IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 94-1080

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JAMES P. HEFFERNAN,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR APPELLEE UNITED STATES OF AMERICA

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STATEMENT OF SUBJECT MATTER JURISDICTION

The district court had jurisdiction pursuant to 18 U.S.C. 3231. The indictment charged violations of 15 U.S.C. 1 and 18 U.S.C. 1341. This Court has jurisdiction pursuant to 28 U.S.C. 1291 and 18 U.S.C. 3742(a). The appeal is from a final judgment of the district court entered on December 9, 1993. The notice of appeal was filed on December 17, 1993.

ISSUE PRESENTED

Whether the district court misapplied the Sentencing Guidelines, U.S.S.G. §2R1.1(b)(1), when it enhanced defendant's sentence by one offense level for bid-rigging.

STATEMENT OF THE CASE

A. Course of Proceedings

On March 6, 1991, a grand jury sitting in the Northern District of Illinois returned a superseding indictment charging James P. Heffernan, Irving A. Rubin, and Robert Bonczyk with one count of price-fixing in violation of section 1 of the Sherman Act (15 U.S.C. l) and two counts of mail fraud (18 U.S.C. 1341). (R. 17; A-1 to A-11.) Rubin and Bonczyk pled guilty (R. 284, 282). Heffernan went to trial and was convicted by a jury on all counts.

The district court (Lindberg, J.) initially sentenced the defendants on December 14, 1992. The court determined that the guideline for Antitrust Offenses, U.S.S.G. §2R1.1, applied to the Sherman Act count and that the guideline for Offenses Involving Fraud or Deceit, §2F1.1, should be applied to the mail fraud counts.[1] After grouping the antitrust and mail fraud offenses (U.S.S.G. §3D1.2(b)), the court determined that the fraud and deceit guideline had the higher offense levels (U.S.S.G. §3D1.3(a)), and thus the court applied that Guideline in imposing sentence. Heffernan's offense level was found to be 17.[2] He was

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[1]The district court applied the guidelines effective November 1, 1989. Unless otherwise noted, citations to the guidelines in this brief refer to that edition of the guidelines.

[2] The base level under the fraud and deceit guideline was 6. U.S.S.G. §2F1.1. The base level was adjusted to 15 because the stipulated fraud loss was at least $500,000 (U.S.S.G. §2F1.1(a),(b)(l)(J). An additional two level enhancement was imposed on Heffernan for obstruction of justice (U.S.S.G. §3C1.1) because he had ordered the destruction of documents after

(continued...)

sentenced to 24 months imprisonment and three years supervised release, the minimum term of imprisonment for offense level 17. (R. 299.)[3]

The three defendants appealed, challenging only their sentences. They argued that the antitrust guideline, not the fraud and deceit guideline, should have been applied to the mail fraud offenses. This Court agreed. On June 30, 1993, it vacated the sentences and remanded for resentencing under the antitrust guideline. United States v. Rubin, 999 F.2d 194 (7th Cir. 1993).

On July 2, 1993, the defendants were released from prison pending resentencing. By that time, Heffernan had served approximately five months of his prison term.

On December 9, 1993, after a two-day hearing, the court reimposed sentence. The court applied the base offense level of 9 for antitrust offenses. §2R1.1(a). It then enhanced one level for bid rigging (§2R1.1(b)(1)), one level for volume of commerce in excess of $4 million (§2R1.1(b)(2)(C)), and, for Heffernan, two levels for obstruction of justice (see note 1, supra). This resulted in an offense level of 13, and a sentencing range of 12-18 months. The court imposed the minimum prison sentence of 12

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[2](...continued)
learning of the grand jury's price-fixing investigation.

[3] Rubin (offense level 18) was sentenced to 27 months imprisonment, three years supervised release and a $250,000 fine (R. 296); Bonczyk (offense level 15) was sentenced to 18 months imprisonment, three years supervised release and a $50,000 fine (R. 297).

months, with three years supervised release. No fine was imposed. R. 408-2, pp. 219-220; A-12 to A-14.

On December 17, 1993, Heffernan filed a notice of appeal. R. 386.[4] Heffernan is on bail pending appeal. R. 391.

B. Statement of Facts

The indictment charged, and the evidence at trial proved, that between October 1988 and March 1990, Heffernan and others participated in a conspiracy to fix the prices of new steel drums sold in five states.[5] Heffernan was the vice-president in charge of sales of Astro Containers, Inc. His co-conspirators included Rubin, the CEO of Container Products, Inc. (CPI), Bonczyk, CPI's executive vice-president, and representatives of five other companies. Through meetings and telephone conversations, the conspirators agreed to issue published price lists with agreed-on prices for standard 20/18 gauge 55-gallon drums, and not to deviate from those published prices. Prices for other drums and ancillary items were also agreed on.

The agreement was discussed at a meeting in Cleveland, Ohio, on December 21, 1988, and finalized in January 1989 in Columbus, Ohio. Heffernan and his competitors agreed to adopt uniform price lists for steel drums, including a price of $19.80 for 20/18 gauge drums. Berenfield 7:643, 616-629. They also agreed that the effective date for the increases would be April 1, 1989.

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[4] Rubin and Bonczyk have not appealed.

[5] Steel drums are large steel packaging containers ranging in size from about 13 gallons to about 57 gallons, used most frequently to store or transport chemical and petroleum products.

The April l date was adopted because Lubrizol, a major account (2458), was putting a large contract out for bid in mid-March and the effective date of the order was to be April l. 7:652-653, 22:2338. The conspirators all agreed to bid a price of $19.80 to Lubrizol. R. 7:653. They recognized that the Lubrizol bids would be the "acid test" for the price list (7:653; 8:792, 836). Specifically, the Lubrizol bids would test whether the conspirators would indeed adhere to their published prices.

Heffernan and the other conspirators in fact submitted identical bids of $19.80 to Lubrizol. 8:794. Moreover, Heffernan and his competitors colluded on other bids as well. In July 1989 they agreed to submit identical bids to Valspar (Heff. Br. 15) and, at the end of 1989, they agreed on bid prices to Pennzoil. 23:2396-2398. On this occasion, they agreed to quote a price that was lower than the published list price because a former co-conspirator, Leonard Berenfield, had withdrawn from the conspiracy and the remaining members feared Berenfield would submit a price lower than the published price and thereby take away the Pennzoil business. 23:2396; 2356; 2410-2413, 2431.

C. Sentencing

In determining the appropriate sentence on the remand of this case, the district court increased the base offense level by one for "bid rigging" under U.S.S.G. §2R1.1(b)(l).[6] The court found that "the bids were rigged because they were submitted

[6] The court enhanced the offense level for obstruction and volume of commerce as well, but Heffernan has not challenged these portions of his sentence.

pursuant to an agreement to submit non-competitive bids, to use the language of 2Rl.lBl." R. 408-2, p. 209; A-20. The court rejected defendant's argument that, because the conspirators did not allocate the contracts on which they bid in addition to agreeing on bid the prices, they did not "rig bids." The court concluded that "the fact that the bidding by the producers was not rigged to favor a particular bidder to allocate markets doesn't take it ouside the ambit of 2R1.1Bl." Ibid.

STANDARD OF REVIEW

In reviewing a sentence under the Sentencing Guidelines, questions of fact are reviewed under a clearly erroneous standard and questions involving the interpretation of the guidelines are reviewed de novo. United States v. Lozoya-Morales, 931 F.2d 1216, 1218 (7th Cir. 1991); 18 U.S.C. 3742(e)("The court of appeals shall . . . accept the findings of fact of the district court unless they are clearly erroneous and shall give due deference to the district court's application of the guidelines to the facts.").

ARGUMENT

THE DISTRICT COURT CORRECTLY CONCLUDED THAT HEFFERNAN HAD PARTICIPATED "IN AN AGREEMENT TO SUBMIT NON-COMPETITIVE BIDS" THAT REQUIRED A ONE LEVEL ENHANCEMENT OF HIS OFFENSE LEVEL

The district court correctly enhanced Heffernan's sentence one level for bid rigging since Heffernan's conduct falls squarely within the plain meaning of U.S.S.G. §2Rl.l(b)(l) and the relevant commentary accompanying it.

A. An Agreement To Submit Bids At A Prearranged Bid Price Falls Within The Plain Language Of §2R1.1(b)(1)

U.S.S.G. §2Rl.l deals with "Antitrust Offenses." Subsection 2R1.1(b)(1) provides:

> If the conduct involved participation in an agreement to submit non-competitive bids, increase by l level.

Defendant admits that he and his competitors agreed in advance on the bid prices they would submit to Lubrizol and other customers (Heff. Br. 12-15). Defendant denies, however, that this constituted "an agreement to submit non-competitive bids" within the meaning of U.S.S.G. §2R1.1(b)(l). He argues for a narrow reading of the term "non-competitive" that would include only those agreements in which competing bidders agree, not only on the price that they will bid, but in which the bidders foreclose competition as to all other factors that some buyer in some circumstance might deem relevant in selecting a supplier -- "inventory, product quality, service, credit terms, delivery" (Heff. Br. 20). This narrow construction of the term "noncompetitive bid" is at odds with the language of the applicable sentencing guideline and its commentary; it also ignores relevant antitrust law that supports and reinforces the broad language of the sentencing statute.

Although Heffernan purports to find ambiguity in the term "non-competitive bid" (Heff. Br. 19-20), the Sentencing Commission likely did not think to include a definition of it in the statute because the term is neither technical nor arcane. Its meaning can be discerned from its common, everyday usage and

such usage is the first and best guide to statutory interpretation. Mallard v. United States District Court, 490 U.S. 296, 301 (1989) (the interpretation of a statute must begin with the statute's language; there is little reason to think Congress did not intend words used to bear their most common, ordinary, and "natural signification"); Jones v. Hanley Dawson Cadillac Co., 848 F.2d 803, 807 (7th Cir. 1988) (interpretation of statute begins with language of statute itself and the words in a statute are to be given their plain and ordinary meaning); Illinois EPA v. US EPA, 947 F.2d 283, 289 (7th Cir. 1991) (to ascertain the intent of the law, court must examine the plain meaning of the statute at issue); Meredith v. Bowen, 833 F.2d 650, 654 (7th Cir. 1987) (the plain language is the best evidence of the statute's meaning); see also, First United Methodist Church v. United States Gypsum Co., 882 F.2d 862, 869 (4th Cir. 1989) (the most fundamental guide to statutory construction is common sense).

The dictionary defines "bid" as "an offer of a price" (Webster's Third New International Dictionary (unabr.) 1981, p. 212-213) (emphasis added) and "competitive" means "produced by, based on, resulting from, or capable of existing in rivalry of economic endeavor and without the presence of monopoly or collusion." Id. at 464 (emphasis added). "Noncompetitive" is simply "not competitive." Id. at 1536. In this case, since Heffernan and his co-conspirators agreed to submit bid "prices"

that were the result of "collusion," they agreed "to submit non-competitive bids."

Heffernan's claim that an agreement to submit "non-competitive bids" cannot encompass agreements that merely fix a bid price but must preclude competition on all the terms of sale, cannot be reconciled therefore with the plain statutory language. That the bidders may have remained free to compete for customers on the basis of factors other than price is simply irrelevant. Section 2R1.1(b)(1) requires the offense level to be raised for "non-competitive bids." It does not address itself to any other aspect of competition in a market; it does not care whether market participants otherwise compete on bases other than their bid submissions. In the bid submission process itself -- which is the only relevant conduct at issue -- there was no competition, even though the bidders may have reserved the right to compete for customers before or after their bids were submitted.[7] When a buyer decides that he will select a supplier through competitive bidding rather than negotiation, it is the buyer who has eliminated factors other than price from the competitive process. Thus, in rigging the bid price, the suppliers have foreclosed competition with respect to the only factor that is relevant.

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[7] Heffernan appears alternatively to argue that "non-competitive bids" are those that eliminate "competition as to all *bid* terms" (rather than all terms of sale generally). Heff. Br. 20 (emphasis added). There is nothing in the record to suggest that the bids in question in this case concerned any competitive terms other than price, however.

B. An Agreement To Submit A Bid At A Prearranged Bid Price Is An Agreement To Submit A "Noncompetitive Bid" As That Term Has Been Applied In Cases Under The Sherman Act

Section 2R1.1 and subsection 2R1.1(b)(1) are found in Part R of the Sentencing Guidelines, titled "Antitrust Offenses." Any terminology used in Part R, therefore, must be read in light of the related antitrust law. See also §2R1.1, comment. (backg'd) ("These guidelines apply to violations of the antitrust laws . . . . horizontal price-fixing (including bid rigging) and horizontal market-allocation . . . .").

Even if the term "non-competitive bids" did not have a meaning readily capable of determination from its everyday, common usage and even if it were not plainly applicable to the conduct at issue in this case, the case law developed under the Sherman Act unequivocally establishes that Heffernan agreed to submit a "non-competitive bid."[8]

For almost 100 years, an agreement to fix prices or rig bids has been regarded as illegal per se, i.e., "noncompetitive,"[9] under the Sherman Act -- whether or not the agreement leaves competitors free to compete on terms other than price. United States v. Addyston Pipe & Steel Co., 85 Fed. 271, 278-279 (6th

[8] In purporting to search for the appropriate meaning of "non-competitive bids," defendant has ignored the entire body of Sherman Act law to which §2R1.1 applies.

[9] Since, the object of the Sherman Act is to preserve competition, an agreement that on its face restrains competition is per se illegal. Northern Pacific Railway, 356 U.S. at 4-5. (The Sherman Act is "aimed at preserving free and unfettered competition as the rule of trade;" the Act seeks "unrestrainted interaction of competitive forces;" "the policy unequivocally laid down by the Act is competition").

Cir. 1898), aff'd, 175 U.S. 211 (1899). Indeed, price-fixing and bid-rigging are the "archetypal" anticompetitive agreements found illegal per se under the Sherman Act. Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 647 (1980); Northern Pacific Railway v. United States, 356 U.S. l, 5 (1958); United States v. Brighton Building & Maintenance Co., 598 F.2d 1101, 1106 (7th Cir.), cert. denied, 444 U.S. 840 (1979). Thus, from the Sherman Act's inception, it was deemed "well settled that an agreement between intending bidders at a public auction or a public letting not to bid against each other, and thus to prevent competition" was a violation of the Sherman Act. Addyston Pipe & Steel, 85 Fed. at 278-279.

Since "[t]he Sherman Act was intended to . . . protect the public against . . . combinations which tend directly to suppress the conflict for advantage called competition -- the play of the contending forces ordinarily engendered by an honest desire for gain," "it is not necessary . . .that the challenged arrangement suppresses all competition between the parties . . . " Paramount Famous Corp. v. United States, 282 U.S. 30, 43, 44 (1930). Agreements that tamper with price are deemed anticompetitive whether or not they restrain competition completely, whether they leave areas other than price open to competition, or whether or not they work to control entire markets. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 221 (1940) ("Any combination which tampers with price structures is engaged in an unlawful activity [under the Sherman Act]. Even though the members of the

price-fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices, they would be directly interfering with the free play of market forces"); National Society of Professional Engineers v. United States, 435 U.S. 679, 692-693 (1978) (agreement that eliminates competitive bidding among engineers but otherwise leaves engineers free to compete on basis of service and quality is one that, on its face, suppresses competition and constitutes a Sherman Act restraint of trade because it "`impedes the ordinary give and take of the market place,' and substantially deprives the customer of the `ability to utilize and compare prices in selecting engineering services'").

Defendant has ignored the settled meaning of "noncompetitive" under the antitrust laws. While we cannot conceive of any accepted definition of "noncompetitive bid" that would fail to include the bids submitted in this case, there certainly is no reason for the court to apply a definition of the term "noncompetitive bid" under the specific sentencing guideline for antitrust offenses that is at odds with the meaning of "noncompetitive bid" under the antitrust laws. Compare U.S.S.G. §1B1.1, comment. (n.l(b),(j)) (defining "bodily injury" and "serious bodily injury" and noting that "[a]s used in the guidelines, the definition of this term is somewhat different than that used in various statutes").

C. Defendant's Conduct Constituted "Bid Rigging" Within The Meaning Of The Guideline Commentary And The Antitrust Laws

Proceeding from the erroneous premise that the meaning of "non-competitive bid" in §2R1.1(b)(1) is unclear, Heffernan claims that one must look to the commentary accompanying the guideline to discern its meaning. While we disagree with the premise that the term "non-competitive bid" contains any ambiguity in its application to Heffernan's conduct, we agree that the commentary is a further guide to interpretating the guidelines. Commentary explaining the sentencing guidelines is relevant in interpreting the guidelines and should be relied on where it is not inconsistent with the language of the guidelines themselves. United States v. Stinson, 113 S. Ct. 1913, 1919 (1993).

The background commentary to §2R1.1 on which Heffernan relies provides:

> The Commission believes that the volume of commerce is liable to be an understated measure of seriousness in some bid-rigging cases. For this reason . . . the Commission has specified a l-level increase for bid-rigging.

Heffernan argues that a prearranged agreement among potential bidders to bid a certain price is not bid-rigging unless the bidders also agree "to fix a result in advance" (Heff. Br. 21) and "allocate the contracts among the [conspiring bid-riggers]" (Heff. Br. 22), and that §2Rl.l(b)(l) "applies only to those non-competitive agreements in which there was no feature of competition" (Heff. Br. 24, emphasis added). Nothing in the

commentary supports this narrow reading of the term "bid rigging," however.

The Sentencing Commission clearly understood that "market allocation" agreements were different from "bid-rigging" agreements. Section 2R1.1 is titled "Bid-Rigging, Price-Fixing, or Market-Allocation Agreements Among Competitors" (emphasis added). The background commentary, however, provides that the l-level enhancement under §2Rl.l(b)(l) applies to "bid rigging," not "market allocation," as Heffernan suggests. Had the Sentencing Commission intended the enhancement provision to apply to "market allocation" schemes, it certainly would have said so. Instead, the commentary speaks only to "bid-rigging," just as the enhancement provision itself is addressed to "bids."

Heffernan's claim, moreover, that bid-rigging must involve market allocation and cannot simply be price-fixing is contrary to cases decided under the Sherman Act. Bid-rigging agreements are simply one form of price-fixing. United States v. Bensinger Co., 430 F.2d 584, 589 (8th Cir. 1970); United States v. Flom, 558 F.2d 1179, 1183 (5th Cir. 1977) ("an agreement that one company would not submit a bid lower than another is price fixing of the simplest kind"); see also, United States v. Finis P Ernst Co., 509 F.2d 1256, 1261 (7th Cir.) ("where bids are rigged, the price the [buyer] will have to pay . . . is artificially increased"), cert. denied, 423 U.S. 874 (1975).[10] The guidelines

[10] Even the Hovencamp treatise on which Heffernan relies treats bid-rigging as a form of "price-fixing" and classifies (continued...)

commentary also expressly recognizes this, noting that "agreements among competitors, such as horizontal price-fixing (including bid rigging) and horizontal market-allocation, can cause serious economic harm." §2R1.1, comment. (backg'd.)

In this case, the essential element in the bids submitted to Lubrizol was the price. In requiring competitive bids, Lubrizol had apparently decided that price was the single important factor in choosing its suppliers. If one accepted Heffernan's contention that there can be no "bid-rigging" where a customer remains free to select among the bidders on bases other than price (Heff. Br. 25), then bid-rigging would be non-existent. Buyers are always free to decide on the basis of quality, service, reputation, and reliability what suppliers they will accept bids from or award contracts to. Even when bidders agree which of them will submit a low bid, the buyer remains free to reject the low bid after the bids are submitted. The reservation of such power by the buyer does not preclude the possibility of bid-rigging or nullify its anticompetitive effects.

The cases under the Sherman Act confirm that the concept of bid-rigging is broader than Heffernan acknowledges. The most commonly quoted definition of "bid rigging" in Sherman Act case law appears to be the definition originally stated in United States v. Portsmouth Paving Co., 694 F.2d 312, 325 (4th Cir.

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[10](...continued)
bid-rigging where the winning bidder is chosen in advance as "the simple fixing of prices." H. Hovencamp, Economics and Federal Antitrust Law 87-88 (1985).

1982): "Any agreement between competitors pursuant to which contract offers are to be submitted or withheld from a third party constitutes bid rigging per se violative of 15 U.S.C. section 1." (emphasis added); accord, W.F. Brinkley & Son Construction Co., 783 F.2d 1157, 1160 (4th Cir. 1986); United States v. Mobile Materials, Inc., 881 F.2d 866 (10th Cir. 1989); United States v. Reicher, 983 F.2d 168, 170 (10th Cir. 1992); see also, Harkins Amusement Enterprises, Inc. v. General Cinema Corp., 850 F.2d 477, 487 (9th Cir. 1988) ("Concerted action to eliminate competitive bidding" comes under the heading of "bid-rigging"); Ramsay v. Vogel, 970 F.2d 471, 474 (8th Cir. 1992) ("`bid rigging,' in which prospective sellers or purchasers in a private transaction agree upon the price they will offer, is a form of price-fixing that violates section l of the Sherman Antitrust Act"). As the court explained in Reicher, "in a bid rigging conspiracy, the determination of a per se antitrust violation depends on whether there was an agreement to subvert the competition . . . " 983 F.2d at 172. By "manipulat[ing] the bidding" the defendants "lull[ed] the [buyer] into the belief it had the benefits of true competition." Ibid. Had the buyer not received what it believed to be competitive bids, it would have tried "to obtain competition for a rebidding process, or it would have negotiated a contract . . . . In a negotiated contract it would have scrutinized the costs in a manner presumed to be unnecessary when there are competititve bids." Ibid." Thus, bid-rigging is simply the submission of any "collusive" or

"noncompetitive" bid. United States v. Brighton Building & Maintenance Co., 598 F.2d 1101, 1106 (7th Cir.), cert. denied, 444 U.S. 840 (1979).

The cases on which Heffernan relies are not to the contrary. In United States v. Azarelli Construction Co., 612 F.2d 292, 297 (7th Cir. 1979), the court noted that the facts of the case showed "collusive allocation of three highway construction contracts," but characterized the defendant's scheme as "price-fixing" (612 F.2d at 297) not "market allocation," and noted the "illegality of collusive bidding" (id. at 298), without suggesting that "contract allocation" was a necessary predicate for such illegal bid rigging. United States v. W.F. Brinkley & Son, 783 F.2d 1157, 1161 (4th Cir. 1986), upheld a district court charge stating that "a conspiracy to allocate projects or rig bids" is illegal under the Sherman Act." 783 F.2d at 1161 (emphasis added). Neither the district court nor the appeals court equated bid rigging with "market allocation," as Heffenan would require. The court of appeals upheld as an "accurate statement of the law and a proper definition of bid rigging" the jury instruction that "where two or more persons agree that one will submit a bid for a project higher or lower than the others or that one will not submit a bid at all, then there has been an unreasonable restraint of trade which violates the Sherman Antitrust Act" (quoted in part at Heff. Br. 22). But the court did not suggest that this definition of "bid-rigging" was the only acceptable one or foreclose application of the term "bid-

rigging" to the conduct at issue in this case. To the contrary, the court quoted the broad definition from Portsmouth Paving that "[a]ny agreement between competitors pursuant to which contract offers are to be submitted to or withheld from a third party constitutes bid rigging." 783 F.2d at 1160 (emphasis added).

Similarly, while Heffernan relies on "scholarly literature" to suggest that market allocation is more anticompetitive than simple price-fixing (Heff. Br. 22-23), none of that opinion suggests that market allocation is a sine qua non of "bid-rigging." Certainly none of the literature on which Heffernan relies has stated, or even suggested, "that the unique characteristic of a bid-rigging agreement is its complete supppression of competition." Heff. Br. 22. The quoted literature does not attempt to even define "bid-rigging" at all; nor does it address the Sentencing Guidelines, or purport to interpret them. Thus, Heffernan's argument that "bid-rigging," as contemplated in the sentencing guidelines necessarily contemplates complete market allocation and the complete suppression of all forms of competition has no basis.[11]

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[11] While many bid rigging schemes have elements of market allocation, many do not. In many forms of bid rigging, one company solicits other companies who actually have no interest in the project to submit a "complementary" bid so that an adequate number of bids will be received or so there will be the appearance of competitive bidding. United States v. Finis P. Ernst, supra, 509 F.2d at 1262; Reicher, supra, 983 F.2d at 169-170; Brinkley, supra, 783 F.2d at 1160. Such schemes are not "market allocation" schemes even though they "fix a result in advance" (see Heff. Br. 21).

Under the guideline at issue, the conduct that triggered the one-level enhancement was an agreement to submit a "non-competitive bid." A bid is nothing more than "an offer of a price" (Websters, supra; Ramsay v. Vogel, 970 F.2d 471, 474 (8th Cir. 1992)); and a noncompetitive bid is a price that is collusive.[12]

Finally, Heffernan relies on language in the background commentary "that the volume of commerce is liable to be an understated measure of seriousness in some bid-rigging cases" to argue that in cases where the volume of commerce has not been understated, no enhancement for bid-rigging should be applied. Heff. Br. 27, 28. This argument, again, misreads the commentary. The commentary states that volume of commerce is liable to be understated in "some" bid rigging cases. It does not suggest that it will be understated in "all" cases, or in "most" cases, or even in "many" cases. Thus, the commentary recognizes that there will be many bid-rigging cases in which the seriousness of the offense is not understated. Yet, as the commentary goes on to state, the l-level enhancement will apply to all bid-rigging generally. It does not impose any duty on the courts -- it does not permit the courts -- to differentiate those bid rigging cases where volume of commerce has in fact been understated and those

[12] Unlike the "market allocation" agreements on which Heffernan relies, where competing entities agree to withdraw from certain markets, in bid-rigging conspiracies (including the conspiracy in this case), the conspirators remain in the market and compete for business until the customer decides that a certain contract will be awarded on the basis of price alone. It is then that the conspirators limit the customer's choices by raising their bids, increasing the cost to the buyer and foreclosing true competition in price among them.

where it has not. See also background commentary stating that "the guideines require confinement of six months or longer in the great majority of cases that are prosecuted, including all bid-rigging cases" (1994 Guidelines p. 242). In contrast, commentary note 6 recognizes that "[u]nderstatement of seriousness is especially likely in cases involving complementary bids." U.S.S.G. §2R1.1, comment. (n.6). In such cases, the Commission says, "[t]he court should consider sentences near the top of the guideline range." Ibid. Thus, when the commentary is read in its entirety, it is plain that the one-level enhancement applies to all bid-rigging cases generally; where the court finds that the seriousness of the offense is particularly understated, the court should then sentence at the top of the resulting range. In this case, which did not involve complementary bids, Heffernan was given the minimum sentence within the appropriate guideline range.[13]

[13] To the extent Heffernan may be suggesting that in those bid-rigging cases where the volume of commerce is not likely to be understated there should be an exemption from the one-level enhancement, that is a policy question that should be directed to the Sentencing Commission, not the courts. In rePlaza de Diego Shopping Center, Inc., 911 F.2d 820, 832 n.20 (lst Cir. 1990) ("that the reasons for Congress's decision to adopt a particular rule may not be present in an individual case, however, is no justification for failing to give effect to the rule in that case"); West Virginia University Hospitals, Inc. v. Casey, lll S.Ct. 1138, 1146-1147 (1991) (where statute's language is plain, court must enforce it as to its terms).

Thus, the commentary is consistent with and in fact supports the broad language of the guideline itself: increase one level for all agreements to submit non-competitive bids.[14]

D. The Rule Of Lenity Has No Application In This Case

Heffernan argues that because the term "`non-competitive bids' is not as clear as necessary" it should be interpreted in the manner most favorable to him (Heff. Br. 29-31). While it is true that ambiguities in criminal statutes must be resolved in favor of lenity, this case does not contain the necessary ambiguity to call the rule of lenity into play.

Where the statutory language is unambiguous, the rule of lenity is inapplicable. Beecham v. United States, S.Ct. No. 93-445 (decided May 16, 1994), slip op. 6. It is not the court's task to ascertain what the legislators who passed the law would have decided had they considered defendant's particular case. "Rather, it is to determine whether the language the legislators actually enacted has a plain, unambiguous meaning." Beecham, slip op 6.

As discussed above, the terms "non-competitive bid" and "bid-rigging" are not ambiguous in light of their plain meaning and the cases developed under the Sherman Act. A statute is not ambiguous simply because the two opposing sides argue for a different reading of it. See Beecham; United States v. LeCoe, 936 F.2d 398, 402 (9th Cir. 1991) (a statute is not subject to

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[14] If the commentary and the guideline were inconsistent, the guideline would, of course, control. CITES

the rule of lenity unless it is truly ambiguous and a statute is not ambiguous simply because it is possible to construe it narrowly; "the rule of lenity is reserved `for those situations in which a reasonable doubt persists about a statute's intended scope even after resort to the language and structure, legislative history, and motivating policies of the statute'" (emphasis in original).

Moreover, a defendant cannot rely on purported ambiguity or vagueness in a statute if the statute is not ambiguous or vague as it applies to him. Posters `N' Things, Ltd. v. United States, S.Ct. No. 92-902 (May 23, 1994), slip op. 13-14; Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 505 (1983). In this case, Heffernan cannot credibly argue that the bid that he submitted to Lubrizol was "competitive." It was the result of a prearranged agreement among the bidders to submit an agreed on price. The "rule of lenity" has no application.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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