

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

Plaintiff,

v.

Case No. 06-CR-20 (RTR)

GEORGIA THOMPSON,

Defendant.

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**DEFENDANT'S REPLY SUPPORTING  
MOTION TO DISMISS INDICTMENT**

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**I.**

**INTRODUCTION**

According to the Indictment, if in evaluating bids a civil service employee is at all motivated by promoting her own interests, she violates one or more federal criminal laws. It makes no difference that her own interest is controlled or guided by her professional, independent judgment *and* coincides with the interests of the citizens of Wisconsin.

Imagine a state employee who has come up with an idea that will benefit the state (for purposes of this example, imagine that the idea's result will save a state agency money). She describes the idea to the co-worker and then decides to tell her supervisor of her idea. Her co-worker is a cynic and he responds that the

supervisor will never agree to her proposal. While he's a cynic, the co-worker also appreciates good ideas, so he tells her that if the supervisor approves of her idea, he will nominate her for an award as "employee of the year." The next day, she meets with her supervisor. Upon hearing her idea, the supervisor agrees to implement the idea. Her idea works and the state agency saves money. The co-worker keeps his word and nominates her for an award. Now, if the law is as the government asserts, then the state employee could be charged with precisely the same offenses as Georgia Thompson, for precisely the same reasons. In both cases, the motivation of the employee benefits the state; and there is, additionally, the possibility of a job benefit and making her supervisor look good, based on her actions. Yet this is not a crime and, for that reason, the Indictment must be dismissed.

## II.

### REPLY

Throughout its brief, the government refers to the alleged conduct as "bid-rigging." The government's use of this term is clever, but flatly inaccurate. The term lends a nefarious, criminal air to a case having to do with a state bureaucracy.<sup>1</sup> But, bid-rigging has absolutely nothing to do with this case. Bid-

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<sup>1</sup> Similarly, the government (mis)characterizes the Adelman Travel Group partner contract as "lucrative." GOVERNMENT'S CONSOLIDATED RESPONSE TO PRETRIAL

rigging is not alleged in the Indictment nor, for that matter, does the Indictment allege a conspiracy, necessary in bid-rigging which always involves collusion absent here. If the allegation were to have any meaning beyond word-play, the Indictment would have to demonstrate the submission of a “‘subverted’ or ‘collusive,’ *i.e.*, ‘non-competitive bid.’” *United States v. Heffernan*, 43 F.3d 1144, 1145-46 (7th Cir. 1994)(“the term ‘bid-rigging,’ though much bandied about in antitrust cases, [does] not denote a distinct offense. It is merely a descriptive term for a subset of price-fixing cases, so no one bothered with a careful definition”); *see also*, 15 U.S.C. § 1; *see, e.g.*, *United States v. Streu Construction Company, Inc.*, Eastern District of Wisconsin Case No 04 CR 53 (WCG)(a recent criminal antitrust case prosecuted in this district); and *JTC Petroleum v. Piasa Motor Fuels, Inc.*, 190 F.3d 775, 777 (7th Cir. 1999)(noting a “long history of bid-rigging and related practices of collusion in the road construction and road maintenance business.”). The only import of the government’s use of the term “bid-rigging” has to do with Thompson’s motion for bill of particulars; if there is any substance to the term’s use, then the bill of particulars must be granted.

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MOTIONS at 16. This was neither factually accurate nor alleged in the Indictment. There are numerous instances where the government refers to Georgia Thompson as an “official.” She is not and the Indictment correctly notes she is an employee of the State of Wisconsin. Indictment, ¶ 1. As such, her employment status is protected by state law. *See* WIS. STAT. §§ 230.34 and 230.37. While her pay grade is not at the lowest level, Georgia Thompson should not be confused with a public official.

Having disposed of the government's word games, Thompson turns to what the government does *not* address in its response. Its silence with respect to two arguments raised by Georgia Thompson is telling.

First, the government does not address the example raised in Thompson's opening brief of the good Samaritan. Consistent with that example, the legitimacy of this Indictment may be reduced to the following question:

When a state employee's service is honest and consistent with state law, but her reasons for providing honest services may have exceeded those that state law lists, has the state employee violated federal law punishing schemes to defraud citizens of the honest services of civil servants?

The answer to this query is no. This answer has its roots in *United States v. Bloom*, 149 F.3d 649 (7th Cir. 1998), *United States v. Munson*, 2004 WL 1672880 (N.D. Ill. 2004), *United States v. Bauer*, 2000 WL 1720245 (N.D. Ill. 2000), and the paradigm in which a violation of 18 U.S.C. § 1346 has been properly alleged.<sup>2</sup>

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<sup>2</sup> Cf. *United States v. Spano*, 401 F.3d 837 (7th Cir. 2005)(public employee accepting money in lieu of conducting an investigation); *United States v. Spano*, 421 F.3d 599 (7th Cir. 2005)(mayor is reimbursed 100% for medical expenses by town where insurer covers 80% of such expenses and administrator of insurance plan was part of scheme to defraud); *United States v. Genova*, 333 F.3d 750 (7th Cir. 2003)(city officials authorizing payment of kick-back and use of public monies); *United States v. Martin*, 195 F. 3d 961 (7th Cir. 1999)(public employee receives gratuities to steer contract to company); *United States v. Bauer*, 2000 WL 1720245 (N.D. Ill. 2000)(government employee terminates investigation into other employees' wrongdoing); *United States v. Bolden*, 1997 WL 473240 (N.D. Ill 1997)(city commissioner grants after-hours access to city facilities in exchange for payment as a security consultant); *United States v. Lopez-Lukis*, 102 F.3d 1164 (11th Cir. 1997)(commissioner ensures that majority of

In sum, what distinguishes Georgia Thompson's alleged conduct from those cases in which the court has found an intent to deprive the public of honest services is that *here* there is no alleged intent to evade the requirements of a statute. Where a public employee uses his office for *ultra vires* pecuniary gain, that is dishonest and, independently, unlawful. *See, e.g., United States v. Bolden*, 1997 WL 473240 (N.D. Ill. 1997)(city commissioner grants after-hours access to city facilities in exchange for payment as a security consultant). Where a public employee uses his office in order to undermine the purpose of another statute, that too is dishonest and, independently, unlawful. *See, e.g., United States v. Bauer*, 2000 WL 1720245 (N.D. Ill. 2000). But where, as here, the public employee uses her office to fulfill the purpose of the statute without either gain to anyone or harm to the public, then no criminal offense has been committed.<sup>3</sup> Thus, in

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commissioners vote for projects favored by lobbyist and accepts payments from lobbyist and conceals the monetary relationship to lobbyist); *United States v. Mandel*, 591 F.2d 1347 (4th Cir. 1979)(governor acquires interest in investment company through pattern of racketeering that included mail fraud); *United States v. Adler*, 274 F. Supp. 2d 583 (S.D. N.Y. 2003)(county political chairman attempts to use position to improperly influence member of town planning board to further real estate development project); *United States v. Fauver*, 888 F. Supp. 668 (M.D. PA 1995)(checks mailed to prison warden at home thereby circumventing recording on county books); *United States v. Czubinski*, 106 F.3d 1069 (1st Cir. 1997)(IRS employee conducting unauthorized searches of confidential tax records); *United States v. Wayner*, 55 F.3d 564 (11th Cir. 1995)(school board member seeks percentage of gross proceeds of service contracts with public school system vendors).

<sup>3</sup> *See United States v. Sawyer*, 85 F.3d 31 (1st Cir. 2001)("Although a public official might engage in reprehensible misconduct related to an official position, the conviction

*United States v. Czubinski*, 106 F.3d 1069 (1st Cir. 1997), the court noted that

the government must not merely indicate wrongdoing by a public official, but must also demonstrate that the wrongdoing at issue is intended to prevent or call into question the proper or impartial performance of that public servant's official duties. In other words, 'although a public official might engage in reprehensible misconduct related to an official position, the conviction of that official cannot stand where the conduct does not actually deprive the public of its right to her honest services, and it is not shown to intend that result.'

106 F.3d at 1077 (internal citations omitted); see also *United States v. Genova*, 333 F.3d 750, 759 (7th Cir. 2003).

Second, the government's response does not dispute that the use of a "best and final offer" procedure in determining the lowest-priced, most-responsible bidder was provided for under State law. And where the bidders were informed by the Request for Proposal that a "best and final" process was available and the state law with respect to the process was followed, then the use of that process does not support an allegation that Georgia Thompson either caused the misapplication of public funds or deprived the State of Wisconsin of her honest services. With this implicit admission by the government, there can be no proof of any dishonest service, the cornerstone of this scheme to defraud.

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of that official cannot stand where the conduct does not actually deprive the public of its right to her honest services, and it is not shown to intend that result").

The Indictment alleges that Georgia Thompson scored ATG higher than other evaluators during the oral presentation phase of the bidding process (Indictment, ¶ 13(a)); that she told other evaluators that she scored ATG higher than they did (Indictment, ¶ 13(b)); and that she suggested that other evaluators change their scores (Indictment, ¶ 13(d)). The Indictment alleges that the evaluation committee's vote was not unanimous (Indictment, ¶ 13(c)).<sup>4</sup>

The Indictment does not allege, because it cannot, that Georgia Thompson either created or changed the procedures for the evaluation process or the Request for Proposals. Indeed, the Indictment does not allege that Georgia Thompson failed to consider criteria set forth in the Request for Proposal.

While a Request for Proposals creates certain parameters by which bids are

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<sup>4</sup> There exists no requirement that the evaluation committee act with unanimity and the government has not identified any such requirement. The government argues that Georgia Thompson "prevented the committee from unanimously recommending that the partner contract be awarded to a bidder other than Adelman Travel." GOVERNMENT'S CONSOLIDATED RESPONSE TO PRETRIAL MOTIONS at 9. No such "unanimity" requirement is pled in the Indictment. Nor does such a requirement exist under Wisconsin statute, administrative code or the procurement manual used by the Wisconsin Department of Administration. *See* WIS. ADMIN. CODE, ADM § 10.08. Though the government asserts a requirement that the evaluation committee's decision be unanimous, when later addressing this point, the government subsequently argues, that "this argument misses the mark." GOVERNMENT'S CONSOLIDATED RESPONSE TO PRETRIAL MOTIONS at 11. Either there is such a requirement or there isn't; if the Indictment is to provide sufficient notice, then the government cannot have it both ways.

to be evaluated, the actual evaluation is, by definition, inherently subjective.<sup>5</sup>

This is why the evaluation committee is composed of no less than three individuals; disagreements over what the proposals mean are expected. *See* WIS. ADMIN. CODE, ADM § 10.08(4). If this were not the case, a computer could be used to determine which bidder submitted the best proposal. And the fact that there was professional disagreement among seven evaluators regarding who was the lowest-priced, best-qualified bidder does not make one view point a materially false representation or omission.<sup>6</sup> Moreover, even that disagreement disappeared here after the process properly went to a best and final offer.

Regardless of the committee's evaluation, there can be no misapplication of funds as a result of its action, because, in the end, the evaluation committee's recommendation was exactly that: a recommendation.<sup>7</sup> The committee cannot

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<sup>5</sup> The definition of "evaluate" reflects the subjective nature of the committee's endeavor and is synonymous with estimate.

<sup>6</sup> Georgia Thompson's scoring of oral presentations did not affect the outcome of the "best and final" process. Nothing alleged in the Indictment prevented any bidder from submitting a lower price bid in the "best and final" process. Nor does the Indictment allege that Georgia Thompson gave some sort of advantage to ATG, with regard to their submission in the "best and final."

<sup>7</sup> WIS. STAT. § 16.76 (1) provides that "all contracts for materials, supplies, equipment or contractual services to be provided to any agency shall run to the state of Wisconsin. Such contracts shall be signed by the secretary or an individual authorized by the secretary, except that contracts entered into directly by the legislature, the courts or a legislative service or judicial branch agency shall be signed by an individual authorized under s. 16.74(2)(b)."

and its recommendation does not bind the State of Wisconsin in a contract. *See* WIS. STAT. § 16.76 (1). Notwithstanding the government's bald-faced assertion that the evaluation committee acts as an agent of the State of Wisconsin, state law does not authorize the committee to act in such a manner. WIS. STAT. § 16.71 addresses this point head-on. The statute sets forth to whom the Wisconsin Department of Administration has delegated purchasing powers; and the evaluation committee at the heart of this case is not one of those entities. Only if the agency decides to pursue a contract does the evaluation committee's recommendation come into play, for then only limited circumstances set forth in statute allow an award to a bidder other than the one who has been recommended by the evaluation committee. But the committee is not obliged to award a contract at all, no matter what the evaluation committee concludes.

The Indictment thus demonstrates that Georgia Thompson's service on the evaluation committee was honest and consistent with state law, although for the sake of argument her reasons for providing honest services may have included considerations beyond those that state law lists. The outcome was the committee's work, and quite properly saved money for Wisconsin taxpayers without producing improper pecuniary gain for anyone. Thompson's services were honest.

As to the government's contention that Georgia Thompson obtained a private gain from the alleged conduct, its response relies heavily on *United States v. Munson*, 2004 WL 1672880 (N.D. Ill. 2004), and *United States v. Bauer*, 2000 WL 1720245 (N.D. Ill. 2000). Neither *Munson* nor *Bauer* are on point. In both cases – and unlike the instant case – the defendants accomplished their offenses by committing underlying, independent criminal offenses or dishonest acts tending to harm the public in the end. Thompson did neither; whatever the composite of her reasons, her services were honest. In contrast to *Munson* and *Bauer*, the instant Indictment alleges that Georgia Thompson violated federal law solely through the exercise of her discretion, where the exercise of that discretion was permitted. There was no underlying unlawful act; she accomplished the objective of the procurement statutes.

**III.**

**CONCLUSION**

For these reasons the Indictment ought be dismissed.

Dated this 29th day of March, 2006.

Respectfully submitted,

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