

activities because it was important to HUD that the public have trust and faith in HUD's ability to conduct fair note sales. Two former HUD officials, Helen Dunlap and Kathy Rock, testified purportedly in Hamilton's defense, but the evidence simply showed that Dunlap had an inappropriately close relationship with Hamilton's president, Catherine Austin Fitts, at a time when Dunlap was making important decisions that directed multi-million dollar, non-competitive contracts and task orders to Hamilton, and that Kathy Rock was willing to mislead both the HUD Inspector General and a U.S. District Court to protect Hamilton. Dunlap even got rid of HUD employees who complained that Hamilton was getting too much work.

Of the four witnesses Hamilton presented, each was personally and directly involved in the award of multi-million dollar non-competitive contracts and task orders that benefited Hamilton and, therefore, were not objective. In fact, each of these witnesses acted to enrich and protect Hamilton.

Notably, Hamilton presented no new information concerning its failure to correct the optimization model problems before the North and Central ("N/C") note sale. The only facts it relies upon in defense of Ervin's N/C claim -- the departure and illness of two individuals who knew of the problems in the West of Mississippi ("WoM") sale -- were established during Ervin's case-in-chief and, thus, presumably rejected by the Court in the Rule 52(c) proceedings. In any event, the departure/illness of these individuals is not a valid excuse because, as a matter of law, Hamilton is liable for the recklessness of its own employee and subcontractor. Moreover, with nearly a billion in assets up for sale in the N/C sale, Hamilton should have debriefed these key members of the WoM sales team before the N/C sale, especially since Hamilton was required to, and belatedly did, submit a "Post-Auction Review" purportedly to take advantage of "Lessons

Learned" from the WoM sale. The WoM Post-Auction Review discusses the optimization process in the WoM sale, but does not disclose the problems that occurred during the sale - - including the need to create a "temporary fix" or the omission of a substantial pool bid from the optimal solution (ALI pool bid #3).

Indeed, the evidence concerning the N/C sale further showed that both Hamilton and its co-conspirators within HUD failed to disclose Hamilton's errors to the Inspector General (even though they knew of the pending criminal investigation) or the contracting officer, as well as the outright concealment of the errors from an unsuccessful bidder on the N/C sale. This evidence flies in the face of Hamilton's alleged "mantra" of transparency and openness.

Hamilton likewise failed to disprove any of the core facts in Ervin's crosscutting task order claim. For example, Hamilton did not and cannot disprove that it "ghost-wrote" a memorandum sent by Dunlap to her superior regarding the concept of a crosscutting contractor, that it drafted substantial portions of the statement of work for the crosscutting task order months before the solicitation was issued, or that it worked with its supporters within HUD (Dunlap and Rock) to plan and schedule the crosscutter "competition." Hamilton presented no evidence that these facts were disclosed to the contracting officer as required by law; it did not and cannot rebut Annette Hancock's testimony in this regard. The evidence clearly demonstrates that Hamilton, along with Dunlap, Rock and others, participated in a "sham" competition that enabled HUD to justify paying Hamilton an outrageous fixed price for the crosscutting work, despite a bid from a competing contractor that was less than half of Hamilton's price. Instead, Hamilton argued, without any support and contrary to the expectation of fair competition, that it was Hamilton's job as financial advisor to do this.

As to the Single Family #1 reoffering sale ("SF #1"), Hamilton totally ignored the fact, proven in Ervin's case-in-chief, that Hamilton was courting business with Goldman Sachs and BlackRock (apart from the Partially Assisted sale work) at the time it presented the bidding team of Goldman Sachs and BlackRock as an eligible option for award of the SF #1 notes even though that option was ineligible under the rules established for the sale. Hamilton presented no rationale for not following these rules.

In addition, Hamilton did not rebut the core facts in Ervin's 8(a) contract claim, most notably, the pre-contract agreement between Hamilton and Williams, Adley to divide the \$15 million contract ceiling price. The evidence simply confirmed that Hamilton and Dunlap planned to use the 8(a) contract to provide funding for Hamilton, a non-8(a) contractor, without having to compete that work.

As discussed below and in Ervin's Proposed Findings of Fact and Conclusions of Law in Response to Hamilton's Rule 52(c) Motion, Ervin is entitled to judgment on each of the four remaining claims.

II. PROPOSED FINDINGS OF FACT

A. Hamilton's Relationship With Certain Senior HUD Officials

1. In its final Disposition Report, the HUD Office of Inspector General ("OIG") found that HUD's Deputy Assistant Secretary for Multifamily Housing, Helen Dunlap, and Hamilton's President, Austin Fitts, "maintained a relationship that went beyond the normal contractor relationship. The investigation disclosed that they dined together, met for plays in New York City, and engaged in e-mails that suggested a close personal relationship."

PX 35 at 2.¹ During this period, Hamilton received over \$40 million in non-competitively awarded contracts, task orders and subcontracts to support HUD's note sale program.

2. The testimony and documentary evidence confirm this long term relationship. Dunlap and Fitts exchanged several e-mails that mix business and personal issues. See Tr. 154-55 (Dunlap).²

3. On October 3, 1994, Dunlap wrote to Fitts: "I have been using the mortgage sales work as a vehicle for communication with you. While I need to stop doing that, I also need the source of feedback, insights, support and energy that I have and continue to get from that communication." PX 9.

4. On April 20, 1995, Dunlap wrote to Fitts: "We need you and are very dependent not just because we are thin but because you are good." PX 11.

5. On September 11, 1995, Fitts wrote to Dunlap: "love you as I do" PX 13.

6. On December 9, 1995, Dunlap wrote to Fitts: "while i [sic] may not express it clearly at the right times, you are the vision behind everything we have done and the master mind behind the successes." PX 14.

7. On December 16, 1995, Dunlap wrote to Fitts:

I regret this and am coming to accept that mixing roles is both difficult and possibly inappropriate. I recognize I have been asking to [sic] much as I am likely to do. I not only want you to be the best contractor which you are but also friend and advisor. . . .

¹ "PX" refers to Plaintiff-Relator's exhibits; "HX" refers to Hamilton's exhibits, and "WX" refers to defendant Williams, Adley's exhibits. Filed herewith is an Appendix of all exhibits cited herein that were admitted at the resumed trial. The remaining exhibits are contained in the Appendix submitted with Ervin's response to Hamilton's Rule 52(c) Motion.

² Unless otherwise indicated, "Tr." refers to the transcript from the trial that resumed on July 19-21, 2004. Where a citation refers to the transcript from the first phase of trial, the citation will include the date.

Once a long time ago, I said that I was interested in maintaining a friendship with you for the long haul and I am coming to recognize that I need to let up in the short run and stop expecting you to meet my emotional needs on top of everything else you are all doing.

PX 15. Fitts replied to this e-mail later on December 16, 1995:

The problem is not about roles. It is about time. If your institution will provide for no capacity and then they or you insist of high quality 24/7 on a crisis basis, then the result is that my time and the time of the people is exhausted.

Consequently, if HUD needs such a capacity on an enduring basis, it must be created on an enduring basis.

But it is about time.

PX 15.

8. Dunlap forwarded Fitts' December 16, 1995 e-mail to Nancy Andrews. Tr. 173 (Dunlap). On cross-examination, Dunlap was asked if she told Andrews that "getting Hamilton what they need [is] perceived by ... Austin [as] the goal at all costs and she believes I am both the access and the barrier." Dunlap admitted that "[i]t certainly is the type of thing I might have said." Tr. 173-74 (Dunlap).

9. On February 8, 1996, Dunlap sent an e-mail from her personal AOL e-mail account to several Hamilton employees. PX 196; Tr. 188 (Dunlap). The e-mail contains a list of HUD employees that Dunlap either questioned in their job performance or had removed from their positions. Tr. 188 (Dunlap). The list includes Dave Ryan and Bill Richbourg. PX 196 at 2; Tr. 188 (Dunlap).

10. Ryan and Richbourg, who alternated as Government Technical Representative ("GTR") on Williams, Adley's 8(a) contract, "complained to [Henry Adley] quite often that they thought Hamilton was getting too much work." Tr. 102-03 (Adley). In fact, they "continually

expressed" this concern. Tr. 104-05 (Adley). Dunlap testified that she had Richbourg replaced as chairman of the Source Evaluation Board in the second Financial Advisor procurement in which Hamilton was competing for a contract. Tr. 159 (Dunlap).

11. The testimony of Kevin McMahan confirmed that Hamilton interviewed Kathy Rock for a position at Hamilton. Tr. 57 (McMahan). At the time she was interviewing with Hamilton, Rock also contacted Helen Dunlap concerning a position at HUD, and Dunlap passed on Rock's resume to the deputy of FHA Commissioner Nicolas Retsinas. Tr. 222-24 (Rock). According to the HUD OIG's Disposition Report, e-mails between Fitts and Dunlap show that Fitts knew Rock was about to commence employment with HUD. HX 35 at 3.

B. THE NORTH AND CENTRAL NOTE SALE

1. Failure To Remedy Optimization Errors From WoM Sale

12. Hamilton did not present testimony from a Hamilton or Lucent/Bell Labs employee who was personally involved in the N/C sale. The sole Hamilton employee offered by Hamilton on this subject, Kevin McMahan, testified that most of his knowledge about the N/C sale was based on the "Manhattan project" investigation and not his personal knowledge. Tr. 71-72 (McMahan). McMahan could not recall whether he was involved in the N/C sale. Tr. 73 (McMahan).³

13. On direct examination, McMahan testified that he learned during the Manhattan investigation that the error on the WoM sale resulted from a miscommunication between the Hamilton "direct interface" - - Robert Robinson - - and Lucent/Bell Labs - - Sol Schindler - - that was not discovered until the bid day of the WoM sale. Tr. 46 (McMahan). Robinson believed

³ Hamilton expressly chose not to call Rick Wolfe, the lead Hamilton employee on the N/C sale.

the problem had been corrected for the WoM sale and that a new model was being developed that would be used any time future sales would be based on minimum UPB. Tr. 46 (McMahan).

14. McMahan further learned during the Manhattan investigation that, subsequent to the WoM sale, Lucent/Bell Labs did create a UPB model, but Robinson was not employed by Hamilton at the time of the N/C sale; he left Hamilton in December of 1995. Tr. 48 (McMahan). Shortly after the WOM sale, Schindler had a heart attack, but McMahan did not know when that occurred. Tr. 48, 76 (McMahan).

McMahan further testified:

It appears that the, Mr. Robinson was not available, was not a Hamilton employee, Mr. Schindler was not a Bell Labs employee. Those were the two main contacts who had completed the last sale who had discovered the error and discovered the need for a fix. The fix being the development of a UPB model. When the north and central sale occurred, Hamilton's instructions to now new people at Lucent Bell Labs was to run the same model we did for west of the Mississippi, and they simply pulled the wrong one off the shelf and ran it.

Tr. 49 (McMahan).

15. As noted, McMahan's knowledge comes from his investigation. Specifically, he conducted a "two to three" hour interview of Robert Robinson at the American Café restaurant. Tr. 73-74 (McMahan). At the time, Robinson was no longer a Hamilton employee but was willing to volunteer his time to sit for the interview. Tr. 74 (McMahan). This interview was the only time McMahan spoke to Robinson about the N/C sale. Tr. 75 (McMahan).

16. Coopers & Lybrand, Hamilton's subcontractor, was initially involved in developing the optimization model for the multifamily note sales, but was dismissed from that obligation. Tr. 76 (McMahan).

2. The WoM Post-Auction Review

17. Hamilton was required to prepare and submit to HUD a post-auction review of each sale, including the West-of-Mississippi sale. HX 8 at p.C-2, ¶ 1.g.. One purpose of the post-auction review is to identify the “Lessons Learned” during the sale, and “document what actually transpired in the WoM sale, and present suggestions for consideration in future sales based on the experiences of the WoM Sale.” HX 167 at 8.

18. Although the WOM sale occurred in September 1995, Hamilton did not submit the post-auction review to HUD until August 22, 1996 - - two weeks after the N/C sale. HX 167.

19. While the WoM Post-Auction Review includes a section entitled “**Optimization Model and Bid Selection**,” it does not disclose the problems associated with the optimization model that required two separate runs, the latter involving a “temporary fix.” HX 167 at 15. Nor does it disclose the September 29, 1995 memorandum of Michael Brocks regarding the omission of ALI pool bid #3. *Id.*

20. In the section entitled “Lessons Learned”, 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. The document, however, does not disclose the communications between Robert Robinson and Sol Schindler about the need to fix the optimization model so that it would properly calculate bid floors in future sales or the communications from Michael Brocks.

3. The December 1996 Optimization Error Reports

21. Hamilton presented testimony concerning its December 4, 1996 and December 20, 1996 memoranda disclosing optimization errors in the WoM and N/C sales (“optimization reports”). According to McMahan, Hamilton directed its optimization reports to Kathy Rock

because she was the Government Technical Monitor (“GTM”) for the crosscutting task order. Tr. 50 (McMahan); PX 77.⁴

22. Rock testified that when she received Hamilton’s optimization reports she and Retsinas met with HUD’s general counsel. Tr. 242 (Rock). According to Rock, “that was the end of my involvement” Tr. 242 (Rock).

23. A few months prior to her receipt of Hamilton’s optimization reports, Rock was interviewed by the HUD OIG, wherein she was told that she was the subject of a criminal investigation regarding the note sale program and read the Advisement of Rights. Tr. 265-66 (Rock).

24. On or about October 7, 1996, Rock received a phone call from a reporter at U.S. News and World Report concerning allegations of insider information in connection with the note sale program. Tr. 268-69, 271 (Rock). On November 11, 1996, an article entitled "Of contacts and confidence" appeared in the U.S. News and World Report criticizing Hamilton's conduct of the note sales. HX 126.

25. Thus, at the time Rock received Hamilton optimization reports, she knew that both the OIG and the news media were investigating the note sales, but she did not turn the optimization reports over to the OIG or the contracting officer. Tr. 271-72 (Rock). As established in Ervin’s case-in-chief, the contracting officer first learned of the optimization reports in October 1997 when HUD's Office of Inspector General showed her the reports. Oct. 28, 2003 Tr. 96 (Hancock).

⁴ Rock denied that she was the GTM on the crosscutting contract; she believed Kate Trygstad held that position. Tr. 274 (Rock). The crosscutting task order identifies Rock as the GTM. HX 7.

26. On September 30, 1996, Hawthorn Management Services, Inc. ("Hawthorn), a bidder on the N/C sale, submitted a Freedom of Information Act ("FOIA") request to HUD seeking, among other things, "the results of the computer optimization model confirming that HUD selected the combination that produced the highest proceeds to HUD." *Hawthorn Mgmt Services, Inc. v. Dep't of Housing & Urban Development*, 1997 U.S. Dist. LEXIS 21491 at *2. HUD denied Hawthorne's FOIA request on the grounds that the information was confidential and thus exempt from disclosure pursuant to "Exemption 4" of the FOIA. *Id.* at 3. On December 4, 1996, Hawthorn sued HUD in U.S. District Court for the District of Connecticut pursuant to the FOIA, seeking an order requiring HUD to produce the documents. *Id.* Both parties moved for summary judgment.

27. In support of its motion for summary judgment, HUD submitted a Declaration signed by Kathy Rock ("initial Declaration"). In her initial Declaration, Rock stated:

HUD used an optimization model to determine the combination of individual bids and pool bids that maximized both the number of loans sold and the proceeds to HUD and the federal taxpayers.

HUD's financial advisor scanned the bid cards it received and then transmitted the bids in electronic format to Lucent Technologies ("Lucent"), which created and maintains the optimization model. Lucent ran the bids through the optimization model and submitted a report of the results to HUD's financial advisor. HUD's financial advisor reported to HUD the identities of the bidders whose bids would maximize both the number of loans sold and the proceeds to HUD and the federal taxpayers and the prices they paid for loans or pools of loans.

Id. at *5-6 (quoting the initial Declaration of Kathy Rock). See also Tr. 276-77 (Rock).

28. On December 5, 1997, Hawthorn filed a motion to take the deposition of Kathy Rock, claiming that HUD's handling of its FOIA request evidenced "bad faith." *Hawthorn*, 1997 U.S. Dist. LEXIS 21491 at *3-4. Hawthorn's request was based on news articles stating

that in 1996, Rock was aware that HUD's chief financial advisory contractor had changed the winners and losers in the note sales. *Id.* at * 6. In response to Hawthorn's motion, Rock submitted a supplemental Declaration admitting that she was aware of these problems at the time she submitted her initial Declaration:

HUD's financial adviser has advised HUD that, because of an error in the instructions that HUD's financial adviser provided to Lucent for the optimization model, the results of the optimization as reported to and accepted by HUD did not fully maximize the proceeds to HUD for this sale . . . The error in the North and Central sale, therefore, resulted in decreased proceeds to HUD of \$ 1,511,244 or 2/10ths of one percent.

Id. at * 8 (quoting Rock's supplemental Declaration).

29. The court (Alan H. Nevas, U.S. District Judge) granted Hawthorn's motion to take Rock's deposition, stating that Rock's

untimely acknowledgment is troubling to the court. Rock's revised declaration also lends credence to the allegations in the news accounts.

Based on the allegations in the newspaper articles and Rock's failure to disclose all pertinent information concerning the bidding process in her initial declaration, the court finds that Hawthorn has made a sufficient showing of bad faith entitling it to the limited discovery it seeks.

Id. at *8-9.

30. Confronted with the *Hawthorn* decision, Rock acknowledged that she "neglected to disclose that on one specific sale there was an error that would have made the process incorrect." Tr. 278 (Rock). The information that Rock "neglected to disclose" in her initial Declaration in the *Hawthorn* case was the optimization error in the N/C sale that Hamilton brought to her attention in December of 1996. Tr. 279 (Rock).

C. SINGLE FAMILY # 1

1. Hamilton's Relationship With Winning Bidders

31. Kevin McMahan testified that Hamilton had no "business relationships" with BlackRock or Goldman Sachs apart from the BlackRock subcontract on the partially assisted sale task order. Tr. 27 (McMahan). McMahan defines "business relationship" as "an existing agreement to do some kind of business or there are active discussions to undertake some type of business." Tr. 78-79 (McMahan).

32. McMahan did not address Hamilton employee Grace Huebscher's testimony that Hamilton also pursued business deals with Goldman Sachs. Oct. 30, 2003 Tr. 121-23 (Huebscher). Huebscher's testimony is supported by her e-mail with Goldman Sachs on October 16, 1995, less than two weeks before the Single Family #1 sale, wherein she summarized a meeting exploring business relationships between Goldman Sachs and Hamilton. The companies agreed to

Separately evaluate the potential federal loan sale opportunities based upon information we have or are able to collect and then we will get together and compare information and then set out a couple of targets we can work on together . . . we promised to meet in one month . . . and we will share each other's analysis and come up with proposed targets.

PX 205.

33. Hamilton did not address the fact, established in Ervin's case-in-chief, that on November 19, 1995, Grace Huebscher wrote to Wes Edens, President of BlackRock, stating "lastly, I hope the next several months 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." PX 82.

34. Hamilton did not rebut the fact that Blackrock and J.E. Roberts, which was partially owned by Goldman Sachs, were identified as teaming partners to Hamilton in the second Financial Advisor proposal. See Tr. 161 (Dunlap).

35. Nor did Hamilton present any evidence to rebut the fact that as of January 21, 1996 - - less than three months after the Single Family #1 Reoffering sale - - Hamilton owed a debt of \$500,000 to BlackRock and Hamilton's Board of Directors considered converting this debt into Hamilton equity and selling BlackRock a FHA database for another \$250,000. PX 195. Hamilton provided no evidence that it ever satisfied this debt.

36. At about this time, Hamilton, through Williams, Adley, received an extension and corresponding price increase for the partially assisted task order. Tr. 170-71 (Dunlap); Tr. 247-48 (Rock). BlackRock continued to work with Hamilton through the extended period until the sale was completed. Tr. 248-49 (BlackRock). Hamilton presented no evidence that it paid BlackRock for its additional four months of service at the rate of \$125,000 per month (for a total of an additional \$500,000) out of the \$1.2 million task order increase proceeds for the partially assisted sale received by Hamilton.

37. Kathy Rock was not concerned whether Hamilton had paid BlackRock for all of the work it performed on the partially-assisted sale; her only concern was whether BlackRock had access to information on other loan sales. Tr. 249-50 (Rock).

38. Hamilton did not present any evidence that it disclosed to the HUD contracting officer or those who attended the SF #1 decision meeting its substantial debt to BlackRock or of how and when that debt was liquidated.

2. The Selection Of The BlackRock/Goldman Sachs Team's Bid

39. At a meeting with FHA Commissioner Nicolas Retsinas, Dunlap and Rock, Hamilton presented briefing slides identifying the four bids received in the Single Family #1 reoffering. HX 231; Tr. 134-35 (Dunlap). Option #1, the BlackRock/Goldman Sachs bid, was for 73.11% of unpaid principal balance, which was below the 74% minimum identified in the reoffering memorandum and resulted in positive credit subsidy of \$2,295,507. PX 233; HX 228 at bates p. 000508.

40. Dunlap testified that HUD was "very concerned about the fact that the rules were clear and there was lots of collaboration in setting policy and we had a lot of communication." Tr. 127 (Dunlap).

41. Dunlap testified that she recalled Hamilton made a "light" recommendation - - which means "they were not vehement" - - to select Option # 4. Tr. 137 (Dunlap).⁵ Retsinas chose Option #1, the BlackRock/ Goldman Sachs bid, because according to Dunlap, it brought in the most revenue for the Government even though it was not the most profitable. Tr. 137-38 (Dunlap). Dunlap further testified that "the number one most important goal was to get this portfolio, these portfolios gone so that we could return our energies to the HUD insured portfolio." Tr. 137-38 (Dunlap). McMahan likewise testified that Retsinas selected the option that would sell the most loans and generate the most revenue to the government. Tr. 34 (McMahan).

42. Option # 1 (BlackRock/Goldman Sachs) did not meet the pre-established 74% threshold price. Neither did Hamilton advise Retsinas that option one was ineligible for

⁵ Kevin McMahan also testified that Hamilton made a recommendation to FHA Commissioner Nicolas Retsinas, but could not recall which option it recommended. Tr. 33 (McMahan).

selection. Tr. 150 (Dunlap). In addition, Option #1 generated a positive credit subsidy of \$2,295,507. HX 228 at bates p. 000508. Hamilton did not explain why a non-conforming bid was presented to Retsinas as an acceptable option or justify why Retsinas would have chosen a loss of \$2,295,507 million instead of a profit of \$645,837.

43. Hamilton presented no evidence that Retsinas was informed of Hamilton's relationships with Goldman Sachs or BlackRock.

D. WILLIAMS, ADLEY SUBCONTRACTED TASK ORDERS TO HAMILTON

44. HUD invited Williams, Adley to make a presentation on its qualifications to perform due diligence work. Tr. 86-87 (Adley). As requested, Williams, Adley made a presentation at a meeting at HUD attended by approximately 15-20 people. Tr. 87 (Adley). Helen Dunlap attended and did most of the questioning. Tr. 87 (Adley); Tr. 139 (Dunlap). Employees of Coopers & Lybrand were present; Henry Adley recalled a Coopers employee named Rick Sampson being present. Tr. 87 (Adley).

45. When asked on direct examination whether Hamilton "play[ed] any role" in the group decision to select Williams, Adley for the due diligence work, Dunlap responded: "There was a participant in the interviews that came from Coopers & Lybrand to provide us with some technical support that was a sub to Hamilton on their FA contract at the time, a woman by the name of Susan Ellis I believe." Tr. 140 (Dunlap) *see also* Tr. 151 (Dunlap).

46. Dunlap had "a number of conversations" with Hamilton about the concept of awarding a contract to an 8(a) firm for the due diligence to support the sales. Tr. 151 (Dunlap).

In an email dated October 26, 1994 addressed to Fitts, Dunlap suggested "swing[ing]" a "supplement to Hamilton and Coopers through the 8(a) contract." PX 53.⁶

47. HUD informed Williams, Adley that it had been selected as the 8(a) firm to perform the due diligence work. Tr. 89 (Adley).

48. On October 26, 1994, Williams, Adley submitted its cost and technical proposal for the due diligence work. WAX 24; Tr. 91-92 (Adley). Hamilton was not named in the October 26, 1994 submission. WAX 24.

49. HUD then verbally requested that Williams, Adley look into whether it could perform financial advisory work, in addition to the due diligence, and do so formally in a proposal. Tr. 92 (Adley).

50. Henry Adley testified that he needed a subcontractor for the financial advisory work, and he contacted Chemical Bank and others to see if they were available. Tr. 93 (Adley). HUD told Adley about Hamilton. Tr. 94 (Adley). Adley then contacted Hamilton. Tr. 94 (Adley).

51. Hamilton did not explain how Hamilton, which needed an additional vehicle to fund its loan sale activities, was assured of being approached by Williams Adley as a Financial Advisory subcontractor under a contract that on October 26, 1994 Dunlap suggested to Fitts would be used to "swing a supplement to Hamilton and Coopers through the 8(a)." PX 53

⁶ In Ervin's proposed findings of fact in response to Hamilton's Rule 52(c) motion, Ervin inadvertently cited to Hamilton Exhibit 53 when the correct exhibit is Plaintiff's Exhibit 53. Hamilton acknowledged this error in its Reply. See Hamilton's November 14, 2003 Reply at 3, n.3 ("Hamilton assumes Ervin intended to cite to its own Exhibit 53."). A copy of Plaintiff's Exhibit 53 is included in the Appendix filed herewith.

52. During Ervin's case-in-chief, Ervin established that Williams, Adley and Hamilton met at least once between October 26, 1994 and November 2, 1994 to discuss carving up the 8(a) contract funds. PX 51 (last page); Oct. 31, 2003 Tr. at 191-192 (Robinson). At the meeting, Hamilton Officer and Director Robert Robinson's handwritten notes indicated 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. Hamilton did not address these facts during its case.

53. Williams, Adley submitted a revised technical and cost proposals on November 2, 1994 that identifies Hamilton, KPMG, Coopers & Lybrand and CS First Boston as loan sale and financial advisory subcontractors. WAX 27; Tr. 96-97 (Adley).

54. Henry Adley testified that the reason HUD was considering Williams, Adley for the financial advisory services is that they were in the process of letting contracts for additional financial advisors and the 8(a) contract was "a stop gap measure until [the Second Financial advisory contracts were] in place, then we would go back to performing the due diligence work." Tr. 94 (Adley).

55. After the 8(a) contract was awarded, Williams, Adley engaged in negotiations with Annette Hancock, the HUD contracting officer. Hancock asked Williams, Adley to describe the process by which Williams, Adley selects its subcontractors. PX 72; Tr. 99-100 (Adley).

56. Williams, Adley responded:

WA&Co will utilize its data base of subcontractors who have successfully performed work for the firm in the past. When

subcontracting is required under a task order, WA&Co will solicit proposals from one or more firms from its data base.

WX 72.

57. In August 1995, Hamilton sought an increase in its firm fixed price for the work it was performing in support of the partially assisted sale under task order #4 of the 8(a) contract. Tr. 169 (Dunlap). After the contracting officer turned down the request, McMahan complained directly to Dunlap. Tr. 170 (Dunlap). Dunlap "made the case" to the contracting officer and the task order price was increased by \$1.2 million. Tr. 167, 170-71 (Dunlap).

58. Kathy Rock also asked the HUD Contract Specialist to approve the expanded scope of work for the partially assisted task order. Tr. 248 (Rock). Hamilton's subcontractor, BlackRock, continued to work on the partially assisted sale until its completion. Tr. 248 (Rock).

E. THE CROSSCUTTING TASK ORDER

1. The Concept Of The Crosscutter

59. The term "crosscutting" means support for a wide array of program services as opposed to individual transactions. Tr. 34-35 (McMahan). According to Kevin McMahan, the idea for a crosscutting contractor came about in an informal meeting between himself and two members of HUD's Office of Inspector General, Chris Greer and Dave Daracola. Tr. 35 (McMahan). But according to Helen Dunlap, "Hamilton was the first to suggest that we would benefit from having a regular crosscutting teammate." Tr. 142-43 (Dunlap).

60. At some point, HUD concluded it needed additional capacity to support the loan sale program. It was faced with a choice of whether to hire additional in-house staff or an outside contractor. Tr. 164 (Dunlap). Dunlap had no expectation, given HUD's experience with

trying to hire new staff, that Retsinas would approve the option of staffing internally. Tr. 144-45 (Dunlap).

61. On August 14, 1995, McMahan wrote an e-mail to Helen Dunlap and Chris Peterson with the subject line "One IOU paid." PX 107; Tr. 58. Attached to the e-mail was a three-page memorandum in a word perfect file entitled "nic-memo.doc" - - a reference to FHA Commissioner Nicolas Retsinas, who was Dunlap's superior. Tr. 59 (McMahan); PX 107.⁷

62. The "Nic-memo" outlines three options to address HUD's staffing shortfall:

Detailees From Other Government Agencies
Individual Contractors
Oversight & Crosscutting Contractor

PX 107. Under the heading "Oversight & Crosscutting Contractor," the memo states in part:

the Department is about to expand the number of financial advisors it contracts with from one to six (three on the FA solicitation and three on the Due Diligence Contract). The extent of the training and orientation these new FA's will require can only be guess at this time, but its safe to say that it is substantial.

...

To provide oversight and direction to the FA's, as well as be responsible for all crosscutting functions, we propose to engage one of the FAs. We have reviewed the scope of work from the pending FA solicitation and find that it is broad enough to do much of this work.

PX 107 at 2.

⁷ Plaintiff's Exhibit 107 was authenticated and discussed at trial by Kevin McMahan. Tr. 58 (McMahan). Unfortunately, Plaintiff neglected to formally move the document into evidence. Ervin respectfully requests that the Court receive the document in evidence. Prior to trial, Hamilton objected to this document only on the grounds of relevance. After a meeting among counsel, by letter dated October 28, 2003, Hamilton withdrew its preliminary objection to Plaintiff's Exhibit 107, "[s]ubject to objections at trial." On August 3, 2003, plaintiff's counsel called Hamilton's counsel to inquire whether Hamilton has any objection to the admission of this document. Hamilton's counsel stated that he does object to the admission of the document.

63. Neither Greer, Daracola, nor any other HUD OIG employee was copied on McMahan's August 14, 1995 e-mail. PX 107; Tr. 58 (McMahan). In his testimony, McMahan characterized the memorandum as "the results of the discussion from a meeting with Helen and Chris." Tr. 59 (McMahan). The memorandum does not mention any meeting. PX 107.

64. At the time McMahan wrote this memorandum, HUD had a pending solicitation for new financial advisors ("FA II solicitation"). See Tr. 156 (Dunlap) (FA II request for proposals issued in February 1995). The FA II solicitation contemplated the award of three financial advisory contracts. Tr. 157 (Dunlap); See PX 143A ("SEB recommends awards to three firms"). Hamilton submitted a proposal in response to the FA II solicitation. Tr. 157 (Dunlap).

65. Audrey Hinton was chair of the Source Evaluation Board ("SEB") for the FA II procurement. 157-58 (Dunlap). She replaced the original SEB chair, Bill Richbourg, who was removed at the request of Dunlap and Chris Peterson. Tr. 159 (Dunlap). As noted above, Richbourg had repeatedly complained that Hamilton was getting too much work from HUD.

66. On September 11, 1995, Hinton sent an e-mail to Dunlap setting forth the rankings the SEB assigned to the top seven proposals submitted in response to the FA II solicitation; it showed Hamilton in a tie for fourth place. PX 112; Tr. 160 (Dunlap). It also showed BlackRock and J.E. Roberts as subcontractors to Hamilton. PX 112.⁸ On the same day she received the e-mail from Hinton, Dunlap sent a lengthy e-mail to Austin Fitts discussing personal matters. PX 13; Tr. 163 (Dunlap).

⁸ This fact is inconsistent with Hamilton's position that its only relationship with BlackRock was on the partially assisted sale.

67. Shortly after receiving Hinton's September 11, 1995 e-mail, Dunlap met with the SEB to "provide them with the, what from a programmatic standpoint that we were looking for in the mix of [financial advisors]." Tr. 162-63 (Dunlap). On November 2, 1995, Hamilton moved in the rankings and was one of the three firms that the SEB recommended for award. Tr. 162 (Dunlap); PX 143A. Hamilton was eventually awarded a contract for the second Financial Advisor procurement. *Id.*

68. On October 2, 1995, Dunlap sent a memorandum to Commissioner Retsinas providing advice and recommendations as to whether HUD should hire more internal staff to support the note sale program or hire a crosscutting contractor. PX 22; Tr. 164-65. The memorandum was almost word-for-word identical to the "nic-memo" memorandum drafted by Hamilton employee Kevin McMahan and sent to Dunlap on August 14, 1995. Compare PX 107 with PX 22. For example, like McMahan's draft, Dunlap's October 2, 1995 memo states:

the Department is about to expand the number of financial advisors it contracts with from one to six (three on the FA solicitation and three on the Due Diligence Contract). The extent of the training and orientation these new FA's will require can only be a guess at this time, but it is safe to say that it is substantial.

...

To provide direction to the FA's, ensure the career staff is involved in the entire process, and to be responsible for all crosscutting functions (including credit reform, systems, and program design), we propose to engage one of the FA's. We have reviewed the scope of work from the FA solicitation in process and find that it is broad enough to support such a role.

PX 22 at 3-4.

2. Preparation Of The Crosscutter Statement of Work and Schedule

69. When asked whether he drafted a portion of the Statement of Work ("SOW") for the crosscutting task order, McMahan testified: "Yes. I responded to a request and provided some input on the task order.... I don't recall if what I drafted ended up in the task order verbatim or not." Tr. 66 (McMahan). He later conceded that the "input came in the form of [a draft of at least sections of the SOW] as well as ... there were additional requests for providing language to expand certain paragraphs." Tr. 69 (McMahan).

70. Former HUD Comptroller Kathy Rock testified that she "wrote the task order." Tr. 227 (Rock). She admits that she "solicit[ed] input from Kevin McMahan at Hamilton" and that the so-called "input" was in written form. Tr. 228; 243 (Rock). She also admits that she met with McMahan from time to time in December 1995. Tr. 244 (Rock). After finalizing the SOW, Rock turned it over the "procurement folks" to issue the crosscutter Request for Proposals ("RFP"). Tr. 229 (Rock).

71. In Plaintiff-Relator's case-in-chief, Hamilton employee Grace Huebscher identified plaintiff's exhibit 115 as a draft SOW that she and McMahan were working on as early as December 12, 1995. Tr. 126-27 (Huebscher). A side-by-side comparison of McMahan's draft and the SOW included in the RFP reveals:

- Section 1.1 of McMahan's draft is almost identical to section 1.2 of the RFP.
- Section 1.2 of McMahan's draft is substantially similar to section 1.3 of the RFP.
- Section 1.3 of McMahan's draft is *verbatim* identical to section 1.4 of the RFP.
- Section 1.4 of McMahan's draft is almost identical to section 1.1 of the RFP.
- Section 1.5 of McMahan's draft is *verbatim* identical to section 1.5 of the RFP.
- Sections 2.1 and 2.2 of McMahan's draft are *verbatim* identical to section 3.1 of the RFP.

- Section 2.3 of McMahan's draft is almost identical to section 3.2 of the RFP.
- Sections 3.1 and 3.2 of McMahan's draft are *verbatim* identical to section 5.1 of the RFP.
- Section 3.3 of McMahan's draft is *verbatim* identical to section 5.2 of the RFP.
- Section 3.5 of McMahan's draft is almost identical to section 5.4 of the RFP.
- Section 4.1 of McMahan's draft is *verbatim* identical to section 6.1 of the RFP.
- Section 4.2 of McMahan's draft is *verbatim* identical to section 6.2 of the RFP.
- Section 4.3 of McMahan's draft is *verbatim* identical to section 6.3 of the RFP.
- Section 4.4 of McMahan's draft is *verbatim* identical to section 6.4 of the RFP.

Compare PX 115 with PX 262.

72. On December 29, 1995, McMahan sent Dunlap and Rock a proposed schedule for the crosscutting task order procurement. Tr. 175 (Dunlap). In direct examination, Rock characterized this e-mail as "probably a schedule for asset sales for the sales that were sort of planned and pending as we got the financial advisory contracts done." Tr. 239 (Rock). On cross examination, Rock admitted that she understood the following terms in the schedule to have the following meanings:

"OPC" means Office of Procurement and Contracts.

"FA's" means the financial advisors who were awarded contracts under the FA II solicitation.

"Selection Panel" means a panel evaluating proposals.

"BAFOs" means best and final offers.

T/O means task order.

Tr. 244-45 (Rock).

73. In January 1996, HUD prepared an estimate of the cost of the crosscutting task order for purposes of reserving funds. Tr. 175 (Dunlap). The cost estimate was \$5 million per

year, and was based on a detailed estimate of labor hours, labor rates and other costs for specific tasks. PX 172; Tr. 180-81 (Dunlap). Both Dunlap and Rock signed, approving the estimate. Tr. 180 (Dunlap); PX 180. Dunlap then instructed HUD employees Skip Day and Audrey Hinton that the crosscutter cost estimate should be \$10 million for two years. Tr. 181 (Dunlap); PX 125.

74. On February 15, 1996, Skip Day wrote to Rock, Dunlap and Kathy Trygstad that he "persuaded OPC to reduce the time for submitting proposals on the Cross-cutting T.O., proposals due 2/23." Tr. 182 (Dunlap).

3. The "Competition" For The Crosscutting Task Order

75. HUD issued the crosscutting task order RFP to all four contractors that received contracts under the FA II solicitation. PX 143A. Hamilton's was sent on February 16, 1996. PX 22; Tr. 183-84 (Dunlap). The RFP stated that proposals were due on February 23, 1996. PX 22. When asked how long it took Hamilton to put its proposal together, Kevin McMahan testified: "every minute that was provided from the time the proposal arrived until it was due." Tr. 39 (McMahan).

76. HUD sent Cushman & Wakefield ("C&W") the RFP on February 19, 1996. PX 262. Although sent three days after the RFP sent to Hamilton, it likewise set a proposal due date of February 23, 1996. *Id.*

77. The RFP contemplated award of a cost plus incentive fee type contract, and asked bidders to submit "[a] separate cost proposal (submitted on [Standard Form] 1411) which fully documents the costs." *Id.*

78. The RFP required the offeror to certify that it "does not have any organizational conflict of interest", which is defined to include a situation in which the work to be performed

and the contractor's organization does not "[r]esult in an unfair competitive advantage to the offeror." PX 262 (last page).

79. Kathy Rock was a member of the technical evaluation panel ("TEP") that reviewed the crosscutter proposals, along with Kate Trygstad, Jackie Campbell and Greg Bolden. Tr. 230-31 (Rock). The TEP concluded that the Hamilton proposal was "stronger" than the C&W proposals, and that recommendation is set forth in a March 22, 1996 memorandum to Nicolas Retsinas. Tr. 232 (Rock); PX 133. As set forth in this memorandum, which Retsinas signed, the TEP found that the C&W proposal had some strengths and some weaknesses; the TEP did not conclude that C&W's proposal was "technically unacceptable." Tr. 255 (Rock). The TEP's March 22, 1996 memorandum concludes: "Based on technical superiority, the panel recommends Hamilton Advisory Service, Incorporated to perform the cross-cutting task order." PX 133 at 3.

80. The TEP's March 22, 1996 memorandum erroneously states that "a *one-year* cost for Cushman would probably be \$8.2 million." PX 133 at 3 (emphasis added). C&W's proposal clearly states that "[t]he engagement period will be two years from task order acceptance" and that C&W's price of \$8.2 million is for loans sold both during Fiscal Years 1996 and 1997. PX 258.

4. OIG's Contemporaneous Inquiry Into The Crosscutter RFP

81. On March 26, 1996, members of HUD's OIG met with Rock and others to discuss two issues regarding the crosscutting RFP; one issue was "whether the solicitation [RFP] 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 this meeting:

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. HUD’s Disposition Report in this matter states:

The investigation disclosed that although FHA officials knew that Hamilton was going to bid on the cross-cutter, they permitted HAMILTON, in its capacity as First Financial Advisor, to write portions of the statement of work and other parts of the Request for Proposal. HAMILTON’s direct involvement drafting the RFP for a procurement for which they subsequently were awarded was a violation of Section 9.505-2(b)(1) of the Federal Acquisition Regulations.

At the time of the procurement, KATHY ROCK, the FHA Comptroller, failed to acknowledge HAMILTON’s participation in drafting the statement of work, when questioned by HUD OIG.

HX 35 at 3.⁹

82. Rock maintains that she did not prepare the crosscutting task order so that only Hamilton could win; she describes the tasks as “fairly generic either financial advisory or consultant activities that any financial advisory and/or any financial firm should be able to respond to” and that C&W was capable of providing those services. Tr. 235-36 (Rock).

5. The Revised Justification

83. In her direct examination, Rock testified that “at one point Annette Hancock came and talked to me and asked me to re-clarify in my evaluation of the two proposals and I did that, and she said well, it sounds like to me that you’ve found to Cushman proposal to be technically

⁹ Rock testified that she disclosed to the OIG that she obtained McMahan’s “input” on the crosscutter SOW, but could not recall whether she did so in the March 26, 1996 meeting or in the subsequent OIG interview of Rock during the *qui tam* investigation wherein she was told she was the subject of an investigation and read the Advisement of Rights. Tr. 260-67 (Rock). Based on OIG’s reports on this issue, it is clear that Rock did not disclose McMahan’s “input” during the March 26, 1996 meeting.

unacceptable.” Tr. 233 (Rock). In Plaintiff-Relator’s case-in-chief, Hancock described her conversation with Rock regarding the March 22, 1996 report as follows:

from my perspective, there was no indication that those two firms could not perform the work. And given the fact that the only indication here is one is stronger than the other, the issue in cost and pricing, what they were recommending was not sufficiently documented to support their selection [of Hamilton].

Tr. 65 (Hancock).

84. Hancock asked the panel to "go back and take a look at their evaluation findings and be clear what characterization you would give each firm’s proposal as it relates to whether or not their proposal is an acceptable on or not." Tr. 62-63 (Hancock).¹⁰

85. Likewise, the OIG, in its final Disposition Report, found that

ROCK initially drove the recommendation to the FHA Commissioner that HAMILTON be awarded the bid. The contracting officer in charge of procurement balked at FHA’s recommendation because the CUSHMAN & WAKEFIELD proposal was \$8,000,000 less than the Hamilton proposal, and there was inadequate justification by the evaluation board why HAMILTON’s proposal should be accepted over CUSHMAN & WAKEFIELD’s proposal.

HX 35 at 3.

86. Despite Kathy Rock’s admission that the crosscutter SOW tasks were “fairly generic” and C&W was capable of providing the requested services, Rock concluded that C&W’s proposal was “technically unacceptable” and this conclusion was embodied in a new memorandum to Retsinas dated April 26, 1996, which Retsinas also signed. Tr. 235-38; PX 134.

87. The April 26, 1996 memorandum states that C&W’s proposal “is unacceptable in terms of the offeror’s understanding of this specific task and the nature and level of effort that

¹⁰ All HUD contracting officers with whom Hamilton dealt reported to Annette Hancock. Tr. 20 (McMahan).

the offeror proposed to perform it.” PX 134. It further states that C&W’s “error in perception is reinforced by the pricing proposal of this offeror, which seriously underprices the consulting effort, offering the value of one person per year.” PX 134 at 1-2. The memorandum does not state that C&W’s two-year proposed price of \$8.2 million is much closer to HUD’s estimate (\$10 million for two years) than Hamilton’s. *Id.*

88. Rock discussed the revised evaluation with Kate Trygstad but does not recall discussing it with other members of the TEP and does not know whether Trygstad discussed it with them. Tr. 234; 259 (Rock). HUD’s OIG found that “ROCK advised that she spoke to no one about the proposals and recalculated the CUSHMAN & WAKEFIELD proposal on her own.” HX 35 at 4.

89. Hamilton was aware of the requirements for a crosscutting contactor from August 1995 to February 23, 1996. Cushman and Wakefield learned about the crosscutter on February 19, 1996 and submitted its proposal eight days later on February 26, 1996.

6. Post-Selection Discussions and “Negotiations” With Hamilton

90. The HUD contracting officer informed Hamilton that it had been selected for award of the task order and invited Hamilton to meet and discuss Hamilton’s pricing. Tr. 40 (McMahan).

91. On April 21, 1996, Hamilton proposed changes to the SOW; most of the proposed changes substantially limited Hamilton’s risk and work scope and expressly reserved Hamilton’s right to seek additional compensation. PX 142. Specifically, Hamilton proposed adding the following language:

The Crosscutting FA is expected to support the traditional and currently budgeted loan sales activities, such as are identified in Attachment I.

- 1) The intended transaction support is for loan sales and no other transactions, and then up to an unpaid principal balance of \$5.875 billion. It does not include transactions that include the insured portfolio, nor does it include transactions that may include privatization of business units or sale of entire business lines.
- 2) In the event that a loan sales transaction is approved and is to be implemented, and that transaction pushes the aggregate UPB in excess of \$5.8 billion (see Attachment I), HUD and the Crosscutting FA will negotiate a modification to determine an appropriate level of additional compensation.
- 3) In the event that a transaction other than a loan sale is approved and is to be implemented, HUD and the Crosscutting FA will negotiate a modification to outline the crosscutting role and determine an appropriate level of additional compensation.

PX 142 at 9.

92. Hamilton also proposed an Attachment I to the SOW, which is a schedule of eleven specific loan sales with a combined UPB of \$5,785,000,000. PX 142 at 13. The original RFP contained no such schedule or limit on the number or UPB of loan sales the contractor would be required to support. See PX 262.

93. There is no evidence that Hamilton substantially reduced its proposed fixed price to account for the reduced work scope. Nor is there any evidence that Cushman and Wakefield was permitted to bid on the reduced SOW.

94. Hamilton's proposed SOW changes were incorporated into the final Task Order (Attachment I was increased to \$6,235,000,000 UPB). HX 7. Despite limiting its work scope to sales with a UPB of \$6.235 billion, Hamilton's price of .255 basis points per year was multiplied by the entire FHA portfolio with a UPB of \$408.67 billion. HX 7. Thus, the final crosscutting task order price was \$20,842,000 for two years (\$408.67 billion x .255), to be paid in monthly

increments of \$868,417. HX 7. By comparison, C&W bid a fixed price of \$8.258 million over two years - - a difference of over \$12,584,000. PX 258 at bates p. 10832.

95. In response to best and final answers in the first Financial Advisory procurement, Hamilton warned HUD of this type of pricing: *"The risk of 'huge and hideous' fees.* Percentage fees may seem minute when expressed as say, 0.25% or 0.5% of a transaction. But when the transaction is in the many hundreds of millions of dollars, the actual fee paid to the financial advisor in nominal dollars can look rather exorbitant." PX 1 at p. 4-6.

96. The source selection official - - the decision-maker as to which offeror would win the task order - - was FHA Commissioner Retsinas. Tr. 184 (Dunlap). On direct examination, Dunlap testified that she "was not involved in the selection process." Tr. 146 (Dunlap). On cross, she admitted that she provided advice and input to Retsinas on the selection decision. Tr. 184-85 (Dunlap). On April 21, 1996, Dunlap sent Retsinas and Rock an e-mail regarding the crosscutter pricing, stating: "this looks like a lot in dollars but is actually only 1.6 above the two year estimate for the base work and less than 3 basis points of the anticipated volume during the period." Tr. 186 (Dunlap).

97. The final crosscutting task order price of \$20,842,000 and is more than double the cost estimate HUD prepared in January 1996. Tr. 186 (Dunlap); HX 7; PX 172; PX 155.

III. PROPOSED CONCLUSIONS OF LAW

A. The North And Central Note Sale

In denying Hamilton's Rule 52(c) motion as to Ervin's claim related to the N/C sale (count IX), the Court stated:

That transaction occurred arguably after Hamilton should have known enough about all of the errors and problems with the West of Mississippi sale to place the burden on Hamilton to demonstrate

that the errors' replication is not actionable gross negligence in the extreme.

Jan. 7, 2004 Order at 1-2.

Hamilton has failed to meet its burden. Hamilton presented no witness who was personally involved in the N/C sale. Through Kevin McMahan (who investigated the sale during the Manhattan project), Hamilton offered only two facts to explain its failure to prevent the replication of the errors and problems on the WoM sale: (i) Hamilton employee Robert Robinson's departure from the company between approximately three-to-four months after the WoM sale, and (ii) Lucent employee Sol Schindler's heart attack on some unknown date after the WoM sale.

These were not new facts; the Court made these explicit findings after the first phase of the trial. See Jan. 7, 2004 Memorandum at 8 ("Robinson resigned from Hamilton in January 1996."), and at 9 ("after the West of Mississippi sale, Schindler suffered a heart attack and did not work on HUD note sales subsequent to the West of Mississippi note sale or interact with those at Bell labs who did work on the subsequent HUD note sale auctions."). Yet the Court still found that Hamilton's conduct on the N/C sale presented "greater evidence of reckless disregard of the falsity of the representation that the results reported to HUD were 'optimal.'" *Id.* at 17 n.11. For this reason alone, the Court should enter judgment against Hamilton on Count IX.

It is correct to reject these facts as a defense to Hamilton's reckless conduct. Far from absolving Hamilton, Robinson's conduct alone is sufficient to demonstrate recklessness under the FCA. Hamilton seemingly argues that it is not responsible for the failure to fix the WoM problems because Robinson departed Hamilton without ensuring that the optimization model was corrected in the few months after the WoM sale (as he and Schindler discussed during the

WoM sale) or at least informing someone else at Hamilton of those problems. As a matter of law, that does not excuse Hamilton. Robinson was Hamilton's Assistant Treasurer and a member of Hamilton's Board of Directors. Jan. 7, 2004 Memorandum at 8. Under the doctrine of *respondeat superior*, which applies with equal force in FCA cases, Hamilton is vicariously liable for the reckless conduct of Robinson. See *United States v. O'Connell*, 890 F.2d 563, 568-69 (1st Cir. 1989) ("The purpose of the False Claims Act is to make the government whole (restitution) and to deter fraud against the government...Both those goals are served by vicarious liability."); *Grand Union Company v. United States*, 696 F.2d 888, 891 (11th Cir. 1983) (knowledge of an employee is imputed to the corporation when the employee acts for the benefit of the corporation and within the scope of his employment); *United States v. Domestic Industries, Inc.*, 32 F.Supp.2d 855, 861-62 (E.D.N.Y. 1999) (*respondeat superior* applies to claims made under the FCA).

Moreover, Kevin McMahan testified that he learned about Robinson's knowledge of the WoM problems and the need to fix the optimization model during a two-to-three hour interview of Robinson during the Manhattan project investigation. Tr. 72-73 (McMahan). Hamilton cannot explain why it failed to interview or debrief Robinson before he left the company or Schindler before or after he suffered his heart attack. This is especially egregious since Hamilton was required to submit a "Post-Auction Review" of the WoM sale - - the main purpose of which was to use the "Lessons Learned" on the WoM sale to improve future sales. Certainly, Hamilton should have debriefed key members of WoM sale team for this Report, including Robinson, Schindler, Michael Brocks (who had separately identified a problem regarding the omission of ALI pool bid #3) and Henry Fan. Hamilton should have reviewed Lucent's optimization reports

from that sale, which clearly reveal the floor problem, the “temporary fix” to attempt to overcome that problem, and the need to create a permanent fix. See HX 44, HX 45. Yet the actual WoM Post Auction Review document which McMahan himself submitted to HUD -- notably almost eleven months after the WoM sale and two weeks after the N/C sale -- reports no problems with the optimization model or the sale itself for that matter. HX 167.

Ironically, Hamilton offered non-specific testimony about the openness and transparency which it claims was the "mantra" under which Hamilton and HUD operated, particularly through e-mails and weekly meetings. Yet Hamilton cannot explain the complete lack of any written or verbal communication with anyone at the time regarding the WoM optimization problems. McMahan admitted that he had never even discussed the sale with Robinson until the Manhattan investigation. Tr. 75 (Robinson). Furthermore, although a team from Coopers & Lybrand was involved in developing the optimization model for the first multifamily note sales, they were dismissed from that obligation after the Southeast sale, leaving Robert Robinson as the only Hamilton official overseeing Lucent/Bell Labs' work. See Tr. 76 (McMahan).

The N/C sale involved notes with a UPB of approximately \$881,000,000. See HX 7 at 13. With almost a billion dollars and the integrity of the loan sale program on the line, Hamilton allowed a rookie note sale team to run the optimization process without ever learning or validating what truly occurred on the previous multifamily sale. This clearly meets the standard for recklessness under the FCA.

B. The Crosscutting Task Order

Ervin demonstrated in its case-in-chief that Hamilton drafted the SOW for the crosscutting task order, then “competed” for and was awarded that very task order at a price more than twice the government estimate and more than two and a half times that offered by

Cushman & Wakefield. HUD contracting officer Annette Hancock testified that she was unaware of this fact and that having a competing contractor prepare the SOW for the subject contract "would be a concern" because "if you're running a competition and you've got ... organizations who are competing, they are required to divulge any organizational conflict of interest they could potentially have that would give them an unfair competitive advantage." Oct. 29, 2003 Tr. 75 (Hancock). Hamilton did not refute Ms. Hancock's testimony.

The Federal Acquisition Regulation prohibits a contractor from competing for a contract for which it prepared or assisted in preparing the SOW. 48 C.F.R. § 9.505-2(b) (1996) ("If a contractor prepares, or assists in preparing, a work statement to be used in competitively acquiring a system or services ... that contractor may not supply ... the services....). *See also SSR Engineers, Inc.*, B-282244, June 18, 1999, 99-2 CPD 27; *Baumann, Prost & Assoc., Inc.*, B-274870, Jan. 10, 1997, 97-1 CPD 15; *Ressler Assocs., Inc.*, B-244110, Sept. 9, 1991, 91-2 CPD 230; *Masstor Systems Corp.*, GSBICA No. 8669-P; 87-1 BCA (CCH) 19,435 (1986) ("The obvious 'mischief to be suppressed' is allowing a contractor to draft the specifications for a future procurement, thus enabling it to favor its own products or capabilities thereby obtaining an unfair competitive advantage to the detriment not only of other suppliers, but to the Government as well because of the higher prices to the Government in the absence of competition."). The failure to disclose an organizational conflict of interest under these circumstances, i.e., a competitive advantage resulting from the preparation of procurement documents, constitutes a false claim under the FCA. *See Harrison v. Westinghouse Savannah River Co.*, 352 F.3d 908, 916-17 (4th Cir. 2003).

The evidence presented during the resumed trial showed that in addition to drafting entire sections of the SOW, Hamilton actually conceived of the idea for a crosscutting contractor and “ghost-wrote” a memorandum for Deputy Assistant Secretary Dunlap to present to her superior, Commissioner Retsinas, supporting the hiring of one of the eventual awardees under the then-pending Financial Advisor II procurement as HUD’s crosscutting contractor. This fact alone created an organizational conflict of interest that, had it been disclosed, would have disqualified Hamilton from competing for the crosscutting task order. See *GIC Agricultural Group*, B-249065, Oct. 21, 1992, 72 Comp. Gen. 15, 92-2 CPD 263 (contractor’s preparation of “project paper” that was used to prepare statement of work for subsequent request for proposals created an unfair competitive advantage and, thus, an organizational conflict of interest pursuant to 48 C.F.R. § 9.505).

The resumed trial also showed that Hamilton’s pre-solicitation involvement did not stop with preparation of the SOW. Hamilton worked with Rock and Dunlap to plan and schedule the crosscutter “competition.” A contractor’s involvement in such pre-solicitation activities gives it “unique advantages and insights in how to structure a proposal.” *GIC Agricultural*, 72 Comp. Gen. at 21-22. Hamilton unwittingly proved this point when Kevin McMahan testified that Hamilton used “every minute that was provided from the time the [RFP] arrived until it was due.” Tr. 39 (McMahan). Obviously, with such a short turn-around time, Hamilton’s months of involvement in conceiving of and planning the crosscutter procurement gave it a substantial advantage over the other bidders which had only eight days to respond to the RFP.

Not only did Hamilton fail to disclose to Hancock its prior involvement in drafting the SOW, but after being notified that it had been selected for award, Hamilton went to Hancock and

requested substantial revisions to the SOW that limited Hamilton's scope of work to ten specific note sales, with the right to additional compensation if the work expanded beyond those sale.

PX 142. Hamilton offered no explanation why it did not include these limitations in its original draft of the SOW so that competitors such as Cushman & Wakefield could have bid on the same playing field as Hamilton.

Hamilton vaguely suggested that it was under contract to HUD at the time it planned and prepared documents for the crosscutter procurement. As a matter of law, this does not eliminate the organizational conflict of interest. *See Basile, Bauman*, 97-1 CPD 15; *GIC Agricultural*, 72 Comp. Gen. at 21 n.6.

Subsequent to the Rule 52(c) briefing, the Fourth Circuit issued another opinion in the *Harrison* case, affirming the judgment that Westinghouse violated the FCA when it and its subcontractor falsely certified that they had no organizational conflict of interest. *Harrison v. Westinghouse Savannah River Co.*, 352 F.3d 908 (4th Cir. 2003) ("*Harrison II*").¹¹ The facts in *Harrison II* are strikingly similar to those in the present case and, therefore, warrant discussion.

Westinghouse managed the Department of Energy's facility in Savannah River. James Smith, a Westinghouse manager, was charged with enhancing the project's training program, and had to determine, with DOE approval, whether to do the work in-house or hire a subcontractor. Michael Kirkpatrick was an employee of General Physics Corporation ("GPC"), which held a basic ordering agreement with Westinghouse. Kirkpatrick became Smith's "righthand man." Similar to Hamilton's Kevin McMahan here, Kirkpatrick "helped prepare some of the briefing

¹¹ This Court cited the earlier decision, *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776 (4th Cir. 1999), in its January 7, 2004 Memorandum. See Jan. 7, 2004 Mem. at 19, n. 13.

papers that Smith used to convince DOE to allow Westinghouse to subcontract the training program.” 352 F.3d at 911. And like McMahan and other Hamilton employees on both the 8(a) and crosscutter procurements, Kirkpatrick was intimately involved in preparing procurement sensitive documents. *Id.*

After obtaining DOE’s approval to subcontract out the training program, Westinghouse issued a Request for Proposals to potential subcontractors. GPC and three other firms responded. Kirkpatrick helped prepare GPC’s bid, which included a certification that GPC had no organizational conflict of interest in connection with the potential award of the subcontract. Smith was one of three Westinghouse employees who reviewed the four bids and selected GPC to receive the training subcontract over another lower-priced bidder. GPC’s “no-OCI” certification was submitted to DOE for approval of the subcontract.

Harrison, a relator, claimed that Westinghouse falsely stated that GPC had no organizational conflict of interest relating to the subcontract because Kirkpatrick’s involvement gave GPC a competitive advantage over the other bidders. The court agreed, stating:

the false statement by Westinghouse -- that GPC did not have an unfair competitive advantage over the other bidders -- had a natural tendency to influence or was capable of influencing DOE to disqualify GPC from the bidding process. It is hard for us to imagine that DOE, if it had fully known the details of the OCI, would have allowed GPC to receive the subcontract.

352 F.3d at 917.

Harrison II demonstrates that bidders for government contracts or subcontracts commit a FCA violation if they participate in the planning of a procurement and then compete for the contract, and that they cannot use relationships with procurement officials to gain an unfair

competitive advantage.¹² That is exactly what Hamilton did in the crosscutter procurement (and, as discussed below, in the Williams, Adley subcontract).

Accordingly, Ervin is entitled to judgment on the crosscutting task order claim.

C. The Williams, Adley 8(a) Subcontract

In response to Hamilton's Rule 52(c) motion, Ervin presented evidence that

Hamilton manipulated certain HUD officials to obtain additional funding through the 8(a) vehicle because such funding was not available under Hamilton's own financial advisor contract, that Hamilton was involved in the conception and planning of the 8(a) contract, that the ultimate purpose of the 8(a) contract was to funnel non-competitive procurement funds to Hamilton as the exclusive subcontractor under the 8(a), that Hamilton's agents participated in the selection of Williams, Adley as the prime contractor, that priority items for Hamilton were "processed" through the 8(a) contract, that Hamilton drafted task orders for work under the 8(a) contract before the task orders were even issued (work it later coincidentally performed and was compensated for), that Hamilton was "conservatively" budgeting for revenue under the 8(a) contract before the work was authorized, and that Hamilton and Williams, Adley colluded to carve up the contract funds

See Ervin's Proposed Findings of Fact and Conclusions of Law in Response to Rul 52(c) Motion at 50-51.

Far from dis-proving these facts, Hamilton presented testimony confirming many of them. Helen Dunlap testified that she had "a number of conversations" with Hamilton about the concept of awarding a contract to an 8(a) firm for the due diligence to support the sales. Tr. 151

¹² At the time Hamilton was working with Dunlap and Rock to plan the crosscutter procurement, Dunlap reached out to Austin Fitts for emotional support. PX 15 ("I not only want you to be the best contractor which you are but also friend and advisor."). Fitts replied that "if HUD needs such a capacity on an enduring basis, it must be created on an enduring basis."). *Id.* Thereafter, Dunlap provided advice and input to Commissioner Retsinas on the decision to select Hamilton over C&W for the crosscutting task order. Tr. 184-85 (Dunlap); PX 142.

(Dunlap). Indeed, it appears the only thing Hamilton sought to prove was that no Hamilton employee was present at the “beauty contest” where Williams, Adley was selected over two other potential 8(a) contractors and that Williams Adley sought out Hamilton. Even then, however, when Helen Dunlap was asked whether Hamilton “play[ed] any role” in that selection, Dunlap responded: “There was a participant in the interviews that came from Coopers & Lybrand to provide us with some technical support that was a sub to Hamilton on their FA contract at the time, a woman by the name of Susan Ellis I believe.” Tr. 140 (Dunlap) *see also* Tr. 151 (Dunlap). Dunlap’s answer shows that she associated the Coopers & Lybrand employees with Hamilton - - just as Ervin contends.

Significantly, although Henry Adley testified in Hamilton’s case, neither he nor any other witness addressed the meeting between Williams, Adley and Hamilton that occurred between October 26, 1994 and November 2, 1994, wherein they made an agreement to carve up the \$15 million of 8(a) contract funds. PX 51; PX 63; Oct. 31, 2003 Tr. at 191-192 (Robinson). Hamilton did not explain the notes written by Robert Robinson at that meeting with Adley. See PX 51.

A claim for payment submitted pursuant to a fraudulently-procured contract violates the FCA. *See, e.g., United States ex rel. Alexander v. Dyncorp, Inc.*, 924 F.Supp. 292, 298 (D.D.C. 1996). *See also Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 787-788 (4th Cir. 1999); *United States ex rel. Schwendt v. Planning Research Corp.*, 59 F.3d 196, 199 (D.C. Cir. 1995). Hamilton and Williams, Adley fraudulently procured the 8(a) contract/subcontract. Accordingly, Ervin is entitled to judgment on this claim.

D. The Single Family #1 Reoffering Note Sale

In the SF #1 Reoffering sale, Hamilton presented four options to FHA Commissioner Retsinas, one of which -- Option #1 -- was the award of 3,139 single family mortgage loans to a bidding team of BlackRock and Goldman Sachs. *See* HX 228; HX 25 at 9, ¶ 164. Retsinas selected this option, even though it was the only bid that failed to meet the 74% threshold price identified in the reoffering memorandum and was the least favorable to HUD in that it generated a positive credit subsidy (or a loss to HUD of \$2,295,507). *See* HX 226; HX 228 at bates 000508-11. Under the terms of the SF #1 Reoffering, Hamilton should not have presented the BlackRock/Goldman Sachs bid as a viable option because it did not meet the predetermined threshold price. By submitting it, however, Hamilton sought to influence the selection. Neither did Hamilton explain why a bid less than the minimum identified would be accepted, particularly based on the need for consistency or clarity of the market and the potential that it would drive away buyers who submitted bids in accordance with the pre-established threshold price. *See* Tr. 138 (Dunlap).

Hamilton did not address the fact, proven in Ervin's case-in-chief, that less than a month before the SF #1 Reoffering, Hamilton met and corresponded with Goldman Sachs concerning the possibility of "working on potential new business outside of HUD." *See* Oct. 30, 2003 Tr. 121-23 (Huebscher); PX 205. Nor did Hamilton rebut the fact that it was pursuing other business deals with BlackRock, separate and apart from the subcontract for the Partially Assisted sale. *See* Oct. 31, 2003 Tr. 177 (Robinson); PX 82. Nor did Hamilton explain what type of "leverage" Hamilton could provide to BlackRock, as was identified in Grace Huebscher's November 19, 1995 e-mail to Wes Edens of BlackRock. *See* PX 82. Nor did Hamilton rebut the fact that at about this time, it was indebted to BlackRock for over \$500,000 and was

contemplating converting this debt into stock in Hamilton. Oct. 30, 2003 Tr. 124-25 (Huebscher); Tr. 304-05 (Dietz); PX 195. Nor was it disclosed that Blackrock was not going to be compensated for delays in the partially assisted task order although at the time Hamilton was seeking a million dollar increase in a fixed price task order. The only thing disclosed to HUD was the existence of Hamilton's subcontract with BlackRock on the Partially Assisted sale.

As discussed above, the recent decision in *Harrison* confirms that a contractor's failure to disclose an organizational conflict of interest constitutes a false claim under the FCA.

Harrison v. Westinghouse Savannah River Co., 352 F.3d 908, 916-17 (4th Cir. 2003); *see also United States ex rel. Cantekin v. Univ. of Pittsburgh*, 192 F.3d 402, 414-15 (3rd Cir. 1999).

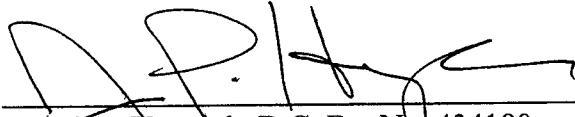
Hamilton failed to disclose its relationship with the bidders it presented as Option #1, and therefore, violated the FCA.

IV. CONCLUSION

For the foregoing reasons and as discussed in Ervin's Proposed Findings of Fact and Conclusions of Law in Response to Hamilton's Rule 52(c) Motion, Ervin is entitled to judgment on (i) the North and Central note sale (count IX), (ii) the Single Family Reoffering note sale

(count II), (iii) the Williams, Adley 8(a) contract (counts XII and XIV) and the cross-cutting contract (counts XV and XVI).

Respectfully submitted,



Joseph P. Hornyak, D.C. Bar No. 434180
SONNENSCHN NATH & ROSENTHAL, LLP
1301 K Street, N.W., Suite 600, East Tower
Washington, D.C. 20005
Telephone: (202) 408-6400
Facsimile: (202) 408-6399

Counsel for Ervin & Associates, Inc.

August 3, 2004


CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of August 2004, a true and genuine copy of Plaintiff-Relator's Modified Proposed Findings of Fact and Conclusions of Law and Exhibits thereto, was served by hand delivery on the following parties:

Michael J. McManus
Kenneth E. Ryan
DRINKER, BIDDLE & REATH LLP
1500 K Street, N.W.
Suite 1100
Washington, D.C. 20005-1209

Brian Sonfield
U.S. Attorney's Office
555 Fourth Street, N.W.
Tenth Floor -- Civil Division
Washington, D.C. 20001

Aaron L. Handleman
Michael P. Freije
Eccleston & Wolf, P.C.
2001 S Street, N.W., Suite 310
Washington, D.C. 20009



Joseph P. Hornyak