UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	Criminal No.: H-92-152
	)	
JOHN J. JOHNSON,	)	
	)	(filed 3/9/94)
Defendant.	)	
	)	

GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS COUNT ONE OF THE INDICTMENT

The United States, through its undersigned attorneys hereby responds to Defendant's Motion to Dismiss Count One of the Indictment.

I

Count One of the Indictment is Clearly Sufficient in this Case

"To determine the sufficiency of an indictment, the court must examine the entire document to ascertain whether it contains the elements of the offense charged and apprises the accused of the nature of the charge so as to enable him to prepare a defense." Russell v. United States, 369 U.S. 749, 764, 83 S.Ct. 1038, 1047 (1962). The test for validity is not whether the indictment could have been framed in a more satisfactory manner, but whether it conforms to minimal Constitutional standards. United States v. Wilson, 884 F.2d 174, 176 (5th Cir. 1989). Furthermore, courts have routinely held that indictments which are tardily challenged on such grounds are liberally construed in favor of validity. United States v. Edmonson, 962

F.2d 1535, 1542 (10th Cir. 1992); United States v. Pheaster, 544 F.2d 353, 361 (9th Cir. 1976).

A. Count One of the Indictment Alleges the Requisite Intent

Defendant contends that Count One of the Indictment fails to sufficiently state an offense under Section One of the Sherman Act, because it fails to allege that the defendant acted with the requisite intent.

"While requisite intent must be pled and proved in any criminal prosecution arising out of the Sherman Act", United States v. United States Gypsum Co., 438 U.S. 422, 436-48 & n. 20, 98 S.Ct. 2864, 2873-2876 & n.20, 57 L.Ed.2d 854 (1978), the "charge of conspiracy to violate the criminal law has implicit in it the elements of knowledge and intent." Schnautz v. United States, 268 F.2d 525, 529 (5th Cir.), cert. denied, 360 U.S. 910 (1959); United States v. Metropolitan Enterprises, Inc., 728 F.2d 444 (10th Cir. 1984).

The Supreme Court in Frohwerk v. United States held that "intent to accomplish an object cannot be alleged more clearly than by stating that parties conspired to accomplish it." 249 U.S. 204 (1919). Similarly, the Fifth Circuit held in Schnautz v. United States, that the omission of the word "knowingly" does not make an indictment defective, the charge of conspiracy to violate a criminal law has implicit in it the elements of knowledge and intent. 263 F.2d at 529; see also Williams v. United States, 208 F.2d 447, 449 (5th Cir. 1953), cert. denied 347 U.S. 928 (1954).

More recently, the Fifth Circuit in United States v. Wilson, 884 F.2d 174, 176 (5th Cir. 1989), and the cases cited therein have routinely rejected challenges to indictments that omit the mens rea requirement. See United States v. De La Rosa, 911 F.2d 985, 989 (5th Cir. 1990). These cases require that the indictment "fairly import" the mental state. Id. Specifically, Wilson holds that the law does not compel a ritual of words, and a recitation of the exact scienter ("knowing") is not required when the pleading fairly imports intent. 884 F.2d at 176. In this case, the indictment fairly imports this knowledge by not only explicitly designating Count I a conspiracy count in the heading and citing to 15 U.S.C. § 1, Id., but also by the allegations of overt acts related to the bid-rigging conspiracy. See United States v. Hodges, 556 F.2d 366, 368 (5th Cir. 1977).

B. The Indictment Sufficiently Informs the Defendant of the Charges Against Him

In United States v. Mobil Materials, Inc., the Tenth Circuit analyzed a case directly on point, holding a bid-rigging indictment sufficiently informed the defendant of the charges against him. 871 F.2d 902, 906 (10th Cir. 1989), cert. denied, 493 U.S. 1043 (1989). For purposes of testing the sufficiency of the indictment, the essential elements of a conspiracy under section 1 of the Sherman Act are time, place, manner, means, and effect. Id. Following the analysis of Mobil Materials, the requirement of time is satisfied in this case where the indictment against the defendant alleges a bid-rigging conspiracy occurred between 1985 and May 1990. The place element is

satisfied by the indictment's allegation that the conspiracy took place within the Southern District of Texas. The indictment sets out the manner and means of the conspiracy in paragraphs 8 and 9 by alleging that the defendant and his co-conspirators, among other things, discussed bids; designated which corporate co-conspirator would be the lowest responsive bidder on contracts; discussed and agreed upon prices to be submitted on bids; refrained from bidding or submitted intentionally high, complementary bids; and supplied wholesale grocery products at noncompetitive prices.

Finally, the effect requirement is met through the allegation that the conspiracy was within the flow of and substantially affected interstate commerce, as well as through alleging that the bids rigged by defendant and his co-conspirators were not competitive. Thus, the indictment in this case, not to mention the numerous bills of particulars, sufficiently apprise the defendant of the charges against him.

II

Willfulness is not an Element of Count One of the Indictment

The government's only burden is to prove that the per se agreement alleged was in fact made, and that the defendant knowingly and intentionally joined that agreement. United States v. All Star Industries, 962 F.2d 465, 474 and n. 18 (5th Cir. 1992). Willfulness is not an element of a Sherman Act offense. See, Government's Pre-trial Memorandum of Law pp. 18-20.

CONCLUSION

For the foregoing reasons, the government requests that the defendant's motion be denied.

Respectfully submitted,

"/s/"
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Government's Response to Defendant's Motion to Dismiss Count One of the Indictment and proposed Order has been served this 9th day of March, 1994, upon:

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"/s/"
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Attorney

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	)	

O R D E R

HAVING DULY CONSIDERED Defendant's Motion to Dismiss Count One and the government's response,

IT IS HEREBY ORDERED that the Motion is DENIED.

DONE AND ENTERED THIS ___ day of _____, 1994.

_____
UNITED STATES DISTRICT JUDGE