

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

Case No. 06-CR-20 (RTR)

GEORGIA THOMPSON,

Defendant.

**DEFENDANT'S SECOND MEMORANDUM
IN SUPPORT OF MOTION TO DISMISS**

I.

INTRODUCTION

On January 24, 2006, the government filed a two count indictment against Georgia Thompson alleging that she unlawfully influenced the award of a State contract to Adelman Travel Group for "political considerations," for "political advantage for her supervisors" and to "help her job security." No one – Georgia Thompson included – obtained any benefit or anything of value from the alleged conduct. If there is any benefit to speak of, resulting from the award of the contract to Adelman Travel Group, it is that the citizens of the State of Wisconsin saved money because the vendor submitted a less costly proposal in order to be awarded the contract.

Georgia Thompson's conduct with respect to the award of the contract to Adelman Travel Group was, in all regards, lawful; her actions saved the State money and the procurement process followed the terms of the Request for Proposals, all applicable state laws and regulations. Neither the process nor Georgia Thompson's conduct support the instant criminal charges. Dismissal of the Indictment is required.

II.

THE INDICTMENT

Georgia Thompson is a Wisconsin state employee. Indictment, ¶ 1. Between about February 28 and March 18, 2005, she and others composed a committee that evaluated proposals from travel agencies. Indictment, ¶ 3. In considering travel bids, the evaluation committee had to use certain criteria and a scoring system imposed by state law. Indictment, ¶ 10. Using "political considerations," Thompson inflated her scores for Adelman Travel Group (ATG) during the oral presentation phase of the bidding process (Indictment, ¶ 13(a)), told other committee members that she inflated her scores for another bidder as a negotiating tool in favor of ATG in her dealings with other committee members (Indictment, ¶ 13(b)), prevented a unanimous vote by the committee to award a contract to a bidder other than ATG (Indictment, ¶ 13(c)), and suggested that

other committee members change their scores (Indictment, ¶ 13(d)).

Her actions meant that the committee used “an additional evaluation step,” which the Indictment describes as a “best and final offer” procedure, following Wisconsin statute. Indictment, ¶ 14; *see also* Indictment, Count Two, ¶ 5 (describing the “best and final” offer request). The best and final offer “resulted” in the state awarding a travel contract to ATG. Indictment, ¶ 14. The state’s obligation under that contract exceeded \$5,000. Indictment, ¶ 15.

Thompson intended these actions “to cause political advantage for her supervisors.” Indictment, Count Two, ¶ 3. She also intended her actions to “help her job security.” Indictment, Count Two, ¶ 4.

III.

APPLICABLE LAWS AND REGULATIONS

The Indictment charges Thompson with one count of mail fraud in violation of 18 U.S. Code §§ 1341, 1346 and 2, and one count of intentionally causing the misapplications of funds under the care, custody and control of the State of Wisconsin in violation of 18 U.S. Code §§ 666(a)(1)(a), and 2.

A. Mail Fraud

The federal mail fraud statute provides, in relevant part:

whoever, having devised or intending to devise and scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses...places in any post

office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the postal service...shall be fined under this title and imprisoned to not more than 20 years, or both.

18 U.S.C. § 1341

Pursuant to 18 U.S. Code § 1346, a “scheme or artifice to defraud” under the mail and wire fraud statutes “includes a scheme or artifice to deprive another of the intangible right of honest services.” The mail fraud charge is based on the honest services theory codified in § 1346.

The essential elements of an offense under the honest services theory of mail fraud are that the defendant:

- (1) knowingly devised or participated in a scheme to defraud;
- (2) did so knowingly and with intent to defraud; and
- (3) for the purpose of carrying out the scheme or attempting to do so, the defendant used or caused the use of a private or commercial interstate carrier.

PATTERN CRIMINAL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT at 214 (1998). For purposes of this motion, the third element is not in issue.

B. Misapplication of Funds

In relevant part, the offense of intentionally misapplying property of another provides:

Whoever, being an agent of State government, or any agency thereof intentionally misapplies, property that is valued at

\$5,000 or more, and is owned by, or is under the care, custody, or control of such organization, government, or agency.

The essential elements of the offense require the government to prove that the defendant:

- (1) was an agent of a state;
- (2) intentionally misapplied some money or property;
- (3) the money or property was owned by, or under the care, custody or control of the state;
- (4) the money or property had a value of \$5,000 or more; and
- (5) the state, in a one year period, received benefits of more than \$10,000 under any Federal program involving a grant, contract subsidy, loan, guarantee, insurance or other assistance.

PATTERN CRIMINAL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT at 178 (1998). For purposes of this motion ,the first, third and fifth elements are not in issue.

C. Statutes & Administrative Code Relating to Procurement

To better understand the allegations one must examine the statutory and regulatory bases for the award of the state contract.

Procurement by the State of Wisconsin is regulated by statutes and codes which grant authority to the Department of Administration to solicit and evaluate bids. The procedure for soliciting bids and proposals with state government are set forth in WIS. STAT. Ch. 16, WIS. ADMIN. CODE, Adm Chs. 7, 8

and 10 and synthesized by the State Procurement Manual.

WIS. ADMIN CODE, Adm § 10.02 sets forth the purpose of the procurement process for the purchase of services.

The purposes of this chapter are as follows:

- (1) To ensure that contracts for contractual services are entered into only in *the best interests of the state*.
- (2) To ensure that the state will *procure at the lowest possible price*, without sacrifice in quality, the contractual services required for the optimum performance of state government functions.
- (3) To establish policies and procedures for the procurement of contractual services.

(Emphasis supplied.) The State Procurement Manual echoes the purpose set forth in the administrative code.

Competitive negotiations, or the request for proposal (RFP) process, is used for soliciting proposals where an award cannot be made strictly on specifications or price and several firms are qualified to furnish the product or service. However, price is always a major consideration.

STATE PROCUREMENT MANUAL, PRO-C-12.¹

The statutes mandate that price and a preference for Wisconsin companies guide the procurement decision.

Buy on low bid, exceptions

¹ The State Procurement Manual is available at <http://vendornet.state.wi.us/vendornet/procman/index.asp>.

(1) (a) 1. All orders awarded or contracts made by the department for all materials, supplies, equipment, and contractual services to be provided to any agency, [...] *shall be awarded to the lowest responsible bidder*, taking into consideration life cycle cost estimates under sub. (1m), when appropriate, the location of the agency, the quantities of the articles to be supplied, their conformity with the specifications, and the purposes for which they are required and the date of delivery.

2. If a vendor is not a Wisconsin producer, distributor, supplier or retailer and the department determines that the state, foreign nation or subdivision thereof in which the vendor is domiciled grants a preference to vendors domiciled in that state, nation or subdivision in making governmental purchases, the department and any agency making purchases under s. 16.74 shall give a preference over that vendor to Wisconsin producers, distributors, suppliers and retailers, if any, when awarding the order or contract. The department may enter into agreements with states, foreign nations and subdivisions thereof for the purpose of implementing this subdivision.

[...]

WIS. STAT. § 16.705 (emphasis supplied).

The procedure for competitive negotiations (also known as the Request for Proposal Process) is found in WIS. ADMIN. CODE, Adm §§ 7.09 and 10.08.² Both sections emphasize that the contract should be in the best interests of the State.

WIS. ADMIN. CODE, Adm § 10.09 provides that the evaluation committee is charged with making a recommendation; the evaluation committee's

² WIS. ADMIN. CODE, Adm § 7.09 relates to the purchase of goods; § 10.08 relates to the purchase of services.

recommendation does not bind the State to any contractual obligation.

Competitive Negotiation

(1) REQUEST FOR PROPOSALS (RFP). The preparation of an RFP is mandatory. The RFP shall be written in clear, concise and measurable terms. The RFP shall:

(a) State the name and address of the contracting agency or the procuring agency, or both, and the names, addresses, titles and telephone numbers of persons to whom questions concerning the proposals should be directed;

(b) State how sealed proposals are to be delivered, the date and time by which they must be received and the name and address of the person who is to receive them;

(c) Contain the date and time of the pre-proposal conference, if any, and the period of the contract or contracts;

(d) Clearly describe the scope of the services requested and shall provide prospective contractors with performance criteria, including quantity of each service required and delivery schedules for those services;

(e) State the factors to be considered in evaluating proposals and the relative importance of each factor. Factors that may be considered when evaluating proposals include;

1. Responsiveness of the proposals. The proposal should clearly state the proposer's understanding of the work to be performed.

2. Technical experience and resources of the firm or individual submitting the proposal.

3. Experience and professional activities of the firm or individual submitting the proposal.

4. Size and structure of the firm or individual practice of the proposer.

5. Cost;

(f) State that the procuring agency reserves the right to reject for cause any and all proposals submitted and to request additional information for purposes of clarification only from proposers; and

(g) State that any award made shall be made to the firm which, based on the evaluation by the procuring agency, is best qualified.

[...]

(3) PROPOSAL EVALUATION. Proposals shall be evaluated using a predetermined method to determine which proposer best meets the needs of the procuring agency. A description of the process of evaluation should be included with the RFP. The RFP should state, whenever possible, whether oral presentations by proposers will be part of the evaluation process.

(4) EVALUATION COMMITTEE. Before an RFP is distributed to prospective contractors, the procuring agency shall establish an evaluation committee. Each committee shall consist of 3 or a larger number of members, depending on the complexity and scope of services being procured. At least one member or a person advising the committee, shall be trained in procuring contractual services. An evaluation committee shall:

(a) Review all proposals submitted in response to an RFP, using as a basis the evaluation criteria included in the RFP;

(b) Conduct all formal, scheduled oral conferences and presentations with proposers that affect the evaluation process;

(c) Keep accurate records of all meetings, conferences, oral presentations, evaluations and decisions;

(d) Not disclose to any proposer any information obtained from any other proposer;

(e) Give all proposers an equal opportunity to make a presentation, if presentations are permitted; and

(f) Issue a final report and *recommendation*.

[...]

(7) CONTRACT AWARD. *Award shall be based on the evaluation committee recommendation* unless, after review by the department of the award or of a protest by a bidder or proposer, a change in an award is approved because:

(a) Mathematical errors were made in scoring proposals;

(b) The award was recommended to a proposer who should have been disqualified as not responsive to all mandatory requirements of the RFP;

(c) Evidence of collusion or fraud involving either the proposer or an evaluation committee member is found;

(d) The evaluation committee failed to follow the evaluation criteria as set forth in the RFP; or

(e) Violations of this chapter or the statutes have occurred.

[...]

WIS. ADMIN. CODE, Adm § 10.09 (emphasis supplied).

Nothing in the relevant sections of the Administrative Code or the Procurement Manual require that the evaluating committee's decision be unanimous; nor is there a prohibition against a committee member trying to influence another member's scores. Moreover, the relevant sections of the

administrative code reveal that neither the evaluating committee, nor any individual member of it, ever decides to whom the award of a contract is made. The committee only scores. Rather, the decision to award is based on the committees scoring but it is vested in the Department of Administration and the statute leaves the Department, after review of the committee's scoring, free to reject any proposal. *See* WIS. ADMIN. CODE, Adm. §§ 7.09(5) and 10.08(7).

The applicable statutes, administrative code and procurement manual all recognize preferences for state purchases. These preferences are inherently political considerations. For example, preference, in some circumstances, is given to minority contractors, WIS. ADMIN. CODE, Adm § 6.01(2) and WIS. STAT. § 16.75(3m); to small businesses, WIS. STAT. §§ 16.701 and 16.75(4); to Veterans, WIS. STAT. § 16.75(4); to in-state contractors, WIS. ADMIN. CODE, Adm § 8.03(4); and to U.S. manufacturers, WIS. ADMIN. CODE, Adm § 7.07. All of these preferences require applicants to adopt and enforce policies that prohibit discrimination against selected groups of people.

IV.

ARGUMENT

This prosecution represents a quantum leap forward in "honest services" cases; it seeks to set a dangerous precedent that is neither founded in fact nor

law. The Indictment must be dismissed.

“Honest services” convictions of public officials typically involve serious corruption, such as embezzlement of public funds, bribery, or the failure of public decision-makers to disclose certain conflicts of interest; in short, there must be some identifiable, direct, personal gain by the public employee before a criminal charge may lie. It is not sufficient for the instant criminal charges that the public official violated her fiduciary duty to the public. The Indictment is deficient because it alleges wrongdoing by a public official, but it must do more than that: the Indictment 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.” *United States v. Sawyer*, 85 F.3d 31 (1st Cir. 2001). Such a result the Indictment cannot demonstrate.

No case exists where a public employee has been criminally charged for effecting the purpose of the procurement process (*i.e.*, to save the public money by awarding the public contract to the lowest, responsible bidder – a political

consideration) at the same time that she has *not* obtained any personal gain as a result of the award of the contract (and that she has not obtained anything of value in this case is not in dispute). Such a case is unheard of, but it is the latter and not the former that is the basis of the charges in this case.

If applied in the manner the government proposes, the statute is unconstitutional because it deprives Georgia Thompson – and any other state employee – of fair warning that their participation in the procurement process could expose them to criminal liability.

A. Legal Standards

The Federal Rules of Criminal Procedure permit a defendant to “raise by pretrial motion any defenses, objection, or request that the court can determine without a trial of the general issues.” *United States v. Segal*, 299 F. Supp. 2d 840, 844 (N.D. Ill. 2004) (quoting FED. R. CRIM. P. 12(b)(2)); *see also United States v. Labs of Virginia, Inc.*, 272 F. Supp. 2d 764, 768 (N.D. Ill. 2003). A defendant may challenge the sufficiency of an indictment on pretrial motion. “In order to be valid an indictment must allege that the defendant performed acts which, if proven, constituted a violation of the law that he or she is charged with violating.” *United States v. Gimbel*, 830 F.2d 621, 624 (7th Cir. 1987); *see also United States v. Risk*, 843 F.2d 1059, 1061 (7th Cir. 1988). This court may dismiss an

indictment “if the government’s inability to prove sufficient evidence so convincingly appears on the face of the indictment that as a matter of law there need be no necessity for such delay.” *Segal*, 299 F. Supp. 2d 84 (quoting *United States v. Castor*, 558 F.2d 379, 384 (7th Cir. 1977)). Further, “pretrial motions are not limited to challenging the technical sufficiency of the indictment.” *United States v. Myr Group, Inc.*, 274 F. Supp. 2d 945, 947 (N.D. Ill. 2003) (dismissing indictment against parent corporation.) “Regardless of the sufficiency of indictment in setting out the elements of a statutory violation, if the government’s own facts establish that there is no violation, the indictment may be dismissed.” *Id.*

B. The Indictment Fails to Allege A Criminal Offense

The Seventh Circuit has noted the long-expressed concern “that the failure of the mail fraud statute to define ‘fraud’ invites prosecutorial overreaching.” *United States v. Martin*, 195 F. 3d 961, 965 (7th Cir. 1999). No more clear example that overreaching can be found than in the “honest services theory” advanced in this case.

There is no support for the concept that by bringing “political considerations” (whatever those might be) into play during the evaluation process before the award of a state contract, a public employee deprives the State

of that official's "honest services" within the meaning of 18 U.S. Code § 1346. Indeed, the facts suggest otherwise, and the law points in the other direction.

For example, the Second Circuit has stated that "[t]here is no reason to think that Congress sought to grant *carte blanche* to federal prosecutors, judges and juries to define 'honest services' from case to case for themselves." *United States v. Rybicki*, 354 F. 3d 124, 138 (2nd Cir. 2003)(en banc).³ Nor is there support for the concept of using "honest services" as a way to challenge the award of government contracts; that is, where the procedures set forth by the state are followed the public is not deprived of the public official's honest services. *See, e.g., United States v. Genova*, 333 F.3d 750, 757-58 (7th Cir. 2003); *see also United States v. Bloom*, 149 F.3d 649, 655 (7th Cir. 1998). In *Bloom*, the Seventh Circuit expressly held that "misuse of office (more broadly, misuse of position) for *private gain* is the line that separates run of the mill violations of state-law

³ Discussing the "honest services" doctrine cases prior to the Supreme Court's decision in *McNally v. United States*, 483 U.S. 350 (1987) and the codification of § 1346, the court in *Rybicki* noted that there existed four general categories of defendants under this doctrine: (1) government officials who defraud the public of their own honest services; (2) elected officials and campaign workers who falsify votes and thereby defraud the electorate of the right to an honest election; (3) private actors who abuse fiduciary duties by, for example, taking bribes; and (4) private actors who defraud others of certain intangible rights, such as privacy. *Rybicki*, 354 F.3d 124,133 (2nd Cir 2003)(en banc). The decisions after § 1346 indicate that these four categories continue to exist today. Cases interpreting the first category all relate to defendants who obtained personal financial benefit or advantage as a direct result of the scheme.

fiduciary duty ... from federal crime.” *Id.* (emphasis supplied). *See also United States v. DeVegter*, 198 F.3d 1324, 1328 (11th Cir. 1999)(“illicit *personal gain* by a government official deprives the public of its intangible right to the honest services of the official.”)(emphasis supplied); *United States v. Frost*, 125 F. 3d 346, 365 (6th Cir. 1997)(“the ‘intangible rights’ theory is anchored upon the defendant’s misuse of his public office for *personal profit*”)(emphasis supplied); *United States v. Sawyer*, 85 F. 3d 713, 725 (1st Cir. 1996)(“cases in which deprivation of an official’s honest services is found typically involved bribery of the official or her failure to disclose a conflict of interest, resulting in *personal gain*”)(emphasis supplied).

Absent life-time tenure, such as is provided in Article III of the United States Constitution, every working person is concerned about job security. The Indictment’s inclusion of an allegation that Georgia Thompson’s conduct was guided by a need to “help her job security” (Indictment, Count Two, ¶ 4) does not provide sufficient facts necessary to demonstrate the requisite intent. Motive, perhaps, but it does not demonstrate a criminal intent (to defraud). In conflating motive and intent, with respect to the job security, the government fails to realize that by doing one’s job well, the job is made more secure; and this is not inimical

to the purpose of the statute.⁴ Indeed, where, as here, Georgia Thompson is employed in the civil service (*i.e.*, she is not a political appointee and thus may not be terminated at-will), her job security is not an issue.

Underlying the applicability of §§ 1341 and 1346 to government officials is the notion that “a public official acts as ‘trustee for the citizens and the State ... and thus owes the normal fiduciary duties of a trustee, *e.g.*, honesty and loyalty’ to them.” *United States v. Silvano*, 812 F.2d 754, 759 (1st Cir. 1987) (quoting *United States v. Mandel*, 591 F.2d 1347, 1363 (4th Cir. 1979)); *see also United States v. Sawyer*, 239 F.3d 31, 40 (1st Cir. 2001). Theft of honest services occurs when a public official strays from this duty: When a government officer decides how to proceed in an official endeavor – as when a legislator decides how to vote on an issue – his constituents have a right to have their best interests form the basis of that decision. If the official instead secretly makes his decision based on his own personal interests – as when an official accepts a bribe or personally benefits from an undisclosed conflict of interest – the official has defrauded the public of his honest services. *United States v. Lopez-Lukis*, 102 F.3d 1164, 1169 (11th Cir. 1997). “The cases in which a deprivation of an official’s honest services is found

⁴ If the government’s theory were indeed correct, we would have grave cause for concern, for any (every) act done in the course of employment which could be interpreted to benefit one’s own professional standing or a superior’s standing (and thus job security) could give rise to mail fraud charges.

typically involve either bribery of the official or her failure to disclose a conflict of interest, resulting in personal gain." *Sawyer*, 85 F.3d at 724. These cases do not involve a public employee breaching her fiduciary duty without further evidence that she – or someone with whom she was associated – obtained some unlawful benefit from that breach. *See, e.g., United States v. Hausman*, 345 F. 3d 952 (7th Cir. 2003); *United States v. Genova*, 333 F3d 750 (7th Cir. 2003); and *United States v. Czubinski*, 106 F.3d 1069 (1st Cir. 1997). Here, there is no allegation of any tangible gain resulting from the conduct, neither to her, nor to her supervisor. Rather, the only allegation is the gain of an intangible which results from a job well done.

Closer examination of the elements and the allegations reveals that the Indictment fails to allege a criminal offense.

1. No Misapplication Occurred: Alleged Use of "Political Considerations" Was Not Improper and Does Not Lead to Misapplication of Funds.

First, Georgia Thompson could not have misapplied any money or property as the evaluation committee, of which she was one of seven members, had no authority to award a contract. Nor does the Indictment allege that the committee awarded the contract. At no point did the evaluation committee's recommendation assure Adelman Travel Group of anything.

Second, no misapplication occurs when a preference is given to the lowest

bidder, based on the results of a subjective evaluation process which is statutorily required to employ a “best and final offer.” Misapplication occurs when a public employee either obtains illicit personal gain, misuses her public office,⁵ receives a bribe or fails to disclose a conflict of interest. None of these scenarios are present in this case.

Third, contrary to the Indictment’s assertion, the use of “political considerations” by members of the evaluation committee is not improper and, indeed, some “political considerations” must be taken into consideration during the subjective evaluation process. The law does not recognize a breach of any known duty when weighing “political considerations” and suggests that, because of concerns over federalism, courts ought not inquire into political considerations in cases such as this.

The use of “political considerations” in government contracting is neither unheard of nor is it *per se* unlawful; indeed, governments are permitted to apply political criteria in awarding public contracts. *See LaFalce v. Houston*, 712 F.2d 292 (7th Cir. 1983)(“ A practical consideration reinforcing our caution is that a decision upholding a First Amendment right to have one’s bid considered without regard to political consideration would invite every disappointed bidder for a public

⁵ Georgia Thompson’s actions, as alleged, do not comprise “misconduct” under Wisconsin law. *See* WIS. STAT. § 946.12.

contract to bring a federal suit against the government purchaser.”)

Cases examining whether the application of “political consideration” in public employment is proper are legion and usually define the phrase in terms of political affiliation, belief or patronage (none of which are at issue in this case). *See, e.g., Branti v. Finkel*, 445 U.S. 507 (1980). The term is also frequently used in cases examining the legality of Congressional reapportionment. Under which ever use one examines the term “political considerations,” courts uniformly avoid determining whether using such considerations are lawful, for to do so would require “intruding on the political affairs of the States and other branches of federal government.” *Rutan v. Republican Party of Illinois*, 868 F.2d 943, 954 (7th Cir), reversed in part on other grounds, 497 U.S. 62 (1990).⁶

In its *Rutan* decision, the Seventh Circuit commented that

Political issues and beliefs do not come in neat packages wrapped “Democratic” and “Republican.” A wide variety of issues, interests, factions, parties, and personalities shape political debate. Moreover, it is questionable whether “politics” could be meaningfully separated from other considerations such as friendships, compatibility, and the enthusiasm to pursue the stated job goals. The Supreme

⁶ The doctrine of judicial restraint in deciding the constitutionality of statutes imposes a duty on the Court to avoid a constitutional issue, if possible. *United States v. Rumely*, 345 U.S. 41 (1953); *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 348 (1936)(“[w]hen the validity of [a statute] is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that [the Supreme Court] will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.”).

Court has shown great reluctance to have the federal courts preside as a platonic guardian over state employment systems. By asking that we review virtually every significant employment decision for absolute political neutrality, plaintiffs essentially ask that we constitutionalize civil service and then preside over the system. This would be an unprecedented intrusion into the political affairs of the states and other branches of federal government. In the absence of a clear indication from the Supreme Court, we will not take such a large step.

Id. (internal citations omitted).

Similarly, as it relates to “political considerations” arising from Congressional reapportionment, the Supreme Court has noted that

It would be idle, we think, to contend that any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it. Banning political considerations from all public service employment decisions, even if practical, would diminish the political will of the voters, insert courts into disputes between political factions, and stifle the ability of elected officials to govern. These public policy questions, rife with serious concerns over federalism and – in the case of federal employment – separation of powers, are best left in the political arena.

Gaffney v. Cummings, 412 U.S. 735, 752-753 (1973). Consequently, the alleged use of “political considerations” was not unlawful and did not result in the alleged misapplication of funds.

2. No Scheme to Defraud of Honest Services.

The Indictment alleges no offer, solicitation or bribe; nor does it allege that the Georgia Thompson knew of an improper offer, solicitation or bribe. She had

no legal duty to agree with other committee members; nor does the law require unanimity of decision. Georgia Thompson had no duty to refrain from persuading other committee members to her point of view, or even to change their scores; indeed, the law contemplates discussion among committee members and does not prohibit attempts to persuade others to one's point of view. Again, Georgia Thompson had no duty to disregard "political consideration;" but rather, had an affirmative duty to consider whatever effect a Wisconsin based company could have on the rating criteria. WIS. ADMIN. CODE, Adm § 8.03(4).

Moreover, motive to gain "political advantage" (again, undefined by the Indictment) for her supervisors and to "help her own job security" do not demonstrate intent and are not inimical to the purpose of the procurement process so long as there was no unlawful gain and the evaluator's decision resulted in the taxpayers saving money.

3. No Material False Statement.

The Indictment alleges that Georgia Thompson inflated her scores and, thus, impermissibly, affected the evaluation process. Under applicable law (and policy), scoring is subjective and left to the discretion of each evaluator.⁷ See

⁷ Because the evaluation process is inherently subjective, the rules provide for no less than three members of the committee, of which one must have procurement experience. WIS. ADMIN. CODE, Adm § 10.09(4).

generally, WIS. ADMIN. CODE, Adm § 10.09(4). There was, therefore, nothing to “inflate ” and thus no material false statement resulted.

The cornerstone of any scheme to defraud is a material misstatement or omission. *See, e.g., Neder v. United States*, 527 U.S. 1, 25 (1999) (“We hold that materiality of falsehood is an element of the federal mail fraud, wire fraud and bank fraud statutes.”) There is no case in the long history of intangible rights prosecutions which holds that a public servant’s dissent from an evaluation committee’s non-binding recommendation, without misuse of one’s position for private gain, is an intangible rights fraud. *See United States v. Bloom*, 149 F. 3d 655, 656 (7th Cir. 1998). Indeed, in this regard, the Seventh Circuit has repeatedly expressed “doubts as to the applicability of these “intangible-rights theory” provisions of the mail and wire fraud statutes to cases of breach of fiduciary duty with nothing more.” *United States v. Hausmann*, 345 F. 3d 952, 956 (7th Cir. 2003)(holding that a kickback arrangement in which both defendants were directly involved satisfied the statute).

In this regard, the Indictment’s omissions are telling. The omissions underscore the lack of facts alleging a material false statement; from the omissions one may infer (and thus conclude) that

- there was no solicitation of a bribe or other improper financial inducement;

- there was no pecuniary loss to anyone;
- there was no actual or intended pecuniary gain to anyone, other than for *bona fide* contractual performance;
- the “best and final offer” resulted in a savings to Wisconsin taxpayers, compared to the situation if an award to any bidder had been made before the best and final offers;
- the evaluation committee’s use of a “best and final offer” was provided for by application of Wisconsin statute (WIS. STAT. § 16.75(2m)(g)); and
- contrary to the indictment, applicable statutes and code sections, the evaluation committee need not have reached a unanimous decision.

Moreover, the applicable statutes and code sections make clear that the evaluation committee cannot award a contract; the state Department of Administration, or a properly delegated agent or agency, must do that. WIS. STAT. § 16.71(1). The Department of Administration retains the authority to reject an evaluating committee’s recommendation, or to reject all proposals. WIS. ADMIN. CODE, Adm §§ 7.09(5) and 10.08(7)

In light of all of these omissions, there can be no argument that the Indictment sets forth a basis to believe that Georgia Thompson made any material misstatement or omission on her part, resulting in the State of Wisconsin being deprived of her honest services.

4. No Intent to Defraud.

The Indictment alleges no reason for Georgia Thompson to know or suspect, nor does it state facts from which to infer she knew or suspected, that preferring the lowest proposal was fraudulent or deprived anyone of a state employee's honest services, when she did not unlawfully benefit personally from the subsequent award of the contract to ATG. See *United States v. Genova*, 333 F3d 750, 759 (7th Cir. 2003) ("A bureaucrat who tells sanitation and snow removal employees to ensure that the mayor's neighborhood is cleaned up early and often may or may not have committed a political sin, but he has not committed the crime of bribery; no more so when he diverts employees' time to more overtly political endeavors."); *United States v. Czubinski*, 106 F.3d 1069, 1077 (1st Cir. 1997) ("Third, and most importantly, [we hold] 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.'") (internal citations omitted).

Further, as will be explained below, Georgia Thompson had no notice to know or suspect that preferring either a Wisconsin company or the lowest proposal was fraudulent or deprived anyone of a state employee's honest services.

C. 18 U.S. Code § 1346 is Unconstitutional As Applied

If the court finds that this Indictment does, in fact, state fraud and bribery claims against Georgia Thompson, then the Indictment must be dismissed as unconstitutional because Georgia Thompson did not have fair notice that her conduct could be read to constitute a crime.

Congress' failure to define "honest services" coupled with the absence of any commonly understood meaning of that term, in conjunction with the addition of "political consequences" as a basis for the offense, violates the longstanding prohibition on common law crimes. *See United States v. Bass*, 404 U.S. 336, 348 (1971)("[L]egislatures and courts should define criminal activity"). Although § 1346 has previously withstood facial constitutional challenges, *see, e.g., United States v. Sabri*, 541 U.S. 600 (2004), it has also been successfully challenged as applied. In *United States v. Handakas*, 286 F. 3d 92, 104 (2nd Cir. 2002)(aff'd in part, *United States Rybicki*, 354 F. 3d 124 (2nd Cir. 2003)(en banc), the Second Circuit stated that "if we were the first panel attempting to discern the

meaning of the phrase 'honest services' in § 1346, we would likely find that part of the statute so vague as to be unconstitutional on its face." The court held the statute unconstitutional as applied to the facts before it.⁸

Similarly, even if the statute as a whole is constitutional, the government's application of the statute to this case is unconstitutional. In order to be constitutional, a statute must give "fair and clear warning" that conduct constitutes a crime. *United States v. Lanier*, 520 U.S. 259, 271 (1997). Specifically, the Supreme Court explained that

Due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor a prior judicial decision has fairly disclosed to be within its scope ... the touchstone is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal.

Id. at 266-267.

The Second Circuit applied the standard to § 1346 in upholding the as-

⁸ In *Rybicki*, the defendants, acting through intermediaries, arranged for payments to be made to claims adjusters employed by insurance companies that had insured against injuries sustained by the defendants' clients. The payments, designed to induce the adjusters to expedite the settlement of the clients' claims, were typically computed as a percentage of the total settlement amount. Each of the insurance companies maintained a written policy that prohibited the adjusters from accepting any gifts or fees and required them to report the offer of any such gratuities. The payments were nonetheless accepted by the adjusters and, not surprisingly, not reported to their employers. Between 1991 and 1994, the defendants caused such payments to be made to adjusters in at least twenty cases that settled for an aggregate of \$3 million. The participants in the scheme took considerable steps to disguise and conceal the payments.

applied challenge in *Handakas*:

The plain meaning of ‘honest services’ in the text of § 1346 simply provides no clue to the public or the courts as to what conduct is prohibited under the statute. Judge Jolly observed in 1997 that the terms ‘intangible right’ and ‘honest services’ cannot be found in *Black’s Law Dictionary*, the United States Code or (for that matter) any federal statute other than § 1346. That observation remains accurate today.

286 F.3d 104 (internal citation omitted). “In almost all of the intangible rights cases this circuit has decided (before *McNally* or since § 1346), the defendant used his office for private gain, as by accepting a bribe in exchange for official action.” *Bloom*, 149 F.3d 655 (7th Cir. 1998). That record has not changed since *Bloom*.

18 U.S. Code § 1346 is plainly unconstitutional as applied in this case. Georgia Thompson is not alleged to have participated in or have been aware of a bribe, remuneration or other financial benefit. Rather, she is alleged to have applied “political considerations” to her recommendation.

That “political considerations” are not defined by the Indictment (and they are certainly not defined by any applicable statute or code provision), makes the issue of notice all the more clear. In the absence of a common understanding of “political considerations,” it is impossible for a public servant such as Thompson to have advance notice that her active participation in a non-binding evaluation process would subject her to criminal sanctions. The breadth of concepts which the phrase “political consideration” applies to – not to mention that courts have

found “political considerations” to be lawful – underscores the lack of notice which arises in this case.

It is no answer for the Government to argue that Georgia Thompson should have known that it was “wrong” for her to insert “political considerations” into the process for awarding a contract. “ Speculation, ‘funny’ looks, and ‘raised eyebrows’ are not sufficient to convict people for knowingly participating in a scheme to defraud.” *United States v. Bailey*, 859 F.2d 1265 (7th Cir. 1988). The Constitution requires that Georgia Thompson be given notice that her conduct was criminal, not merely unwise. The Seventh Circuit has expressly rejected the Government’s attempt to broaden criminal statutes based on this very kind of argument.

Although we understand the temptation to dilate criminal statutes so that corrupt officials get their comeuppance, people are entitled to clear notice of what the criminal law forbids, and the courts must take care not to enlarge the scope of illegality.

United States v. Genova, 333 F.3d 750, 757-58 (7th Cir. 2003).

The Indictment’s application of the “honest services” doctrine, when combined with the alleged, but undefined, “political considerations,” has denied Georgia Thompson fair and clear notice of what the law forbids.

V.

CONCLUSION

This Indictment is an unwarranted attack upon a dedicated civil servant, who vigorously participated in an evaluation process that resulted in a recommendation to award a contract to the lowest priced and responsible bidder. In all regards, Thompson's contributions to the committee's recommendation were in the best interests of the State. The Indictment represents and unprecedented (and unsupported) expansion of the "honest services" doctrine and requires the Court to dismiss the Indictment as it fails to allege a criminal offense.

Dated this 28th day of February, 2006.

Respectfully submitted,

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