

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.

RESPONDENT FLATIRON'S BRIEF

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INTRODUCTION

Appellants ask this Court to revive their, at best, fitful campaign to enjoin the reconstruction of the I-35W bridge that was completed months ago. The futility of that request, and the absence of supporting law or facts, cannot be exaggerated.

Appellants' attempt to resuscitate their declaratory relief claim fares no better. As correctly held by the district court, that claim had no legal basis, and the undisputed material facts conclusively defeated it. Appellants did not even attempt to meet their evidentiary burden in opposing Flatiron's summary judgment motion. Dismissal was therefore appropriate and should be affirmed.

The remainder of appellants' brief is irrelevant. Page after page is consumed by repeatedly setting up and knocking down straw man arguments that MnDOT was required to comply with its previously stated and weighted criteria, could not award to a non-responsive proposer and could not redefine the term 'responsive' after-the-fact.¹ No one disagrees. But there is no evidence that MnDOT violated those obligations; indeed, the undisputed record evidence upon which the district court was required to base its orders (and upon which this Court is required to base its review of those orders) is entirely to the contrary.

In sum, the district court's dismissal of appellants' lawsuit should be affirmed in all respects.

¹ See, e.g., appellants' Brief, p. 24.

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STATEMENT OF THE ISSUES

In conformance with Minn. R. Civ. App. P. 128.02, subd. 2, Respondent Flatiron-Manson, a Joint Venture (“Flatiron”) submits the following reformulation of the issues presented by appellants to correct their failure to comply with the requirement of Minn. R. Civ. App. P. 128.02, subd. 1 (b) to provide: “[a] concise statement of the legal issue or issues involved, omitting unnecessary detail.”

1. DID THE DISTRICT COURT ALLOW RESPONDENT MINNESOTA DEPARTMENT OF TRANSPORTATION (“MnDOT”) TO DEVIATE FROM THE REQUIREMENTS OF MINN. STAT. § 161.3410, *et seq.*?

District Court Ruling:

The district court ruled that MnDOT complied with the statute.

Most Apposite Cases:

DHL, Inc. v. Russ, 566 N.W.2d 60 (Minn. 1997); *Carl Bolander and Sons v. Minneapolis*, 451 N.W.2d 204 (Minn. 1990).

Most Apposite Statutory Provisions:

Minn. Stat. § 161.3410, *et seq.*; Minn. Stat. § 645.17.

2. DID THE DISTRICT COURT VIOLATE “SEPARATION OF POWERS” BY APPLYING THE *DAHLBERG* FACTORS TO APPELLANTS’ REQUEST FOR INJUNCTIVE RELIEF?

District Court Ruling:

The district court applied the *Dahlberg* factors.

Most Apposite Cases:

Dahlberg Bros., Inc. v. Ford Motor Co., 137 N.W.2d 314 (Minn. 1965); *Griswold v. Ramsey County*, 242 Minn. 529, 65 N.W.2d 529

(1954); *Telephone Associates, Inc. v. St. Louis County Bd.*, 364 N.W.2d 378 (Minn. 1985).

Most Apposite Constitutional and Statutory Provisions:

Minn. Const. Art. III § 1; Minn. Stat. § 161.3410, *et seq.*; Minn. Stat. § 645.17.

3. DID THE DISTRICT COURT IGNORE GENUINE ISSUES OF MATERIAL FACT IN ITS DISMISSAL OF APPELLANTS' INJUNCTIVE AND DECLARATORY RELIEF CLAIMS?

District Court Ruling:

The district court held that no genuine issues of material fact precluded dismissal of appellants' claims.

Most Apposite Cases:

Griswold v. Ramsey County, 242 Minn. 529, 65 N.W.2d 529 (1954); *Fetsch v. Holm*, 236 Minn. 158, 52 N.W.2d 113 (1952).

Most Apposite Statutory Provisions and Rules:

Minn. Stat. § 161.3410, *et seq.*; Minn. R. Civ. P. 56.05; Rule 115.03(d) of the General Rules of Practice for District Court.

4. DID THE DISTRICT COURT IMPROPERLY DISMISS A JUSTICIABLE DECLARATORY RELIEF CLAIM?

District Court Ruling:

The district court held in the negative.

Most Apposite Cases:

Kotschevar v. North Fork TP, Stearns County, 229 Minn. 234, 39 N.W.2d 107 (1949); *State ex. rel. Sviggum v. Hanson*, 732 N.W.2d 312 (Minn. Ct. App. 2007).

Most Apposite Statutory Provision:

Minn. Stat. § 555.01, *et seq.*

STATEMENT OF THE CASE

Pursuant to Minn. R. Civ. App. P. 128.02, Subd. 2, Flatiron submits the following Statement of the Case to overcome appellants' failure to satisfy the requirement of Minn. R. Civ. App. P. 128.02, Subd. 1 (c) that: "[a] statement of the case shall first be presented identifying the trial court and the trial judge and indicating briefly the nature of the case and its disposition."

On October 16, 2007, appellants commenced this action in Minnesota state district court, Second Judicial District. On October 23, 2007, the action was assigned to the Honorable Edward J. Cleary. In their Complaint, appellants asked the district court to enjoin reconstruction of the I-35W bridge under a contract awarded to Flatiron by MnDOT and to declare that contract illegal and void.

On October 17, 2007, appellants served and filed a motion for a temporary restraining order. The hearing on that motion was held on October 24, 2007. On October 31, 2007, the district court issued an order denying the motion. On November 7, 2007, appellants appealed from that order. On December 27, 2007, appellants voluntarily dismissed their appeal.

On July 16, 2008, Flatiron served and filed its motion for complete or partial summary judgment, and appellants served and filed their motion for a temporary injunction. The hearing on both motions was held on August 13, 2008.

On August 28, 2008, the district court issued an order denying appellants' motion for a temporary injunction, granting Flatiron's motion to dismiss appellants' injunctive relief claim and holding under advisement Flatiron's motion

to dismiss appellants' declaratory relief claim. On September 4, 2008, appellants appealed from that order in Appeal Number A08-1584.

On October 23, 2008, the district court issued an amended order granting Flatiron's motion to dismiss appellants' declaratory relief claim. On November 14, 2008, appellants appealed from that order in Appeal Number A08-1994.

On November 20, 2008, this Court consolidated the two pending appeals.

STATEMENT OF THE FACTS

In conformance with Minn. R. Civ. App. P. 128.02, subd. 1 (c), Flatiron submits the following concise and fair statement of the facts material to this appeal. Those facts are grouped herein in relation to the issues presented by this appeal: (1) general facts; (2) facts regarding MnDOT's compliance with Minn. Stat. § 161.3410, *et seq.*; and (3) facts regarding appellants' injunctive and declaratory relief claims. Appellants' "separation of powers" and "justiciable" declaratory relief issues do not require separate factual recitations.

I. GENERAL FACTS

In conformance with Rule 115.03(d) of the General Rules of Practice for District Courts, Flatiron provided the district court in its memorandum supporting summary judgment a separate recital of forty-five material facts as to which there was no genuine dispute. *See* SR-338 to SR-347.

Appellants were likewise obligated to provide the district court in their opposition memorandum a separate recital of any material facts they claimed to be in dispute. No such recital was provided. *See* SR-376 to SR-396.

II. MnDOT COMPLIANCE WITH MINN. STAT. § 161.3410, *et seq.*

A. MINN. STAT. § 161.3410, *et seq.* REQUIREMENTS

In relevant part, Minn. Stat. § 161.3410, *et seq.*, under which MnDOT awarded the I35W bridge reconstruction design/build contract to Flatiron, included the following provisions/requirements:

1. Notwithstanding any law to the contrary, MnDOT could solicit and award a design/build contract on the basis of a best value selection process. *See* Minn. Stat. § 161.3412, subd. 1.
2. MnDOT had to appoint a Technical Review Committee (“TRC”) of at least five members, including an individual nominated by the Minnesota chapter of the Associated General Contractors (“Minnesota AGC”). *See* Minn. Stat. § 161.3420, subd. 2.
3. MnDOT had to issue a request for proposals (“RFP”) that included a description of the selection criteria, including the weight or relative order of each criterion. *See* Minn. Stat. § 161.3422.
4. Each proposal had to be segmented into two parts: a technical proposal and a price proposal. *Id.*
5. The TRC had to score the technical proposals using the selection criteria in the RFP and had to reject any proposal it deemed nonresponsive. *See* Minn. Stat. § 161.3426, subd. 1.
6. The price proposals could not be opened until after the TRC scored the technical proposals. *Id.*
7. An adjusted score had to be obtained for each proposal by dividing each design-builder’s time-adjusted price by the technical score given by the TRC. *Id.*
8. Unless it chose to reject all proposals, MnDOT had to award the contract to the responsive and responsible design-builder with the lowest adjusted score. *Id.*

B. MnDOT COMPLIANCE WITH THOSE REQUIREMENTS

The record before the district court contained the following undisputed material facts regarding MnDOT's compliance with its Minn. Stat. § 161.3410, *et seq.* obligations:

1. MnDOT chose to solicit and award a design/build contract for reconstruction of the I-35W bridge on the basis of a best value selection process. Appellants do not challenge this fact.
2. MnDOT appointed a six member TRC consisting of four MnDOT representatives, a City of Minneapolis representative and a Minnesota AGC representative, all of whom were highly qualified and experienced licensed professional engineers in the State of Minnesota. *See* Relevant Undisputed Fact No. 18, SR-341 to SR-342.
3. MnDOT issued an RFP that included a description of the selection criteria, including the weight or relative order of each criterion. *See Instructions to Proposers*, SR-117 to SR-118. *See also* appellants' brief, pp. 6-7 ("MnDOT disclosed its scoring criteria and the weights assigned to those criteria to the proposers in the ITP.").
4. The RFP also expressly defined and described how proposal responsiveness would be determined by the TRC. *See Instructions to Proposers*, ¶ 5.3 "Responsiveness and Pass/Fail Review," SR-123.
5. The TRC scored each of the technical proposals using the selection criteria in the RFP and determined that all proposals were responsive using the responsiveness criteria in the RFP. *See* Relevant Undisputed Fact No. 19, SR-342. *See also* appellants' brief, p. 10 ("The TRC members scored the proposals according to MnDOT's process described in the Proposal Evaluation Plan.") and p. 11 ("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 (sic).").
6. The TRC's work was overseen by the Federal Highway Administration and the State of Minnesota Department of Administration and its results withstood independent reviews by the General Accounting Office, the Federal Highway Administration

and the State of Minnesota Department of Administration. *See* Relevant Undisputed Fact Nos. 21 and 22, SR-343. There was no evidence of bias or improper action by any TRC member in the scoring of the proposals. *See* Relevant Undisputed Fact Nos. 30-32, SR-344.

7. Although the TRC members each scored the proposals privately, all of their individual scores were consistent, and they unanimously agreed that Flatiron's technical proposal was significantly better than all other technical proposals. *See* Relevant Undisputed Fact Nos. 25, 27 and 34, SR-343 to SR-345.
8. The TRC found substantial evidence that the Ames/Lunda proposal contained a design error that could require MnDOT to rebuild major portions of the new bridge, that the McCrossan proposal would require the removal of other bridges and the permanent closing of City of Minneapolis streets, that the City of Minneapolis and Hennepin County would not have accepted the Ames/Lunda or McCrossan proposals because of geometric design concerns and that the Ames/Lunda and McCrossan schedules were not realistic. *See* Relevant Undisputed Fact Nos. 37 and 38, SR-345 to SR-346.
9. MnDOT accurately inputted the TRC technical scores and the price and time proposals into the best value formula and, pursuant to that formula, Flatiron's proposal provided the best value. *See* Relevant Undisputed Fact Nos. 40 and 41, SR-346 to SR-347. *See also* appellants' brief, p. 12 ("MnDOT applied the statutory formula and declared Flatiron the apparent winner.").
10. If the scores of the MnDOT-employed TRC members were eliminated, leaving only the scores submitted by the Minnesota AGC and City of Minneapolis TRC members, the result would have been the same: Flatiron's proposal would have been found to provide the best value under the statutory formula. *See* Relevant Undisputed Fact No. 33, SR-344 to SR-345.
11. MnDOT's award of the contract to Flatiron after it was determined to be the best value proposal under the statutory formula violated no RFP provision. *See* Relevant Undisputed Fact No. 43, SR-347.

III. MATERIAL FACTS REGARDING APPELLANTS' INJUNCTIVE AND DECLARATORY RELIEF CLAIMS

Scattered throughout their brief² to this Court, appellants make numerous *assertions* regarding their injunctive and declaratory relief claims, but assertions are not facts. It is undisputed that appellants failed to provide the district court with a recital of allegedly disputed facts. Moreover, as established herein, appellants' assertions are without factual support.

A. GENERAL ASSERTIONS

Assertion No. 1: Flatiron won because its technical score was an unprecedented 25.56 points higher than McCrossan's. *See* Appellants' brief, p. 6.

Record Evidence: The difference between the Flatiron and McCrossan technical scores (91.47 to 65.91) is similar to the technical score difference on an earlier MnDOT best value project between the winning proposer and another McCrossan joint venture (89.46 to 68.18). *See* SR-208 and SR-279. Moreover, a score differential—of whatever size—is not evidence of impropriety.

Assertion No. 2: Proposers were prohibited from proposing work that required additional right of way. *See* Appellants' brief, p. 7.

Record Evidence: The RFP did not prohibit proposers from including additional right of way. The proposal form included a specific line item for acquiring additional right of way, and every proposer included a dollar figure for that purpose. *See* SR-283 and SR-307.

² Thereby contravening Minn. R. Civ. App. P. 128.02, subd. 1(c).

Assertion No. 3: The RFP provided that: “A minimum of 3 webs are required for concrete box designs.” *See* appellants’ brief, p. 7.

Record Evidence: Undisputed, and it is also undisputed that Flatiron’s concrete box design included eight webs, four in each direction. *See* SR-285.

Assertion No. 4: By lowering 2nd Street, Flatiron gained an advantage not available to the other proposers. *See* appellants’ brief, pp. 7-9, 27.

Record Evidence: The RFP did not prohibit the lowering of 2nd Street, and three of the four proposers (Flatiron, McCrossan and Walsh) lowered 2nd Street in their proposals. *See* SR-284.

Assertion No. 5: Flatiron was able to lower 2nd Street because it went outside the existing right of way. *See* appellants’ brief, p. 27.

Record Evidence: Flatiron’s lowering of 2nd Street took place entirely within the existing right of way. *See* SR-284. McCrossan’s proposal, on the other hand, included work beyond the 4th Street bridge to the north despite a clear RFP prohibition that: “[a]ny work that is proposed to be constructed on the I-35W with this project shall not extend beyond the 4th Street Bridge to the north . . .” *See* SR-162 and SR-284.

Assertion No. 6: MnDOT’s scoring process did not adhere to the RFP and ITP. *See* appellants’ brief, p. 9.

Record Evidence: No supporting evidence is cited, and the undisputed facts confirmed that the scoring process adhered to the RFP and ITP. *See* Relevant Undisputed Fact No. 19, SR-342. *See also* appellants’ brief, p. 10 (“The

TRC members scored the proposals according to MnDOT's process described in the Proposal Evaluation Plan.") and p. 11 ("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 (sic).").

B. INJUNCTIVE RELIEF ASSERTIONS

Assertion No. 7: Appellants' motion for a temporary injunction was timely under the district court's scheduling order. *See* appellants' brief, p. 37.

Record Evidence: The motion was not rejected because it violated the scheduling order, but the district court did consider the following undisputed facts:

1. After filing suit, appellants waited ten months before asking the district court to issue a temporary injunction against work under the contract. *See* Relevant Undisputed Fact No. 12, SR-340.
2. During those ten months, appellants knew Flatiron was working around the clock to complete the contract, which progressed from 3.74% complete with no contract payments to 92.6% complete with approximately \$210,000,000 in contract payments. The bridge was expected to be substantially complete and open to public traffic one month after the hearing date chosen by appellants. *See* Relevant Undisputed Fact Nos. 1, 10 and 11, SR-338 and SR-340.
3. Appellants took only ten depositions during those ten months. *See* appellants' brief, p. 39.
4. Appellants submitted no evidence contesting respondents' evidence that the cost consequences of issuing a temporary injunction in August 2008 would have exceeded \$40 million. *See* A-102 at n. 26.
5. Appellant Phillippi, through one of his companies, personally benefited financially from the same contract he claimed was irreparably harming him, and he was told by appellant Sayer that Mr. Sayer also had a company that might be doing business on the project. *See* Relevant Undisputed Fact No. 13, SR-340 to SR-341.

6. McCrossan, not the appellants, initiated the lawsuit; McCrossan and Ames/Lunda offered to financially support the lawsuit, and McCrossan audited the bills of appellants' attorneys, none of which had been paid more than five months after the lawsuit was filed. *See* Relevant Undisputed Fact Nos. 15 and 16, SR-341.
7. Despite claiming to be taxpayer representatives, appellants did not seek recovery of the \$1 million in public funds paid to McCrossan and Ames/Lunda even though appellants' assertions in the lawsuit—if true—would compel the conclusion that McCrossan and Ames/Lunda were not entitled to those funds. *See* A-106 at n. 27.

C. DECLARATORY RELIEF ASSERTIONS

Assertion No. 8: The TRC scoring process allowed the opportunity for fraud, favoritism and collusion. *See* appellants' brief, p. 43.

Record Evidence: There is no supporting evidence. The undisputed evidence established that the TRC scoring process complied with Minn. Stat. § 161.3410, *et seq.*;³ all TRC scoring was individual and private, *see* Relevant Undisputed Fact No. 25, SR-343; no TRC member knew—or could know—whether or to what extent his or her individual technical scoring decisions would affect the best value determination, *see* Relevant Undisputed Fact No. 26, SR-343; and all TRC scoring and evaluation work was overseen by an independent process oversight committee. *See* Relevant Undisputed Fact No. 21, SR-343. There was no opportunity for fraud, favoritism or collusion.

³ *See, e.g.*, appellants' brief, pp. 6-7 (“MnDOT disclosed its scoring criteria and the weights assigned to those criteria to the proposers in the ITP.”), p. 10 (“The TRC members scored the proposals according to MnDOT’s process described in the Proposal Evaluation Plan.”) and p. 11 (“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(sic).”).

Assertion No. 9: TRC members did not completely read the RFP. *See* appellants' brief, p. 43.

Record Evidence: Nothing in the RFP or Minnesota law required that each TRC member read every page of the multi-volume RFP. *See* A-141.

Assertion No.10: The TRC's scoring was so inconsistent as to be arbitrary and capricious. *See* appellants' brief, p. 43.

Record Evidence: The TRC scoring was very consistent, *see* Relevant Undisputed Fact Nos. 27 and 33, SR-344 to SR-345. A summary of the individual TRC member scores, their scoring sheets and notes, and their complete deposition transcripts were provided to the district court. *See* Relevant Undisputed Fact Nos. 35 and 36, SR-345, and the affidavit of Thomas J. Vollbrecht in Support of Motion for Summary Judgment at ¶¶ 4-9, SR-358 to SR-359.

Assertion No. 11: The TRC did not validly determine the responsiveness of each proposal. *See* appellants' brief, p. 44.

Record Evidence: There is no supporting evidence, and the evidence before the district court was entirely to the contrary. *See, e.g.,* Instructions to Proposers, ¶ 5.3 "Responsiveness and Pass/Fail Review," SR-123, Relevant Undisputed Fact No. 19, SR-342, and appellants' brief, p. 10 ("The TRC members scored the proposals according to MnDOT's process described in the Proposal Evaluation Plan."). No TRC member scored any aspect of Flatiron's proposal as non-responsive under the responsiveness definition expressly set forth in the RFP. *See* A-140, n. 22.

Assertion No. 12: The district court incorrectly found that “there is no evidence that payments made to Flatiron are for anything other than the fair value of Flatiron’s work.” *See* appellants’ brief, p. 48.

Record Evidence: Appellants cite no supporting evidence. Their Complaint and conclusory affidavit are not evidence. *See* appellants’ brief, p. 48, n. 190.⁴ Moreover, the *potential* credibility of their conclusory assertion that the market cost for Flatiron’s bridge was approximately \$200,000,000⁵ was destroyed by their further assertion—two paragraphs later—that Flatiron could not complete the bridge “using normal construction means and methods by Christmas of 2008.”⁶ Given that the bridge was placed in service more than three months earlier, Flatiron must have used unusual construction means and methods unknown to appellants. Appellants provided the district court with no evidence of the reasonable cost or value of the construction means and methods actually used.

Assertion No. 13: Appellants’ statutory claims are capable of repetition but evading review. *See* appellants’ brief, p. 49.

Record Evidence: There is no evidence that the dismissal of a factually unsupported claim that was not brought before the district court for consideration of a temporary injunction until ten months after contract performance began and one month before the bridge was to be placed back into full public service will

⁴ *See also Conlin v. City of Saint Paul*, 605 N.W.2d 396, 402-403 (Minn. 2000) (conclusory affidavits do not satisfy the burden of proof).

⁵ Complaint, ¶ 49, A-17 to A-18, as opposed to the \$234,000,000 contract price.

⁶ Complaint, ¶ 51, A-18 (emphasis added).

have any adverse impact on the ability of future plaintiffs to bring meritorious and timely claims.⁷

Assertion No. 14: Appellants' claims must be decided immediately. *See* appellants' brief, p. 50.

Record Evidence: Appellants' documented lack of urgency before the district court belies their claim to this Court that immediate action is now required, months after the bridge was placed back into public service.

ARGUMENT

I. SUMMARY OF ARGUMENT

Based upon the undisputed facts presented to it, the district court correctly held that MnDOT fully complied with Minn. Stat. § 161.3410, *et seq.* Appellants' attempts to cloud the record through breathless recitations of hypothetical actions that never occurred should be rejected for what they are: unsupported attempts to raise metaphysical doubts that are wholly insufficient to avoid summary judgment. *See DHL, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997).

⁷ *See* October 23, 2008 Amended Order, A-123 to A-124 (“the Court also found that the Plaintiffs failed to show ‘the likelihood of success on the merits’ . . . Other taxpayers challenging other public bidding contracts and armed with more persuasive evidence than these Plaintiffs produced may well succeed in obtaining injunctive relief. Second, these Plaintiffs waited over nine and a half months after the Court’s denial of their request for injunctive relief before renewing their motion. Indeed, Plaintiffs’ motion was only scheduled after the Defendants had scheduled a motion for summary judgment. If the Plaintiff had uncovered evidence during those months that made the issuance of injunctive relief more likely, they could have brought a motion before this Court before substantial completion of the bridge . . . Other taxpayers challenging public bidding contracts may well produce such evidence in support of their challenge, either at the initial stage of the litigation or soon thereafter.”).

The district court also properly rejected appellants' plea that the *Dahlberg* factors be ignored. Since their injunctive relief claim satisfied none of those factors, it is understandable why appellants preferred to ignore them. But long-standing, controlling law precluded the district court—as it does this Court—from also ignoring them when considering appellants' motion for a temporary injunction and Flatiron's motion for summary judgment.

Finally, the district court's denial of appellants' motion for a temporary injunction and its granting of Flatiron's motion to dismiss appellants' injunctive and declaratory relief claims were also correct as matters of law. Appellants failed to demonstrate any ability to satisfy the factual or legal requirements for temporary or permanent injunctive relief or declaratory relief; moreover, the redress sought by appellants was flatly contrary to controlling Minnesota law.

II. STANDARD OF REVIEW

The standards governing this Court's review of the district court's denial of a temporary injunction and dismissal of appellants' injunctive and declaratory relief claims are as follows:

A. DENIAL OF TEMPORARY INJUNCTION

The district court's denial of appellants' motion for a temporary injunction must be affirmed absent a clear abuse of discretion. *See Carl Bolander & Sons Co. v. City of Minneapolis*, 502 N.W. 203, 209 (Minn. 1993) (“A decision on whether to grant a temporary injunction is left to the discretion of the trial court and will not be overturned on review absent a clear abuse of that discretion.”).

Injunctive relief is an extraordinary equitable remedy that should be awarded only in clear cases, reasonably free from doubt when necessary to prevent great and irreparable injury. *AMF Pinspotter, Inc. v. Harkins Bowling, Inc.*, 110 N.W.2d 348, 351 (Minn. 1961). Judicial restraint is especially appropriate here, as this case directly involves the expertise, technical training, education and experience of the TRC, MnDOT and the Federal Highway Administration⁸ in the public procurement of a heavily used, urban interstate highway bridge over a major navigable river:

When reviewing agency decisions we adhere to the fundamental concept that decisions of administrative agencies enjoy a presumption of correctness, and deference should be shown to the agencies' expertise and their special knowledge in the field of their technical training, education and experience.

In the Matter of Excess Surplus Status of Blue Cross and Blue Shield of Minnesota, 624 N.W.2d 264, 278 (Minn. 2001); *see also Onan Corp. v. United States*, 476 F.Supp. 428, 433 (D. Minn. 1979):

Cases involving disputes over government procurement contracts almost invariably emphasize that the courts should be extremely reticent to interfere with government procurement policies, given the complexity of procurement decisions, the lack of expertise possessed by the courts, the discretion invested in the procurement officer, and the potential confusion, inefficiency, delay, and increased expense that can result.

⁸ It is undisputed that the Federal Highway Administration reviewed and supported award of the contract to Flatiron and that the contract is funded by federal, not State of Minnesota, tax dollars.

B. GRANT OF SUMMARY JUDGMENT

Minn. R. Civ. P. 56 is designed to secure the just, speedy and inexpensive determination of an action by allowing the district court to dismiss it on the merits if there is no genuine dispute regarding the material facts and a party is entitled to judgment under the law applicable to those facts. *DHL, Inc. v. Russ*, 566 N.W.2d at 69.

The district court's entry of summary judgment dismissing appellants' injunctive and declaratory relief claims is reviewed *de novo* by this Court to determine whether there were any genuine issues of material fact and whether the district court erred in its application of the law. *Stringer v. Minnesota Vikings Football Club*, 705 N.W.2d 746, 754 (Minn. 2005).

The facts must be viewed in the light most favorable to appellants, but they must have done more than rest on averments or denials in their pleadings. *Id.* and Minn. R. Civ. P. 56.05. To avoid summary judgment, appellants must have presented the district court with specific facts giving rise to a genuine issue of material fact. *W.J.L. v. Bugge*, 573 N.W.2d 677, 680 (Minn. 1998); *DHL, Inc. v. Russ*, 566 N.W.2d at 71:

[W]e hold that there is no genuine issue of material fact for trial when the nonmoving party presents evidence which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of the nonmoving party's case to permit reasonable persons to draw different conclusions.

See also Rule 115.03(d) of the General Rules of Practice for District Courts:

(d) Additional Requirements for Summary Judgment Motions. For summary judgment motions, the memorandum of law shall include:

* * * *

(3) A recital by the moving party of the material facts as to which there is no genuine dispute, with a specific citation to that part of the record supporting each fact . . . A party opposing the motion shall, in like manner, make a recital of any material facts claimed to be in dispute;

(emphasis added). Flatiron provided and supported a recital of forty-five undisputed material facts, while appellants provided and supported no recital of any disputed material facts. *See* Minn. R. Civ. P. 56.05 (“If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.”).

III. ARGUMENTS

A. THE DISTRICT COURT CORRECTLY RULED THAT MnDOT COMPLIED WITH MINN. STAT. § 161.3410, *et seq.*

All evidence presented to the district court confirmed that MnDOT fully complied with the requirements of Minn. Stat. § 161.3410, *et seq.*, even if one accepts appellants’ description of that statutory scheme:

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.

^{*}
See appellants’ brief, p. 15.

MnDOT issued an RFP that stated the selection criteria and the weight of each criterion. That RFP also provided a definition and methodology for

determining responsiveness. In compliance with the statute, each proposal was segmented into technical and price/time proposals, and the price/time proposals were not opened until after the TRC scored the technical proposals.

MnDOT appointed the statutorily-mandated TRC, including a member nominated by the Minnesota AGC. The TRC scored the technical proposals in accordance with selection criteria and responsiveness definition. The TRC's work was contemporaneously supervised by an independent process oversight committee and underwent three independent reviews. There was no bias or improper action.

All six members of the TRC independently and unanimously determined that Flatiron's technical proposal was responsive and significantly superior to the other technical proposals.

MnDOT accurately inputted the technical scores and price/time proposals into the statutory best value formula and, pursuant to that formula, Flatiron's proposal provided the best value. MnDOT then exercised its statutory right to award the contract to Flatiron, rather than rejecting all proposals and starting over.

These facts are undisputed. It is therefore clear as a matter of law that the district court correctly held that MnDOT complied with Minn. Stat. § 161.3410.

Appellants' contrary assertions to this Court are wholly reliant upon hypothetical, metaphysical arguments that, as a matter of law, are insufficient to defeat summary judgment. *See DHL, Inc. v. Russ*, 566 N.W.2d at 71. *See also*

Minn. R. Civ. P. 56.05 (“an adverse party . . . must present specific facts showing there is a genuine issue for trial.”).

As an initial matter, appellants’ reliance on Minn. Stat. § 645.17, appellants’ brief, pp. 16-17, is misplaced because the Legislature explicitly stated its intent that prior competitive bidding law not be applicable. *See* Minn. Stat. § 161.3412 (“Notwithstanding sections 16C.25, 161.32 and 161.321, or 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 selection process.”).

In this case, that best value selection process specifically provided an objective methodology for determining responsiveness. It is undisputed that the TRC and MnDOT complied with that methodology in the scoring and evaluation of all proposals and in the awarding of the contract to Flatiron. Consequently, even if appellants were correct that prior cases by courts of last resort construing other competitive bidding statutes, such as *Coller v. City of St. Paul*, 223 Minn. 376, 26 N.W.2d 835 (1947), *Griswold v. Ramsey County*, 242 Minn. 529, 65 N.W.2d 529 (1954) and *Carl Bolander & Sons v. City of Minneapolis*, 451 N.W.2d 204 (Minn. 1990), prescribed contrary methodologies, the legislature has expressly proclaimed that those cases do not apply here. And, as is stridently argued elsewhere by appellants, *see* appellants’ brief, pp. 28-29, this Court must not usurp the Legislature’s authority in the drafting of statutes.

Moreover, the policy of limiting the discretion of public officials in the letting of public contracts⁹ was fully realized in this procurement. As noted by the district court (quoted at length by appellants¹⁰), the RFP mandated that any proposal receiving a technical score of 0-49 was non-responsive. MnDOT had no discretion in that determination. It did not and could not change the criteria or responsiveness definition after-the-fact. It did not and could not control the scoring. It did not and could not know the scores until they were publicly announced.¹¹ Frankly, it is difficult to conceive of a process that could have done more to take discretion out of the hands of MnDOT, which highlights the false and hysterical nature of appellants' assertions that:

1. "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." Appellants' brief, p. 20.
2. MnDOT retained "discretion" to determine responsiveness after-the-fact by re-stating criteria after seeing competing proposals. *Id.*
3. "MnDOT can, according to the trial court, simply redefine the proposal as "responsive" and give the proposal a very high score!" *Id.* at 20-21.

These assertions are meritless as matters of fact and law.

The same is true of appellants' final two assertions. First, appellants' assertion that MnDOT was obliged to conduct a responsiveness evaluation separate and independent of that undertaken by the TRC has no support in the

⁹ See appellants' brief, p. 18.

¹⁰ See appellants' brief, p. 20.

¹¹ The same was true of the individual TRC members who knew only one sixth of each technical score, that being their own individual scoring of the proposals.

statute. It is also contrary to appellants' much repeated assertion that MnDOT cannot be allowed after-the-fact discretion to alter the RFP's stated and weighted criteria.

Minn. Stat. § 161.3426 "Design-Build Award" makes clear that the scoring of technical proposals and determination of responsiveness was the TRC's responsibility:

The Technical Review Committee shall score the technical proposals using the selection criteria in the request for proposals (RFP). The Technical Review Committee shall then submit a technical proposal score for each design-builder to the commissioner. The Technical Review Committee shall reject any proposal it deems nonresponsive.

No other person or entity is expressly granted scoring rights or responsibilities or nonresponsiveness determination rights or responsibilities under the statute.

The Legislature included checks and balances on the TRC during that process. It mandated that the price/time proposals not be opened until after the TRC completed its scoring of the technical proposals so that the TRC could not know to what extent its scoring decisions would impact the best value determination. The Legislature also mandated the inclusion of at least one non-MnDOT representative on the TRC, selected by the Minnesota AGC. If the technical scoring of that 'independent' TRC member diverged significantly from the scoring of the arguably 'dependent' members, that divergence could provide grounds for further inquiry by MnDOT or a reviewing agency or court. In this case, of course, there was no such divergence. The 'independent' TRC members

concluded that Flatiron submitted the responsive proposal that provided the best value.

The statute does confirm and reaffirm MnDOT's obligation (through its commissioner) to award only to a responsive proposer, and MnDOT complied with that obligation by awarding the contract to Flatiron. But the statute provided MnDOT and the commissioner with no right or duty to ignore or overturn the TRC's independent scoring and responsiveness determinations through a subsequent, independent evaluation and/or scoring of the technical proposals.

The absence of any such statutory right or duty conforms perfectly with appellants' statement to this Court that: "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." Appellants' brief, p. 24. Exactly right. Once the TRC scored the technical proposals and determined whether they were responsive in conformance with the RFP's stated and weighted criteria, MnDOT had no right to interfere with or overturn those statutorily-required determinations. Instead, MnDOT's discretion was limited to two options: (1) it could reject all proposals and start the whole process over¹²; or (2) it could award to the responsive proposer as determined by the TRC who provided the best value under the statutory formula. MnDOT chose the second option which, as correctly ruled by the district court, fully conformed with the requirements of Minn. Stat. § 161.3410, *et seq.*

¹²In this case, starting over would have resulted in significant delay.

Finally, there is no merit to appellants' assertion that the TRC (and, by extension, MnDOT and the district court) was statutorily obligated to reject Flatiron's proposal because it: (1) lowered 2nd Street and allegedly went outside of the published right of way; and (2) used four two-web box girders—for a total of eight webs—in its concrete box design in response to the RFP requirement that "A minimum of 3 webs are required for concrete box designs." Nothing in the statute or the RFP declared that proposals would be nonresponsive if they lowered 2nd Street, contemplated acquisition of additional right-of-way or provided eight webs through the use of four girders.¹³

Nor, in any event, is there evidence that such submittals violated the RFP or provided any improper competitive advantage. Every proposer included the acquisition of additional right-of-way in its proposal. Three of four proposers included the lowering of 2nd Street. And Flatiron—the only proposer who provided a concrete box design (all others proposed steel designs)—gained no unfair competitive advantage by proposing a concrete box design containing eight webs in response to the RFP requirement of a minimum of three webs.

In sum, the undisputed material facts, the plain language of the statute and other controlling law conclusively establishes that the district court correctly held that MnDOT complied with all requirements of Minn. Stat. § 161.3410, *et seq.*

¹³ Compare and contrast to cases such as *Carl Bolander & Sons Co. v. City of Minneapolis*, 451 N.W.2d at 205, in which the bid documents expressly stated that the failure submit certain information would render the bid nonresponsive.

B. APPELLANTS' INJUNCTIVE RELIEF CLAIM WAS NOT EXEMPT FROM THE DAHLBERG FACTORS.

Appellants' argument that application of the *Dahlberg Bros., Inc. v. Ford Motor Co.*, 137 N.W.2d 314 (Minn. 1965) factors to its injunctive relief claim is a violation of the Minnesota Constitution, see appellants' brief, pp. 28-32, is specious. There is simply no support anywhere in Minnesota law for appellants' contention that Minnesota courts cannot "balance the harms" when evaluating a request for injunctive relief based upon an alleged statutory violation.

Indeed, that precise circumstance underlies all reported Minnesota competitive bidding cases, and in none of those decisions did this Court or the Minnesota Supreme Court hold—or even suggest—that "balancing of harms" or any of the other *Dahlberg* factors were inapplicable. See, e.g., *Griswold v. Ramsey County*, 65 N.W.2d at 653 (it is no longer practicable to seek injunctive relief "after . . . construction work has been partially completed."); *Telephone Associates, Inc. v. St. Louis County Board*, 364 N.W.2d 378, 382 (Minn. 1985) ("The phone system is installed and operating. To order its removal now would not be in the public interest."); *Byrd v. Indep. Sch. Dist. No. 194*, 495 N.W.2d 226, 234 (Minn. Ct. App. 1993) ("We recognize that construction on the Lakeville project has been underway . . . Therefore, vacation of the contract may no longer be practical or desirable.").

In the face of this controlling law, appellants are reduced to citing law review article that have no precedential authority. See appellants' brief, p. 28 at n.

113. And they fail to cite the one law review article directly on point, authored by their counsel of record, in which he admitted: “injunctive relief ceases to be an effective enforcement mechanism once construction begins.” Dean B. Thomson, *et al.*, A Critique of Best Value Contracting in Minnesota, 34 Wm. Mitchell L. Rev. 25, 32 (2007).

Appellants’ citation to federal decisions such as *TVA v. Hill*, 437 U.S. 153 (1978) is equally inapt and unpersuasive. In *TVA v. Hill*, the Supreme Court faced an admitted “blatant statutory violation” that all parties agreed would result in a flatly prohibited act, *i.e.*, the complete destruction of an entire endangered species. That situation was brought before the courts for resolution as soon as it was discovered and, in that unique circumstance, the United States Supreme Court held that it could not balance the deliberate, prohibited destruction of an entire endangered species against the value of a public project.

Here, on the other hand, there is no blatant or admitted statutory violation; indeed, the district court twice ruled that appellants established no likelihood of prevailing on the merits of their statutory violation claim. Moreover, appellants waited ten months to move for a temporary injunction after discovering the alleged statutory violation. Finally, the statute at issue here, Minn. Stat. § 161.3410, *et seq.*—unlike the federal Endangered Species Act at issue there—does not mandate injunctive relief to avoid or remedy statutory violations.

The Legislature’s decision not to include a provision mandating injunctive relief for violations of Minn. Stat. § 161.3410, *et seq.*, places this issue squarely

within the purview of Minn. Stat. § 645.17. Prior to enactment of Minn. Stat. § 161.3410, *et seq.*, courts of last resort ruled that requests for injunctive relief for alleged violations of public procurement statutes were subject to the *Dahlberg* factors, including a balancing of harms. The Legislature's decision not to include contrary language in Minn. Stat. § 161.3410, *et seq.*, compels this Court to conclude that the *Dahlberg* factors are equally applicable to this public procurement statute.

Flatiron does, however, agree that the provision of Minn. Const. Art. III, § 1 that: "No person or persons belonging to or constituting one of these departments shall exercise any of the powers properly belonging to the others" is applicable to this case, although not in the manner advocated by appellants. Instead, that provision confirms the inappropriateness of appellants' demand that this Court substitute its judgment for that of the TRC and MnDOT in the evaluation, scoring and award of public contracts. *See also In the Matter of Excess Surplus Status of Blue Cross and Blue Shield of Minnesota*, 624 N.W.2d at 278; *Onan Corp.v. United States*, 476 F. Supp. at 433.

In sum, appellants' demand that the *Dahlberg* factors be ignored and that the district court exercise powers properly belonging to the executive branch was properly rejected by the district court.

C. THERE WERE NO GENUINE ISSUES OF MATERIAL FACT PRECLUDING DISMISSAL OF APPELLANTS' CLAIMS.

Appellants' desire to avoid application of the *Dahlberg* factors to their injunctive relief claim is understandable, as they failed to satisfy any of those factors, thereby confirming that the district court did not abuse its discretion in denying appellants' motion for a temporary injunction, *see Carl Bolander & Sons Co. v. City of Minneapolis*, 502 N.W.2d at 209, and correctly entered summary judgment dismissing their claim for injunctive relief.

For all of the reasons discussed at length earlier in this brief, appellants did not establish any likelihood of success on the merits of their statutory violation claim. Instead, the undisputed material facts conclusively established that the TRC and MnDOT fully complied with the requirements of Minn. Stat. § 161.3410, *et seq.* in the evaluation and scoring of the proposals and in the awarding of the contract to Flatiron as the responsive and responsible design-builder with the lowest adjusted score. *See* Minn. Stat. § 161.3426, Subd. 1. Appellants' inability to present any evidence of a statutory violation dooms its injunctive and declaratory relief claims.

Lacking evidence, appellants are reduced to facially nonsensical arguments that: (1) Flatiron's proposal of eight webs violated the three web minimum requirement; (2) Flatiron gained an illegal advantage over McCrossan and Walsh by proposing to lower 2nd Street even though they also proposed lowering 2nd

Street; and (3) Flatiron's potential request to acquire additional right-of-way¹⁴ gave it an illegal advantage even though every other proposer included the acquisition of additional right-of-way in their proposals. Those arguments were insufficient as a matter of law to avoid summary judgment. *See DHL, Inc. v. Russ*, 566 N.W.2d at 71; *W.J.L. v. Bugge*, 573 N.W.2d at 680; Minn. R. Civ. P. 56.05; Rule 115.03(d) of the General Rules of Practice for District Courts.¹⁵

Nor did appellants provide the district court with any specific facts demonstrating a genuine issue of material fact regarding the other four *Dahlberg* factors: (1) appellants did not dispute that the “balancing of harms” supported denial of injunctive relief—which explains why they argued so vociferously that “balancing of harms” should not be utilized; (2) appellants submitted no evidence to counter the substantial evidence provided by Flatiron and MnDOT documenting the severe damage that would be caused by issuance of an injunction; (3) appellants submitted no evidence to counter the evidence provided by Flatiron that issuance of an injunction would have placed a significant administrative burden on the district court; and (4) public policy, as unambiguously expressed in Minn. Stat. § 161.3410, *et seq.*, clearly dictates that selection of the best value proposal for this substantial public contract was to be made by the TRC and MnDOT—not the

¹⁴ In actuality, no such right-of-way was requested or acquired.

¹⁵ Contrary to appellants' assertion that “there were multiple issues of material fact, preserved for trial,” appellants' brief, p. 36, no required recital of disputed facts was ever provided to the district court.

judiciary; moreover, the public interest would not be served by enjoining completion of the bridge just prior to its reopening.

Nothing additional is required to affirm the district court's denial of a temporary injunction and dismissal of the injunctive relief claim. Yet, three further factors do support and amplify the unavoidable conclusion that appellants had no ability to prevail on a claim for injunctive relief, whether temporary or permanent.

First, that claim was brought to the district court for decision far too late in the process. As far back as the seminal public procurement case of *Griswold v. Ramsey County*, 65 N.W.2d at 653, the Minnesota Supreme Court held that it is not practical to seek injunctive relief after construction work has been partially completed. Yet, appellants still chose to wait ten months after filing their complaint to bring on for hearing a motion for a temporary injunction. During those ten months, the contract progressed from 3.74% complete to 92.6% complete and approximately \$210 million in contract payments were disbursed. No Minnesota case has ever held that injunctive relief can be granted in this circumstance.

Second, the equitable doctrine of laches supported the district court's rejection of injunctive relief. The term "laches" is employed to denote an unreasonable delay in seeking equitable relief. See *Klapmeier v. Town of Center*, 346 N.W.2d 113, 137 (Minn. 1984). It exists to prevent parties who have not been diligent in asserting a known right from recovering from parties who have been

prejudiced by the delay. *Id.* The application of laches rests largely in the discretion of the district court. *Corah v. Corah*, 75 N.W.2d 465 (Minn. 1956).

Appellants' lack of diligence is obvious. They waited more than nine months after their motion for a temporary restraining order was denied before returning to the district court to seek a temporary injunction. In the interim, the contract was almost completely performed and paid for, and the public was informed that it could expect to be able to use the bridge in the Fall of 2008—an expectation that would have been shattered if the district court granted appellants' August 13, 2008 motion for a temporary injunction. The potential prejudice to Flatiron was also patently clear: it had worked seven days a week, twenty-four hours a day for over nine months to get the contract completed in September and thereby secure a significant early completion bonus. Granting an injunction (whether temporary or permanent) on or after August 13, 2008 would have denied Flatiron any recompense for that extraordinary effort.

Appellants' citation to *Byrd v. Indep. Sch. Dist. No. 194*, 495 N.W.2d 226, 234 (Minn. Ct. App. 1993) in an attempt to excuse their lack of diligence is unavailing. That case stands only for the proposition that waiting three weeks to file suit does not, by itself, establish laches. It does nothing to excuse appellants' decision to wait an additional ten months to move for a temporary injunction.

Equally inapt are appellants' citations to *Hunt v. O'Leary*, 84 Minn. 200, 203-204, 87 N.W. 611 (1901) for the proposition that Flatiron cannot raise laches after voluntarily intervening, and *Fetsch v. Holm*, 236 Minn. 158, 52 N.W.2d 113,

115 (1952) for the proposition that laches cannot be asserted in a summary judgment motion.

The *Hunt* court ruled only that a party who previously refused to join in an action and who was wholly independent of and indifferent to the result of that action cannot suddenly reverse course and intervene solely to raise an oral laches defense lacking any specifications. In this case, Flatiron intervened immediately; its position has never been independent of or indifferent to the result, since appellants have always sought to enjoin it from contract performance; and it presented its laches defense in writing and in detail.

Fetsch v. Holm also provides no cover for the appellants. That case did not hold that laches cannot be asserted in a summary judgment motion, but instead held:

In considering laches, we have held that the practical question in each case 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.

Fetsch v. Holm, 52 N.W.2d at 115. Here, the district court properly exercised its discretion by holding that the equitable doctrine of laches supported (although it was not necessary to) the decision to deny appellants' temporary and permanent injunctive relief claims.

Finally, the denial of injunctive relief was supported by appellants' unclean hands. Before the district court, appellants did not contest that they voluntarily participated in—and monetarily profited from—the very contract and conduct that

they, at the same time, claimed was irreparably harming them. They did not deny the intimate (although not voluntarily disclosed) involvement of disappointed proposers in their “taxpayer” protest; and they had no explanation for their failure as “taxpayer representatives” to demand that those same disappointed bidders return \$1 million in taxpayer dollars that—according to appellants’ assertions against Flatiron and MnDOT—had been illegally paid to them.

“He who seeks equity, must do equity, and he who comes into equity, must come with clean hands.” *Peterson v. Holiday Recreational Indus., Inc.*, 726 N.W.2d 499, 505 (Minn. Ct. App. 2007). *See also Heidbreder v. Carton*, 645 N.W.2d 355, 371 (Minn. 2002) (“The doctrine of ‘unclean hands’ bars a party who acted inequitably from obtaining equitable relief.”). The undisputed facts clearly demonstrated that the appellants did not come with clean hands, which provided additional substantive support for the district court’s denial of injunctive relief.

In the end, based upon the undisputed material facts and the controlling law, the district court was left with no rational basis that would have permitted it to conclude that appellants could prevail on the substance of their injunctive or declaratory relief claims. The undisputed facts conclusively established that there was no violation of Minn. Stat. § 161.3410, *et seq.*, and without evidence of such a violation, those claims could not survive summary judgment. *See Minn. R. Civ. P.* 56.05 (“If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.”). As such, the district

court's orders denying a temporary injunction and granting summary judgment should be affirmed in all respects.

D. APPELLANTS' DECLARATORY RELIEF CLAIM WAS PROPERLY DISMISSED.

In light of appellants' failure to satisfy their Minn. R. Civ. P. 56.05 burden of presenting specific facts demonstrating statutory violations (and their failure to present a recital of disputed material facts in compliance with Rule 115.03(d) of the General Rules of Practice for District Courts), their final argument that the declaratory relief claim was "justiciable" is moot. Whether "justiciable" or not, that claim was properly dismissed for failure to provide supporting evidence in response to Flatiron's motion for summary judgment.

Moreover, as of the summary judgment hearing date of August 13, 2008, there was no longer a controversy that allowed for the specific relief that appellants claimed to be seeking. *See Holiday Acres No. 3 v. Midwest Fed. Sv. & Loan Ass'n of Minneapolis*, 271 N.W.2d 445, 447 (Minn. 1978). When a lawsuit presents no injury that a court can redress, the court must dismiss for lack of justiciability. *State ex. rel. Sviggum v. Hanson*, 732 N.W.2d 312, 320 (Minn. Ct. App. 2007).

By the Fall of 2008, there was no injury that the court could redress even if appellants had been able to present evidence of an unlawful contract. Controlling law precluded enjoining a contract that was already 92.6% complete. Moreover, appellants' claim to the district court that they might be entitled to disgorgement

of dollars paid to Flatiron for its performance of that contract was without factual support as appellants provided no evidence that payments to Flatiron were for anything other than the reasonable value of its work.

That claim was also without legal support. The two cases cited by appellants to the district court in supposed support of their disgorgement theory, *Village of Pillager v. Hewitt*, 98 Minn. 265, 107 N.W. 815 (1906) and *Kotschevar v. North Fork TP, Stearns County*, 229 Minn. 234, 39 N.W.2d 107 (1949), actually support the opposite conclusion. *Kotschevar* contains no language supportive of disgorgement. Instead, it quotes approvingly from *Village of Pillager* for the proposition that disgorgement is improper and unavailing:

The defendant in good faith received the money and bonds in payment of the bridge which he had built for the plaintiff. The consideration for such payment was full and fair, and, in equity and good conscience, it ought to have been made by the plaintiff. Such being the case, it would be most inequitable and unconscionable to compel the defendant to return the money and bonds paid to him under the circumstances found by the trial court, and we hold that the plaintiff cannot maintain this action to recover them.

Kotschevar, 229 Minn. at 240, 39 N.W.2d at 111 (quoting *Village of Pillager*, 98 Minn. at 266, 107 N.W. at 816).

Kotschevar stands for—and confirms—the following Minnesota rule:

. . . where a municipal corporation receives money or property of another under and pursuant to a contract upon a subject within its corporate powers, and the contract was made and carried out in good faith and without purpose or intent to violate or evade the law, but is invalid because not entered into or ratified by the officers of the corporation having power to contract, or for some other failure to comply with the statutory requirements, and money or property so received is retained by the corporation and devoted to a legitimate

corporate purpose, resulting in benefits to the corporation, the one so furnishing the money or property may recover in quasi contract to the extent of the benefits received by the corporation.

Kotschevar, 229 Minn. at 238, 39 N.W.2d at 110. *Kotschevar* also held that all dollars that were legally available for payments under a valid contract remained available for payment to the contractor in quasi contract:

3. Court did not err in instructing jury that cash on hand in road and bridge fund at time contract to construct the road in question was entered into was available for application on the contract.

Kotschevar, 229 Minn. at 234, 39 N.W.2d at 108.

In this case, there was no evidence that the Project contract was entered into in anything other than good faith and without intent to violate or evade the law. The fact that MnDOT waited to award the contract until both the federal government and the Minnesota Department of Administration independently confirmed the appropriateness of award to Flatiron confirmed that finding, and there was no contrary evidence. It is undisputed that reconstruction of the I-35W bridge was legitimately within MnDOT's authority and that MnDOT and the general public will retain the benefits of Flatiron's work. It was also undisputed that MnDOT had dollars legally available to cover full payment to Flatiron for the work it performed. Moreover, there was no evidence in the record at all—whether factual or expert—that the fair value of Flatiron's work was anything other than what was set forth in the contract. Applying these facts to *Kotschevar* (and *Village of Pillager*), appellants were clearly barred from seeking disgorgement.

Nor are appellants' final two arguments meritorious. There is no evidence supporting their assertion that this case is capable of repetition but evading review. As noted by the district court, dismissal of this action will have no effect on the ability of other parties to bring prompt, meritorious claims in the future.

Finally, a stale, factually and legally unsupported request for injunctive and/or declaratory relief on an already substantially completed contract presents no "functionally justiciable" claim of statewide significance.

As such, the district court correctly held that, as of August 2008, appellants no longer had a justiciable declaratory relief claim.

CONCLUSION

For the above-stated reasons, respondent Flatiron-Manson, a Joint Venture, respectfully requests that this Court affirm in all respects the district court's dismissal with prejudice of appellants' claims in this action.

Dated: January 20, 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. This brief contains 9,789 words and was prepared using Microsoft Office Word 2003.



Thomas J. Vollbrecht

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