

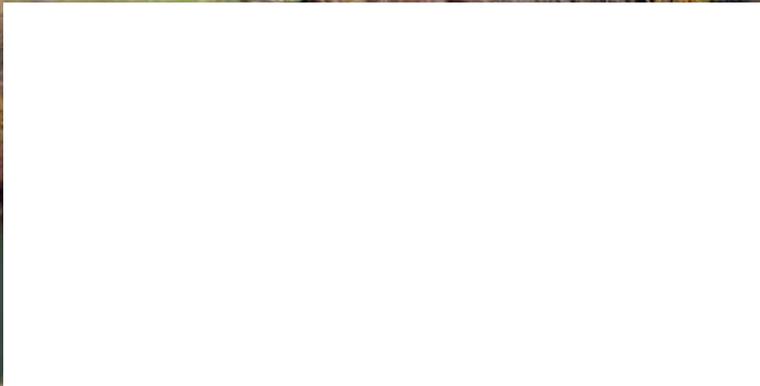
Breaking Ground

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THE BIG PICTURE: *What Comes Next?*

**The Shell
Cracker Site**



LEGAL PERSPECTIVE

A Cautionary Tale: No Leniency in DBE Fraud Sentencing

BY MAUREEN SWEENEY, ESQ.

On November 30, 2016, the Third Circuit Court of Appeals affirmed the 84 month and 41 month prison term sentences against Joseph Nagle, age 55, and Ernest Fink, age 71, two Pennsylvania businessmen who had previously been convicted in what prosecutors called “the largest reported DBE fraud in the nation’s history.”

The scheme, as portrayed by federal prosecutors, evolved between Marikina Engineers and Construction Corp., a Pennsylvania certified Disadvantaged Business Enterprise contractor, and Schuylkill Products, Inc., which manufactured concrete beams, from 1993 through 2008. Fink and Nagle were the owners of Schuylkill Products, the concrete manufacturer, which in turn had a construction contractor subsidiary known as CDS Engineers, Inc. Marikina had been certified as a “DBE” in Pennsylvania and other states due to its ownership by a Romeo Cruz, who was of Filipino descent.

Federal regulations require states that receive federal transportation funds to set annual “goals” for participation in transportation construction projects by disadvantaged business enterprises, or DBEs. 49 C.F.R. § 26.21. A DBE is a for-profit small business that is at least 51% owned by an individual or individuals who are both “socially and economically disadvantaged,” and whose management and daily operations are actually controlled by one or more of the disadvantaged individuals who own it. § 26.5. Government agencies will announce a DBE-participation “goal” when soliciting bids for a contract, and all bids must show how the contractor will meet the goal. If the prime contractor is not a DBE, then the contractor must show that certain subcontractors that will work on a contract are DBEs to demonstrate its efforts in meeting the “goal.” A business must be certified as a DBE before it or a prime contractor can rely on its DBE status in bidding for a contract. § 26.81(c).

Critically, in order for it to count towards a contract’s DBE participation goal, a DBE must “perform[] a commercially useful function on [the] contract.” § 26.55(c). Therefore, a certified DBE whose “role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation,” cannot be counted towards DBE participation. § 26.55(c)(2).

Here, the parties had concocted a scheme in which Marikina, as the DBE entity, would bid as a subcontractor for various PennDOT and other government transportation contracts with DBE participation requirements; if selected, Marikina

would in turn subcontract all of the work to Schuylkill and its subsidiary CDS Engineers. Marikina was paid a fixed fee by Schuylkill and the subsidiary, which in turn pocketed all of the profits from the contracts. The scheme, over the course of 15 years, involved over 336 contracts totaling close to \$136 million.

Upon close examination, the scheme could not be more blatant, with Marikina literally serving only as a “front” or “pass through” for these companies: Schuylkill identified which subcontracts for Marikina to bid, prepared the bid paperwork, and then submitted the information to prime contractors in Marikina’s name. Schuylkill employees used stationery and email addresses bearing Marikina’s name for such communications, and also used Marikina’s log-in information to access PennDOT’s electronic contract management system. Then, CDS employees who performed construction work onsite used vehicles which had magnetic placards of Marikina’s logo covering Schuylkill’s and CDS’s logos. Schuylkill and CDS employees used Marikina business cards and separate cell phones to disguise whom they worked for. They also used a stamp of Cruz’s signature to endorse checks from the prime contractors for deposit into Schuylkill’s bank accounts. Although Marikina’s payroll account paid CDS’s employees, CDS reimbursed Marikina for the labor costs.

Charged with various federal crimes, Fink pled guilty to a count of conspiracy to defraud the federal government in 2010. Nagle was later convicted after a trial on conspiracy, fraud, mail fraud, wire fraud, and money laundering charges in 2012. (Cruz, Marikina’s owner, and several other Schuylkill/CDS executives were indicted separately, pled guilty and agreed to cooperate against Nagle and Fink.)

In sentencing, the District Court had to consider evidence of the amount of loss which the Defendants were responsible for, as part of the calculation to determine the appropriate Sentencing Guidelines range. Here, it concluded Nagle was responsible for a loss of \$54 million, and Fink for approximately \$135 million, and sentenced them to 84 months and 51 months respectively.

During an initial appeal, the Third Circuit had ruled the lower court erred, and the appropriate measure of loss was the face value of the fraudulently procured contracts, minus the fair market value of the goods and services provided, and expenses incurred, under the contracts. In essence, this allowed for a “credit” of the fair market value of the services actually rendered against the face value of the contracts. The initial sentences were vacated, and the matter was remanded

for resentencing.

On remand, the District Court held Nagle and Fink responsible for \$850,931 and \$1,037,828, respectively, which were the net profits earned from the fraudulent contracts; however Fink was resentenced to 41 months imprisonment.

The Third Circuit affirmed this decision on the second appeal, noting that the profits received by the Defendants should not be part of any "credit" for services or benefits provided.

The Third Circuit also rejected Fink's attempt to seek leniency in sentencing due to his age. The lower court had likewise rejected this argument, noting it was reluctant "to give a sentence that would encourage elderly people to commit crimes and then get the benefit of their age as an excuse."

The Third Circuit agreed: "To the extent Fink argues that his sentence is substantively unreasonable based on his age and the nonviolent nature of the offense, we agree with the government that a 41-month sentence for a 70 year old first time offender who, for at least 15 years, presided over the largest reported DBE fraud in the history of the U.S. Department of Transportation is not unreasonable." 

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