

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION**

UNITED STATES OF AMERICA

VS.

CRIMINAL NO. 3:08CR 014

**ROBERT L. MOULTRIE,
NIXON E. CAWOOD,
CHARLES K. MOREHEAD,
FACILITY HOLDING CORP., d/b/a
THE FACILITY GROUP,
FACILITY MANAGEMENT GROUP, INC.,
FACILITY CONSTRUCTION MANAGEMENT INC. and
FACILITY DESIGN GROUP INC.**

**MOTION FOR ISSUANCE OF A RULE 17(c) SUBPOENA
AND FOR EARLY RETURN ON SUBPOENA**

COME NOW Facility Holding Corp., d/b/a The Facility Group, Facility Management Group, Inc., Facility Construction Management Inc., and Facility Design Group, Inc. (“The Facility Group” or “TFG”) and submit this Motion for Issuance of a Rule 17(c) Subpoena and for early return on that Subpoena. In support of the motion, The Facility Group would show the Court the following:

1. TFG requests that the Court issue the attached subpoena to Community Bank of Mississippi (“Bank”). The subpoena seeks documents reflecting communications related to the Mississippi Beef Project that occurred during a limited timeframe between the Bank and a short list of persons and entities involved in the Mississippi Beef Project. It also seeks documents referencing loans, lines of credit, bonds and advances of money – again, during a limited timeframe and concerning only seven persons and entities. Finally, TFG requests from the Bank documents relating to the sale or potential sale of the beef plant. In the light of the facts set out below and as applied to the law, TFG submits that it is entitled to the relief requested herein.

2. Sometime in 2000, Mississippi government officials initiated a project to design, construct, and operate a beef plant in Mississippi. In July 2001, the Mississippi Land, Water and Timber Resources Board (“Board”) approved a \$5 million grant to Mississippi Beef Processors LLP (“MBP”), a company newly formed by Richard Hall for the express purpose of building a beef plant in Oakland, Mississippi.
3. That following summer, Community Bank of Mississippi (“Bank”) approved a construction loan to MBP; the loan was guaranteed by the State of Mississippi through the Mississippi Development Authority (“MDA”).
4. Despite the State guaranty, the Bank refused just a few months later to fund the first construction draw due to concerns over the management of the project. The Bank subsequently contacted TFG and requested that TFG perform a study on the project. TFG complied with the Bank’s request and completed an initial study.
5. Dissatisfied with MBP’s handling of the project, the Board issued on April 23, 2003, a letter of intent to TFG authorizing it to manage the completion of the design and construction of the beef processing plant. The Board likewise promised in the letter to work towards the execution of a “design and construction contract” for the beef plant between the Board, TFG, and the Bank.
6. The Board, Bank, and TFG executed the contemplated Project Management Agreement (“Agreement”) on July 11, 2003, for the completion of the beef project. During this same time, MBP entered into an Appointment Agreement to appoint TFG as its agent to administer its existing contracts concerning the beef plant.
7. TFG completed the project in 2004, but MBP was not able to continue to operate the plant and struggled to remain viable. That struggle was in vain and MBP closed its doors in

November 2004. Thereafter, the Bank foreclosed on the facility, sold the plant to itself, and called in the loan guaranty.

8. In February 2008, the government filed a 16 count indictment against TFG and others alleging that TFG conspired to give and offer things of value to a “public official” in order to influence and reward the official in conjunction with the beef plant work and that TFG subsequently submitted fraudulent invoices for payment under the beef plant contract. These allegations focus on the negotiations that culminated with the Agreement, as well as TFG’s subsequent execution of the Agreement, including requests for compensation, reimbursement of expenses, and the submission of pertinent invoices. The indictment further intimates that TFG is responsible for the plant’s closing in November 2004, as well as the Bank’s subsequent foreclosure in February 2005 and the State’s payment on the loan in June 2005. The Bank’s involvement with the persons and entities associated with the beef project, its demise, and the repercussions associated with the project, however, extended well past the date of the repayment of the loan.

9. Although the government has provided some discovery pursuant to Rule 16, it has not provided documents obtained from the Bank’s files. Rule 16, however, does not set any limits on the materials available under Rule 17. Indeed, documents undiscoverable under Rule 16 may be reached via Rule 17. As the Supreme Court noted, “[t]he plain words of the Rule [17(c)] are not to be ignored. They must be given their ordinary meaning to carry out the purpose of establishing a *more liberal policy* for the production, inspection and use of materials at the trial.” *Bowman Dairy Co. v. United States*, 341 U.S. 214, 218, 71 S.Ct. 675 (1951) (emphasis added). As such, a Rule 17(c) subpoena directed to the Bank is the proper vehicle for TFG to utilize in order to adequately prepare for a defense at trial.

10. The Supreme Court, in *United States v. Nixon*, set out a four-pronged test that a movant must satisfy in order to withstand a motion to quash. 418 U.S. 683, 699-700, 94 S.Ct. 3090, 3103 (1974). First, the documents sought must be relevant and evidentiary. Second, they must not otherwise be procurable in advance of trial despite the exercise of due diligence. Third, the movant cannot adequately prepare for trial without advance production and inspection. And, fourth, the subpoena must not be wielded as a broad discovery tool – a “fishing expedition.” *Id.* As set out in this motion, TFG demonstrates its satisfaction of the *Nixon* factors. *See Bowman Dairy Co. v. United States*, 341 U.S. 214, 221, 71 S.Ct. 675 (1951) (“The burden is on the court to see that the subpoena is good . . .”).

11. The documents requested from the Bank are relevant. *See, e.g., Nixon*, 418 U.S. at 697-702, 94 S.Ct. at 3102-05; *United States v. Iozia*, 13 F.R.D. 335, 338 (D.C. N.Y. 1952) (same). The indictment charges TFG with criminal conduct with respect to the negotiation and execution of the Agreement, and implies that TFG is responsible for the failure and resultant closure and sale of the plant. As set out above, the Bank was intimately involved in those very actions: the negotiation and ultimate execution of the Agreement, as well as the sale of the beef plant. The requested documents will show, among other things, (1) the status of the beef plant project prior to and at the time of the Bank’s request for the TFG study, (2) that TFG was selected to manage the completion of the design and construction of the plant because it was the best qualified company for the project and not because of any alleged undue influence; and (3) that TFG properly complied with the Agreement, including with respect to billing and compensation. The requested documents “make the existence of [facts that are] of consequence to the determination of the action more probable or less probable than [they] would be without the evidence.” Fed.R.Evid. 401; *see also United States v. Arditti*, 955 F.2d 331, 345 (5th Cir.) (requiring only a

“sufficient likelihood” of relevancy), *cert. denied*, 113 S.Ct. 597 (1992). Part of *Nixon*’s first element is satisfied.

12. The subpoena requests documents from the Bank that are kept in its ordinary course of business. Fed.R.Evid. 803(6). As such, they are evidentiary -- admissible pursuant to the hearsay exception. *See Nixon*, 94 S.Ct. at 3104 (TFG need make only a “sufficient preliminary showing that [the requested material] contains evidence admissible with respect to the offenses charged in the indictment.”). At the same time, however, “that is not to say . . . that the materials subpoenaed must actually be used in evidence. It is only required that a good faith effort be made to obtain evidence.” *Id.* at 3103 (citing *Bowman*, 341 U.S. at 219-220). The remainder of *Nixon*’s first element is satisfied.

13. The documents requested from the Bank are not otherwise procurable by TFG. *See Iozia*, 13 F.R.D. at 338. TFG has made its Rule 16 discovery request. *See Exhibit A (Joint Defense Discovery Ltr., Apr. 4, 2008)*. To date, the government has not produced any documents alleged to have originated from the Bank’s custody, control, or possession as requested in the proposed subpoena. The Bank’s documents are not public records and, without a subpoena, TFG has no access to them. *Nixon*’s second element is satisfied.

14. Production and inspection prior to trial of the information developed, obtained, or otherwise considered by the Bank with respect to the Agreement and how TFG performed under the Agreement – which information is likely to be voluminous – is essential to the presentation of the defense in this case. Producing the requested documents on the morning of trial would deprive TFG of the ability to properly prepare its defense. TFG and its counsel must have early access to the materials in order to properly review them and, if warranted, prepare to use them at trial. Production on the morning of trial is likely to do nothing more than delay the trial. *See*

Bowman, 341 U.S. at 220 (“chief innovation was to expedite the trial by providing a time and place *before* trial for the inspection of the subpoenaed materials.”) (emphasis added). *Nixon*’s third element is satisfied.

15. The breadth of the subpoena is carefully circumscribed in that it is reasonably limited in time and scope to (1) communications between the Bank and persons or entities involved in the beef project, (2) documents relating to loans, lines of credit, bonds and advances of money from the Bank to persons or entities involved in the beef project who petitioned or received funds from the Bank, and (3) the Bank’s documents relating to the sale of the plant. TFG has requested only those documents that are relevant to defending the charges in the indictment. In other words, the subpoena satisfies the specificity requirement of *Bowman*. 341 U.S. at 219-20, 71 S.Ct. 675, 679 (1951), and provides the Bank with sufficient knowledge to comply with the subpoena. TFG has narrowly tailored its request in an effort to reduce the burden on the Bank while still seeking with reasonable particularity to procure documents essential to its defense at trial. Compliance with the subpoena, due to its narrow scope, will be neither unreasonable nor oppressive.

Fed.R.Crim.P. 17(c). *Nixon*’s fourth and final element is satisfied.

16. TFG has made a showing sufficient to satisfy the requirements of specificity, relevancy, evidentiary value, and good faith, as well as to indicate its need for the documents as guaranteed by the Due Process Clause of the Fifth Amendment and the Compulsory Process Clause of the Sixth Amendment. Respectfully, TFG requests that this Court grant its Motion for Issuance of a Rule 17(c) Subpoena and for Early Return of Subpoena.

17. While TFG has constructed the subpoena as narrowly as possible, the Bank’s compliance will elicit a substantial number of documents. The trial of this matter is set for August 25, 2008. In order for counsel for TFG to have adequate time to review and analyze the documents prior to

the trial date, it is essential that the Bank produce responsive documents no later than June 30, 2008. This allows the Bank over a month for production, and will allow TFG and its counsel a little less than two months for review, analysis, and follow-up prior to trial.

WHEREFORE, PREMISES CONSIDERED, The Facility Group respectfully requests, pursuant to Fed.R.Crim.P. 17(c) and Uniform Local Rule 7.2, that the Court authorize the issuance of the requested subpoena and direct compliance as set out in this motion. A copy of the proposed subpoena is attached hereto as Exhibit A.

Respectfully submitted, this the 27th day of May 2008.

THE FACILITY GROUP

s/Kari L. Sutherland
KARI L. SUTHERLAND (MB #10177)

ONE OF ITS ATTORNEYS

OF COUNSEL:

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CERTIFICATE OF SERVICE

I hereby certify that on this day I have caused a copy of this "Motion for Issuance of a Rule 17(c) Subpoena and for Early Return on Subpoena" to be electronically filed with the Clerk of Court using the CM/ECF system, which will automatically send e-mail notification of such filing to the following CM/ECF participant attorneys of record:

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THIS 27th day of May 2008.

s/ Kari L. Sutherland

AO89 (Rev. 7/95) Subpoena in a Criminal Case

UNITED STATES DISTRICT COURT

NORTHERN

DISTRICT OF

MISSISSIPPI

United States of America

v.

SUBPOENA IN A
CRIMINAL CASE

Robert L. Mouttrie, et al.

Case Number: 3:08CR 014

TO: Community Bank of Mississippi
Attn: Custodian of Records
1225 West Government Street
Brandon, MS 39042

YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below, or any subsequent place, date and time set by the court, to testify in the above referenced case. This subpoena shall remain in effect until you are granted leave to depart by the court or by an officer acting on behalf of the court.

PLACE The Federal Building 911 Jackson Avenue Oxford, MS 38655	COURTROOM 1 - 1st Floor
	DATE AND TIME 6/30/2008 9:00 a.m.

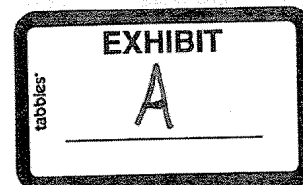
YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s):

See attachment.

Note: If early return on this subpoena is authorized and the documents are provided in certified format by a document custodian, no appearance by a witness may be required.

U.S. MAGISTRATE JUDGE OR CLERK OF COURT	DATE
(By) Deputy Clerk	

ATTORNEY'S NAME, ADDRESS AND PHONE NUMBER:
Kari L. Sutherland, Esq., Butler, Snow, O'Mara, Stevens & Cannada, PLLC, Crescent Center, 6075 Poplar Ave, 5th Floor,
Memphis, Tennessee 38119
Phone: (901) 412-5632



AO89 (Rev. 7/95) Subpoena in a Criminal Case (Reverse)

PROOF OF SERVICE		
RECEIVED BY SERVER	DATE	PLACE
SERVED	DATE	PLACE
SERVED ON (PRINT NAME)		FEEES AND MILEAGE TENDERED TO WITNESS <input type="checkbox"/> YES <input type="checkbox"/> NO AMOUNT \$ _____
SERVED BY (PRINT NAME)		TITLE
DECLARATION OF SERVER		
I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Proof of Service is true and correct.		
Executed on _____		_____
DATE		SIGNATURE OF SERVER

		ADDRESS OF SERVER

ADDITIONAL INFORMATION		

ATTACHMENT TO COMMUNITY BANK RULE 17(C) SUBPOENA

The term "Document" is used herein in the broadest sense permitted by the Federal Rules of Criminal Procedure and Local Rules of this Court, and includes the original version and any non-identical copy of not only all printed or written materials but also any other means of data compilation from which information may be obtained or translated into usable or readable form, including but not limited to: notes, correspondence, internal company communications, telegrams, cables, telexes, ledger books, books of account, purchase orders, invoices, statements, memoranda, summaries of records of telephone conversations, diaries, logs, calendars, appointment books, reports, instructions, charts, labels, art work, mockup labels, photoboards, drawings, graphs, traces, blueprints, sketches, photographs, microfilms, notes, minutes or records of meetings (including directors' meetings), reports and/or summaries of investigations, opinions or reports of consultants, opinions of counsel, contracts, agreements, memoranda, assignments, licenses, notebooks, letters, reports or summaries of negotiations, catalogs, brochures, pamphlets, advertisements, circulars, trade letters, press releases, periodicals, charge slips, hotel charges, expense accounts, statements, receipts, freight bills, bids, bid abstracts, transcripts, manuals, video or sound recordings, films, video tapes, computer tapes, disks, programs or other computerized materials, drafts of documents and revisions of drafts of documents, and all attachments to any documents.

The term "Document" also includes without limitation any document stored electronically on any medium or device, including, but not limited to, personal, home or company computers, personal digital assistants, cell phones, pagers, digital cameras, tape recorders, digital voice recorders, microchips, hard drives, portable hard drives, thumb drives, network drives, network memory storage, floppy disks, diskettes, CD-ROMs, DVDs, servers (whether active or archived), archive tapes, disaster recovery tapes, back up tapes, removable media, magnetic tapes of all types, microfiche, punch cards, punch tapes, computer chips, and any other device for data storage and/or transmittal.

I. Any and all documents, and attachments to such documents, reflecting communications, whether written, oral or electronic, between Community Bank and the following and any attorney, officer, employee, member, representative and agent of the following:

1. Tennessee Dressed Beef Co.
2. Mississippi Beef Processors, LLC
3. The Facility Group
4. Richard Hall Sr.

5. Richard Hall Jr.
6. Jill Hall
7. Mississippi State University
8. Union Planters Bank
9. The Mississippi Department of Agriculture and Commerce
10. The Mississippi Development Authority
11. The Mississippi Cattleman's Association
12. The Mississippi Legislature
13. The Mississippi Way and Means Committee
14. Yalobusha County, Mississippi
15. Willis Engineering
16. Carothers Construction Company
17. The Town of Oakland, Mississippi
18. Office of the State Auditor of Mississippi
19. Tony Brady
20. The Mississippi Land, Water and Timber Resources Board

from September 1, 2000, through May 31, 2007, concerning or relating to any loan, line of credit, bond and advance of money involving or relating to the Mississippi Beef Project, including but not limited to any loan, line of credit, bond and advance of money to Mississippi Beef Processors LLC.

II. Any and all documents, including, but not limited to, internal bank reports, loan officer reports, loan reviews, committee minutes, board of directors' minutes, loan transaction reports, loan committee reports, loan activity reports, credit reports, credit reviews resumes, financial statements, business plans, contracts, grant agreements, consultant reports, loan applications, loan documents, loan collateral reports, referencing or relating to loans, lines of credit, bonds and advances of money between May 1, 2000, through June 1, 2006, to any of the following:

1. Jill Hall
2. Ken Briggs
3. Richard Hall Sr.
4. Richard Hall Jr.
5. Mississippi Beef Processors LLC
6. Tennessee Dressed Beef Co.
7. Carothers Construction Company

III. Any and all documents reflecting or relating to the sale or the potential sale of the Mississippi Beef Processing plant, including but not limited to, any report or correspondence from Tony Brady.