

Nos. A08-1584 and A08-1994

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State of Minnesota
In Court of Appeals

Scott Sayer and Wendell Anthony Phillippi,
Appellants,

v.

Minnesota Department of Transportation and
Flatiron-Manson, a Joint Venture,
Respondents.

APPELLANTS' BRIEF AND APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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STATEMENT OF THE ISSUES

1. Where the settled legal meaning of the term “responsive” in the context of public procurement requires “strict conformity with each and every requirement” of an RFP, and the Minnesota Legislature has enacted a public procurement statute for design-build projects, Minn. Stat. § 161.3426, which requires MnDOT to award best-value design-build projects only to proposals that are “responsive” to the mandatory, weighted selection criteria published in an RFP, can the court ignore the plain text, settled meaning, and overall scheme of the statute to interpret the statutory term “responsive” to grant MnDOT discretion to award a design-build contract to a proposal that deviated from the requirements of MnDOT’s RFP?

Trial Court Ruling: The trial court ruled that MnDOT had discretion to define “responsiveness” differently under §161.3426.

Most Apposite Cases: *Coller v. St. Paul*, 26 N.W.2d 835 (Minn. 1947); *Griswold v. Ramsey County*, 65 N.W.2d 647 (Minn. 1954); *Carl Bolander and Sons v. Minneapolis*, 451 N.W.2d 204 (Minn. 1990).

Most Apposite Statutory Provisions: Minn. Stat. §161.3422; Minn. Stat. §161.3426, subd. 1; Minn. Stat. §645.17(4)

2. Where the Minnesota Legislature enacted Minn. Stat. § 161.3426, which specifically prohibits the Commissioner of MnDOT from awarding a design-build contract to a non-responsive proposer, and the evidence before the trial court demonstrates that a design-build proposal is likely non-responsive such that any contract awarded thereon likely violates the statute and is illegal and void, does the trial court violate the separation of powers by “balancing the harms” that might result from stopping the illegal activity through a temporary injunction to allow the contract specifically prohibited by the Legislature to proceed?

Trial Court Ruling: The trial court ruled that it could weigh the cost of injunction against the mandatory requirements of the statute.

Most Apposite Cases: *Dahlberg Bros., Inc. v. Ford Motor Co.*, 137 N.W.2d 314, 321-322 (Minn. 1965); *Wilderness Soc’y v. Morton*, 479 F.2d 842 (D.C. Cir. 1973); *TVA v. Hill*, 437 U.S. 153 (1978)

Most Apposite Constitutional and Statutory Provisions: Minn. Const. Art. III, § 1; Minn. Stat. §161.3426, subd. 1

3. Did the trial court err by granting Flatiron’s motion for summary judgment despite ample evidence creating genuine issues of material fact as to Appellants’ claims for injunctive and declaratory relief, awarding summary judgment based on its

determination that “substantial evidence” supported MnDOT’s decision, instead of construing the facts in the light most favorable to Appellants, the non-moving parties?

Trial Court Ruling: The trial court ruled that “substantial evidence” supported summary judgment, disregarding numerous disputed and material fact issues.

Most Apposite Cases: *Schroeder v. St. Louis County*, 708 N.W.2d 497, 507 (Minn. 2006)

Most Apposite Statutory Provisions: Minn. R. Civ. P. 56.03; Minn. Stat. §161.3426.

4. Is Appellants’ request for declaratory relief either non-justiciable or moot, such that a violation of Minn. Stat. § 161.3426 is excused by substantial completion of a design-build project, even though a specific declaration that the contract is illegal and void would entitle MnDOT to withhold any remaining contract payment or to seek recovery of the difference between the contract price and the *quantum meruit* value of Flatiron’s completed work, and even though awarding of a contract to a non-responsive proposer pursuant to a declared statutory interpretation by that state agency is a harm capable of repetition yet evading review and presents a question of statewide importance warranting immediate resolution?

Trial Court Ruling: The trial court ruled that Appellants’ claims were not justiciable because the bridge was substantially complete.

Most Apposite Cases: *Rupp v. Mayasich*, 562 N.W.2d 555 (Minn. Ct. App. 1997); *Clark Construction Co., Inc. v. Pena*, 930 F.Supp. 1470 (M.D. Ala. 1996); *Coller v. St. Paul*, 26 N.W.2d 835 (Minn. 1947); *Village of Pillager v. Hewitt*, 98 Minn. 265, 107 N.W. 815 (1906)

Most Apposite Statutory Provisions: Minn. Stat. §555.01-.02.

STATEMENT OF THE CASE AND FACTS

I. STATEMENT OF THE CASE

This case concerns Respondent Minnesota Department of Transportation's ("MnDOT's") allegedly illegal contract with Respondent Flatiron-Manson ("Flatiron") to design and build the new I 35W bridge ("the Project"). Appellants Scott Sayer and Tony Phillippi ("Appellants") commenced this action on October 16, 2007, as Minnesota taxpayers and private attorneys general, seeking a declaratory judgment and a temporary injunction under Minn. R. Civ. P. 65.02 to stop work on the Project because MnDOT had illegally awarded the contract to Flatiron.¹ Appellants' detailed complaint alleges that MnDOT illegally awarded the contract based on a non-responsive proposal.²

Pursuant to Minn. R. Civ. P. 65.01, Appellants served and filed a motion for a temporary restraining order ("the TRO Motion").³ The Trial Court denied the TRO Motion and construction commenced.⁴

The parties thereafter engaged in detailed pre-trial discovery, and after the close of discovery, Plaintiffs moved for a temporary injunction, arguing that the discovery record demonstrated that MnDOT had, in fact, illegally awarded the contract to a non-responsive proposal, violating the statute ("the Motion").⁵ Plaintiffs supported the Motion with an

¹ Complaint at p. 22 (A-23).

² Complaint at ¶¶ 16-48 (A-5 – A-16).

³ Plaintiffs' Notice of Motion and Motion for a Temporary Restraining Order (A-31).

⁴ Appellants initially appealed the denial of the TRO, but then dismissed that appeal without prejudice when its motion for expedited review was denied in order to develop a factual record through the discovery process. *See* Stipulation and Order Dismissing Appeal Without Prejudice (SR-3); Order, dated December 27, 2007 (SR-6).

⁵ *See* Plaintiffs' Notice and Motion for a Temporary Injunction (A-83).

affidavit of counsel, attaching 35 exhibits and the transcripts of ten depositions taken during the case.⁶

At the same time, Flatiron moved for summary judgment arguing laches and unclean hands.⁷ Plaintiffs opposed the motion based on the extensive record already before the court, as well as the affidavits of Charles McCrossan and Wendell Anthony Phillippi.⁸

The trial court denied the motion for temporary injunction by written order dated August 28, 2008,⁹ and granted in part Flatiron's motion for summary judgment, ruling that Appellants were not entitled to injunctive relief.¹⁰ At that time, Flatiron's motion for summary judgment as to Petitioners' claim for declaratory relief remained under advisement.¹¹

Appellants filed appeal number A08-1584 on September 4, 2008, appealing the Trial Court's denial of the temporary injunction and the summary judgment dismissing Appellants' claims for injunctive relief.¹² Before the transcript was delivered, however, the Trial Court issued an order on October 23, 2008, granting Flatiron's motion to dismiss Appellants' request for declaratory relief, and entering its judgment on November

⁶ See Aff. of Jeffrey Wieland in Support of Plaintiffs' Motion for a Temporary Injunction ("Wieland Aff.") (SR-51).

⁷ See Defendant Flatiron's Notice and Motion for Summary Judgment (A-85).

⁸ See Memorandum of Law Opposing Flatiron's Motion for Summary Judgment (SR-376); Aff. of Wendell Anthony Phillippi (SR-397); Aff. of Charles McCrossan (SR-399).

⁹ See Order, dated August 26, 2008 (A-87).

¹⁰ *Id.*

¹¹ *Id.*

¹² See Notice of Appeal to Court of Appeals (A-107).

7, 2008.¹³ On November 14, 2008, Appellants filed appeal number A08-1994 to appeal that judgment and, at the same time, requested that the Court consolidate the two appeals.¹⁴ This Court consolidated the appeals on November 20, 2008.

II. FACTS

The Legislature granted MnDOT the authority to use best value procurement on design-build projects in 2001.¹⁵ MnDOT has used that authority six times before the 35W project. In four of those six previous procurements, the lowest priced proposal also had the highest technical score.¹⁶ Price, not the technical score, was determinative in five of the six previous design-build competitions.

There has only been one previous MnDOT design-build project in which the technical score determined the winner.¹⁷ In that procurement, technical score was the deciding factor, but its influence did not overwhelm the consideration of price. The difference in price between the winning proposal and the lowest-priced proposal was less than 1%.

In contrast, Flatiron's proposed price on the 35W project was \$56,825,000 or 32%

¹³ See Amended Order, dated October 23, 2008 (A-110).

¹⁴ See Notice of Appeal to Court of Appeals (A-163).

¹⁵ Act of July 1, 2001, ch. 8, art. 3, 2001 Minn. Sess. Law Serv. 2015 (West). See also Dean B. Thomson, et al., *A Critique of Best Value Contracting in Minnesota*, 34 WM. MITCHELL L. REV. 25, 35-39 (2007). Best value contracting allows consideration of factors other than price and schedule in the award determination.

¹⁶ See *Wieland Aff.*, Ex. 238 (SR-208). On the TH 212, TH 52 (Rochester), TH 52 (Oronoco), and I-494 projects, the lowest priced proposals also had the highest technical score.

¹⁷ See *id.*

higher than C.S. McCrossan's, the lowest priced, shortest duration proposal.¹⁸ If the cost of time is added, valued at \$200,000 per day, then Flatiron's price was \$70,825,000 higher than C.S. McCrossan's.¹⁹ Flatiron won because its technical score was scored an unprecedented 25.56 points higher than C.S. McCrossan's. In the previous six design-build projects, the largest difference in technical scores between the first and second place proposers was only 7.12 points.²⁰

MnDOT issued a Request for Qualifications ("RFQ") for the new 35W bridge on August 4, 2007 and found that the four teams submitting proposals possessed the technical capabilities and the "vast experience" necessary to successfully complete the project in a compressed time frame.²¹

MnDOT's Mandatory Selection Criteria Were Established by The RFP and ITP

MnDOT's subsequent Request For Proposal ("RFP") and the Instructions to Proposers ("ITP") was delivered to the proposers on August 23. MnDOT also wrote the Proposal Evaluation Plan²², outlining the TRC's proposal evaluation process and procedures at that time.

MnDOT disclosed its scoring criteria and the weights assigned to those criteria to

¹⁸ See Wieland Aff., Ex. 227 (SR-193).

¹⁹ See *id.* If one uses the \$400,000 daily cost to road users cited by Jon Chiglo in his Affidavit, then the Flatiron proposal is \$84,825,000 more expensive than C.S. McCrossan's.

²⁰ See Wieland Aff., Ex. 238 (SR-208). The T.H. 212 project held the previous record.

²¹ See Wieland Aff., Ex. 245, p. 18, line 7 through p. 20, line 21 (SR-233).

²² Attached as Wieland Aff., Ex. 31 (SR-55).

the proposers in the ITP.²³ The ITP also specified the financial, temporal, and geographic bounds on the project. MnDOT's internal cost estimate for the design and construction of the Project, which was not disclosed to the proposers, was \$182,238,000.²⁴ The proposers were prohibited from proposing work that required capacity or right of way beyond what was shown on the Right of Way Map.²⁵

Book 2 of the RFP contained the project's detailed technical requirements.²⁶ In it, MnDOT specified the allowable types of bridges, placing further restrictions on the structural design of the bridge by stating, "If the Contractor chooses a steel box girder design, a minimum of 3 boxes in each direction of traffic is required. A minimum of 3 webs are required for concrete box designs."

Design of the 35W roadway profile presented significant challenges to the proposers. Near the north end, the new 35W roadway had to pass *under* the University Avenue bridge overpass with at least 16', 4" of clearance to allow passage of trucks and busses. Continuing farther south, the new roadway had to pass *over* 2nd Street with at least 14' of clearance. Connecting those dots seems trivial until one considers that the slopes of the vertical curves are also constrained by MnDOT's roadway design standards, which specify the maximum change in roadway elevation over a length at a given

²³ See Wieland Aff., Ex. 32, at §§ 4.3.3.3 through 4.3.3.6 (SR-117).

²⁴ See Wieland Aff., Ex. 235 (SR-197).

²⁵ See *id.* at § 4.3.3.5.1 (SR-117). The Right of Way Map is attached as Wieland Aff., Ex. 193 (SR-160).

²⁶ See Aff. of Aaron Dean in Support of Plaintiffs' Motion for a Temporary Restraining Order ("Dean Aff."), Ex. K.

speed.²⁷

The proposers could not use the old 35W roadway profile because MnDOT directed them to assume that the University Avenue overpass will get three feet deeper, to accommodate a future redesign of that interchange.²⁸ That three feet of additional depth made design of a vertical profile with an acceptable slope difficult, as Figure 1 illustrates.²⁹

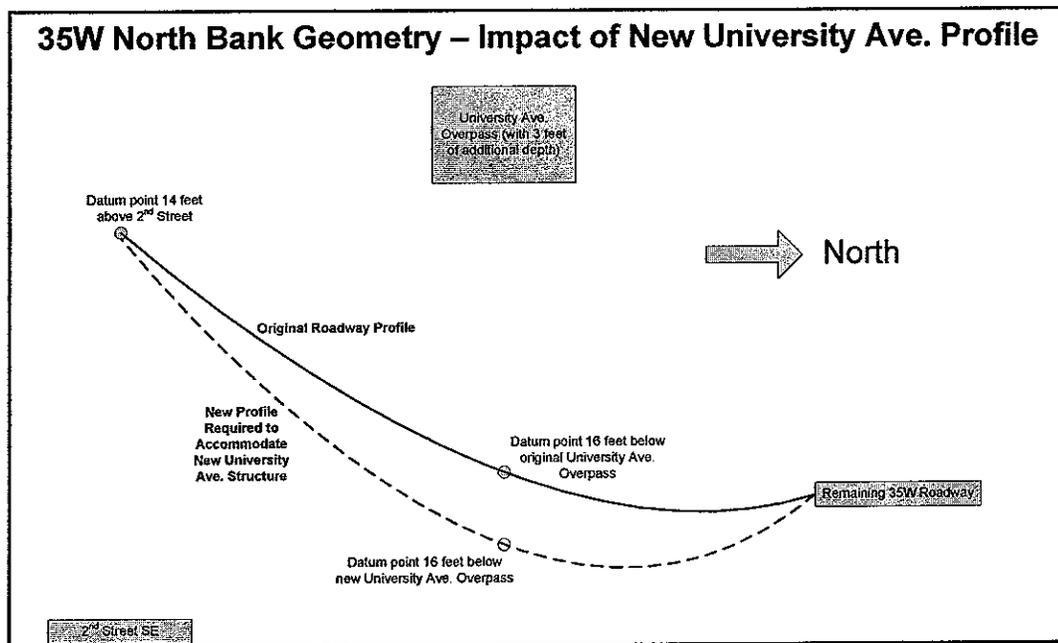


Figure 1

Flatiron proposed to address this problem by lowering 2nd Street three feet, even though the Right of Way Map only showed a temporary easement along that street,³⁰ and Flatiron's proposal even exceeded that easement.³¹ Because its proposal lowered 2nd Street, Flatiron's resulting roadway profile, shown on Figure 2, has a curvature that is

²⁷ See Wieland Aff., Ex. 240 at p. 54, line 1 through p.61, line 18 (SR-215).

²⁸ See Wieland Aff., Ex. 32 at § 4.3.3.5.1 (SR-117).

²⁹ The sketch in Figure 1 is roughly to scale.

³⁰ See Complaint, Ex. B (A-25) and Dean Aff., Ex. L at Appendix A.

³¹ See Dean Aff., Ex. L; compare Wieland Aff., Ex. 193 (SR-160).

very similar to the original 35W roadway and is much less steep than if 2nd Street were not lowered.³²

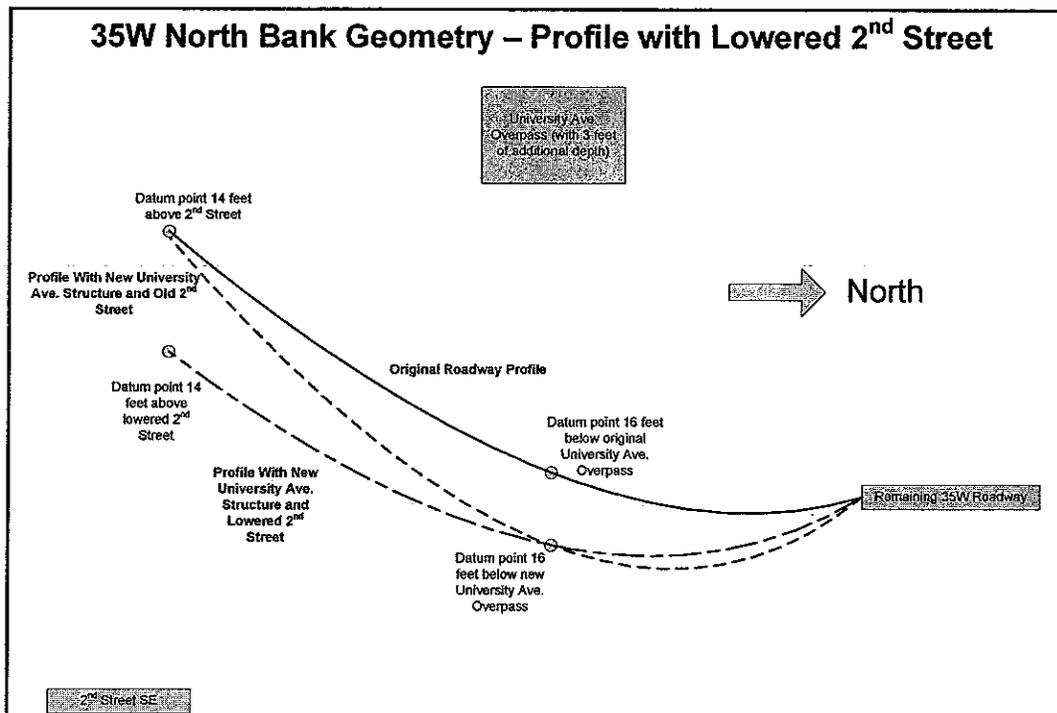


Figure 2

The structures proposed by Flatiron also included several bridge spans using single cell box girders.³³ Flatiron used two such box girders on each span, but each box girder only has two not three webs.

MnDOT's Scoring Process Did Not Adhere to the RFP and ITP

MnDOT described its internal process for evaluating the proposals in its Proposal Evaluation Plan.³⁴ Under MnDOT's process, its "Legal Subcommittee" conducted a Pass/Fail review of the proposals to determine if the proposals conformed with administrative requirements like maximum number of pages and inclusion of the proper

³² See Figure 2.

³³ See Complaint, Ex. A (A-24); Dean Aff., Ex. L at Appendix A.

³⁴ See Wieland Aff., Ex. 31 (SR-55).

forms.³⁵ After that, the Technical Review Committee (“TRC”) chairman, who is not a scoring member of the TRC, conducted another non-technical, check.³⁶ Finally, the proposals were given to the scoring members of the TRC.

In their depositions, the TRC members described the process they used to evaluate the proposals.³⁷ Each member was given a copy of the ITP and had access to a copy of the RFP, although five of the six TRC members testified that they did not read the entire RFP for the project.³⁸ Technical sub-committees, which did not include any TRC members, reported their findings of strengths and weaknesses for each proposal. The TRC members often took notes on the sub-committee report handouts.³⁹ After all of the technical sub-committees had reported, the TRC attended one hour interviews with each of the proposers. Again, the TRC members took notes on handouts.⁴⁰ After the interviews, the TRC members discussed the proposals and then scored the proposals on the prescribed scoresheets.⁴¹

The TRC members scored the proposals according to MnDOT’s process described in the Proposal Evaluation Plan.⁴² The TRC members assigned a qualitative rating,

³⁵ *Id.* at § 4.2 (SR-62) and Appendix A (SR-67).

³⁶ *Id.* at § 4.3 (SR-63) and Appendix B (SR-71).

³⁷ *See, e.g.*, Wieland Aff., Ex. 245 at p. 29, line 8 through p. 60, line 20 (SR-235).

³⁸ *See* Wieland Aff., Ex. 242 at p. 43, line 21 through p. 44, line 18 (SR-225); Wieland Aff., Ex. 245 at p. 32, line 6 through line 24 (SR-236); Wieland Aff., Ex. 246 at p. 29, line 2 through line 20; Wieland Aff., Ex. 247 at 28, line 3 through p. 29, line 6 (SR-257); Wieland Aff., Ex. 249 at p. 71, line 8 through p. 73, line 3 (SR-274).

³⁹ *See, e.g.*, Wieland Aff., Exs. 173 (SR-154) and 180 (SR-157).

⁴⁰ *See, e.g.*, Wieland Aff., Exs. 171 (SR-147).

⁴¹ *See, e.g.*, Wieland Aff., Exs. 113 (SR-129), 120 (SR-135), and 127 (SR-141).

⁴² *See* Wieland Aff., Ex. 31 at § 4.4 (SR-63).

ranging from “Excellent” to “Fails,” for each criterion to each proposal.⁴³ Appendix H of the Proposal Evaluation Plan contained descriptions of each of the qualitative ratings that the TRC members were to score for each sub-criterion.⁴⁴ Those descriptions are very short and do not contain all the requirements in the RFP for the same sub-criterion. For example, a Very Good rating for the Extent of Quality Control/Quality Assurance sub-criterion is described in the Proposal Evaluation Plan as, “Proposer commits to several enhancements to the Design Quality templates that provide significant added value to the Design and Construction interaction on this project.”⁴⁵ That description does not capture the myriad requirements contained in the 19 pages in the RFP devoted to quality control/quality assurance.

After assigning the qualitative ratings, the TRC members assigned a point score within the range defined for that rating. The “Fails” rating, which had a numeric range of 0 to 49 percent, was defined as, “The Proposal is considered to not meet the RFP requirements or is non-responsive.”⁴⁶ Each TRC member’s total score for each proposal was calculated by applying the defined weight to the point scores and then adding the weighted scores for each criteria. The scores of the six TRC members were averaged to determine the final technical score for each proposal.

MnDOT’s proposal scoring process in its Proposal Evaluation Plan did not include a verification that the proposals complied with all the technical requirements in Book 2 of

⁴³ *Id.* at § 5.0 (SR-65).

⁴⁴ *Id.* at Appendix H (SR-92).

⁴⁵ *Id.*

⁴⁶ *Id.* (emphasis in the original).

the RFP.⁴⁷ No one, including the scoring members of the TRC, made a determination of the responsiveness of the proposal, other than the limited administrative checks noted above, before the proposals were scored.⁴⁸ According to MnDOT, responsiveness was determined based on the TRC's scoring: a proposal that garnered an average score of 50 or above was considered responsive; proposals with scores of 49 or lower were not responsive.⁴⁹ Thus, a failing score for one criteria or component of a proposal did not render that proposal nonresponsive; only an averaged failing score for all criteria or components of a proposal could render that proposal nonresponsive.

The TRC scored the technical proposals and awarded Flatiron an average score of 91.47.⁵⁰ The price proposals were opened on September 19, 2007. MnDOT applied the statutory formula and declared Flatiron the apparent winner.⁵¹

Appellants Challenged Flatiron's Responsiveness As Taxpayer Plaintiffs.

Minn. Stat. § 161.3426 requires that MnDOT best value contracts only be let to responsive proposers. After the TRC completed its scoring of the proposals, no effort was made by the Commissioner of the Department of Transportation, her Deputy or assistant to determine if the proposals were responsive.⁵² MnDOT awarded and executed the contract to design and build the replacement 35W bridge to Flatiron-Manson on

⁴⁷ See Wieland Aff., Exs. 225 and 247 at p. 48, line 14 through p. 49, line 12 (SR-259).

⁴⁸ See Wieland Aff., Ex. 31 at § 4.1 (SR-62).

⁴⁹ See Wieland Aff., Ex. 31 at § 5.0 (SR-65) and Ex. 236 at p. 2 (SR-205); see also Wieland Aff., Ex. 240 at p. 40, line 7 through p. 43, line 1 (SR-211).

⁵⁰ See Wieland Aff., Ex. 226 (SR-188).

⁵¹ See Wieland Aff., Ex. 227 (SR-193).

⁵² See Wieland Aff., Ex. 243 at p. 62, lines 11 through 13 (SR-229); Wieland Aff., Ex. 241 at p. 116, line 23 through p. 117, line 9 (SR-222); Wieland Aff., Ex. 244 at p. 39, lines 17 through 22 (SR-231).

October 8, 2007.⁵³ MnDOT deemed Flatiron's proposal to be the best value, despite the fact that it was the highest priced and longest duration proposal submitted.⁵⁴

⁵³ See Dean Aff., Ex. B.

⁵⁴ See Wieland Aff., Ex. 235 (SR-197).

STANDARDS OF REVIEW

Appellants raise questions of law, which this Court reviews *de novo*, regarding the application of Minnesota statutes and case law to a publicly bid construction project.⁵⁵ “On appeal, this court need not defer to the trial court’s conclusion when reviewing questions of law.”⁵⁶

The question of whether the trial court properly denied Appellants’ requested temporary injunction is reviewed for abuse of discretion.⁵⁷ A trial court abuses its discretion when its ruling is based on an erroneous view of the law.⁵⁸

Likewise, the trial court’s grant of summary judgment is reviewed to determine whether the trial court erred in its application of the law and whether there are any genuine issues of material fact.⁵⁹ On appeal, the court reviewing summary judgment must view the evidence in the light most favorable to the party against whom judgment was granted.⁶⁰

As the Minnesota Supreme Court recently noted, the “substantial evidence” test does not apply to summary judgments:

A party need not show substantial evidence to withstand summary judgment.
Instead, summary judgment is inappropriate if the nonmoving party has the burden

⁵⁵ *Doe v. Minnesota State Bd. of Medical Examiners*, 435 N.W.2d 45, 48 (Minn. 1989); *Hibbing Educ. v. P.E.R.B.*, 435 N.W.2d 45, 48 (Minn. 1985); *Pella Prods., Inc. v. Arvig Tel. Co.*, 488 N.W.2d 316, 317 (Minn. Ct. App. 1992)).

⁵⁶ *County of Lake v. Courtney*, 451 N.W.2d 338, 341 (Minn. Ct. App. 1990).

⁵⁷ *Carl Bolander & Sons Co. v. City of Minneapolis*, 502 N.W.2d 203, 209 (Minn. 1993).

⁵⁸ *Almor Corp. v. County of Hennepin*, 566 N.W.2d 696, 701 (Minn. 1997).

⁵⁹ *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990).

⁶⁰ *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993) (citation omitted).

of proof on an issue and presents sufficient evidence to permit reasonable persons to draw different conclusions.⁶¹

ARGUMENT

This appeal primarily concerns the trial court's erroneous interpretation of the Minnesota Statutes that govern MnDOT's use of the best-value design-build contracting, Minn. Stat. §161.3420 *et seq.* Minnesota's appellate courts have not previously construed or interpreted these statutes, which MnDOT plans to use for future public procurements in Minnesota road and highway construction. The trial court's error of law on this critical legal issue will be addressed first, as it affects all of the issues in this consolidated appeal.

I. THE TRIAL COURT'S MISINTERPRETATION OF THE STATUTE CONTRADICTS ITS PLAIN LANGUAGE, SETTLED LEGAL MEANING, AND STATUTORY SCHEME.

The trial court erroneously interpreted Minn. Stat. §161.3426 contrary to the plain language of the statute, ignoring the settled legal meaning of the term "responsive" and the statutory scheme for awarding best value design-build projects. That scheme requires MnDOT to state and weight the criteria upon which MnDOT will award a design-build proposal, and allows MnDOT to award design-build work only to proposals that are responsive to the mandatory, stated criteria. The trial court erroneously interpreted Minn. Stat. §161.3426 to allow MnDOT "discretion" to define "responsiveness" thereby rendering irrelevant the mandatory criteria that proposers are supposed to satisfy.

⁶¹ *Schroeder v. St. Louis County*, 708 N.W.2d 497, 507 (Minn. 2006) (citations omitted, emphasis added)

A. The Plain Language of the Best-Value Statute Requires MnDOT to Award only to Proposals that are Responsive to MnDOT's Previously Stated and Weighted Criteria

The Best-Value Design-Build statute requires MnDOT to issue a Request for Proposals (“RFP”) to the short-listed proposers, whose proposals are then scored by the Technical Review Committee (“TRC”).

Minnesota Statutes §161.3422 requires RFPs to include, among other things, “the selection criteria, including the weight or relative order, or both, of each criterion”.⁶² Section 161.3426 governs the award of the project, and requires that MnDOT award design-build projects only to “responsive” proposers, stating in part that “the commissioner shall award the contract to the responsive and responsible design-builder with the lowest adjusted score.”⁶³ Indeed, section 161.3426 intentionally imposes the requirement of responsiveness no less than four times. Thus, based on the plain text of the statute, MnDOT can only award a best-value design-build project to a design-build proposer whose proposal is responsive to the criteria that MnDOT was required to state and weight in its RFP.

B. The Concept of Responsiveness Must be Interpreted According to its Settled Legal Meaning.

Although the legislature did not define “responsiveness” in the statute, the legislature is deemed to use words according to their well-settled meaning, in light of common law decisions on the same subject matter.⁶⁴ According to Minn. Stat. §645.17:

⁶² Minn. Stat. §161.3422 (emphasis added).

⁶³ Minn. Stat. §161.3426, subd. 1(d). (2007) (emphasis added).

⁶⁴ *In re Application of Gau*, 41 N.W.2d 444 at 447 (Minn. 1950).

(4) when a court of last resort has construed the language of a law, the legislature in subsequent laws on the same subject matter intends the same construction to be placed upon such language.⁶⁵

As Appellants explained to the trial court, the concept of responsiveness has a well-settled legal meaning in the context of public procurement. Public procurement statutes have developed over the years in order to protect the integrity of the award of contracts by the government.⁶⁶ Sixty years ago, in *Coller v. City of St. Paul*, the Minnesota Supreme Court stated that “laws requiring competitive bidding . . . ought not to be frittered away by exceptions,” declaring a rule of “[s]tern insistence upon positive obedience” to procurement statutes.⁶⁷

To protect these important policies, Minnesota law has long restricted state agencies to awarding public contracts only to a “responsive” proposer or bidder – in other words, to a contractor whose proposal responds to all material terms of a public body’s solicitation.⁶⁸ A term is material if it affects a proposer’s price, time, quality or manner of performance, or if it gives one proposer a competitive advantage over another.⁶⁹ The requirement of bid responsiveness thus protects the fundamental fairness of the bid process. As one court has explained:

⁶⁵ Minn. Stat. §645.17 (4).

⁶⁶ 1 BRUNER & O’CONNOR ON CONSTRUCTION LAW § 2:22 at pp. 85-86.

⁶⁷ *Coller v. City of St. Paul*, 223 Minn. 376, 385, 26 N.W.2d 835, 841-842 (1947).

⁶⁸ *Foley Bros., Inc. v. Marshall*, 266 Minn. 259, 263, 123 N.W.2d 387, 390 (1963); *Lovering-Johnson, Inc. v. City of Prior Lake*, 558 N.W.2d 499, 502 (Minn. Ct. App. 1997).

⁶⁹ *Id.*; *Carl Bolander and Sons v. Minneapolis*, 451 N.W.2d 204, 206-07 (Minn. 1990); see also 1 BRUNER & O’CONNOR ON CONSTRUCTION LAW §2:74, pp. 181-182 (2002) (stating the same standard).

These principles rest upon and effectuate important public policies. Rejection of irresponsible bids is necessary if the purposes of formal advertising are to be attained, that is, to give everyone an equal right to compete for Government business, to secure fair prices, and to prevent fraud. The requirement that a bid be responsive is designed to avoid unfairness to other contractors who submitted a sealed bid on the understanding that they must comply with all of the specifications and conditions in the invitation for bids, and who could have made a better proposal if they imposed conditions upon or variances from the contractual terms the government had specified. The rule also avoids placing the contracting officer in the difficult position of having to balance the more favorable offer of the deviating bidder against the disadvantages to the government from the qualifications and conditions the bidder has added. In short, the requirement of responsiveness is designed to avoid a method of awarding government contracts that would be similar to negotiating agreements but which would lack the safeguards present in either that system or in true competitive bidding.⁷⁰

The requirement for responsiveness is a bedrock principle at the foundation of public procurement law. Responsiveness promotes competition by ensuring a level playing field for all competitors.⁷¹ Increased competition tends to decrease prices, which directly benefits the public.⁷² Most importantly, responsiveness prevents fraud, waste, and abuse in public procurement by limiting the discretion of public officials.⁷³ Responsiveness maintains the integrity of the public procurement system, and “[t]he preservation of integrity is the primary objective that the public tender mechanism is meant to achieve, and it clearly outweighs the public tenders two other objectives

⁷⁰ *Toyo Menka Kaisha, Ltd. v. U. S.*, 597 F.2d 1371, 1377 (Ct.Cl. 1979) (citing R. NASH & J. CIBINIC, FEDERAL PROCUREMENT LAW, 260 (3d Ed. 1977) (other citations and quotations omitted).

⁷¹ *See Toyo Menka Kaisha, Ltd. v. United States*, 597 F.2d 1371, 1377 (Ct. Cl. 1979).

⁷² *See id.* *See also Griswold v. Ramsey County*, 242 Minn. 529, 534-35, 65 N.W.2d 647, 651 (1954).

⁷³ *Griswold* at 536, 652.

[equality of opportunity and the attainment of economic efficiency].”⁷⁴

Minnesota courts do not tolerate erosion of the responsiveness principle.⁷⁵ Public procurements that do not strictly follow that principle undermine the public’s faith in the government’s honesty and proposers’ confidence that competing for a contract is worth the cost.⁷⁶

In this case, Appellants sought to apply the settled legal meaning of the term responsiveness to Minn. Stat. §161.3426. The trial court disagreed, relying on the very general statement in Minn. Stat. §161.3426 that “[n]otwithstanding any other law to the contrary, the commissioner may solicit and award a design-build contract for a project on the basis of a best value procurement.”⁷⁷ Of course, the well understood definition of ‘responsiveness’ is not at odds with the commissioner’s ability to engage in design-build, best value procurement. Best-value procurement merely allows award based on factors other than price; the process still depends on the concept of ‘responsive’ proposals in order to make awards. Indeed, Minn. Stat. § 645.17(4) precludes the trial court from using the broad “notwithstanding any other law to the contrary” language in §161.3426 as a means to disregard 60 years of Minnesota Supreme Court precedent.

C. The Trial Court’s Order Contradicted the Statutory Scheme.

The trial court erroneously ignored the settled legal meaning of responsiveness in each of its orders. Its reasoning is well-summarized by the following passage:

⁷⁴ Omer Dekel, *The Legal Theory of Competitive Bidding for Government Contracts*, 37 *Pub. Cont. L. Journal* 237, 258-259 (Winter No. 2 2008).

⁷⁵ *Griswold* at 535-36, 652.

⁷⁶ *See Toyo Menka Kaisha, Ltd.*, 597 F.2d at 1377.

⁷⁷ Order dated August 26, 2008 at p. 13 (A-99).

Plaintiffs' assertion that any material deviation from the RFP should render a proposal nonresponsive ignores the statutory framework. Responsiveness should be understood in the context of the statutory framework which mandates the procedure for a best-value design-build procurement, rather than in a layman's or commonlaw understanding of that term. The Court cannot ignore the plain language of the statute which clearly leaves the determination of the responsiveness of a proposal in the hands of the TRC. The scoring system employed by the TRC, as mandated in the ITP, illustrates the TRC's understanding of nonresponsiveness as any proposal which has an overall failing score, evidenced by the language in the ITP describing the scoring system where a score of 0-49 was a "Fail"; meaning the proposal did not meet RFP requirements of was non-responsive. The status of a proposal as responsive or nonresponsive under this process is a product of the scoring methodology. Responsiveness then is not determined based on a proposal's strict conformity with each and every requirement of the RFP. The evidence provided by Plaintiffs is insufficient to persuade the Court that Flatiron's proposal should have been rejected outright as nonresponsive.⁷⁸

In the October order, the trial court similarly stated that responsiveness "had little application to the concept as used in the design-build/best-value statute, under which the agency is granted a great deal of discretion by the legislature."⁷⁹

The trial court's interpretation of responsiveness effectively renders irrelevant the statutory requirement that MnDOT state and weight the criteria it would follow in its RFP. If MnDOT has "discretion" to determine responsiveness after-the-fact, then the mandatory requirements of the RFP – the stated and weighted criteria – can be completely circumvented by MnDOT's TRC, in effect allowing MnDOT to re-state its award criteria after it has seen the competing proposals. In other words, if a strict scoring of a weighted and stated RFP requirement would result in a rejected proposal, MnDOT can, according to the trial court, simply redefine the proposal as "responsive" and give

⁷⁸ Order, dated August 26, 2008 at p. 14 (A-100).

⁷⁹ Amended Order, dated October 23, 2008 at p. 7 (A-116).

the proposal a very high score! The trial court's interpretation thus opens the door to fraud or favoritism, by allowing MnDOT to score a non-responsive but favored proposal more highly and ignore violations of the RFP, giving its favored proposer an unfair advantage.

This Court should not so quickly read the term "responsive" out of the statute.⁸⁰ If the TRC had discretion to ignore responsiveness, or define the term however it wants, then there is no reason for the statute to use the understood term. Yet, as noted above, the statute uses the term 'responsive' repeatedly, applying it to the TRC's scoring as well as to the MnDOT Commissioner's ultimate award of a proposal based on the results of the scoring.

The trial court found that MnDOT had "discretion" in this context based on statutory language that requires the TRC to "reject any proposal it *deems* nonresponsive."⁸¹ The trial court's reading of the statute ignores the remainder of §161.3426, subd. 1, which requires responsiveness at each stage of the scoring and award process. The language the trial court cited is from subdivision 1(a), which concerns the TRC's scoring of the proposals: the TRC must reject nonresponsive proposals as part of its duties. The TRC is not infallible, however, and it is possible that there will be items of non-responsiveness that the TRC fails to recognize or mistakenly decides to allow.

The remainder of subd. 1 serves as a check against such scoring, by continuing to require MnDOT, not just the TRC, to ensure responsiveness throughout the process.

⁸⁰ Minn. Stat. §645.16 ("every law shall be construed, if possible, to give effect to all its provisions").

⁸¹ Minn. Stat. §161.3426, subd.1 (a)

Under subd. 1 (b), when the scores of competing proposers are announced, the lowest-scoring “responsible and responsive” bidder “must be” selected to perform the project. The TRC does not make that selection, MnDOT does, but if responsiveness were only a result of TRC scoring, there would be no need for this additional requirement, because non-responsive proposals already would have been rejected by the TRC.⁸²

Subdivision 1(d) subsequently provides that, independently of how the proposals are scored pursuant to 1(a) and which is selected pursuant to 1(b) or (c), MnDOT’s commissioner “*shall* award the contract to the *responsive* and responsible design-builder with the lowest adjusted score.”⁸³ This final protection further ensures that, regardless of the scoring method, MnDOT’s commissioner has an independent obligation to award the contract only to a responsive proposer.

1. 161.3426 does not contain qualifying language that might permit an award to an otherwise non-responsive proposer.

It is possible to build discretion into best value procurement, as was illustrated by this Court’s decision in *Siemens Transp. Systems, Inc. v. Metropolitan Council*.⁸⁴ In that case, the Metropolitan Council conducted a best value procurement, awarding a contract for Light Rail Vehicles to the contractor with the second best technical score. In that case, mandatory language requiring award to the highest scoring proposal was qualified by a caveat, as follows:

⁸² The same language is repeated for procurements that include a time factor. Minn. Stat. §161.3426, subd. 1(c).

⁸³ *Id.* at subd 1 (d) (emphasis added).

⁸⁴ Court of Appeals file no. C8-00-2213, 2001 WL 682892, (unpublished) (Minn. Ct. App. June 19, 2001) (A-184).

The Council *will award a contract to the Bidder whose Best and Final Offer yields the highest combined score* in accordance with the evaluation criteria in Section 1.12 and, when considered in its entirety, best conforms to the overall long term interests of the Council.

Siemens argued the proposal language required the Council to award only to the proposer with the highest score. The Court disagreed, concluding that Siemens' position would read the qualifying language out of the contract.:

The council argues that the express language of the request gives the council discretion to consider the scores in relation to its overall long-term interests before making an award. We agree. The district court correctly noted that nothing in the request required the council to award the contract to the bidder with the highest score and that the contract language and evaluation panel would be superfluous under Siemens's reading of the request.

In this case, §161.3426 governs the contract award, and that provision does not contain any qualifying language as found in the *Siemens* procurement. If the legislature wanted to grant discretion to MnDOT to re-define responsiveness, it could have easily appended similar language onto subdivision 1(b), (c), or 1(d) or not chosen to use the well understood word "responsive."

But 161.3426 contains no such caveats admitting to any discretionary interpretation. The statute instead provides simply and plainly that the commissioner "shall award the contract to the responsive and responsible design-builder with the lowest score." The trial court believed that "discretion is inherent in the statutory [design-build] scheme."⁸⁵ This is generally true, but not in the specific way stated by the trial court. MnDOT's discretion lies in its ability to select, state, and weight the criteria it decides to

⁸⁵ Amended Order dated October 23, 2008 p. 7 (A-116).

include in the RFP. This is vast discretion. Once the criteria are stated and weighted, however, MnDOT must reject proposals that are non-responsive to those required criteria and score only responsive proposals. MnDOT retains discretion to timely amend its criteria before proposals are received or reject all proposals and resolicit the project. But MnDOT does not have the discretion to redefine the term 'responsive' after-the-fact so it can select whatever proposal it wants irrespective of whether it is responsive to the stated criteria in the RFP. The trial court erred when it found otherwise and disregarded the settled meaning of this phrase.

2. The trial court based its decisions on its erroneous interpretation of responsiveness.

Based on its mis-interpretation of responsiveness, the trial court erroneously ruled in the August Order that Plaintiffs could not prevail on the merits and, therefore, were not entitled to injunctive relief. Instead of applying the settled meaning of responsiveness, the trial court considered responsiveness to be purely a function of the TRC's scoring methodology. Under that methodology, if the TRC gave a proposal a score of 0-49, that score was a "Fail" and considered non-responsive. Because the trial court considered that methodology controlling, it ruled that responsiveness "is not determined based on a proposal's strict conformity with each and every requirement of the RFP." The trial court did not discuss the caselaw noted above, other than to disregard it based upon its analysis of the statute.

By ignoring the settled legal meaning of 'responsive,' and substituting for that meaning a scoring methodology not found in the statute, the trial court violated the

presumption found in Minn. Stat. §645.17 (4). The statute is presumed to contain the settled legal meaning of the term responsiveness, where the issue has been determined by a court of last resort. The Minnesota Supreme Court has established the settled legal meaning of responsiveness through cases such as *Coller* and *Carl Bolander*, and the legislature was deemed to know that meaning when it authorized awarding best-value design-build projects only to responsive proposers. The trial court's explicit decision to ignore those decisions in its interpretation is clear legal error that must be reversed.

Indeed, the trial court explicitly refused to credit Appellants' arguments on responsiveness almost entirely because of its mistaken view of the law. In the August Order, the trial court stated:

The bulk of evidence proffered by Plaintiffs in support of their assertion that Flatiron's proposal was nonresponsive and should have been rejected, is only useful if their interpretation of what is meant by 'responsive' is accepted. Given the relative clarity of the statute, and the deference to be given to administrative decisions of this nature, the Court finds this Dahlberg factor weighs in favor of denial of the requested injunctive relief.⁸⁶

In other words, the trial court's decision to deny Appellants' temporary injunction explicitly turned on its decision to ignore the settled legal meaning of the concept of responsiveness.

Yet the evidence the trial court rejected persuasively demonstrates that MnDOT awarded the contract to a proposal that was materially non-responsive to the RFP in at least two major respects: 1) Flatiron proposed work outside of the Project's right-of-

⁸⁶ Order, dated Aug. 26, 2008 at p. 15 (A-101).

way;⁸⁷ and 2) Flatiron proposed a design that used concrete box girders with only two webs each, contradicting the RFP's requirement that concrete box designs to a minimum of three webs.⁸⁸ In support of the first point, Appellants presented the relevant requirements from the RFP and ITP⁸⁹; Flatiron's Proposal⁹⁰; MnDOT's Right of Way Map;⁹¹ MnDOT's Right of Way Manual;⁹² the TRC's scoresheets for the Flatiron proposal⁹³; affidavits from Jon Chiglo,⁹⁴ Richard Fahland,⁹⁵ and Eric Sellman;⁹⁶ and deposition testimony from Jon Chiglo,⁹⁷ Tom O'Keefe,⁹⁸ and Wayne Murphy;⁹⁹ and a letter from Jon Chiglo to Tom Sorrel.¹⁰⁰ In support of the second point, Appellants presented the structural requirements from the RFP¹⁰¹; Flatiron's proposal¹⁰²; deposition testimony from Tom Styrbicki,¹⁰³ and affidavits from Randy Reiner.¹⁰⁴

⁸⁷ See Memo. of Law Supporting Plaintiffs' Motion for a Temporary Injunction at p. 20-24 (SR-26).

⁸⁸ Wieland Aff. Ex. 198 at § 13.3.3.1.2 (SR-176); *see also* Memo. of Law Supporting Plaintiffs' Motion for a Temporary Injunction at p. 25-26 (SR-31).

⁸⁹ See Wieland Aff., Ex. 32 at § 4.3.3.5.1 (SR-117); Ex. 194 at p. 2 (SR-162); Ex. 196 at §§ 7.5.1 and 7.5.4 (SR-166).

⁹⁰ See Dean Aff., Ex. L.

⁹¹ See Wieland Aff., Ex. 193 (SR-160).

⁹² See Wieland Aff., Ex. 237 (SR-207).

⁹³ See Dean Aff., Exs. D, E, F, G, H, and I.

⁹⁴ See Supplemental Aff. of Jon Chiglo at paragraphs 3 and 4.

⁹⁵ See Aff. of Richard Fahland at paragraph 5.

⁹⁶ See Supplemental Aff. of Eric Sellman at paragraph 3.

⁹⁷ See Wieland Aff., Ex. 240 at p.54, line 1 through p. 55, line 14 (SR-215), p. 99, line 9 through p. 104, line 10 (SR-218), and p. 149, line 7 through p. 151, line 21 (SR-220).

⁹⁸ See Wieland Aff., Ex. 246 at p. 99 lines 16-20 (SR-255).

⁹⁹ See Wieland Aff., Ex. 245 at p. 157, line 21 through p. 158, line 9 (SR-247).

¹⁰⁰ See Wieland Aff., Ex. 232 (SR -194).

¹⁰¹ See Wieland Aff., Ex. 198 at § 13.3.3.1.2 (SR-176).

¹⁰² See Dean Aff., Ex. L.

¹⁰³ See Wieland Aff., Ex. 247 at p. 191, line 6 through p. 194 , line 14 (SR-262).

This evidence demonstrated that Flatiron gained a competitive advantage by violating the right of way requirement in the RFP. The record demonstrates that Flatiron's proposal was highly scored because the TRC found Flatiron's bridge profile to be superior to the proposers who did not violate the project bounds.¹⁰⁵ One TRC member went so far as to say that the difference in profiles was the key discriminator between the proposals.¹⁰⁶

Flatiron was able to lower its profile because it went outside the right of way.¹⁰⁷ The evidence thus shows a direct correlation between this violation and Flatiron's high score. This is the very definition of a non-responsive bid: something that affects the price, quantity, quality and score of a proposal.¹⁰⁸ Flatiron's solution to the problem presented by the profiles was to violate the RFP and the TRC was, therefore, required to reject Flatiron's proposal.¹⁰⁹

Whether or not Flatiron violated the RFP was subject to multiple competing affidavits, which should have prevented summary judgment.¹¹⁰ The problem with the decision below is that the trial court never evaluated all this contested evidence under the proper legal standard. Its decision must be reversed accordingly, and the matter sent back to the trial court with an order to re-evaluate the facts under the correct legal standard.

¹⁰⁴ See Aff. of Randy Reiner, P.E.; Supplemental Aff. of Randy Reiner, P.E.; and Third Aff. of Randy Reiner, P.E.

¹⁰⁵ *Id.* at SR-29 (citing and discussing the evidence)

¹⁰⁶ *Id.*

¹⁰⁷ Statement of Facts, *supra*, text accompanying Figures 1-2.

¹⁰⁸ See n. 79, *supra*.

¹⁰⁹ *Id.* at SR-29 to SR-30.

¹¹⁰ *Pl's Mem. Opp. S.J.* at p. 17; *Pl's Mem. Supp. Temp. Inj.* at pp. 20-26, SR-26 to SR-32;

II. THE TRIAL COURT VIOLATED THE SEPARATION OF POWERS BY IMPROPERLY “BALANCING THE HARMS”

In the August Order, the trial court denied temporary injunctive relief in part because, using the language of *Dahlberg*, it “balanced the harms” in favor of MnDOT and Flatiron. The trial court noted that it “continues to believe that the harm of additional costs and delay to the public, and direct harm to [Respondents], outweigh potential harm to the Plaintiffs.”

A. Balancing of the Harms is Inappropriate When the Alleged Legal Wrong to be Enjoined is a Statutory Rather Than Common Law Violation.

By its very nature, a temporary injunction requires the court to act before holding a full trial on the merits.¹¹¹ Minnesota courts seek to minimize the possibility of damage caused by an improvidently granted injunction by weighing the *Dahlberg* factors, particularly the likelihood of success and balance of harms factors.¹¹² When the alleged legal wrong to be enjoined is a violation of statute, however, balancing of the *Dahlberg* factors represents an impermissible usurpation of legislative authority by the court.

When the Legislature enacts a statute declaring an action to be illegal, the Legislature divests the courts of the right to tolerate continuance of that illegal action.¹¹³ Using a *Dahlberg* analysis, a court could decide that the moving party is likely to succeed

¹¹¹ See Minn. R. Civ. P. 65.02.

¹¹² See *Dahlberg*, 137 N.W. at 321.

¹¹³ See Zygmunt J. B. Plater, *Statutory Violations and Equitable Discretion*, 70 CAL. L. REV. 524 (1982). See also Michael D. Axline, *Constitutional Implications of Injunctive Relief Against Federal Agencies in Environmental Cases*, 12 HARV. ENVTL. L. REV. 1 (1988); Jason David Fregeau, *Comment, Statutes and Judicial Discretion: Against the Law . . . Sort Of*, 18 B.C. ENVTL. AFF. L. REV. 501 (1991).

on the merits, thus finding sufficient proof of a statutory violation to warrant action, but refuse to enjoin illegal activity based on any of the other four factors. Such “balancing” would violate the separation of powers between the judicial and legislative branches because, by enacting the statute, the Legislature has already done that balancing and declared the activity to be impermissible.¹¹⁴ If there are circumstances in which the Legislature intended that activity to be allowable, it would have enacted exceptions.¹¹⁵

This does not imply that an injunction should automatically issue upon the mere allegation of a statutory violation. The court still must make a determination that the party moving for the injunction is likely to succeed on the merits. If the court makes that finding, then it is required to halt the activity pending a full trial on the merits. This does not prejudice the non-moving party, because Minn. R. Civ. P. 65.03 requires the moving party to post security to compensate the enjoined party if the injunction is later found to be unwarranted.

Two federal cases are instructive on this point. In *Wilderness Soc’y v. Morton*¹¹⁶, the D.C. circuit enjoined the permitting for the Alaska Pipeline based on a violation of an archaic statute limiting rights of way to 54’. Although the Court recognized the huge

¹¹⁴ The Minnesota Constitution provides a bright-line: “[t]he powers of government shall be divided into three distinct departments: legislative, executive and judicial. *No person or persons belonging to or constituting one of these departments shall exercise any of the powers properly belonging to either of the others* except in the instances expressly provided in this constitution.” Minn. Const. art. III, § 1 (emphasis added). *E.g.*, *State v. S.L.H.*, 755 N.W.2d 271, 275 (Minn. 2008).

¹¹⁵ See *United States v. City and County of San Francisco*, 310 U.S. 16, 28 (1940) (upholding an injunction stopping San Francisco from selling excess electricity in violation of the Raker Act of 1913).

¹¹⁶ 479 F.2d 842 (D.C. Cir. 1973)

importance of the oil pipeline to the developers, the state of Alaska, and U.S. national security, the court refused to balance those benefits against the impact of violating even an obscure and obsolete statute.¹¹⁷

In the last analysis, *it is an abiding function of the courts*, in the course of decision of cases and controversies, *to require the Executive to abide by the limitations prescribed by the Legislature*. The scrupulous vindication of that basic principle of law, implicit in our form of government, its three branches and its checks and balances, looms more important in the abiding public interest than the embarkation on any immediate or specific project, however desirable in and of itself, in contravention of that principle.¹¹⁸

In other words, because Congress had enacted specific limits on pipeline rights of way, the court had no authority to conduct a balancing of harms contrary to that legislation.¹¹⁹

Likewise, in *TVA v. Hill*, the U.S. Supreme Court upheld a decision to halt the Tennessee Valley Authority's ("TVA's") construction of the Tellico Dam in order to protect the snail darter pursuant to the Endangered Species Act ("ESA"). In that case, the Court of Appeals ruled that the district court abused its discretion by refusing an injunction, and opined that because completion of the dam violated the ESA, the court was obligated to issue an injunction to stop it.¹²⁰ The U.S. Supreme Court agreed, despite the fact that \$53 million in sunk costs had already been spent: "We agree with the Court of Appeals that in our constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with 'common sense and the public weal.' Our Constitution vests such

¹¹⁷ *Id* at 891.

¹¹⁸ *Id.* at 892-93 (emphasis added).

¹¹⁹ *Id.*

¹²⁰ *Id* at 168-69.

responsibilities in the political branches.”¹²¹

This case is similar: the bridge was nearly complete when the motion was argued, tens of millions of dollars in sunk costs had been spent, and Respondents argued that an injunction would slow progress on an important public works project. But as with *TVA*, Minnesota Legislature declared that contract award may only be made to a responsive proposal. The Court is obligated to enforce that mandate.

B. The Weinberger case is distinguishable.

The trial court disregarded *Wilderness Society* and *TVA v. Hill* based on the distinguishable authority of *Weinberger v. Romero-Barcelo*.¹²² In *Weinberger*, the district court declined to issue an injunction against the Navy’s violation of the Federal Water Pollution Control Act (“FWPCA”).¹²³ The U.S. Supreme Court agreed, reading the FWPCA as granting the courts discretion to fashion a remedy:¹²⁴

Rather than requiring a district court to issue an injunction for any and all statutory violations, the FWPCA permits the district court to order that relief it considers necessary to secure prompt compliance with the Act. That relief can include, but is not limited to, an order of immediate cessation.¹²⁵

Minnesota’s design-build statute, in contrast to the FWPCA, does not contain language giving the Court discretion to fashion a remedy. The statutory language regarding award of contract is mandatory; the contract *shall* only be issued to a

¹²¹ *Id.* at 194.

¹²² 456 U.S. 305 (1982).

¹²³ *See id.* at 307-08.

¹²⁴ *Id.* at 316-18.

¹²⁵ *Id.* at 320.

responsive proposal.¹²⁶ Absent language granting equitable discretion, this Court must act immediately to stop violations of that statute.

III. THE TRIAL COURT INCORRECTLY GRANTED SUMMARY JUDGMENT DESPITE THE PRESENCE OF GENUINE ISSUES OF MATERIAL FACT AS TO RESPONSIVENESS AND FLATIRON'S DEFENSES.

The trial court granted summary judgment in two phases. In the August Order, the trial court granted summary judgment as to Count I of Appellants' Complaint, which sought injunctive relief. In the October Order, the trial court granted summary judgment as to Count II, the sole remaining count, which sought declaratory judgment. In each order, the trial court incorrectly concluded that Appellants had not presented genuine issues of fact for trial, and incorrectly credited Flatiron's allegations. A proper analysis of each order demonstrates that summary judgment should have been denied, and reversal is appropriate on each issue.

A. The Trial Court Granted Summary Judgment Based on the Wrong Standard of Review

The trial court adopted and followed the wrong standard of review with regard to each of its summary judgment determinations. As the Minnesota Supreme Court recently explained, "*A party need not show substantial evidence to withstand summary judgment.*" In *Schroeder v. St. Louis County*, 708 N.W.2d 497, 507 (Minn. 2006) the Court specifically ruled that the trial court erred when it refused to consider disputed evidentiary testimony because the plaintiff had not presented "substantial evidence" in support of its claims. The Court ruled that substantial evidence was the wrong standard

¹²⁶ See Minn. Stat. § 161.3426(b), (c), and (d) (2006).

for a summary judgment motion, noting that summary judgment is inappropriate if the nonmoving party presents sufficient evidence to permit reasonable persons to draw different conclusions.¹²⁷

In this case, however, the trial court did exactly the opposite, ruling that because MnDOT was entitled to deference for its administrative decisions, the “substantial evidence” test should apply. This error turns the standard of review for summary judgment on its head. The trial court assumed that judicial deference to administrative decisions empowered it to ignore the summary judgment standard and consider the disputed evidence proffered by Flatiron – the moving party – in the most favorable light. This error lies at the heart of the court’s decisions on summary judgment, which should be reversed on this basis alone.

The trial court may have been aware of its questionable use of the substantial evidence test, as it devoted several pages of the October Order to a discussion of judicial deference in the context of summary judgment. While the trial court noted that Appellants “correctly state the standard for summary judgment is to view the evidence in the light most favorable to the nonmoving party,” the trial court asserts that “this review is nevertheless conducted within the context of the required judicial deference to agency expertise.”

The trial court offered no pertinent case law to support this legal authority, however, as none of the trial court’s citations on this point concern cases that referenced summary judgment motions, much less the interplay between agency deference and the

¹²⁷ *Id.*

summary judgment standard.¹²⁸ None of the cases cited by the trial court supports overturning Minnesota's standard of review for summary judgments in district courts, and this Court should reverse accordingly.

Indeed, the trial court's cases are examples of judicial review of determinations that had been made by the agency after an adversarial hearing process. In this case, both Commissioner Molnau and her Deputy Lisa Freese admitted that no such process occurred.¹²⁹ Administrative deference is inappropriate as a result.

Other cases apply the traditional Rule 56 standard to bid protests. For example, in *Clark Construction Co., Inc. v. Pena*¹³⁰ the U.S. District Court of the Middle District of Alabama considered a summary judgment motion in a bid protest brought by a disappointed bidder in a federal highway procurement case. In *Clark*, the court considered summary judgment under the traditional standard: "the court is to construe the evidence and factual inferences arising therefrom *in the light most favorable to the nonmoving party*."¹³¹ The government claimed entitlement to the presumption of agency discretion. Moreover, FWHA and ADOT argued that cases decided under the applicable

¹²⁸ *Fine v. Bernstein*, 726 N.W.2d 137, 142 (Minn. Ct. App. 2007) (certiorari review of administrative law judge's determination, after evidentiary hearing, that Bernstein violated the Fair Campaign Practices Act, Minn. Stat. § 211B.06); *Minn. Ctr. For Envtl. Advocacy v. Comm'r of Minn. Pollution Control Agency* 696 N.W.2d 95, 100 (Minn. Ct. App. 2005) (certiorari review under the APA of MPCA decision to grant a permit, after contested hearing before the MPCA Board); *Krumm v. R. A. Nadeau Co.* 276 N.W.2d 641, 642 (Minn., 1979) (certiorari review of decision of Workers Compensation Court of Appeals on stipulated facts, following determination by compensation judge of Department of Labor and Industry).

¹²⁹ See *Wieland Aff.*, Ex. 241 at p. 116, line 23 through p. 117, line 9 (SR-222); Ex. 244 at p. 38, line 15 through p. 40, line 9 (SR-231).

¹³⁰ 930 F.Supp. 1470, 1491 -1492 (M.D.Ala.,1996).

¹³¹ *Id.*

federal administrative procedure act likewise suggested some deference was due the agency. But the Court was unmoved by this appeal for deference, noting that the agency had violated an applicable statute:

However, while the court should allow administrative agencies to function with minimum interference by the judiciary, “uncritical deference” to an agency decision is inappropriate. “[T]here certainly may be instances where the District Court will find procurement illegality that the [agency] failed to recognize, or at any event failed to correct.”

Here, the court finds that the FHWA's decision not only has no rational basis but also that the procurement procedure involved a clear and prejudicial violation of applicable statutes and regulations. The Federal Highway Act requires that contracts be awarded to the lowest responsible bidder pursuant to the state highway authority's regulations. 23 C.F.R. § 635.114; 23 U.S.C. § 112(B)(1). Once a state selects a contractor, it submits its selection to the FHWA for its concurrence. As noted in Clark I, the FHWA's *authority to reject a state proposal award is statutorily limited:*

*Contracts for the construction of each project shall be awarded only on the basis of the lowest responsive bid submitted by a bidder meeting established criteria of responsibility.*¹³²

In this case, the trial court was concerned that it was not presented with “caselaw to suggest judicial deference to agency expertise does not apply when a party moves for summary judgment, or that this deference disappears when summary judgment is alleged.”¹³³ As pointed out above, it is the trial court that failed to cite opposite support. Minn. R. Civ. P. 56 speaks for itself. Moreover, *Clark v. Pena* responds to both of the points raised by the trial court. As to the first point, the *Clark* court applied traditional Rule 56 standards even though in that case, deference was called for under federal administrative standards that do not apply here. As to the second point, *Clark* clearly

¹³² *Id.* at 1481 -1482 (emphasis added).

¹³³ Amended Order, dated October 23, 2008 at p. 6 (A-115).

stands for the proposition that the courts need not defer to an agency's determination to violate applicable procurement laws. The same is true in this case.

B. The Trial Court Improperly Granted Summary Judgment as to Count I, Dismissing Appellants' Claims for Injunctive Relief.

Despite multiple genuine issues of material fact, the trial court nevertheless granted summary judgment, dismissing Appellant's claims for injunctive relief based on its analysis of the requested temporary injunction, and based on the further grounds that injunctive relief was too late, laches, and the "unclean hands" doctrine. None of these grounds support summary judgment, and the trial court must be reversed accordingly.

1. Genuine Issues of Material Fact Were Presented on Plaintiff's Request for Injunctive Relief.

As is noted above, there were multiple issues of material fact, preserved for trial, even if the trial court determined to deny the motion for temporary injunction. The trial court remarkably concluded that Appellants did not present any evidence to rebut Flatiron's affidavit. In making this finding, the trial court ignored reams of evidence that Appellant's presented supporting their position on each of these issues.¹³⁴ Appellants explained below how all that evidence presented issues of material fact,¹³⁵ and that summary judgment was improper. Taking the evidence *in the light most favorable to Appellants*, as Rule 56 requires, then the trial court should have denied summary judgment. Its failure to do so must be reversed.

¹³⁴ Pt. I.C., *Supra*, at pp. 29-30.

¹³⁵ Mem. Law Opp. S.J. at p. 17; *see also Supra* at n. 95 (discussing the evidence).

2. Summary Judgment Was Not Proper Due to “Lateness.”

The trial court also ruled that Appellants could not obtain injunctive relief because the bridge was over 90% complete when the motion was argued. The trial court ignores, however, that the motion was timely under its own scheduling order, the deadlines having been stipulated to by the parties.¹³⁶ Injunctive relief does not cease to exist as a remedy once construction begins on a project; it is always available, in the discretion of the court, to “prevent great and irreparable injury.”¹³⁷ At the time the motion was presented, work was not complete, and the Appellants presented the trial court with an opportunity to protect the integrity of Minnesota’s public contracting system by enjoining the completion of the final 10% of the bridge project under an illegal contract.

The trial court likewise ruled that Appellants did not provide any caselaw suggesting injunctive relief remains timely when construction work is substantially complete.”¹³⁸ But in fact Appellants cited many such cases, including *TVA v. Hill*,¹³⁹ where the U.S. Supreme Court upheld the grant of an injunction stopping the completion of the dam, which was at the time 95% complete.¹⁴⁰ The trial court had ample basis for injunctive relief at the time of the motion, and summary judgment was not proper on this basis.¹⁴¹

¹³⁶ Amend Sched. Order dated (May 14, 2008).

¹³⁷ *AMF Pinspotter, Inc. v. Harkins Bowling, Inc.*, 110 N.W.2d 348, 251 (Minn. 1961).

¹³⁸ Order dated August 26, 2008 at p. 19 (A-105).

¹³⁹ 437 U.S. 153 (1978).

¹⁴⁰ See Memo of Law Opposing Flatiron’s Motion for Summary Judgment at p. 5 (SR-380) and Memo. of Law Supporting Plaintiffs’ Motion for a Temporary Injunction at p. 41-43 (SR-47).

¹⁴¹ Nor is this case moot. See pt. IV, *infra*.

3. The Trial Court Erred By Finding Laches

The trial court also ruled that laches supported its determination because Flatiron was prejudiced by a delay, or at least could be if the trial court ordered Flatiron to disgorge payments received above the fair market value of its work. The trial court misapplied the doctrine of laches in five ways, committing reversible legal error.

First, laches is available if the plaintiff inexcusably delayed asserting a right, causing the defendant undue prejudice.¹⁴² In this case, Appellants timely asserted their rights. As taxpayers, Appellants did not have standing to sue until the contract was executed. This suit was filed just eight days later, including a claim for injunctive relief, and laches is accordingly inappropriate.¹⁴³

Second, Flatiron's voluntary intervention defeats laches. The Minnesota Supreme Court held in *Hunt v. O'Leary*¹⁴⁴ that a party who voluntarily intervenes in a lawsuit cannot assert the defense of laches. The *Hunt* Court reasoned that the intervener waives the defense, because by voluntarily joining the action, he suffers no prejudice.¹⁴⁵

Third, Flatiron failed to prove any "inexcusable delay." Laches is meant to prevent defendants from being prejudiced by stale claims.¹⁴⁶ Instead of a set calendar

¹⁴² See *Klapmeier v. Town of Center*, 346 N.W.2d 133, 137 (Minn. 1984).

¹⁴³ *Byrd v. Indep. Sch. Dist. No. 194*, 495 N.W.2d 226 (Minn. Ct. App. 1993) (no laches despite a three week delay between gaining standing and the filing of a taxpayer complaint for declaratory and injunctive relief.)

¹⁴⁴ 87 N.W. 611, 611 (1901).

¹⁴⁵ *Id.*

¹⁴⁶ See *City of St. Paul v. Harding*, 356 N.W.2d 319, 322 (Minn. Ct. App. 1984) (holding it inequitable to allow an administrative hearing six years after the events giving rise to the dispute because two witnesses had left the state and memories or remaining witnesses had faded).

deadline, as with a statute of limitation, the standard for laches is “inexcusable” or “unreasonable” delay arising from a lack of diligence by plaintiffs.¹⁴⁷

The record demonstrates that Appellants diligently prosecuted their claims and Flatiron contributed to any delay. Appellants deposed ten witnesses and attended two other depositions. Appellants examined thousands of documents, which Flatiron itself refused to produce until late March 2008 after Appellants had filed two motions to compel.¹⁴⁸ Flatiron cannot take advantage of its own delays to argue laches.

Fourth, laches cannot be asserted in a summary judgment motion. “The doctrine of laches depends on a *factual* determination in each case. The basic question is ‘whether there has been such an *unreasonable* delay in asserting a known right, resulting in prejudice to others, as would make it inequitable to grant the relief prayed for.’”¹⁴⁹ The reasonableness of the period of time between the temporary restraining order hearing and the temporary injunction hearing are disputed fact issues, and Appellants presented reams of deposition transcripts and exhibits demonstrating their diligence.¹⁵⁰

Finally, Flatiron was not prejudiced by the delay between the hearings. The inconvenience of a work stoppage would have been just as great if not greater had the motion been brought and work stopped earlier. The inconvenience of a valid injunction is not a showing of prejudice for the purposes of laches. Flatiron did not allege that

¹⁴⁷ See *Klapmeier*, 346 N.W.2d at 137. See also *City of St. Paul*, 356 N.W.2d at 322.

¹⁴⁸ Plaintiff’s Notice and Motion to Compel (Nov. 30, 2007); Plaintiff’s Second Notice and Motion to Compel (Mar. 14, 2008).

¹⁴⁹ *Klapmeier*, 346 N.W.2d at 137 (quoting *Fetsch v. Holm*, 163 N.W.2d 113, 115 (Minn. 1952)) (emphasis added).

¹⁵⁰ *E.g.*, Pt. I.C.2., *supra* at pp. 29-30.

witnesses have become unavailable, that memories have faded, that documents or evidence have been destroyed, or any other hallmark of the prejudice suffered by defendants facing stale claims. Adverse consequences to a defendant resulting from a lawful judgment, which is all Flatiron raises, do not equal prejudice. Because Flatiron has failed to show that essential element of the defense of laches, Flatiron's argument fails and it cannot be granted summary judgment.

4. Flatiron was not entitled to summary judgment based on "unclean hands."

The trial court likewise ruled that Appellants could not obtain injunctive relief based on unclean hands because Appellant Phillippi "benefited to some degree" from the project, and also apparently credited Flatiron's argument that Appellants were not the real parties in interest.¹⁵¹ Neither factor supports summary judgment based on "unclean hands"

a. Mr. Phillippi's connection to the project is too remote to support an unclean hands defense.

Mr. Phillippi's connection to the project does not support judgment based on "unclean hands." As the record shows, Mr. Phillippi owns a holding company which, in turn, has an interest in a company called Truck Crane Services.¹⁵² Truck Crane Services received a contract valued at less than \$1,000 to rent a mobile truck crane to a company called Dawes.¹⁵³ Dawes was a subcontractor to a subcontractor of Flatiron.¹⁵⁴ That

¹⁵¹ Order, dated August 26, 2008 at p. 20 (A-106).

¹⁵² Vollbrecht Aff., Ex. C at p. 70, line 22 through p. 72, line 11 (SR-364).

¹⁵³ *Id.*

¹⁵⁴ *Id.*

means that there were at least five degrees of corporate separation between Flatiron and Mr. Phillippi. At that level of remoteness in the stream of commerce, nearly anyone could be shown to have received some benefit from the 35W bridge contract. Moreover, Truck Crane Services would have rented its crane to another customer had it not been rented to Dawes, so Truck Crane Services did not receive any money it would not otherwise have received but for the 35W bridge project.¹⁵⁵ Any benefit received by Mr. Phillippi as a shareholder of a holding company was too remote to constitute illegal or unconscionable conduct.

Indeed, it appears that by holding Mr. Phillippi “responsible” for the sub-sub-sub-contract entered by a corporate subsidiary of a company in which Mr. Phillippi is a shareholder, the trial court in effect “pierced the corporate veil” of both the holding company and Truck Crane Services. The trial court’s decision to disregard the veil piercing requirements of *Victoria Elevator*¹⁵⁶ based solely on this remote connection to the project is clear legal error, and cannot support judgment in Flatiron’s favor.¹⁵⁷

- b. Flatiron’s “real party in interest” argument does not support an unclean hands defense.

Although the trial court’s order is not entirely clear, it apparently credited several of Flatiron’s contested allegations about the involvement of “McCrossan.” C.S. McCrossan Construction, Inc. (“CSM”) is a corporate entity that was a proposer on the 35W bridge contract. Flatiron misleadingly obscured its references to CSM and two

¹⁵⁵ See Affidavit of Wendell Anthony Phillippi (SR-397).

¹⁵⁶ *Victoria Elevator Co. v. Meriden Grain Co.*, 283 N.W.2d 509, 512 (Minn. 1979).

¹⁵⁷ Additionally, the trial court ignored the “clean hands” of the other plaintiff, Scott Sayer.

individuals associated with CSM, Mr. Charles McCrossan and Mr. Tom McCrossan, asserting that “McCrossan initiated this lawsuit,”¹⁵⁸ referring to statements attributed to Mr. Charles McCrossan in a newspaper article.¹⁵⁹ Charles McCrossan supplied an affidavit disputing the article, disputing the comments. In any event, he clearly did not commence this lawsuit.¹⁶⁰ As Mr. Phillippi stated in his deposition, “[CSM and Ames/Lunda] aren’t trying to do anything, Mr. Vollbrecht, I’m doing this.”¹⁶¹

The trial court apparently disbelieved (without a trial) that Appellants were genuinely asserting their taxpayer rights, despite contrary testimony by both Appellants.¹⁶²

Appellants sued MnDOT to rectify MnDOT’s improper use of the design-build statute. That is the epitome of civic virtue. The trial court’s opposite finding reflects an erroneous and disturbing rush to judgment at the summary judgment stage.

C. The Trial Court Improperly Granted Summary Judgment as to Count II, Dismissing Appellants’ Claims for Declaratory Relief.

The trial court similarly erred in by granting summary judgment dismissing Appellants’ claims for declaratory relief. For the same reasons outlined above, there were too many fact issues outstanding to grant summary judgment.

¹⁵⁸ See Flatiron’s Memo. in Support of its Motion for Complete or Partial Summary Judgment at p. 19 (SR-353).

¹⁵⁹ See Vollbrecht Aff., Ex. P (“he says he is doing it on behalf of taxpayers, not his firm.”). (SR-375).

¹⁶⁰ See Affidavit of Charles McCrossan (SR-399).

¹⁶¹ Vollbrecht Aff., Ex. C at p. 22, lines 17-22 (SR-362).

¹⁶² Vollbrecht Aff., Ex. D at p. 19, line 22 through p. 20, line 3 (SR-370); p. 39, lines 11 through 17 (SR-371); Vollbrecht Aff., Ex. C at p. 85, lines 2 through 12 (SR-365).

The trial court was persuaded that “substantial evidence” supported the TRC’s scoring, based in part on a perceived absence of evidence of collusion or favoritism among the TRC members.¹⁶³ Yet Appellants do not have to prove actual corruption in order to prevail; instead, appellants only needed to show that the process in question allowed the *opportunity* for fraud, favoritism and collusion.¹⁶⁴ Such opportunities abounded in this procurement. For example, it was undisputed that at least five of the six scoring members of the TRC did not completely read the RFP.¹⁶⁵ The TRC can not properly grade the answers to RFPs when the TRC has not fully read the project requirements they are to score.

Appellants likewise contested the conclusion that “substantial evidence” supported the TRC’s scoring. Appellants submitted evidence that the TRC’s scoring was so inconsistent as to be held arbitrary and capricious.¹⁶⁶ In several instances, TRC members could not reconstruct the rationale for their scores from their own score sheets.¹⁶⁷ That means that the TRC score sheets do not provide “such relevant evidence as a reasonable

¹⁶³ Amended Order dated October 23, 2008 at p. 9 (A-118).

¹⁶⁴ *Telephone Associates, Inc. v. St. Louis County Board*, 364 N.W.2d 378, 382 (Minn. 1985).

¹⁶⁵ See *Wieland Aff.*, Ex. 242 at p. 43, line 21 through p. 44, line 18 (SR-225); *Wieland Aff.*, Ex. 245 at p. 32, line 6 through line 24 (SR-236); *Wieland Aff.*, Ex. 246 at p. 29, line 2 through line 20; *Wieland Aff.*, Ex. 247 at. 28, line 3 through p. 29, line 6 (SR-257); *Wieland Aff.*, Ex. 249 at p. 71, line 8 through p. 73, line 3 (SR-274).

¹⁶⁶ See Memo. of Law Supporting Plaintiffs’ Motion for a Temporary Injunction at p. 29-33 (SR-35).

¹⁶⁷ See *id.* at p. 35-36 (SR-41).

mind might accept as adequate to support a conclusion” and, therefore, do not qualify as substantial evidence.¹⁶⁸

The TRC did not make a valid determination of the responsiveness of the proposals. The TRC did not evaluate each proposal’s compliance with RFP requirements.¹⁶⁹ The designated representative of the Commissioner, Lisa Freese, did even less, relying wholly on the flawed determination by the TRC.¹⁷⁰ Regardless of the responsiveness determination (or lack thereof) by the TRC, the fact remains that Flatiron’s proposal was not responsive because it exceeded the project’s allowed geographic bounds and it used an impermissible box girder design.¹⁷¹ There were conflicting affidavits on these two points,¹⁷² but conflicting detailed affidavits did not derail the trial court’s intent to grant summary judgment at the wrong procedural juncture.

IV. THIS CASE PRESENTS A JUSTICIABLE CONTROVERSY OVER THE LEGALITY OF MNDOT’S INTERPRETATION OF THE DESIGN-BUILD STATUTE DESPITE THE SUBSTANTIAL COMPLETION OF THE REPLACEMENT BRIDGE.

The trial court erred by ruling that the case is not justiciable. In the October Order, the trial court ruled that because the replacement bridge was substantially complete, Appellants could not present a justiciable controversy and were not entitled to

¹⁶⁸ *Citizens Advocating Responsible Dev. v. Kandiyohi County Bd.*, 713 N.W.2d 817, 832 (Minn. 2006).

¹⁶⁹ See Memo. of Law Supporting Plaintiffs’ Motion for a Temporary Injunction at p. 18-20 (SR-24).

¹⁷⁰ See *id.*

¹⁷¹ See *id.* at p. 20-26 (SR-26).

¹⁷² See, e.g., Supp. Aff. of Eric Sellman; Supp. Aff. of Randy Reiner; Aff. of Alan Phipps; Supp. Aff. of Jon Chiglo.

declaratory relief.¹⁷³ Appellants also anticipate that MnDOT and Flatiron will argue this appeal is moot. As the record demonstrates, this case was not moot when argued on August 13, 2008 and has not become moot by completion of the bridge.¹⁷⁴

A. Appellants' Complaint Presents a Justiciable Controversy

Minnesota courts are empowered to hear cases in which a genuine controversy is presented by adverse parties and capable of specific, rather than advisory relief.¹⁷⁵ This case clearly presents a genuine controversy regarding the legality of the contract issued by MnDOT to Flatiron to reconstruct the I-35W bridge. Appellants, acting as private attorneys general, maintain that the contract is illegal because MnDOT acted in contravention of statute by awarding the contract in response to a non-responsive proposal.¹⁷⁶ Respondents have vigorously disputed that point, rendering the parties adverse.¹⁷⁷

¹⁷³ The trial court ignored its duties under the Uniform Declaratory Judgments Act and directed Appellants to seek a remedy from the legislature. *See* Amended Order at p. 14 (A-123).

¹⁷⁴ Appellants do not concede that even their injunctive relief claim is moot. They sought to enjoin *all* performance on the contract. A construction contract can still be executory after substantial completion. The record does not show that Flatiron has achieved final completion, nor that MnDOT has made all payments (including bonus payments) to Flatiron under the contract. Enjoining those activities is still possible.

¹⁷⁵ *See Rupp v. Mayasich*, 561 N.W.2d 555, 557 (Minn. Ct. App. 1997).

¹⁷⁶ *See* Complaint at p. 1 (A-2)

¹⁷⁷ *See generally* Verified Answer of Minn. Dept. of Transportation (A-36) and Defendant Flatiron's Answer to the Complaint (A-79).

This dispute can be resolved through specific declaratory relief. Appellants seek and are statutorily entitled to a declaration of the legality of the contract.¹⁷⁸ Minnesota has adopted the Uniform Declaratory Judgments Act, which provides in pertinent part:

Any person interested under a deed, will, written contract, or other writings constituting a contract, or *whose rights, status, or other legal relations are affected by a statute*, municipal ordinance, contract, or franchise *may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration* of rights, status, or other legal relations thereunder.¹⁷⁹

Respondent Flatiron argued to the trial court that such a declaration would be an impermissible advisory opinion because it would only effect hypothetical future contracts.¹⁸⁰ That argument fails for two reasons. First, by statute, Appellants are entitled to the declaration they seek “whether or not further relief is or could be claimed.”¹⁸¹ Second, Appellants are indeed seeking further relief in this case, under these facts, and against these named adversaries, not in some future hypothetical case. Appellants seek to void the contract between MnDOT and Flatiron because MnDOT violated the Legislature’s command that design-build contracts may only be awarded to responsive proposals.¹⁸² This is direct and not advisory relief and is clearly a justiciable controversy that the trial court should have determined on its merits.¹⁸³

¹⁷⁸ See Complaint at p. 21 (A-22).

¹⁷⁹ Minn. Stat. § 555.02 (2007) (emphasis added).

¹⁸⁰ See Flatiron’s Memo. in Support of its Motion for Complete or Partial Summary Judgment at p. 21-22 (SR-355).

¹⁸¹ See Minn. Stat. § 555.01 (2007).

¹⁸² See Complaint at p. 21 (A-22)..

¹⁸³ See, e.g., *Clark Const. Co., Inc. v. Pena* 930 F.Supp. 1470, 1491 -1492 (M.D.Ala.,1996) (holding that disappointed bidder’s request for declaration that the

B. Collateral Legal Consequences Prevent This Case from Being Moot.

Courts will find a continuing controversy whenever there is a possibility of adverse collateral legal consequences.¹⁸⁴ As this Court explained in *Weber v. Albrecht*: “controversies which, if resolved, would create collateral legal consequences for the parties are not doomed to end ignominiously in the limbo of mootness.”¹⁸⁵ In this case, Appellants seek a declaration that MnDOT violated Minn. Stat. § 161.3426 by contracting with a party that submitted a non-responsive proposal. If such a declaration were made in this case, it would create collateral legal consequences for the parties by voiding the Flatiron-MnDOT contract as illegal.¹⁸⁶

As Appellants argued to the trial court, Minnesota law provides that if the contract is void, the contract price cannot be paid. Instead, the correct payment is either nothing, or the *quantum meruit* value of the work, not the contract price. In *Coller v. St. Paul*, the Minnesota Supreme Court ruled that a public contract that was illegally awarded was void, and could not support *any* recovery for the contract:

Since they are based upon public economy and are of great importance to the taxpayers, laws requiring competitive bidding as a condition precedent to the letting of public contracts ought not to be frittered away by exceptions, but, on the contrary, should receive a construction always which will fully, fairly, and reasonably effectuate and advance their true intent and purpose, and which will avoid the likelihood of their being circumvented, evaded, or defeated. Stern insistence upon positive

contract award was illegal, arbitrary, and capricious presented a justiciable controversy that was capable of repetition yet evading review).

¹⁸⁴ *Elzie v. Comm’r of Public Safety*, 298 N.W.2d 29, 32 (Minn. 1980).

¹⁸⁵ *Weber v. Albrecht*, 437 N.W.2d 77, 80 (Minn. Ct. App. 1989).

¹⁸⁶ See, e.g., *Scheeler v. Sartell Water Controls, Inc.*, 730 N.W.2d 285, 288-89 (Minn. Ct. App. 2007) (“a ‘contract violating law or public policy is void.’”) (quoting *Barna, Guzy & Steffen, Ltd. v. Beens*, 541 N.W.2d 354, 356 (Minn. Ct. App. 1995)).

obedience to such provisions is necessary to maintain the policy which they uphold. *Contracts made in defiance of such requirements not only are unenforceable, but afford no basis for recovery by the contractor upon an implied obligation to pay the value of benefits received by the public body.*¹⁸⁷

On the other hand, other authorities provide that if a construction contract is held illegal and void, but the contractor had in good faith provided something of value to the public which could not be returned, the contractor may be allowed to recover in quasi-contract the value of what it provided to the public body.¹⁸⁸ The “reasonable value” of the work issue presents an additional fact question that the trial court should not have resolved. The court held, “there is no evidence that payments made to Flatiron are for anything other than the fair value of Flatiron’s work.”¹⁸⁹ To the contrary, the fair value of Flatiron’s work was early put at issue.¹⁹⁰ If the contract between MnDOT and Flatiron was indeed illegal, the fair market value of the bridge was disputed and must be determined. If the determined quantum meruit value is less than the amount already paid to Flatiron, then it necessarily follows that Flatiron must return its unjust enrichment. The necessity of resolving those factual and legal issues is a collateral legal consequence that flows from the declaration of the contract’s legality. The case is, therefore, not moot, even though the bridge has been largely built.

¹⁸⁷ *Coller v. St. Paul*, 26 N.W.2d 835, 841-42 (Minn. 1947) (emphasis added).

¹⁸⁸ *E.g., Kotschevar v. North Fork Twp.*, 229 Minn. 234, 39 N.W.2d 107 (1949); *Village of Pillager v. Hewitt*, 98 Minn. 265, 107 N.W. 815 (1906).

¹⁸⁹ Amended Order dated October 23, 2008 at p. 13 (A-122).

¹⁹⁰ Complaint at paragraph 49 (A-17); and Aff. of Eric Sellman at Paragraph 5.

C. **In the Alternative, At Least Two Exceptions to Mootness Apply and Permit Review of This Case**

The Minnesota Supreme Court considers mootness “a flexible discretionary doctrine, not a mechanical rule that is invoked automatically.”¹⁹¹ Even if substantial completion of the bridge rendered this case technically moot, which Appellants do not concede, two recognized exceptions to the mootness doctrine apply that would allow this case to proceed: 1) it is capable of repetition, yet likely to evade review,¹⁹² and 2) it is functionally justiciable and presents an important public issue of statewide significance.¹⁹³

1. **This Case Is Reviewable Because It Is Capable Of Repetition, Yet Evading Review.**

This exception applies when “(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again.”¹⁹⁴ Both requirements were met in this case.¹⁹⁵

As the 35W bridge project has demonstrated, MnDOT can execute and complete contracts involving large expenditures of public funds in less time than it takes to move a case through litigation at the district court level, let alone the appellate level.

¹⁹¹ *Kahn v. Griffin*, 701 N.W.2d 815, 821 (Minn. 2005) (quoting *Jasper v. Comm’r of Pub. Safety*, 642 N.W.2d 435, 439 (Minn. 2002)).

¹⁹² *Id.*

¹⁹³ *Id.* at 821-22.

¹⁹⁴ *Kahn v. Griffin*, 701 N.W.2d at 821 (quoting *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975)).

¹⁹⁵ Despite Judge Cleary’s comment to the contrary, *see* Amended Order at p. 11 (A-120); Plaintiffs’ raised the issue of repetition evading review. *See* Transcript of August 13, 2008 Hearing at p. 17, line 14 through p. 21, line 10.

MnDOT has used the design-build process several times in the past, and several of the MnDOT officials deposed in this case indicated that they would use it again.¹⁹⁶ MnDOT is likely to interpret the requirement for responsiveness in the same way it did on this project.¹⁹⁷ That means that without a ruling from this Court, taxpayers are likely to be subjected to the expense of future illegal contracts. Both requirements for this exception to the mootness doctrine are, therefore, satisfied.

2. This Case Is Reviewable Because It Presents A Functionally Justiciable Controversy On An Issue Of Statewide Significance That Should Be Decided Immediately.

The second relevant exception to the mootness doctrine is in cases that address issues of statewide significance that should be decided immediately.¹⁹⁸ Minnesota courts will address such cases if they are “functionally justiciable,” that is, having a sufficiently developed record to support judicial decision making.¹⁹⁹

This case is functionally justiciable. The underlying facts have been revealed through discovery, including deposition testimony. The issues have been briefed and argued by counsel, and reviewed by a district court judge. The record is as complete as any that comes to this Court following a summary judgment hearing, and is, therefore, sufficient to support decision making by this Court.

¹⁹⁶ See, e.g., *Wieland Aff.*, Ex. 240 at p.48, lns 7-18 (discussing MnDOT’s prior use of this contracting method) (SR-213) and at p. 51, lns 9-23 (discussing MnDOT’s plan to use this contracting method in the future) (SR-214).

¹⁹⁷ See *Wieland Aff.*, Ex. 248 at p. 20, line 4 through p. 24, line 8 (SR-265).

¹⁹⁸ See *Jasper v. Comm’r of Pub. Safety*, 642 N.W.2d 435, 439-40 (Minn. 2002).

¹⁹⁹ *Id.*

Further, the proper interpretation and use of the design-build statute by MnDOT is a matter of statewide significance. The Minnesota Legislature itself declared that importance:

Recognizing that the preservation of the integrity of the public contracting process of the Department of Transportation is vital to the development of a balanced and efficient transportation system and a matter of interest to the people of the state, the legislature hereby determines and declares that: (1) the procedures of the department for bidding and awarding department contracts exist to secure the public benefits of free and open competition and to secure the quality of public works.

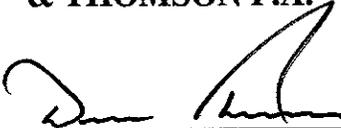
Minn. Stat. § 161.315 subd. 1 (2008). Because the integrity of public contracting is a vital concern, this Court is empowered to act when a functionally justiciable case raises questions about MnDOT's interpretation and use of the design-build statute.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that the trial court's decision be reversed; and the case be remanded to the trial court for further proceedings consistent with the Appellants Court's decision.

Dated: December 15, 2008.

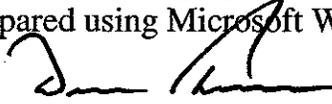
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BRIEF LENGTH CERTIFICATION

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs.1 and 3, for a brief produced with a proportional font. The length of this brief is **13,889** words. This brief was prepared using Microsoft Word 2003.



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