IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SMITHKLINE BEECHAM CORPORATION,	:	**CIVIL ACTION**
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
EASTERN APPLICATORS, INC.,	:	
RICHARD W. GREAR,	:	
PROFESSIONAL ROOF SERVICES, INC.	:	
BLAINE CHIPOLA, JOTTAN, INC.,	:	
TOBY CHROSTOWSKI,	:	
D'ONOFRIO GENERAL CONTRACTORS	:	
CORP., and JOHN D'ONOFRIO	:	
	:	
Defendants.	:	**NO. 99-CV-6552**

Reed, S. J. **December 3, 2002**

M E M O R A N D U M

This is an antitrust action in which plaintiff alleges that the defendants colluded in the bidding process for a roofing project, to ensure that defendant Eastern Applicators, Inc. submitted the winning bid. In support of its defense, defendants have offered Laurence E. Parisi as an expert witness pursuant to Federal Rule of Evidence 702.[1] Mr. Parisi offers his opinion "that the bids received in May of 1997 for the re-roofing project were reasonable and non-collusive." (Pl. Mot., Exh. D at 1.) Now before the Court is the motion in limine of plaintiff SmithKline Beecham Corporation ("SmithKline") to suppress the Mr. Parisi's expert testimony. For the reasons set forth below, the motion of plaintiff will be denied in part and granted in part.

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[1] Federal Rule of Evidence 702, as amended December 1, 2000, states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Legal Standard

Under Rule 702, when "[f]aced with a proffer of expert scientific testimony ... the trial judge must determine at the outset, pursuant to Rule 104(a) whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue." Daubert v. Merrell Dow Pharms. 509 U.S. 579, 592, 113 S. Ct. 2786, 2796, 125 L. Ed. 2d 469 (1993) (footnotes omitted). This gatekeeping function extends beyond scientific testimony to "testimony based on ... 'technical' and 'other specialized' knowledge." Kumho Tire Co. v. Carmichael, 526 U.S. 137, 141, 119 S. Ct. 1167, 1171, 143 L. Ed. 2d 238 (1999). The Court of Appeals for the Third Circuit has established that Federal Rule of Evidence 702 as interpreted by Daubert and its progeny embodies "'three distinct substantive restrictions on the admission of expert testimony: qualifications, reliability, and fit.'" United States v. Mathis, 264 F.3d 321, 335 (3d Cir. Aug. 30, 2001) (quoting Elcock v. Kmart Corp., 233 F.3d 731, 741 (3d Cir. 2000)). The proponent of the expert testimony bears the burden of establishing its admissibility by a preponderance of the evidence. See Oddi v. Ford Motor Co., 234 F.3d 136, 144 (3d Cir. 2000), cert. denied, 121 S. Ct. 1537 (2001).

The Third Circuit Court of Appeals has set the following standard to qualify as an expert:

> Rule 702 requires the witness to have "specialized knowledge" regarding the area of testimony. The basis of this specialized knowledge "can be practical experience as well as academic training and credentials." We have interpreted the specialized knowledge requirement liberally, and have stated that this policy of liberal admissibility of expert testimony "extends to the substantive as well as the formal qualification of experts." However, "at a minimum, a proffered expert witness ... must possess skill or knowledge greater than the average layman . . . ."

Elcock, 233 F.3d at 740 (quoting Waldorf v. Shuta, 142 F.3d 601, 625 (3d Cir. 1998)).

The factors which govern reliability are as follows:

> (1) whether a method consists of a testable hypothesis; (2) whether the method has been subject to peer review; (3) the known or potential rate of error; (4) the existence and maintenance of standards controlling the technique's operation; (5) whether the method is generally accepted; (6) the relationship of the technique to methods which have been established to be reliable; (7) the qualifications of the expert witness testifying based on the methodology; and (8) the non-judicial uses to which the method has been put.

Elcock, 233 F.3d at 745-46 (quoting In re Paoli R.R. Yard PCB Litig., 35 F.3d 717, 742 n.8 (3d Cir. 1994)). It has been noted that Daubert:

> makes certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field . . . . The trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable. That is to say, a trial court should consider the specific factors identified in Daubert where they are reasonable measures of the reliability of expert testimony.

Elcock, 233 F.3d at 745-46 (quoting Kumho Tire, 526 U.S. at 152, 119 S. Ct. at 1176). Thus, the factors outlined above are not exhaustive and the inquiry remains flexible. See Elcock, 233 F.3d at 746. Where the testimony is not scientific in nature, "relevant reliability concerns may focus upon personal knowledge or experience," as opposed to "scientific foundations." Kumho Tire, 526 U.S. at 150, 119 S. Ct. at 1175.

The fit requirement stems from the textual provision that "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." Mathis, 264 F.3d at 335 (quoting F.R.E. 702). Admissibility under this factor turns on "the proffered connection between the scientific research or test result to be presented and particular disputed factual issues in the case. Oddi, 234 F.3d at 145. This measure is "not intended to be a high one." Id. Its standard is not dissimilar to the general liberal standard of relevance under the Rules. See Mathis, 264 F.3d at 335.

Analysis

Mr. Parisi is an architect with a bachelor degree in architecture from the New York Institute of Technology. (Pl. Mot., Exh. A.) Since 1977, he has been the owner and president of his own architectural firm, Laurence E. Parisi, P.C. (Id.) His practice began primarily in residential gut renovation projects, but has expanded to include commercial, institutional, and public work renovations and additions such as new roofs and exterior renovations. (Pl. Mot., Exh. B at 10.) In his position, Mr. Parisi calculates his own estimates for bids to evaluate the bids he receives in his various projects. (Id. at 25.) Plaintiff's experts, Robert P. Piccione and John DiNenna, were previously found qualified to testify regarding the reasonableness of the bids at issue based on their years of experience in the roofing industry. (Order of November 29, 2001, Doc. No. 52.) I find that Mr. Parisi's practical experience and background has similarly provided him with specialized knowledge beyond the ken of the average layman in this area. Consequently, I find that Mr. Parisi is qualified to testify as an expert witness on what constitutes a reasonable bid for commercial roofing projects in 1997. Because of Mr. Parisi's knowledge and experience in the Northern New Jersey and New York area, I find him facially competent to evaluate the bids in this case arising in nearby Philadelphia, Pennsylvania.

Because the proffered testimony is not scientific in nature, the methodology need not be subjected to rigorous testing for scientific foundation or peer review, but must still provide a methodology that can be proven to be reliable. In calculating his review of the bids for plaintiff's roofing project, Mr. Parisi reviewed the following materials: (1) the bid specifications; (2) the bids submitted by the actual bidders on the first and second round of bids; and (3) the roof surveys. (Pl. Mot., Exh. D, Parisi Letter; Exh. B at 13-14.) He further inspected the roofs in

question, and reviewed pictures of them taken prior to the completion of the project. (Pl. Mot., Exh. B at 18-19.) He further compared the controversial bids to the bids submitted for his own projects in 1997. (Id. at 21-22.) The method used by Mr. Parisi to derive an estimated bid is similar to the methods used by Mr. Piccione and Mr. DiNenna that were previously accepted as facially reliable by this Court. As well, the methodology is strongly rooted in Mr. Parisi's practical experience. As I have previously determined that there is no single standard formula for bid estimations, (Doc. No. 52 at 5-6), the fact that Mr. Parisi has maintained a successful architecture firm for many years lead to the conclusion that his estimation process and management of roofing bids for his clients, like those of Mr. Piccione and Mr. DiNenna, is within the realm of reasonable and acceptable methods.

To the extent Mr. Parisi's opinion regarding the reasonableness of the bids at issue would assist the jury in resolving the factual issue of whether they were competitive, it is relevant and helpful to the trier of fact, and therefore fits the purpose for which it is being offered. I thus conclude that Mr. Parisi's testimony regarding whether defendants' bids fell within the ambit of reasonable business estimates is admissible.

Nevertheless, with regard to Mr. Parisi's opinion that the bids at issue were not collusive, I find no support in the record to find Mr. Parisi qualified on this issue. Mr. Parisi has not claimed or shown any specialized knowledge, skill or experience that would qualify him as an expertise on matters of collusion.[2] Nor has Mr. Parisi set forth any reliable methodology to reach his opinion that there was no collusion. The expert must explain the means by which he reached

[2] Collusion is defined as "[a]n agreement between two or more persons to defraud a person of his rights by the forms of law, or to obtain an object forbidden by law," or "[a] secret combination, conspiracy, or concert of action between two or more persons for fraudulent or deceitful purpose." BLACK'S LAW DICTIONARY 264 (6th ed. 1990).

his conclusions, and such means must satisfy at least one of the Daubert factors of reliability. "An 'expert's opinion must be based on the methods and procedures of science rather than on subjective belief or unsupported speculation.'" Oddi v. Ford Motor Co., 234 F.3d 136, 158 (3d Cir. 2000) (quoting In re Paoli R.R. Yard PCB Litig., 35 F.3d at 742). In light of Mr. Parisi's statements,[3] his analysis of whether or not there was collusion among the bidders amounts to no more than speculation. Mr. Parisi's conclusion rises to nothing more than "ipse dixit [that] does not withstand Daubert's scrutiny." Id. The Court thus determines that his opinion, insofar as it attempts to set forth conclusions on the issue of collusion, poses no benefit in assisting "the trier of fact to understand or determine a fact in issue" as required under Rule 104(a) and Daubert. His opinion could only cause the jury to join in his speculation.

The Court further determines that, in light of these findings, there appears to be no need to hold an in limine hearing. See id., 234 F.3d at 153-54 (record sufficient to exclude expert

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[3] Mr. Parisi's deposition transcript on this point provides as follows:

Q: Let me ask about the other part of your conclusions where you concluded that they are not [sic] noncollusive. What is it that leads you to believe that these three bids are noncollusive?

A: Well I see that the numbers are, again, consistent with what I'm familiar with. Nothing was glaring. I would have no reason to think that it was something that was conspired or together.

Q: Okay. Is there a way to tell from the relationship of one bid to another, either from the relationship of one bid to another in terms of dollars or the relationship of one or more bids to a budget figure, whether or not the bids are collusive?

[Objection to form]

A: Well, you know, when I look at these numbers – like, for instance the Donofrio bid was high within the three – I have about five years worth of work with him bidding, and he was the exact same way. I don't see him varying in any way from what he normally does for me in my bids. To me, you know, that was an indication that he – unless he's collusive with my bids too.

Q: Which we'll presume he is not.

A: I didn't see anything here that would lead me to believe that it was collusive.

Q: What hypothetically would you look for to see if, in your view, bids were collusive?

A: I don't really look for that sort of thing. I don't take that approach to my business.

Q: Okay.

A: But I guess if I saw something that all the numbers were out of whack completely, I would just throw them all out. I wouldn't entertain any.

(Pl. Mot. Exh. B at 43-44.)

testimony without hearing) (no need for a district court to "provide a plaintiff with an open-ended and never-ending opportunity to meet a Daubert challenge until plaintiff 'gets it right'") (quoting In re TMI Litig., 199 F.3d 158, 159 (3d Cir. 1999), cert. denied sub. nom. General Public Utilities Corp. v. Abrams, 530 U.S. 1225, 147 L. Ed. 2d 266, 120 S. Ct. 2238 (2000)). Consequently, I conclude that Mr. Parisi's opinion on the collusive nature of the defendants' bids is inadmissible as expert testimony under Rule 702.

Conclusion

For the foregoing reasons, the motion of plaintiff will be granted in part and denied in part. Mr. Parisi's testimony regarding the reasonableness of the defendants' bids is admissible, but his opinion regarding any collusion or lack thereof among the defendants will be suppressed.

An appropriate Order follows.

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Plaintiff,	:	
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	:	
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O R D E R

AND NOW this 3rd day of December, 2002, upon consideration of the motion in limine of plaintiff SmithKline Beecham Corporation ("SmithKline") to exclude the expert testimony of Laurence E. Parisi (Doc. No. 77), and the response thereto, and for the reasons set forth in the foregoing memorandum, **IT IS HEREBY ORDERED** that the motion in limine of plaintiff is **GRANTED IN PART AND DENIED IN PART**. Mr. Parisi may testify as to the factual issue of the reasonableness of the defendants' bids, but may not testify as to the issue of whether the bids were collusive.

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LOWELL A. REED, JR., S.J.