

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Criminal Action No. 06-CR-00264-PSF

UNITED STATES OF AMERICA, FILED: August 7, 2006

Plaintiff,

v.

KENNETH L. RAINS,

Defendant.

**PLEA AGREEMENT AND STATEMENT OF FACTS
RELEVANT TO SENTENCING**

The United States of America ("United States"), by and through Diane Lotko-Baker and Carla M. Stern, Trial Attorneys, United States Department of Justice, Antitrust Division, and the defendant, Kenneth L. Rains (Rains or defendant), personally and by counsel, Eugene E. Gozdecki, submit the following Plea Agreement and Statement of Facts Relevant to Sentencing pursuant to D.C.COLO.LCrR 11.1.

PLEA AGREEMENT

1. The defendant agrees to plead guilty to the Information charging a violation of 15 U.S.C. § 1, The Sherman Antitrust Act. Pursuant to Rule 7(b) of the Federal Rules of Criminal Procedure (Fed.R.Crim.P.), the defendant will waive indictment and plead guilty at arraignment to the Information, in the form attached, to be filed in the United States District Court for the District of Colorado. The Information will charge the defendant with participating in a conspiracy to suppress and eliminate competition by submitting non-competitive and rigged bids from the Farmington, N.M. regional office of Flint Energy Services, Inc. ("Flint") to BP America

Production Company for the construction of pipelines to transport natural gas from wells in the Upper San Juan Basin in Colorado beginning in approximately June of 2005 and continuing until December 2005, in violation of the Sherman Antitrust Act, 15 U.S.C. § 1 ("Relevant Offense").

2. The government and the defendant hereby enter into this Plea Agreement pursuant to Fed.R.Crim.P. 11(c)(1)(B).

3. The defendant understands his 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 him;
- d. to have a trial by jury, at which he 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 him to be found guilty;
- e. to confront and cross-examine witnesses against him and to subpoena witnesses in his defense at trial;
- f. not to be compelled to incriminate himself;
- g. to appeal his conviction if he is found guilty; and
- h. to appeal the imposition of sentence against him.

4. The defendant knowingly and voluntarily waives the rights set out in Paragraph 3. b.- g. above. The defendant also knowingly and voluntarily waives the right to file any appeal, any collateral attack, or any other writ or motion, including but not limited to an appeal under 18 U.S.C. § 3742 or a motion under 28 U.S.C. § 2241 or 2255, that challenges the sentence imposed by the Court if that sentence is consistent with or below the recommended sentence in Paragraph

23 of this Plea Agreement, regardless of how the sentence is determined by the Court. This agreement does not affect the rights or obligations of the United States as set forth in 18 U.S.C. § 3742(b).

5. 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 Relevant Offense, 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. making himself 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, 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 *et seq.*);
- d. otherwise voluntarily providing the United States with any non-privileged material or information, not requested in a. - c. of this paragraph, that he may have that is related to any Federal Proceeding; and
- e. when called upon to do so by the United States in connection with any

Federal Proceeding, testifying in grand jury, trial, and other judicial proceedings in the United States, 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 *et seq.*).

6. Subject to the full, truthful, and continuing cooperation of the defendant, as described in Paragraph 5 of this Plea Agreement, and upon the Court's acceptance of the guilty plea called for by this Plea Agreement and the imposition of the sentence, the United States will not bring further criminal charges against the defendant for any act or offense committed before the date of this Plea Agreement that was undertaken in furtherance of the Relevant Offense. 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.

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

8. 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.

9. 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 5 of this Plea Agreement, or has otherwise violated any provision of this Plea Agreement, the United States will notify the defendant or his counsel in writing by personal or overnight delivery or facsimile transmission and may also notify his counsel by telephone of its intention to void any of its obligations under this Plea Agreement (except its obligations under this paragraph), and 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 the Relevant Offense, the statute of limitations period for such offense will be tolled for the period between the date of the signing of this 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.

10. The defendant understands and agrees that in any further prosecution of him 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 him to attorneys or agents of the United States, federal grand juries, or courts, and any leads derived therefrom, may be used against him in any such further prosecution. In addition, the defendant unconditionally waives his right to

challenge the use of such evidence in any such further prosecution, notwithstanding the protections of Fed. R. Evid. 410.

STATUTORY PENALTIES

11. The maximum statutory penalty for a violation of 15 U.S.C. § 1 is: not more than 120 months imprisonment; a fine in an amount equal to the greatest of (1) not more than \$1,000,000 (15 U.S.C. § 1), (2) twice the gross pecuniary gain the conspirators derived from the crime, or (3) twice the gross pecuniary loss caused to the victims of the crime by the conspirators (18 U.S.C. § 3571(b) and (d)), or both; not more than three (3) years supervised release; \$100 special assessment fee pursuant to 18 U.S.C. § 3013(a)(2)(A); plus pursuant to 18 U.S.C. § 3563(b)(2) or 3663(a)(3) and U.S.S.G. §8B1.1 restitution may be ordered.

12. The conviction may cause the loss of civil rights, including but not limited to the rights to possess firearms, vote, hold elected office, and sit on a jury.

13. A violation of the conditions of probation or supervised release may result in a separate prison sentence.

STIPULATION OF FACTUAL BASIS AND FACTS RELEVANT TO SENTENCING

14. The parties agree that there is no dispute as to the material elements which establish a factual basis of the offense of conviction.

15. Pertinent facts are set out below in order to provide a factual basis of the plea and to provide facts which the parties believe are relevant, pursuant to U.S.S.G. § 1B1.3, for computing the appropriate guideline range.

16. The statement of facts herein does not preclude either party from presenting and arguing, for sentencing purposes, additional facts or factors not included herein which are

relevant to the guideline computation (U.S.S.G. § 1B1.3) or to sentencing in general (U.S.S.G. § 1B1.4). In "determining the factual basis for the sentence, the court will consider the stipulation of the parties, together with the results of the presentence investigation, and any other relevant information." (U.S.S.G. § 6B1.4 Comm.)

17. The parties agree that the United States' evidence would show that the date on which conduct relevant to the offense (U.S.S.G. § 1B1.3) began is in or about June 2005 and that it continued until December 2005 ("Relevant Period").

18. The parties agree that the United States' evidence would be that during the Relevant Period:

a. The defendant was the Regional Manager and head of the Farmington, New Mexico regional office for Flint Energy Services, Inc. ("Flint"), a corporation organized and existing under the laws of the State of Delaware with its principal place of business in Tulsa, Oklahoma, and various regional offices, including one located in Farmington, New Mexico.

b. Flint, the defendant's employer, was engaged in the pipeline construction business in the State of Colorado and elsewhere.

c. The defendant, a high-level personnel of Flint, participated in a conspiracy among pipeline construction companies, the primary purpose of which was to submit non-competitive and rigged bids to BP America Production Company for the construction of pipelines to transport natural gas from wells in the Upper San Juan Basin in Colorado. In furtherance of the conspiracy, the defendant engaged in discussions and attended meetings with co-conspirators at which they discussed among themselves the

prospective submission of bids for pipeline construction projects. During these discussions and meetings, agreements were reached to submit non-competitive and rigged bids from the Farmington, N.M. regional office of Flint to BP America Production Company for the construction of pipelines to transport natural gas from wells in the Upper San Juan Basin in Colorado.

d. The defendant submitted non-competitive and rigged bids from the Farmington, N.M. regional office of Flint to BP America Production Company for the construction of pipelines to transport natural gas from wells in the Upper San Juan Basin in Colorado.

e. Pursuant to the conspiracy to submit non-competitive and rigged bids from the Farmington, N.M. regional office of Flint to BP America Production Company for the construction of pipelines to transport natural gas from wells in the Upper San Juan Basin in Colorado the defendant's employer, Flint, was awarded at least four (4) contracts that totaled at least \$672,036. The United States and the defendant agree and stipulate that \$672,036 is the volume of affected commerce attributable to the defendant and therefore is the amount used to determine volume of commerce enhancements and the base fine for the defendant under U.S.S.G. § 2R1.1.

f. Over 200 people are employed in the Flint's Farmington, New Mexico regional office.

g. Substantial quantities of essential materials and equipment were transported across state lines in a continuous and uninterrupted flow of interstate

commerce and in a manner substantially affecting interstate commerce, for use in pipeline construction projects in Colorado that were rigged by the defendant and his co-conspirators. In addition, the defendant and his co-conspirators caused rigged bids to be electronically submitted from New Mexico to the BP America Production Company office in Houston, Texas where they were processed, and to the BP America Production Company office in Durango, Colorado, which was responsible for the work on the pipeline construction projects rigged by the defendant and his co-conspirators.

h. Acts in furtherance of this conspiracy were carried out within the District of Colorado within the five years preceding the charges in the Information. The pipeline construction projects that were affected by this conspiracy were located in San Juan Basin area of Colorado.

SENTENCING COMPUTATION

19. The parties stipulate that sentencing in this case will be determined by application of the Sentencing Guidelines in effect on the day of sentencing, issued pursuant to 28 U.S.C. § 994(a).

20. The parties understand that the court may impose any sentence, up to the statutory maximum, regardless of any guideline range computed, and that the court is not bound by any position of the parties. (U.S.S.G. § 6B1.4(d)) The court is free, pursuant to U.S.S.G. §§ 6A1.3 and 6B1.4, to reach its own findings of facts and sentencing factors considering the parties' stipulations, the presentence investigation, and any other relevant information. (U.S.S.G. § 6B1.4 Comm.; § 1B1.4) 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 recommendation

contained in this Agreement, he nevertheless has no right to withdraw his plea of guilty.

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

22. Subject to the ongoing, full, and truthful cooperation of the defendant described in Paragraph 5 of this Plea Agreement, and before sentencing in the case, the United States will fully advise the Court and the Probation Office of the fact, manner, and extent of the defendant's cooperation and his 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, and the defendant will not oppose, that sentencing be postponed until his cooperation is complete.

23. Pursuant to Fed. R. Crim. P. 11(c)(1)(B), the United States will recommend, as the appropriate disposition of this case, that the defendant be sentenced to a period of no more than six (6) months incarceration; to pay a fine of \$10,000 payable in full before the fifteenth (15th) day after the date of judgment; and to at least 2 years of supervised release ("Recommended Sentence"). The defendant's employer, Flint, has already made restitution to

the victim. The defendant is free to argue for any sentence within the applicable Sentencing Guidelines range as determined by the Court. The United States will not object to the defendant's request that the Court make a recommendation to the Bureau of Prisons that the Bureau of Prisons designate that the defendant be assigned to a Federal Minimum Security Camp to serve his sentence of imprisonment and that the defendant be released following the imposition of sentence to allow him to self-surrender to the assigned correctional facility on a specified date. The parties agree that there exists no aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the U.S. Sentencing Commission in formulating the Sentencing Guidelines justifying a departure pursuant to U.S.S.G. §5K2.0.

24. The parties agree that the computations below set forth the Sentencing Guidelines calculations for the defendant.

a. The base guideline is U.S.S.G. § 2R1.1, with a base offense level of 12.

b. Pursuant to U.S.S.G. § 2R1.1(b)(1) the base offense level is increased by 1 because the conduct involved participation in an agreement to submit non-competitive bids. There are no increases in the offense level pursuant to U.S.S.G. § 2R1.1(b)(2) because the volume of commerce attributable to the defendant is less than \$1,000,000.

c. The adjusted offense level would therefore be 13.

d. The defendant should receive the adjustment for acceptance of responsibility pursuant to U.S.S.G. § 3E1.1(a). The resulting offense level would therefore be 11.

e. The parties understand that the defendant's criminal history computation is

tentative. The criminal history category is determined by the court. The parties are not aware of any information which would impact the defendant's criminal history category. If no other information were discovered, the defendant's criminal history category would be I.

f. Assuming the (tentative) criminal history facts of e. above, the career offender/criminal livelihood/armed career criminal adjustments would not apply.

g. The Guidelines range resulting from the estimated offense level of d. above, and the (tentative) criminal history category of e. above, is 8-14 months. However, in order to be as accurate as possible, with the criminal history category undetermined at this time, the estimated offense level of d. above could conceivably result in a range from 8 months (bottom of Category I), to 33 months (top of Category VI). The sentence would be limited, in any case, by the statutory maximum.

h. Pursuant to U.S.S.G. §§ 5E1.2(b) and 2R1.1(c)(1) the Guidelines Fine Range for an individual is one to five percent of the volume of commerce, but not less than \$20,000. Therefore, the Guidelines Fine Range would be \$6,720 to \$33,602 (one to five percent of \$672,036), plus applicable interest and penalties. The government intends to recommend a fine of \$10,000.

i. The defendant understands that the Court will order him to pay a \$100 special assessment, pursuant to 18 U.S.C. § 3013(a)(2)(A), in addition to any fine imposed.

j. Pursuant to guideline U.S.S.G. § 5D1.2, if the court imposes the term of

supervised release, that term shall be at least two (2) years but not more than three (3) years.

k. Restitution is not required, pursuant to guideline U.S.S.G. § 5E1.1, because the defendant's employer, Flint, has already made restitution to the victim, BP America Production Company, pursuant to an agreement dated June 6, 2006, between Flint and BP America Production Company.

25. Subject to the full and continuing cooperation of the defendant, as described in Paragraph 5 of this Plea Agreement, and prior to sentencing in this case, the United States agrees that it will make a motion, pursuant to U.S.S.G. §5K1.1, for at least a one-level downward departure from the Guidelines range as calculated in Paragraph 24 of this Plea Agreement to Sentencing Guidelines Zone B. The United States will request that the Court impose the fine and term of imprisonment consistent with the Recommended Sentence set out in Paragraph 23 of this Plea Agreement because of the defendant's substantial assistance in the United States' investigation and prosecutions of violations of federal criminal law in the pipelines construction industry.

WHY THE PROPOSED PLEA DISPOSITION IS APPROPRIATE

26. The parties believe the sentencing range resulting from the proposed plea agreement is appropriate because all relevant conduct is disclosed, the Sentencing Guidelines take into account all pertinent sentencing factors with respect to this defendant, the charge to which the defendant has agreed to plead guilty adequately reflects the seriousness of the actual offense behavior, and the defendant has cooperated fully and truthfully with respect to the investigation of this matter.

27. This document states the parties' entire agreement. There are no other promises, agreements (or "side agreements"), terms, conditions, understandings, or assurances, express or implied. In entering this agreement, neither the United States nor the defendant has relied, or is relying, on any terms, promises, conditions, or assurances not expressly stated in this agreement. This Plea Agreement cannot be modified except in writing, signed by the United States and the defendant.

28. The undersigned attorneys for the United States have been authorized by the Attorney General of the United States to enter this Plea Agreement on behalf of the United States.

Date: July 11, 2006

_____/s/
Kenneth L. Rains
Defendant

Date: July 11, 2006

_____/s/
Eugene E. Gozdecki
Attorney for Defendant

Date: July 11, 2006

_____/s/
Diane Lotko-Baker
Carla M. Stern
Trial Attorneys
United States Department of Justice,
Antitrust Division