UNITED STATES OF AMERICA

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Washington, D. C.

In the Matter of:	:	
ERIC CRABTREE,	:	HUDBCA No.81-630-D35
Appellant	:	

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DETERMINATION

Statement of the Case

Pursuant to 24 C.F.R. §24.7(a), the Assistant Secretary for Community Planning and Development sent a letter to the Appellant, dated August 20, 1981, advising that the Department of Housing and Urban Development (HUD) proposed to debar him, Crabtree Corporation, and business concerns in which he has a substantial interest, for a period of three years. In support of the debarment, the letter alleged violations of a contract between Crabtree Corporation and a borrower on a Section 312 rehabilitation loan. The letter also advised that Appellant was entitled to be heard on the proposed action and that, pending final determination of the matter, he was temporarily suspended from HUD programs.

By letter to the Assistant Secretary dated August 25, 1981, which was filed with the Office of the Administrative Law Judge on September 8, 1981, Appellant requested an oral hearing. However, after a hearing date was set, the parties elected to have the matter decided on written briefs. Both parties subsequently submitted briefs, exhibits, and stipulations of fact. The Government's brief, filed on December 2, 1981, was accompanied by a Motion for Leave to File Out of Time, which is hereby granted.

The Government's brief raised questions as to the relationship between the charges presented therein and those specified in the Assistant Secretary's letter proposing debarment. Accordingly, by Order dated December 11, 1981, Government counsel was directed to file a statement of position regarding this relationship, which was submitted on December 22, 1981. Appellant filed a response thereto on December 28, 1981.

Stipulations and Undisputed Facts

The parties have either formally stipulated, or do not dispute, that:

1. On June 28, 1979, Appellant, doing business as Crabtree Corporation, was awarded a contract to rehabilitate the property located at [redacted] Arapahoe Street, Denver, Colorado on the basis of a negotiated bid. The apparent owner 1/ of the property was [redacted] Doty, a former girl friend of the Appellant. The award to Appellant was made at Doty's request.

2. Rehabilitation of the property was financed by a $26,650 HUD loan, applied for by Doty and authorized under §312 of the Housing Act of 1964, 42 U.S.C. 1452b.

3. During rehabilitation of the property, Appellant submitted three forged Lien Waiver forms (Denver Urban Renewal Authority Forms CD 2-898). The forms indicated that three subcontractors -- Weekley Electric Co. (form dated October 23, 1979), A & M Heating (also dated October 23, 1979), and Tony Capra Plumbing (October 30, 1979) -- had been paid for work performed under the contract.

4. Appellant personally forged the signatures on the forms submitted on behalf of A & M Heating and Tony Capra Plumbing.

5. During rehabilitation of the property, Appellant requested and received payment for work under the contract.

1/ While Doty signed the Bid and Proposal (Government Exhibit 2, dated June 27, 1979) and Certification of Completion (Government Exhibit 5, dated November 8, 1979) as owner, the record raises questions as to the extent and duration of her ownership interest (see interviews of Doty and Appellant, Government Exhibit 10, pages 11, 12, 15 and 33; Appellant's Brief at page 1; Appellant's Appendix A at page 1). A HUD Inspector General Report (Government Exhibit 10) concludes that false ownership information may may have been submitted in order to obtain the §312 loan. However, this possibility has not been alleged as a charge either in the Assistant Secretary's letter proposing debarment or in the Government's brief and therefore will not be considered in my decision.

Findings of Fact

1. At the time that the forged Lien Waiver forms were submitted, the subcontractors had not been paid for the work reflected thereon. (Interviews of [redacted] Negri, [redacted] Martin, and Appellant, Government Exhibit 10 at pages 24, 27, and 32-33, respectively; receipts, invoices, and payroll sheets submitted with Appellant's brief.)

2. At the time that the forged Lien Waiver was submitted on behalf of A & M Heating, the work reflected thereon had not been performed. (Interview of [redacted] Martin, Exhibit 10 at page 27. The statement, attributed to Martin, that A & M did not begin work until a building permit was obtained in December, 1979, is not disputed in Appellant's comments on this interview summary at page 3 of Appendix A.)

3. The forged Lien Waivers were submitted by Appellant in order to receive a progress payment in the amount of $9,160.40. (Government Exhibit 5.)

Discussion

A. Cause for debarment.

The Assistant Secretary's letter to Appellant dated August 20, 1981 specifies the cause and regulatory basis for the proposed debarment as follows:

> This Department has been informed, through an Operational Survey conducted by the Office of the Inspector General, that you and your affiliate, Crabtree Corporation, have violated contract provisions as set forth in a contract between Crabtree Corporation and a borrower on a Section 312 Rehabilitation Loan, Ms. Suzanne Doty, and further that you wilfully failed to perform in accordance with specifications or within the time limit provided in the contract.
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> The foregoing conduct is cause for debarment under the provisions of Title 24, Code of Federal Regulations, Section 24.6(a)(3)(i).

24 C.F.R. §24.6(a)(3)(i), in turn, authorizes HUD to debar a contractor or grantee in the public interest for "Willful failure to perform in accordance with the specifications or within the time limit provided in the contract."

The Government's brief exclusively bases the proposed debarment upon Appellant's submission of forged documents in order to receive payment for work that had not been performed. However, it does not specify any provision of Appellant's contract with Doty that was

violated thereby. Indeed, the brief does not claim §24.6(a)(3)(i) as regulatory authority for the debarment. 2/

In its subsequent response to my Order dated December 11, 1981 (see Statement of the Case, supra), the Government states that the proposed debarment is based upon Appellant's failure "to complete the work, as set forth in the specifications ... within the time period provided in the [Doty] contract," and his submission of the three forged lien waivers. The Government contends that both bases reflect violations of Appellant's contract with Doty and constitute cause for debarment under 24 C.F.R. §24.6(a)(3)(i). Appellant argues, however, in his comments on the Government's response, that "Any forgery, in and of itself, is not a contract violation and cannot give rise to this debarment."

With regard to the submission of forged forms, the Government cites Article 4 of an "Agreement Between Contractor and Owner," which was signed by Appellant and Doty on August 30, 1979. Paragraph C of this Article (not referenced or included in the Government's original brief) states:

> Lien Waivers - Before issuance of progress payment, the Contractor shall submit mechanics lien waivers and evidence satisfactory to the Denver Urban Renewal Authority that all payroll, materials, bills, and any indebtedness connected with the work completed have been paid.

In view of this language, I find that the forgery of the lien waivers directly resulted in, and is inextricably tied to, a violation of Appellant's contract with Doty. Because of the forgeries, Appellant in effect received progress payments without submitting these documents, contrary to the specific requirements of Paragraph 4. Indeed, the record suggests that the very purpose of the forgeries was to circumvent this contractual precondition to the receipt of progress payments. The violation of Paragraph 4, by

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2/ Page 3 of the brief cites §24.6(a) (4), (5), and (6) as authorizing the proposed debarment. These subsections specify the following causes for debarment:

> (4) Any other cause of such serious compelling nature, affecting responsibility, as may be determined by the appropriate Assistant Secretary, to warrant debarment.
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> (5) Violation of any law, 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 conditional or final commitment to insure or guarantee.
>
> (6) Making or procuring to be made any false statement for the purpose of influencing in any way the action of the Department.

means of these forgeries, constituted a "wilful failure to perform in accordance with the specifications" of the Doty contract within the meaning of 24 C.F.R. §24.6.

Accordingly, I further find that the language of the Assistant Secretary's August 20, 1981 letter, while not as straightforward as might be expected, nonetheless was sufficiently broad to include this violation of Paragraph 4 as cause for the proposed debarment. In this regard, I note that Appellant does not dispute that he has been specifically aware, since September, 1981, that the forgeries constituted a major part of the Government's case. (See Appellant's Response.) In fact, he voluntarily entered into stipulations with respect to the forgeries and has argued this matter at length in his brief.

Appellant argues that the second charge, that he failed to complete required work within the contractual time period, was first advanced by the Government in its December 22nd Response to my Order, and therefore should not be considered by the Hearing Officer. The Assistant Secretary's letter proposing debarment, however, as noted, included the charge that Appellant "wilfully failed to perform in accordance with the specifications or within the time period provided in the [Doty] contract."

With regard to this charge, which Appellant also denies, the Government's December 22nd Response states:

> Article 2 of the contract required that the work under the contract was to be fully completed on or before January 4, 1980. An inspection conducted by a HUD Rehabilitation Management Specialist on February 27, 1981, indicated that repairs had not been completed in accordance with contract specifications. (See Exhibit 10, pages 13 and 14, to Brief in support of Debarment).

Article 2 of Appellant's contract with Doty (not submitted with the prior Government brief), in turn, provides:

> ARTICLE 2, TIME OF COMPLETION: The work performed under the Contract shall be commenced within ten (10) days after the date when the Notice to Proceed is issued and shall be fully completed on or before January 4, 1980. The Owner, through the Denver Urban Renewal Authority (hereinafter sometimes referred to as "Disburser"), shall issue the Notice to Proceed in writing to the Contractor within thirty (30) days of the signing of this Agreement. If the Owner does not issue the Notice to Proceed within thirty (30) days, the Contractor has the option of withdrawing from the Agreement and the Contract Document shall be void and of no effect.

Pages 13 and 14 of Exhibit 10, cited in the Government's Response in support of this charge, consist primarily of the quoted portions of a memorandum dated February 27, 1981 from Walter Murrell, Rehabilitation Management Specialist, HUD Regional/Area

Office, to Wayne D. Zigler, HUD Regional Inspector General for Investigation, as follows:

> On February 24, 1981, at request of your office, I inspected the property located at [redacted] Arapahoe Street in Denver, Colorado, accompanied by Mr. John Balaun. My inspection resulted in the following observations:
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> Exterior: Roofing was not applied in a professional manner. Edges are ragged and some shingles at rear of structure are already loose. Masonry walls were not stuccoed and trim on front portion of structure was not painted. Windows were improperly installed. Gutters and downspouts were not primed. Ornamental iron handrail was not installed at entry stairs of front porch. There was approximately $1,600 dollars worth of work paid for which was not completed.
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> Interior: There were exposed wires at breaker box. Particle board was not installed over existing subfloor in kitchen. Drywall in loft area was not finished at joints and corners. Carpet was not installed in all areas specified in work description. Metal spiral staircase was not installed. There was approximately $2,000 dollars worth of work paid for which was not completed. This structure in its present condition would not comply with local housing code or Section 8 minimum standards.

Page 14 of this Exhibit contains the following additional information:

> (NOTE: MURRELL's memorandum indicates items 3, 4, 6, 7, 8, 9, 14, 22, 25, and 26 in the Description of Work (EXHIBIT 3) were not completed, or not properly completed.)
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> Photographs of the exterior of the property at [redacted] Arapahoe Street were taken by Investigator [redacted] BALAUN on February 27, 1981. These photographs display the lack of completion of the exterior work and copies are attached as EXHIBIT 14. 3/

The HUD inspection was referenced in the Government's brief as part of its Statement of Facts (at page 3), but only to show that work had not been performed at the time the forged waivers were submitted. In this regard, the brief merely states: "Further, an inspection conducted in February, 1981, by an employee of the HUD Regional/Area Office indicated at that time that all of the specified repairs were not complete. (Exhibit 10, page 18)."

3/ Exhibit 14 apparently refers to the Inspector General report. No photographs were attached to the Government's brief.

Neither the HUD inspection nor Government Exhibit 10 is mentioned in the "Discussion" portion of the brief, which relates to cause for the proposed debarment. Further, pages 13 and 14 of Exhibit 10 are not specified in any part of the brief.

Apart from the fact that the Government, at most, has treated this charge as a "throwaway" basis for the proposed debarment, I find that the information contained on pages 13 and 14 of Government Exhibit 10 is not persuasive. While such hearsay evidence may technically be admissible, in this case the narrative and excerpts submitted are not sufficiently probative to offset Applicant's denial. The Government's exhibit does not even include the signed memorandum relied on, let alone an affidavit by the inspecting official or the referenced photographs. Accordingly, I conclude that the Government has failed to meet its burden of proof on this charge.

On the other hand, Appellant's stipulations regarding the fraudulent submissions, coupled with the language of Paragraph 4 of his contract with Doty, establish cause to debar under 24 C.F.R. §24.6(a)(3)(i). Further, Appellant is a contractor or grantee subject to this regulation pursuant to §24.4(f) of that Title, since he was an indirect recipient of HUD funds and was in a business relationship with a HUD recipient.

I also conclude that the suspension of Appellant on suspicion of having violated the Doty contract by submitting forged lien waivers is supported by adequate evidence and was authorized under 24 C.F.R. §24.13(a)(2). 4/

B. Duration of the debarment.

Appellant requests a modification of the proposed three-year debarment period. He argues that the forgeries were committed "... in good faith, under the direction and guidance of John Slothower, the DURA [Denver Urban Renewal Authority] representative. [The] violations resulted in no harm to any person and no measurable

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4/ That subsection states:

> (a) The Assistant Secretaries may, in the interest of the Government, suspend a contractor or grantee:
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> * * *
>
> (2) For other causes of such serious and compelling nature, affecting responsibility as may be determined in writing by the appropriate Assistant Secretary to warrant suspension. Among such causes are cases where the contractor or grantee is suspected, upon adequate evidence of:

(CONTINUED)

injury. Any such violations have been cured by the total performance of the contract. Accordingly, [Appellant] believes that a three-year debarment period is overly severe and totally unnecessary to prevent future reoccurrences." (Appellant's brief at page 2).

I find these arguments to be unpersuasive. First, the proposition that forgery of an individual's signature, without consulting the individual involved, could be undertaken "in good faith" strains credulity. Any complicity of others in falsifying the waivers (and I do not reach the question of Mr. Slothower's involvement) would only indicate that Appellant was not the only one guilty of bad faith. It certainly would not suggest the conclusion that he acted in good faith. Appellant's receipt of a direct monetary benefit from the forgeries very clearly negates such a conclusion.

Second, I do not agree that the forgeries, and the resulting violations of the Doty contract, resulted in no harm. The harm was to the public interest, which demands integrity on the part of those who benefit from its business. Further, it does not follow, in any event, that HUD's luck in escaping monetary loss with respect to these particular forgeries should be credited to the forger or entitles him to another go at the public fisc.

Finally, Appellant has not proven that the violations were "cured by the total performance of the contract." Just as I cannot accept the Government's assertion that work was left uncompleted, I cannot accept Appellant's assertion to the contrary in the absence of sufficient probative evidence, which is lacking in the present record.

The record in this case reflects much more than violations of a contract. It reflects an underlying lack of personal integrity which raises serious questions about Appellant's present responsibility as a HUD contractor. Although I recognize that any

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4/ (CONTINUED FROM PREVIOUS PAGE)

(i) Violation of any law, 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 conditional or final commitment to insure or guarantee.

(ii) Making or procuring to be made any false statement for the purpose of influencing in any way the action of the Department.

period of debarment to some extent is speculative, and that the forgeries in this case occurred in the latter part of 1979, I cannot conclude, based on this record, that the three-year exclusion proposed by the Assistant Secretary is unreasonable.

CONCLUSION AND ORDER

The present suspension and debarment of Appellant are sustained. In determining the period of debarment, Appellant shall be credited with the period of time during which he has been suspended.

Accordingly, Appellant is hereby debarred from participating in HUD programs under 24 C.F.R. Part 24 through August 19, 1984.

Steven Horowitz
Administrative Judge

Dated: January 21, 1982