

NOLAN J. MAYTHER
ANNE J. VELDHUIS
Trial Attorneys
United States Department of Justice
Antitrust Division
450 Golden Gate Avenue, Rm 10-0101
San Francisco, CA 94102
Telephone: (415) 934-5300
Facsimile: (415) 934-5399
nolan.mayther@usdoj.gov

Attorneys for Plaintiff
United States of America

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA)	
)	Criminal No. 4:22-cr-00007-RRB-SAO
v.)	
)	Filed
BENJAMIN MCCULLOCH,)	
)	
Defendant.)	
_____)

PLEA AGREEMENT

The United States of America and Benjamin W. McCulloch (“defendant”) hereby enter into the following Plea Agreement pursuant to Rule 11(c)(1)(B) 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:
- (a) the rights set out in subparagraphs 1(b)-(f) above;
 - (b) the right to file any appeal or collateral attack, including but not limited to an application or motion under 28 U.S.C. § 2241 or 2255, that challenges his conviction, including but not limited to any appeal or collateral attack raising an argument that (1) the statute to which he is pleading guilty is unconstitutional or (2) the admitted conduct does not fall within the scope of such statute; and
 - (c) the right to file any appeal or collateral attack, including but not limited to an appeal under 18 U.S.C. § 3742 or an application or 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 Paragraphs 11-13 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).

(d) Nothing in this paragraph, however, will 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 a challenge to the voluntariness of the defendant's guilty plea. The defendant agrees that there is currently no known evidence of ineffective assistance of counsel. Pursuant to Fed. R. Crim. P. 7(b), the defendant will waive indictment and plead guilty to a five-count Information to be filed in the United States District Court for the District of Alaska. The Information will charge the defendant with one count of conspiring to provide kickbacks in violation of 18 U.S.C. § 371, and four counts of providing kickbacks to a prime contractor employee in violation of 41 U.S.C. § 8702.

3. The defendant will plead guilty to the criminal charges described in Paragraph 2 above pursuant to the terms of this Plea Agreement 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 OFFENSES CHARGED

4. The parties agree, that had this case gone to trial, the United States would have presented evidence sufficient to prove the following facts:

(a) Fort Wainwright is a United States Army facility located in Fairbanks, Alaska. Between 2016 and 2021, the United States Army awarded contracts to various prime contractors for construction services and maintenance at Fort Wainwright.

(b) Beginning no later than March 2016 and continuing through at least March 2021, (“the relevant period”), defendant BENJAMIN MCCULLOCH (“the defendant”) was the owner of COMPANY A. During the relevant period, COMPANY A was a sub-contractor providing flooring construction services to the United States Army at Fort Wainwright.

(c) During the relevant period, INDIVIDUAL 1 was an employee of COMPANIES B and C, both of which were prime contractors providing construction services at Fort Wainwright.

(d) During the relevant period, COMPANY A, at the defendant’s direction, provided flooring construction services at Fort Wainwright as a subcontractor to COMPANIES B and C.

(e) During the relevant period, the defendant knowingly and willfully participated in a conspiracy with INDIVIDUAL 1, the primary purpose of which was to provide kickbacks related to flooring construction contracts performed at Fort Wainwright.

(f) In furtherance of the conspiracy, the defendant engaged in communications and attended meetings with INDIVIDUAL 1. In the course of these interactions, INDIVIDUAL 1 requested that the defendant inflate the prices COMPANY A charged COMPANY B and COMPANY C for flooring construction services at Fort Wainwright. The defendant agreed in the course of these interactions to pay approximately half of the inflated amount to INDIVIDUAL 1 as kickbacks. The defendant paid the kickbacks in the form of cash and goods.

(g) Acts in furtherance of this conspiracy were carried out within the District of Alaska. The conspiratorial meetings and discussions described above took place in the District of Alaska, the kickbacks were provided within the District of Alaska, and the flooring

construction services that were the subject of this conspiracy were provided by the defendant and COMPANY A in the District of Alaska.

(h) Beginning on or around March 13, 2017, in a continuing course of conduct, the defendant knowingly and willfully provided at least \$47,563.22 in kickbacks to INDIVIDUAL 1, as a prime contractor employee, for the purpose of improperly obtaining and rewarding favorable treatment in connection with a subcontract relating to a prime contract for construction services at Building 1053 located on Fort Wainwright. Among the kickbacks defendant provided INDIVIDUAL 1 was a 2017 Ford Explorer worth at least \$45,164.00.

(i) Beginning on or around September 20, 2018, and continuing through at least December 2, 2019, the defendant knowingly and willfully provided at least \$32,021.87 in kickbacks to INDIVIDUAL 1, as a prime contractor employee, for the purpose of improperly obtaining and rewarding favorable treatment in connection with a subcontract relating to a prime contract for construction services at Building 3416 located on Fort Wainwright. The kickbacks defendant provided INDIVIDUAL 1 included, among other things, Apple Watches, TVs, a camera, a camera lens, binoculars, workout equipment, and cash payments.

(j) Beginning on or around January 29, 2020, and continuing through at least April 30, 2020, the defendant knowingly and willfully provided at least \$1,816.98 in kickbacks to INDIVIDUAL 1, as a prime contractor employee, for the purpose of improperly obtaining and rewarding favorable treatment in connection with a subcontract relating to a prime contract for construction services at a Popeyes-Taco Bell restaurant, located on Fort Wainwright.

(k) Beginning in or around July 2020, in a continuing course of conduct, the defendant knowingly and willfully provided at least \$20,000 in kickbacks to INDIVIDUAL 1, as a prime contractor employee, for the purpose of improperly obtaining and rewarding favorable treatment in connection with a subcontract relating to a prime contract for construction services at Hangar 1, located on Fort Wainwright. Among the kickbacks the defendant provided INDIVIDUAL 1 were cash payments and a side-by-side all-terrain vehicle worth approximately \$16,499.

ELEMENTS OF THE OFFENSES

18 U.S.C. § 371 – Conspiracy to Provide Kickbacks (One Count)

5. The elements of the charged offense are that:
- (a) Beginning at least as early as March 2016, and continuing through and around March 2021, there was an agreement between two or more persons to commit a crime against the United States, namely, to provide kickbacks in violation of the Anti-Kickback Act, 41 U.S.C. § 8702;
 - (b) the defendant became a member of the conspiracy knowing of its object and intending to help accomplish it; and
 - (c) one of the members of the conspiracy performed at least one overt act for the purpose of carrying out the conspiracy.

41 U.S.C. § 8702(1) – Providing and Attempting to Provide Kickbacks (Four Counts)

6. The elements of the charged offense are that:
- (a) The defendant was an employee of a subcontractor;

- (b) who knowingly and willfully provided or attempted to provide, directly or indirectly, money, fees, commissions, credits, gifts, gratuities, things of value, or compensation;
- (b) to a prime contractor employee; and
- (c) for the purpose of improperly obtaining or rewarding favorable treatment in connection with a subcontract relating to a prime contract.

POSSIBLE MAXIMUM SENTENCE

7. The defendant understands that the statutory maximum penalty which may be imposed against him upon conviction for a violation of 18 U.S.C. § 371 is:
- (a) a term of imprisonment for five (5) years (18 U.S.C. § 371);
 - (b) a fine in an amount equal to not more than the greatest of (1) \$250,000; or (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. § 371; 18 U.S.C. § 3571(b) and (d)); and
 - (c) a term of supervised release of one (1) year following any term of imprisonment.
8. The defendant understands that the statutory maximum penalty which may be imposed against him upon conviction for a violation of 41 U.S.C. § 8702 is:
- (a) a term of imprisonment for ten (10) years (41 U.S.C. § 8707);
 - (b) a fine in an amount equal to not more than the greatest of (1) \$250,000; or (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 (41 U.S.C. § 8707; 18 U.S.C. § 3571(b) and (d)); and
 - (c) a term of supervised release of three (3) years following any term of

imprisonment.

9. In addition, the defendant understands that:

(a) pursuant to the Mandatory Victim Restitution Act, 18 U.S.C. § 3663A(c)(1)(A)(ii) *et seq.*, the Court is required to 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 each charged crime.

SENTENCING GUIDELINES

10. The defendant understands that the Sentencing Guidelines are advisory, not mandatory, but that the Court must consider, in determining and imposing sentence, the Guidelines Manual in effect on the date of sentencing unless that Manual provides for greater punishment than the Manual in effect on the last date that the offense of conviction was committed, in which case the Court must consider the Guidelines Manual in effect on the last date that the offense of conviction was committed. The parties agree there is no *ex post facto* issue under the November 1, 2018 Guidelines Manual. The Court must also consider the other factors set forth in 18 U.S.C. § 3553(a) in determining and imposing sentence. The defendant understands that the Court will make Guidelines determinations by applying a standard of preponderance of the evidence. 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).

SENTENCING AGREEMENT

11. The government and the defendant agree that there is no material dispute as to the following Sentencing Guideline variables and therefore stipulate to the following:

- (a) The value of the improper benefit conferred results in an increase of 8 levels. The parties further agree that the defendant provided between \$95,000 and \$150,000 in kickbacks. U.S.S.G. §2B1.1(b)(1)(E).
12. Pursuant to Fed. R. Crim. P. 11(c)(1)(B) and subject to the full, truthful, and continuing cooperation of the defendant, as defined in Paragraph 19 of this Plea Agreement, the United States agrees that it will recommend that the Court impose a sentence at the low end of the applicable guideline range as determined by the Court. The defendant is free to recommend to the Court whatever sentence he believes is appropriate under 18 U.S.C. § 3553(a).
13. Pursuant to Fed. R. Crim. P. 11(c)(1)(B) and subject to the full, truthful, and continuing cooperation of the defendant, as defined in Paragraph 19 of this Plea Agreement, the United States agrees that it will recommend that the Court order the minimum applicable criminal fine under §5E1.2.
14. 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).
15. The defendant agrees that the actual amount of restitution to be paid is \$101,402 pursuant to 18 U.S.C. § 3663A(c)(1)(A)(ii), payable in installments as set forth below with interest accruing under 18 U.S.C. § 3612(f)(1)-(2).
16. The defendant understands that the Court will order him to pay a \$100 special assessment for each crime pursuant to 18 U.S.C. § 3013(a)(2)(A) in addition to any fine imposed.
17. Subject to the full, truthful, and continuing cooperation of the defendant, as defined in Paragraph 19 of this Plea Agreement, and prior to sentencing in this case, the United States will

fully advise the Court and the Probation Office of the fact, manner, and extent of the defendant's cooperation and his commitment to prospective 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.

18. The United States and the defendant understand that the Court retains complete discretion to accept or reject the recommended sentence provided for in Paragraphs 11-13 of this Plea Agreement. The defendant understands that, as provided in Fed. R. Crim. P. 11(c)(3)(B), if the Court does not impose the recommended sentence contained in this Agreement, he nevertheless has no right to withdraw his plea of guilty.

DEFENDANT'S COOPERATION

19. The defendant will cooperate fully and truthfully with the United States in the prosecution of this case, the current federal investigation of violations of federal fraud, kickback, and related criminal laws involving the provision of construction services at Fort Wainwright, any 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 (collectively "Federal Proceeding"). Federal Proceeding includes, but is not limited to, an investigation, prosecution, litigation, or other proceeding regarding obstruction of, the making of a false statement or declaration in, the commission of perjury or subornation of perjury in, the commission of contempt in, or conspiracy to commit such offenses in, a Federal Proceeding. The full, truthful, and continuing cooperation of the defendant will include, but not be limited to:

- (a) producing all documents, including claimed personal documents, and other

materials, wherever located, not protected under the attorney-client privilege or the work-product doctrine, in the possession, custody, or control of the defendant, that are requested by attorneys and agents of the United States in connection with any Federal Proceeding;

(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 in connection with any Federal Proceeding;

(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 a false statement or declaration (18 U.S.C. §§ 1001, 1623), obstruction of justice (18 U.S.C. §§ 1503 *et seq.*), or conspiracy to commit such offenses;

(d) otherwise voluntarily providing the United States with any material or information not requested in (a) - (c) of this paragraph and not protected under the attorney-client privilege or work-product doctrine that he may have that is related to any Federal Proceeding;

(e) when called upon to do so by the United States in connection with any Federal Proceeding, participating in affirmative investigative techniques, including but not limited to making telephone calls, recording conversations, and introducing law enforcement officials to other individuals, with all such activity being conducted only at the express direction and under the supervision of attorneys and agents of the United States;

(f) 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 fully, truthfully, and under oath, subject to the penalties of perjury (18 U.S.C. § 1621), making a false statement or declaration in grand jury or court proceedings (18 U.S.C. § 1623), obstruction of justice (18 U.S.C. §§ 1503 *et seq.*), and contempt (18 U.S.C. §§ 401-402); and

(g) not committing, participating in, or attempting to commit or participate in any additional crimes.

GOVERNMENT'S AGREEMENT

20. Subject to the full, truthful, and continuing cooperation of the defendant, as defined in Paragraph 19 of this Plea Agreement, and upon the Court's acceptance of the guilty plea called for by this Plea Agreement and the imposition of a sentence, the United States agrees that it will not prosecute the defendant further for any other offense now known to the United States arising out of this Federal Proceeding or related to the charges brought in the Information in this case. The non-prosecution terms of this paragraph do not apply to (a) any acts of perjury or subornation of perjury (18 U.S.C. §§ 1621-22), making a false statement or declaration (18 U.S.C. §§ 1001, 1623), obstruction of justice (18 U.S.C. §§ 1503 *et seq.*), contempt (18 U.S.C. §§ 401-402), or conspiracy to commit such offenses; (b) civil matters of any kind; (c) any violation of the federal tax or securities laws or conspiracy to commit such offenses; or (d) any crime of violence.

21. The government agrees to recommend at the time of sentencing that the defendant's sentence of imprisonment be reduced if he provides substantial assistance to the government, pursuant to U.S.S.G. §5K1.1. The defendant understands that he must comply with Paragraph

19. The defendant understands that it is within the sole and exclusive discretion of the United States to determine whether the defendant has provided substantial assistance.

23. The defendant understands that the government may recommend a reduction in his sentence or no reduction at all, depending upon the level of assistance the government determines that the defendant has provided.

24. The government agrees to recommend a two-level reduction (if the offense level is less than 16) or a three-level reduction (if the offense level reaches 16) in the computation of defendant's offense level if the defendant clearly demonstrates acceptance of responsibility for his conduct as defined in U.S.S.G. § 3E1.1. This includes the defendant meeting with and assisting the probation officer in the preparation of the pre-sentence report, being truthful and candid with the probation officer, and not otherwise engaging in conduct that constitutes obstruction of justice within the meaning of U.S.S.G § 3C1.1, either in the preparation of the pre-sentence report or during the sentencing proceeding.

25. The defendant further understands that a motion pursuant to U.S.S.G. §5K1.1 is only a recommendation and is not binding on the Court, that this plea agreement confers no right upon the defendant to require that the government make a §5K1.1 motion, and that this plea agreement confers no remedy upon the defendant in the event that the government declines to make a §5K1.1 motion.

26. The defendant understands that, upon sentencing, the Antitrust Division will report his conviction to the Department of Justice's Bureau of Justice Assistance pursuant to 10 U.S.C. § 2408 for inclusion in the Defense Procurement Fraud Debarment Clearinghouse database and the System for Award Management. The defendant understands that 10 U.S.C. § 2408 provides for a mandatory term of debarment of at least five years, which term may only be waived if the

Secretary of Defense determines a waiver is in the interests of national security. The defendant understands that he may be subject to additional suspension or debarment actions by state or federal agencies other than the Antitrust Division, based upon the conviction resulting from this Plea Agreement and upon grounds other than 10 U.S.C. § 2408, and that this Plea Agreement in no way controls what additional action, if any, other agencies may take. However, the Antitrust Division agrees that, if requested, it will advise the appropriate officials of any governmental agency considering such additional action of the fact, manner, and extent of the cooperation of the defendant as a matter for that agency to consider before determining what action, if any, to take. The defendant nevertheless affirms that he wants to plead guilty regardless of the suspension or debarment consequences of his plea.

REPRESENTATION BY COUNSEL

27. 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

28. 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

29. 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, truthful, and continuing cooperation, as defined in Paragraph 19 of this Plea Agreement, or has otherwise violated any provision of this Plea Agreement, the United States will notify counsel for the defendant in writing by personal or overnight delivery, email, or facsimile transmission and may also notify 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 may 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 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 any Relevant Offense, the statute of limitations period for such offense will be tolled for the period between the date of signature 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.

30. 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 because of the defendant's violation of this 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 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

31. This Plea Agreement constitutes the entire agreement between the United States and the defendant concerning the disposition of the criminal charge in this case. This Plea Agreement cannot be modified except in writing, signed by the United States and the defendant.

32. 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.

33. A facsimile or PDF signature will 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: 9/19/22

Respectfully submitted,


BY: 
BENJAMIN W. MCCULLOCH

Defendant

BY: 
STEVEN HANSEN

BY: 
HAROLD MALKIN
KENDALL COWLES

Counsel for Defendant

BY: 
ANNE J. VELDHUIS
NOLAN J. MAYTHER
Trial Attorneys
U.S. Department of Justice
Antitrust Division
450 Golden Gate. Ave. Rm. 10-0101
San Francisco, CA 94102