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Filed Aug. 26, 2003

IN THE UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF CALIFORNIA

FRESNO DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. DUANE MAYNARD, Defendant.	No. CRF-03-5325 OWW MEMORANDUM OF PLEA AGREEMENT PURSUANT TO RULE 11(c)(1)(B) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE Date: Time: Dept:

Pursuant to Rule 11(c)(1)(B) of the Federal Rules of Criminal Procedure, the United States of America, by and through its attorneys Matthew D. Segal and Richard B. Cohen, and the defendant, DUANE MAYNARD, and his attorney KENNETH REED, have agreed as follows:[1]

1. Charges.

The defendant acknowledges that he has been charged by

[1] The defendant acknowledges that this plea agreement is with the Antitrust Division of the United States Department of Justice and cannot bind any other federal, state, or local prosecuting, administrative, or regulatory authorities.

Information with bid rigging, in violation of Title 15, United States Code, Section 1.

2. Agreements by the Defendant.

(a) The defendant agrees to waive Indictment in this matter and proceed by way of Information.

(b) The defendant agrees that this plea agreement shall be filed with the Court and become a part of the record in the case.

(c) The defendant agrees to enter a plea of guilty to the Information, charging him with bid rigging, in violation of Title 15, United States Code, Section 1. The defendant agrees that he is in fact guilty of this charge and that the facts set forth in the factual basis of this Plea Agreement are true and accurate.

(d) The defendant understands and agrees that the Court is not a party to this agreement, that sentencing is a matter solely within the discretion of the Court, the Court is under no obligation to accept any recommendations made by the government, and the Court may in its discretion impose any sentence it deems appropriate up to and including the statutory maximum stated in this Plea Agreement. If the Court should impose any sentence up to the maximum established by the statute, the defendant cannot, for that reason alone, withdraw his guilty plea, and he will remain bound to fulfill all of the obligations under this Agreement. The defendant understands that neither the prosecutor, defense counsel, nor the Court can make a binding prediction or promise regarding the sentence he will receive.

(e) The defendant acknowledges that, should the Court fail to follow any or all of the Government's or defendant's sentencing recommendations, the defendant will not be allowed to withdraw his

plea.

(f) The defendant agrees to pay a special assessment of $100.00 at the time of sentencing by delivering a check or money order payable to the United States District Court to the United States Probation Office immediately before the sentencing hearing.

(g) In addition to entering a plea of guilty as set forth above, the defendant will cooperate with representatives of the federal government in the investigation and prosecution of various individuals and companies involved in bid rigging and fraud related to the E-Rate program. This cooperation will include, but not be limited to: subjecting himself to interviews by representatives of the government, providing to the government at the government's request any document in the defendant's possession, custody, or control, testifying truthfully before a federal grand jury and in any and all court proceedings when called by the government. Should the defendant breach his agreement with the government by (l) refusing to testify at any court or grand jury proceeding when called by the government, (2) knowingly giving false testimony or information, or (3) knowingly withholding information, the government will be released from all of its promises, but the defendant will not be released from his guilty plea. Further, any statements made by the defendant after the execution of this agreement may be used against him in any subsequent proceeding.

(h) The defendant understands that it is within the sole discretion of the government to determine whether he has complied with paragraph 2(g) pursuant to Section 5K1.1 of the Sentencing Guidelines or Rule 35(b) of the Federal Rules of Criminal

Procedure. He also understands that this agreement confers no right upon the defendant to challenge a government determination that he has not complied with the terms of paragraph 2(g). He further understands that a motion pursuant to Section 5K1.1 or Rule 35(b) is only a recommendation, and is not binding on the Court.

(i) If it is determined that the defendant has violated any provision of this Agreement including paragraph 2(g), or if the defendant successfully moves to withdraw his plea: (1) all statements made by the defendant to the government, the Court, or other designated law enforcement agents, shall be admissible in evidence in any criminal, civil, or administrative proceedings hereafter brought against the defendant; and (2) the defendant shall assert no claim under the United States Constitution, any statute, Rule 410 of the Federal Rules of Evidence, or any other federal rule, that statements made by the defendant before or after this Agreement should be suppressed.

(j) The defendant understands that there is no agreement with respect to where within the applicable Guideline range the defendant should be sentenced.

(k) The defendant agrees that his plea is knowing and voluntary, and that no threats or promises have been made to him, other than those set forth within this Agreement.

(l) The defendant agrees not to move for a downward departure of his sentence. The defendant understands and agrees that this Agreement includes, but is not limited to, not moving for a downward departure of his offense level, criminal history category or criminal history points as determined by the United States

Sentencing Guidelines and the Probation Office.

(m) The defendant agrees that the volume of commerce, for purposes of section 2R1.1 of the Sentencing Guidelines, is between $2.5 million and $6.25 million.

(n) The defendant agrees to make restitution to the Universal Services Administrative Company under terms and conditions set by the Probation Office.

(o) The defendant agrees that his offense level calculation should include a two-level upward adjustment pursuant to section 3C1.1 of the Sentencing Guidelines (obstructing or impeding the administration of justice).

3. Agreements by the Government.

(a) The government will recommend that the defendant receive a two-level reduction in the computation of his offense level due to his acceptance of responsibility if his adjusted offense level is below 16; or a three-level reduction in the computation of his offense level if his adjusted offense level is 16 or greater; provided that the defendant qualifies for such a reduction in his interview with the probation officer, and the defendant demonstrates acceptance of responsibility for his conduct as defined in Section 3E1.1 of the Sentencing Guidelines.

(b) If the government determines that the defendant has complied with paragraph 2(g) of this agreement, the government will move, pursuant to Section 5K1.1 of the Sentencing Guidelines, for a reduction based on the defendant's substantial assistance to law enforcement authorities and recommend that the Court reduce his sentence from the sentence that would otherwise be imposed.

4. Nature, Elements, Possible Defenses, and Factual Basis.

(a) The defendant has read the charges contained in the Information, and those charges have been fully explained to him by his attorney.

(b) The defendant fully understands the nature and elements of the crime set forth in the Information with which he has been charged, together with the possible defenses thereto, and has discussed them with his attorney.

(c) The elements of the crime of bid rigging, in violation of 15 U.S.C. § 1, are as follows: The elements of a Sherman Act offense, each of which the United States must prove beyond a reasonable doubt, are:

First, the conspiracy charged was formed, and it was in existence at or about the time alleged;

Second, the defendant knowingly formed or participated in that conspiracy; and

Third, the activity that was the object of the conspiracy was within the flow of, or substantially affected, interstate or foreign commerce.

(d) The defendant will plead guilty because he is in fact guilty of the crimes set forth in the Information. The defendant also agrees that the following is true:

On or about February 18, 1999 the defendant, on behalf of his employer, attended a pre-bid meeting at the West Fresno Elementary School District ("WFESD"), in the Eastern District of California. The pre-bid meeting related to a project to provide, among other things, equipment and services related to telecommunications, Internet access, and internal connections to the WFESD ("the WFESD E-Rate Project"). Those present at the pre-bid meeting understood that the project was related to the E-Rate program, in which the Universal Services Administrative Company ("USAC") subsidizes the provision of telecommunications, Internet access, and internal communications to underprivileged schools.

Competitive bidding was required for the WFESD E-Rate

Project. Nonetheless, the defendant, together with school district representatives, a consultant, and others representing potential competitors, combined, conspired, and agreed that:

1) The defendant's employer would be the successful bidder and have general responsibility for the the WFESD E-Rate Project;

2) No co-conspirator other than the defendant's employer would submit a general bid for the the WFESD E-Rate Project;

3) Other co-conspirator companies would be the defendant's employer's subcontractors for the the WFESD E-Rate Project; and

4) any bid competing with the defendant's employer's bid would be stricken as nonresponsive.

The defendant, his superiors at his company, and his other co-conspirators did what they agreed to do to carry out the conspiracy. They further acted in concert to provide equipment and services related to the WFESD E-Rate Project and receive from USAC payment therefor. Equipment provided for this project was shipped across state lines and payments from USAC were made into the State of California from banks in New Jersey and Illinois. The last USAC payment for the WFESD E-Rate Project was made from the LaSalle Bank, in Illinois, on or about January 17, 2002.

The defendant held the title of Senior Estimator for his employer during the bidding and subcontracting for the WFESD E-Rate Project. The defendant's actions in relation to the WFESD E-Rate Project were on behalf of, and approved by, his employer.

On December 13, 2002 the defendant testified before a Northern District of California grand jury investigating, among other things, the WFESD E-Rate Project. At that time the defendant, under oath, willfully gave false, material testimony when he claimed that he could not recall certain events related to the WFESD E-Rate Project.

5. Potential Sentence.

The defendant understands that since the offense to which he is pleading guilty occurred after November 1, 1987, a sentencing guideline range for his case will be determined by the Court pursuant to the Sentencing Reform Act of 1984 (18 U.S.C. §§ 3551-3742 and 28 U.S.C. §§ 991-998). The defendant further understands that the Court will impose a sentence within that

guideline range. The following is the maximum potential sentence which the defendant faces:

(a) Imprisonment.

Maximum: three(3) years

(b) Fine.

Maximum: The greatest of Three Hundred and Fifty Thousand Dollars ($350,000.00), twice the gross pecuniary gain the conspirators derived from the crime, or twice the gross pecuniary loss caused to the victims of the crime by the conspirators.

(c) Both such fine and imprisonment.

(d) Term of Supervised Release.

Maximum: One (1) year.

Should the defendant violate any of the terms of his supervised release, he can be returned to prison for one (1) year.

(e) Restitution to victims of the offense.

(f) Penalty Assessment.

Mandatory: One Hundred Dollars ($100).

6. Waiver of Rights.

The defendant understands that by pleading guilty he surrenders certain rights, including the following:

(a) If the defendant persisted in a plea of not guilty to the charges against him, he would have the right to a public and speedy trial. The trial could be either a jury trial or a trial by a judge sitting without a jury. The defendant has a

right to a jury trial. However, in order that the trial be conducted by the judge sitting without a jury, the defendant, the government and the judge all must agree that the trial be conducted by the judge without a jury.

(b) At trial, the defendant would have the right to be assisted by an attorney, who would be appointed if necessary.

(c) If the trial were a jury trial, the jury would be composed of twelve lay persons selected at random. The defendant and his attorney would have a say in who the jurors would be by removing prospective jurors for cause where actual bias or other disqualification is shown, or without cause by exercising peremptory challenges. The jury would have to agree unanimously before it could return a verdict of either guilty or not guilty. The jury would be instructed that the defendant is presumed innocent and that it could not convict him unless, after hearing all the evidence, it was persuaded of his guilt beyond a reasonable doubt.

(d) If the trial were held before a judge without a jury, the judge would find the facts and determine, after hearing all the evidence, whether or not he was persuaded of the defendant's guilt beyond a reasonable doubt.

(e) At a trial, whether by a jury or a judge, the government would be required to present its witnesses and other evidence against the defendant. The defendant would be able to confront those government witnesses and his attorney would be able to cross-examine them. In turn, the defendant could present witnesses and other evidence on his own behalf. If the witnesses for the defendant would not appear voluntarily, he could require

their attendance through the subpoena power of the Court.

(f) At a trial, the defendant would have a privilege against self-incrimination so that he could decline to testify, and no inference of guilt could be drawn from his refusal to testify. The defendant understands that by pleading guilty he is waiving all of the rights set forth above and the defendant's attorney has explained those rights to him and the consequences of his waiver of those rights.

(g) Waiver of Appeal Rights.

(Rule 11 as amended and in effect December 1, 1999 requires the district court to inform the defendant of his rights to appeal on the record in the Rule 11 proceeding).

The defendant is aware that Title 18, United States Code, Section 3742 affords a defendant the right to appeal the sentence imposed. Acknowledging this, the defendant knowingly and voluntarily agrees to waive all Constitutional and statutory rights to appeal his conviction and sentence, including, but not limited to an express waiver of appeal of this plea (including venue and statute of limitations) and to attack collaterally his mental competence, and his plea, whether by way of a motion pursuant to 28 U.S.C. §2255, 18 U.S.C. §3742, or otherwise. This waiver includes any appeal of his sentence on the grounds set forth under Title 18, United States Code, Section 3742 or any other ground whatever, including, but not limited to, a motion brought under Title 28, United States Code, Sections 2241 or 2255.

If the defendant’s conviction on the count to which he is pleading is ever vacated at the defendant’s request, or his sentence is ever reduced at his request, the government shall have

the right (1) to prosecute the defendant on any of the counts to which he pleaded guilty; (2) to reinstate any counts that may be dismissed pursuant to this agreement; and (3) to file any new charges that would otherwise be barred by this agreement. The decision to pursue any or all of these options rests solely in the discretion of the Antitrust Division of United States Department of Justice. By signing this agreement, the defendant agrees to waive any objections, motions, and defenses he might have to the government's decision, including Double Jeopardy. In particular, he agrees not to raise any objections based on the passage of time with respect to such counts including, but not limited to, any statutes of limitation or any objections based on the Speedy Trial Act or the Speedy Trial Clause of the Sixth Amendment.

7. Questions by Court.

The defendant understands that if the court questions him under oath, on the record and in the presence of counsel, about the offenses to which he has pleaded guilty, his answers, if false, may later be used against him in a prosecution for perjury or false statement.

8. Entire Agreement.

The defendant and his attorney acknowledge that no threats, promises or representations have been made, nor agreements reached, other than those set forth in the Agreement, to induce defendant to plead guilty.

9. Court not a Party.

It is understood by the parties that the sentencing Court is neither a party to nor bound by this Agreement and the sentencing judge is free to impose the maximum penalties as set

forth in paragraph 5 above. Also, should the Court fail to follow any or all of the government's sentencing recommendations, the defendant will not be allowed to withdraw his plea.

10. Right to Counsel.

The defendant understands that he has a right to counsel throughout his case from his initial appearance through his trial or guilty plea or dismissal of the case against him and through and including any sentencing. Unless waived in the agreement, the defendant also has a right to counsel for a direct appeal in his case. The defendant understands that the right to counsel includes the provision of defense counsel through the Court if the defendant cannot afford to hire counsel.

11. Presentence Report.

The defendant understands that the United States Probation Office is not a party to this agreement and will conduct an independent investigation of the defendant's activities and his background and prepare a presentence report which it will submit to the Court as its own sentencing recommendation. In addition, the government will fully apprise the Probation Office, as well as the Court, of the full and true nature, scope and extent of the defendant's criminal activities concerning the charge to which the defendant is entering a plea of guilty, including information on

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his background, criminal history and activities which may not have been charged in the Information or were the subject of dismissed counts.

DATED: August 26, 2003

/s/
MATTHEW D. SEGAL
RICHARD B. COHEN
Trial Attorneys

DATED: August 26, 2003

/s/
KENNETH REED, ESQ.
Attorney for Duane Maynard

DATED: August 26, 2003

/s/
DUANE MAYNARD
Defendant