IN THE UNITED STATES COURT OF FEDERAL CLAIMS

HAMILTON SECURITIES ADVISORY SERVICES, INC.	)	
Plaintiff,	)	**CASE NO. 98-169C**
	)	**(Judge Horn)**
v.	)	
UNITED STATES OF AMERICA,	)	
Defendant.	)	

PLAINTIFF'S REPLY TO DEFENDANT'S MEMORANDUM OF LAW
REGARDING APPLICATION OF THE INSPECTION OF SERVICES CLAUSE

Plaintiff, Hamilton Securities Advisory Services, Inc. ("Hamilton"), by its undersigned counsel respectfully submits the following Reply to Defendant's Memorandum of Law Regarding Application of the Inspection of Services Clause.

INTRODUCTION

As explained in Hamilton's initial brief, Subparagraph (e) of the Inspection of Services Clause provides a specific remedy for the precise situation presented in this case. "If any of the services do not conform with contract requirements" and the defects "cannot be corrected by reperformance," as here, the Inspection of Services Clause provides for reduction in "contract price to reflect the reduced value of the services performed." ***FAR 52.246-4(e)***.

Apparently unhappy with the bargain it struck, HUD now seeks a different remedy -- consequential damages for alleged losses of revenues -- based on

common law breach and tort theories. As shown below, however, long-established Court of Claims precedents require HUD to seek relief solely under the agreed remedy-granting provision of the contract and preclude this Court from re-writing the parties' contract to allow HUD to obtain the different remedies it now seeks. Indeed, HUD itself has cited precedents plainly foreclosing its attempted resort to breach and tort theories, on the basis that the contract includes a remedy-granting clause covering the contingency presented. Accordingly, the Court should determine that the Inspection of Services Clause bars HUD's breach and tort based claims. Since HUD's refusal to pay Hamilton is grounded solely on its breach and tort based counterclaim, judgment should be entered in favor of Hamilton on Hamilton's claim.

STATEMENT OF FACTS

The facts necessary to interpret the Inspection of Services clause of the Hamilton's contracts are set forth in Hamilton's Initial Brief and the parties' Joint Stipulation of Facts. Hamilton does not agree with the Government's contention that the Court should take as true the allegations of the First Amended Counterclaim, but even if it does, the result will remain the same: the Government's common law claims are barred by the availability of a specific remedy under the contracts.

ARGUMENT

For the reasons set forth below, HUD's arguments that the Inspection of Services Clause does not serve to limit HUD's remedy to the contractually agreed price adjustment afforded by that clause are meritless.

I.

HUD's main argument is that the Inspection of Services Clause is not an exclusive remedy because it does not provide for the specific type of remedy that HUD seeks here; i.e., consequential damages. **See Defendant's Memorandum, page 18.** Relying on **Northern States Power Co. v. United States**, 43 Fed.Cl. 374 (1999), HUD asserts that contract remedy clauses are exclusive only if "they actually cover the specific type of losses suffered by the aggrieved party." **Defendant's Memorandum, page 18.** As shown below, HUD misstates the law.

Ironically, **Northern States** actually supports Hamilton's position and, indeed, rejects the very argument that HUD now advances. The Government, of course, advocated in the **Northern States** case the very position that Hamilton advances here; that is, that the presence of a specific contract remedy precludes a breach claim.

The **Northern States** case involved a contract in which the Department of Energy ("DOE") agreed to store and dispose of a utility's radioactive waste. The utility brought a breach of contract claim based on DOE's 12-year delay in accepting

such waste. The Government argued that the breach claim was foreclosed by the contract's "Avoidable Delays" and Disputes clauses, which specifically provided for an equitable adjustment in the event of delays caused by DOE. Among other things, the utility argued that it should be permitted to pursue its breach claim because the remedies afforded under the Avoidable Delays and Disputes clauses were "inadequate and incomplete;" that is, they did not provide the contractor with "complete relief." The Court rejected this argument, which is the same one advanced by HUD here.

Judge Wiese expressly rejected the utility's contention that this principle did not apply where the aggrieved party argues that the administrative remedy does not offer "complete relief" because it does not provide a "reasonably adequate substitute for the damages available in a breach action." **Id.** The Court explained as follows:

> We do not agree with this position. Under the accepted meaning of the phrase, a claim is said to "arise under" the contract where the contract contains "some substantive contract provision [that] authorizes the granting of a specific type of relief [for the particular injury in question]." **Len Co. & Assoc. v. United States**, 181 Ct.Cl. 29, 51, 385 F.2d 438, 451 (1967). *That the relief specified 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.* Where these twin considerations exist, the claim "arises under" the contract.

Id.[1] (Emphasis added.) This is the same reasoning that Hamilton advanced in its initial brief. **Hamilton Initial Brief, page 21.**

When these principles are applied here, it is clear that HUD's claim is barred. The Inspection of Services Clause of Hamilton's contracts expressly covers the contingency where "any of the services do not conform with contract requirements."[2] It also specifies the adjustment to be provided: an adjustment in contract price. Accordingly, the claim arises under the contract, and HUD's breach claim is barred.

HUD also cites another case involving a closely similar nuclear waste storage and disposal contract, **Yankee Atomic Electric Co. v. United States**, 42 Fed.Cl. 223 (1998), in which Judge Merow suggests in *dicta* that "complete relief" is not available if the particular types of losses (e.g., consequential damages) are not compensable under the remedy granting provision.[3] **See Defendant's**

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1 The Court also found that two other cases on which HUD relies, **Edward R. Marden Corp. v. United States**, 442 F.2d 364, 194 Ct.Cl. 799 (1971) and **Koppers/Clough v. United States**, 201 Ct.Cl. 344 (1973), were consistent with "the proposition that 'complete relief' means that a claim arises under a specific provision of the contract and is made adjustable by or under it." **Id.**, at 386.

2 HUD must, of necessity, take the position that the type of defect in services here was within the contemplation of the Inspection of Services Clause. Otherwise, HUD could not obtain the damages it seeks, because, in order to be recoverable, consequential damages must have been foreseeable and within the parties' contemplation at 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. 1086 (1987); **Northern Helex Co. v. United States**, 524 F.2d 707, 715, 207 Ct.Cl. 862 (1975) ("The consequences must be contemplated at the time of the making of the contract"). With the type of auction process used for the mortgage sales, of course, there were no guarantees that HUD would earn anything from the sales. Hence, viewed prospectively, any potential "loss" of revenue would have been wholly speculative and illusory.

3 Judge Merow ultimately concluded that the Remedies provision of the contract – which provided that "[n]othing in this contract shall be construed to preclude either party from asserting its rights and remedies under the contract or at law" – preserved the utility's right to pursue common law remedies even though the Avoidable Delays clause provided a contract adjustment. That conclusion, by itself,

Memorandum, page 14. HUD's reliance on such *dicta* is misplaced, because Judge Merow's analysis is inconsistent with the binding precedents of the Court of Claims.

Judge Merow's *dicta* in **Yankee Atomic** are flawed for several reasons. First, the cases Judge Merow cites do not equate the term "complete relief" with common law (or consequential) damages, or lead to such a conclusion. **See Yankee Atomic**, 42 Fed.Cl. at 230-31.

In ***William Green Constr. Co., Inc. v. United States***, 477 F.2d 930, 201 Ct.Cl. 616 (1973), ***cert. denied***, 417 U.S. 909 (1974), the Court of Claims specifically rejected the argument that, because the convenience termination clause did "not give full enough relief for the injuries suffered," the breach claim must be permitted. ***Id.***, 477 F.2d at 936. Similarly, Judge Gibson, in **Gregory Lumber Co. v. United States**, 9 Cl.Ct. 503, 517 (1986), explained that a claim arises under a contract when there is a specific administrative remedy, such as those provided in the standard Changes, Changed Conditions and Construction Inspection clauses. None of those clauses encompassed consequential damages. Finally, in **Chaney & James Constr. Co. v. United States**, 421 F.2d 728, 731-32, 190 Ct.Cl. 699 (1970), the Court simply held that the Suspension of Work Clause was intended to provide, as an administrative remedy, the same relief previously available under a breach claim – an equitable adjustment for all of the delay. The Court did not suggest that consequential

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is not inconsistent with Court of Claims precedent or Hamilton's position here.

damages were, or had to be, included in that administrative remedy to provide complete relief.

Judge Merow also did not explain how his views could be reconciled with cases such as **Len Co. & Assoc. v. United States**, 385 F.2d 438, 181 Ct.Cl. 29 (1967), which hold that "complete relief" means only specific relief. Nor can those views be reconciled. As Judge Wiese explained, "under the accepted meaning of the phrase [complete relief], a claim is said to "arise under" the contract where the contract contains 'some substantive contract provision [that] authorizes the granting of a specific type of relief [for the particular injury in question]." **Northern States**, 43 Fed.Cl. at 386, **quoting Len Co. & Assoc.**, 385 F.2d at 451.

Judge Merow also failed to abide by the admonition that the Court may not re-write the parties' contract for them. This was a fundamental error because, as Judge Wiese explained, "it has been a settled rule of government contract law that courts may not displace, through the substitution of their own procedures, the administrative procedures that parties have chosen for the resolution of their contract disputes." **Northern States**, 43 Fed.Cl. at 385. For this reason, "[i]t would therefore be an unwelcome intrusion upon the administrative process – indeed, an unlawful intrusion – were this court to side with plaintiff in saying that the administrative remedy appears unsatisfactory and therefore may be disregarded in favor of a breach action in this court." **Id.**, at 386.

The Government itself recognized that Judge Merow erred in this regard. It argued in **Yankee Atomic** that the Court must accept the bargain the parties struck, contending that "Yankee is entitled solely to the remedy it agreed to in Article IX.B . . . regardless of how limited it may be." **Id.**, at 232 (emphasis added). It is indeed ironic that, while Hamilton advances that very same position, the Government has abandoned it here in favor of a contrary one.[4]

Finally, Judge Merow did not give any consideration to how his reasoning would affect future claims. If Judge Merow's *dicta* were considered to be controlling, all claims for directed or constructive changes, delays or convenience terminations would be converted into breach claims, entitling contractors to consequential damages, because no contract clause affords to a contractor the remedy of consequential damages against the Government. Such a result would do violence to the longstanding policy favoring administrative resolution of contract claims pursuant to contractually agreed remedies. The better, and controlling, view is that both the Government and contractors are limited to the equitable adjustment provided under applicable contract clauses, even if they suffer consequential damages.

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4 The Government has appealed the **Yankee Atomic** decision to the Federal Circuit (Federal Circuit Docket No. 99-5140), and that case has been consolidated on appeal with the contractor's appeal in **Northern States (Federal Circuit Docket No. 99-5096)**. Consequently, the Government is in the awkward position of simultaneously arguing inconsistent positions before this Court and the Federal Circuit.

The Court of Claims has long and consistently adhered to this latter principle, allowing consequential damages only when the contingency is **not** covered by the applicable remedy-granting clause. Here, again, this point is established by the cases on which HUD itself relies, **Edward R. Marden Corp. v. United States**, 442 F.2d, 194 Ct.Cl. 799 (1971) and **Koppers/Clough v. United States**, 201 Ct.Cl. 344 (1973).

In the **Edward R. Marden** case, the contractor pursued a breach claim based on the Government's directive to re-build a structure that had collapsed during construction as a result of faulty government-furnished design specifications. The Government contended that the breach claim was foreclosed by the Changes Clause of the contract. The Court held to the contrary, however, concluding that the contractor's claim "when characterized as a change . . ., is not redressable under the Changes clause because it alleges a cardinal change." **Edward R. Marden**, 442 F.2d at 369. It reasoned that the purpose of the cardinal change theory is to provide relief for changes that are so drastic they are **outside** the scope of the contract. Such clauses are beyond the purview of the Changes clause, because that clause only authorizes equitable adjustments for changes "within the scope of the contract." The Court of Claims explained this point as follows:

> The cardinal change doctrine is not a rigid one. Its purpose is to provide a breach remedy for contractors who are directed by the Government to perform work which is not within the general scope of the contract. In

> other words, a cardinal change is one which, because it fundamentally alters the contractual undertaking of the contractor, is not comprehended by the normal Changes clause.

Id.[5] **Edward R. Marden**, thus, stands for the proposition that breach is available only when the contingency is outside the scope of the contract.

The **Koppers/Clough** decision similarly was based on the premise that the contingency presented was not encompassed within the applicable contract clause. The contractor in that case sued under a breach theory for the extra costs it incurred as a result of delays in the completion of a government-furnished pier. The Government contended that the Government-Furnished Property ("GFP") Clause provided administrative relief, but the Court held otherwise.

The Court noted that the contract's GFP clause provided that "if the property were not delivered on time, and in the absence of a suspension-of-work clause – there was none in this contract – 'the Government shall only be liable to make an equitable adjustment . . . **for changes in the property furnished**.'" **Id.**, 201 Ct.Cl. at 350 (emphasis added). The Court determined that, although the pier was delayed, there were no changes in it. **Id.**, at 354. Accordingly, it held that "the very explicit statement at the end of this GFP clause bars administrative relief under that article;

5 Even the Government recognizes that a cardinal change is "outside the scope of the changes clause." **See Defendant's Memorandum, page 16.**

it is beyond our judicial competence to make the limitation disappear." **Id.**, at 354-55. It further expanded upon this point as follows:

> [The GFP Clause] contains a very clear and specific limitation on the possibility of administrative relief for delay in delivery. If there are changes or deficiencies in what is furnished, if it is unsuitable for its intended use, then there is administrative relief. But if the pier furnished is as represented but only later in delivery then there is to be no contractual remedy even if there are changes in manner of performance as a result of the delay.

Id., at 360-61. **Koppers/Clough**, therefore, allows a breach claim only when the clause does not cover the contingency.

Here, the contingency presented – defective services – is expressly contemplated by the Inspection of Services. Accordingly, neither **Edward R. Marden** nor **Koppers/Clough** is applicable here.

II. The Availability of a Breach Theory Is Not Determined By the Amount of Damages Sought.

The Government alternatively tries to bootstrap itself into a breach claim by arguing that the consequences of the defective services here were so "drastic" that complete relief is not available under the contract. **See Defendant's Memorandum, page 16.** In essence, this argument seeks to have the Court rewrite the contract to give HUD broader remedies than it bargained for.

There is no authority for the Government's proposition that a breach claim may be permitted based solely on the amount of damages claimed. The theory underlying

the cardinal change and defective specification doctrines is that the nature of the undertaking is different from that agreed by the contractor, not that the amount claimed is large. The Court of Claims explained this concept in **Edward R. Marden**, where, after finding the "alleged change involved major reconstruction," the Court reasoned as follows:

> By any standard the events alleged would have to be deemed to have materially altered the nature of the contractor's undertaking. If plaintiff's allegations are true, then it performed work which was not "essentially the same work as the parties bargained for when the contract was awarded." **Aragona Constr. Co. v. United States**, 165 Ct.Cl. 382, 391 (1964). Our decision on this point is based on the sheer magnitude of reconstruction work caused by the alleged defective specifications.

Id., at 370. Here, the nature of the undertaking remained the same, although the Government may not have received all the revenues it might otherwise have received. Moreover, the alleged lost revenues here were not "drastic," but were actually insignificant in relation to the total amounts involved in the sales. In the aggregate, they amounted to less than four tenths of one percent of the more than $1.1 Billion that HUD collected on the two sales. This situation does not compare to the situation in the **Edward R. Marden** case, where the defective specifications "resulted in increased costs [to the contractor] of almost double the contract price." **Edward R. Marden**, 442 F.2d at 370. Stated another way, it is unlikely in the extreme that a contractor could establish a cardinal change based on a showing that

it incurred unanticipated increased costs of only $3.8 million on a $1.1 Billion contract. **See, e.g., In re Boston Shipyard Corp.**, 886 F.2d 451, 457 n. 4 (1st Cir. 1989) (claims of $958,000 on a $4.9 million were not enough to signify a cardinal change); **General Dynamics Corp. v. United States**, 585 F.2d 457 (Ct.Cl. 1978) ($12 million claim on contracts totaling $120 million was insufficient to constitute cardinal change). The result should be no different when the Government's alleged lost revenues are of the same relative magnitude.

III. The Court May Not Ignore Court of Claims Precedent By Applying Inconsistent Board Cases.

The Government has relied on ***PAE International***, ASBCA No. 45314, 98-1 BCA ¶ 29,347 (1997) and **General Electric Co.** ASBCA No. 45936, 94-3 BCA ¶ 26,578 (1993) to argue that the Inspection of Services Clause does not preclude its breach of contract/consequential damages claim. The Government's reliance on those cases is misplaced for the reasons set forth in Hamilton's initial brief: (1) the Court of Claims has rejected the concept that "complete relief" must include consequential damages; (2) the Board's interpretation of the term "complete relief" would have the absurd effect of converting all claims to breach claims, because no remedy-granting clause permits contractors to recover consequential damages; (3) the parties here cannot be bound by a novel (and unsound) interpretation of the Inspection of Services Clause first articulated years after their contracts were made;

and (4) **General Electric** is inapposite because it involved the Inspection of Supplies clause, which specifically reserved "other rights and remedies provided by law."

IV. The Inspection of Services Clause Limits the Government's Remedy To An Adjustment in Price.

The Government's initial argument is that the Inspection of Services Clause does not limit Hamilton's liability because it contains no language stating it is an exclusive remedy. **See Defendant's Memorandum, pages 7-9**. This argument is plainly meritless, because it directly contradicts the holdings of the Federal Circuit and the Court of Claims that "contingencies contemplated by various contract clauses are remediable under those clauses of the contract, not as a breach of the contract." **Triax-Pacific v. Stone**, 958 F.2d 351, 354 (Fed.Cir. 1992); **Johnson & Sons Erectors Co. v. United States**, 231 Ct.Cl. 753, 759, **cert. denied**, 459 U.S. 971 (1982). **See also Northern States Power**, 43 Fed.Cl. at 385-87. This Court would have to overrule those cases in order to accept the Government's position.

Moreover, the Government cites only one Board case in support of its position, **Marine Hydraulics International, Inc.**, ASBCA No. 46116, 94-3 BCA ¶ 27,057 (1994), but that case does not establish the principle the Government asserts. **Marine Hydraulics** merely stands for the unremarkable proposition that, where the contract fails to provide a specific remedy for the contingency presented, the remedies specified for <u>other</u> contingencies will not bar a breach claim, unless the

remedial clause for the other contingencies expressly states it is the exclusive remedies for all contingencies.

The contractor in **Marine Hydraulics** was delayed on a particular shipbuilding contract, and it submitted a claim for the increased costs it thereby incurred on other contracts. The Government argued that the claimed cross-contract impact costs were not within the scope of the shipbuilding contract's Government Delay of Work clause. Although it did not decide that issue, the Board observed that "if such costs are not eligible for inclusion in an equitable adjustment under the clause, recovery could be sought on the theory of common-law breach." **Id.**, at 134,824.[6/] The Board reasoned that the Government Delay of Work clause could not be interpreted as precluding the breach claim because that clause did not prohibit the granting of "compensation for such costs on any basis." **Id.**, at 134,824-25. In other words, the clause did not state that it was the exclusive remedy for any and all costs incurred as a result of the delay, whether incurred on that contract or on another.

Marine Hydraulics has no application here, because the Inspection of Services Clause specifically provides a remedy for the contingency presented.[7/] The

6 This is consistent with the long line of court cases holding that if the contingency is not redressable under a contract clause, a breach claim is not precluded. **See Edward R. Marden Corp.**, 442 F.2d at 367.

7 Similarly, the Limitation of Liability clauses to which Defendant refers, **see Defendant's Memorandum, page 8**, do not indicate that common law remedies are also available for contingencies the Inspection of Services Clause contemplates. The Limitation of Liability clauses merely exclude liability for contingencies outside the scope of the Inspection of Services Clause; that is, damage to Government property. At page 32 of its Initial Brief, Plaintiff mistakenly stated that a

issue here is **not** whether the Inspection of Services clause forecloses breach claims for contingencies other than those contemplated by that clause. Rather, the issue is whether the availability of a specific remedy under that clause for the particular contingency presented – a defect in services performed – bars a common law breach claim premised on that contingency. The answer is it does. **Triax-Pacific v. Stone**, 958 F.2d at 354; **Johnson & Sons Erectors Co. v. United States**, 231 Ct.Cl. at 759; **Northern States Power**, 43 Fed.Cl. at 385-87.

V. If the West of Mississippi Contract Is Closed, the Government Has No Valid Claim With Respect To It.

The Government argues that it should be allowed to proceed with a breach claim with respect to Task Order 7 of the 18161 Contract, because that task order was completed and purportedly the Inspection of Services Clause of that contract no longer applies. This is a specious argument.

If, as the Government alleges, Task Order 7 is no longer open, then there is no basis whatsoever for the Government to advance any claim with respect to it. If, under the Government's interpretation, the contract is closed, all rights and obligations under it have been finally and conclusively settled, and neither party may proceed under it. **See American Western Corp. v. United States**, 730 F.2d 1486, 1488-89 (Fed.Cir. 1984) (explaining the "final payment rule"); **Poole Engr'g &**

Limitation of Liability clause was in both of Hamilton's contracts. Defendant correctly points out that such clause was only in the 18505 contract.

Machine Co. v. United States, 57 Ct.Cl. 232, 234 (1922) ("[w]hen a contract has been performed and a stipulated consideration has been paid the general presumption is that the transaction is a closed one").

It is significant in this regard that the contract provides no mechanism for re-opening it after final payment and acceptance. There are no warranty provisions in the contract, and, unlike the Inspection of Supplies Clause, the Inspection of Services Clause does not contemplate any circumstance under which acceptance could be revoked and the contract re-opened. In contrast, the Inspection of Supplies Clause very specifically states that "[a]cceptance shall be conclusive, except for latent defects, fraud, gross mistakes amounting to fraud, or as otherwise provided in the contract." **FAR 52.246-2.** Since no such language appears in the Inspection of Services Clause, the Government did not reserve the ability to re-open the contract. Accordingly, if the Court were to accept the Government's theory, it would have to conclude that the Government has no basis for any claim for the $2.5 million HUD seeks in relation to the West of Mississippi Sale – whether under the Inspection of Services Clause or pursuant to common law theories of breach or tort.

Even if, however, the Government could re-open the West of Mississippi Task Order, its rights would be no greater than provided for in that contract. In such circumstances, the Inspection of Services Clause would be operative and would bar the Government's breach and tort claims.

VI. The Tort Claim Is Barred Because the Alleged Duty Arises Only Under the Contract.

The Government's final argument is that the presence of a contract remedy does not preclude reliance on a tort theory. However, this argument is refuted by the very case the Government cites, **Wolf v. United States**, 855 F. Supp. 337 (D. Kansas 1994). The plaintiffs in that case alleged negligence on the part of the United States in relation to the Government's failure to perform acts required by the parties' contract. The Government sought dismissal of the negligence count, asserting the claim was, in reality, a contract claim over which the Court of Claims had exclusive jurisdiction. **Id.**, at 340. The Court agreed with the Government, reasoning as follows:

> A breach of contract and a tort action may co-exist. However, claims which are based essentially on an alleged failure to carry out contractual duties are not tort claims which confer jurisdiction under the FTCA. Jurisdiction cannot be invoked by framing the complaint as something other than a breach of contract. The classification of a particular action as one which is or is not a contract action depends on the source of the rights upon which the plaintiffs base their claims, and upon the type of relief sought.
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> * * *
>
> A breach of contract may be described as a material failure of performance of a duty arising under or imposed by an agreement, while a tort is a violation of a duty imposed by law, a wrong independent of contract.

> In the appropriate case, a defendant's actions may constitute a breach of a contractual duty as well as a breach of a duty imposed by law. In such a case, either tort or contract remedies may be pursued. The presence of a contract remedy does not preclude reliance on a tort theory of recovery. **However, a claim for negligence must be based on a duty separate from a contractual duty.**

Id. (citations omitted).

The Government's reliance on **Wolf** is misplaced because HUD has not identified <u>any</u> duty separate from a contractual duty that Hamilton allegedly breached. Although the Government asserts that the "duties to not act negligently and to not make negligent misrepresentations are imposed by law," it nowhere identifies the law from which these duties supposedly arise. **See Defendant's Memorandum, page 21.** The reason for this lapse is plain: there is no law to which the Government can point as the source of the purported duty not to act negligently.

Those duties, to the extent they existed, arose solely out of the contract between the parties. Indeed, the Government's First Amended Counterclaim makes it clear that the duties breached stem from Hamilton's contracts, and from no other source. The Government generally alleges in the First Amended Counterclaim that "Hamilton owed a duty to exercise reasonable care in performing services for HUD." **First Amended Counterclaim ¶ 29.** However, the only source HUD alleges for any

duty owed by Hamilton to HUD is the Hamilton contract.[8/] Accordingly, the Government here finds itself in the same position as the plaintiffs in **Wolf:** since it is "unable to identify a duty of [Hamilton] independent of the duty to perform under the alleged contract, [the Government] do[es] not state a claim for negligence." **Id.**

CONCLUSION

For the reasons set forth above, the Inspection of Services Clause precludes HUD's claims under its breach and tort theories. Accordingly, the Court should grant Hamilton's Motion in Limine, and it should enter judgment in Hamilton's favor on Hamilton's claim.

Respectfully submitted,

Dated: October 15, 1999

Claude P. Goddard, Jr.
Wickwire Gavin, P.C.
International Gateway, Suite 700
8100 Boone Blvd.
Vienna, VA 22182-7732
Telephone: (703) 790-8750
Fax: (703) 448-1767
Attorney for Plaintiff

OF COUNSEL:
Michael J. McManus

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8 The Government alleges that "[u]nder the terms of Contracts 18161 and 18505, Hamilton was to perform various services" including "determining which bids were winning bids;" "developing an Optimization Model;" and "either directly or through another financial advisor . . . inform[ing] HUD as to which bids were the winning bid(s). **First Amended Counterclaim ¶¶ 5, and 7-9.** The Government further alleges that "if Hamilton had complied with its obligations . . . [the] bids would have generated substantially greater revenue for HUD . . . ." **First Amended Counterclaim ¶¶ 17-18.** HUD relied on these same allegations in support of its negligence count. **First Amended Counterclaim ¶ 27.**

Drinker, Biddle & Reath, LLP
1500 K Street, N.W.
Suite 1100
Washington, DC 20005
Telephone: (202) 842-8830
Fax: (202) 842-8465

Certificate of Service

The undersigned certifies he caused a copy of the foregoing Plaintiff's Brief in Support of Its Motion in Limine to be served on the following government counsel by first class mail on October 15, 1999:

David J. Gottesman
Attorney
Commercial Litigation Branch
Civil Division
United States Department of Justice
Washington, D.C. 20005

Attn: Classification Unit
8th Floor, L Street Building

____
Claude P. Goddard, Jr.