

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

<b>UNITED STATES <i>ex rel.</i></b>	)
<b>ERVIN AND ASSOCIATES, INC.</b>	)
	)
	)
<b>Plaintiffs,</b>	)
	)
	) <b>Civ. Action No. 96-CV-1258 (LFO) (AK)</b>
	) <b>Civ. Action No. 99-CV-1698 (LFO) (AK)</b>
<b>THE HAMILTON SECURITIES</b>	)
<b>GROUP, INC. <i>et al.</i></b>	)
	)
	)
<b>Defendants.</b>	)

**PLAINTIFF-RELATOR'S REPLY TO HAMILTON SECURITIES'  
MODIFIED PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Plaintiff-Relator Ervin and Associates, Inc. ("Ervin") hereby replies to Hamilton Securities' Modified Proposed Findings of Fact and Conclusions of Law. Hamilton's Modified Proposed Findings/Conclusions presents many of the same arguments raised in the Rule 52(c) proceedings. Ervin generally will not repeat its previous responses to these arguments, and respectfully refers the Court to Ervin's briefs in the Rule 52(c) proceedings. Herein, Ervin will address facts and evidence, or the lack thereof, presented in the July 19-21, 2004 resumed trial.

**I. Subject Matter Jurisdiction**

The "original source" issue was fully briefed during the summary judgment and Rule 52(c) proceedings. Hamilton presented no evidence at the July 19-21, 2004 resumed trial on this issue. Nor does it raise any new evidence or arguments in its Modified Proposed Findings and Conclusions. Accordingly, Ervin has met its burden to establish subject matter jurisdiction.

**II. North and Central Note Sale**

Hamilton has not met its burden to demonstrate that the West of Mississippi ("WOM") optimization errors' replication is not actionable gross negligence in the extreme. See Jan. 7,

2004 Order at 1-2. Hamilton improperly attempts to distance itself from the reckless conduct of its officer and director, Robert Robinson, and lay the blame on its subcontractor, Lucent/Bell Labs. Even under Hamilton's version of the facts, Robinson behaved recklessly in failing to inform others in Hamilton, Bell Labs or HUD, in the three and one-half months before he left Hamilton, of the nature of the problem and the need to ensure that Bell Labs corrected the WOM optimization errors before the next multifamily note sale. Hamilton is vicariously liable for Robinson's and Lucent/Bell Labs' conduct even if nobody else in the company knew what Robinson and Sol Schindler knew. *See United States v. O'Connell*, 890 F.2d 563, 568-69 (1st Cir. 1989) (corporation held liable under the False Claims Act for the fraudulent conduct of an agent acting within the scope of his authority); *see also United States ex rel. Ali v. Daniel, Mann, Johnson & Mendenhall*, 355 F.3d 1140 (9<sup>th</sup> Cir. 2004 (corporation vicariously liable for employees' false statements to government agency where employees recklessly failed to investigate the truth of the statements). Hamilton also bears responsibility for not debriefing Robinson, Schindler, Michael Brocks or Henry Fan and each of their supervisors (who should have been informed of the problem) immediately after the WOM sale and long before the North and Central sale, or reviewing the bidding documents, in connection with the required WOM Post-Auction Review.<sup>1</sup> Hamilton's assertions of "openness" and "transparency" make the failure to discover these errors even more unforgiveable.

Hamilton added no new facts in its defense case. Hamilton states: "When the time came to optimize the North Central bids, Rick Wolf, who had no reason to believe that Bell Labs had two different optimization models, instructed Bell Labs to use the model from the WOM sale."

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<sup>1</sup> Schindler had returned to Bell Labs from his medical leave before the North and Central Note sale. See PX 77 at 4, ¶ 17.

Ham. Pr. Find./Concl. at 30. Rick Wolf did not testify at the trial nor did anyone from Bell Labs. There was no admissible evidence as to what Wolf (or any other Hamilton employee who was actually involved) knew during the North and Central sale. Moreover, Hamilton presented no evidence as to why, if Wolf instructed Bell Labs to use the model from the WOM sale, neither he nor any other Hamilton or Bell Labs employee made an effort to find out whether that model had worked correctly during the WOM sale.<sup>2</sup>

Hamilton shrugs off these problems as a mere "failure to have adequate backup lines of communication." Ham. Pr. Find./Concl. at 30. In reality, there is no evidence of any communication between the WOM and North Central note sale teams or between the members of the WOM team, particularly immediately after the sales when the participants' memories are fresh. This is contrary to Hamilton's representations to HUD in the "Lessons Learned" section of the WOM Post-Auction Review, wherein Hamilton stated "[b]oth during the WOM Sale and immediately thereafter, members of the Sale Team presented ideas for enhancing the loan sales program." HX 167 at 17.

Referring to the December 4, 1996 and December 20, 1996 memoranda resulting from the "Manhattan project" investigation, Hamilton argues that it "fully documented and disclosed to HUD the source of those errors." Ham. Pr. Find./Concl. at 32. But those memoranda came only after HUD's Office of Inspector General ("OIG") and the news media began investigating

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<sup>2</sup> There are inconsistencies in Hamilton's version of events. Hamilton now contends that Schindler told Robinson he would permanently correct the bid floor definition problem in the optimization model, and Robinson accepted this representation. Ham. Pr. Find./Concl. at 5, ¶ 11. By contrast, in the December 20, 1996 memorandum, Hamilton states that "the Lucent/Bell Labs technician determined *on his own*, that he would develop a UPB model and would therefore have both a revenue and UPB model for future sales." PX 77 at 4, ¶ 11 (emphasis added).

the note sale program.<sup>3</sup> As Kevin McMahan testified, Hamilton learned of the WOM optimization errors in a two-to-three hour interview of Robert Robinson during the Manhattan project. Hamilton cannot explain why it did not interview Robinson and others before the North and Central note sale and before problems on that sale arose. The appropriate time and forum to "document and disclose" the WOM optimization errors was in preparing the contractually-required WOM Post-Auction Review that should have been completed immediately after the WOM sale, so that all responsible parties could identify the WOM problems and ensure they did not re-occur.

Finally, it must again be emphasized that although Hamilton knew the note sales were the subject of an OIG investigation under which two subpoenas had been issued to Hamilton, the reply for which was the responsibility of Kevin McMahan, then employed by Hamilton's outside counsel (see July 19, 2004 Tr. at 80-81), Hamilton did not provide the December 1996 optimization memoranda to the OIG or the contracting officer. This fact is inconsistent with the so-called "mantra" of transparency and openness.

In sum, Hamilton has not met its burden to "demonstrate that the [WOM] errors' replication is not actionable gross negligence in the extreme." See Jan. 7, 2004 Order at 1-2.

### **III. Single Family #1 Reoffering Note Sale.**

Hamilton now contends that in presenting the acceptable options on the Single Family #1 Reoffering, Hamilton recommended option #4 instead of option #1. Ham. Pr. Find./Concl. at 34. Hamilton has never before contended that it recommended option #4 or that it made any recommendation at all in connection with the Single Family #1 Reoffering. Its present

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<sup>3</sup> These memoranda did not mention the exclusion of ALI pool bid #3 or the fact that the December 4, 1996 memorandum produced a different result from the December 20, 1996 memorandum.

contention that it recommended option #4 is based solely on the testimony of Helen Dunlap. *Id.* Dunlap testified that she recalled "Hamilton made a light which means they were not vehement, recommendation that we seek the best return for the taxpayer. Which would have been in this case, option four I believe." Tr. 137 (Dunlap). However, two other Hamilton witnesses with knowledge of the sale testified that they recalled Hamilton making a recommendation, but could not recall which option they recommended. See July 19, 2004 Tr. at 33 (McMahan); Oct. 31, 2003 Tr. at 175 (Robinson).

Dunlap's testimony on this point is inconsistent with Hamilton Exhibit 223 - - a Record of Discussion between the Hamilton Single Family #1 note sale team and the HUD OIG:

The option selected (#1) does not appear to agree with HUD's sale objectives listed in the Single Family #1 Post Auction Review to 1) maximize sale proceeds; and 2) maximize credit subsidy.

**Response:** [Hamilton employee] Jim Ladd said in hind sight another option may have agreed with the Mortgage Sale Program's goals better, *but at the time everyone agreed that liquidating HUD's inventory was the highest priority item.*

HX 223 at bates HUD/KK 000490 (emphasis added). Surely, the Hamilton employees would have told the OIG if they had recommended an option other than the option selected by HUD. Thus, Dunlap - - an obviously biased witness given her relationship with Austin Fitts and animosity toward Ervin - - is either not credible or not recalling correctly, and her testimony should thus be discounted.

Even if Dunlap is correct that Hamilton made a "light" recommendation of option #4, Hamilton should not have presented the BlackRock/Goldman Sachs bid to Commissioner Retsinas as an acceptable option because it was below the pre-established 74% minimum published threshold bid price. At a minimum, Retsinas had the right to know that Hamilton was

pursuing deals with the members of the bidding team represented by option #1, i.e., BlackRock and Goldman Sachs, before he selected a bid that manifestly did not meet the pre-established threshold price.<sup>4</sup>

With respect to Hamilton's pursuit of deals with Goldman Sachs, Hamilton relegates that issue to a footnote: "Ervin's half-hearted claim that a single conversation between a mid-level Hamilton employee and someone at Goldman Sachs amounts to an organizational conflict of interest is unsustainable, particularly give the undisputed evidence that Hamilton and Goldman Sachs never did any business together." Ham. Pr. Find./Concl. at 35 n.7. The so-called "mid-level" Hamilton employee was Grace Huebscher. She was the "transaction lead" in charge of the WOM sale and was tangentially involved in the Single Family #1 Reoffering. See Oct. 30, 2003 Tr. 112 (Huebscher). Her discussions with Goldman Sachs about "evaluat[ing] the potential federal loan sale opportunities based upon information we have or are able to collect" occurred on October 16, 1995 -- less than three weeks before the Single Family #1 Reoffering -- and called for a follow-up between the parties in one month. PX 205.

Nor does Hamilton address Grace Huebscher's November, 19, 1995 e-mail to Wes Edens of BlackRock, which stated:

Lastly I hope the next several months will allow BlackRock to get better leverage from the association with the HUD business through this contract and I will do whatever I can to make that happen.

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<sup>4</sup> In his November 1, 1995 letter to HUD Secretary Cisneros, BlackRock's Chief Operating Officer, Wes Edens, acknowledged that the Single Family # 1 Reoffering sale is "subject to a bid minimum of 74.0%." PX 88. Yet days later, BlackRock bid a price that was 73.11% of UPB. Hamilton has never explained why BlackRock had any reason to believe that its bid on the Reoffering, which was below the published minimum, could or would be accepted, particularly in light of BlackRock's original Single Family #1 bid being rejected because it did not meet an unpublished minimum.

PX 82. The same e-mail discusses the delays requiring extension of BlackRock's ten-month, \$1,250,000 subcontract with Hamilton on the partially assisted sale. Hamilton never provided any evidence that BlackRock was paid for the full amount of its subcontract or for the delays for which Hamilton received a contract price increase.<sup>5</sup> These facts create the appearance of a conflict between Hamilton and the most successful of all note buyers, and should have warranted some disclosure to the contracting officer.

An organizational conflict of interest is defined in the HUD-Hamilton first Financial Advisor contract as, among other things, "a situation in which the nature of work under a Government contract and a Contractor's organizational, financial, contractual or other interests are such that ... [t]he Contractor's objectivity in performing the contract work may be impaired." HX 8 at I-1 (quoting 48 C.F.R. 2452.209-72(a)). Certainly, Hamilton's (i) pursuit of at least a potential business relationship with Goldman Sachs shortly before the Single Family #1 sale and (ii) a substantial liability to BlackRock that Hamilton was considering converting into equity, "may" impair its objectivity in evaluating and presenting note sale bids to Commissioner Retsinas. Thus, Hamilton was required to disclose this potential relationship to the HUD contracting officer. *See Id.* at 2452.209-72(b). Hamilton failed to do so.

Accordingly, Ervin is entitled to judgment on its Single Family #1 Reoffering claim.

#### **IV. Williams, Adley 8(a) Contract**

With regard to the 8(a) contract, Hamilton argues that "[t]here is no evidence of any secret arrangements." Ham. Pr. Find./Concl. at 37. In fact, there is substantial un-rebutted evidence of a pre-contract agreement between Hamilton and Williams, Adley to divide up the

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<sup>5</sup> In early 1996, Hamilton through Williams and Adley, had its contract modified to increase the payments to Hamilton by \$1,241,000 million.

8(a) contract. Hamilton and Williams, Adley not only failed to disclose this agreement to the contracting officer, but they misled her into believing that Williams, Adley would solicit competition for task order subcontracts for financial advisory work. Hamilton failed to address this agreement during its defense case.

Hamilton emphasizes that the 8(a) contract was an “indefinite delivery, indefinite quantity” contract, meaning that work requirements and prices are defined not in the basic contract itself, but in task orders negotiated and issued by the contracting officer subsequent to the award of the basic contract. Ham. Pr. Find./Concl. at 37. The contracting officer, Annette Hancock, asked Williams, Adley to describe how it would award task order subcontracts. Williams, Adley replied on February 22, 1995: “When subcontracting is required under a task order, WA&Co will solicit proposals from one or more firms from its data base.” Williams, Adley Exhibit 72. In its response, Williams, Adley identified Kenneth Leventhal, Ernst & Young and Chemical Bank as financial advisors it had previously worked with. Ham. Pr. Find./Concl. at 14, ¶ 36. In its November 2, 1994 cost proposal, Williams, Adley included CS First Boston, KPMG Peat Marwick, Coopers & Lybrand and Hamilton as available financial advisory subcontractors. Williams, Adley Exhibit 27. Based on this, it appeared that Williams, Adley had access to at least seven qualified financial advisory subcontractors from which it could solicit task order bids, making competition for subcontractors possible.

Ervin further demonstrated that, unbeknownst to Hancock, even before Williams, Adley represented that it would “solicit proposals” for subcontract task orders, Hamilton was busy drafting those very same task orders. Oct. 29, 2003 Tr. at 53 (Hancock); PX 43; PX 56; PX 57;

PX 194. Hamilton Chief Financial Officer Brian Dietz acknowledged the covert nature of this arrangement:

Our arrangement with HUD whereby we draft the task orders (under TO6) so that we can do the work under the 8(a) contract is pretty unusual (although not in violation of any procurement regulation). Given all the unique rules relating to subcontractors under the 8(a) program, the less of a paper trail back to us the better (in case someone files a bid protest).

PX 57; Nov. 3, 2003 Tr. 284-285 (Dietz).

Ervin also demonstrated that even before the basic 8(a) contract was awarded, Hamilton's Robert Robinson met with Henry Adley to discuss carving up the 8(a) contract funds. PX 51; Oct. 31, 2003 Tr. at 191-192 (Robinson). At the meeting, Robinson noted that the contract amount was 15 million and Williams Adley "must get eight" million. Oct. 31, 2003 Tr. at 191; PX 51. After the meeting, on October 31, 1994, Robinson faxed requested information to Williams, Adley. Oct. 31, 2003 Tr. at 193; PX 63. Notably, Hamilton failed to address this meeting in its defense case or in its Modified Proposed Findings/Conclusions.<sup>6</sup>

Nor does Hamilton address the circumstances immediately preceding this meeting. On October 26, 1994, Williams, Adley submitted a proposal to provide due diligence services to HUD on a cost plus basis. *See* WX 24. Hamilton was not mentioned in that proposal. *Id.* At this time, Hamilton was running out of contract authority under its first Financial Advisory contract. At 6:48 a.m. on October 26, 1994, Helen Dunlap sent an email to Marta Angueira and Austin Fitts stating: "We could get a supplement to Hamilton and Coopers through the 8A to

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<sup>6</sup> Hamilton argues that Ervin "presented no evidence as to why Williams, Adley, a successful government contractor, would risk its reputation and entire business by entering into a conspiracy with Hamilton, a company it did not know, to defraud the government." Ham. Pr. Find./Concl. at 38. There is a simple answer to this. Williams, Adley's work under the 8(a) contract would run into the tens of millions, plus the 8% mark-up on Hamilton's subcontracts.

swing in additional people.” PX 53. This plan was implemented in that Williams, Adley was requested to submit a revised proposal within less than one week, which added financial advisory services to the due diligence procurement. While Henry Adley testified that he sought out Hamilton as but one potential source for the financial advisory services, this is simply not credible. To implement Dunlap and Fitts’ conspiracy to “supplement” Hamilton would have had to be based on the assumption that Williams, Adley would find Hamilton, who they did not know, and Williams, Adley would then accept a pricing strategy that was radically different than what was called for in the request for proposals. There is simply no doubt that Hamilton was intended from the outset to be the sole provider of Financial Advisory work under the 8(a) contract.

Finally, Hamilton argues, based mostly on the testimony of Brian Dietz in Ervin's case-in-chief, that:

- Hamilton had no expectation that it would receive any of the financial advisory work required under the 8(a) contract;
- Hamilton’s budget documents reflected revenue Hamilton "hoped" to derive from subcontracts but Hamilton was not assured of being selected as subcontractor;
- Hamilton’s budget reflected income that "might" be available;
- Hamilton’s budget did not and was not intended to reflect what Hamilton thought or knew was going to happen; and
- Once HUD issued a task order, Williams, Adley was still free to engage any other financial advisor it deemed appropriate.

Ham. Pr. Find./Concl. at 17-18. As discussed in response to Hamilton's Rule 52(c) motion, Dietz's testimony was simply not credible in this regard. Worse, these assertions are inconsistent with the above-described evidence of Dunlap's plan to "swing" a supplement to Hamilton under

the 8(a) contract, and the late October 1994 meeting between Robinson and Adley to divide up the 8(a) contract.

In short, as Hamilton correctly observes, the Small Business Administration's section 8(a) program permits the government to award contracts to small, minority-owned business without competitive bidding. Ham. Pr. Find./Concl. at 12. As such, it is an exception to the general requirement for full-and-open competition in the award of government contracts that Hamilton, a non-8(a) firm, would be subject to. The evidence overwhelmingly shows that Hamilton, with the assistance of Williams, Adley, exploited the 8(a) program so that Hamilton could continue performing HUD financial advisory work at fixed, UPB-based fees without having to compete for that work.

Accordingly, Ervin is entitled to judgment on its 8(a) contract claim.

## **V. Crosscutting Task Order**

Hamilton argues Ervin's crosscutter claim is unsupported because "[t]he award of the Crosscutting Task Order was fully scrutinized in advance by the FHA Program Staff who selected Hamilton, the Office of Inspector General and the Office of Procurement and Contracts." Ham. Pr. Find./Concl. at 39. In fact, there was very little meaningful scrutiny. Ervin will address these in reverse order.

The Office of Procurement and Contracts (i.e., the contracting officer) was unaware of Hamilton's prior involvement in the preparation of the statement of work ("SOW"). Contracting officer Annette Hancock testified that she believed HUD's Office of Housing, including Helen Dunlap and others, prepared the SOW for the crosscutter RFP. Hamilton did not disclose to her that it was involved in preparing the crosscutter SOW. Oct. 29, 2003 Tr. at 69, 75 (Hancock). Hancock explained:

if you're running a competition and you've got ... the organizations are competing, they are required to divulge any organizational conflict of interest that they could potentially have that could give them an unfair competitive advantage. Having a contractor develop a statement of work and in turn compete for the same statement of work along with others is a concern and would be a concern.

Tr. 75 (Hancock). Thus, to the extent HUD's Office of Procurement and Contracts participated in the process, it did so without knowledge of important facts that Hamilton failed to disclose, as it was required to do. This simply underscores the need for a written certification by the offeror that it has no unfair competitive advantage. See PX 262 (last page).

It is likewise true that HUD's OIG, while conducting an investigation, questioned the crosscutter solicitation at the time it was pending. However, important facts regarding Hamilton's involvement were also withheld from OIG. This is particularly troubling since OIG, in March of 1996, was investigating "whether the solicitation was prepared in a manner where Hamilton Securities would be the only one who could qualify for the work." PX 139.

According to the official minutes of a meeting between OIG and Kathy Rock:

Marty [Heaster of the OIG Capital District] asked who had drafted the solicitation. Ms. Rock stated that she did the first draft, which was then processed through Helen Dunlap, Kate Trygstad, Skip Day, etc., via cc: mail to obtain their input.

PX 139 at 2. Rock did not disclose to the OIG that she received "input" from Hamilton's Kevin McMahan -- which "input" took the form of writing at least four entire sections of the SOW.

Compare PX 115 with PX 262. Given the issue the OIG was investigating, i.e., whether the RFP was skewed to favor Hamilton, this was truly a relevant fact.<sup>7</sup>

As for the so-called “scrutin[y]” by FHA’s “Program Staff,” this presumably refers to Helen Dunlap and Kathy Rock. As demonstrated, these individuals were biased toward Hamilton and actually acted to protect Hamilton from any meaningful scrutiny.

Hamilton makes a few other meritless arguments that Ervin will briefly address. Hamilton argues that “HUD did not have to compete the Crosscutting Task Order, but chose to do so as part of its goal of transparency in the loan sales program.” Ham. Pr. Find./Concl. at 39; *see also id.* at 19-20 (“HUD could simply have sole sourced it to one of its financial advisors.”). However, once HUD decided to conduct a competition, it was required to treat all offerors equally. As the foregoing demonstrates, the only thing “transparent” about the crosscutter competition was the fact that bids were solicited from all four financial advisor contracts. There was nothing transparent about Hamilton’s prior involvement in conceiving of the crosscutter, drafting a substantial portion of the SOW, planning the procurement, or having the extra time and information to write the winning proposal. However, with the pretense of a “competition,” Hamilton and its supporters within HUD could justify Hamilton’s outrageous price based on a percentage of HUD’s entire \$408 billion portfolio, which was over twice HUD’s pre-solicitation estimate and over two and one-half times Cushman & Wakefield’s price.

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<sup>7</sup> Rock testified that she in fact wrote the first draft of the crosscutting task order and merely obtained “input” from Kevin McMahan. However, on December 12, 1995, Kevin McMahan wrote an email to Grace Huebscher entitled “Drafting XC Task Order.” McMahan stated: “Grace I wanted to ask you to complete *the first draft of the sales crosscutting task order.*” PX 115 (emphasis added).

Hamilton argues that the Technical Evaluation Panel ("TEP") found Cushman and Wakefield's proposal to be technically unacceptable. See Ham. Pr. Find./Concl. at 40-41. In fact, Kathy Rock made this determination to eliminate Cushman and Wakefield on her own without consulting with all of the members of the TEP. See HX 35 at 4 ("Rock advised that she spoke to no one about the proposals and recalculated the CUSHMAN and WAKEFIELD proposal on her own."). The reason for this unsupported disqualification was that Hamilton's price when compared to Cushman and Wakefield's simply could not be justified. This is particularly distressing since Rock identified the tasks as being "generic" and identifying Cushman and Wakefield as being capable of performing them. July 21, 2004 Tr. at 235-36. Rock's action left Hamilton as tantamount to a sole source contractor, yet supposedly selected based on "competition" thereby eliminating the scrutiny required for a sole source contract.<sup>8</sup>

Hamilton also argues that its preparation of the SOW did not give it a competitive advantage. Ham. Pr. Find./Concl. at 42. That is not a judgment call Hamilton was entitled to make. Having drafted portions of the SOW and engaging in other pre-solicitation activities, Hamilton could not certify that it had no organizational conflict of interest. "[W]hen the FAR conditions defining a conflict of interest exist, *the existence of an unfair competitive advantage is assumed ....*" *Basile, Baumann, Prost & Assoc., Inc.*, B-274870, Jan. 10, 1997, 97-1 CPD 15

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<sup>8</sup> When the government decides to award a contract on a "sole source" basis (i.e., without competition), the contracting officer must prepare a detailed "justification" containing among other things "[a] determination by the contracting officer that the anticipated cost to the Government will be fair and reasonable." 48 C.F.R. § 6.303-1, § 6.303-2(a)(7). Such a justification for a contract in excess of \$10 million must be approved by a civilian in grade GS 16 or above. *Id.* at § 6.304(a)(3). The justification document must be made available for public inspection. *Id.* at § 6.305. By conducting a competition for the crosscutting task order, HUD avoided the justification and public disclosure requirements.

(emphasis added). The presumption of a competitive advantage is consistent with Annette Hancock's testimony on this point:

Q. You have no evidence ... that Hamilton was given any competitive advantage for this Task Order as a result of Mr. McMahan's revisions to the scope of work?

A. I wouldn't, I wouldn't say that's accurate.

Q. What evidence do you have?

A. I have an organizational [conflict of] interest certification that was completed at the time the competition was done that asked offer[or]s to determine whether or not they have an unfair competitive advantage or impartiality in competing for this or they have been involved in something that causes them to have impartial -- may be impartial in terms of doing work.

Oct. 30, 2003 Tr. at 131.

Finally, Hamilton argues that its conduct falls into an exception to the general prohibition on contractors competing for contracts in which they drafted the SOW or specifications, namely, where the contractor is a "design and development" contractor. See Ham. Pr. Find./Concl. at 43 (citing 48 C.F.R. § 9.505-2(a), (b)(3)). This exception refers to "a contractor who pushes the edges of technology in developing or designing new hardware or processes." See *GIC Agricultural Group*, B-249065, Oct. 21, 1992, 72 Comp. Gen. 14, 21 n.6, 92-2 CPD 263. Hamilton cites to no provision in any of its contracts or task orders that required or permitted Hamilton to design or develop a new program whereby a contractor would serve in a cross-cutting role, let alone draft a SOW or plan a procurement for such a contract for which it would compete. Hamilton simply points to its inherent advantage as an "incumbent" contractor. Ham. Pr. Find./Concl. at 43-44. An incumbent contractor does not qualify as a design and development contractor under 48 C.F.R. § 9.505-2(b)(3). See, e.g., *Basile, Bauman*, 97-1 CPD

15; *GIC Agricultural*, 72 Comp. Gen. at 21 n.6; *Ressler Assocs., Inc.*, B-244110, Sept. 9, 1991, 91-2 CPD 230; *Masstor Systems Corp.*, GSBCA No. 8669-P; 87-1 BCA (CCH) 19,435 (1986).

In sum, Hamilton falsely certified that it had no organizational conflict of interest and then participated in a sham competition for the crosscutting task order so that it could avoid justifying prices that greatly exceeded those estimated by HUD. Accordingly, Ervin is entitled to judgment on its crosscutting task order claim.

## **VI. Damages**

Ervin demonstrated the Government's damages in its case-in-chief and in its briefs during the Rule 52(c) proceedings. Hamilton presented no evidence concerning damages in the July 19-21, 2004 resumed trial. Therefore, Ervin stands on its previous submissions regarding damages.

Respectfully submitted,

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August 10, 2004

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 10th day of August 2004, a true and genuine copy of Plaintiff-Relator's Reply To Hamilton Securities' Modified Proposed Findings Of Fact And Conclusions Of Law, was served electronically by the Court's electronic filing system on the following parties:

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