UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA, Plaintiff, v. **JULIA BEATRICE KELEHER [1]**, Defendant.	**CASE NUMBER**: 19-431 (PAD)

JULIA BEATRICE KELEHER'S MOTION TO DISMISS COUNTS SIXTEEN THROUGH TWENTY-THREE OF THE SUPERSEDING INDICTMENT FOR FAIILURE TO STATE A CLAIM

Counts Sixteen through Twenty-three set forth what the Superseding Indictment calls "the Individual C Subcontracting Scheme." This purported scheme is based on allegations that Colón and Ponce, Inc. ("C&P") and BDO Puerto Rico, P.S.C. ("BDO") each had a contract with the Puerto Rico Department of Education ("DOE") and each, at different points in time, hired Individual C as an independent contractor to assist in the performance of its contract and charged DOE for Individual C's services. By cherry-picking language from the C&P contract, the Superseding Indictment alleges that the contracts C&P and BDO had with DOE each prohibited the contractor from hiring independent contractors and, therefore, the hiring of Individual C and charging DOE for Individual C's services was a breach of each contract. The Superseding Indictment then bootstraps these alleged breaches of contract by C&P and BDO into purported criminal activity by Ms. Keleher, alleging in Counts Sixteen through Twenty-three that because Ms. Keleher caused these breaches of contract, she committed wire fraud and conspiracy to commit wire fraud. A review of the plain terms of the C&P and BDO contracts, however, shows that hiring Individual C and charging DOE for Individual C's services did not violate the terms of either contract. As a

matter of law, the alleged objective of the purported criminal scheme did not even constitute a breach of contract, much less a violation of law. Accordingly, Counts Sixteen through Twenty-three must be dismissed for failure to state an offense.

I. BACKGROUND

The Superseding Indictment asserts that Ms. Keleher arranged first for C&P to hire Individual C as an independent contractor, and then for BDO to hire Individual C as an independent contractor, at $40.00 per hour. *See* Superseding Indictment (Docket No. 368 at ¶¶ 50, 53). It further alleges that both companies then submitted invoices to DOE that included services performed by Individual C. (*Id*. at ¶¶ 51, 54). The Superseding Indictment alleges that Paragraph 24 of the C&P contract precluded subcontracting and quotes from Paragraph 24 of the C&P contract:

Original Spanish language	***English translation***
"La Segunda Parte no podrá subcontratar, ceder ni traspasar los servicios objeto de este contrato. La Segunda Parte será responsable de la contratación y/o reclutamiento del personal que ofrecerá los servicios y actividades estipulados en la cláusula TERCERA de este Contrato. ..."	"The Second Party may not subcontract, give or transfer the services object of this contract. The Second Party will be responsible for the hiring and/or recruitment of the personnel that will offer the services and activities stipulated in the THIRD clause of this Contract … …"

See id. at ¶ 45.[1]

Lastly, the Superseding Indictment alleges that the hiring of Individual C and invoicing DOE for Individual C's time violated the C&P and BDO contracts because "said contracts prohibited these entities from subcontracting its services." *Id.* at ¶ 55. On this basis, Ms. Keleher is charged with seven counts of wire fraud (Counts Sixteen through Twenty-two) for causing "Colon & Ponce

[1] Paragraph 10 of the BDO contract, while not quoted in the Superseding Indictment, is similar to Paragraph 24 of the C&P contract. Paragraph 10 of the BDO contract states: "The SECOND PART [BDO] shall not subcontract the performance of the services specified in paragraph number '3' of this Agreement. The SECOND PART will be responsible for hiring the personnel that will offer the services under this Agreement. The FIRST PART [DOE] shall have no obligation regarding the working schedule, wages and any other claim on the part of the personnel recruited by the SECOND PART under this Agreement." The C&P contract is attached as Exhibit A; the BDO contract is attached as Exhibit B. While the Superseding Indictment cherry-picks language from Paragraph 24 of the C&P contract, as set forth in the Argument section below, the Court should consider both contracts in their entirety in resolving this Motion.

and BDO to subcontract such services to Individual C, while concealing this fact in their invoices to DOE, causing DOE to pay for said services" (*id.*) and one count of conspiracy to commit wire fraud (Count Twenty-three).

Thus, the Superseding Indictment alleges that the respective "no subcontracting" clauses in each contract precluded the hiring of any third-party independent contractor in the performance of the contract. It is apparent that the "no subcontracting" clauses do not allow the contractor to subcontract the duty of performance of the contract to third-party. As set forth below, however, in reviewing each contract in its entirety, as the Court must do to interpret any particular clause, the "no subcontracting" clauses do not preclude the contractor from employing independent contractors to assist the contractor in the contractor's performance of the contract. Indeed, each contract specifically contemplates that in the performance of the contract, the contractor will not be restricted to using its own employees and may use third-party contractors.

The following clauses from each contract (with emphasis added) are pertinent to the analysis:

The C&P Contract

> The SECOND PARTY [C&P] will invoice the FIRST PARTY [DOE] a maximum of eight (8) hours per day **per person or employee** of the SECOND PARTY that provides services to the FIRST PARTY under the terms of the contract. The SECOND PARTY can only bill for services that it carries out on Saturdays, Sundays, or holidays, only if the FIRST PARTY previously authorized them in writing.
>
> The SECOND PARTY is responsible for ***contracting*** **and/or recruiting of the personnel** that will perform the services and activities stipulated to in the "THIRD" clause of this Contract hereby expressly exempting the FIRST PARTY from everything related to the work hours, salary, and any other claim brought by the recruited staff.

The BDO Contract

> Paragraph 14(ii)(a):

> The SECOND PARTY [BDO] agrees to invoice the FIRST PARTY [DOE] up to a maximum of eight (8) hours daily per **employee or resource** that provides services to the FIRST PART under the terms of this Contract. The SECOND PARTY may invoice for services rendered in excess of eight (8) hours daily, or on Saturdays, Sundays or holidays, only if the FIRST PARTY previously authorized them in writing.

II. ARGUMENT

Pursuant to Federal Rule of Criminal Procedure 12(b)(3), a defendant may file a pretrial motion, *inter alia*, to raise defects in instituting the prosecution and in the indictment, including failure to state an offense. Fed. R. Crim. P. 12(b)(3)(B)(v). The United States Supreme Court has interpreted Rule 12 to permit pretrial resolution of a motion to dismiss the indictment when "trial of the facts surrounding the commission of the alleged offense would be of no assistance in determining the validity of the defense." *United States v. Covington*, 395 U.S. 57, 60 (1969). Accordingly, "[i]t is perfectly proper, and in fact mandated, that the district court dismiss an indictment if the indictment fails to allege facts which constitute a prosecutable offense." *United States v. Coia*, 719 F.2d 1120, 1123 (11th Cir. 1983).

Generally, "a motion to dismiss is 'capable of determination' before trial if it involves questions of law instead of questions of fact on the merits of criminal liability." *United States v. Craft*, 105 F.3d 1123, 1126 (6th Cir. 1997); *United States v. Flores*, 404 F.3d 320, 324 (5th Cir. 2005) ("the district court did not err by considering the purely legal question at hand in Flores's pretrial motion"); *United States v. Korn*, 557 F.2d 1089, 1090 (5th Cir. 1977) ("[t]he propriety of granting a motion to dismiss an indictment under [Fed.R.Crim.P.] 12 by pretrial motion is by-and-large contingent upon whether the infirmity in the prosecution is essentially one of law or involves determinations of fact."); *United States v. Jones*, 542 F.2d 661, 664-65 (6th Cir. 1976) (Rule 12 and accompanying notes support decision to dismiss indictment on motion raising legal questions); *see also United States v. Smith*, 866 F.2d 1092, 1097 (9th Cir. 1989) (one of the purposes of Rule 12(b)

is "conservation of judicial resources by facilitating the disposition of cases without trial").

"District courts may ordinarily make preliminary findings of fact necessary to decide questions of law presented by pretrial motions so long as the trial court's conclusions do not invade the province of the ultimate factfinder." *Craft*, 105 F.3d at 1126; *see also* Fed. R. Crim. P. 12(b)(1) ("A party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial on the merits."); Fed. R. Crim. P. 12(b)(3) (noting that certain "defenses, objections, and requests must be raised by pretrial motion if the basis for the motion is then reasonably available and the motion can be determined without a trial on the merits")

On a motion to dismiss, the Court may consider facts not in dispute. *See e.g. United States v. Weaver*, 659 F.3d 353, 355 n.* (4th Cir. 2011) ("Although there is no provision for summary judgment in the Federal Rules of Criminal Procedure, the district court's pretrial dismissal of the § 922(h) charges was procedurally appropriate under Rule 12(b)(2). . . . As circuit courts have almost uniformly concluded, a district court may consider a pretrial motion to dismiss an indictment where the government does not dispute the ability of the court to reach the motion and proffers, stipulates, or otherwise does not dispute the pertinent facts." (collecting cases)). There is no factual dispute about what the contracts say and, accordingly, there is no need to defer to trial making the determination whether the contracts preclude the hiring of independent contractors as the Superseding Indictment alleges.

When analyzing a contract, a court must examine the contract as a whole, rather than one clause in isolation. *See Barbosa v. Midland Credit Mgmt.*, 981 F.3d 82, slip op. at 18 (1st Cir. Nov. 25, 2020) ("Another well-settled principle of contract law (using the Delaware Supreme Court's words) tells us to "read a contract as a whole and . . . give each provision and term effect, so as not to render any part of the contract mere surplusage." (citing *Bank of N.Y. Mellon v. Commerzbank*

Capital Funding Tr. II, 65 A.3d 539, 549 n.30 (Del. 2013) (quoting *Kuhn Constr., Inc. v. Diamond State Port Corp*., 990 A.2d 393, 396-97 (Del. 2010)); *Okmyansky v. Herbalife Int'l of Am., Inc*., 415 F.3d 154, 160 (1st Cir. 2005) ("a contract must be read as a whole.") (citing *Given v. Commerce Ins. Co*., 440 Mass. 207, 796 N.E.2d 1275, 1277 (Mass. 2003) ("We interpret the words of [the contract] in light of their plain meaning, giving full effect to the document as a whole." (citation omitted)); *Comite Fiestas De La Calle San Sebastian, Inc. v. Cruz*, 170 F. Supp. 3d 271, 274 (D.P.R. 2016) ("As required by Puerto Rico law, P.R. Laws Ann. tit. 31, § 3475, the Court must read this section in conjunction with the whole of the contract….").

In *Itzep v. Target Corp*., No. SA-06-CA-568-XR, 2010 U.S. Dist. LEXIS 55185, at *31-37 (W.D. Tex. June 4, 2010) a district court analyzed this very same type "no subcontract clause" on which Counts 16 through 23 of the Superseding Indictment are based. There, Target argued that its contract with Jim's Maintenance, which had a "no subcontracting" clause, precluded Jim's from hiring independent contractors to perform cleaning services. *See id.* at *32 ("Target contends that Jim's was not authorized to use subcontractors to provide its standard cleaning services, and that its hiring of its cleaners as independent contractors violated the contracts."). Jim's, on the other hand, contended that the "no subcontracting" clause could not be read in isolation and pointed to other provisions in the contract that contemplated the use of independent contractors to demonstrate that the "no subcontracting" clause could not be interpreted to preclude the use by Jim's of independent contractors in the performance of the contract:

> Jim's contends that it was not a breach of contract to hire its cleaners as independent contractors, because the contract acknowledges that Jim's may hire independent contractors to perform the work. Jim's points to paragraph 11 of the 2005 contract, **which refers to the Contractor "to include its agents, servants, employees, assigns, independent contractors, or anyone else retained by Contractor for the performance of Contractor's obligations under this Agreement,"** and paragraph 16, which refers to the "**Contractor and its employees and agents**" as being subject to security checks and regulations.

Id. at *33-34 (emphasis added)

The court agreed with Jim's that it could not read the "no subcontracting" clause in isolation and instead examined the contract as a whole.

> **Looking at the contract as a whole, as it must, the Court finds that Jim's did not breach the anti-subcontracting provisions of the contract by hiring its cleaning personnel as independent contractors….**
>
> **The contract's anti-subcontracting provisions are unambiguous and are intended to prevent the Contractor from subcontracting with another company to provide housekeeping services without Target's written approval; they do not purport to control the Contractor's relationship with its cleaners.** . . . Further, whether Jim's could treat its cleaners as independent contractors was encompassed within the intended scope of the clauses requiring Jim's to comply with applicable employment laws. **The fact that the contract contained these additional provisions indicates that the general anti-subcontracting provision was not intended to reach the issue of whether Jim's could hire its individual cleaners as independent contractors. . . .**
>
> **Again, there was no express requirement, apart from the provisions requiring Jim's to comply with applicable laws, that Jim's could not hire its individual cleaning personnel as independent contractors as opposed to employees**.

Id. at *35-37 (emphasis added).

In this case, like in *Target*, examining the C&P and BDO contracts as a whole, rather than the "no subcontracting" in isolation, demonstrates "that the general anti-subcontracting provision was not intended to reach the issue of whether [C&P or BDO] could hire its individual [workers] as independent contractors." *Id.* at *37.

The C&P contract

It is clear from the contract's plain text that the contract did not preclude C&P from hiring independent contractors to perform work under the contract. First, the contact specifically provides that C&P may invoice DOE for the work of each "person or employee" under the contract. If the "no subcontracting" clause precluded the use of independent contractors and therefore was intended

to confine C&P to the use of its own employees in the performance of the contract, the contract would not allow C&P to invoice DOE for each "person or employee," but only for each "employee." As written, any interpretation that limited C&P to invoicing for employees would render the word "person" surplusage. As noted above, the Court may not read the contract in a manner that fails to give each term in the contract effect and renders terms surplusage. *Barbosa v. Midland Credit Mgmt.*, 981 F.3d, slip op. at 18.

Second, the contract says explicitly that C&P "is responsible for ***contracting*** **and/or recruiting of the personnel** that will perform the services and activities" under the contract. The use of the word "contracting" demonstrates that third parties may be used in the performance of the services and activities of the contract, particularly since what is contemplated is not simply contracting with or hiring "employees," but rather the much broader category of "personnel." Indeed, this clause is simply inconsistent with reading the "no subcontracting" clause to preclude C&P from contracting with third parties to assist it in performing the contract.

Third, this reading is reinforced by the "no subcontracting" provision itself, which says C&P is responsible for "hiring and/or recruiting personnel" to perform the contract. *See* Exhibit A at ¶ 24. If the "no subcontracting" clause was confining C&P to using its own employees, it would speak solely in terms of hiring employees. That it also speaks of "recruiting" in addition to "hiring" and uses the term "personnel," rather than "employees," consistent with the two clauses above, contemplates that C&P may contract with and use personnel who are not employees of C&P in performance of the contract and invoice DOE for their services.

<u>The BDO contract</u>

The BDO contract explicitly states that BDO may invoice DOE for time incurred by each "employee **or resource"** used by BDO in the performance of the contract. The contract would not

include the phrase "or resource" if BDO could use only its own employees in the performance of the contract and only invoice DOE for the use of employees in performing the contract. As with the C&P contract, the BDO contract cannot be read in a manner that does not give effect to each term and renders certain terms surplusage. Yet, an interpretation of the BDO contract as restricting BDO to using and charging DOE for employees is dependent on the Court causing the term "resource" to be surplusage.

Further, as with the C&P contract, any interpretation of the BDO contract to limit the contractor to the use of its own employees in the performance of the contract is inconsistent with the language of the "no subcontracting" clause itself. In the BDO contract, the "no subcontracting" clause speaks in terms of "personnel recruited" by BDO, rather than merely "employees of" BDO. Thus, the "no subcontracting" clause itself plainly contemplates that BDO may use people who are not BDO employees in its performance of the contract.

* * * * * * * * * *

Thus, like in *Target*, in which the contract referred to "employees *and agents*," the inclusion of the broad terms "person," "personnel", and "resource," and their use of these terms *in addition to* the word "employee," is wholly inconsistent with any reading of the "no subcontracting" clauses to preclude C&P and BDO from contracting with third-party independent contractors to assist the contractor in the performance of the contract. *See Target*, 2010 U.S. Dist. LEXIS 55185, at *35-36 ("The contract's anti-subcontracting provisions are unambiguous and are intended to prevent the Contractor from subcontracting with another company to provide [] services … [T]hey do not purport to control the Contractor's relationship with its [independent contractors].").

Counts Sixteen through Twenty-three of the Superseding Indictment are all built on a premise that is flawed as a matter of law. Neither the C&P contract nor the BDO contract precluded

the contractor from hiring Individual C as an independent contractor to assist the contractor in the performance of the contract or from invoicing DOE for Individual C's services. Indeed, each contract specifically allowed the contractor to do so.

III. CONCLUSION

Counts Sixteen through Twenty-three fail to allege Ms. Keleher committed a criminal offense. On plain reading of the documents, the C&P and BDO contracts did not prohibit the companies from hiring independent contractors to perform work under the contracts. Accordingly, even assuming the truth of the factual allegations that Ms. Keleher participated in a plan to have C&P and BDO hire Individual C as an independent contractor on their respective contracts with DOE, have C&P and BDO invoice DOE for Individual C's services, and have DOE pay for Individual C's services, Counts Sixteen through Twenty-three fail to state an offense. The objective of this alleged plan would not result in either contractor breaching its contract with DOE, much less would the objective of this plan be criminal.

WHEREFORE, the defendant, Julia Beatrice Keleher, respectfully requests the Court GRANT this motion and dismiss Counts Sixteen through Twenty-three of the *Superseding Indictment* (Docket No. 368).

Respectfully submitted on this 7th day of January 2021, in San Juan, Puerto Rico.

I HEREBY CERTIFY that on this date, I electronically filed the foregoing with the Clerk of the Court, using the CM/ECF system, which will provide access to all parties of record.

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