

Nos. A08-1584 and A08-1994

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' REPLY BRIEF

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INTRODUCTION

Public procurements must be open and fair. Minnesota courts, therefore, have long required MnDOT to award public projects only to “responsive” contractors, i.e., contractors whose bids actually addressed the items required by MnDOT’s bid documents. In that way, all the contractors seeking to obtain public work are evaluated based on the same rules and standards, and MnDOT can award based on an “apples to apples” comparison of competing proposals. Yet in this case, the 35W bridge procurement was awarded to a non-responsive proposal, which gave Flatiron a huge competitive advantage over the other qualified proposers. The 35W procurement, as a result, was based on an unfair “apples to oranges” comparison, as if MnDOT decided -- after the proposals were submitted -- that it preferred oranges, scoring them more highly than apples.

Appellants brought this action to ensure that Minn. Stat. §161.3410 *et seq.* is interpreted in a manner that preserves the integrity of public procurement processes by a proper recognition of the concept of responsiveness preventing MnDOT from awarding contracts to non-responsive design-build proposers. Appellants’ initial brief demonstrates that the trial court’s summary judgment orders ignored well-supported issues of material fact and were based on an erroneous interpretation of a statute.

Respondents’ briefs have not addressed these arguments forthrightly, but instead attempt to justify the result at the expense of principle. Now that the Bridge is open to traffic, this Court can use this case as an opportunity to carefully set precedent for hundreds of future projects. In doing so, the Court should endorse a statutory

interpretation that protects the integrity of public procurements for administrations and generations to come.

REPLY ARGUMENT

I. RESPONDENTS' ARGUMENTS OVERLOOK GENUINE ISSUES OF MATERIAL FACT

A. Respondents Concede the Court Applied the Wrong Standard

Respondents apparently concede that the trial Court applied the wrong standard of judging evidence in a summary judgment motion, as they no longer rely on the argument, advanced below and adopted by the trial court, that “substantial evidence” justifies summary judgment.¹ This argument was foreclosed by the Minnesota Supreme Court in *Schroeder v. St. Louis County*,² which Respondents do not address. The trial court’s grant of summary judgment must be reversed on this basis alone.³

B. Summary Judgment Is Inappropriate Because Appellants Presented Genuine Issues Of Material Fact For Trial.

Flatiron relies heavily on its argument that Rule 115.03 (d) of the General Rules of Practice for District Courts required summary judgment in this case. This argument is directly contrary to Minnesota caselaw. Appellants more than complied with the spirit and substance of the Rule, as its many filings are replete with references to disputed facts supported by affidavits.

¹ Order, dated 10/23/08, A-162.

² *Schroeder v. St. Louis County*, 708 N.W.2d 497 (Minn. 2006).

³ See Appellant’s Brief at pp. 14-15, 32-33 (applying *Schoeder* to this appeal).

Flatiron's analysis contradicts the holding in the only case to discuss Rule 115.03 in any relevant respect *Schilling v. Oman*.⁴ In *Schilling*, the non-moving party did not include evidence of a particular disputed fact in its memorandum of law, but the evidence included in a later affidavit. The Court of Appeals rejected the argument on the disputed fact was waived under Rule 115.03 and reversed this aspect of the trial court's judgment, holding that "rules pertaining to the filing of court memoranda on summary judgment motions are designed to streamline the process related to summary judgments rather than to serve as a means for curtailing claims."⁵

This Court reached a similar result in *Bunkowske v. Briard*,⁶ in which the Court analyzed a district court's application of a local rule analogous to Rule 115.03. In that case, Bunkowske did not file a memorandum of law opposing Briard's third summary judgment motion, although he had filed memoranda and affidavits responding to previous motions and also filed a motion to amend his complaint with accompanying materials to be heard contemporaneously with Briard's third summary judgment motion. The district court narrowly construed the local rule, refused to consider Bunkowske's previous and contemporaneous filings, and granted Briard's motion as unopposed.

This Court reversed, reasoning that the required information was presented to the trial court. Further, the *Bunkowske* Court opined that the district court's rigid application

⁴ *Schilling v. Oman*, 2002 WL 1163649 (Minn. Ct. App. June 4, 2002) (unpublished).

⁵ *Schilling* at p. *2.

⁶ *Bunkowske v. Briard*, 461 N.W.2d 392 (Minn. Ct. App. 1990).

of the local rule was contrary to the Minnesota Supreme Court's interpretation of Minn. R. Civ. P. 56.05, requiring "careful scrutiny of the pleadings, depositions, admissions, and affidavits, if any, *on file*."⁷ Appellants have adequately disputed key facts in this case multiple times based on what was *on file* at the time of the summary judgment motion.

C. **The Record Is Replete with Genuine Issues of Material Fact**

Appellants clearly responded to Flatiron's motion for summary judgment by presenting specific facts showing that there are genuine issues of fact for trial. Appellants' Memorandum of Law Supporting Plaintiffs' Motion for a Temporary Injunction contained an extensive fact section with detailed citations to evidence in the record. *See* SR8-SR22. Appellants filed this memorandum contemporaneously with Flatiron's memorandum supporting summary judgment, along with affidavits, exhibits, and deposition testimony supporting Appellants' position. As a matter of efficiency, Appellants responded to the summary judgment motion by pointing directly to many of the same facts that Appellants had advanced in support of their motion.

As a result, there is no question that Appellants met their obligations under Rules 115.03 and 56.05 to recite and discuss the disputed material facts, supported by detailed citations to affidavits, exhibits, and deposition testimony. While Flatiron is correct that Appellants did not put all contested facts under a bold heading that said "Contested

⁷ *Bunkowske*, 461, N.W.2d at 395 (quoting *Burner Serv. & Combustion Controls Co. v. City of Minneapolis*, 312 Minn. 104, 107, 250 N.W.2d 224, 226 (1977)) (emphasis added in the Court of Appeals opinion).

Facts,” it is beyond dispute that Appellants filings below are full of affidavits contesting in detail the facts at issue in this case. For example, the central dispute in this lawsuit is the responsiveness of Flatiron’s proposal. Appellants’ memorandum opposing summary judgment discussed factual disputes pertinent to responsiveness and directed the trial court to their temporary injunction memorandum for full discussion.⁸ That discussion, in turn, referred to numerous exhibits and excerpts of sworn testimony, all indicating that it was, at minimum, a disputed fact whether the contractors were entitled to propose work outside the project right of way.⁹ Other areas of the same discussion included what type of work was allowed in the Project’s temporary easement,¹⁰ whether Flatiron proposed work extending outside the temporary easement,¹¹ and the configuration of concrete box girders allowed by the RFP.¹² The trial court’s refusal to acknowledge this wealth of contrary evidence must be reversed.

⁸ See SR-382.

⁹ See Mem. Law. Supp. Temp. Inj., SR-27, at discussion corresponding to notes 99 through 103 (citing numerous documents attached as affidavit exhibits and the deposition testimony of Jon Chiglo).

¹⁰ See *id.*, SR-27 to SR-28, at discussion corresponding to notes 104 through 107 (citing affidavit exhibits, the Supplemental Affidavit of Jon Chiglo, and deposition testimony of Jon Chiglo and Tom O’Keefe).

¹¹ See *id.*, SR-29 at discussion corresponding to notes 108 through 112 (citing affidavits and exhibits).

¹² See *id.*, SR-31 at discussion corresponding to notes 120-122; see also Affidavit of Randy Reiner, P.E.; Supplemental Affidavit of Randy Reiner, P.E.; and Third Affidavit of Randy Reiner, P.E.

Appellants likewise pointed the trial court to record evidence demonstrating genuine issues of material fact for trial as to: 1) the reasonableness of the time before they filed their temporary injunction motion;¹³ 2) whether the TRC was competent to determine the responsiveness of the proposals because they had not even read all of the RFP requirements;¹⁴ 3) whether the TRC's scores were arbitrary;¹⁵ and 4) whether the TRC failed to reject non-responsive proposals.¹⁶ Again, the trial court's failure to acknowledge the existence of these factual disputes is reversible error.

¹³ Mem. Opp. S.J., SR-382, citing depositions and corresponding exhibits in the record at Affidavit of Jeffrey Wieland in Support of Plaintiffs' Motion for a Temporary Injunction ("Wieland Aff.") (relevant portions of which are at SR-51 *et seq.*).

¹⁴ Mem. Opp. S.J., SR-391, citing the deposition testimony of: Heidi Hamilton (Wieland Aff., Ex. 242 at p. 43, line 21 through p. 44, line 18, included at SR-225); Wayne Murphy (Wieland Aff., Ex. 245 at p. 32, lines 6 through 24, included at SR-236); Tom O'Keefe (Wieland Aff., Ex. 246 at p. 29 lines 2 through 20); Tom Styrbicki (Wieland Aff., Ex. 247 at p. 28, line 3 through p. 29, line 6, included at SR-257 through SR-258); and Kevin Western (Wieland Aff., Ex. 249 at p. 71, line 8 through p. 73, line 3, included at SR-274 through SR-275).

¹⁵ Cited as a disputed fact at SR-391, which refers back to Plaintiffs' temporary injunction memorandum at SR-35 through SR-39. In turn, that portion of the memorandum cites to Exhibits D, E, F, G, H, I, Q, and R attached to the Affidavit of Aaron Dean in Support of Plaintiffs' Motion for a Temporary Restraining Order ("Dean Aff."), numerous exhibits attached to Wieland's Affidavit, and the deposition testimony of Wayne Murphy (Wieland Aff., Ex. 245 at p. 90, line 18 through p. 93, line 20 and p. 121, line 17 through p. 122, line 25), and Heidi Hamilton (Wieland Aff., Ex. 242 at p. 38, lines 2 through 19).

¹⁶ Cited as a disputed fact at SR-392, which refers back to Plaintiffs' temporary injunction memorandum at SR-24 through SR-26. The facts discussed in that portion of the memorandum are supported by extensive cites to affidavit exhibits and deposition testimony.

Respondents disingenuously claim that the facts were undisputed, but the opposite is true. The trial court should be reversed and this case remanded for a decision on the disputed facts.

II. FLATIRON AND MNDOT IGNORE THE PLAIN LANGUAGE OF THE STATUTE AND SETTLED LEGAL MEANING OF “RESPONSIVE.”

Appellants’ opening brief established that the plain language and statutory scheme of Minn. Stat. §161.3426 required the trial court to apply the settled legal meaning of the term “responsive” to MnDOT’s decision to award the Project to Flatiron. Under that definition, the TRC is prohibited from scoring, and MnDOT is prohibited from awarding a contract based on any proposal that violates a mandatory term of the Request for Proposals (“RFP”) that gives a proposer a competitive advantage.¹⁷ In response, both Flatiron and MnDOT argued in their briefs – without citation to any case law – that “responsiveness” should be understood differently from the way the Minnesota Supreme Court had previously defined that term. Respondents simply posit that the concept of responsiveness does not apply to best value design-build procurements, so whatever is meant by “responsive” should be left to the sole discretion of MnDOT’s Technical Review Committee (“TRC”) to determine.

Respondents’ authorities (or notable lack thereof) do not support their conclusions. By using the word four times, Minn. Stat. §161.3426 clearly intended to incorporate the prior judicial definitions of responsiveness. Otherwise, there would be no point in using the word. The RFP and ITP did not reject that definition, but the TRC failed to follow

¹⁷ Appellant’s Brief at p. 17 citing *Carl Bolander and Sonsu, Minneapolis*, 451 NW.2d 204, 206-07 (Minn. 1990).

(and really didn't even understand) the concept. MnDOT's commissioner also abdicated her responsibility to determine the responsiveness of Flatiron's proposal. The trial court's refusal to apply the settled legal meaning of "responsive" infected its decisions on injunctive relief and summary judgment with clear legal error, which must be reversed.

A. **The Responsiveness Concept Is Used In Best Value and Negotiated Procurements**

Flatiron and MnDOT each argue that this Court can ignore the settled legal meaning of the term "responsive," because they contend that definition is limited to its use with low-bid procurement and does not apply to best-value design-build procurement. This argument has two components: first, Respondents argue that cases on low bid procurement must be ignored based on the "notwithstanding" language in Minn. Stat. §161.3412 and, second, Respondents argue that, in any event, differences between the contracting methods of low bid and best value design build procurement justify different treatment of the term. Both of these premises are false.

1. **The Notwithstanding Language Does Not Limit Minn. Stat. §161.3426**

Flatiron and MnDOT both allege that when the Legislature enacted the design build law, it "explicitly stated its intent that prior competitive bidding law not be applicable," citing Minn. Stat. §161.3412.¹⁸ To the contrary, that statutory section, entitled "Design-build authority," merely states as follows:

Subdivision 1. Best value selection for design-build contracts.
Notwithstanding sections 16C.25, 161.32, and 161.321, or any other law to

¹⁸ Flatiron's Brief at p. 20; MnDOT's brief at p. 17.

the contrary, the commissioner may solicit and award a design-build contract for a project on the basis of a best value selection process. Section 16C.08 does not apply to design-build contracts to which the commissioner is a party.

A plain reading of this language reveals that it was intended solely to authorize MnDOT's Commissioner to award contracts on a best value, design-build basis as opposed to a design-bid-build basis where the award was based on low price alone. Before the enactment of §161.3410, design-build best value procurement was prohibited by the other sections of Minnesota Statutes listed in section §161.3412.¹⁹ MnDOT's design-build authority needed to be exempt from those explicit prohibitions, or it would have been illegal for MnDOT to exercise its newly enacted best value design-build authority. That exemption is all Minn. Stat. §161.3412 accomplished. Section §161.3412 surely was not intended to eradicate all other applicable law, only "contrary" law. In fact, the concept of "responsiveness" is not contrary to design-build procurement, so there is no reason to sweep all understanding or application of responsiveness aside via this provision. Surely, if the drafters of this statute had meant for a new definition of responsiveness to apply after using it four times in the statute, they would have given it a

¹⁹ Minn. Stat. §16C.25 (2001) (requiring competitive bidding of all building and construction contracts as provided by the Department of Administration statutes then found at §§16B.07, 16B.08, and 16B.09); Minn. Stat. §161.32, subd. 1(b) (2001) (requiring MnDOT to award highway construction contracts to "the lowest responsible bidder"); Minn. Stat. §161.321, subd 1(a) (2000) (allowing MnDOT to award contracts to small and "targeted" businesses "in accordance with all applicable laws and rules governing competitive bidding.")

new special definition as they did several other terms. By not redefining the term, the legislature left the settled legal meaning intact.²⁰

Indeed, it is worth noting that all the other public procurement statutes from which the design-build law was exempted do not even contain the word “responsive.” Responsiveness is a judicially created concept imposed on public procurement to ensure its integrity.²¹ Yet the best value design-build law deliberately contains that term, every time it describes a legal award of a best value design-build contract. The drafters wanted to make sure the judicial concept of responsiveness was incorporated into the new statute to make sure that the award discretion granted by the new statute was properly exercised.

B. The RFP Requires a Determination of Responsiveness Based On Compliance with the RFP and the Law of Responsiveness

Flatiron’s brief argues that the policies behind a responsiveness requirement were “fully realized” in this procurement, because responsiveness was determined by a mechanical application of TRC scores to a pass-fail formula stated in the RFP.²² Flatiron cites this pass-fail review provision of the RFP as the vehicle that defined responsiveness and established how it would be determined by the TRC.²³ MnDOT reached the same

²⁰ Minn. Stat. §645.17(4).

²¹ *See, e.g.*, Minn. Stat. §161.32 (2001) (requiring MnDOT to award contracts to “the lowest responsible [not responsive] bidder”).

²² Flatiron’s brief at p. 21.

²³ Flatiron’s brief, p. 6 at ¶B. 4. (“The RFP also expressly defined and described how proposal responsiveness would be determined by the TRC,” citing ITP ¶5.3, SR-123).

conclusion, arguing that the trial court “correctly viewed” that TRC’s scoring system was the proper mechanism for determining responsiveness.²⁴

MnDOT’s own Proposal Evaluation Manual disproves Respondents’ assertions and shows that responsiveness in a best value procurement is a predicate to, not a result of scoring. MnDOT’s definition of the “Fails” scoring category was “The Proposal is considered to not meet the RFP requirements or is non-responsive.”²⁵ That definition clearly shows that the TRC is required to determine the Proposal’s responsiveness *before* scoring, because without that knowledge, the TRC cannot assign a score. But once the TRC made a determination that a proposal was non-responsive, both the TRC and MnDOT had statutory duties to reject that proposal.²⁶ In this regard, the statute and MnDOT’s Proposal Evaluation Manual are entirely consistent with the settled legal meaning of “responsive”: if a proposal does not respond to the RFP, it cannot be considered, and should not even have been scored.

But in this case, Appellants demonstrated that Flatiron was non-responsive even if the Court accepts Respondents’ definition of responsiveness as a result of scoring. Under MnDOT’s understanding, if a proposal is non-responsive, it must be scored between zero and 49 points for that item. Viewing the facts in the light most favorable to Appellants, Flatiron should have been scored less than 50 points for each non-responsive features of

²⁴ MnDOT’s brief at p. 16.

²⁵ Proposal Evaluation Manual at SR-66 (emphasis in the original).

²⁶ Minn. Stat. § 161.3426 subd. 1(a). (“The Technical Review Committee shall reject any proposal it deems nonresponsive.”) (emphasis added).

its proposal. Under this rule, Flatiron should have received less than 50 points for geometric enhancements, based on its failure to adhere to the required Right of Way. Instead, the opposite occurred, and Flatiron was rewarded for this non-responsive feature of its proposal, violating the very scoring rules MnDOT says it established. Under either Appellants' or Respondents' definition of responsiveness, this award does not satisfy the statute, and summary judgment as to Flatiron's responsiveness must be reversed.

C. **The Concept Of Responsiveness Is Not Different When Used Outside Of Low Bid Procurements.**

Respondents likewise incorrectly argue that Minn. Stat. §645.17 cannot apply because best value design-build procurement is not the same "subject matter" as the Minnesota cases governing responsiveness. As Appellants' opening brief explained, the requirement of responsiveness advances important policies that protect the purposes of advertised procurements: to give every bidder equal treatment, to secure fair prices, and to prevent favoritism, collusion, and fraud.²⁷ There is nothing about these policies that limits their application strictly to the "low bid" context as opposed to design-build procurement. Whenever the Government solicits work, these principles need protection.

Several federal bid protests on best value procurements have applied the identical principle outside of the low bid context. For example, in *In re Arthur Young & Co.*,²⁸ the Comptroller General sustained a protest of a negotiated best value procurement of

²⁷ Appellants' Brief at p. 18 (quoting *Toyo Menka Kaisha, Ltd. v. U.S.* 597 F.2d 1371, 1377 (Ct. Cl. 1979)).

²⁸ *In re Arthur Young & Co.*, 1985 WL 52801, at p. *3, 85-1 COD P598 (Comp. Gen. 1985).

accounting services by the Navy, based on the identical issue raised by this case. In *Arthur Young*, the winning bidder had included, as “professional” work, services that would be done by temporary bookkeepers hired by a subcontractor. The Comptroller General sustained the second low bidder’s protest, ruling that if the Navy had wanted to expand the definition of “professional,” it should have done so by amendment or during discussions, so that other offerors could have made the same adjustments to their labor force, thereby competing on the same basis. As the Comptroller General decision explained:

It is a fundamental principle of federal procurement that offerors must be treated equally and provided with a common basis for the preparation of their proposals. In negotiated procurements such as this, any proposal which ultimately fails to conform with the material terms of the solicitation should be considered unacceptable and should not form the basis of award.²⁹

Likewise, in *In re Compliance Corporation*, the Comptroller General denied a protest where the protester had violated pertinent RFP requirements in a best value procurement for maintenance services by the Navy.³⁰ Among other things, the RFP required that the employees that would do the work must have two years of direct experience with the applicable aircraft systems.³¹ In its final offer, Compliance added

²⁹ *Arthur Young & Co., supra* at p. *3 (emphasis added).

³⁰ *In re Compliance Corporation*, 1993 WL 560471, 94-1 CPD P 166 (Comp. Gen. 1993).

³¹ *Id.*

two employees who lacked the required experience, and the Navy ruled that Compliance's offer was technically unacceptable as a result.

Compliance protested, arguing that aside from the personnel defect, the differences between the proposals' overall evaluations were not large. The Comptroller General disagreed, noting that: "Evaluation scores notwithstanding, however, an otherwise acceptable proposal properly may be rejected where the proposal fails to comply with material solicitation requirements."³²

These and other cases show that the GAO will sustain protests in best value procurements where the evaluation is not consistent with the stated requirements in the solicitation.³³ While best value decisions are qualitative (just like design-build decision at issue), the agency is required to adhere to the requirements for technical evaluation announced in its solicitation.

These cases all involve best value procurements in which the award was not made to the low bid. Instead, they were procurements, like the one at issue, where judgment was used to evaluate quality and design. Nevertheless, these cases used the concept, if not the word, of "responsiveness" to protect the integrity of the procurement. Proposals

³² *Compliance Corp.*, *supra* at p. *3.

³³ *See, L-3 Communications Titan Corp.*, 2007 CPD ¶66 at p. 8. *See also, Sikorsky Aircraft Company*, Comp. Gen. B-299145 Feb. 26, 2007, 2007 CPD ¶45. (sustaining protest at best value award due to agency's departure from the RFP) ("the agency may not announce in the solicitation that it will use one evaluation plan and then follow another."); *Contingency Management Group*, Comp. Gen. B-309752, Oct 5, 2007, pp. 15, 20-26, 2008 CPD ¶83 ("it is a fundamental principle of government procurement that the contracting agency must treat all offerors equally, and in so doing must evaluate proposals evenhandedly against common requirements.").

that did not follow the important provisions of the solicitation were disqualified. This is the same analytical framework that Appellants seek for the protection of the public in this case. Flatiron allegedly violated the RFP requirements by going outside the designated right of way. Flatiron got a huge competitive advantage by doing so. Whether Flatiron, in fact, violated the RFP by going outside the right of way is a disputed factual question that should have prevented summary judgment and should be finally decided on remand. But this Court must decide the impact and effect of any proposal's material variance from the RFP. As the above cases show, and as Appellants argue, MnDOT must apply the long standing judicial definition of "responsive" and reject non-responsive proposals even in a design-build, best value solicitation.

MnDOT argues that its Commissioner cannot evaluate the responsiveness of the winning proposal, calling Appellants' view of the Commissioner's role "practically unworkable" and a mis-reading of Minn. Stat. §161.3426, because [t]he TRC, determines whether a proposal is responsive."³⁴ This argument ought to insult the intelligence of any competent Commissioner, and it also directly contradicts the plain language of the statute. Only one subdivision of Minn. Stat. §161.3426 pertains to the TRC's determination of responsiveness, at subdivision 1(a), but the obligation to award only to responsive proposers appears three more times, in subdivisions 1(b), 1(c) and 1(d).

³⁴ MnDOT's Brief at p. 16.

MnDOT's interpretation renders three of these four references superfluous, and cannot be adopted.³⁵

A more straightforward reading of the statute takes the current language seriously, recognizing that *both* the TRC and the Commissioner are obliged to determine responsiveness and that *both* are prohibited from awarding the project to a non-responsive proposal. This reading is not "unworkable," as MnDOT claims, but instead provides an intended additional safeguard to protect the integrity of the process.

D. The Factual Record Demonstrates that MnDOT Failed to Award to A Responsive Proposer

MnDOT and Flatiron repeatedly claim that the award should be affirmed because the record demonstrates that MnDOT awarded the project to a responsive proposer. Yet as is discussed in more detail in Section I above, Appellants presented reams of evidence demonstrating that Flatiron's bid was non-responsive, in that it violated mandatory requirements in the RFP as to use the right of way for the project and the required number of webs for concrete box girders such as Flatiron proposed. The trial court's conclusion that MnDOT was responsive to the proposal in spite of these defects is directly contrary to the factual record. Even if the trial court was within its discretion to deny temporary injunctive relief on this basis, it should not have granted summary judgment precluding any injunctive relief without a trial to resolve the disputed facts.

MnDOT's Brief proves this point by arguing that Appellants' evidence cannot support its claims because, according to MnDOT, Appellants' professional engineering

³⁵ See Minn. Stat. §645.16 ("Every law shall be construed, if possible, to give effect to all its provisions.")

experts lack sufficient qualifications to render the opinions their affidavits contain.³⁶ In other words, MnDOT wants this court to repeat the trial court's error, and weigh the facts in the light most detrimental to Appellants. Obviously this approach directly contradicts Rule 56, and cannot support summary judgment.

III. RESPONDENTS' CASELAW ON BALANCING THE HARMS IS NOT PERSUASIVE.

Appellants' opening brief discusses caselaw establishing that, when a statutory violation occurs, it is not appropriate for the trial court to "balance the harms" in order to determine whether the violating act should be enjoined. Any such balancing, at least in the case of a statutory violation, directly contradicts the constitutionally required separation of powers between the legislative and judicial branches of government.

Respondents each cite distinguishable cases in an effort to avoid this argument. Flatiron, citing *Griswold*, *Telephone Associates*, and *Byrd*, argues that such balancing is always at issue in bid protest cases.³⁷ None of these cases supports Flatiron's argument. In *Griswold*, there was no discussion of such balancing, and certainly no discussion of *Dahlberg*, a decision which would not be rendered for another 11 years.

Nor was *Griswold* a case where balancing of the harm from an injunction was found to outweigh the harm from the bid violation. To the contrary, in *Griswold* the court discussed the fundamental principles of responsiveness, and upheld a summary judgment permanently enjoining construction of a public project in the interests of

³⁶ MnDOT's Brief at p. 8.

³⁷ Flatiron's Brief at p. 20.

maintaining those principals.³⁸ Yet, in *Griswold*, there was no statute governing the procurement, and thus no statutory violation.³⁹ Because legislation was not at issue, the separation of powers issue raised by Appellants was not considered. The same can be said of Flatiron's other citations, as neither *Telephone Associates* nor *Byrd* discuss either a violation of statute or the question of *Dahlberg*-type balancing of the harms. These authorities are simply unpersuasive as cited by Flatiron.⁴⁰

MnDOT likewise argues that three Minnesota cases foreclose Appellants' argument: *Wadena*, *Ulland*, and *Cross Country Bank*⁴¹. In each of these cases, it is worth noting, the Court of Appeals determined that *Dahlberg* did not require a finding of irreparable harm or inadequate legal remedies as a prerequisite to statutorily-authorized injunctive relief, a proposition that differs from Appellants' request to forego the "balance of the harms" factor in this case. In each of those cases, the question was whether a violation of such a statute allowed *liberalization* of the *Dahlberg* analysis, and in each case the Court answered in the affirmative. Neither case, however, concerns MnDOT's assertion that *absent* explicit statutory authorization for an injunction, courts

³⁸ *Griswold*, 65 N.W. 2d 647, 650 (Minn. 1954).

³⁹ *Id.* at 650.

⁴⁰ Flatiron's citation to *Blue Cross and Blue Shield of Minnesota*, 624 N.W.2d at 278 is likewise unpersuasive. In that non-procurement case, the Minnesota Supreme Court noted potential separation of powers issues raised when the judiciary does not defer to agency ALJ determinations. In this case, of course, the appeal turns on whether the agency's interpretation of the term "responsive" was contrary to the statute the legislature enacted. If so, no such deference is allowed.

⁴¹ MnDOT's Brief at p. 10.

must always balance the harms, even when a bid protester proves that a contract will be or has been awarded in violation of a mandatory statute. Such balancing violates the separation of powers, and nothing in *Wadena*, *Ulland*, or *Cross-Country Bank* is to the contrary.⁴²

IV. FLATIRON MISSTATES THE LAW OF JUSTICIABILITY AND MOOTNESS

The Respondents took radically different positions on Judge Cleary's dismissal of Appellants' declaratory relief claim. While Flatiron tries to argue that the claim is non-justiciable and moot, MnDOT did not address the propriety of declaratory relief, justiciability, or mootness, thereby conceding these issues to Appellants. Notably, MnDOT did argue in its brief that the declaratory judgment statute "provides the enforcement muscle" for the design-build statute, which has no self-contained remedy mechanism.⁴³ Appellants agree with MnDOT on this issue.

A. The Dispute Is Justiciable Because There Is A Live Controversy.

In its brief, Flatiron presented the general rule of justiciability, that courts must dismiss cases in which they cannot redress the injury.⁴⁴ Flatiron then argued that its

⁴² Appellants already have disputed MnDOT's analysis of the *Weinberger* case at pages 31-32 of their opening brief.

⁴³ MnDOT's Brief at p. 14.

⁴⁴ Flatiron's Brief at p. 34, citing *Sviggum v. Hanson*, 732 N.W.2d 312, 320 (Minn. Ct. App. 2007).

contract with MnDOT was a *fait accompli*, which presented no redressable injury even if proved illegal.⁴⁵ Flatiron's argument fails on at least three levels.

First, the injury to the Appellants is clear. The Minnesota Legislature explicitly found "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."⁴⁶ Blatant violations of this statute by MnDOT vitiates that integrity. Adding further injury to insult, MnDOT spent tens of millions of dollars too much on the bridge. Flatiron shrugs this off by claiming that the contract was mostly funded with federal, not state, tax dollars,⁴⁷ as if Minnesotans were exempt from federal taxation!

Second, that injury is clearly redressable through the injunctive and declaratory relief sought by Appellants. Flatiron admitted that the contract is still executory and was only 92.6% complete at the summary judgment motion hearing.⁴⁸ The record shows that Flatiron had achieved substantial, not final, completion. Until the contract is completely finished, with all work completed and all payments made, the trial court has the power to enjoin or declare illegal further performance. Thus, the dispute in this lawsuit is and was justiciable because the court can redress the injury.

⁴⁵ *Id.*

⁴⁶ Minn. Stat. § 161.315 subd. 1 (stating the Legislature's intent).

⁴⁷ See Flatiron's Brief at n. 8 on p. 16.

⁴⁸ See *id.*

Third, the trial court can redress the injury through the declaratory relief sought by Appellants. A declaration that MnDOT misconstrued the design-build statute and illegally awarded the contract to Flatiron is itself specific relief to which Appellants are statutorily entitled.⁴⁹ That declaration would redress Appellants' injuries in two ways. First, it would help restore the public's confidence in the integrity of MnDOT's public procurement processes. Second, it raises the possibility of returning money to the public's coffers.

B. Flatiron Misstated The Consequences Of An Illegal Contract.

The fact that Flatiron may be required to return some money to the State if the contract is illegal also means that this case is still justiciable and not moot.

The rule in Minnesota is that when a contractor, acting in good faith, provides the public with something of value under an illegal contract, the contractor may only recover the fair value of what it provided to the public.⁵⁰ Flatiron helpfully quoted the language in *Kotschevar* holding that the contractor's recovery on an illegal contract is not the contract value, but the *quantum meruit* value of its contribution to the public. But then

⁴⁹ See Minn. Stat. § 555.01 ("Courts of record within their respective jurisdictions shall have the power to declare rights, status, and other legal relations whether or not further relief is or could be claimed.") (emphasis added).

⁵⁰ *Kotschevar v. North Fork Twp.*, 229 Minn. 234, 238, 39 N.W.2d 107, 110 (1949) ("the one furnishing the money or property may recover in quasi contract to the extent of the benefits received by the corporation.") (quoted in Flatiron's Brief at pp. 35-36.) Other cases are to the same effect. See also, *Retzman v. City of Litchfield*, 354 N.W.2d 426, 428 (Minn. 1984) (discussing *Kotschevar*); *Buffalo Bituminous, Inc. v. Maple Hill Estates, Inc.*, 311 Minn. 468, 469, 250 N.W.2d 182, 182-83 (1977) (approving the rule stated in *Kotschevar*).

Flatiron makes the illogical jump that Appellants are barred from seeking return of payment beyond the fair market value of the bridge because there is no evidence in the record about the value of the bridge it is providing to the public.⁵¹ The trial court has not yet reached the issue of the fair market value of this bridge because it hasn't declared the contract illegal. Nevertheless, there is evidence in the record, supported by affidavit, that the fair market value of the bridge is at least \$34,000,000 less than what Flatiron has been paid.⁵² When MnDOT's contract with Flatiron is declared illegal, the court will have to hold an evidentiary hearing to determine how much money has been paid to Flatiron, determine the fair and reasonable value of the bridge, and then order disgorgement of the difference.

But for purposes of this appeal, the fact that disgorgement is possible proves that there is a redressable injury, so the case is justiciable.

C. Flatiron Virtually Ignored The Exceptions To The Mootness Doctrine Argued By Appellants.

Appellants argued that two recognized exceptions to the mootness doctrine apply in this lawsuit, permitting appellate review: the alleged injury is capable of repetition, yet evading review; and the case presents a functionally justiciable dispute on an issue of statewide importance. Flatiron presented no evidence and only three sentences of conclusory statements to rebut Appellants' arguments.

⁵¹ Flatiron's Brief at p. 36.

⁵² Complaint at ¶ 49 (A-17); Supplemental Affidavit of Eric Sellman submitted with Appellants Motion for Temporary Injunction at ¶ 2.

Appellants showed in their opening Brief that their injuries are capable of repetition, yet evading review. This case clearly demonstrates that MnDOT can spend hundreds of millions of dollars in less time than it takes a case to make its way through the courts. Further, Appellants cited to passages in Jon Chiglo's deposition testimony showing that MnDOT intends to reuse the same contracting methods and procedures that Appellants are challenging on future contracts.⁵³ This exception to the mootness doctrine clearly applies and was not even seriously argued by Flatiron.

Flatiron stated in its Brief, without citation to the record or to any legal authority, that this case does not present a functionally justiciable claim of statewide significance.⁵⁴ A claim is functionally justiciable if it has a record that is sufficiently developed to support judicial decision making.⁵⁵ Even a cursory look at the record in this case show that that standard is met. Flatiron's bald assertion that the integrity of MnDOT's public procurement practices is not an issue of statewide importance is shown to be without merit by the Legislature's statement of intent in Minn. Stat. § 161.315 subd. 1. Both prongs of this exception to the mootness doctrine apply and were un rebutted by Flatiron. This case, therefore, cannot be dismissed on justiciability or mootness grounds.

⁵³ See Appellants' Brief at p. 50.

⁵⁴ See Flatiron's Brief at p. 37.

⁵⁵ *Jasper v. Comm'r of Pub. Safety*, 642 N.W.2d 435, 439-40 (Minn. 2002).

V. RESPONDENTS' FACTUAL MISSTATEMENTS AND RED HERRINGS

Instead of addressing the primary issues of this appeal, Respondents present irrelevant and inaccurate contentions that should not affect the outcome of this appeal.

A. The Composition of the TRC is Irrelevant to this Case.

Flatiron notes the composition of the Technical Review Committee no less than five times.⁵⁶ No one disputes the composition of this panel, but Appellants presented genuine issues of fact that the TRC not only scored non-responsive proposals,⁵⁷ but also generally scored the proposals arbitrarily and capriciously. Whatever its composition, the panel members had obligations only to score responsive proposals, and the fact that the TRC was properly composed does nothing to blunt this error.⁵⁸

B. Ames And McCrossan Are Not Parties To This Case.

Flatiron likewise continually refers to two of the disappointed bidders, McCrossan and Ames/Lunda. This case is not about any other bidder's responsiveness. This case is about whether the taxpayers overspent for a bridge that was awarded contrary to law, based on a contract that is therefore illegal and void. Flatiron nonetheless repeats these

⁵⁶ Flatiron's Brief p. 5 at ¶2, p. 6 at ¶2, p. 7 at ¶10, p. 19, p. 22.

⁵⁷ See pt. I.D., *supra* (discussing the specific facts in the record showing Flatiron's proposal violated the right of way and 3-web requirements in the RFP).

⁵⁸ Flatiron likewise suggests that the procurement was legal because even the TRC's members from the Associated General Contractors and the City of Minneapolis scored its proposal the highest. The fact that the members all made the same mistake is not surprising, however, as at least five of the six TRC members did not completely read the RFP. The TRC and MnDOT's Commissioner both failed to properly analyze proposals for responsiveness, ignoring Flatiron's non-responsiveness and scoring it higher than the other proposals.

irrelevant facts about McCrossan and Ames/Lunda throughout its brief in an attempt to discredit Appellants' evidence. Yet Ames and McCrossan and Lunda are not parties to this action, and their responsiveness is not at issue in this lawsuit.

One example of these allegations is particularly instructive. At page 9 of its brief, Flatiron claims that McCrossan's proposal included work violating the RFP with regard to work north of the 4th Street Bridge.⁵⁹ Flatiron and the trial court then criticized Appellants for not including a claim against McCrossan and Ames/Lunda as part of its action.⁶⁰ But the time for adding parties to their Complaint had passed by over three months⁶¹ when Flatiron made those allegations about McCrossan to the court.⁶² Therefore, it was unfair for Flatiron to encourage the trial court to impugn Appellants for their lack of knowledge about McCrossan's proposal. Indeed, as McCrossan was not a party to the case, it was also unfair for the trial court to make comments about McCrossan's proposal based on Flatiron's self-serving description of it when McCrossan was not present to defend itself. The trial courts conclusion that Lunda also violated the right of way is troubling for the same reasons. Lunda even had an affidavit in the record

⁵⁹ Flatiron's Brief at p. 9, citing SR-162 (part of the RFP, not McCrossan's proposal) and SR-284 (Flatiron's Mem. Law. Opp. Temp. Inj.).

⁶⁰ October Order at p. 9, A-118.

⁶¹ *See* Amend. Sch. Order of Jan 17, 2008 (deadline for adding parties Feb. 29, 2008); *see also* Stipulation and Order of Feb. 27, 2008 (extending deadline to April 29, 2008).

⁶² SR-284 (citing "Exhibit 1 to the Sanderson Affidavit"); *see also* Aff. of Peter Sanderson Opp. Temp. Inj. (Aug. 8, 2008) (alleging that McCrossan's initial site plan proposed such work, attaching the site plan as Exhibit 1).

aving that it did not violate the right-of-way, and the trial court blithely ignored it in making its finding.⁶³

In any event, whether or not McCrossan's or Ames/Lunda's proposals were responsive has absolutely no bearing on whether Flatiron's proposal was responsive to the RFP based on its right of way violations.

It is significant, however, how the trial court responded to this information about Ames/Lunda's and McCrossan's proposals. In its October order, the trial court explicitly found that, under Appellants' interpretation of the word responsive, "none of the proposals were responsive, including the proposals submitted by C.S. McCrossan and Ames/Lunda."⁶⁴ Although the fate of the McCrossan and Ames/Lunda proposals was not relevant to the motion before the court, the Court acknowledged in this statement that whether Flatiron complied with the statute depends entirely on the meaning of the definition of the statutory term "responsive." The only way to justify the award to Flatiron was for Flatiron to propose and the trial court to adopt a construction of that phrase directly contrary to its settled legal meaning.

C. No Agency Beyond MnDOT Was Charged with Awarding This Procurement According to the Statute

Flatiron also claims that this procurement was "overseen" by the Federal Highway Administration and the Minnesota Department of Administration, and further claims that those entities and the General Accounting Office all independently reviewed this procurement. No such independent review was ever made part of the record; instead

⁶³ Supplement Aff. of Richard Fahland at paragraphs 3 and 4 (verifying Complaint ¶ 31).

⁶⁴ Order, dated 10/23/2008 at p. 9, A-156.

Flatiron relies on hearsay from depositions concerning those reviews. There is no valid evidence in the record to suggest that any entity beyond MnDOT was specifically charged with reviewing the *responsiveness* of the proposal, or, in fact, reviewed responsiveness.

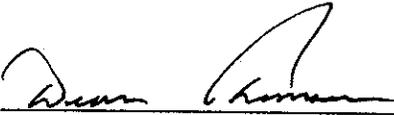
CONCLUSION

The trial court's Orders granting Flatiron summary judgment and dismissing Appellants' injunctive and declaratory relief claims cannot be upheld by this Court for two fundamental reasons. First, the trial court exceeded its authority at the summary judgment stage by determining facts instead of only determining if facts were in dispute. Second, and more importantly, it misconstrued Minn. Stat. §161.3426, opening the door for fraud, favoritism, and extravagance in violation of the Legislature's stated intent.

The Legislature used the word "responsive" deliberately. The trial court's interpretation of the statute renders that essential protection meaningless. This Court should correct that error by properly interpreting the statute.

Dated: February 2, 2009.

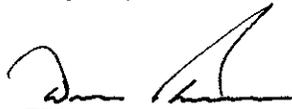
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BRIEF LENGTH CERTIFICATION

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds.1 and 3, for a brief produced with a proportional font. The length of this brief is **6,990 (must be not more than 7,000)** words. This brief was prepared using Microsoft Word 2003.



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