

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

UNITED STATES OF AMERICA	)	
	)	Criminal No. WI 06 153 PHX NVW
v.	)	
	)	Filed: 07/20/06
KEVIN TOSH,	)	
	)	Violation: 18 U.S.C. § 1001
	)	
Defendant.	)	
_____	)	

PLEA AGREEMENT

The United States of America and Kevin Tosh (“defendant”) hereby enter into the following Plea Agreement pursuant to Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure (“Fed. R. Crim. P.”):

RIGHTS OF DEFENDANT

1. 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.

AGREEMENT TO PLEAD GUILTY
AND WAIVE CERTAIN RIGHTS

2. The defendant knowingly and voluntarily waives the rights set out in Paragraph 1(b)-(h) 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 8 of this Plea Agreement, regardless of how the sentence is determined by the Court. This agreement does not affect the rights or obligations of the United States as set forth in 18 U.S.C. § 3742(b)-(c). Pursuant to Fed. R. Crim. P. 7(b), the defendant will waive indictment and plead guilty at arraignment to a one-count Information to be filed in the United States District Court for the District of Arizona. The Information will charge the defendant with submitting written bid documents that contained a materially false, fictitious and/or fraudulent statement and representation in connection with a construction, renovation and heating/ventilation/air conditioning contract solicited by a federal department in the United States in violation of 18 U.S.C. § 1001(a)(2)-(3).

3. The defendant, pursuant to the terms of this Plea Agreement, will plead guilty to the criminal charge described in Paragraph 2 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 4 below. The United States agrees that at the arraignment, it will stipulate to the release of the defendant on his personal recognizance, pursuant to 18 U.S.C. § 3142, pending the sentencing hearing in this case.

FACTUAL BASIS FOR OFFENSE CHARGED

4. Had this case gone to trial, the United States would have presented evidence sufficient to prove the following facts relating to the defendant:

(a) On or about July 23, 2001, defendant did knowingly and willfully make and cause to be made a materially false, fictitious and fraudulent statement and representation in a matter within the jurisdiction of the executive branch of the United States by submitting a bid to the United States Coast Guard Civil Engineering Unit (the "Coast Guard"), then an agency of the United States Department of Transportation, for a mechanical rehabilitation project in Portsmouth, Virginia, in which defendant falsely represented that his employer had performed a prior fire sprinkler retrofit project, when in truth and fact it had not.

(b) Acts in furtherance of this offense were carried out within the District of Arizona, Phoenix Division. The defendant identified the Coast Guard bid solicitation on which his employer would bid, prepared bid estimates and caused the bid documents to be prepared and transmitted from offices in Mesa, Arizona.

POSSIBLE MAXIMUM SENTENCE

5. The defendant understands that the statutory maximum penalty which may be imposed against him upon conviction for a violation of Title 18, United States Code, Section 1001(a) is:

- (a) a term of imprisonment for five (5) years (18 U.S.C. § 1001);
- (b) a fine in an amount equal to the greatest of (1) \$250,000,
- (2) twice the gross pecuniary gain the conspirators derived from the crime, or (3) twice

the gross pecuniary loss caused to the victims of the crime by the conspirators (18 U.S.C. § 3571(b) and (d)); and

(c) a term of supervised release of three (3) years following any term of imprisonment. If the defendant violates any condition of supervised release, the defendant could be imprisoned for up to two (2) years (18 U.S.C. § 3559(a)(4); 18 U.S.C. § 3583(b)(2) and (e)(3); and U.S.S.G. § 5D1.2(a)(2).

6. In addition, the defendant understands that:

(a) pursuant to U.S.S.G. § 5E1.1, the Court may order him to pay restitution to the victims of the offense; and

(b) pursuant to 18 U.S.C. § 3013(a)(2)(A), the Court is required to order the defendant to pay a \$100.00 special assessment upon conviction for the charged crime.

SENTENCING GUIDELINES

7. The defendant understands that the Sentencing Guidelines are advisory, not mandatory, but that the Court must consider the Guidelines in effect on the day the offense was committed, 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). 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 to increase the volume of affected commerce attributable to

the defendant or in determining the defendant's applicable Guidelines range, except to the extent provided in U.S.S.G. §1B1.8(b).

SENTENCING AGREEMENT

8. Pursuant to Fed. R. Crim. P. 11(c)(1)(C), the United States and the defendant agree that the appropriate disposition of this case is, and agree to recommend jointly that the Court impose, a sentence within the applicable Guidelines range requiring the defendant to pay to the United States a criminal fine of \$5,000.00, payable at sentencing; and a jail term of zero (0) to six (6) months, ("the recommended sentence"). 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. The parties agree not to seek or support any sentence outside of the Guidelines range nor any Guidelines adjustment for any reason that is not set forth in this Plea Agreement. The parties further agree that the recommended sentence set forth in this Plea Agreement is reasonable.

(a) The United States and the defendant agree that the recommended sentence is within the range prescribed for this offense through application of the Sentencing Guidelines as follows:

- (i) The base level offense is six (6) (U.S.S.G. 2B1.1(a)(2));
- (ii) defendant's acceptance of responsibility for his offense provides for a decrease of two (2) levels, resulting in an adjusted offense level of four (4) (U.S.S.G. 3E1.1(a)); and
- (iii) the defendant has a criminal history category level of one, so the

applicable Guidelines sentence is 0 - 6 months imprisonment, with eligibility for probation.

(b) The criminal fine of \$5,000 has been calculated pursuant to U.S.S.G.

5E.1.2 (c), which provides for a fine of \$250 to \$5,000.

(c) 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.

(d) The defendant is not ordered to make restitution because it would entail determining complex fact issues related to the amount of the victim's losses that would complicate and prolong the sentencing process to a degree that the need for restitution would be outweighed by the burden on the sentencing process pursuant to U.S.S.G. 5E1.1(b)(2)(B).

9. Subject to the ongoing, full, and truthful cooperation of the defendant described in Paragraph 11 of this Plea Agreement, and before sentencing in the case, the United States will fully advise the Court and the Probation Office of the fact, manner, and extent of the defendant's cooperation with the United States' investigation and prosecutions, all material facts relating to the defendant's involvement in the charged offense, and all other relevant conduct. 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.

10. The United States and the defendant understand that the Court retains complete discretion to accept or reject the recommended sentence provided for in Paragraph 8 of this Plea Agreement.

(a) If the Court does not accept the recommended sentence, the United States

and the defendant agree that this Plea Agreement, except for Paragraph 10(b) below, shall be rendered void. Neither party may withdraw from this Plea Agreement, however, based on whether probation is granted or the type or location of the correctional facility to which the defendant is assigned to serve his sentence, if any.

(b) If the Court does not accept the recommended sentence, the defendant will be free to withdraw his guilty plea (Fed. R. Crim. P. 11(c)(5) and (d)). If the defendant withdraws his plea of guilty, this Plea Agreement, the guilty plea, and any statement made in the course of any proceedings under Fed. R. Crim. P. 11 regarding the guilty plea or this Plea Agreement or made in the course of plea discussions with an attorney for the government shall not be admissible against the defendant in any criminal or civil proceeding, except as otherwise provided in Fed. R. Evid. 410. In addition, the defendant agrees that, if he withdraws his guilty plea pursuant to this subparagraph of the Plea Agreement, the statute of limitations period for any Relevant Offense, as defined in Paragraph 12 below, will be tolled for the period between the date of the signing of the Plea Agreement and the date the defendant withdrew his guilty plea or for a period of sixty (60) days after the date of the signing of the Plea Agreement, whichever period is greater.

DEFENDANT'S COOPERATION

11. The defendant will cooperate fully and truthfully with the United States in the prosecution of this case, the conduct of the current federal investigation of violations of federal antitrust and related criminal laws involving the rigging of bids solicited by or the making of false statements to the United States in connection with construction, renovation and heating/ventilation/air conditioning projects at various federal buildings, military bases and other facilities, any other federal investigation resulting therefrom, and 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, 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);

(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).

GOVERNMENT'S AGREEMENT

12. Subject to the full, truthful, and continuing cooperation of the defendant, as described in Paragraph 11 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 recommended sentence, the United States will not bring further criminal charges against the defendant for any act or offense committed before the date of this Plea Agreement that was undertaken (a) in furtherance of an antitrust conspiracy involving the rigging of bids solicited by the United States in connection with construction, renovation and heating/ventilation/air conditioning projects at various federal buildings, military bases and other facilities and (b) in making any false, fictitious or fraudulent statement or representation in connection with any bid solicited by any department, bureau or agency of the United States or in connection with any submission to the Small Business Administration (collectively, "Relevant Offenses"). 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.

REPRESENTATION BY COUNSEL

13. 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.

VOLUNTARY PLEA

14. 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.

VIOLATION OF PLEA AGREEMENT

15. 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 11 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 may seek Court review of any determination made by the United States under this Paragraph to void any of its obligations under the 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 any 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.

16. 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.

ENTIRETY OF AGREEMENT

17. This Plea Agreement constitutes the entire agreement between the United States and the defendant concerning the disposition of the criminal charges in this case.

This Plea Agreement cannot be modified except in writing, signed by the United States and the defendant.

18. The undersigned attorneys for the United States have been authorized by the Attorney General of the United States to enter this Plea Agreement on behalf of the United States.

19. A facsimile signature shall be deemed an original signature for the purpose of executing this Plea Agreement. Multiple signature pages are authorized for the purpose of executing this Plea Agreement.

DATED: 07/14/06

Respectfully submitted,

BY: /s/
Kevin Tosh
Defendant

/s/
Jacob S. Frenkel
Counsel for Kevin Tosh

BY: /s/
Peter H. Goldberg
Brent Snyder
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