UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	Criminal No.: H-92-152
	)	
JOHN J. JOHNSON,	)	
	)	(filed 7/12/93)
Defendant.	)	

GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION TO EXCLUDE EVIDENCE PURSUANT TO RULE 403, OR IN THE ALTERNATIVE, TO LIMIT THE GOVERNMENT'S EVIDENCE IN THE PRESENTATION OF ITS CASE

The United States of America, through its attorneys, hereby responds to the Defendant's Motion to Exclude Evidence Pursuant to Rule 403, or in the Alternative, to Limit the Government's Evidence in the Presentation of its Case (hereinafter, "Motion"). The government's position on this issue was first presented in its Response to Defendant's Motion for Clarification of Order, filed May 17, 1993. The legal authority, arguments and representations set forth in that Response remain applicable here. For reasons of economy, they will not be repeated here, but that Response is incorporated herein by reference.

In his Motion, the defendant asks the Court to limit the bid evidence introduced against him at trial to only those specific line items that the government intends to introduce into evidence at trial, see Govt.'s Third Subm. in Compl. with Ct.'s Order Ent. April 23, 1993, filed May 17, 1993; or, in the alternative, to no more than 15 bids. Motion at 5, 6.

Because the government's evidence indicates that approximately 245 bids were involved in the bid-rigging or mail fraud conspiracies, the defendant's attempt to limit this evidence to a handful of line items on 12 bids, or at most 15 bids total, amounts to a request for

wholesale exclusion of relevant evidence. In support of his motion, he offers absolutely no legal authority or precedent, only broad, conclusory allegations. See Motion at 2, 5.

Briefly, Rule 403 permits the exclusion of relevant evidence if:

> . . . its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury or by considerations of undue delay, waste of time or needless presentation of cumulative evidence.

Exclusion under Rule 403 is considered "an extraordinary measure because it permits a trial court to exclude concededly probative evidence, and thus it should be used sparingly." United States v. Caldwell, 820 F.2d 1395 (1987), citing United States v. Thevis, 664 F.2d 616, 633 (5th Cir.), cert. denied, 459 U.S. 825 (1982). Doubts should be resolved in favor of admissibility. United States v. Dennis, 625 F.2d 782, 797 (8th Cir. 1980). The defendant here fails to make even the threshhold showing that the government's bid evidence presents any of the dangers identified in the rule, let alone reach the ultimate balancing test.

A. The government's bid evidence does not pose any dangers under Rule 403.

While the defendant does not dispute the relevance of the government's extensive bid evidence, he essentially claims that use of that evidence against him would be cumulative, would mislead the jury, waste time and result in undue delay under Rule 403. Motion at 2, 5. There is simply no basis for these claims.

Cumulative evidence is defined as evidence that replicates other admitted evidence. United States v. Ives, 609 F.2d 930, 933 (9th Cir. 1979), cert. denied, 445 U.S. 919 (1980). There is no such replication among these bids. Each rigged bid constitutes an important and significant act in furtherance of the charged conspiracies. As a whole, they demonstrate the

full scope, duration and nature of the defendant's bid-rigging and mail fraud activities. For these same reasons, introduction of this evidence in no way constitutes a waste of time.

Neither will presentation of this evidence mislead the jury or result in undue delay. As previously stated, the government does not necessarily intend to introduce evidence regarding each and every one of the 245 bids on the revised list. Furthermore, evidence of rigged bids will be elicited through the testimony of co-conspirators using summary exhibits and limited documentary evidence. The government believes that this approach is the most straightforward, efficient and expeditious method in which to present this important and extensive evidence. Indeed, it would be grossly misleading to the jury to allow it to hear no more than the miniscule amount of evidence requested by the defendant, which would in no way fairly or accurately depict the broad scope of his criminal activity.

The defendant's request to limit the amount of bid evidence presented against him appears to be grounded on an argument concerning line items that is not clear to the government. The defendant apparently would have the Court believe that the charged bid-rigging conspiracy can only be proven by evidence regarding specific line items on specific bids. Motion at 2, 5. This notion is simply inaccurate. The defendant is charged with conspiring to rig bids and the government will for the most part prove its case by presenting evidence of rigged bids, not rigged line items per se. (Although an agreement to rig even one line item on a bid makes it a rigged bid.) As the government stated in its Third Submission in Compliance with Court's Order Entered April 23, 1993, at 1, and at the June 21st hearing, the list of line items furnished in that Submission are those the government anticipates will be specifically discussed in its case-in-chief. All other rigged bids will be identified without reference to specific line items. If

the defendant wants to cross examine on specific line items, he will have that opportunity. However, the Court recently advised both the government and the defendant that it may interrupt protracted questioning by either side on any particular bid.

B. The government must be able to prove its case using all necessary bids.

The government has the responsibility to prove the charges in the indictment against the defendant. Essential to this obligation is the ability to show the jury the nature, extent and duration of his criminal activities. The absurdly narrow limitation on bid evidence sought by the defendant would make it impossible for the government to prove the charges or to adequately present its case to the jury. Moreover, the proposed limitations would seriously mislead the jury concerning the full scope of the defendant's illegal activities and permit the defendant to escape responsibility for the extensive and lucrative bid-rigging and mail fraud schemes that he perpetrated. Simply put, after participating in and profiting from these illegal conspiracies for many years, the defendant cannot avoid responsibility for his actions simply because he may find it difficult or inconvenient to defend himself against evidence of the full extent of his illegal activities.

Conclusion

The defendant has failed to establish that use of the government's extensive bid evidence would pose any of the dangers enumerated in Rule 403. Nor has he cited any legal authority or precedent in support of his attempt to exclude nearly all of the bid evidence against him at trial. In the absence of such authority or proof, the substantial probative value of this evidence, which outlines the scope, duration and nature of the defendant's bid-rigging and mail

fraud activities, makes it unquestionably admissible against the defendant at trial. Accordingly, his motion must 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 Exclude Evidence Pursuant to Rule 403, or in the Alternative, to Limit the Government's Evidence in the Presentation of its Case and proposed order was forwarded by U. S. mail, Certified Mail--Return Receipt Requested, this 9th day of July 1993, to:

Dan Cogdell, Esq.
Boyd & Cogdell
711 Travis, 32nd Floor
Houston, TX 77002

"/s/"
JANE E. PHILLIPS
Attorney

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ORDER

HAVING DULY CONSIDERED the Defendant's Motion to Exclude Evidence Pursuant to Rule 403, or in the Alternative, to Limit the Government's Evidence in the Presentation of its Case, and the Government's Response,

IT IS HEREBY ORDERED that the Motion is DENIED.

DONE AND ENTERED THIS __ day of _____, 1993.

_____
UNITED STATES DISTRICT JUDGE