

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

Criminal Action No. 10-Cr-00597-MSK

Filed: 12/21/10

UNITED STATES OF AMERICA,

Plaintiff,

v.

1. WENDEL P. TORRES,

Defendant.

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

The United States of America ("United States"), by and through Andre M. Geverola, Trial Attorney, United States Department of Justice, Antitrust Division, and the defendant Wendel P. Torres ("Torres" or "the defendant"), personally and by counsel, Richard Tegtmeier, 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 an Information charging a violation of 18 U.S.C. § 201(c)(1)(A), giving a thing of value to a public official, for or because of official acts performed by such public official. Pursuant to Rule 7(b) of the Federal Rules of Criminal Procedure (Fed.R.Crim.P.), the defendant will waive indictment and plead guilty to the Information filed in the United States District Court for the District of Colorado. The Information charges the defendant with one count of giving a thing of value to a public official,

for or because of official acts performed by such public official, in violation of 18 U.S.C. § 201(c)(1)(A) ("Relevant Offense").

2. The defendant, pursuant to the terms of this Plea Agreement, will plead guilty to the criminal charge described in Paragraph 1 above and will make a factual admission of guilt to the Court in accordance with Fed. R. Crim. P. 11, as set forth in Paragraph 22 below.

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

4. 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.

5. The defendant knowingly and voluntarily waives the rights set out in Paragraph 4(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 6 of this Plea Agreement, regardless of how the sentence is determined by the Court. The defendant reserves the right to appeal the sentence if the Court imposes a sentence that is higher than the recommended sentence in Paragraph 6 of this Plea Agreement based upon sentencing factors not stipulated to as part of this plea agreement. This agreement does not affect the rights or obligations of the United States as set forth in 18 U.S.C. § 3742(b). Nothing in this paragraph, however, shall act as a bar to the defendant perfecting any legal remedies he may otherwise have on appeal or collateral attack respecting claims of ineffective assistance of counsel or prosecutorial misconduct. The defendant agrees that there is currently no known evidence of ineffective assistance of counsel or prosecutorial misconduct.

6. Subject to the full, truthful, and continuing cooperation of the defendant, the United States will recommend as the appropriate disposition of this case, pursuant to Fed. R. Crim. P. 11(c)(1)(B), that the defendant be sentenced to a period of no more than ten (10) months imprisonment, and pay a fine of \$10,000 to the United States, payable in full before the fifteenth (15th) day after the date of judgment (“Recommended Sentence”). The defendant is free to argue for any sentence under 18 U.S.C. § 3553(a). 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.

7. The defendant will cooperate fully and truthfully with the United States in the prosecution of this case, in the current federal investigation of violations of federal criminal laws

involving conduct relating to the Relevant Offense, in any other related federal investigation, and in 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.*).

8. The defendant understands that the sentence to be imposed on him is within the sole discretion of the sentencing judge. The United States cannot and does not make any promises or representations as to what sentence he will receive, and is free to recommend any specific sentence of up to ten (10) months to the Court. However, subject to the full, truthful, and continuing cooperation of the defendant, as described in Paragraph 7 of this Plea Agreement, before sentencing in the case, the United States will inform the Probation Office and the Court of: (a) this Agreement; (b) the fact, manner, and extent of the defendant's activities with respect to this case and all other activities of the defendant which the United States deems relevant to sentencing; and (c) the nature and extent of the defendant's cooperation with the United States. In so doing, the United States may use any information it deems relevant, including information provided by the defendant both prior and subsequent to the signing of this Agreement. The United States reserves the right to make any statement to the Court or the Probation Office concerning the nature of the criminal violation charged in the attached Information, the participation of the defendant therein, and any other facts or circumstances that it deems relevant. The United States also reserves the right to comment on or to correct any representation made by or on behalf of the defendant, and to supply any other information that the Court may require. 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.

9. Subject to the full, truthful, and continuing cooperation of the defendant, as described in Paragraph 7 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 (a) any act or offense committed before the date of this Plea Agreement that was undertaken in furtherance of the Relevant Offense, or (b) any act or offense that the Defendant disclosed to the United States prior to the date of this Plea Agreement pursuant to U.S.S.G. §1B1.8. 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.

10. 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.

11. 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.

12. 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 7 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.

13. 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.

ESSENTIAL ELEMENTS

14. The essential elements of the Relevant Offense are:
- (1) The defendant knowingly gave a thing of value;
 - (2) To a public official or person selected as a public official;

(3) For or because of any official act performed or to be performed.

United States v. Schaffer, 183 F.3d 833, 840 (D.C. Cir. 1999); *see also* Tenth Circuit Criminal Pattern Jury Instructions, § 2.13.

STATUTORY PENALTIES

15. The maximum statutory penalty for a violation of 18 U.S.C. § 201(c)(1)(A) is: not more than two years imprisonment; a fine in an amount not more than \$250,000; a term of supervised release of not more than one year following any term of imprisonment; a \$100 special assessment; and restitution.

16. 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.

17. 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

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

19. 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.

20. 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.)

21. The parties agree that the United States' evidence would show that the conduct relevant to the offense (U.S.S.G. § 1B1.3) began in or about April 2007 and ended in or about November 2007 ("the Relevant Period").

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

a. The defendant was the Managing Partner of Company A, a construction company that had substantial business at Fort Carson, a U.S. Army installation near Colorado Springs, CO.

b. William T. Armstrong was the Chief of the Construction Division with the Fort Carson Directorate of Contracting, an office of the Army Contracting Agency. Armstrong was authorized to award contracts for construction projects on behalf of the U.S. Army.

c. Prior to April 2007, Armstrong had performed official acts concerning Company A. To wit, Armstrong had awarded multiple construction contracts at Fort Carson to Company A.

d. In or about April 2007, Armstrong contacted the defendant regarding certain construction materials. From April 2007 to May 2007, the defendant and Armstrong engaged in discussions regarding the construction materials that Armstrong needed for his home. After these discussions, in May 2007, the defendant ordered the

materials, which were delivered to Armstrong's home.

e. In or about May 2007, the defendant informed Armstrong that Armstrong did not need to pay for the construction materials that were delivered. The construction materials were given because of the official acts previously performed by Armstrong. The defendant was not authorized by law to provide these materials to Armstrong.

f. In June 2007, at the direction of the defendant, Company A paid two invoices relating to the construction materials delivered to Armstrong's home. The invoices totaled \$3368.12.

g. Government Official A was a contracting official with the Army Contracting Agency at Fort Bliss, TX, and previously worked at the Fort Carson Directorate of Contracting. The defendant traveled to El Paso, TX, and met with Government Official A on at least one occasion during the Relevant Period to discuss business opportunities at Fort Bliss.¹

h. In or about May 2007, Government Official A contacted the defendant regarding the defendant's efforts to obtain business for Company A at Fort Hood, TX. Government Official A offered to and did provide assistance to the defendant relating to Fort Hood, namely, by contacting Fort Hood contracting officials on Company A's behalf. Government Official A contacted the defendant and informed the defendant that the defendant would be hearing from contracting officials at Fort Hood. The defendant was subsequently contacted by a contracting official from Fort Hood. However, Company A did not obtain any business at Fort Hood following these communications.

¹ The parties stipulate that Paragraphs 22g - 22k are covered by U.S.S.G. § 1B1.8.

i. In or about July 2007, Government Official A contacted the defendant for assistance relating to repairs to the home of Government Official A's adult daughter, which was located in Colorado Springs, CO. Government Official A informed the defendant that he (Government Official A) was paying for the repairs.

j. In or about August 2007, the defendant agreed to assist with the home repairs, and contacted various companies to perform work at the home. From in or about August 2007 through in or about November 2007, the defendant obtained free and discounted work to be performed at the home by various companies that had relationships with Company A; in addition, Company A provided the services of its own workers for free at the home, and paid for some (but not all) of the work performed by other companies.

k. In or about October 2007, Government Official A asked the defendant to provide a single "package price" invoice that would conceal discounts and free services provided by the various companies working at the home. The defendant did not provide such an invoice to Government Official A.

SENTENCING COMPUTATION

23. 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).

24. 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.

25. 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). The defendant is free to argue for any sentence under 18 U.S.C. § 3553(a). Pursuant to U.S.S.G. § 1B1.8, the United States agrees that self-incriminating information that the defendant provides to the United States pursuant to this Plea Agreement will not be used in determining the defendant's applicable Guidelines range, except to the extent provided in U.S.S.G. § 1B1.8(b).

26. 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. § 2C1.2, with a base offense level of 9.

b. The parties stipulate that the offense involved only one gratuity pursuant to

U.S.S.G. § 2C1.2, Application Note 2. The parties stipulate that the gratuity does not

exceed \$5,000. The parties stipulate that Armstrong is a public official in a “high-level decision-making position” pursuant to U.S.S.G. § 2C1.2(b)(3). Accordingly, the adjusted offense level is 15. These stipulations exclude any conduct relating to Government Official A, pursuant to U.S.S.G. § 1B1.8.

c. The defendant should receive a two (2) level downward adjustment for acceptance of responsibility pursuant to U.S.S.G. § 3E1.1(a), resulting in an offense level of 13.

d. 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.

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

f. The Guidelines range resulting from the estimated offense level of c. above, and the (tentative) criminal history category of d. above, is 12 - 18 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 Guidelines range from 12 months (bottom of Category I), to 41 months (top of Category VI). The sentence would be limited, in any case, by the statutory maximum of 24 months.

g. Pursuant to U.S.S.G. § 5E1.2(c), assuming the estimated offense level of

13, the Guidelines Fine Range for the offense would be \$3,000 to \$30,000 plus applicable interest and penalties.

h. 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.

i. Pursuant to Guideline U.S.S.G. § 5D1.2, if the court imposes the term of supervised release, that term shall be not more than one year.

j. Restitution is not required, pursuant to Guideline U.S.S.G. § 5E1.1, because there is no quantifiable loss to an identifiable victim.

27. Subject to the full, truthful, and continuing cooperation of the defendant, as described in Paragraph 7 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 a departure from the Total Offense Level determined by the Court to a Total Offense Level 10. Consequently, with the departure, the applicable advisory guideline sentencing range is 6 to 12 months and the applicable fine range is \$2,000 to \$20,000. The United States will request that the Court impose the fine and term of imprisonment consistent with the Recommended Sentence set out in Paragraph 6 of this Plea Agreement because of the defendant's substantial assistance in the United States' investigation and prosecutions of violations of federal criminal law.

WHY THE PROPOSED PLEA DISPOSITION IS APPROPRIATE

28. 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.

29. 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.

30. The undersigned attorney for the United States has been authorized by the Attorney General of the United States to enter this Plea Agreement on behalf of the United States.

Date: 12-2-2010

/s/
Wendel P. Torres
Defendant

Date: 12-2-10

/s/
Richard Tegtmeier
Attorney for Defendant

Date: 12/2/10

/s/
Andre M. Geverola
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