

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

MICHAEL ANGELO PADRON,

Defendant.

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SA-21-CR-00124-XR

ORDER

On this day came on to be considered various objections to the Presentence Report in this case.

The Defendant was found guilty by a jury of conspiracy to defraud the United States and wire fraud. In sum, Blackhawk Ventures LLC was awarded various set-aside government contracts which were meant for service-disabled veteran-owned small businesses. The jury found that the Defendant, who is neither a veteran, much less service-disabled, was controlling Blackhawk and so he engaged in a conspiracy to defraud the United States. The wire fraud counts stemmed from amounts Blackhawk improperly billed.

The Defendant has raised several objections to various portions of the Presentence Report, arguing that they either do not reflect accurately the evidence at trial, or that they substantively disagree. “For any disputed portion of the presentence report or other controverted matter”, the court must “rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing.” Fed. R. Crim. P. 32(i)(3)(B). For purposes of the guideline computations, the Court will only rely on

the trial record, and accordingly, a ruling on the myriad number of objections to the PSR is unnecessary.

The major objection lodged by the Defendant is to how the fraudulent loss was calculated. The Presentence Report calculates the monetary loss at \$6,299,766. The Defendant argues that the loss amount is zero, or in the alternative, that Blackhawk's operating costs, income taxes, and the civil settlement with the bonding company should be calculated as offsets.

Loss is generally calculated pursuant to *United States v. Harris*, 821 F.3d 589 (5th Cir. 2016). In *Harris*, the Court said that loss should be the “difference between the contract price and the fair market value of services rendered” to “reflect[] the contracting agencies' losses under their respective contracts—the difference between what they paid and what they received.” *Id.* at 606.

But by defrauding the government to obtain the contract, the Defendant prevented the government from awarding the contract to a legitimate service-disabled veteran-owned small business, and therefore, deprived those legitimate entities of the ability to obtain the contract at issue. See *United States v. Blanchet*, 518 F. App'x 932, 957 (11th Cir. 2013); see also *United States v. Bin Wen*, No. 6:17-CR-06173 EAW, 2018 WL 6715828, at *11 (W.D.N.Y. Dec. 21, 2018) (citing various cases).

That said, the Fifth Circuit has stated that “[t]he mere fact that a government contract furthers some public policy objective apart from the government's procurement needs is not enough to transform the contract into a ‘government benefit’ akin to a grant or an entitlement program payment.” *Harris*, 821 F.3d at 604. Accordingly, this Court is bound to apply the calculation announced in *Harris*. There is no evidence in the record to establish that the Government did not receive the buildings and facilities it contracted for. There likewise was no evidence presented that valid service-disabled veterans who have presented bids that had lower

profit margins than the bid presented by Blackhawk. Accordingly, the objection to paragraph 26 is sustained and the +18 enhancement becomes 0. The gross profit calculation of \$6.3 million is only to be used when loss cannot be reasonably determined.

The Defendant objects to the +2 enhancement he received in paragraph 27 of the PSR. This enhancement was given because the offense involved the use of sophisticated means to accomplish the offense. The trial testimony and record demonstrated that the Defendant found real service-disabled individuals which he gave the title of Blackhawk President to. Defendant, however, controlled the major decisions of the corporation behind the scenes to avoid Small Business Administration detection and “papered” the corporate records to convince the SBA that control was vested in a qualified person. The enhancement was properly made, and the objection is overruled.

In addition, the Defendant objects to the +4 enhancement he received in paragraph 29 of the PSR for his role as an organizer or leader in this offense. The Defendant again merely restates testimony that the jury rejected that his co-defendants duped him. The trial testimony, however, reflected that the Defendant was the organizer and leader in this conspiracy controlling the major decisions of Blackhawk during the relevant timeframes of this conspiracy. This objection is therefore overruled.

Finally, Defendant objects to the \$6,299,766 restitution amount recommended in the PSR, relying on the arguments addressed above. Restitution is determined by 18 U.S.C. § 3663A. Yet, the Fifth Circuit has again taken a position that, at least in the health care fraud setting, a victim’s “actual loss for restitution purposes must not include any amount that the insurer would have paid had the defendant not committed the fraud.” *United States v. Sharma*, 703 F.3d 318, 324 (5th Cir. 2012). In government set-aside contract cases, other jurisdictions have awarded restitution in an

amount equal to the profits the defendant made. *See United States v. Aldissi*, 758 F. App'x 694, 714 (11th Cir. 2018) (rejecting arguments “that the restitution amount is miscalculated because the agencies received the benefit of their bargain and that to further impose restitution would essentially result in a windfall to the agencies”).

It appears incorrect to allow a defendant to defraud the United States, misrepresent that he has a right to participate in government contracts that are meant to help service-disabled veterans, and still allow the defendant to keep the profits he made from the scheme. But this apparently is what the Fifth Circuit mandates, and this Court is not allowed to circumvent their decisions. The Defendant’s objection to the restitution amount is therefore sustained.

It is so **ORDERED**.

SIGNED January 18, 2023.



XAVIER RODRIGUEZ
UNITED STATES DISTRICT JUDGE