

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION

UNITED STATES OF AMERICA)	
)	Criminal No. 1:02CR83
v.)	
)	Filed: September 10, 2002
TAYLOR & MURPHY)	
CONSTRUCTION CO., INC.,)	Violation: 18 U.S.C. § 1001
)	
Defendant.)	

PLEA AGREEMENT

The United States of America and Taylor & Murphy Construction Co., Inc., the defendant, hereby enter into the following Plea Agreement pursuant to Rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure (the “Fed. R. Crim. P.”):

RIGHTS OF DEFENDANT

1. The defendant understands its right:
 - (a) to be represented by an attorney;
 - (b) to be charged by indictment;
 - (c) to plead not guilty to any criminal charges brought against it;
 - (d) to have a trial by jury, at which it would be presumed not guilty of the charges against it and the United States would have to

prove every essential element of the charged offense beyond a reasonable doubt in order for it to be found guilty;

- (e) to confront and cross-examine witnesses against it and to subpoena witnesses in its defense at trial;
- (f) to appeal its conviction if it is found guilty at trial;
- (g) to appeal the imposition of sentence against it, including the rights provided under 18 U.S.C. § 3742; and
- (h) to contest its sentence on collateral attack, including the rights provided under 28 U.S.C. § 2255.

AGREEMENT TO PLEAD GUILTY AND WAIVE CERTAIN RIGHTS

2. The defendant waives the rights set out in Paragraph 1(b)-(f) above. The defendant also waives the right to appeal the imposition of sentence against it (Paragraph 1(g)), so long as the sentence imposed is consistent with the recommendation in Paragraph 8 of this Plea Agreement; and the defendant waives the right to contest its sentence on collateral attack (Paragraph 1(h)), excluding any potential claims of ineffective assistance of counsel or prosecutorial misconduct. The defendant expressly and explicitly agrees and understands that the United States preserves all its rights and duties with respect to appeal as set forth in 18 U.S.C. § 3742(b), while the defendant waives all rights to appeal or collaterally attack the sentence or conviction, saving only those appellate and collateral rights set out in the first sentence of this Paragraph. Pursuant to Fed. R. Crim. P. 7(b),

the defendant will waive indictment and plead guilty pursuant to Fed. R. Crim. P. 11(e)(1)(C) to an Information, to be filed in the United States District Court for the Western District of North Carolina. The Information will charge that in or about February 2001, the 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 Federal Highway Administration (“FHWA”), an agency of the United States Department of Transportation, a department of the United States, by falsely certifying that it had not disclosed its bid prices on a federal project to any other competitor, when in truth and fact it had, in violation of 18 U.S.C. § 1001.

3. Pursuant to the terms of this Plea Agreement, the defendant will plead guilty at arraignment 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.

FACTUAL BASIS FOR OFFENSE CHARGED

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

(a) In or about January 2001, the FHWA issued a sealed bid solicitation for a road construction project, designated PRA-BLRI 2R16 (the “2R16 Parkway project”), on the Blue Ridge Parkway in Buncombe County, North

Carolina. The FHWA issued the bid on behalf of the National Park Service of the United States Department of the Interior, a department of the United States.

(b) The bid solicitation for the 2R16 Parkway project required the submission of line item prices, and included a requirement for bids on federal projects entitled “Certificate of Independent Price Determination.” This Certificate, adopted as part of the Federal Acquisition Regulation (“FAR”) in 1985, 48 C.F.R. § 52.203-2, requires the bid offeror to certify, among other things, that “[t]he prices in this offer have not been and will not be knowingly disclosed by the offeror, directly or indirectly, to any other offeror or competitor before bid opening (in the case of a sealed bid solicitation),” and must be incorporated in the offeror’s bid submission. The Certificate of Independent Price Determination influences FHWA in its contracting decisions because FHWA will not consider the bid of or award a project to an offeror whose bid does not include the Certificate.

(c) On or about February 16, 2001, with the knowledge and consent of a corporate officer (“the corporate officer”), an employee of the defendant met with employees of a competitor at the defendant’s offices in Asheville, North Carolina. At that time, the defendant’s employee disclosed the defendant’s line item prices on the 2R16 Parkway project to the competitor’s employees.

(d) At or about this time in February 2001, having been informed of and having approved and authorized the disclosure of defendant’s line item prices to a competitor, the corporate officer signed the 2R16 Parkway project bid form for the defendant, which included the Certificate of Independent Price Determination.

(e) At the time that the corporate officer signed the bid form, he knew that he was certifying for the defendant that the defendant had not disclosed its prices to any other offeror or competitor. In truth and fact, at the time that the corporate officer signed the bid form, he knew that defendant's employee had met with another offeror and competitor and had disclosed defendant's prices to that offeror and competitor.

(f) At the time that the corporate officer signed the bid form, he 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 FHWA, United States Department of Transportation, a department of the United States.

(g) On or about February 26, 2001, defendant sent its bid from defendant's offices in North Carolina to FHWA's offices in Virginia.

(h) In or about February and March 2001, officials of FHWA opened the bids submitted on the 2R16 Parkway project and tabulated the results. FHWA awarded the project to defendant for a total price of \$1,648,190.24.

(i) The offense charged in the Information was carried out, in part, within the Western District of North Carolina within the five years preceding the filing of the Information.

POSSIBLE MAXIMUM SENTENCE

5. The defendant understands that the maximum penalty that may be imposed against it upon conviction for a violation of the False Statements Statute, 18 U.S.C. § 1001, charged in Count One is a fine in an amount equal to the greatest of: (a) \$500,000 (18 U.S.C. § 3571(c)(3)); or (b) twice the gross pecuniary gain or loss resulting from the offense (18 U.S.C. § 3571(d)).

6. In addition, the defendant understands that:

(a) pursuant to the United States Sentencing Guidelines (“USSG”) § 8B1.1, the Court may order it to pay restitution to the victims of the offense;

(b) pursuant to 18 U.S.C. § 3561(c)(1) and USSG § 8D1.1, the Court may order a term of probation of at least one year, but not more than five years; and

(c) pursuant to 18 U.S.C. § 3013(a)(2)(B) and USSG § 8E1.1, the Court is required to order the defendant to pay a four hundred dollar (\$400) special assessment upon conviction for the charged offense.

SENTENCING GUIDELINES

7. The United States and defendant agree that sentencing for the offense charged will be conducted pursuant to the USSG in effect in February 2001, up to and including the November 1, 2000 amendments to the USSG.

SENTENCING AGREEMENT

8. Pursuant to Fed. R. Crim. P. 11(e)(1)(C), the United States and the defendant agree that the appropriate disposition of this case is, and agree jointly to recommend that the Court impose, a sentence of the payment of a criminal fine of \$200,000 to be paid immediately.

(a) The United States and the defendant agree that this sentence is within the range prescribed for this offense through application of the Sentencing Guidelines, as follows: (i) the amount of intended loss from the offense was \$75,000; (ii) the base offense level for the subject offense is 6 (USSG § 2F1.1(a)), with an increase of 6 levels for an intended loss of more than \$70,000 (USSG § 2F1.1(b)(1)(G)) and an increase of 2 levels for more than minimal planning (USSG § 2F1.1(b)(2)(A)) for an adjusted offense level of 14; (iii) the base fine for this offense level is \$85,000 (USSG § 8C2.4); (iv) the base culpability score is 5 (USSG § 8C2.5(a)), with an increase of 3 for the participation in the offense of an individual within the high-level personnel of a defendant organization with more than 200 employees (USSG § 8C2.5(b)(3)(A)(i)), and a decrease of 2 for full cooperation and acceptance of responsibility after the initiation of the investigation (USSG § 8C2.5(g)(2)), resulting in an adjusted culpability score of 6; (v) the minimum multiplier a culpability score of 6 is 1.2 and the maximum is 2.4 (USSG § 8C2.6), resulting in a fine range between \$102,000 and \$204,000 (USSG § 8C2.7).

(b) The defendant understands that the Court will order it to pay a \$400 special assessment, pursuant to 18 U.S.C. § 3013(a)(2)(B) and USSG § 8E1.1, in addition to any fine imposed.

(c) In light of the availability of civil causes of action which potentially provide for a recovery of a multiple of actual damages, it is the view of both parties to this agreement that the complication and prolongation of the sentencing process that would result from an attempt to fashion a proper restitution order outweighs the need to provide restitution to any victims in connection with this criminal proceeding (see 18 U.S.C. § 3663(a)(1)(B)(ii)). Therefore, the United States agrees that it will not seek a restitution order with respect to the offense charged in the Information.

(d) The United States and the defendant jointly submit that this Plea Agreement, together with the record that will be created by the United States and the defendant at the plea and sentencing hearing, provides sufficient information concerning the defendant's role in the offense to enable the meaningful exercise of sentencing authority by the Court under 18 U.S.C. § 3553. The United States and the defendant will jointly request that the Court accept the defendant's guilty plea and immediately impose sentence on the day of arraignment based upon the record provided by the defendant and the United States pursuant to the provisions of Fed. R. Crim. P. 32(b)(1) and USSG § 6A1.1. The Court's denial of the request to impose sentence immediately based upon the record provided by the defendant and the United States will not void this Plea Agreement.

9. (a) The United States and the defendant understand that the Court retains complete discretion to accept or reject the agreed-upon recommendations provided for in this Plea Agreement. If the Court does not accept the recommended sentence, this Plea Agreement, except for Paragraph 9(b) below, will be void and the defendant will be free to withdraw its guilty plea (Fed. R. Crim. P. 11(e)(4)).

(b) If the defendant does withdraw its plea of guilty, the United States will dismiss the Information without prejudice, and this Plea Agreement, the guilty plea, and any statements made in the course of any proceedings under Fed. R. Crim. P. 11 regarding the 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 as provided in Fed. R. Crim. P. 11(e)(6).

DEFENDANT'S COOPERATION

10. The defendant will fully and truthfully cooperate with the United States in the prosecution of this case, the conduct of the current federal investigation of violations of the federal antitrust and related criminal laws in the road construction industry in North Carolina and Tennessee, any other federal investigation resulting therefrom, and any litigation or other proceeding 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 to the United States all documents, information, and other materials, wherever located, in the possession, custody, or control of the defendant, requested by the United States in connection with any Federal Proceeding, except for documents privileged under United States law;

(b) using its best efforts to secure the ongoing, full, and truthful cooperation, as defined in Paragraph 11 of this Plea Agreement, of the current and former directors, officers, or employees of the defendant as may be requested by the United States, including making such persons available for interviews and the provision of testimony in grand jury, trial, and other judicial proceedings in connection with any Federal Proceeding.

11. The ongoing, full, and truthful cooperation of each person described in Paragraph 10(b) above will be subject to the procedures and protections of this paragraph, and shall include, but not be limited to:

(a) producing all documents (including claimed personal documents) and other materials requested by attorneys and agents of the United States, except for documents privileged under United States law;

(b) making himself or herself available on reasonable notice 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;

(d) otherwise voluntarily providing the United States with any materials or information, not requested in Paragraphs 11(a)-(c) above, that he or she may have related to any such Federal Proceeding; and

(e) when called upon to do so by the United States, testifying in trial and grand jury or other 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), obstruction of justice (18 U.S.C. § 1503), and contempt (18 U.S.C. §§ 401-402), in connection with any such Federal Proceeding.

GOVERNMENT'S AGREEMENT

12. Subject to the defendant's full and continuing cooperation, as described in Paragraph 10 above, and upon the Court's acceptance of the defendant's guilty plea and imposition of sentence in this case, the United States agrees not to bring further criminal charges against the defendant for any violations committed before the date of this Plea Agreement relating to or arising out of its making false statements as charged in the Information. The non-prosecution terms of this agreement do not apply to any civil liability of any kind, to any violation of the federal tax or securities laws, or to any crime of violence. The terms of this agreement do not obligate the United States to consider defendant's cooperation for purposes of a motion, pursuant to USSG § 8C4.1, for imposition of a sentence below the applicable Sentencing Guidelines, and the defendant recognizes that the Court

cannot depart below the Sentencing Guidelines for substantial assistance absent such a motion from the United States.

13. The defendant understands that it may be subject to administrative or other action by federal or state agencies other than the United States Department of Justice, Antitrust Division, based upon any conviction resulting from this Plea Agreement, and that this Plea Agreement in no way controls whatever action, if any, such other agencies may take.

REPRESENTATION BY COUNSEL

14. Defendant has been represented by counsel and is fully satisfied that its attorneys have provided competent legal representation. Defendant has thoroughly reviewed this Plea Agreement and acknowledges that its attorneys have advised it of the nature of the charges, any possible defenses to the charges, and the nature and range of possible sentences.

VOLUNTARY PLEA

15. Defendant's decision to enter into this Plea Agreement and defendant's decision to tender a plea of guilty are freely and voluntarily made and are 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 defendant as to whether the Court will accept or reject this Plea Agreement.

VIOLATION OF PLEA AGREEMENT

16. 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 cooperation (as described in Paragraph 10 of this Plea Agreement) or otherwise has violated any other provision of this Plea Agreement, the United States shall notify counsel for defendant in writing by personal or overnight delivery or facsimile transmission 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 offense relating to the investigation resulting in this Plea Agreement. This prosecution may be based upon information provided by the defendant during the course of its cooperation, and this information and any leads derived from this information may be used as evidence against it, notwithstanding the protections of Fed. R. Crim. P. 11(e)(6) and Fed. R. Evid. 410. Should this Plea Agreement become void, defendant agrees that it will waive any defense it might otherwise have to any charges for any offense referred to in Paragraph 12 above, under any statute of limitations or the Speedy Trial Act, with regard to any period which passes after the date of this Plea Agreement.

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, Kenneth D. Murphy, the Chief Executive Officer of Taylor & Murphy Construction Co., Inc., is authorized to enter this Plea Agreement on behalf of Taylor & Murphy Construction Co., Inc. as evidenced by the Resolution of the Board of Directors of Taylor & Murphy Construction Co., Inc., attached hereto, and incorporated herein by reference.

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

DATED:

Respectfully submitted,

/s/

PETER H. GOLDBERG
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/s/

Kenneth D. Murphy, CEO
Taylor & Murphy Construction Co., Inc.

/s/

Joseph Blount Cheshire V, Esq.
Counsel for Defendant