In the United States Court of Federal Claims

No. 98-169C
Filed June 14, 2004
TO BE PUBLISHED

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	*	Ambiguity;
HAMILTON SECURITIES ADVISORY	*	Contract Interpretation;
SERVICES, INC.,	*	Integration Clause;
	*	Motion For Reconsideration;
Plaintiff,	*	Parol Evidence;
	*	Plain Meaning;
v.	*	RCFC 7.1(c);
	*	RCFC 59(a)(1).
THE UNITED STATES,	*	
	*	
Defendant.	*	
	*	
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Claude P. Goddard, Jr., Wickwire Gavin, P.C., Vienna, Virginia, for plaintiff.

Jeannine Lesperance and David J. Gottesman, United States Department of Justice, Washington, D.C., for defendant.

MEMORANDUM OPINION AND FINAL ORDER DENYING DEFENDANT'S MOTION FOR RECONSIDERATION

BRADEN, *Judge*

RELEVANT PROCEDURAL BACKGROUND

On March 24, 2004, the court issued a Memorandum Opinion and Order denying both Hamilton Securities Advisory Services, Inc. ("Hamilton")'s November 3, 2003 Motion for Summary Judgment and defendant ("the Government")'s November 3, 2003 Cross Motion for Summary Judgment. *See Hamilton Securities Advisory Services, Inc.* v. *United States*, 60 Fed. Cl. 144, 161 (2004) ("*Hamilton Securities II*").[1] Therein, the court determined that neither the 18161 Contract, (the six amendments of Solicitation/Modification of Contract) nor Task Order 7 concerning the West of Mississippi Sale, nor the 18505 Contract, nor Task Order 1 concerning the North/Central Sale

[1] On March 24, 2004, the court also denied Hamilton's October 1, 2003 Motion For Declaratory Judgment regarding the 18505 Contract and Task Order 1. *See Hamilton Securities II*, 60 Fed. Cl. at 155-56.

required or imposed any legal duty on Hamilton to run an optimization model utilizing bid "floors" to yield HUD "maximum sales proceeds." *Id.* at 157-59 (quoting Gov't Aug. 18, 1999 Amended Counterclaim at ¶¶ 5-8). Therefore, the court held that the Government was not entitled to damages for a breach of either of these contracts. *Id.* at 161. Nevertheless, the court granted the Government leave to amend the August 18, 1999 Counterclaim in order to pursue a claim in quasi-contract for restitution. *Id.* at 159-61; *see also University of Colorado Found., Inc.* v. *American Cyanamid Co.*, 342 F.3d 1298, 1309-12 (Fed. Cir. 2003) (discussing RESTATEMENT OF RESTITUTION § 1 (1937), the elements of a legal claim in quasi-contract, and availability of money damages). The Government, however, declined to amend and pursue this alternative remedy for relief.

Accordingly, on April 19, 2004, the court issued a Memorandum Opinion and entered a final judgment holding that the Government breached the 18505 Contract and Task Order 1 by failing to pay Hamilton promptly for work performed thereunder. *See Hamilton Securities Services, Inc.* v. *United* States, 60 Fed. Cl. 296, 298 (2004) ("*Hamilton Securities III*"). Hamilton Securities was awarded the amount of $1,505,256 plus any interest due under law. *Id.*

On May 7, 2004, the Government filed a Motion for Reconsideration ("Gov't Recon. Mot.") requesting that the court vacate the April 19, 2004 final judgment and enter summary judgment in favor of the Government or "set a new trial date to try the question of damages for breach, should the court find that there are material disputed factual issues." Gov't Recon. Mot. at 1. The Government advanced five arguments to support its Motion for Reconsideration and Entry of Summary Judgment:

> 1) the "only reasonable interpretation of the plain language" of the 18161 Contract and Task Order 7 requires the court to hold that Hamilton breached its "duties with respect to the West of Mississippi Sale." *Id.* at 14-17.
>
> 2) the "only reasonable interpretation of the plain language" of the 18505 Contract and Task Order 1 requires the court to hold that Hamilton breached its "duties with respect to the North/Central Sale." *Id.* at 14, 17-18.
>
> 3) neither the 18161 Contract and Task Order 7 nor the 18505 Contract and Task Order 1 are "too uncertain to be enforced" and "should be measured against the approved design of the sale." *Id.* at 19-23.
>
> 4) the [18161 Contract and Task Order 7 or the 18505 Contract and Task Order 1] are "ambiguous" and "construing the contract[s] in light of all the facts and circumstances requires" the court to hold that Hamilton had a "contractual duty to run an optimization model using a UPB-based bid floor." *Id.* at 23-28.
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> 5) the integration clause does not prohibit the court from considering the parties' "factual stipulations and course of dealing" with respect to interpreting Hamilton's contracts. *Id.* at 28-32.

STANDARD OF REVIEW

RCFC 59(a)(1) provides that "reconsideration *may* be granted to . . . any of the parties and on all or part of the issues, for any of the reasons established by the rules of common law or equity[.]" (emphasis added). Although the Government's first and second reconsideration arguments essentially restate those addressed only as an afterthought in one of the Government's prior briefs,[2] the court has exercised its discretion to revisit them, as well as the Government's remaining reconsideration arguments, which could and should have been made on summary judgment, particularly since this case has been pending for resolution for approximately six years.

The court further notes that it has exercised its discretion to consider the Government's May 3, 2004 Motion for Reconsideration, although it could be disallowed for failure to comply with the Rules of the United States Court of Federal Claims because the Government improperly cites and relies on the March 23, 2004 Stipulations of Fact proffered three months after the briefing closed.[3]

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[2] *See* Dec. 9, 2003 Gov't Opp. at 13 ("Hamilton's obligations are clearly stated in the contracts."); *Id. at* 20 ("Hamilton's running of an optimization model and determination of which bids offered the maximum sales proceeds were the direct and immediate subjects of Hamilton's contracts.").

[3] The briefing period for the Government's November 3, 2003 Cross Motion for Summary Judgment ended on December 22, 2003, when the Government filed its last brief. *See Hamilton II*, 60 Fed. Cl. at 145 n.1. On March 23, 2004, the parties filed new Stipulations of Fact. *See Hamilton Securities Advisory Services, Inc.* v. *United States*, No. 98-169C (Jan. 20, 2004 Scheduling Order setting trial for April 14–23, 2004 and requesting stipulations and joint exhibit list by March 23, 2004). The court did not receive the new Stipulations of Fact until March 26, 2004, two days after the March 24, 2004 Memorandum Opinion was issued. *See attached.*

The March 23, 2004 Stipulations of Fact contain a substantial amount of new information about the origin, purpose, and objectives of HUD, regarding the asset sale program. *See* March 23, 2004 Stipulations of Fact at ¶¶ 2-15. The March 23, 2004 Stipulations of Fact also detail the auction rules, bid instructions, and method of notifying winning bidders. *Id.* at ¶¶ 16-27. In addition, the bid selection, HUD decision making process, and actual revenues derived from the West of Mississippi Sale and North Central Sale are set forth in the March 23, 2004 Stipulations of Fact. *Id.* at ¶¶ 28-46. Since none of these stipulations are relevant to the meaning of the 18161 Contract (the six amendments of Solicitation/Modification of Contract), Task Order 7, the 18505 Contract, or Task Order 1, it is not surprising that they do not cite any contractual documents as authority. *Id.* at ¶¶ 28-46.

Certain of the March 23, 2004 Stipulations of Fact, however, concern Hamilton's contracts, *id.* at ¶¶ 47-86, the North Central Sale, *id.* at ¶¶ 100-43, and essentially are identical to the August 12, 1999 Joint Stipulation of Facts. *Compare* March 23, 2004 Stipulations of Fact *with* (August 12, 1999 Joint Stipulations of Fact) at ¶¶ 100 (30), 102 (31), 103 (33), 104 (35), 105 (36), 106 (34), 107 (37), 108 (38), 110 (38/59), 111 (40), 112 (41), 113 (42), 114 (43), 116 (44), 117 (45), 119 (46), 125 (47), 126 (48), 130 (50/55), 131 (50), 133 (51), 134 (52), 135 (53/56), 137 (53), 139 (57), 140

Compare RCFC 7.2(c) ("Responses to . . . motions under [RCFC 56 summary judgment] shall be filed within 28 days after service of the motion and replies thereto within 14 days of the service of the response.") *with* Gov't Recon. Mot. at 13 (citing March 23, 2004 Stipulations of Fact at ¶¶ 34, 37, 38, 39, 115, 118, 121, 122); *id.* at 25 (citing March 23, 2004 Stipulations of Fact at ¶¶ 34, 37, 38, 39, 115, 118, 121); *id.* at 31 (citing March 23, 2004 Stipulations of Fact at ¶ 53); s*ee also Anchor Wall Systems* v. *Rockwood Retaining Walls,* Inc., 340 F.3d 1298, 1314 (Fed. Cir. 2003) (affirming district court decision to strike declarations served after close of discovery as untimely and because "a party may not submit affidavits purporting to create a genuine issue of fact if they simultaneously contradict prior sworn testimony"); *cf. Sage Prod., Inc.* v. *Devon Indus., Inc.*, 126 F.3d 1420, 1426 (Fed. Cir. 1997) (holding that an appellate court does not "'review' that which was not presented to the [trial] court.").

For the reasons discussed in *Hamilton II*, however, neither the August 10, 1999 Joint Stipulation of Facts nor the March 23, 2004 Stipulations of Fact are relevant to the court's construction of the plain language of the contracts at issue, particularly in light of the integration clause contained in both. *See Jowett, Inc.* v. *United States*, 234 F.3d 1365, 1369 (Fed. Cir. 2000) ("affidavits . . . are simply irrelevant where the language of the contract is unambiguous on its face."); *Rumsfeld* v. *Freedom NY, Inc*., 329 F.3d 1320, 1328 (Fed. Cir. 2003) ("Where, as here, the parties are both commercial entities or the government, integration clauses are given particularly great weight" in excluding oral or parol statements that conflict with, supplant, or controvert the language of a written agreement.).

DISPOSITION OF THE ISSUES PRESENTED FOR RECONSIDERATION

1. The Plain Language Of The 18161 Contract And Task Order 7 Does Not Require The Court To Hold That Hamilton Breached Any Duty "To Run" The Optimization Model Using A UPB-Based Bid Floor.

(58/61), 141 (59), 142 (61), and 143 (63). In addition, there are a number of additional new stipulations about other topics. *See* March 23, 2004 Stipulations of Fact at ¶¶ 49, 50, 51, 57, 64, 66, 74, 75, a portion of 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 101, 115, 118, 121, 122, 123, 124, 127, 128, 129, 130, 132, 138, and 144.

Since no language in the 18161 Contract (the six amendments of Solicitation/Modification of Contract) or Task Order 7 required Hamilton to "run an optimization model utilizing bid floors to yield HUD 'maximum proceeds' on the West of Mississippi Sale," the Government argues on reconsideration that the phrase "manage and implement all phases of the bidding and auction process" should be interpreted by the court to include "running the optimization model using a UPB-based bid floor." Gov't Recon. Mot. at 15. To reach this result, a two step process is required. First, under the holding of *Coast Fed*. v. *United States*, 323 F.3d 1035, 1038 (Fed. Cir. 2003) that a contract should be read as a "whole and interpreted so as to harmonize and give reasonable meaning to all of its parts," the Government argues that the court must incorporate the words "assumed workload," found in Hamilton's technical proposal, into the 18161 Contract as including "Bid Analysis Software" and "Bid Results/Reports." Gov't Recon. Mot. at 16. Then, the court must interpret the words "Bid Analysis Software" to "include the use of an optimization model and UPB-based bid floor" as the only "reasonable interpretation[.]" *Id.*

The plain language of the 18161 Contract, agreed to by the parties, however, does not state that the duties assumed by Hamilton require anything regarding an "optimization model" or a "UPB-based bid floor," nor did the Government choose to explain anywhere in the 18161 Contract (the six amendments of Solicitation/Modification of Contracts), or Task Order 7 that "Bid Analysis Software" and "Bid Results/Reports" had any specified meaning, much less one that should be understood to use an "optimization model" and "UPB-based bid floors." The Government fails to appreciate, or in this case declines to recognize, that the court may not substitute words in the contract with those suggested by one of the litigating parties in order to provide an alternative meaning to that which the plain language dictates. *See Barron Bancshares, Inc.* v. *United States*, 366 F.3d 1360, 1375 (Fed. Cir. 2004) ("When construing a contract, a court first examines the plain meaning of its express terms."); *Gould* v. *United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991) (holding that "[c]ontract interpretation begins with the plain language of the agreement.")

In addition, our appellate court repeatedly has cautioned the court to remember that it is not at liberty to adopt litigation-driven interpretation of contracts. *See WDC West Carthage* v. *United States*, 324 F.3d 1359, 1363 (Fed. Cir. 2003) (citing *Foley* v. *United States*, 11 F.3d 1032, 1034 (Fed. Cir. 1993) (holding that contract interpretation begins with the plain language of the agreement) and (citing *Chase & Rice, Inc*. v. *United States*, 354 F.2d 318, 321 (1965) (the interpretation of a contract by parties before a controversy "is deemed to be of great, if not controlling, weight"); *see also AM Int'l, Inc.* v. *Graphic Mgmt. Assoc., Inc.*, 44 F.3d 572, 575 (7th Cir. 1995) ("By 'subjective' evidence we mean the testimony of the parties themselves as to what they believe the contract means. Such testimony is invariably self-serving, being made by a party to the lawsuit, and is inherently difficult to verify.").

In this particular case, however, there is no reason for the court to import new words into Contract 18161 or Task Order 7 because the Government concedes that both parties specifically did not define Hamilton's duties regarding the auction since that "at the time the parties entered the contract, Hamilton had not designed the auction yet." Gov't Recon. Mot. at 19. Therefore, *ipso facto*, neither the 18161 Contract nor Task Order 7 could have specified what duties Hamilton

assumed with respect to the auction, much less that it assumed a duty "to run the [optimization] model using a UPB-based bid floor." *Id.*

2. The Plain Language Of The 18505 Contract And Task Order 1 Does Not Require The Court To Hold That Hamilton Breached Any Duty "To Run" The Optimization Model Using A UPB-Based Bid Floor.

In the March 24, 2004 Memorandum Opinion, the court specifically acknowledged that although the words "optimization model" appear nowhere in the language of the 18505 Contract, the April 25, 1996 Task Order 1 did require Hamilton to "provide and to run an optimization model." *Hamilton Securities II*, 60 Fed. Cl. at 158. Task Order 1, however, required only that the optimization model function in "accordance with the design approved by HUD." *Id.* at 152 (citing Gov't App. at 191 ¶ 6.2). Task Order 1 did not contain any language that obligated Hamilton to utilize "bid floors" or to "provide the maximum sales proceeds, while still meeting all criteria, including but not limited to the floors designed by the bidders." *Id.* at 158 (quoting Gov't Aug. 18, 1999 Amended Counterclaim at ¶ 8).

On reconsideration, the Government faults the court for failing to give a more expansive reading, *i.e.*, "reasonable meaning," and emphasis to the phrase in Task Order 1 that states: "Hamilton [shall] run the optimization model *in accordance with the design approved* by HUD." Gov't Recon. Mot. at 17-18. Of course, there is no language in Task Order 1 that specifies *what* design HUD approved. Since it is apparent that HUD neglected to specify whatever "design" requirements that it required in either the 18505 Contract or Task Order 1, the Government simply asserts that "Hamilton and the United States have at all times shared a common understanding that pursuant to Hamilton's contracts Hamilton had a duty to run the optimization model using a UPB-based bid floor." *Id.* at 18. And, the court is informed that it "should enforce that common understanding." *Id.* It is not surprising that the Government provides absolutely no supporting record citation for this assertion, because there are no such words in the English language in either the 18505 Contract or Task Order 1 that evidence any such "common understanding" or manifestation of assent regarding the running of the optimization model. *See Anderson* v. *United* States, 344 F.3d 1343, 1355 (Fed. Cir. 2003) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 50(1) (1981) (If an offer is made, there must be an acceptance for a contract to be formed, *i.e.*, a "manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer.")); *see also Barron Bancshares*, 366 F.3d at 1375.

The Government also misperceives the limited role of the court as an interpreter of what the parties have written, rather than the drafter or lexicographer. As Chief Judge Posner of the United States Court of Appeals for the Seventh Circuit has observed: "When judges say that a contract is 'clear on its face,' they mean simply that an ordinary reader of English, reading the contract, would think its application to the dispute at hand certain. . . . [Where] [t]he text contains no clue that the contract might mean something different from what it says. . . . [or] the language of a contract

appears to admit of only one interpretation, the case is indeed over. This is the 'four corners' rule." *See AM Int'l, Inc.*, 44 F.3d at 574 (citations omitted).

Thus, the court is bound to interpret the language of the 18505 Contract and Task Order 1 as it was written, which, in this case, does not require the court to hold that Hamilton breached any duty "[to run] the optimization model using a UPB-based bid floor." Gov't Recon. Mot. at 15. It is not the role of the court independently to discern or "figur[e] out" what the parties would have agreed to had they completed their negotiations." *Goldstick* v. *ICM Realty*, 788 F.2d 456, 461 (7th Cir. 1986).[4]

3. The Terms Of Contract 18161 And Contract 18505 Regarding Hamilton's Obligation "To Run An Optimization Model" Are Not Certain.

In this argument, the Government first confuses the latitude that the United States Court of Appeals for the Federal Circuit generally affords federal procurement officials in "administering its contracts" with settled principles that determine whether the terms of a contract are sufficiently specific to apprise the parties of their assumed duties and advise a court how to formulate a remedy in the event of a breach. *Compare Fireman's Fund Ins. Co.* v. *United States*, 909 F.2d 495, 498-500 (Fed. Cir. 1990) (recognizing the Government has "considerable leeway in 'administering' its contracts," but declining to find "the existence of an independent contract[.]") *with Modern Sys.*

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[4] An important economic debate illustrates the reason why courts should not "complete" a contract where the parties have not done so. *Compare* Charles J. Goetz and Robert E. Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089 (1981) (suggesting that courts may engage in "gap-filling" in order to supply terms based on "efficiency considerations" to allocate risk to the least-cost insurer) *with* Gillian K. Hadfield, *Judicial Competence and the Interpretation of Incomplete Contracts*, 23 J. LEGAL STUDIES 159 (Jan. 1994).

As Professor Hadfield astutely has observed:

> [O]nce we raise the question of how courts should fill . . . contract gaps, the competence of the courts to determine how contracts should be completed becomes a central consideration for the design of a policy towards gap filling. If courts are able in all cases to determine the efficient outcome (taking into account the effect of any rule on *ex ante* incentives in future, similar contracts), then judicial activism in contract enforcement should be welcomed. The reality of generalist courts, however, is that they possess only limited competence in any one area. Put simply, courts make mistakes about efficient outcomes."

Id. at 162.

Tech. Corp. v. *United States*, 979 F.2d 200, 202 (Fed. Cir. 1992) ("In the absence of contractual intent or sufficiently definite terms, no contractual obligations arise."); RESTATEMENT (SECOND) OF CONTRACTS § 33(2) (1981) ("The terms of a contract are reasonably certain *if* they provide a bases for determining the existence of a breach and for giving an appropriate remedy.") (emphasis added).

The lack of certainty in Contract 18161 and Contract 18505 as to how Hamilton was "to run" an optimization model is not cured by measuring or defining the absence of language with the "objective needs" of HUD-approved designs. *See* Gov't Recon. Mot. at 19-20. First, since neither of the contracts states what design HUD approved, there is no objective measure against which to evaluate the meaning of Hamilton's obligation "to run" an optimization model. Second, in this case, the Government presented no objective evidence that the contracts mean something different from what they say. Moreover, since the concept of using an optimization model was not agreed to by the parties until April 24, 1996 when Task Order 1 was issued, no obligation could have arisen under the 18161 Contract (the six amendments of Solicitation/Modification of Contract), Task Order 7, or Contract 18505 "to run" an optimization model. *See* Gov't Recon. Mot. at 19. Hamilton performed under the 18161 Contract and contracts were awarded to purchasers in the West of Mississippi Sale. Thereafter, HUD decided to design an optimization model in the spring of 1985 that Hamilton would run. The April 24, 1996 Task Order 1 provided HUD with an appropriate opportunity to specify what it expected from Hamilton regarding its duty to "[p]rovide and run an optimization model for whole loan auctions," *see Hamilton II*, 60 Fed. Cl. at 152 (quoting Gov't App. at 190 ¶ 3.2), as well as "the design approved by HUD [to run the optimization model]." *Id*. (quoting Gov't App. at 191 ¶ 6.2). For whatever reasons, HUD again chose not to provide that content in Task Order 1. This was a conscious decision to leave Hamilton's contractual duties unspecified regarding running the optimization model.

Therefore, in the face of the clarity of the contractual language the Government concedes, as it must, that HUD *could* have solicited a contract to design the auction and a separate contract to run the auction, but rejects this option speculating that "HUD might well have incurred substantial costs involved with multiple reprocurements; consistency may also have suffered by letting two separate contracts for the design and auction work." Gov't Recon. Mot. at 20. The Government also concedes, as it must, that HUD *could* have modified the contract, but argues that option "could imply that the new work is outside the scope of the original agreement, which also would require HUD to pay the contractor more money." *Id.* at 21. There is no reason to assume, however, that either of these options would have cost the Government additional money nor resulted in any performance inconsistency. The contract price could have been bifurcated between the design and implementation functions and, if necessary, the contract could have specified that the contractor selected would have to be capable of performing both functions.

Nevertheless, the Government argues that "it sought a financial advisor to design and run the entire auction for a specified price. Hamilton agreed to do so. This court should enforce that promise." *Id.* at 21. The court has done so. *See Hamilton III*, 60 Fed. Cl. at 298. What the court

has declined to do is to specify *what* the HUD design for the optimization model required and *how* the optimization model should be run by Hamilton, since the parties chose not to do so.

4. Neither The 18161 Contract, 18505 Contract, Nor Relevant Task Orders Are Ambiguous.

The Government correctly states that Hamilton agreed to "manage and implement all phases of the bidding and auction process" for the West of Mississippi Sale and "run the optimization model in accordance with the design approved by HUD" in the North/Central Sale. Gov't Recon. Mot. at 24 (quoting March 23, 2004 Stip. at ¶¶ 62, 108). The Government, however, then mischaracterizes this stipulation, which tracks the language of Task Order 1 and clearly does not state that "Hamilton and the United States have taken the position at all times that Hamilton had a contractual duty to run the optimization model for both sales using a UPB-based bid floor." *Id.* In fact, the phrase "UPB-based bid floor" appears nowhere in the 18161 Contract, 18505 Contract, or relevant Task Orders. *See* Gov't App. at 85-200. The Government also proceeds to mischaracterize the court's holding that none of the relevant contracts and task orders at issue required Hamilton to design or run an optimization model utilizing bid floors to yield HUD "maximum sales proceeds." *See Hamilton Securities II*, 60 Fed. Cl. at 157-59. Instead, the Government asserts that: "The Court apparently believes that Hamilton's running of the model using a revenue floor is acceptable." Gov't Recon. Mot. at 24. The court has made no determination regarding the manner in which Hamilton "ran" the optimization model in this case, other than it "ran" the model and thereby complied with the terms of the 18505 Contract and Task Order 1. *See Hamilton III*, 60 Fed. Cl. at 298.

Most importantly, the Government's ambiguity argument overlooks the fact that a contract must include language about which there are conflicting views *before* the issue of ambiguity even arises. *See Barron Bancshares*, 366 F.3d at 1375 ("A contract provision is only ambiguous if susceptible to more than one reasonable meaning."); *Jowett, Inc.* v. *United States*, 234 F.3d 1365, 1368 n.2 (Fed. Cir. 2000) ("When a contract is susceptible to more than one reasonable interpretation it contains an ambiguity."); *Grumman Data Sys. Corp.* v. *Dalton*, 88 F.3d 990, 997 (Fed. Cir. 1996) ("If more than one meaning is reasonably consistent with the contract language, then the contract term is ambiguous."). The absence of contractual language does not create an ambiguity. *See, e.g., Home Ins. Co.* v. *Chicago & Northwestern Transp. Co.*, 56 F.3d 763, 768 (7th Cir. 1995) ("most of the modern cases in the 'four corners line' . . . generally 'stand for the unexceptionable proposition that language in a contract is not rendered ambiguous simply because the parties do not agree upon its meaning.'"). Therefore, the recent decision of the United States Court of Appeals for the Federal Circuit in *HPI/GSA-3C, LLC* v. *Perry*, 364 F.3d 1327 (Fed. Cir. April 12, 2004) regarding the legal rules for choosing between competing interpretations of an ambiguous contract provision is inapplicable in this case.

5. The Integration Clauses In Contract 18161 And Contract 18505 Specifically Prohibit The Court From Considering The Parties' Stipulations, As Well As The Parties' "Course Of Dealing."

Finally, the Government argues that the court erred in holding that the integration clauses in Contract 18161 and Contract 18505 prohibit the court from determining that Hamilton had a duty to run the optimization model using bid floors "because, under applicable Federal Circuit law, the integration clause does not apply to the question of whether Hamilton had a duty to run the model using bid floors." Gov't Recon. Mot. at 28. It is astonishing that the Government suggests that the court should simply discard the recent directive of the Federal Circuit in *Rumsfeld* v. *Freedom NY, Inc*., 329 F.3d 1320, 1327 (Fed. Cir. 2003) that a court may not "supplement or interpret" a written agreement with "oral or parol statements that conflict with, supplant, or controvert the language of the written agreement[.]" *See also Coast Fed*., 323 F.3d at 1038 ("[W]e may not resort to extrinsic evidence [where the provisions of an agreement are "phrased in clear and unambiguous language."]); *McAbee Constr., Inc.* v. *United States*, 97 F.3d 1431, 1434 (Fed. Cir. 1996) (holding that when a document is completely integrated, no additional terms may be added, whether consistent or inconsistent through parol evidence); RESTATEMENT (SECOND) OF CONTRACTS § 216 cmt. e (1981) (where a contract includes an integration clause a court is "likely to conclude the issue of whether the agreement is completely integrated"). Equally surprising is the Government's argument that the integration clauses in Contract 18161 and Contract 18505 are "irrelevant . . . where a party is asking the court to interpret the 'necessary and incident' language of the contract." Gov't Recon. Mot. at 28. Of course, the flaw in this argument is there is *no language* in the 18161 Contract (the six amendments of Solicitation/Modification of Contract), Task Order 7, the 18505 Contract, or Task Order 1 that states *how* Hamilton was to run the optimization model and thus, there is no language for the court to interpret.

In an even more cavalier argument, the Government simply asserts that "the court is free to enforce the plain language of [these contracts terms], *or* to consider extrinsic evidence to interpret such terms, provided the court first holds that the disputed term is ambiguous." Gov't Recon. Mot. at 28-29 (emphasis added). The United States Court of Appeals for the Federal Circuit has held clearly and unambiguously that the plain language of a contract governs. *See Foley Co.* v. *United States*, 11 F.3d 1032, 1034 (Fed. Cir. 1993) ("Contract interpretation begins with the plain language of the agreement."). Only if the terms of the contract are susceptible to more than one interpretation does the issue of ambiguity even arise. *See McAbee Constr.*, 97 F.3d at 1434-35; *see also Johnson Enter. of Jacksonville, Inc.* v. *FPL Group, Inc.*, 162 F.3d 1290, 1310 (11th Cir. 1998) ("parol evidence is not admissible to explain a patent ambiguity" because this would allow courts to rewrite the contract). No ambiguity exists in this case where neither of the contracts at issue nor task orders include any specific language about any design much less any HUD "approved" design of an optimization model. *See Barron Bancshares*, 366 F.3d at 1379 ("Significantly, the government has not directed us to a case in which contract provisions set forth in clear and unambiguous language and accompanied by an integration clause were disregarded by reason of the absence of parol evidence . . . Indeed, we have consistently rejected such an approach."). The Government provided no such authority either in this case or in its May 4, 2004 Motion for Reconsideration.

In *Rumsfeld*, the Federal Circuit held only a year ago, without qualification, that: "[W]e elect to follow the 'traditional rule' . . . namely that an integration clause 'conclusively establishes that the integration is total unless (a) the document is obviously incomplete or (b) the merger clause was

included as a result of fraud or mistake or any other reason to set aside the contract.'" 329 F.3d at 1328-29 (quoting John D. Calamari and Joseph M. Perillo, THE LAW OF CONTRACTS §3.4(c) (4th ed. 1998) (citing Samuel Williston, WILLISTON ON CONTRACTS § 633 (3d. ed. 1957)). The court faithfully has followed that rule in this case.

Moreover, the circumstances surrounding Contract 18161 (the six amendments of Solicitation/Modification of Contract), Task Order 1, Contract 18505, and Task Order 7 support a finding of complete integration. *See Skycom Corp.* v. *Telestar Corp.*, 813 F.2d 810, 816 (7th Cir. 1987) (observing "the more formal agreement appears to be boilerplate, an objective reading of the documents more readily leads to the conclusion that . . . [an] agreement is binding."); *Banking & Trading Corp.* v. *Floete*, 257 F.2d 765, 770 (2nd Cir. 1958) (when a contract involved a governmental agency "it was important that whenever [it] entered into contractual relationships its legal rights and obligations be clearly defined."). In addition, there is no suggestion in the Government's Motion for Reconsideration that the integration clause in either contract or relevant task order was imposed as a result of fraud, mistake, or duress sufficient to set aside the contract. *See generally* Gov't Recon. Mot. Nevertheless, the Government asserts that since the contracts were "incomplete, because, other than the design, there is no indication whatsoever as to how Hamilton was supposed to run the sale." Gov't Recon. Mot. at 31. Thus, the Government argues that the "integration clause . . . does not bar the court from looking to the parties' course of performance and other evidence to determine their true intent[.]" *Id.* The language of the integration clause in this case, however, specifically bars the consideration of extrinsic evidence and the parties' "course of performance" also is irrelevant as a matter of law.[5] *See* Gov't App. at 85, 128. As for the need to seek extraneous evidence to ascertain the parties' "true intent," as Justice Holmes observed:

> The making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs, – *not on the parties having meant the same thing but on having said the same thing.*

O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 464 (1897) (emphasis added).

CONCLUSION

[5] Uniform Commercial Code ("UCC") 2-202(1)(a) provides that an agreement may be supplemented by evidence of "course of performance, course of dealing or usage of trade." The UCC, however, it is limited to "transactions in goods" and does not apply to contracts for services. *See* UCC 2-102.

Therefore, for the aforegoing reasons, and those discussed in *Hamilton Securities II* and *Hamilton Securities III*, the Government's May 3, 2004 Motion for Reconsideration of the April 19, 2004 Final Judgment is denied.[6]

IT IS SO ORDERED.

_____
SUSAN G. BRADEN
Judge

[6] The Government correctly notes a clerical error in the March 24, 2004 Memorandum Opinion where the court should have stated that "over 5 percent of the bidders failed to close on HUD's mortgage sales over time." Gov't Recon. Mot. at 32 n.5. Therefore, an errata is being filed together with this Memorandum Opinion and Final Order Denying Defendant's Motion for Reconsideration.

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IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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JUDGE BRADEN

HAMILTON SECURITIES ADVISORY SERVICES, INC.,	
PLAINTIFF,	**No. 98-169C**
v.	**(Judge Braden)**
UNITED STATES OF AMERICA,	
DEFENDANT.	

STIPULATIONS OF FACT

HUD's Objectives, Expectations and Results

1. In the mid-1990s, the Federal Housing Administration ("FHA"), headed by HUD's Assistant Secretary - Federal Housing Commissioner, Nicolas Retsinas, established a program in which it sold, by sealed-bid auction, mortgages held by HUD. (The terms "sale" and "auction" are used interchangeably here.)

2. The program was initiated because the volume of defaulted mortgages had grown too large for HUD to manage effectively. By the end of fiscal year 1993, HUD held $11 billion of mortgages, approximately 2,400 multifamily loans and 100,000 single family loans. Most of the loans had been assigned to HUD when borrowers defaulted and FHA paid an insurance claim to the lender. HUD did not have adequate capacity to service the inventory, and the value of the mortgages was deteriorating. Further, the substantial inventory was diverting attention from principal FHA responsibilities including effective monitoring of the approximately $400 billion of insured mortgages,