

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA)	
)	FILED:
v.)	MARCH 30, 2006
)	IP 06-54-CR-01 M/F
BUILDER'S CONCRETE & SUPPLY CO., INC.)	
Defendant.)	

PLEA AGREEMENT

The United States of America and Builder's Concrete & Supply Co., Inc. ("the defendant"), a corporation organized and existing under the laws of Indiana, hereby enter into the following Plea Agreement pursuant to Rule 11(c)(1)(B) of the Federal Rules of Criminal Procedure ("Fed. R. Crim. P."):

RIGHTS OF DEFENDANT

1. The defendant understands its rights:
 - (a) to be represented by an attorney;
 - (b) to be charged by Indictment;
 - (c) to plead not guilty to any criminal charge brought against it;
 - (d) to have a trial by jury, at which it would be presumed not guilty of the charge and the United States would have to prove every essential element of the charged offense beyond a reasonable doubt for it to be found guilty;
 - (e) to confront and cross-examine witnesses against it and to subpoena witnesses in its defense at trial;
 - (f) to appeal its conviction, if it is found guilty; and
 - (g) to appeal the imposition of sentence against it.

**AGREEMENT TO PLEAD GUILTY
AND WAIVE CERTAIN RIGHTS**

2. The defendant knowingly and voluntarily waives the rights set out in paragraph 1(b)-(f) above. Pursuant to Fed. R. Crim. P. 7(b), the defendant will waive Indictment and plead guilty to a one-count Information to be filed in the United States District Court for the Southern District of Indiana, Indianapolis Division. The Information will charge the defendant with participating in a conspiracy to suppress and eliminate competition by fixing the price at which ready mixed concrete was sold in the Indianapolis, Indiana metropolitan area beginning in or about July, 2000 and continuing until May 25, 2004 in violation of the Sherman Act, 15 U.S.C. § 1.

3. The defendant, pursuant to the terms of this Plea Agreement, will plead guilty to the criminal charge described in paragraph 2 above and will make a factual admission of guilt to the Court in accordance with Fed. R. Crim. P. 11, as set forth in paragraph 4 below.

FACTUAL BASIS FOR OFFENSE CHARGED

4. Had this case gone to trial, the United States would have presented evidence sufficient to prove the following facts:

(a) For purposes of this Plea Agreement, the “Relevant Period” is that period from in or about July, 2000 and continuing until May 25, 2004. During the Relevant Period, the defendant was a corporation organized and existing under the laws of Indiana with its principal place of business in Fishers, Indiana. During the Relevant Period, the defendant was a producer of ready mixed concrete and was engaged in the sale of ready mixed concrete in the Indianapolis, Indiana metropolitan area and elsewhere. Ready mixed concrete is a product whose ingredients include cement, aggregate (sand and gravel), water, and, at times, other additives. Ready mixed concrete is made on demand and, if necessary, is shipped to work sites by concrete mixer trucks.

(b) During the Relevant Period, the defendant, through some of its officers and employees, including high-ranking personnel of the defendant, participated in a conspiracy with

other persons and entities engaged in the production and sale of ready mixed concrete, the primary purpose of which was to fix the price of ready mixed concrete sold in the Indianapolis, Indiana metropolitan area. In furtherance of the conspiracy, the defendant, through its officers and employees, engaged in conversations and attended meetings with representatives of other ready mixed concrete producers in the Indianapolis, Indiana metropolitan area. During those meetings and conversations, the defendant and its co-conspirators reached agreements to fix the price at which ready mixed concrete was to be sold in the Indianapolis, Indiana metropolitan area.

(c) During the course of the conspiracy, the defendant's President on at least two occasions hosted meetings among the conspirators at which prices, discounts, and conditions of sale for the metropolitan Indianapolis, Indiana area were discussed and agreed upon by the defendant and its coconspirators. Those meetings were held in a horse barn located adjacent to the defendant's President's home on property he owns in Fishers, Indiana. The defendant's President also made numerous telephone calls and participated in several meetings among smaller numbers of individuals to ensure the compliance of his coconspirators with the conspiracy agreements. In addition to the defendant and its President, more than five individuals associated with the defendant's corporate coconspirators participated in the conspiracy on behalf of the companies they owned or by which they were employed.

(d) During the Relevant Period, the corporate conspirators purchased substantial quantities of equipment and supplies from outside Indiana which were necessary to the production and distribution of ready mixed concrete. During the Relevant Period, the business activities of the corporate conspirators who produced and sold ready mixed concrete affected by this conspiracy were within the flow of, or substantially affected, interstate trade and commerce.

(e) Acts in furtherance of this conspiracy, including the conspiratorial meetings and conversations described above, were carried out within the Southern District of Indiana. In addition, sales of ready mixed concrete affected by this conspiracy were made by one or more of the conspirators to customers within the Southern District of Indiana.

POSSIBLE MAXIMUM SENTENCE

5. The defendant understands that the statutory maximum penalty which may be imposed against it upon conviction for a violation of Section One of the Sherman Act completed prior to June 22, 2004 is a fine in an amount equal to the greatest of:

- (a) \$10 million (15 U.S.C. § 1);
- (b) twice the gross pecuniary gain the conspirators derived from the crime (18 U.S.C. § 3571(c) and (d)); or
- (c) twice the gross pecuniary loss caused to the victims of the crime by the conspirators (18 U.S.C. § 3571(c) and (d)).

6. In addition, the defendant understands that:

- (a) pursuant to Section 8B1.1 of the United States Sentencing Guidelines (“U.S.S.G.,” “Sentencing Guidelines,” or “Guidelines”), 18 U.S.C. § 3563(b)(2), or 18 U.S.C. § 3663(a)(3), the Court may order it to pay restitution to the victims of the offense;
- (b) pursuant to 18 U.S.C. § 3013(a)(2)(B), the Court is required to order it to pay a \$400.00 special assessment upon conviction for the charged crime; and
- (c) pursuant to 18 U.S.C. § 3561(c)(1), the Court may impose a term of probation of at least one year, but no more than five years.

SENTENCING GUIDELINES

7. The defendant understands that the Sentencing Guidelines are advisory, not mandatory, but that the Court must consider the Guidelines in effect on May 25, 2004, along with the other factors set forth in 18 U.S.C. § 3553(a), in determining and imposing sentence. The defendant understands and agrees that the Guidelines determinations will be made by the Court by a preponderance of the evidence standard. The defendant further understands and agrees that although the Court is not ultimately bound to impose a sentence within the applicable advisory Guidelines range, its sentence must be reasonable based upon consideration of all relevant sentencing factors set forth in 18 U.S.C. § 3553(a). Pursuant to U.S.S.G. § 1B1.8, the United

States agrees that self-incriminating information that the defendant provides to the United States pursuant to this Plea Agreement will not be used to increase the volume of affected commerce attributable to the defendant or to determine the defendant's applicable Guidelines range, except to the extent provided in U.S.S.G. § 1B1.8(b).

SENTENCING AGREEMENT

8. Pursuant to Fed. R. Crim. P. 11(c)(1)(B), the defendant will recommend that it be sentenced to pay a fine to the United States of no less than \$1.5 million and the United States will recommend that the defendant be sentenced to pay a fine to the United States of no more than \$11.5 million ("Recommended Fine Range"). Once the Court has determined the fine amount, both parties are free to argue as to the appropriate payment schedule. The United States contends that had this case gone to trial, the United States would have presented evidence to prove that the gain derived from or the loss resulting from the charged offense is sufficient to justify a fine of \$11.5 million, pursuant to 18 U.S.C. § 3571(d). For purposes of this plea and sentencing only, the defendant waives its rights to contest this calculation. In light of civil cases filed, which potentially provide for a recovery of a multiple of actual damages, the United States agrees that it will not seek a restitution order for the offense charged in the Information. The defendant understands that the Court will order it to pay a \$400 special assessment pursuant to 18 U.S.C. § 3013(a)(2)(B) in addition to any fine imposed.

9. The United States and the defendant agree that the applicable Guidelines fine range exceeds the fine range contained in the Recommended Fine Range set out in Paragraph 8 above. The United States and the defendant further agree that the Recommended Fine Range is appropriate, pursuant to U.S.S.G. § 8C3.3(b), due to the inability of the defendant to pay a fine greater than that recommended without substantially jeopardizing its continued viability.

10. The United States and the defendant agree that there exists no aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the United States Sentencing Commission in formulating the Sentencing Guidelines that should result

in a departure pursuant to U.S.S.G. § 5K2.0. The United States and the defendant also agree not to seek or support any sentence outside of the advisory Guidelines range nor any Guidelines adjustment for any reason that is not set forth in this Plea Agreement. The United States and the defendant further agree that the Recommended Fine Range set forth in this Plea Agreement is reasonable.

11. Subject to the ongoing, full, and truthful cooperation of the defendant described in paragraph 13 of this Plea Agreement, and before sentencing in the case, the United States will fully advise the Court and the United States Probation Office of the fact, manner, and extent of the defendant's cooperation and its commitment to prospective cooperation with the United States' investigation and prosecutions, all material facts relating to the defendant's involvement in the charged offense, and all other relevant conduct. To enable the Court to have the benefit of all relevant sentencing information, the United States may request that sentencing be postponed until its cooperation is complete.

12. The United States and the defendant understand that the Court retains complete discretion to accept or reject the Recommended Fine Range provided for in paragraph 8 of this Plea Agreement. The defendant understands that, as provided in Fed. R. Crim. P. 11(c)(3)(B), if the Court does not impose a sentence consistent with the Recommended Fine Range contained in this Agreement, it nevertheless has no right to withdraw its plea of guilty.

DEFENDANT'S COOPERATION

13. The defendant will cooperate fully and truthfully with the United States in the prosecution of this case, the conduct of the current federal investigation of violations of federal antitrust and related criminal laws involving the manufacture and sale of ready mixed concrete, any other federal investigation resulting therefrom, and any litigation or other proceedings arising or resulting from any such investigation to which the United States is a party ("Federal Proceeding"). The ongoing, full, and truthful cooperation of the defendant shall include, but not be limited to:

(a) producing all non-privileged documents, including claimed personal documents, and other materials, wherever located, in the possession, custody, or control of the defendant, requested by attorneys and agents of the United States;

(b) using its best efforts to secure the ongoing, full and truthful cooperation, as defined in paragraph 14 of this Plea Agreement, of the current and former directors, officers, and employees of the defendant as may be requested by the United States, but excluding Gus B. Nuckols III, a/k/a Butch Nuckols, John Blatzheim, and Timothy Kuebler, including making these persons available, at the defendant's expense, for interviews and the provision of testimony in grand jury, trial and other judicial proceedings in connection with any Federal Proceeding as described above.

14. The ongoing, full, and truthful cooperation of each person described in paragraph 13(b) above will be subject to the procedures and protections of this paragraph, and shall include, but not be limited to:

(a) producing all non-privileged documents, including claimed personal documents, and other materials, requested by attorneys and agents of the United States;

(b) making himself or herself available for interviews, not at the expense of the United States, upon the request of attorneys and agents of the United States;

(c) responding fully and truthfully to all inquiries of the United States in connection with any Federal Proceeding as defined above, without falsely implicating any person or intentionally withholding any information, subject to the penalties of making false statements (18 U.S.C. § 1001) and obstruction of justice (18 U.S.C. § 1503);

(d) otherwise voluntarily providing the United States with any material or information, not requested in (a) - (c) of this paragraph, that he may have that is related to any Federal Proceeding as defined above;

(e) when called upon to do so by the United States in connection with any Federal Proceeding as defined above, testifying in grand jury, trial, and other judicial

proceedings, fully, truthfully, and under oath, subject to the penalties of perjury (18 U.S.C. § 1621), making false statements or declarations in grand jury or court proceedings (18 U.S.C. § 1623), contempt (18 U.S.C. §§ 401 - 402), and obstruction of justice (18 U.S.C. § 1503); and

(f) agreeing that, if the agreement not to prosecute him or her in this Plea Agreement is rendered void under paragraph 16(c), the statute of limitations will be tolled as to him or her for any Relevant Offense as defined in paragraph 15 will be tolled for the period between the date of the signing of this Plea Agreement and six (6) months after the date that the United States gave notice of its intent to void its obligations to that person under the Plea Agreement.

GOVERNMENT'S AGREEMENT

15. Upon the Court's acceptance of the guilty plea called for by this Plea Agreement and the imposition of a sentence within the Recommended Fine Range, and subject to the cooperation requirements of paragraph 13 of this Plea Agreement, the United States agrees that it will not bring further criminal charges against the defendant for any act or offense committed on or before the date of this Plea Agreement that was undertaken in furtherance of an antitrust conspiracy involving the manufacture and sale of ready mixed concrete in the Indianapolis, Indiana metropolitan area. The non-prosecution terms of this paragraph do not apply to civil matters of any kind, to any violation of the federal tax or securities laws, or to any crime of violence.

16. The United States agrees to the following:

(a) Upon the Court's acceptance of the guilty plea called for by this Plea Agreement and the imposition of a sentence within the Recommended Fine Range and subject to the exceptions noted in Paragraph 16(c), the United States will not bring criminal charges against any current or former director, officer, or employee of the defendant for any act or offense committed before the date of this Plea Agreement and while that person

was acting as a director, officer, or employee of the defendant that was undertaken in furtherance of an Antitrust conspiracy involving the manufacture and sale of ready mixed concrete in the Indianapolis, Indiana metropolitan area, except that the protections granted in this paragraph shall not apply to Gus B. Nuckols III, a/k/a Butch Nuckols, John Blatzheim, or Timothy Kuebler;

(b) Should the United States determine that any current or former director, officer, or employee of the defendant may have information relevant to any Federal Proceeding, the United States may request that person's cooperation under the terms of this Plea Agreement by written request delivered to counsel for the individual (with a copy to the undersigned counsel for the defendant) or, if the individual is not known by the United States to be represented, to the undersigned counsel for the defendant;

(c) If any person requested to provide cooperation under paragraph 13(b) fails to comply with his or her obligations under paragraph 14, then the terms of this Plea Agreement as they pertain to that person, and the agreement not to prosecute that person granted in this Plea Agreement, shall be rendered void;

(d) Except as provided in paragraph 16(e), information provided by a person described in paragraph 16(b) to the United States under the terms of this Plea Agreement pertaining to any Relevant Offense, or any information directly or indirectly derived from that information, may not be used against that person in a criminal case, except in a prosecution for perjury (18 U.S.C. § 1621), making a false statement or declaration (18 U.S.C. §§ 1001, 1623), or obstruction of justice (18 U.S.C. § 1503);

(e) If any person who provides information to the United States under this Plea Agreement fails to comply fully with his or her obligations under paragraph 14 of this Plea Agreement, the agreement in paragraph 16(d) not to use that information or any information directly or indirectly derived from it against that person in a criminal case shall be rendered void;

(f) The nonprosecution terms of this paragraph do not apply to civil matters of any kind, to any violation of the federal tax or securities laws, or to any crime of violence; and

(g) Documents provided under paragraphs 13(a) and 14(a) shall be deemed responsive to outstanding grand jury subpoenas issued to the defendant.

17. The defendant understands that it may be subject to administrative action by federal or state agencies other than the United States Department of Justice, Antitrust Division, based upon the conviction resulting from this Plea Agreement, and that this Plea Agreement in no way controls whatever action, if any, other agencies may take. However, the United States agrees that, if requested, it will advise the appropriate officials of any governmental agency considering such administrative action of the fact, manner, and extent of the cooperation of the defendant as a matter for that agency to consider before determining what administrative action, if any, to take.

REPRESENTATION BY COUNSEL

18. The defendant has reviewed all legal and factual aspects of this case with its attorney and is fully satisfied with its attorney's legal representation. The defendant has thoroughly reviewed this Plea Agreement with its attorney and has received satisfactory explanations from its attorney concerning each paragraph of this Plea Agreement and alternatives available to the defendant other than entering into this Plea Agreement. After conferring with its attorney and considering all available alternatives, the defendant has made a knowing and voluntary decision to enter into this Plea Agreement.

VOLUNTARY PLEA

19. The defendant's decision to enter into this Plea Agreement and to tender a plea of guilty is freely and voluntarily made and is not the result of force, threats, assurances, promises, or representations other than the representations contained in this Plea Agreement. The United States has made no promises or representations to the defendant as to whether the Court will accept or reject the recommendations contained within this Plea Agreement.

VIOLATION OF PLEA AGREEMENT

20. The defendant agrees that, should the United States determine in good faith, during the period that any Federal Proceeding is pending, that the defendant has failed to provide full and truthful cooperation, as described in paragraph 13 of this Plea Agreement, or has otherwise violated any provision of this Plea Agreement, the United States will notify counsel for the defendant in writing by personal or overnight delivery or facsimile transmission and may also notify its counsel by telephone of its intention to void its obligations under this Plea Agreement (except its obligations under this paragraph), and, thereafter, the defendant shall be subject to prosecution for any federal crime of which the United States has knowledge including, but not limited to, the substantive offenses relating to the investigation resulting in this Plea Agreement. The defendant agrees that, in the event that the United States is released from its obligations under this Plea Agreement and brings criminal charges against the defendant for any offense referred to in Paragraph 15 of this Plea Agreement, the statute of limitations for such offense will be tolled for the period between the date of the signing of the Plea Agreement and six (6) months after the date the United States gave notice of its intent to void its obligations under this Plea Agreement or the date that the court rules that this Plea Agreement is null and void, whichever is later.

21. The defendant understands and agrees that in any further prosecution of it resulting from the release of the United States from its obligations under this Plea Agreement based on the defendant's violation of the Plea Agreement, any documents, statements, information, testimony, or evidence provided by it to attorneys or agents of the United States, federal grand juries, or courts, and any leads derived therefrom, may be used against it in any such further prosecution. In addition, the defendant unconditionally waives its right to challenge the use of such evidence in any such further prosecution, notwithstanding the protections of Fed. R. Evid. 410.

ENTIRETY OF AGREEMENT

22. This Plea Agreement constitutes the entire agreement between the United States and the defendant concerning the disposition of the criminal charge in this case. This Plea

