

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

UNITED STATES OF AMERICA

v.

MARK E. BIXBY

No. 13 CR 50004

Judge Frederick J. Kapala

PLEA AGREEMENT

1. This Plea Agreement between the United States Attorney for the Northern District of Illinois, ZACHARY T. FARDON, and defendant MARK E. BIXBY, and his attorney, PAUL E. GAZIANO, is made pursuant to Rule 11 of the Federal Rules of Criminal Procedure and is governed in part by Rule 11(c)(1)(A), as more fully set forth below. The parties to this Agreement have agreed upon the following:

Charges in This Case

2. The indictment in this case charges defendant with mail fraud, in violation of Title 18, United States Code, Section 1341 (Counts 1 -2), honest services fraud, in violation of Title 18, United States Code, Sections 1341 & 1346 (Counts 3 - 4), extortion, in violation of Title 18, United States Code, Section 1951 (Counts 5 - 6), and making a material false statement in a matter within the jurisdiction of the Federal Bureau of Investigation, in violation of Title 18, United States Code, Section 1001(a)(2) (Count 7).

3. Defendant has read the charges against him contained in the indictment, and those charges have been fully explained to him by his attorney.

4. Defendant fully understands the nature and elements of the crimes with which he has been charged.

Charge to Which Defendant Is Pleading Guilty

5. By this Plea Agreement, defendant agrees to enter a voluntary plea of guilty to the following count of the indictment: Count One, which charges defendant with mail fraud, in violation of Title 18, United States Code, Section 1341.

Factual Basis

6. Defendant will plead guilty because he is in fact guilty of the charge contained in Count One of the indictment. In pleading guilty, defendant admits the following facts and that those facts establish his guilt beyond a reasonable doubt:

During the time period charged in the indictment, defendant was employed as the Energy Director for the City of Rockford, Illinois. As the Energy Director, defendant managed and supervised the City of Rockford's Energy Division. The City of Rockford's Energy Division served as the Local Administrative Agency for the Illinois Home Weatherization Assistance Program ("IHWAP") in Winnebago and Boone Counties.

The purpose of the IHWAP was to help low-income residents save energy and money. Services provided through the IHWAP program included repairing and replacing heating systems, and repairing and replacing windows and doors.

Only two contractors were approved by the Rockford Energy Division to repair and install heating systems under the IHWAP program in Winnebago and Boone Counties. One of these contractors was a business (“Business A”) owned and operated by “Individual A.”

Only two contractors were approved by the Rockford’s Energy Division to do architectural work, including repairing and replacing windows and doors, under the IHWAP program in Winnebago and Boone Counties. One of these contractors was a business owned and operated by “Individual B.”

As the Energy Director, defendant submitted requisitions to the City’s Human Services Department for work to be performed by contractors under the IHWAP program.

Defendant admits that from at least as early as December 2006, and continuing to at least March 2010, he knowingly devised and participated in a scheme to defraud and to obtain money and property belonging to Individual A, Business A, and Individual B, by means of materially false and fraudulent pretenses, representations, and promises. Through this scheme, defendant fraudulently obtained at least \$51,101.33 in funds and benefits from Individual A and Business A and at least \$2,000 in funds from Individual B.

Defendant further admits that in approximately December of 2006, he informed Individual A that he wanted Individual A and Business A to “lease” a vehicle to defendant, for which defendant promised he would make lease payments.

This statement was false, because defendant did not intend to make any lease payments to Individual A or Business A.

Defendant informed Individual A that the specific vehicle he wanted Business A to lease to him was a new Pontiac Solstice. Pursuant to defendant's directive, on approximately December 23, 2006, Individual A purchased, through Business A, a 2007, red, two-door, convertible Pontiac Solstice for approximately \$29,000. Shortly after Individual A purchased the vehicle, defendant picked up the Pontiac Solstice from Individual A. Defendant kept the vehicle and used it as his personal vehicle until his scheme was discovered in March 2010 during certain civil litigation in which defendant was involved.

Defendant never paid Individual A or Business A any "lease" payments for the Pontiac Solstice. Defendant also did not pay any of the expenses or fees associated with the Pontiac Solstice, such as the insurance expenses or license renewal fees, but instead required Individual A to pay those expenses and fees.

Defendant further admits that from approximately October through December of 2007, he solicited Individual A for charitable donations by falsely telling Individual A that the donations would be used to pay for massages for disabled children and also a Christmas dinner for disabled children. Through these false representations, defendant caused Business A to write three checks, totaling \$5,775, payable to a business owned by defendant's wife. As defendant well knew at the time he solicited these funds from Individual A, the \$5,775 would not be, and

were not in fact, used for massages for disabled children or for a Christmas Party for disabled children.

Defendant further admits that from approximately January through March of 2008, he solicited Individual A for charitable donations by falsely telling Individual A that the donations would be used for a fund that would benefit the family of a recently deceased Rockford civic leader. Through these false representations, defendant caused Business A to write six checks, totaling \$12,665, payable to Amcore Bank. Each of the checks had a notation in the memo section indicating that the check was for a fund for the civic leader. Defendant deposited the six checks totaling \$12,665 into his personal checking account at Amcore Bank and used those funds for his own personal expenses.

Defendant further admits that in approximately November of 2008, he solicited Individual A to purchase certain cemetery plots from him for \$2,980. After he received the \$2,980 from Individual A, defendant never delivered the titles or deeds to these cemetery plots to Individual A.

Defendant further admits that in July of 2009, he solicited Individual B for a \$2,000 "loan" for the benefit of defendant's mother, well knowing that he had no intention of using the money for his mother's benefit or paying back the money. After Individual B gave defendant the \$2,000, defendant never repaid the money.

Defendant further admits that he misrepresented, concealed, and hid, and caused to be misrepresented, concealed, and hidden, the true purposes of the acts

done in furtherance of his fraud scheme, including by lying, and encouraging Individual A to lie, at a Citation to Discover Assets proceeding, which related to certain civil litigation in which defendant was involved.

On or about November 8, 2008, at Machesney Park, Illinois, for the purpose of executing the aforesaid scheme, and attempting to do so, defendant knowingly caused to be placed in an authorized depository for mail matter, to be sent and delivered by the United States Postal Service, an envelope containing a check in the amount of \$666, drawn on the account of Business A at Alpine Bank, payable to "Standard Mutual Insurance," that envelope being addressed to: Standard Mutual Insurance, 1028 South Grand Avenue West, P.O. Box 19267, Springfield, IL 62794-9267.

Maximum Statutory Penalties

7. Defendant understands that the charge to which he is pleading guilty carries the following statutory penalties:

a. A maximum sentence of 20 years' imprisonment. This offense also carries a maximum fine of \$250,000, or twice the gross gain or gross loss resulting from that offense, whichever is greater. Defendant further understands that the judge also may impose a term of supervised release of not more than three years. Defendant further understands that the judge may impose a sentence of one to five years of probation.

b. Defendant further understands that the Court must order restitution to the victims of the offense in an amount determined by the Court.

c. In accord with Title 18, United States Code, Section 3013, defendant will be assessed \$100 on the charge to which he has pled guilty, in addition to any other penalty or restitution imposed.

Sentencing Guidelines Calculations

8. Defendant understands that in imposing sentence the Court will be guided by the United States Sentencing Guidelines. Defendant understands that the Sentencing Guidelines are advisory, not mandatory, but that the Court must consider the Guidelines in determining a reasonable sentence.

9. For purposes of calculating the Sentencing Guidelines, the parties agree on the following points, except as specified below:

a. **Applicable Guidelines.** The Sentencing Guidelines to be considered in this case are those in effect at the time of the offense or at sentencing, whichever results in a lower range. The following statements regarding the calculation of the Sentencing Guidelines are based on the Guidelines Manual currently in effect, namely the November 2013 Guidelines Manual.

b. **Offense Level Calculations.**

i. It is the position of the United States that the relevant conduct establishes a scheme that deprived the City of Rockford and the citizens of Rockford, Winnebago County, and Boone County of their intangible right to

defendant's honest services. As a result, it is the position of the United States that the applicable offense guideline is Guideline § 2C1.1.

ii. It is further the position of the United States that the base offense level is 14, pursuant to Guideline § 2C1.1(a)(1).

iii. It is further the position of the United States that the offense level must be increased by 2 levels, pursuant to Guideline § 2C1.1(b)(1), because the offense involved more than one bribe or extortion.

iv. It is further the position of the United States that the offense level must be increased by 6 levels, pursuant to Guideline § 2C1.1(b)(2), because the value of the benefits obtained by the defendant exceeded \$30,000.

v. It is the position of the defendant that the applicable offense guideline is Guideline § 2B1.1.

vi. It is further the position of the defendant that the base offense level is 7, pursuant to Guideline § 2B1.1(a)(1).

vii. It is further the position of the defendant that the offense level must be increased by 6 levels, pursuant to Guideline § 2B1.1(b)(1)(D), because the loss exceeded \$30,000.

viii. It is further the position of the defendant that the offense level must be increased by 2 levels, pursuant to Guideline § 3B1.3, because defendant abused a position of public trust in a manner that significantly facilitated the commission and concealment of the offense.

ix. If the Court determines at the time of sentencing that defendant has clearly demonstrated a recognition and affirmative acceptance of personal responsibility for his criminal conduct within the meaning of Guideline § 3E1.1(a), including by furnishing the United States Attorney's Office and the Probation Office with all requested financial information relevant to his ability to satisfy any fine and restitution that may be imposed in this case, a two-level reduction in the offense level will be appropriate. The government reserves the right to take whatever position it deems appropriate at the time of sentencing with respect to whether defendant has accepted responsibility within the meaning of Guideline § 3E1.1(a).

x. If the Court determines that defendant has fully accepted responsibility within the meaning of Guideline § 3E1.1(a), and that the offense level is 16 or higher prior to the application of any reduction for acceptance of responsibility pursuant to § 3E1.1(a), the government will move for an additional one-level reduction in the offense level pursuant to Guideline § 3E1.1(b) because defendant has timely notified the government of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the Court to allocate its resources efficiently.

c. **Criminal History Category.** With regard to determining defendant's criminal history points and criminal history category, based on the facts

now known to the government, defendant's criminal history points equal zero and defendant's criminal history is I.

d. Anticipated Advisory Sentencing Guidelines Range.

Therefore, if the Court accepts the government's Sentencing Guidelines calculations, the anticipated offense level will be 19, which, when combined with the anticipated criminal history category of I, will result in an anticipated advisory Sentencing Guidelines range of 30 to 37 months' imprisonment, in addition to any supervised release, fine, and restitution the Court may impose. If the Court accepts the defendant's Sentencing Guidelines calculations, the anticipated offense level will be 13, which, when combined with the anticipated criminal history category of I, will result in an anticipated advisory Sentencing Guidelines range of 12 to 18 months of imprisonment, in addition to any supervised release, fine, and restitution the Court may impose.

e. Defendant and his attorney and the government acknowledge that the above guidelines calculations are preliminary in nature, and are non-binding predictions upon which neither party is entitled to rely. Defendant understands that further review of the facts or applicable legal principles may lead the government to conclude that different or additional guidelines provisions apply in this case. Defendant understands that the Probation Office will conduct its own investigation and that the Court ultimately determines the facts and law relevant to sentencing, and that the Court's determinations govern the final guideline

calculation. Accordingly, the validity of this Agreement is not contingent upon the probation officer's or the Court's concurrence with the above calculations, and defendant shall not have a right to withdraw his plea on the basis of the Court's rejection of these calculations.

f. Both parties expressly acknowledge that this Agreement is not governed by Fed. R. Crim. P. 11(c)(1)(B), and that errors in applying or interpreting any of the sentencing guidelines may be corrected by either party prior to sentencing. The parties may correct these errors either by stipulation or by a statement to the Probation Office or the Court, setting forth the disagreement regarding the applicable provisions of the guidelines. The validity of this Agreement will not be affected by such corrections, and defendant shall not have a right to withdraw his plea, nor the government the right to vacate this Agreement, on the basis of such corrections.

Agreements Relating to Sentencing

10. Each party is free to recommend whatever sentence it deems appropriate.

11. It is understood by the parties that the sentencing judge is neither a party to nor bound by this Agreement and may impose a sentence up to the maximum penalties as set forth above. Defendant further acknowledges that if the Court does not accept the sentencing recommendation of the parties, defendant will have no right to withdraw his guilty plea.

12. Regarding restitution, defendant acknowledges that, pursuant to Title 18, United States Code, § 3663A, the Court must order him to pay full restitution to Individual A, Business A, and Individual B, minus any credit for funds repaid prior to sentencing.

13. Restitution shall be due immediately, and paid pursuant to a schedule to be set by the Court at sentencing. Defendant acknowledges that pursuant to Title 18, United States Code, Section 3664(k), he is required to notify the Court and the United States Attorney's Office of any material change in economic circumstances that might affect his ability to pay restitution.

14. Defendant agrees to pay the special assessment of \$100 at the time of sentencing with a cashier's check or money order payable to the Clerk of the U.S. District Court.

15. Defendant agrees that the United States may enforce collection of any fine or restitution imposed in this case pursuant to Title 18, United States Code, Sections 3572, 3613, and 3664(m), notwithstanding any payment schedule set by the Court.

16. After sentence has been imposed on the count to which defendant pleads guilty as agreed herein, the government will move to dismiss the remaining counts of the indictment as to defendant.

Acknowledgments and Waivers Regarding Plea of Guilty

Nature of Agreement

17. This Agreement is entirely voluntary and represents the entire agreement between the United States Attorney and defendant regarding defendant's criminal liability in case 13 CR 50004.

18. This Agreement concerns criminal liability only. Except as expressly set forth in this Agreement, nothing herein shall constitute a limitation, waiver, or release by the United States or any of its agencies of any administrative or judicial civil claim, demand, or cause of action it may have against defendant or any other person or entity. The obligations of this Agreement are limited to the United States Attorney's Office for the Northern District of Illinois and cannot bind any other federal, state, or local prosecuting, administrative, or regulatory authorities, except as expressly set forth in this Agreement.

19. Defendant understands that nothing in this Agreement shall limit the Internal Revenue Service in its collection of any taxes, interest or penalties from defendant and his spouse.

Waiver of Rights

20. Defendant understands that by pleading guilty he surrenders certain rights, including the following:

a. **Trial rights.** Defendant has the right to persist in a plea of not guilty to the charges against him, and if he does, he would have the right to a public and speedy trial.

i. The trial could be either a jury trial or a trial by the judge sitting without a jury. However, in order that the trial be conducted by the judge sitting without a jury, defendant, the government, and the judge all must agree that the trial be conducted by the judge without a jury.

ii. If the trial is a jury trial, the jury would be composed of twelve citizens from the district, selected at random. Defendant and his attorney would participate in choosing the jury by requesting that the Court remove prospective jurors for cause where actual bias or other disqualification is shown, or by removing prospective jurors without cause by exercising peremptory challenges.

iii. If the trial is a jury trial, the jury would be instructed that defendant is presumed innocent, that the government has the burden of proving defendant guilty beyond a reasonable doubt, and that the jury could not convict him unless, after hearing all the evidence, it was persuaded of his guilt beyond a reasonable doubt and that it was to consider each count of the indictment separately. The jury would have to agree unanimously as to each count before it could return a verdict of guilty or not guilty as to that count.

iv. If the trial is held by the judge without a jury, the judge would find the facts and determine, after hearing all the evidence, and considering

each count separately, whether or not the judge was persuaded that the government had established defendant's guilt beyond a reasonable doubt.

v. At a trial, whether by a jury or a judge, the government would be required to present its witnesses and other evidence against defendant. Defendant would be able to confront those government witnesses and his attorney would be able to cross-examine them.

vi. At a trial, defendant could present witnesses and other evidence in his own behalf. If the witnesses for defendant would not appear voluntarily, he could require their attendance through the subpoena power of the Court. A defendant is not required to present any evidence.

vii. At a trial, 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. If defendant desired to do so, he could testify in his own behalf.

b. **Appellate rights.** Defendant further understands he is waiving all appellate issues that might have been available if he had exercised his right to trial, and may only appeal the validity of this plea of guilty and the sentence imposed. Defendant understands that any appeal must be filed within 14 calendar days of the entry of the judgment of conviction.

21. Defendant understands that by pleading guilty he is waiving all the rights set forth in the prior paragraphs, with the exception of the appellate rights

specifically preserved above. Defendant's attorney has explained those rights to him, and the consequences of his waiver of those rights

Presentence Investigation Report/Post-Sentence Supervision

22. Defendant understands that the United States Attorney's Office in its submission to the Probation Office as part of the Pre-Sentence Report and at sentencing shall fully apprise the District Court and the Probation Office of the nature, scope, and extent of defendant's conduct regarding the charges against him, and related matters. The government will make known all matters in aggravation and mitigation relevant to sentencing.

23. Defendant agrees to truthfully and completely execute a Financial Statement (with supporting documentation) prior to sentencing, to be provided to and shared among the Court, the Probation Office, and the United States Attorney's Office regarding all details of his financial circumstances, including his recent income tax returns as specified by the probation officer. Defendant understands that providing false or incomplete information, or refusing to provide this information, may be used as a basis for denial of a reduction for acceptance of responsibility pursuant to Guideline § 3E1.1 and enhancement of his sentence for obstruction of justice under Guideline § 3C1.1, and may be prosecuted as a violation of Title 18, United States Code, Section 1001 or as a contempt of the Court.

24. For the purpose of monitoring defendant's compliance with his obligations to pay a fine and restitution during any term of supervised release or

probation to which defendant is sentenced, defendant further consents to the disclosure by the IRS to the Probation Office and the United States Attorney's Office of defendant's individual income tax returns (together with extensions, correspondence, and other tax information) filed subsequent to defendant's sentencing, to and including the final year of any period of supervised release or probation to which defendant is sentenced. Defendant also agrees that a certified copy of this Agreement shall be sufficient evidence of defendant's request to the IRS to disclose the returns and return information, as provided for in Title 26, United States Code, Section 6103(b).

Other Terms

25. Defendant agrees to cooperate with the United States Attorney's Office in collecting any unpaid fine and restitution for which defendant is liable, including providing financial statements and supporting records as requested by the United States Attorney's Office. Defendant will not object to a motion brought by the United States Attorney's Office for the entry of an order authorizing disclosure of documents, testimony and related investigative materials which may constitute grand jury material, preliminary to or in connection with any judicial proceeding, pursuant to Fed. R. Crim. P. 6(e)(3)(E)(i). In addition, defendant will not object to the government's solicitation of consent from third parties who provided records or other materials to the grand jury pursuant to grand jury subpoenas, to turn those materials over to the Civil Division of the United States Attorney's Office, or an

appropriate federal or state agency (including but not limited to the Internal Revenue Service), for use in civil or administrative proceedings or investigations, rather than returning them to the third parties for later summons or subpoena in connection with a civil or administrative proceeding involving, or investigation of, defendant and his spouse. Nothing in this paragraph or the preceding paragraph precludes defendant and his spouse from asserting any legal or factual defense to taxes, interest, and penalties that may be assessed by the IRS.

Conclusion

26. Defendant understands that this Agreement will be filed with the Court, will become a matter of public record, and may be disclosed to any person.

27. Defendant understands that his compliance with each part of this Agreement extends throughout the period of his sentence, and failure to abide by any term of the Agreement is a violation of the Agreement. Defendant further understands that in the event he violates this Agreement, the government, at its option, may move to vacate the Agreement, rendering it null and void, and thereafter prosecute defendant not subject to any of the limits set forth in this Agreement, or may move to resentence defendant or require defendant's specific performance of this Agreement. Defendant understands and agrees that in the event that the Court permits defendant to withdraw from this Agreement, or defendant breaches any of its terms and the government elects to void the Agreement and prosecute defendant, any prosecutions that are not time-barred by

the applicable statute of limitations on the date of the signing of this Agreement may be commenced against defendant in accordance with this paragraph, notwithstanding the expiration of the statute of limitations between the signing of this Agreement and the commencement of such prosecutions.

28. Should the judge refuse to accept defendant's plea of guilty, this Agreement shall become null and void and neither party will be bound to it.

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

30. Defendant acknowledges that he has read this Agreement and carefully reviewed each provision with his attorney. Defendant further acknowledges that he understands and voluntarily accepts each and every term and condition of this Agreement.

AGREED THIS DATE: _____

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