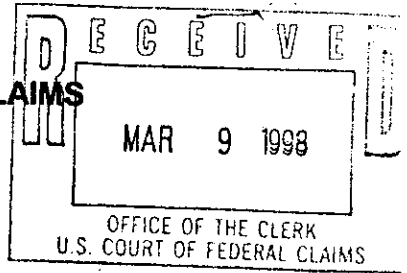


IN THE UNITED STATES COURT OF FEDERAL CLAIMS



HAMILTON SECURITIES ADVISORY SERVICES, INC.
7 Dupont Circle, N.W.
Washington, D.C. 20036

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

CASE NO. 97-__C

(JUDGE _____)

COMPLAINT

COMES NOW, Plaintiff, Hamilton Securities Advisory Services, Inc. ("Hamilton"), and alleges as follows for its Complaint:

INTRODUCTION

1. This is an action seeking payment of \$1,505,256 for work Hamilton performed under a contract with the U.S. Department of Housing and Urban Development ("HUD"). Hamilton submitted proper invoices for the work, and HUD has acknowledged that it is indebted to Hamilton in the claimed amount. Nevertheless, HUD has wrongfully refused to pay Hamilton's certified claim on the basis that it has an alleged offset. HUD's offset claim is wholly without legal or contractual basis and is, therefore, in breach of contract. Accordingly, Hamilton is entitled to a judgment in the amount of \$1,505,256, plus interest allowed by law.

JURISDICTION

2. This Court has jurisdiction over this action pursuant to the Tucker Act, 28 U.S.C. § 1491(a)(1) and the Contract Disputes Act of 1978, 41 U.S.C. § 609(a)(1).

FACTUAL ALLEGATIONS

The Contract

3. On January 24, 1996, HUD awarded contract number DU100C000018505 (the "18505 Contract" or the "Crosscutting Contract") to Hamilton for the performance of financial advisory support services related, among other things, to the sale, refinancing or auction of HUD-held mortgages. A copy of the 18505 Contract is attached hereto as Exhibit 1.

4. The 18505 Contract was an indefinite quantity contract, under which services were to be ordered by the issuance of task orders. The terms of the 18505 Contract applied to all task orders issued under it, and those terms are incorporated by reference as though fully set forth herein. Among other things, the 18505 Contract contained the Payments clause (Federal Acquisition Regulation ("FAR") 52.232-1 (April 1984)); the Prompt Payment clause (FAR 52.232-25 (March 1994)); the Disputes Clause (FAR 52.233-1 (March 1994)); and the Limitation of Liability—Services clause (FAR 52.246-25 (April 1984)).

5. On April 25, 1996, HUD issued to Hamilton Task Order Number 1 under the 18595 Contract ("Task Order 1"). A copy of Task Order 1 is attached hereto as Exhibit 2.

6. Task Order 1 stated that Hamilton was to assist HUD in managing so-called "crosscutting" issues associated with portfolio restructuring and asset sales. "Crosscutting" issues were ones that had ramifications on – or cut across – all restructuring and sales transactions and were best handled on a coordinated basis by a single entity. Hamilton was expected to provide advice on such issues as a means of achieving desired consistency and efficiency among Federal Housing Administration ("FHA") activities. Hamilton was not employed to provide comprehensive advice on discrete sales or restructuring transactions.

7. The Task Order provided that "[t]he contractor shall be paid the amount of \$868,417 on a monthly basis not to exceed \$20,842,000 for monthly summary of activities and other required reports and services performed as outlined in the Statement of Work."

HUD's Failure To Pay Hamilton's Invoices

8. On April 26, 1996, Hamilton began performing services for HUD pursuant to Task Order 1. On October 17, 1997, HUD terminated the 18505 Contract and Task Order 1 for the convenience of the Government.

9. Hamilton submitted monthly invoices to HUD in the amount of \$868,417, and HUD paid Hamilton's invoices in full for the period of April 26, 1996 through August 25, 1997.

10. On September 26, 1997, Hamilton submitted a proper invoice to HUD in the amount of \$868,417 for work performed during the period of August 26 through September 25, 1997 (the "September Invoice" or "Voucher No. 17"). A copy of the September Invoice is attached hereto as Exhibit 3. To date, HUD has wrongfully failed and refused to pay Hamilton's September Invoice.

11. On October 23, 1997, Hamilton submitted a proper invoice to HUD in the amount of \$636,839 for work performed during the period of September 26 through October 17, 1997 (the "October Invoice" or "Voucher No. 18"). A copy of the October Invoice is attached hereto as Exhibit 4. The amount invoiced was pro rated on the contractual monthly payment. To date, HUD has wrongfully failed and refused to pay Hamilton's October Invoice.

12. By letter dated December 10, 1997, Hamilton submitted to the contracting officer its certified claim in the amount of \$1,505,256 plus interest. A copy of Hamilton's certified claim is attached hereto as Exhibit 5. The amount claimed was the aggregate of the amounts of the September and October Invoices (\$868,417 and \$636,839, respectively).

13. The contracting officer has failed to respond to Hamilton's certified claim within 60 days, as required by the Contract Disputes Act of 1978. By failing to respond as required by the Contract Disputes Act of 1978, the contracting officer has effectively denied Hamilton's claim. The Government has, however, acknowledged that it is indebted to Hamilton in the amount set forth in Hamilton's certified claim. (An excerpt of a court transcript is attached as Exhibit 6 hereto.)

The Contracting Officer's Baseless Offset Claim

14. The contracting officer has also taken other action that has had the effect of denying Hamilton's claim. On October 17, 1997, the contracting officer issued a letter demanding that Hamilton make a "voluntary repayment" of \$3,883,551, which the contracting officer alleged was the amount of loss HUD suffered as a result of an alleged "performance failure" on Hamilton's part under the 18505 Contract. The letter further stated that HUD was "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." A copy of the October 17, 1997 letter is attached as Exhibit 7 hereto.

15. The claim asserted by the contracting officer actually relates to Hamilton's performance of advisory services in connection with two mortgage auctions, the North Central Sale and the West of Mississippi Sale. The North Central Sale was conducted under the 18505 Contract, but the West of Mississippi Sale was

conducted pursuant to another, separate contract, Contract No. DU100C000018161 (the "18161 Contract").

16. Hamilton discovered a discrepancy in the way the bid "floor" was applied in the two auctions. Each bidder was permitted to designate the minimum aggregate dollar amount of awards it would have to be awarded – its "floor" – in order to make any of its bids binding. If the bidder's winning bid did not aggregate at least the amount of the designated floor, the bidder would receive no awards.

17. The bid instructions stated that floor for individual bidders should be expressed in terms of the unpaid principal balance ("UPD") of the loans bid upon, but, on the two referenced sales, the so-called "Optimization Model" calculated the winning bids as if the floor had been expressed in terms of minimum revenue (i.e., the price offered by the bidder). The Optimization Model was a computer model that evaluated the optimum combination of bids to accept in the auction.

18. Hamilton has estimated that, if the discrepancy had not existed and all other sale variables were construed most favorably towards HUD, HUD possibly might have collected an additional \$3,883,551 on such sales. The potential additional amount represented less than four tenths of one percent of the total \$1,006,871,149 that HUD actually realized on such sales. This amount (\$3,883,551) also is far less than the monetary advantage HUD derived from use of the Optimization Model.

19. Hamilton fully disclosed the discrepancy to HUD in December 1996 and took appropriate action to assure the discrepancy did not occur again. HUD did not request Hamilton to take any further corrective action. Although the HUD Assistant Secretary for Housing/Federal Housing Commissioner and the HUD Comptroller were both personally aware of these circumstances in December 1996, HUD took no action to assert a claim against Hamilton until October 1997. Between December 1996 and September 1997, HUD fully paid all of Hamilton's invoices.

20. Upon its receipt of HUD's October 17th letter, Hamilton, acting by and through its attorneys, "vigorously dispute[d]" HUD's claim and rejected any "notion that Hamilton acted as an underwriter and/or guarantor on mortgage sales." A copy of Hamilton's response is attached hereto as Exhibit 8. Nevertheless, by letter dated December 30, 1997, HUD's Office of General Counsel advised Hamilton that HUD was exercising set off rights based on an alleged "breach of contract" by Hamilton. A copy of the December 30, 1997 letter is attached hereto as Exhibit 9. HUD's December 30, 1997 letter effectively denies Hamilton's claim for payment of \$1,505,256. Although fully aware of this alleged "breach" in October 1997, HUD elected to terminate the 18505 Contract for convenience rather than for default.

21. 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.

COUNT I -- BREACH OF CONTRACT

22. The allegations of paragraphs 1 through 21 above are realleged and incorporated by reference as though fully set forth herein.

23. Hamilton properly invoiced HUD, and HUD is indebted to Hamilton, in the amount of \$1,505,256.

24. HUD's failure to pay Hamilton's September and October Invoices was wrongful and in breach of contract.


25. HUD's withholding of payments to Hamilton on the basis of the allegations set forth in its October 17, 1997 letter was wrongful and in breach of contract.

PRAYER FOR RELIEF

WHEREFORE, HAMILTON demands judgment against the Defendant as follows:

1. Judgment in the amount of \$1,505,256, plus interest allowed by law;
and
2. Such other and further relief as the Court may deem just and proper.

Respectfully submitted,



Claude P. Goddard, Jr.
Kilcullen, Wilson and Kilcullen, Chtd.
1800 K Street, N.W.
Suite 300
Washington, DC 20006
Telephone: (202) 296-5700
Fax: (202) 296-5706
Attorney for Plaintiff

3/9/98
Dated

OF COUNSEL:
Christopher M. Johnson
Kilcullen, Wilson and Kilcullen, Chtd.
1800 K Street, N.W.
Suite 300
Washington, DC 20006
Telephone: (202) 296-5700
Fax: (202) 296-5706