

3. Admits, but further states that the contract later was modified, and the modifications are not within Exhibit 1 to the Complaint.

4. Admits the allegations of paragraph 4 to the extent supported by the contract cited, which is the best evidence of its contents; otherwise denies such allegations.

5. Admits.

6. Admits the allegations of paragraph 6 to the extent supported by the document cited, which is the best evidence of its contents; otherwise denies such allegations.

7. Admits the allegations of paragraph 7 to the extent supported by the document cited, which is the best evidence of its contents; otherwise denies such allegations.

8. Denies for lack of knowledge or information sufficient to form a belief as to the truth of the allegations concerning the precise date when Hamilton began performing the services alleged. Admits the remaining allegations of paragraph 8.

9. Admits.

10. Admits that on September 26, 1997, Hamilton submitted an invoice to HUD in the amount of \$868,417 for work performed during the period of August 26 through September 25, 1997, and that a copy of that invoice is attached to the Complaint as Exhibit 3. Allegations concerning whether the invoice was "proper" are legal conclusions to which no answer is required. Admits that HUD has not paid and has refused to pay that invoice, and further states that HUD is not legally obligated to do so.

Denies the remaining allegations of paragraph 10.

11. Admits that on October 23, 1997, Hamilton submitted an invoice to HUD in the amount of \$636,839 for work performed during the period of September 26 through October 17, 1997, that a copy thereof is attached to the Complaint as Exhibit 4, and that the amount invoiced was pro rated on the contractual monthly payment. Allegations concerning whether the invoice was "proper" are legal conclusions to which no answer is required. Admits that HUD has not paid and has refused to pay that invoice, and further states that HUD is not legally obligated to do so.

Denies the remaining allegations of paragraph 11.

12. Admits.

13. Admits that the contracting officer did not respond to Hamilton's claim within 60 days, but further states that no such response was required. Denies the allegations of the second sentence of paragraph 13. Admits that an excerpt of a court transcript is attached to the Complaint as Exhibit 6, but denies the allegations characterizing the comments reflected in that transcript except to the extent supported by such transcript, which is the best evidence of its contents. Denies any remaining allegations of paragraph 13.

14. Admits that the contracting officer issued a letter dated October 17, 1997, a copy of which is attached to the Complaint as Exhibit 7. Admits the allegations of paragraph 14 characterizing the contents of the October 17, 1997 letter to the extent supported by that letter, which is the best evidence of

performance, 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). Further admits that the Optimization Model was a computer model that evaluated the optimum bid or combination of bids to accept in the auction. Further states that Hamilton's defective performance was the cause of the "Optimization Model" not calculating the winning bids in accordance with the bid instructions. Denies the remaining allegations of paragraph 17.

18. Admits that Hamilton conceded to HUD that, if the Optimization Model had been run correctly by using the UPS as the floor, this "would have generated increased proceeds" of \$3,883,551 on the two sales discussed above, and that Hamilton stated that this was less than 4/10ths of one percent of the \$1,006,871,149 that HUD actually received. Denies the remaining allegations of paragraph 18 for lack of knowledge or information sufficient to form a belief as to their truth.

19. Admits, except that Defendant is without knowledge or information sufficient to form a belief as to the truth of allegations regarding whether Hamilton disclosed all facts pertaining to the so-called discrepancy, and therefore denies such allegations.

20. Admits that, after receiving the October 17, 1997, letter, Hamilton's attorneys sent to HUD a letter dated October 22, 1997, a copy of which is attached to the Complaint as Exhibit

8. Admits the allegations regarding the contents of that letter

other and further relief as may be appropriate.

COUNTERCLAIM

Defendant states the following as its counterclaim against Hamilton:

26. This Court has jurisdiction over this counterclaim pursuant to 28 U.S.C. 1503 and 2508.

27. The United States Department of Housing and Urban Development ("HUD") is an executive agency of the United States.

28. By the early and mid-1990s, HUD held a large inventory of mortgages that had been involved in its mortgage insurance programs. HUD desired to sell the mortgages to private entities at auction sales.

29. Toward that end, HUD contracted with Hamilton Securities Group, Inc., and its successor-in-interest, Plaintiff Hamilton Securities Advisory Services, Inc. (collectively, "Hamilton"). HUD and Hamilton entered into the following two contracts that are relevant here, and under each, HUD issued one or more task orders specifying work to be done by Hamilton:

(a) On September 30, 1993, HUD and Hamilton entered into contract number DU100C000018161, which later was modified, and under which HUD later issued task orders, including but not limited to Task Order #7 (the contract, as modified, and Task Order #7 will be referred to collectively as "Contract 18161"); and

(b) On January 24, 1996, HUD and Hamilton entered into contract number DU100C000018505, which later was modified,

and under which HUD later issued Task Order #1 (collectively, "Contract 18505").

30. Under the terms of Contracts 18161 and 18505, Hamilton was to perform various services pertaining to HUD's auctions of mortgages, including two auctions commonly referred to as the "West of Mississippi Sale," which was conducted in September, 1995, under Contract 18161, and the "North and Central Sale" (hereafter, "North/Central Sale"), which was conducted in August, 1996, under Contract 18505. Hamilton was responsible for properly conducting all phases of each auction, including but not limited to being responsible for all personnel, equipment, services and supplies in connection with those auctions.

31. In connection with the West of Mississippi Sale and the North/Central Sale, persons interested in acquiring the mortgages were to submit sealed bids. With regard to bids on individual mortgages, bidders were permitted to condition acceptance of their bids on their being the successful bidder for mortgages having, in the aggregate, at least a designated unpaid principal balance, i.e., a "floor."

32. As part of its responsibility to conduct all phases of the auctions in the West of Mississippi Sale and the North/Central Sale, pursuant to Contracts 18161 and 18505, respectively, Hamilton was responsible for determining which bids were winning bids in each of those auctions. The winning bids were to be the group of bids that would produce the maximum sale proceeds to HUD, while still meeting all other conditions or

criteria, such as compliance with the "floors" described above.

33. To meet its obligation of determining which bids were winning bids, as set forth above, Hamilton developed, either directly or through a subcontractor, a computer model known as an "Optimization Model" that was supposed to analyze all bids and select as winning bids the group of bids that would provide the maximum sales proceeds, while still meeting all criteria, including but not limited to the floors designated by bidders.

34. Hamilton, either through its own personnel or its subcontractor(s), was responsible for the design and running of the Optimization Model.

35. Hamilton caused the Optimization Model to be designed and/or run incorrectly and improperly with regard to the auctions in the West of Mississippi Sale and the North/Central Sale.

36. Specifically, with regard to the above-referenced auctions, Hamilton caused the Optimization Model to be designed and/or run so as to treat the floors designated by bidders as though they referred to the minimum amount of the revenue of the bid (i.e., the price offered the bidder is offering to pay), rather than the minimum unpaid principal balance of mortgages bid upon.

37. As a result of the foregoing, Hamilton caused various incorrect bids (i.e., bids that did not meet all applicable criteria) to be selected as winning bids at the West of Mississippi Sale and the North/Central Sale.

38. If 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 would have been selected.

39. If only those bids that met the applicable criteria had been selected as winning bids, such bids would have generated substantially greater revenue for HUD from the West of Mississippi Sale and the North/Central Sale.

40. Hamilton's acts or omissions, as described above, constituted a breach of its obligations under Contracts 18161 and 18505.

41. At the time of the auctions in the West of Mississippi Sale (in September, 1995) and the North/Central Sale (in August, 1996), at the time that the bid results were announced and approved, and at the time the awards were made, HUD was unaware of the defects in Hamilton's performance, as described above.

42. On information and belief, Hamilton did not notify HUD personnel of Hamilton's errors until the week of December 2, 1996, and even then, Hamilton did not notify the contracting officer, who remained unaware of Hamilton's defective performance.

43. On December 20, 1996, Hamilton issued a report to HUD, confessing Hamilton's error, and stating that if the unpaid principal balance had been used as the floor in running the Optimization Model (as Hamilton conceded was required), this "would have generated increased proceeds" of \$3,883,551,

consisting of additional proceeds of \$2,372,307 in the West of Mississippi Sale and additional proceeds of \$1,511,244 in the North/Central Sale.

44. By reason of Hamilton's breach, the Government has suffered damages of at least the amount conceded by Hamilton (i.e., \$3,883,551), although the Government has not completed its analysis of the amount of damages suffered.

45. On October 17, 1997, the contracting officer issued a letter to Hamilton, which the Court found, in its opinion dated April 27, 1999, constituted a final decision on the Government's claim against Hamilton.

46. If 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.

WHEREFORE, the United States prays that this Court enter judgment in its favor and against Hamilton, that the United States be awarded damages of \$3,883,551 or such other amount as may be proved at trial, that any recovery that otherwise would be awarded to Hamilton be subject to setoff by the award to the

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United States, and that the United States be awarded its costs and such other and further relief as may be appropriate.

Respectfully submitted,

DAVID N. COHEN
Director



ROBERT M. HOLLIS
Assistant Director



DAVID J. GOTTESMAN
Attorney
Commercial Litigation Branch
Civil Division
U.S. Department of Justice
Attn: Classification Unit
8th Floor, 1100 L St.
Washington, DC 20530
Tel: (202) 307-0183
Fax: (202) 307-0494

Attorneys for Defendant

Dated: May 27, 1999

OF COUNSEL:

Virginia Kelly Stephens
U.S. Department of Housing
and Urban Development
Office of General Counsel
451 7th Street, SW
Washington, D.C. 20410

CERTIFICATE OF SERVICE

I declare, under penalty of perjury, that on the 27th day of May, 1999, a copy of the foregoing DEFENDANT'S ANSWER AND COUNTERCLAIM was served upon:

Mr. Claude P. Goddard, Jr.
Wickwire Gavin, P.C.
International Gateway, Suite 700
8100 Boone Blvd.
Vienna, VA 22182-7732
Fax: 703/448-1801

by sending the same by fax and first-class U.S. Mail.

