

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

No. 10-CR-20403

Hon. Nancy G. Edmunds

-vs-

D-1 KWAME M. KILPATRICK,

Defendant.

**GOVERNMENT’S BRIEF IN RESPONSE TO THE SIXTH CIRCUIT
COURT OF APPEALS’ REMAND OF RESTITUTION ORDER AS TO
DEFENDANT, KWAME M. KILPATRICK**

Introduction

Pursuant to the Sixth Circuit’s remand of this Court’s restitution order as to defendant Kwame Kilpatrick, the government recommends that the restitution order be reduced from \$4,584,423 to \$1,637,087. There is no need to alter the money judgment against Kilpatrick of \$4,584,423, since it was unaffected by the remand.

The Sixth Circuit’s Decision

At his original sentencing, Kwame Kilpatrick’s restitution obligation to the Detroit Water and Sewerage Department (DWSD) was calculated by

approximating his illicit gain from DWSD. Kilpatrick challenged the restitution order on appeal. In its decision affirming his convictions, the Sixth Circuit held that the restitution calculation was erroneous and should have been based more specifically on DWSD's loss, rather than on Kilpatrick's gain. *United States v. Kilpatrick*, Nos. 13-2500/14-1120 at 27. The Court stated, "the consensus among our sister circuits compels us to conclude that a district court may not use the defendant's gain to approximate the victim's loss unless the government establishes such a correlation that the defendant's gain can act as a measure of – not substitute for – the victim's loss." *Id.* The Sixth Circuit thus required the Court to reduce the restitution order amount for DWSD to the actual loss amount caused by Kwame Kilpatrick's criminal conduct.

**The Contract Kilpatrick Rigged for Ferguson Cost
DWSD Over \$1.6 Million**

Since the government cannot, with sufficient precision, correlate the former mayor's \$4.5 million in illicit gain to the *actual loss* to DWSD in this case, the government recommends that the Court calculate Kilpatrick's restitution obligation based on a large water main contract known as CM-2014.

Contract CM-2014 was a construction management contract for water main replacement contracts throughout the City of Detroit. (*Dan Edwards, 10/22/12; Pg ID: 7539*). The top two scored bidders were to receive the contract. The bidder who should have been one of the top two bidders was a team of DLZ and Superior

Engineering. (*Kim Harris, 11/29/12; Pg. ID 9369*). However, that bid was thwarted when Gerard Grand Phillips, then the Director of the Human Rights Department, instructed his subordinate, Kim Harris, to decertify DLZ and pull their human rights certification. Harris testified that Phillips explained that Mayor Kilpatrick had given the order for this to be done. (*Kim Harris, 11/29/12; Pg. ID 9370 - 9372*). Harris then drafted a letter for Phillips' signature that decertified DLZ. (*Kim Harris, 11/29/12; Pg. ID 9374*) (Exhibit LS3-11).

Dan Edwards and Darryl Latimer testified to the impact of DLZ arbitrarily losing its human rights certification. The decertification dropped DLZ/Superior from a winning bid spot in the evaluation (out of the top two spots), allowing Ferguson/Lakeshore to move up to the second spot and obtain the contract. (*Dan Edwards, 10/22/12; Pg. ID 7557 - 7558*); (*Darryl Latimer, 11/27/12; PG ID 9086 - 9087*).

In a memorandum from Victor Mercado to the Board of Water Commissioners that awarded the contract to Ferguson/Lakeshore, the following table was included, which shows the cost difference between Ferguson/Lakeshore and DLZ/Superior as **\$1,637,087.50**:

<u>FIRM</u>	<u>SCORE</u>	<u>PROPOSED COST</u>
Detroit Program Mgt. Team (JV)	3766.96	\$14,208,811.00
Lakeshore Engineering	3718.24	\$13,603,089.00
Superior Engineering	3706.40	\$11,966,001.50
Jenkins Walbridge (JV)	3671.40	\$13,367,065.00
EBI-Detroit	3575.12	\$11,445,014.82
Inland Waters Pollution Controls	3481.40	\$15,000,654.02
Visions Consultants\ECM (JV)	1739.76	\$10,413,279.85

(Exhibit LS3-18) (*Dan Edwards, 1/22/12; Pg. ID 7574*) . Thus, unlike for several other contracts, the evidence permits the Court to calculate DWSD's loss with sufficient precision to order restitution on it. And indeed, the Sixth Circuit even suggested that the evidence sufficed for the Court to impose restitution on CM-2014. *Kilpatrick* at 28, n. 3.

Conclusion

Given the Sixth Circuit's requirement on remand that restitution be based on actual loss proved by the government, the court should reduce Kwame Kilpatrick's restitution to DWSD to \$1,637,087.

Respectfully submitted,

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Dated: November 2, 2016

CERTIFICATE OF SERVICE

I hereby certify that on November 2, 2016, I electronically filed the foregoing document with the Clerk of the Court using the ECF system, which will send notification of such filing to:

Harold Gurewitz
Attorney for Defendant

s/R. Michael Bullotta
R. MICHAEL BULLOTTA
Assistant United States Attorney

Date: November 2, 2016