In the United States Court of Federal Claims

No. 98-169C

FILED: March 15, 2000

* * * * * * * * * * * * * * *

HAMILTON SECURITIES ADVISORY SERVICES, INC.,

Plaintiff,

v.

UNITED STATES,

Defendant.

Motion in Limine; Inspection of Services Clause; Remedies for breach of contract; Damages; Economic Loss Rule in tort claims.

* * * * * * * * * * * * * * *

Claude P. Goddard, Jr., Wickwire Gavin, P.C., Vienna, Virginia, attorney of record for plaintiff.

David J. Gottesman, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, D.C., with whom were Robert M. Hollis, Assistant Director, and David M. Cohen, Director.

ORDER

HORN, J.

FINDINGS OF FACT

In the mid-1990s, the Federal Housing Administration (FHA) established a program in which it sold, by sealed-bid auction, mortgages held by the United States Department of Housing and Urban Development (HUD). In support of that program, HUD awarded

Contract No. DU100C000018161 (the 18161 contract) and Contract No. DU100C000018505 (the 18505 contract) to the plaintiff, Hamilton Securities Advisory Services, Inc. (Hamilton). Under the contracts, Hamilton was to provide financial advisory support services necessary to sell or refinance HUD-held mortgages, and to conduct auction sales of groups of HUD-held mortgages. Hamilton rendered services with respect to two auctions: the "West of the Mississippi Sale," conducted under the 18161 contract, and the "North/Central Sale," conducted under the 18505 contract.

The contracts were indefinite-quantity contracts, under which services were to be procured through the issuance of task orders. In March of 1995, HUD issued Task Order 7 (effective March 29, 1995) to the 18161 Contract, which encompassed work on the West of the Mississippi Sale. Task Order 7 had a period of performance of six months and, as later modified, established a fixed-fee in an amount not to exceed $1,765,631.00. Under the Task Order, Hamilton, as the "Financial Advisor," was required to perform numerous specific tasks including (1) overseeing the design of the due diligence process; (2) recommending alternative methods for structuring the mortgage sale and pricing options to maximize loan sale proceeds to HUD; (3) preparing advertisements and other materials for the pre-marketing of the loans; (4) designing the auction process and preparing auction announcements with relevant information for buyers, including any representations and warranties HUD would make to purchasers, and explaining the procedures for bidding and the necessary documentation required of purchasers; (5) working with HUD and the contractor for legal counsel to review and oversee the design of required legal documents, including the Loan Purchase Agreement; (6) preparing copies of loan documents, and preparing bid packages and all necessary due diligence materials; (7) managing and implementing all phases of the bidding and auction process; and (8) overseeing the closings for the loan sales. The Task Order also described deliverables, including specified periodic reports, which Hamilton was obligated to provide, and directed that on the day of the auction, Hamilton was to "conduct all phases of the auction with responsibility for the necessary personnel, equipment, services and supplies."

Hamilton performed work under Task Order 7 on the West of the Mississippi Sale from March, 1995, through October, 1995. To perform the auction, plaintiff retained Bell Laboratories/Lucent Technologies, Inc. (Lucent) and instructed Lucent to use an "optimization model," which was a computer model that evaluated the optimum combination of bids for HUD to accept in any particular auction of HUD-held mortgages. Plaintiff alleges that Lucent was paid $20,000.00 to run the optimization model for the West of the Mississippi Sale.

According to the parties, on or about September 18-19, 1995, potential purchasers submitted bids in the West of the Mississippi Sale, and Lucent ran the optimization model on September 20-21, 1995. Afterwards, Hamilton reported to HUD the results of the optimization model run by Lucent, and HUD awarded mortgages based upon the bid results presented by Hamilton. HUD received revenues of $385,196,928.00 from the West

of the Mississippi Sale, and HUD paid Hamilton $1,765,631.00, the amended fee specified in Task Order 7, for all services which Hamilton performed relating to the sale.

For the North/Central Sale, on April 25, 1996, HUD issued Task Order 1 under the 18505 contract. Under Task Order 1, Hamilton was the "Crosscutting Advisor", and a different firm was the Financial Advisor. The task order referred to "crosscutting issues" as "issues and services that will cut across transactions and many Departmental disciplines and are best handled on a coordinated basis by one entity." Hamilton was to be paid a fee not to exceed $20,842,000.00, and the fee was payable in monthly installments of $868,417.00. The task order required that plaintiff provide services in several areas, including credit reform, overall project management, asset sales design, due diligence, marketing the transaction, review and approval of bids and sales, post-closing support, data review and website development and maintenance, budget planning, business process engineering, and staff development.

As part of its "Bid Date Review, Sale Approval and Post Auction Review" for the North/Central Sale, plaintiff was required under Task Order 1 to review plans for the auction and to "[r]un the optimization model in accordance with the design approved by HUD . . . ." Hamilton retained the services of Lucent and provided Lucent with instructions – the same as those used in the West of the Mississippi Sale – to run the optimization model. Plaintiff alleges that Lucent was paid $59,000.00 to run the optimization model for the North/Central Sale.

On or about August 5-6, 1996, potential purchasers submitted bids in the North/Central Sale, and Lucent ran the optimization model within the next few days. Afterwards, Lucent reported the model results to Hamilton, which, in turn, provided them to the Financial Advisor for the North/Central Sale. The Financial Advisor then submitted the results to HUD, and HUD awarded mortgages based upon the bid results. HUD received revenues of $621,674,221.00 from the North/Central Sale. Hamilton invoiced HUD, and HUD paid Hamilton $868,417.00 for all the services which plaintiff performed from July 26 through August 25, 1996.

In both of the auctions at issue, the optimization model incorporated a "floor" feature in which each bidder was permitted to designate the minimum aggregate dollar amount of awards that the bidder would have to be awarded – the bid floor– before any of its bids would become binding. In late October 1996, plaintiff realized that there might have been a discrepancy in the way the bid floor was calculated in the West of the Mississippi and North/Central Sales. The bid instructions stated that the bid floor for each bidder should be expressed in terms of the unpaid principal balance of the loans bid upon. However, after conducting an investigation, Hamilton determined that the optimization model incorrectly had expressed the bid floor in terms of minimum revenue, i.e., the price offered by the bidder. Because the optimization model as run by or for Hamilton did not treat the "floors" expressed by bidders as referring to the unpaid principal balance of the mortgages,

the optimization model did not select the group of bids that would have yielded the maximum sales proceeds while satisfying the correct floor requirements which actually were put forth in the bids. As a result, in each of the two sales, the optimization model identified as winning bids one or more bids which should not have been accepted and excluded one or more bids which should have been accepted.

In December, 1996, Hamilton disclosed the discrepancy to the HUD Assistant Secretary, Nicolas Retsinas, and to the Comptroller of the FHA, Kathryn Rock, who also was the Government Technical Monitor for the Hamilton contract. Plaintiff stated that the use of the unpaid principal balance floor in running the optimization model would have generated total additional proceeds of $3,883,551.00, consisting of $2,372,307.00 from the West of the Mississippi Sale and $1,511,244 from the North/Central Sale.

Hamilton continued to perform services under the 18505 Contract through the end of 1996 and for most of 1997. The government paid Hamilton for all invoices submitted before September 26, 1997. On September 26, 1997, Hamilton submitted an invoice for $868,417.00 to HUD for services rendered from August 26, 1997 to September 25, 1997. On October 23, 1997, Hamilton submitted an invoice for $636,839.00 to HUD for services rendered from September 26, 1997 to October 17, 1997, reflecting a pro rata calculation of 22/30 days at $868,417.00 per month. To date, HUD has not paid Hamilton on either of these invoices.

On October 17, 1997, HUD terminated the 18505 Contract for the convenience of the government. On that same day, Contracting Officer Annette Hancock sent a letter to C. Austin Fitts, president of Hamilton. The October 17, 1997 letter summarized the documentation submitted by Hamilton regarding the incorrect application of the optimization model. The October 17th letter concluded:

> I have thoroughly reviewed the contents of the referenced documents written by Hamilton. I find that they document Hamilton's failure to perform services required under the Task Order. Specifically, the Task Order Statement of Work at Sections 3.2, 6.1 and 6.2, requires the contractor to run the optimization model for the auctions and to deliver bids in accordance with the optimization model. By your own admission, Hamilton provided erroneous instructions that resulted in the Department suffering significant loss; a loss quantified by Hamilton at $3,883,551. I find that this amount, at a minimum, represents the monetary loss to HUD as a result of Hamilton's performance failure. However, the Government reserves the right to make future claims against Hamilton to recover any additional losses or damages the Department may suffer or has suffered as a result of Hamilton's failed performance.
>
> In accordance with paragraph 32.610 of the Federal Acquisition

> Regulation, this letter is a demand for payment of the $3,883,551 loss that the Department suffered as a result of Hamilton's performance failure. . . . If I do not hear from you within 10 work days, it is assumed you have determined not to make such voluntary repayment. The Department is currently withholding any further payments due and owing Hamilton under the terms and conditions of Contract DU100C000018505 and Task Order 001 until such time as the debt is satisfied.
>
> Further, any amounts not paid within 30 days from the date of receipt of this letter will bear interest at the rate established by the Secretary of the Treasury, for the period affected, under Public Law 92-41. In addition, you may submit a proposal for deferment of collection if immediate payment is not practicable or if the amount is disputed.

On October 22, 1997, Hamilton's attorneys at the time, Leslie Lepow and David Handzo, replied with a letter to Ms. Hancock, in which Hamilton "vigorously disputed" HUD's claim for setoff. The October 22nd letter concluded:

> Nevertheless, because Hamilton does not have the resources to deal with these continued assaults ad infinitum, we suggest the following. Legal representatives of your office and Hamilton should meet to discuss a method of settlement or alternative dispute resolution to resolve the demand and all other issues with the Department, once and for all. We do not believe that your demand is well-founded as a matter of contract law, but we are willing to attempt to resolve matters quickly and without litigation. In view of Hamilton's current financial condition and the magnitude of your demand, Hamilton will also submit a proposal for deferment of collection.

On November 13, 1997, Hamilton representative Brian Dietz sent an additional letter to Hancock. Hamilton requested deferment of the collection of the alleged $3,883,551.00 contract debt demanded by HUD and against which HUD was withholding contract payments otherwise due Hamilton.

On December 10, 1997, Mr. Fitts, the president of Hamilton, sent another letter to Ms. Hancock. The December 10, 1997 letter concluded:

> Accordingly, claim is hereby made for the combined amount of $1,505,256, plus interest from and after the date of this letter. Hamilton requests that a contracting officer final appealable decision be issued within the time provided by the Contract Disputes Act of 1978 and FAR Part 33, Subpart 2.
>
> I certify that the claim is made in good faith; that the supporting data is accurate and complete to the best of my knowledge and belief; that the

> amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable; and that I am duly authorized to certify the claim on behalf of the contractor.

Plaintiff filed the above-captioned case in the United States Court of Federal Claims on March 9, 1998. Hamilton alleges that "HUD has wrongfully refused to pay Hamilton's certified claim on the basis that it has an alleged offset." Plaintiff contends that:

> Neither the 18505 Contract nor the 18161 Contract provides HUD with any basis to assert a claim against Hamilton for the alleged loss of $3,883,551. Hamilton performed fully in accordance with its contractual obligations. Hamilton is not a guarantor or warrantor under the contracts, and it was not required to assure that HUD received the maximum possible amount under any sale or auction. The contracting officer has identified no cognizable basis in law or under the contracts for asserting the claim set forth in her October 17th letter. Accordingly, the contracting officer's failure to pay Hamilton's invoices and claim is legally and contractually insupportable.

Plaintiff argues that it is entitled to a judgment in the amount of $1,505,256.00, plus interest allowed by law.

On April 27, 1999, this court denied defendant's motion to dismiss for lack of jurisdiction, finding that the contractor had received a final decision from the contracting officer before filing suit, as required by the Contract Disputes Act of 1978, 41 U.S.C.A. §§ 601-13 (West 1994 & Supp. 1999) (CDA). See Hamilton Securities Advisory Servs., Inc. v. United States, 43 Fed. Cl. 566, 581 (1999). The court stated:

> Because, however, the contracting officer issued a final decision on the government's claim for setoff, and because Hamilton's affirmative claim can be considered the "mirror image" of the government's claim for setoff, the contracting officer's final decision on the government's claim for setoff served as a constructive denial of plaintiff's claim, and this court has jurisdiction to hear the claim.

Id.

On August 18, 1999, the government filed a First Amended Counterclaim.[1] The defendant alleges that "[i]f Hamilton had complied with its obligations and had caused the Optimization Model to be designed and run correctly, some of the bids selected as winning bids would not have been selected, and some of the bids not selected as winning bids

[1] On May 27, 1999, the defendant filed its original Answer and Counterclaim.

would have been selected." According to the government, if the auctions had been conducted properly, the winning bids "would have generated substantially greater revenue for HUD from the West of the Mississippi Sale and the North/Central Sale." In Count I of the First Amended Counterclaim, defendant claims that Hamilton breached its obligations under the 18161 and 18505 contracts. In Count II, defendant claims that plaintiff made negligent misrepresentations when Hamilton provided "false information about which group of bids would yield maximum sales proceeds while meeting all applicable criteria," and that plaintiff was negligent because "it failed to exercise reasonable care in performing its services for HUD . . . ." For both counterclaims, the government contends that "[i]f and to the extent that Hamilton were awarded any recovery on its claim, such recovery should be subject to setoff by the damages suffered by the Government; to the extent that the damages suffered by the Government exceed any amount that otherwise would be awarded to Hamilton, the Government is entitled to affirmative recovery from Hamilton."

This case is now before the court on a motion in limine for the resolution of a legal issue which is central to the parties' dispute. In particular, the parties seek a determination by the court as to whether the Inspection of Services Clause of both contracts provides the exclusive remedy and the only possible source of damages. If so, plaintiff contends that defendant would be foreclosed from claiming consequential damages defendant alleges are due to Hamilton's errors in running the optimization model, and defendant would owe plaintiff monies which defendant used as offsets.

DISCUSSION

Among the provisions of the 18161 Contract and the 18505 Contract, both contained the "Inspection of Services – Fixed Price (February 1992)" clause found at 48 C.F.R. § 52.246-4 (1995). That clause reads:

> (a) Definitions. Services, as used in this clause, includes services performed, workmanship, and material furnished or utilized in the performance of services.
>
> (b) The Contractor shall provide and maintain an inspection system acceptable to the Government covering the services under this contract. Complete records of all inspection work performed by the Contractor shall be maintained and made available to the Government during contract performance and for as long afterwards as the contract requires.
>
> (c) The Government has the right to inspect and test all services called for by the contract, to the extent practicable at all times and places during the term of the contract. The Government shall perform inspections and tests in a manner that will not unduly delay the work.
>
> (d) If the Government performs inspections or tests on the premises

> of the Contractor or a subcontractor, the Contractor shall furnish, and shall require subcontractors to furnish, without additional charge, all reasonable facilities and assistance for the safe and convenient performance of these duties.
>
> (e) If any of the services do not conform with contract requirements, the Government may require the Contractor to perform the services again in conformity with contract requirements, at no increase in contract amount. When the defects in services cannot be corrected by reperformance, the Government may (1) require the Contractor to take necessary action to ensure that future performance conforms to contract requirements and (2) reduce the contract price to reflect the reduced value of the services performed.
>
> (f) If the Contractor fails to promptly perform the services again or to take the necessary action to ensure future performance in conformity with contract requirements, the Government may (1) by contract or otherwise, perform the services and charge to the Contractor any cost incurred by the Government that is directly related to the performance of such service or (2) terminate the contract for default.

48 C.F.R. § 52.246-4.

Plaintiff has filed a motion in limine for an interpretation of the Inspection of Services Clause and its impact on this case. Plaintiff argues that this clause is a remedy-granting provision which addresses the problem that occurred in this case and limits defendant's remedies. Hamilton asserts that:

> The Inspection of Services Clause allows an equitable adjustment in price in the event the contractor renders defective services. The adjustment is based on the price of the defective services, and not on damage to the Government. The availability of such a contractual remedy prevents HUD from working a total forfeiture on Hamilton or recovering damages under either a breach of contract or tort theory.

(Emphasis in original.) Thus, plaintiff contends that defendant's damages are limited to a price reduction, and that the reduction can be no more than the total costs of running the optimization model for the two sales, $79,000.00.

The defendant counters that "the price adjustment provisions of subsection (e) only address the 'reduced value' of services received, not consequential losses resulting from a breach." The government explains its position as follows:

> Hamilton's defective services resulted in two types of loss to the Government: First, the Government did not get services worth the contract

> price, and second, the Government suffered consequential damages consisting of at least $3.8 million in sales proceeds that were lost as a direct and proximate result of Hamilton's breaches. The Inspection of Services Clause pertains to the first category of loss, but not the second. The Government may sue Hamilton for breach of contract based upon the second type of loss.

In their briefs and at oral argument, the parties have relied extensively upon cases which arose prior to the effective date of the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613, and also on post-CDA cases in which the Contract Disputes Act was inapplicable and a pre-CDA disputes clause was employed. The United States Court of Appeals for the Federal Circuit has observed, in pertinent part, that:

> Before enactment of the Contract Disputes Act, a contractor could pursue two kinds of claims: claims for equitable adjustments under the disputes clause of the contract and claims for breach of contract. Disputes clause claims could be heard and decided by contracting officers and by boards of contract appeals, from which limited judicial review was available in the Court of Claims. The contracting officers and boards were not permitted to decide breach claims, however, which were taken directly to the Court of Claims.
>
> The Contract Disputes Act to a certain extent unified the process. Section 6(a) of the act, 41 U.S.C. § 605(a), provides that "[a]ll claims by a contractor against the government relating to a contract" (emphasis supplied) are to be first submitted to the contracting officer for decision. ...

Essex Electro Eng'rs, Inc. v. United States, 702 F.2d 998, 1002 (Fed. Cir. 1983) (citations omitted). With respect to the instant case, because breach of contract claims are "related to the contract," such claims are within the scope of the post-CDA disputes clause. See generally Mega Constr. Co. v. United States, 29 Fed. Cl. 396, 415 n.11 (1993); See John Cibinic, Jr. & Ralph C. Nash, Jr., Administration of Government Contracts, ch. 13, at 1239-45 (3d ed. 1995).

Since, however, the pre-CDA cases were concerned with whether remedy granting clauses of the contract were available and would provide a complete remedy to the claimant, or whether a claimant would have to bring a breach of contract action to secure redress (in order to determine which procedures to follow in seeking a remedy), the pre-CDA cases can be instructive. In one pre-CDA case, Len Co. and Assocs. v. United States, 385 F.2d 438 (Ct. Cl. 1967) (a case in which the court allowed a breach of contract claim and found the claims at issue were not reviewable or adjustable under the Changes and Changed Conditions clause or the Inspection clause of the contract), the government argued that the contractor's remedy was an equitable adjustment under the Inspection

clause of the contract, pursued under a pre-CDA disputes clause. Id. at 450-51. The Court of Claims concluded that:

> [W]e do not find [the claims] redressable under the "Inspection" article because that provision does not authorize the granting of specific relief . . . . The Supreme Court, this court, and the Armed Services Board have said on many occasions that disputes cannot "arise under" the contract . . . unless some substantive contract provision authorizes the granting of a specific type of relief.

Id. at 451 (citations omitted); see also Edward R. Marden Corp. v. United States, 442 F.2d 364, 367 (Ct. Cl. 1971). In another pre-CDA case, United States v. Utah Constr. & Mining Co., 384 U.S. 394 (1966), the United States Supreme Court affirmed the ruling of the Court of Claims that the contractor may seek breach of contract damages from the government, when only partial relief was available under the clauses of the contract. Id. at 402, 404, 423.

As noted in Len Co. & Assocs. v. United States, for "complete relief" to be available under a specific contract provision, a claim must be "both cognizable under and adjustable by the terms of the contract." 385 F.2d at 442. In a 1998 decision of the Court of Federal Claims, Yankee Atomic Elec. Co. v. United States, 42 Fed. Cl. 223 (1998) (Yankee Atomic), the term "complete relief" was defined as "a reasonably adequate substitute for the damages available in a breach action." Id. at 230-31.[2] The court in Yankee Atomic stated that "[t]he presence of a limited contractual remedy for a breach does not automatically bar a court action for additional relief unless the parties clearly agreed that the contractual remedy would be exclusive." Id. at 232.

In the Yankee Atomic case, the United States Department of Energy (DOE) had promised under contract, in return for payment of fees, to begin disposing not later than January 31, 1998 of spent nuclear fuel and high-level radioactive waste. Id. at 225. When DOE failed to perform on time, the plaintiff Yankee Atomic sought damages for breach of contract. Id. DOE argued for a dismissal of the case, alleging that its postponement of its obligations was an "avoidable delay" within the meaning of a particular contract clause which called for specific relief in such a situation, and that Yankee was entitled solely to a limited remedy included in that clause of the contract. Id. at 232. The court rejected DOE's contention, noting that the clause "does not purport to be an exclusive remedy, nor

---

[2] Because the contract at issue in Yankee Atomic employed a provision which was similar to the disputes clause used in government contracts before passage of the CDA, and because the defendant in Yankee Atomic had decided to use the pre-CDA dispute resolution process after concluding that the CDA was inapplicable, the court in Yankee Atomic analyzed the case before it under pre-CDA law. Id. at 230.

does it contain any language limiting either party's liability for avoidable delays which constitute a breach of the contract." Id. at 233. The court found that Yankee could bring a breach of contract action because it could not be afforded complete relief under the contract, as an "adequate adjustment" to the contract charges was not available. See id. at 234.

However, in another Court of Federal Claims decision, Northern States Power Co. v. United States, 43 Fed. Cl. 374 (1999) (Northern States), which was based upon nearly-identical facts, the court dismissed the case for failure to pursue contract-mandated administrative remedies. Id. at 376. The court found that the claim did arise under the contract, and was, thus, subject to remedial procedures established by the contract, because the contract provided complete relief. Id. at 387. The court stated:

> That the relief specified [under a contract] may be less than a common law remedy might offer in the same circumstances has nothing to do with the issue. The only consideration that counts is whether the parties' contract contains language that addresses the specific contingency to which the claim relates and specifies the adjustment that is to be provided in the event liability is established.

Id. at 386.

These decisions present contradictory resolutions of the legal issue in dispute between Hamilton Securities and the government in the present case. In its most basic formulation, the issue is whether a party may seek consequential damages which arise from another party's deficient provision of contracted services if the contract identifies at least some remedies which may be obtained for defects in services. Neither the Yankee Atomic holding nor the Northern States holding create binding precedent and both cases are currently on appeal in the United States Court of Appeals for the Federal Circuit. While both decisions were careful examinations of the legal issue, this court respectfully concurs with the reasoning in the Yankee Atomic case and finds that, considering the factual pattern presented in the case currently before the court, the government is not foreclosed from seeking consequential damages from Hamilton Securities. The court agrees with the government's assertion that the instant case resulted in two distinct losses to the defendant: (1) a reduction in the value of the services received, and (2) identifiable consequential damages ensuing from the rendering of the defective services.[DM11] The Inspection of Services Clause addresses the first type of loss, but does not allow for adjustment for the identifiable consequential damages alleged.

The pertinent part of the Inspection of Services Clause included in the contract at issue states that "[w]hen the defects in services cannot be corrected by reperformance, the Government may (1) require the Contractor to take necessary action to ensure that future performance conforms to contract requirements and (2) reduce the contract price to reflect

the reduced value of the services performed." With both contracts completed, correction of future performance is not an option. At best, under the Inspection of Services Clause, the government could effect a price reduction reflecting the reduced value of the services at issue – namely, the running of the optimization model for the West of the Mississippi Sale and the North/Central Sale. Hamilton alleges that the total cost of running the model for the two sales was $79,000.00 and that the Government's right to adjust the contract price is limited to that amount.

This court does not agree that defendant's damages must be limited to a $79,000.00 reduction. The price which the government was to pay for the services, and the damages which the government may have suffered from the faulty execution of the services, are not comparable. Under plaintiff's reasoning, the Inspection of Services Clause would effectively become a limitation of liability clause. However, another standard clause is available which specifically is titled "Limitation of Liability – Services (April 1984)." See 48 C.F.R. § 52.246-25 (1995). This clause was included in the 18505 contract, but it is of no help to the plaintiff because it is intended only to limit liability for damage to government property.

The reasoning of the court in Yankee Atomic, dealing with an analogous factual situation, supports the decision here. In that case, although there was a contract clause which discussed remedies for the defendant's delay breach, the court specifically noted that the clause "does not purport to be an exclusive remedy, nor does it contain any language limiting either party's liability for avoidable delays which constitute a breach of the contract." Yankee Atomic Elec. Co. v. United States, 42 Fed. Cl. at 233. The same is true in the instant case with respect to the Inspection of Services Clause, as there is no language suggesting that the reduction in price is to be the government's exclusive remedy, or that there is a "cap" on the damages which the government might otherwise seek. The court noted in Yankee Atomic, and the court here agrees, that "[t]he presence of a limited contractual remedy for a breach does not automatically bar a court action for additional relief unless the parties clearly agreed that the contractual remedy would be exclusive." Id. at 232.

Furthermore, this court's holding is consistent with the most recent examination of the Inspection of Services Clause by a Board of Contract Appeals, the Armed Services Board of Contract Appeals in Appeal of PAE Int'l, ASBCA 45314, 98-1 BCA ¶ 29,347 at 145,916 (1997) (PAE). In PAE, the named appellant had contracted with the United States to perform building maintenance services at the United States Embassy in Tokyo, Japan. Id. at 145,917. At various times from 1973 until 1990, several employees of both PAE and the Embassy stole fuel oil from the Embassy. Id. at 145,916. In 1992, a contracting officer issued a final decision finding PAE liable for damages under theories of breach of contract, negligence and respondeat superior. Id. at 145,921. PAE appealed to the Armed Services Board of Contract Appeals, arguing that the government should have been limited to its remedies under the Inspection of Services Clause. See id.

As the board's reasoning in PAE is directly on par with the court's analysis of the parties' arguments in this case, the board's discussion with respect to the Inspection of Services Clause is reproduced in full below:

> The Government seeks damages for breach of contract. It does not assert a claim under the Inspection of Services-Fixed Price clause, FAR 52.246-4 (APR 1984). Appellant contends that the Government is limited to its remedies under that clause.
>
> As a general principle, "a claim remediable under a contract clause is not a breach and cannot be remediable as a breach." Johnson & Sons Erectors Co. v. United States, 231 Ct. Cl. 753, 759, cert. denied, 459 U.S. 971 (1982). Accord Triax-Pacific, ASBCA No. 36353, 91-2 BCA ¶ 23,724 at 118,747, aff'd, 958 F.2d 351 (Fed. Cir. 1992); L. W. Foster Sportswear Co., Inc. v. United States, [13 CCF ¶ 82,493] 405 F.2d 1285, 1287 (Ct. Cl. 1969); Morrison-Knudsen Co. v. United States, [10 CCF ¶ 73,010] 345 F.2d 833, 837 (Ct. Cl. 1965). On the other hand, "when only partial relief is available under the contract . . . the remedies under the contract are not exclusive and the contractor may secure damages in breach of contract . . . ." United States v. Utah Construction and Mining Co., [11 CCF ¶ 80,489] 384 U.S. 394, 402 (1966). Accord Len Co. and Associates v. United States, 385 F.2d 438, 451 (Ct. Cl. 1967).
>
> Subject to limitations such as the requirement of foreseeability, the injured party in an action for breach of contract is entitled to recover for two types of loss: "the loss in the value to him of the other party's performance caused by its failure or deficiency" and "any other loss, including incidental or consequential loss, caused by the breach . . . ." (Restatement (Second) of Contracts § 347. Measure of Damages in General (1981)). Consequential losses "include such items as injury to person or property resulting from defective performance" (id., comment c) See also San Carlos Irrigation and Drainage District v. United States, 111 F.3d 1557, 1562-63 (Fed. Cir. 1997) ("The general rule in common law breach of contract cases is to award damages sufficient to place the injured party in as good a position as he or she would have been had the breaching party fully performed"). Complete, as opposed to partial, relief for breach of contract includes, therefore, recovery for both types of loss.
>
> The Inspection of Services clause provides that when defects in services cannot be corrected by reperformance, "the Government may ... reduce the contract price to reflect the reduced value of the services performed" (FAR 52.246-4(d)). The clause thus provides for recovery of the first type of loss, the loss in value of the other party's performance. It does

> not provide for recovery of the second type of loss, the incidental or consequential loss. It follows, therefore, that the Inspection of Services clause provides only partial relief for defects in services and does not preclude a claim for breach of contract seeking relief for the second type of loss. We agree in this regard with the majority in General Electric Co., ASBCA No. 45936, 94-1 BCA ¶ 26,578 at 132,241, which, construing FAR 52.246-2, Inspection of Supplies--Fixed Price (APR 1984), "decline[d] to adopt the proposition that the Inspection clause, as a matter of law, constitutes the exclusive remedy for a Government's breach of contract damages claim . . . ."

Id.

Similarly, in the case before this court, the Inspection of Services Clause can provide relief only for the diminished value of the services provided by Hamilton, namely, the running of the optimization model for the West of the Mississippi Sale and the North/Central Sale. The reduced value of those services is distinct from the consequences which resulted from their improper execution. This is consistent with the view espoused in Restatement (Second) of Contracts § 347 (1981), which draws a distinction, in expectation interest damages, between "(a) the loss in the value to [the injured party] of the other party's performance caused by its failure or deficiency" and "(b) any other loss, including incidental or consequential loss, caused by the breach." The government's claim for damages resulting from those consequences – the government's alleged shortfall in proceeds from the mortgage auctions – is not within the scope of the Inspection of Services Clause and, thus, complete relief is not available "under the contract." See United States v. Utah Constr. and Mining Co., 384 U.S. at 402 (controversy may be tried de novo as suit for breach of contract unless "complete relief is available under a specific contract adjustment provision"); Edward R. Marden Corp. v. United States, 442 F.2d at 366-67 (controversy arises "under the contract" to the extent that "complete relief" is available under specific contract provisions). In the above-captioned case, the Inspection of Services Clause of both contracts does not provide an exclusive remedy and the defendant is not foreclosed from claiming consequential damages due to Hamilton's errors in running the optimization model.[3]

---

[3] Hamilton was terminated for the convenience of the government, not for default. However, the standard default clause, FAR 52.249-8 (April 1984), at paragraph (h) provides that: "The rights and remedies of the Government in this clause are in addition to any other rights and remedies provided by law or under this contract." 48 C.F.R. § 52.249-8(h) (1995). This language has been interpreted as "reserving to the government the right to seek common law damages as well as contractually provided damages." Mega Constr. Co. v. United States, 29 Fed. Cl. at 415 n.11, 486; see also Yankee Atomic Elec. Co. v. United States, 42 Fed. Cl. at 233 (The Remedies clause provides that"[n]othing in

As the United States Supreme Court observed in United States v. Winstar, 518 U.S. 839 (1996), "damages are always the default remedy for breach of contract." Id. at 885. Citing 3 E. Farnsworth, Contracts § 12, at 185 (1990), the Court stated that "[t]he award of damages is the common form of relief for breach of contract. Virtually any breach gives the injured party a claim for damages." Id. at 885 n.30. The United States Court of Appeals for the Federal Circuit also has noted that, in breach of contract cases, an award of damages should "place the injured party in as good a position as he or she would have been had the breaching party fully performed." San Carlos Irrigation and Drainage Dist. v. United States, 111 F.3d 1557, 1562-63 (Fed. Cir. 1997) (reh'g denied); see also Restatement (Second) of Contracts § 344 (1981).

After the Supreme Court affirmed the government's liability for breach of contract in Winstar, the Court remanded the consolidated cases to the Court of Federal Claims to determine the measure of damages. Id. at 910. In one of those remanded cases, Glendale Federal Bank, FSB v. United States, 43 Fed. Cl. 390, 397 (1999), the Court of Federal Claims examined theories of contract recovery, including expectancy damages like those sought by the defendant in this case. The court in Glendale, citing the Restatement (Second) of Contracts § 344(a), noted: "A party's expectancy interest is the 'interest in having the benefit of his bargain by being put in as good a position as he would have been had the contract been performed." Id. This court agrees with the court in Glendale, which concluded, after reviewing the Federal Circuit opinion in Wells Fargo Bank, N.A. v. United States, 88 F.3d 1012 (Fed. Cir. 1996), cert. denied, 520 U.S. 1116 (1997), that "expectancy damages, including lost profits, are recoverable, so long as they are either actually foreseen or reasonably foreseeable, are caused by the breach of the promisor and are proved with reasonable certainty." Glendale Federal Bank, FSB v. United States, 43 Fed. Cl. at 398; see Lasalle Talman Bank, F.S.B. v. United States, 45 Fed. Cl. 64, 87-88 (1999) (citing Chain Belt Co. v. United States, 115 F. Supp. 701, 714 (Ct. Cl. 1953)); California Federal Bank v. United States, 43 Fed. Cl. 445, 450-51 (1999).

With respect to the first requirement for recovering expectancy damages, "foreseeability for consequential damages under government contract law is based upon what the parties contemplated as of the time the contract was made." Prudential Ins. Co. of America v. United States, 801 F.2d 1295, 1300 (Fed. Cir. 1986), cert. denied, 479 U.S.

---

this contract shall be construed to preclude either party from asserting its rights and remedies under the contract or at law. 10 C.F.R. § 961.11, Art. X1 (emphasis added). Similar language in the standard default clause has been held to preserve the government's right to pursue common law breach damages if the contractual remedies for default are unavailable or incomplete."); Tester Corp. v. United States, 1 Cl. Ct. 370, 375-76 (1982) (referencing Astro-Space Lab., Inc. v. United States, 470 F.2d 1003, 1019-20 (Ct. Cl. 1972); Marley v. United States, 423 F.2d 324, 334-35 (Ct. Cl. 1970); Rumley v. United States, 285 F.2d 773, 776-77 (Ct. Cl. 1961)).

1086 (1987). In the present case, the consequential damages which the government claims are simply the benefit of the bargain which both parties expected the government to receive. Both Hamilton and the government expected that the government would receive the maximum proceeds through the proper selection of winning bids from auctions conducted within specific parameters. The government did not receive that maximum amount through error on the plaintiff's part. As the government is claiming damages here which would bring those auction proceeds to the level which both parties contemplated, the damages were reasonably foreseeable.

As noted above, the second requirement for expectancy damages is that the damages must have been caused by the breach of the promisor. The parties in the present case have stipulated that, in both auctions, Hamilton gave to its subcontractor incorrect instructions for evaluating and choosing winning bids. As a result, the optimization model used by the subcontractor did not select the groups of bids that would have yielded the maximum sales proceeds within the parameters of the auctions. Thus, the error on the part of Hamilton directly led to the shortfall in auction proceeds for which the government is requesting an award of consequential damages.

The third requirement for awarding expectancy damages is that they be proven with reasonable certainty. The parties' stipulations do not allow for such a determination, and both parties will have to address this issue in detail as the case progresses. Thus, if defendant is able to prove its consequential damages with reasonable certainty, the court finds that, under post-CDA law applicable to this case, the government will be able to recover those consequential damages. In that eventuality, defendant will not be limited solely to recovering the alleged $79,000.00 value of the services at issue.

In addition, the parties have advanced arguments concerning whether or not Count II of defendant's First Amended Counterclaim, presenting tort-based claims of negligence and negligent misrepresentation,[4] is barred by the "economic loss rule." Hamilton argues

---

[4] This court has jurisdiction over these tort-based claims under 28 U.S.C. § 2508 (1994) and 28 U.S.C. § 1503 (1994). In pertinent part, these provisions read as follows:

> **§ 2508. Counterclaim or set-off; registration of judgment**
>
> Upon the trial of any suit in the United States Court of Federal Claims in which any setoff, counterclaim, claim for damages, or other demand is set up on the part of the United States against any plaintiff making claim against the United States in said court, the court shall hear and determine such claim or demand both for and against the United States and plaintiff.
>
> If upon the whole case it finds that the plaintiff is indebted to the

that "[t]he only losses HUD alleges are purely economic losses – there are no allegations of personal injury or property damage. HUD has alleged only that it was denied the expectations it bargained for – the identification of the bids that would yield optimum results."[PM,36]

Under the economic loss rule, "a plaintiff who suffers only pecuniary injury as a result of the conduct of another cannot recover those losses in tort. Instead, the claimant is limited to recovery under the law of contract." Apollo Grp., Inc. v. Avnet, Inc., 58 F.3d 477, 479 (9th Cir. 1995); see generally East River Steamship Corp. v. Transamerica Delaval Inc., 476 U.S. 858, 870-71 (1986). Judge Posner of the United States Court of Appeals for the Seventh Circuit recently explained rationales behind the rule:

> One explanation for it is that a tort may have indirect consequences that are beneficial . . . as well as harmful, and since the tortfeasor is not entitled to sue for the benefits, neither should he have to pay for the losses. Another and less esoteric explanation is the desirability of confining remedies for contract-type losses to contract law.

All-Tech Telecom, Inc. v. Amway Corp., 174 F.3d 862, 865 (7th Cir. 1999) (citations omitted). Judge Posner further explained:

> Where there are well-developed contractual remedies, such as the remedies that the Uniform Commercial Code (in force in all U.S. states) provides for breach of warranty of the quality, fitness, or specifications of goods, there is no need to provide tort remedies for misrepresentation. The tort remedies would duplicate the contract remedies, adding unnecessary complexity to the law. Worse, the provision of these duplicative tort remedies would undermine contract law.

Id.

In the present case, it is clear that the government's claimed damages are solely economic losses. In particular, the government seeks lost revenue which it allegedly would

---

> United States it shall render judgment to that effect, and such judgment shall be final and reviewable.
>
> **§ 1503. Set-offs**
>
> The United States Court of Federal Claims shall have jurisdiction to render judgment upon any set-off or demand by the United States against any plaintiff in such court.

have garnered from the auctions if they had been run properly and the correct bids had been accepted. Defendant first tries to avoid the application of the economic loss rule in this case by arguing that "many courts hold that the doctrine does not bar tort claims involving contracts for services," citing four cases. Two of defendant's cited cases indicate that under Michigan law, the economic loss rule is only applied to cases involving the sale of goods. Therefore, a tort claim concerning a contract for services would not be barred under the economic loss rule. See Cargill, Inc. v. Boag Cold Storage Warehouse, Inc., 71 F.3d 545, 550 (6th Cir. 1995); Allmand Assocs., Inc. v. Hercules Inc., 960 F. Supp. 1216, 1223 (E.D. Mich. 1997). Another of defendant's cited cases is consistent with the Michigan standard, but was decided under New York law and under an exception to the economic loss rule in New York for cases involving contracts for services. See American Tel. & Tel. Co. v. New York City Human Resources Admin., 833 F. Supp. 962, 983 (S.D.N.Y. 1993). Defendant's fourth cited case also recognizes a situation in which a party suffering a purely economic loss is allowed to pursue a tort cause of action against another who contracted to provide professional services. See Rockport Pharmacy, Inc. v. Digital Simplistics, Inc., 53 F.3d 195, 199 (8th Cir. 1995) (when plaintiff suffers only economic losses, a negligence claim still may proceed against defendant who is held to a professional, rather than an ordinary, standard of care, and who provided professional services to plaintiff). Other cases also note exceptions to the economic loss rule in limited circumstances. See, e.g., Moransais v. Heathman, 774 So. 2d 973, 982-83 (Fla. 1999); Lurzer v. Allied Signal, Inc., No. 96 C 3845, 1998 WL 102637 at *5 (N.D. Ill. Feb. 27, 1998) (citing In re Chicago Flood Litigation, 680 N.E.2d 265, 275 (Ill. 1997)).[5] By excepting particular types of professional service contracts from the application of the economic loss rule, these latter cases appear to indicate that the rule would apply generally to other types of service contracts. After considering these cases and others, the court is not convinced that the economic loss rule universally is held inapplicable to contracts for services.[6]

Defendant next argues that the economic loss rule does not apply to its tort counterclaims because there is an exception for negligent misrepresentation claims. Again, however, a survey of the case law in various jurisdictions of the United States does not support the government's contention. See Reeder R. Fox & Patrick J. Loftus, Riding

---

[5] The court notes that although the "professional services" contract fact pattern is often termed an "exception," this indicates an exception to the economic loss rule's general prohibition against recovery for tort claims when the claim is for economic loss only, not an exception to any prohibition against using the economic loss rule with respect to all service contracts. This latter prohibition appears not to be in existence anywhere except, perhaps, in Michigan and New York.

[6] The United States Supreme Court and the United States Court of Appeals for the Federal Circuit, both of whom have binding authority on this court, appear not to have addressed the issues raised in the instant case by the economic loss rule.

the Choppy Waters of East River: Economic Loss Doctrine Ten Years Later, 64 Def. Couns. J. 260, 268 (1997). Rather, the question appears unsettled. Compare Duquesne Light Co. v. Westinghouse Elec. Corp., 66 F.3d 604, 620 (3d Cir. 1995) (negligent misrepresentation held not to be an exception to the economic loss rule); Bailey Farms, Inc. v. NOR-AM Chem. Co., 27 F.3d 188, 191 (6th Cir. 1994) (Michigan law would not allow negligent misrepresentation exception to the economic loss rule); Apollo Grp., Inc. v. Avnet, Inc., 58 F.3d at 480 (Arizona law does not allow the negligent misrepresentation exception to the economic loss rule); with Squish La Fish, Inc. v. Thomco Specialty Prods., Inc., 149 F.3d 1288, 1291 (11th Cir. 1998) (Georgia law recognizes negligent misrepresentation exception to the economic loss rule); In re Ford Motor Co. Bronco II Prod. Liab. Litig., 1995 U.S. Dist. LEXIS at 18207 at *15 (E.D. La. Dec. 4, 1995) (under West Virginia, Indiana and Texas law, misrepresentation claims were not barred by the economic loss rule; under New York law, misrepresentation claims were barred); In re Chicago Flood Litig., 680 N.E. 2d at 275 (economic loss rule is inapplicable to negligent misrepresentations by a defendant in the business of supplying information); State by Bronster v. United States Steel Corp., 919 P.2d 294, 307 (Haw. 1996) (negligent misrepresentation claim is not barred by the economic loss rule).

Thus, this court is without binding precedent or a clear indication favoring either position with respect to whether or not the economic loss rule is inapplicable in the instant case. However, as Judge Posner noted, "where there are well-developed contractual remedies, . . . there is no need to provide tort remedies for misrepresentation. The tort remedies would duplicate the contract remedies, adding unnecessary complexity to the law. Worse, the provision of these duplicative tort remedies would undermine contract law." All-Tech Telecom, Inc. v. Amway Corp., 174 F.3d at 865. Accordingly, the rule should bar a negligence action when the duties giving rise to the action were created solely by contract. Palmetto Linen Serv., Inc. v. U.N.X., Inc., No. 99-1209, 2000 WL 235068 at *2 (4th Cir. March 2, 2000). "No tort duty can be imposed on a party where that party's same duties and rights are specifically defined by contract." Hess Oil Virgin Islands Corp. v. UOP, Inc., 861 F.2d 1197, 1201 (10th Cir. 1988) (citing Isler v. Texas Oil & Gas Corp., 749 F.2d 22 (10th Cir. 1984)); see Wolf v. United States, 855 F. Supp. 337, 340 (D. Kansas 1994) ("[A] claim for negligence must be based on a duty separate from a contractual duty.").

In the present case, with respect to duties, the government's First Amended Counterclaim states only that "Hamilton owed HUD a duty to exercise reasonable care in performing services for HUD." The statement itself indicates that any duties which Hamilton owed to the plaintiff sprang from their contractual relationship for the provision of specific services. Were it not for the contract, plaintiff would have had no relationship with defendant. In addition, in light of the court's holding above that the government's contractual remedies may encompass consequential damages, permitting the government to proceed with its tort counterclaims in this case would allow duplicative remedies in contract and tort. Since such duplication is exactly the outcome which the economic loss

rule sensibly is designed to prevent, the court holds that defendant's tort counterclaim should be barred and is dismissed.

CONCLUSION

After thoroughly reviewing the record and carefully considering the arguments, the court holds that the Inspection of Services Clause in the 18161 and 18505 Contracts is not an exclusive remedy. Under Count I of defendant's First Amended Counterclaim, the government may recover provable consequential damages allegedly arising from plaintiff's defective furnishing of services. However, because the government allegedly has suffered purely economic losses in the form of possible lost revenues from the improper conduct of the auctions, the court also holds that the economic loss rule bars defendant from pursuing its tort counterclaims, and the court **ORDERS** that **Count II** of defendant's First Amended Counterclaim is **DISMISSED**.

IT IS SO ORDERED.

MARIAN BLANK HORN
JUDGE