both multifamily and single family contracts throughout the State of Ohio for a period of twelve months from September 24, 1979, through September 23, 1980 (Exh. G-1). The action was based on appellant's allegedly unsatisfactory performance of repair contracts pertaining to HUD's Property Disposition Rehabilitation Program. The letter itself identified four general areas of deficient performance. Annexed to the letter was a supplemental itemization of what purported to be the more paramount incidents which generated the denial of participation.

After an adverse determination following an informal hearing conducted on November 5, 1979, appellant filed a timely appeal, requesting a hearing pursuant to 24 C.F.R. §24.7. A hearing was held in Washington, D.C., on January 17-18, 1980, before Administrative Judge B. Paul Cotter, Jr. The case was reassigned on September 11, 1980, to Administrative Judge Edward Terhune Miller. This determination is based on the record of that hearing considered as a whole.

Findings of Fact

In the notice of October 12, 1979, the Ohio Area Manager identified as reasons for the temporary denial of participation:

1. Failure to fulfill warranty obligations;
2. Adequate evidence that there are construction deficiencies in on-going projects and some recently completed projects;
3. Adequate evidence that the requirements of the contracts will not be satisfied upon completion;
4. Commission of fraud in the performance of Government contractual dealings.

"A Listing of Significant Incidents of Unacceptable Contractor Performance" which was attached to and incorporated by reference into the notice identified a substantial number of particular deficiencies relating to five specific houses for whose rehabilitation appellant was contractually responsible (Exh. G-1).

Appellant was an experienced contractor who claimed to have done numerous rehabilitations under HUD programs by the time that he became involved in the rehabilitation projects which are the basis for the Area Manager's denial of participation (Tr. II 59-61, 82). Appellant conceded that a one year warranty attached to his performance under the relevant contracts (Tr. II 77-78). For the most part, appellant acted as a general contractor and employed subcontractors for actual performance of the work (Tr. II 62-63, 104). Five houses, three in Lima and two in Columbus, Ohio, were the subject of the specific alleged deficiencies (Exh. G-1). Appellant's base of operations was over 100 miles from the three identified rehabilitation projects in Lima. In addition, appellant had to deal with certain local employment restrictions in Lima. (Tr. II 62-63) The record shows a significant lack of supervision of the work by appellant (Tr. II 62-26, 66-70, 107-08, 117-18). As a result of appellant's substantial omissions, HUD was burdened with added repair costs in some instances, and with the cost of mortgage payments in another, because, for example, in the case of [REDACTED] S. West Street, discussed in more detail below, the house could not be put in condition to meet local requirements for timely occupancy by the entitled tenants (Tr. 18-38, 48-52; Tr. II 78-79, 105-106; G-1, -3, -12, -13 at 1-8).

The Government's case depended primarily upon the credible and persuasive testimony of the contracting officer, James G. Smith, Jr. That testimony was buttressed not only by his apparently good recall of detail, but by corroboration in the form of detailed photographs of the numerous deficiencies he described and by circumstances which tended to show an extensive and consistent pattern of negligent conduct on appellant's part.

This record provides no support for appellant's insinuation that the temporary denial of participation was discriminatory or that it represented retribution by HUD because he had complained of slow payment for some 26 invoices for past work and resorted to frequent visits to the HUD Area Office and sought help from Congressional staff. The record shows that the complaints as to appellant's deficient performance and the Government's remedial action actually occurred well before appellant's first complaint for delayed payment, and therefore would have had no bearing upon them (Tr. II 35-38, 45; Exh. A-L, G-5 to -8).

1. ██████ Nye Street, Lima, Ohio

Appellant and the Government stipulated that appellant had contracted to install storm windows at ██████ Nye Street, Lima, Ohio (Tr. 3). However, three of the metal storm windows that were initially installed were too short for the existing window frames and the installation left gaps which were only partially closed by flimsy makeshift metal strips attached around the storm window frames (Tr. 9-12; Exh. G-2; and Exh. G-13 at 31-32). In response to tenant complaints, and to a notice of specific defects and demand for cure by the contracting officer, James G. Smith, Jr., which was transmitted by letter dated July 30, 1979, appellant replaced the three defectively installed storm windows. But in the replacement installation, appellant used storm windows that were of varying sizes and were still too small, both horizontally and vertically. Appellant also used makeshift metal strips and wooden boards in an unsuccessful attempt to close or mask the resulting gaps. (Tr. 11-15, Exh. G-13 at 32) Such storm window installation, which reduced the size of the existing windows, is not standard practice in the industry (Tr. 12).

2. ██████ S. West Street, Lima, Ohio

The comprehensive rehabilitation of the house at (██████) S. West Street, Lima, Ohio, gave rise to the most extensive and varied allegations of appellant's deficient contractual performance among the five cited examples in the Area Manager's notice. Appellant's work, according to his testimony, was

initially completed in March, 1978, following a contract award in November, 1977 (Tr. II 64). The voucher was approved for payment, less two items and holdback, on April 11, 1978 (Exh. G-11). This work was also subject to a "Warranty of Construction" clause explicitly incorporated by reference (Exh. G-4). It was also subject to an explicit "Guarantee" of "all work performed under the contract against defects of material, and workmanship for a period of one year after date of final acceptance of the work" which required that appellant "replace or repair without delay, at his own expense, any defects...." (Exh. G-4).

At a meeting on April 5, 1979 appellant and the Government, represented by Marvin Cooks, Sr. as contracting officer, negotiated an agreement to accomplish certain detailed repairs which had not been made or which in the Government's opinion had not been made properly. Pursuant to that agreement, appellant agreed to make certain of the repairs to the house at his own expense and to perform certain additional work tasks at Government expense, as recorded in a letter with attachments from the contracting officer to appellant dated April 26, 1979. (Tr. 54-59; Tr. II 105-06; Exh. G-6) The Government assumed those costs to expedite completion under circumstances in which appellant's fault for certain conditions or deficiencies could not be indisputably established (Tr. 54-59). Appellant also contended that the tasks identified in the agreement were mostly "more than one year after the warranty." But though he nevertheless agreed to make the repairs, he never completed them. (Tr. II 78-79, 105-06)

Inspection reports in evidence reflecting inspections on August 4, 1978 and November 21, 1978, recorded significant performance deficiencies relating to roof installation, garage rewiring, and a variety of other items (Exh. G-7, -8). Defects in the roof repairs were still uncorrected by May 15, 1979, as reflected in an inspection report of that date by June 21, 1979, and an undated memo to file by James G. Smith, Jr. as contracting officer; by August 9, 1979, as reflected in correspondence to appellant dated August 16, 1979 (Exh. G-9, -10, -12). In repairing the roof, appellant's subcontractors initially did not install the necessary underlying felt (Tr. 39, 68-69, 100; Exh. G-13 at 12, 24; Exh. G-7). Thereafter, in response to HUD's remedial order, appellant's subcontractors first installed the roof felt joints improperly so that the long lap joints were vertical instead of horizontal. This deficiency was ultimately corrected. (Tr. 40-41, 109-12; Exh. G-9, G-10).

Although plywood floor underlayment was specified in the contract, particle board was installed under the floor tile in the kitchen and bathroom. When this was discovered and ordered to be remedied, only the most readily visible areas such as heat register openings and door thresholds were corrected. Otherwise much of the particle board was left in place and a leveling agent used unsuccessfully in an apparent attempt to conceal the impression caused by the uneven joint between the two materials of differing thicknesses. (Tr. 41-42, 63-67, 98, 100-03; Tr. II 29-30, 44-45, 58, 69, 106-08, 126; Exh. G-13 at 10-11, 22-25).

Storm windows were also installed improperly as alleged. Metal storm windows were used that were too small for the existing window frames and installed by the use of nails instead of screws as required by proper construction standards. After inspection by HUD officials disclosed the improper installation, wooden strips were installed, apparently to conceal the use of the nails for installation, and the irregularly sized storm windows were not replaced. (Tr. 42-43, 68, 73, 88-90, 93-95; Tr. II 124; Exh. G-13 at 11, 13, 18-21)

The existing knob and tube electric wiring in the garage was not removed as contractually required (Tr. 43, 69-70, 78-81, 92; Exh. G-13 at 12, 15, 19). At least one light fixture was installed without the required electric junction box (Tr. 97; Exh. G-13 at 21, G-7, -8). A kitchen light switch was improperly installed (Tr. 43-44). Most electric lights and outlets in the house were improperly installed on a single circuit breaker (Tr. 44). The quality of electrical installations was sufficiently deficient that the Lima City Electrical Inspector posted a stop work notice on the property which was still posted at the time of HUD's August 9, 1979 inspection (Tr. 44-45, 78-79; Tr. II 124; Exh. G-13 at 15). The deficient and unsafe electrical installations were evidenced by the example of the wire loosely draped across overhead beams in the garage (Tr. 79-81; Exh. G-13 at 13, 15).

Despite repeated instructions, appellant did not effect the removal of certain old heating pipes as contractually required, or seal the return air intake plenum at the base of the first floor stairs (Tr. 45, 86-87, 104; Exh. G-13 at 17, 26). Appellant also failed to repair a joist damaged during installation of a heat duct (Tr. 45-46, 62, 95-96; Exh. G-13 at 9, 21).

Poured insulation was used instead of the blanket type specified in the contract (Tr. 46). Instead of the required installation of a 24" x 24" x 24" concrete foundation to support a floor jack, appellant permitted installation over rubble of a potentially dangerous foundation which was 24" x 24" on top, but only 6" or less in thickness (Tr. 46-47, 61, 87, 90; Exh. G-13 at 9, 18). A door required by the contract was improperly installed (Tr. 47). Screens installed were makeshift and, because they were not drawn properly, bulged and did not fit (Tr. 48, 74; Exh. G-13 at 14). Both the installation and the quality of replacement window panes for those broken by appellant was deficient (Tr. 48, 94; Exh. G-13 at 20).

The walls and ceilings of this house, which had been damaged by water from a rainstorm when appellant's subcontractors left the roof uncovered over a weekend while it was being repaired, were not repaired (Tr. 49, 109-111; Tr. II 46-48, 54-55; Exh. G-9). Appellant testified that he had no personal knowledge that the roof was left open but did not deny that it happened (Tr. II 66-67). Other deficiencies that were proved included a kitchen counter top that was not properly anchored (Tr. 50); floor tiles and rubber base moulding that had pulled loose as a result of deficient installation and insufficient adhesive compound (Tr. 50, 85, 97-98; Exh. G-8, G-13 at 17, 22); roof gutters improperly installed that did not drain properly (Tr. 50-57, 74-75, 82-84; Tr. II 20-21, 31; Exh. G-13 at 13, 14, 16, 26); and both roof valley flashing and step flashing that was improperly installed and not adequately water sealed (Tr. 51, 75-77, 98-101, 104-05; Exh. G-13 at 14, 23, 24, 26).

These defects had the effect of denying the tenants the use of the house for approximately twelve months and caused the government to assume the mortgage payments because the tenants could not use the house (Tr. 52; Exh. G-12). The record showed that several problems relating to the original repair contract were still uncorrected on August 9, 1979 (Tr. 52, 114).

3. [REDACTED] Cedar Street, Lima, Ohio

The existence of a contract between HUD and appellant to replace a storm door at [REDACTED] Cedar Street, Lima, Ohio, was stipulated (Tr. 3-4). Inspection disclosed that the pre-made front storm door frame was deficiently anchored (Tr. 113-16, 118). The back storm door at that house was installed with a conspicuous two inch gap between the bottom of the door and without regard to the broken threshold (Tr. 114-19, 161-63; Tr. II 21-22; Exh. G-13 at 33, 35, 126-27). That defect had not been remedied by the August 9, 1979 inspection (Tr. 118).

4. ██████ 7 Laguna Drive, Columbus, Ohio

The parties stipulated that the house at ██████ Laguna Drive, Columbus, Ohio, was the subject of a contract between HUD and appellant to replace the rear exterior door and driveway overlay (Tr. 4). Appellant's failure to repair the door resulted in rain infiltration through the threshold which caused buckling of the floor tiles in the vicinity of the door. Although appellant was directed to replace the tiles as well as the door, he failed to do so. (Tr. 119-21, 173, Exh. G-13 at 27; Exh. A-A) Appellant's repeated resurfacing of the driveway failed to provide the even and proper slope necessary to provide proper drainage away from the house as required by the contract (Tr. 119-25; Exh. G-13 at 27-29). Timely demand for corrective action under the applicable warranty, which specified the deficiencies, was incorporated in correspondence from Smith as contracting officer to appellant dated September 14, 1979 (Exh. A-A).

5. ██████ Hudson Street, Columbus, Ohio

Appellant's roofing installation at the house at ██████ Hudson Street, Columbus, Ohio was seriously deficient. The applicable purchase order (HUD 2542) dated February 23, 1979, required appellant to "Replace rear shed type roof with roll roofing and replace flashing. Repair bedroom drop ceiling (water damage). Repair bedroom floor (water damage.)" A warranty of construction clause was explicitly incorporated by reference. (Tr. 18-19; Exh. G-3) The detailed deficiencies enumerated in support of the temporary denial of participation explicitly alleged breach of warranty (Exh. G-1). Appellant testified that the work specified was completed and billed in January 1979 (Tr. II 94-96; Exh. A-0). The work, however, was of unacceptable quality and not in conformity with specifications (Tr. 18-38; Exh. G-13 at 1-8). Appellant testified that he had not inspected the finished roof work because the roof had been covered with snow (Tr. II 118).

The contracting officer's personal inspection disclosed evidence of serious roof leakage which had been continuing for some time and whose source at defective flashing he had been able to locate. The leakage had caused conspicuous and continuing water damage to the interior of the house (Tr. 18-20). Although the contracting officer could not fix the exact time when the interior water stains had occurred, the record clearly supports the inference that the damage from the leak which was photographed in August had occurred after

appellant had purportedly completed and been paid for the job in late January or February (Tr. 146-47, 180-81; Tr. II 94, 118). That inference is further supported by the contracting officer's testimony that August had been wet and that weather had delayed the start of the successor contractor who had been engaged to remedy the deficiencies (Tr. 146).

The one-year warranty period had not expired when the notice of temporary denial of participation was transmitted on October 12, 1979. (Tr. 18-38; Tr. II 94-96; Exh. A-0; G-3). Appellant testified that he did not honor the request to repair the roof leak because he did not consider the leak to be his fault (Tr. II 82). That contention is unpersuasive, but his testimony supports the Government's claim that he did not honor the warranty.

Appellant improperly installed the required roll roofing over multiple layers of deteriorated and existing asphalt roofing. A proper and workmanlike job would have required removal of the preexisting deteriorated roofing, which was not done (Tr. 24, 26-29, 33-34, 37; Exh. G-13 at 2-4, 6, 8). He also did not replace certain old and defective flashing as required; certain new flashing was improperly installed; and the seals around both the old and certain newly installed flashing were defective (Tr. 19, 21, 24-31, 33, 38, 147; Tr. II 38-39; Exh. G-13 at 1-8). When he was through, the roof still leaked (Tr. 19). The resulting defects necessitated HUD's retaining a successor contractor to effect necessary repairs on an emergency basis, since the failure to repair the leak or leaks in the roof caused substantial damage to the house (Tr. 19, 21, 31-32, 35; Exh. G-13 at 5, 7).

#### APPLICABLE REGULATIONS

The departmental regulation applicable to temporary denials of participation, 24 C.F.R. Part 24 (1978), provides in pertinent part as follows:

##### §24.4 Definitions.

(f) "Contractors or grantees." Individuals, ... and ... or private organizations that are direct recipients of HUD funds ... including, but not limited to ... builders ...; and Federally assisted construction contractors.



(g) "Financial assistance." Assistance through grant or contractual arrangements; ... and in addition, award of procurement contracts, notwithstanding any quid pro quo given or whether the Department gives anything of value in return.

(h) "Temporary denial of participation." Unless taken as a result of a pending investigation or an indictment which gives rise to the suspension of the contractor or grantee, a temporary denial is an exclusion from HUD programs by an Area Office Director, Insuring Office Director or a Regional Administrator for a specified period not to exceed twelve months. The denial is limited in effect to the jurisdiction of the office initiating the action and the specific program under which this action is taken.

§24.5 General (a) [Certain Department actions including] ... temporary denial of participation ... are measures which may be invoked by offices of the Department either to exclude or to disqualify contractors and grantees from participation in Department programs. These measures shall be used for the purpose of protecting the public and are not for punitive purposes.

(b) Department action to exclude or to disqualify contractors and grantees from participation in its programs, or to reconsider such measures, shall be based upon all available relevant facts....

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§24.18 Temporary denial of participation; conditional denial.

(a) Causes and conditions under which a temporary denial of participation may be invoked. (1) An Area Director, Insuring Office Director or Regional Administrator may issue an order which denies the participation in Departmental programs of a contractor or grantee.

(2) Causes for denial of participation shall include: ...

(ii) Adequate evidence of irregularities in contractor's or grantee's past performance in a Department program....

### DISCUSSION

As a housing repair contractor who received payments directly from HUD pursuant to HUD's procurement of repair services under the Property Disposition Rehabilitation Program, appellant falls within the regulation's definition of "Contractors or grantees." 24 C.F.R. §24.4(f)(1979) The detailed testimony of the contracting officer, James G. Smith, Jr., was based on personal observation reinforced by well-explained illustrative photographs of the deficiencies in appellant's contract performance which he described. Together with the photographs and other documentary evidence, Smith's testimony provided clear and convincing evidence of the pattern of irregularities which characterized appellant's performance of rehabilitation contracts relating to five specific residential properties. Those properties were identified in the October 12, 1979 notice to Appellant of his temporary denial of participation. The photographs were adequately related to the relevant contract specifications which appellant had failed to perform.

The pattern of commission and omission described by the evidence is sufficiently diverse and extensive to counteract any suggestion that the deficiencies were isolated or merely the product of occasional oversights by an overburdened contractor. Rather, under the most favorable assessment, what is shown is repeated instances of unacceptable performance at least in part attributable to a lack of supervision by appellant.

Appellant claimed to be an experienced contractor. He acted as general contractor in relation to the five identified residential properties, mostly using local subcontractors to make the prescribed repairs. Appellant has not contested his clear legal responsibility for the performance of his employees and subcontractors, which, in any event, is well established. See Basic Engineering & Construction Co., Inc., ASBCA No. 12,977, 68-1 BCA ¶6915, at 31,950 and citations therein.

### Lack of Responsibility

Although the evidence showed that corrective action was taken in response to some complaints, appellant never remedied a substantial number of the deficiencies. The resulting

diverse and extensive pattern of deficient repair contract performance either by appellant or imputable to appellant, amply supports a finding that appellant lacked the responsibility necessary for doing business with the Government. That concept of responsibility, which is fundamental to Government contract law, contemplates not only the ability of the contractor to satisfy the contract requirements, but his manifestation of integrity and conscientiousness in the performance of his responsibilities. See Roemer v. Hoffman, 419 F. Supp. 130 (D.D.C. 1976); 49 Comp. Gen. 139 (1969); 39 Comp. Gen. 468 (1959); 34 Comp. Gen. 86 (1954). The evidence in this case establishes that appellant clearly lacked those qualifications at the time of the Ohio Area Manager's action and that the temporary denial of participation was an entirely justifiable measure to protect the public.

Appellant's contention that 24 C.F.R. 24.18(a)(2)(ii) "seems to support an experience prior to the contractor's present program participation" is neither reasonable nor persuasive (App. Br. 9-10). The language and manifest intent of that provision would be unreasonably strained if construed to exclude from consideration behavior which occurred immediately prior to the notice of temporary denial of participation. The temporary denial of participation is not a sanction but a measure to protect the public prospectively from non-responsible contractors such as appellant. 24 C.F.R. §24.5(a) A finding of a lack of responsibility can be based on past acts. Schlesinger v. Gates, 249 F.2d 111 (D.C. Cir. 1957). Thus the most recent behavior which could be proved would normally be the best evidence of current responsibility or lack of it. 49 Comp. Gen. 139 (1969).

#### Construction Deficiencies

The demonstrably poor performance of appellant and those who worked for him is consistent with certain circumstances that were established largely by Appellant's testimony. Three of the properties located in Lima, Ohio, were more than a hundred miles distant from his base of operations. This factor buttresses the inference otherwise established that contract performance suffered from lack of supervision by appellant. That lack of supervision is shown to have persisted even after

appellant had notice of the deficient performance of his local subcontractors, whom he had hired because of local restrictions and with whom he had had limited prior involvement.

These kinds of problems are no excuse, however, for the deficient performance. The evidence of the overall pattern and the number and scope of the proved deficiencies clearly outweighs whatever persuasiveness appellant's contention might otherwise have that the deficiencies were either small in and of themselves or an insignificant part of a larger picture of responsible performance (App. Br. 11).

Some of the deficiencies were clearly serious. The omissions cited in connection with roof repairs at [REDACTED] S. West Street in Lima, for example, established negligent or incompetent construction craftsmanship, not explained away on this record by the age of the house. The omissions also led to serious damage to the interior of the house, for example, at [REDACTED] S. West Street, Lima, Ohio, where appellant's workmen negligently left the roof uncovered while under repair, and as another example, at [REDACTED] Hudson Street, Columbus, Ohio, where unacceptable contract performance was shown to be the cause of extensive interior damage. These omissions burdened HUD with various significant extra costs. Thus, both the nature and the consequences to the Government of appellant's nonfeasance or misfeasance were substantial, not inconsequential and minor as appellant has argued (App. Br. 8).

#### Unfulfilled Warranties and Contract Requirements

To the extent that certain of the deficiencies in appellant's performance were the subject of complaints and demands for remedial action after appellant had been paid for his initial work, but were not corrected, appellant failed in several instances to fulfill his obligations under the acknowledged warranty as alleged by the Government. There were also instances as to which, as alleged by the Government, appellant never rendered satisfactory performance. Appellant's suggestion, for example, that the complaint relating to the installation of the front and back storm doors at [REDACTED] Cedar Street, Lima, Ohio, were insignificant in the context of a \$6,615 rehabilitation is unpersuasive, because the record shows obviously negligent initial installation; no proof of expedited or completed remedial action by appellant; and similar kinds of deficiencies in that and numerous other instances of record. (App. Br. 6) Some deficiencies still existed even after appellant apparently made unsuccessful attempts at corrective action. The contract for additional work at [REDACTED] S. West Street in Lima, which was negotiated and executed in April 15, 1979, though binding, was simply never performed.

The primary instance of appellant's failure to honor an applicable warranty occurred in relation to the house at [REDACTED] S. West Street in Lima, Ohio. Although appellant testified that work was completed in March 1978 and the agreement for additional repairs did not occur until April 15, 1979, and therefore out of warranty, appellant had actual notice that certain of his work was deficient by November 21, 1978, and earlier, well within the warranty period (Tr. II 64; Exh. G-7, -8). Likewise, the work performed at [REDACTED] Hudson Street, Columbus, Ohio, pursuant to a purchase order dated February 23, 1979, and completed and billed by approximately that date, was shown to be well within warranty, even on the October 12, 1979, date of the notice to appellant of the temporary denial of participation. The deficient but unremedied quality of that work was clearly established and constituted a breach of warranty as alleged.

Crucial roof flashing, was improperly installed at the Hudson Street house. The contracting officer identified that to be the source of the leak. The evidence of continuing serious leakage and interim water damage, which appellant should have repaired under his contract, on this record supports the conclusion that the interim water damage was attributable to appellant's deficient repairs to the roof and flashing which were never completed or corrected. The proof of these omissions clearly supports the Government's allegation that appellant was not responsible, in part, because he had not satisfied his contract obligations.

#### Alleged Fraudulent Performance

The circumstances surrounding the initial installation of particle board on the floors of the kitchen and bathroom at the house at [REDACTED] S. West Street in Lima, Ohio, lend considerable support to the Government's allegation of fraud. A further inference of fraud derives from the response to the Government's demand for corrective action, which was to substitute plywood where it could be readily seen but to leave the cheaper particle board in less visible parts of the kitchen and bathroom floor areas. On the other hand, appellant's uncontradicted, but uncorroborated, testimony that the use of particle board had been common and accepted practice in other instances, and that he himself had taken eleven sheets of plywood to the site in response to HUD's demand for correction, is not incredible. When considered with his testimony, adverse to his interests in other contexts, that his supervision and inspection was minimal as to work on those projects in distant Lima, there is substantial doubt on this record whether appellant himself actually connived at the substitution of the cheaper material or the false remedy that perpetuated the deception. Therefore, while appellant is responsible for this irregularity, and was legally responsible for the actions of his subcontractors, if, as seems likely, they were the actual malfeasors, the evidence is too speculative to permit a

conclusive attribution of actual fraud to appellant himself. Since the proof of the irregularity is sufficient, when taken on the record as a whole, to establish appellant's lack of responsibility and thus to support the temporary denial of participation, the Board need not make a further determination on this record that appellant actually committed fraud.

#### CONCLUSIONS OF LAW

1. Appellant is a "contractor or grantee" within the meaning of 24 C.F.R. §24.4(f) and is therefore subject to an order by the Area Manager temporarily denying him participation in the Property Disposition Rehabilitation Program in Ohio under 24 C.F.R. §24.18(a).

2. Appellant had a contractual and legal obligation to perform the several elements of rehabilitation described in the notice of temporary denial of participation dated October 12, 1979 and either failed or refused to perform them in an acceptable manner as required.

3. Appellant breached those obligations initially by deficient contract performance and breached certain of the warranties which required their correction after defective initial installation or construction. The temporary denial of participation was properly based on the allegations of these irregularities.

4. None of the defenses, excuses, or matters in mitigation offered by appellant provide an appropriate basis for reducing or setting aside or otherwise altering the temporary denial of participation which was imposed upon appellant by the Ohio Area Manager.

#### CONCLUSION

Upon consideration of the public interest and the entire record in this case, Hobert Curnutte, d/b/a/ A-1 Home Maintenance Company, was properly denied participation in the Property Disposition Rehabilitation Program in Ohio from September 24, 1979 through September 23, 1980.



Edward Terhune Miller  
Administrative Judge  
HUD Board of Contract Appeals

Issued at Washington, D. C.  
on December 24, 1980.