

No. A08-1584 and No. A08-1994

STATE OF MINNESOTA

IN COURT OF APPEALS

Scott Sayer and Wendall Anthony Phillipi,

Appellants,

vs.

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

Respondents.

**BRIEF OF RESPONDENT
MINNESOTA DEPARTMENT OF TRANSPORTATION**

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LEGAL ISSUES

I. Did the District Court correctly conclude that Plaintiffs were not like to prevail on their claim that the Minnesota Department of Transportation (“MnDOT”) illegally awarded a design-build contract to Flatiron-Manson (“Flatiron”) and that they were, therefore, not entitled to a temporary injunction halting Flatiron’s replacement of the I-35W Bridge pending a trial on the merits?

II. Was the District Court correct in employing a balance of harms analysis when considering Appellants’ request for a temporary injunction of an alleged statutory violation?

Trial court held in the affirmative.

Most apposite cases:

Dahlberg Bros., Inc. v. Ford Motor Co., 137 N.W.2d 314 (Minn. 1965)

Brecht v. Schramm, 266 N.W.2d 514 (Minn. 1978)

Weinberger v. Romero-Barcello, 456 U.S. 305, 102 S.Ct. 1798 (1982)

Most apposite statute:

Minn. Stat. § 161.3426 (2008)

STATEMENT OF THE CASE

This matter involves appeals from two district court orders. The first, issued on August 28, 2008, (the “August order”) denied Appellants’ request for an injunction temporarily halting any work done or payments made pursuant to a design-build contract awarded by MnDOT to Flatiron for the purpose of building a new I-35W Bridge and its approaches following the bridge’s collapse approximately one year earlier. Appellants’ Appendix (“A. App.”) at 87. The August order also granted Flatiron-Manson’s motion for summary judgment as regards any injunctive relief. The second order was issued on October 23, 2008, and granted Flatiron’s request for summary judgment as to declaratory relief. *Id.* at 110. In this brief, MnDOT addresses Appellants’ arguments regarding the August order and in so doing demonstrates that the district court properly barred temporary injunctive relief.

ARGUMENT

I. INTRODUCTION.

The Court should affirm the district court’s August order. As is explained below, the district court correctly concluded that Appellants were unlikely to demonstrate that MnDOT awarded the I-35W Bridge contract (the “contract”) to Flatiron although it was not a responsive proposer.

Appellants argue that Flatiron’s proposal did not meet the Request for Proposals (“RFP”) or the Instructions for Proposers (“ITP”) in two respects. First, Flatiron’s proposal envisioned construction on land that was outside of the boundaries, i.e., right-of-way, established for the I-35W Bridge Project (the “Project”). Appellants’ Brief

("App. Br.") at 25-26. Second, Flatiron's proposed design for the bridge consisted of box girders that did not each contain three webs. *Id.* at 26.¹ Appellants were not able to demonstrate that they were likely to prevail on either of these contentions. The district court therefore refused to halt work on the contract.

The second reason why Appellants were unable to obtain a temporary injunction is because the district court found that any harm in allowing the bridge reconstruction to go forward was outweighed by the harm to and additional cost that would be borne by the public if the work was stopped pending a trial. A. App. at 103. Appellants argue that because the action that they sought to enjoin was prohibited by statute, i.e., Minn. Stat. § 161.3426 (2008) (design-build contract must be awarded only to a responsive proposer), the district court was prevented from examining the harms that would befall the parties to this litigation if the requested injunction issued. The district court properly rejected this misreading of decisional law and Appellants' misunderstanding of its equitable authority.

II. THIS COURT SHOULD FIND THAT APPELLANTS WERE NOT ENTITLED TO THE TEMPORARY INJUNCTIVE RELIEF THEY SOUGHT.

A. The *Dahlberg* standard and its application by the district court.

Dahlberg Bros., Inc. v. Ford Motor Co., 137 N.W.2d 314 (Minn. 1965) contains the five-part standard against which this Court must determine whether the district court

¹ The ITP and Book 2 of the RFP are Exhibits J and K respectively to the affidavit of Aaron Dean in support of the motion for a temporary restraining order. The right-of-way work map is best viewed online where magnification of it is possible. <http://www.dot.state.mn.us/designbuild/35wbrproject.html> and is found in RFP Book 2, 07-ROW as Exhibit A.

abused its discretion in refusing to grant temporary injunctive relief. *Id.* at 321. In turn these factors are: 1) the status and relationship of the parties prior to the dispute; 2) a balancing of harm to be suffered by the party requesting the temporary relief as compared to that inflicted upon the party against whom that relief would be issued; 3) the likelihood of success on the merits; 4) the public policy issues at stake in the litigation; and 5) the administrative burdens that the temporary injunctive relief would impose upon the issuing court. *Id.* at 321-22.

The district court considered all factors, holding in each instance that Appellants had failed to demonstrate they were entitled to a temporary injunction. A. App. at 97-104. Appellants take no direct position before this Court on the relationship of the parties or the administrative burden factors. We therefore address, in turn and in order of importance, the likelihood of success, balancing the harms, and public policy components. *See Mpls. Fed. of Teachers, Local 59 v. Mpls. Pub. Sch.*, 512 N.W.2d 107, 110 (Minn. Ct. App. 1994) (Primary factor in decision on temporary injunctive relief is likelihood of success).

B. Likelihood of success on the merits.

As we noted above, Appellants argue that Flatiron's proposal was not responsive and should therefore have been rejected because its design required the company to use land outside of the right-of-way boundaries outlined in the RFP. App. Br. at 25-26 They claim that Flatiron's design violated Section 4.3.3.5.1 of the ITP ("proposed work for this project shall not include additional capacity or right-of-way"). *Id.* at 26. The district court found that Appellants' reading of that language was not correct and "far beyond its

intended scope.” A. App. at 95. In addition, the district court found that neither that section of the ITP nor the RFP prohibited any proposer from, on their own, obtaining right-of-way on Second Street beyond the temporary easement shown in the right-of-way work map. *Id.* at 95. An examination of the evidence presented by MnDOT reveals why Appellants are unlikely to succeed on the right-of-way prong of their non-responsive claim.

The Right-of-Way Work Map. First, Appellants argued that the temporary easement designation on this map of a portion of 2nd Street neither authorized nor allowed proposers to lower that roadway. Appellants’ Supplemental Record (“SR”) at 27-28. This is not accurate. Chiglo Third Aff. at para. 9, Teater Aff. The Right-of-Way Work Map shows that a temporary easement on 2nd Street was not being taken as part of a condemnation action. *Id.* at para. 2; Chiglo Third Aff. at para. 7. As such, it would be taken and known in the construction industry as being taken by commissioner’s orders. *Id.*; Minn. Stat. § 161.16 (2008) (authority for MnDOT’s Commissioner (the “Commissioner”) to temporarily take a city street or road as a trunk highway).

Further, by designating 2nd Street with a temporary easement, MnDOT thereby informed proposers that it was acquiring possession and use of the street for a limited period, in this case, until no longer than December 1, 2010. Teater Aff. at para. 2. Use of the phrase “temporary easement” was not a restriction on the Commissioner’s ability to lower that road. *Id.*, Chiglo Third Aff. at para. 7.

While it was in the Commissioner’s possession, 2nd Street could be lowered. *Id.*; SR at 218-19; Minn. Stat. § 160.07 (2008); *see* Minn. Stat. § 160.02, subd. 25 (2008)

(Commissioner is “road authority” over trunk highways). Each proposer should have known this. Chiglo Third Aff. at para. 7. Not only did the Right-of-Way Work Map notify proposers that the 2nd Street temporary easement would be obtained by commissioner’s orders, the orders were first issued on September 11, 2007. Teater Aff., Exh. A. Proposals on the Project, including Flatiron’s, were not submitted until September 14, 2007. A. App. at 90.

Appellants argued to the district court that MnDOT’s Right-of-Way Manual did not allow the lowering of 2nd Street. SR at 28. This was an incorrect reading of that document. Teater Aff. at para. 2; Chiglo Third Aff. at para. 7. Appellants incorrectly conflated the meaning of “T.E.” as used to indicate the limited period for which 2nd Street was to be taken pursuant to commissioner’s orders with use of that term for a different purpose in the Right-of-Way Manual. *Id.* The portion of the manual upon which Appellants relied is a direction to MnDOT right-of-way personnel as to when to acquire land for highway projects in fee simple and when to acquire it only through a temporary easement. SR at 207.

Next, Appellants noted that Flatiron’s proposal for 2nd Street involved land beyond the eastern boundary of the temporary easement. SR at 29. This proposal was responsive because Flatiron had the opportunity to obtain use of this portion of 2nd Street at its own risk and cost. Chiglo Third Aff. at para. 5. In any event, the design that Flatiron proposed to implement on roadway outside the temporary easement boundary and for which it was scored was carried out within the 2nd Street temporary easement shown on the Right-of-Way Work Map. Chiglo Third Aff. at para. 6. Contrary to

Appellants' claim, Flatiron therefore realized no competitive advantage through a purported violation of the RFP's directions on land usage.

The Box Girder Design. The second purportedly non-responsive aspect of Flatiron's proposal was its alleged failure to follow the specification in the RFP for designs utilizing concrete box girders. A. App. at 95. That portion of the RFP, Section 13.3.1.2, required that "[i]f the contractor chooses a steel box girder design, a minimum of three boxes in each direction of traffic is required. A minimum of three webs are required for concrete box designs." The district court, noting that Appellants "restated" that provision to require "three webs per concrete box girder", rejected this interpretation as contravening "both the plain language of the RFP as well as commonly understood engineering concepts." A. App. at 96. The evidence presented at district court demonstrates that this conclusion was correct and that Appellants were not likely to prevail at trial on this issue. A review of that evidence follows.

The Three Web Requirement. Section 13.3.3.1.2 of the RFP gave proposers options as to the superstructures they could choose for their bridge designs. SR 176. These included steel with welded girders, including steel box girders, and concrete with post-tensioned concrete box girders. *Id.* If a proposer chose "a steel box girder design, a minimum of three boxes in each direction of traffic is required. A minimum of three webs are required for a concrete box design." *Id.* Appellants erroneously argued that Flatiron chose and was allowed to use a concrete box design with only two webs. SR at 31. They incorrectly asserted that Flatiron violated this portion of the RFP by proposing an improper design. *Id.*

Appellants read the RFP as requiring three webs for each box girder underlying the roadway. SR at 31. Contrary to their assertion, this is not “a plain reading” of the RFP. *Id.* Clifford Freyermuth, Kevin Western, and Alan Phipps provided credible convincing testimony that Appellants mistakenly construed the RFP to require three webs for each concrete box girder. Freyermuth, Western, and Phipps Affs. Indeed, Flatiron’s design has four webs for each roadway or direction of traffic. *Id.*

Finally the testimony that Appellants offered to the district court was not well informed. Neither of their experts, Fahland and Sellman, had the depth of experience with concrete bridges that Western, Freyermuth, or Phipps had. *Compare* Fahland Aff. para. 1, and Sellman Supp. Aff. para. 1 *with* Phipps Aff. paras. 1 and 10, Western Aff., and Freyermuth Aff. Exh. A. Indeed, neither Fahland nor Sellman testified about any experience with building or designing concrete bridges or concrete bridges with box girder designs. Appellants did not demonstrate to the trial court that they were likely to prove that Flatiron’s concrete box design violated Section 13.3.3.1.2 of the RFP. The district court therefore correctly found that this design resulted “in four webs per direction of traffic.” A. App. at 96.

Appellants’ brief to this Court contains little discussion on the merits of the district court’s disposition of the likelihood of success test. Instead, they argued that the district court’s view of what did or did not constitute responsiveness was erroneous. *Compare* App. Br. at 25-27 *with* App. Br. at 15-25. For this reason, they ask that the matter be remanded and the trial court instructed to reevaluate the facts under the correct legal standard [of responsiveness].” *Id.* at 27. This Court should not do that. As demonstrated

above, Flatiron's proposal did not contain material deviations from either the RFP or the ITP. Even if the Court uses the standard for responsiveness advocated by Appellants (App. Br. at 17), the requested injunctive relief was correctly denied. The district court's rejection of a temporary injunction should be affirmed. *Brecht v. Schramm*, 266 N.W.2d 514, 520 (Minn. 1978) (if trial court decision is correct, it should be affirmed regardless of theory upon which it was based); *Matter of Linehan*, 544 N.W.2d 308, 317 (Minn. Ct. App.1996).

C. Balancing the harms.

Adhering to *Dahlberg*, the district court balanced the harms that would befall the parties should the requested injunction be granted. A. App. at 101-03. In this appeal, Appellants do not argue that the district court incorrectly read the balances as favoring MnDOT and Flatiron, but rather that the instrument was used in the first place. App. Br. at 28. Appellants argue as follows: a design-build contract can be awarded only to a responsive bidder. This requirement is statutory. As such, the district court's consideration of harm that would accrue to the public if construction on the I-35W Bridge Project was halted is prohibited by the legislature's announcement that non-responsive design-build contracts are not to be awarded. App. Br. at 28-29.

The initial weakness in this argument is that it is made without regard to the procedural posture of the case at the district court level. Appellants sought a temporary, not a permanent injunction. They did so on the basis of a record that was not fully formed. Absent was not only a final determination that the design-build statute had been violated, but also any compelling evidence that the Appellants would prevail on the

merits. Appellants' argument that harm balancing is not proper in this case overlooks the very real possibility that they will not be able to demonstrate at trial that a violation of Minn. Stat. § 161.3426 (2008) occurred. Given the uncertainty that surrounds the merits of Appellants' case on the merits, the district court did not impermissibly interfere with the legislature's authority by a balancing of harms. See *State of Wisconsin v. Weinberger*, 582 F. Supp. 1489, 1495 n.1 (D. Wis. 1984), order rev'd, *State of Wisconsin v. Weinberger*, 745 F.2d 412 (7th Cir. 1984) (Equity balancing more appropriate prior to post-trial finding that statutory violation occurred).

Next, Appellants' argument that the second *Dahlberg* factor does not apply in this case is advanced without any citation to Minnesota decisional law. While the precise proposition Appellants advance has not been decided by a Minnesota appellate court, cases in which the facts and the law are quite close have been. They do not favor Appellants. *State ex rel. Hatch v. Cross Country Bank*, 703 N.W.2d 562 (Minn. Ct. App. 2005); *State by Ulland v. Int'l Ass'n of Entrepreneurs of Am.*, 527 N.W. 2d 133 (Minn. Ct. App. 1995); *Wadena Implement Co. v. Deere & Co.*, 480 N.W.2d 383 (Minn. Ct. App. 1992).

Wadena involved the Minnesota Agricultural Equipment Dealership Act (MAEDA), Minn. Stat. § 325E.061-.065 (2008), and the question of whether a farm equipment manufacturer had good cause to terminate a dealership agreement. *Wadena*, 480 N.W.2d at 386-387. After the trial court issued an injunction prohibiting termination of that agreement, Deere appealed, arguing that the trial court had failed to hold an

evidentiary hearing to analyze the requirements for that relief. *Id.* at 388.² While acknowledging that the *Dahlberg* factors traditionally include a harm balancing component, the appellate court found that “where injunctive relief is explicitly authorized by statute . . . proper exercise of discretion requires the issuance of an injunction, if the prerequisites for the remedy have been demonstrated and the injunction would fulfill the legislative purposes behind the statute’s enactment.” *Id.* at 389 (internal citation omitted). This holding was refined in *Cross Country Bank* when the court held that an assessment of the relevant harms need not be made “when injunctive relief is *explicitly authorized* by a statute.” *Cross Country Bank*, 703 N.W.2d at 573 (emphasis added).

Unlike *Wadena* and its progeny, the instant case does not involve a statute in which the legislature specifically circumscribed a district court’s equitable authority. The Minnesota Uniform Declaratory Judgments Act, Ch. 555 (2008) is devoid of any such language. Minn. Stat. § 555.01 (2008) gives a district court judge authority “to declare rights, status, or other legal relations.” Minn. Stat. § 555.08 (2008) is an enumerated grant of authority to provide “further relief based on a declaratory judgment or decree.” The temporary injunction that Appellants requested is not “a specifically authorized statutory remedy.” *Cross Country Bank*, 703 N.W.2d at 573. It is a remedy that flows from a court’s traditional authority to do equity. As such, the trial court employed the harm balancing test in *Dahlberg*. *Id.* (“We conclude that when a legislature has explicitly

² Minn. Stat. § 325E.065 (2008) provides in part that if a farm equipment dealer can demonstrate that the equipment manufacturer violated the MAEDA, it “may be granted injunctive relief against unlawful termination, cancellation” of the dealership.

authorized the State to obtain injunctive relief to prevent violations that protect consumers, the legislature has obviated a showing of irreparable harm and inadequate legal remedy”).

Appellants assert that their approach to risk balancing is supported by two federal cases, *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 98 S.Ct. 2279 (1978); *Wilderness Soc’y v. Morton*, 479 F.2d 842 (D.C. Cir. 1973). App. Br. at 29-31. An examination of those cases as well as of subsequent Supreme Court limitations on how *TVA* can be read reveals that neither case compels the conclusion that if the district court finds that the I-35W contract was likely awarded to a non-responsive proposer, it must immediately enjoin work on the Project.

In *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 102 S.Ct. 1798 (1982), respondents sued pursuant to the Federal Water Pollution Control Act (the “FWPCA”), 33 U.S.C. § 1251 *et. seq.* (1976 ed. and Supp. IV), seeking to enjoin the United States Navy from violating the FWPCA by improperly releasing Naval ordinance into waters off Vieques, an island near Puerto Rico. *Id.* at 307-309, 102 S.Ct. at 1801-1802. Faced with a claim that a violation of the FWPCA required, *ipso facto*, an injunction be issued, the Supreme Court examined the power of the federal courts to order such relief. In so doing, the court noted that “the grant of jurisdiction to ensure compliance with a statute hardly suggests an absolute duty to do so under any and all circumstances, and a federal judge sitting as a chancellor is not mechanically obligated to grant injunctions for every violation of law.” *Id.* at 313, 102 S.Ct. at 1803 (citing, *inter alia*, *TVA v. Hill*). The Supreme Court’s subsequent examination of *TVA* is instructive.

The *Weinberger* Court noted that *TVA* involved recourse to the Endangered Species Act in an attempt to halt the construction of a dam that would wipe out the snail darter fish. *Id.* at 313, 102 S.Ct. at 1803-04. Congress, in passing the Endangered Species Act (“ESA”), left no doubt that it “had chosen the snail darter over the dam.” *Id.* at 314, 102 S.Ct. at 1804. Only by enjoining the dam’s completion could a purpose of the ESA, i.e., preventing extinction of the snail darter, be realized. Thus it was “the purpose and language of the statute under consideration . . . not the bare fact of a statutory violation, [that] compelled . . . [the injunction].” *Id.* at 314, 102 S.Ct. 1804. In addition, the *Weinberger* Court looked for but could not find in the ESA, evidence that Congress intended to completely foreclose the exercise of the district court’s equity discretion or to require it to “issue an injunction for any and all statutory violations.” *Id.* at 320, 102 S.Ct. at 1807.

Also inappropriate is Appellants’ reliance on *Wilderness Soc’y*. First, that court’s view on when injunctions should be issued in the face of statutory violations must be read in the limiting light of *Weinberger*. As such, arguing that the decision supports a “statutory violation equals no harm balancing” approach is not correct. Second, unlike the present case, *Wilderness Soc’y* did not involve balancing a statutory violation against the court’s traditional equity powers. In operative part, the court of appeals held that the deference to be accorded an agency’s interpretation of a statute did not permit approval of such an interpretation that was contrary to Congressional intent. *Wilderness Soc’y*, 479 F.2d at 866-868. Given that decision, the Alyeska Pipeline Service Co. was not able to obtain sufficient right-of-way to commence construction of a 48 inch diameter oil

pipeline. *Id.* at 847-848. Unlike the pipeline company, neither MnDOT nor Flatiron sought to commence work on a project that was demonstrably illegal.

The *Weinberger* analysis is helpful in the instant case. The legislature has required that a design-build contract, if awarded, must go to a responsive and responsible bidder. Minn. Stat. § 161.3426 (2008). The legislature has not, however, limited a district court's equity powers as to the enforcement of that statute. Nothing in Minn. Stat. § 161.3426 (2008) contains a restriction on the Court's equitable powers to remedy a violation of that law. Neither *TVA* nor *Wilderness Soc'y v. Morton* compelled the trial court to halt the construction of the I-35W Bridge and thereby subject the traveling public to the admittedly significant economic consequences of an indeterminate delay in the opening of that important transportation corridor.

Appellants believe that this Court cannot look to the *Weinberger* decision for assistance in determining whether the district court properly utilized the harm balancing component of *Dahlberg*. App. Br. at 31-32. The reason for this, they argue, is that in *Weinberger* the Supreme Court realized that the FWPCA does not require the district court to issue an injunction for each statutory violation. *Id.* at 31. Minn. Stat. § 161.3426 (b)(c), and (d) (2008) does not, unlike the federal law, give the district court "discretion to fashion a remedy." *Id.* This argument has two flaws. First, as noted above, the design-build statute is not self-contained as regards remedy. The declaratory judgment action statute provides the enforcement muscle.

Second, the *Weinberger* court's preservation of the equitable powers of a district court in the face of statutorily prohibited conduct pivots on whether Congress

affirmatively circumscribed those powers in the statute at issue. *Weinberger*, 456 U.S. at 316 n. 11, 102 S.Ct. at 1805 (“here we do not read the FWPCA as intending to abolish the court’s equitable discretion in ordering remedies”).

In the instant case, Appellants make no examination of what the Minnesota legislature did or didn’t do regarding a remedy for an illegally awarded design-build contract. They stop at the fact that design-build contracts cannot be awarded to non-responsive bidders. App. Br. at 29, 31. To argue that a statutory violation equals injunction issuance therefore misreads *Weinberger*. The inquiry in this case, as was the Supreme Court’s in *Weinberger*, should be upon whether the legislature, having prohibited a certain practice, “intended to deny courts their traditional equitable discretion in enforcing . . . [such a] statute.” *Weinberger*, 436 U.S. at 316, 102 S.Ct. at 1805. Simply arguing that a violation occurred and the court’s equitable powers are thus foreclosed did not carry the day in *Weinberger* and should not do so here.

III. THE TECHNICAL REVIEW COMMITTEE (“TRC”) PROPERLY AND CORRECTLY CONCLUDED THAT FLATIRON’S PROPOSAL WAS RESPONSIVE TO THE RFP AND THE ITP.

In applying the public policy and likelihood of success factors in *Dahlberg*, the district court considered the requirement of Minn. Stat. § 161.3426 (2008) that a design-build contract cannot be awarded to a non-responsive proposer. A. App. 99-101, 103. The district court concluded that Minn. Stat. § 161.3426 (2008) confers on the TRC the authority to decide whether a proposal is or is not responsive. A. App. at 100. (“The plain language of the statute . . . clearly leaves the determination of the responsive proposal in the hands of the TRC”). The district court viewed the scoring system that the

TRC developed as well as the manner in which that scoring system was employed as a proper mechanism for determining responsiveness. *Id.* (“The status of a proposal is responsive or non-responsive under this process is a product of the scoring methodology”). Because that procedure was, as correctly viewed by the district court, statutorily created, reliance upon the common law definition of responsiveness was neither necessary nor appropriate. By allowing the TRC leeway to determine responsiveness, the legislature did not anchor them to court developed law. The district court therefore appropriately rejected Appellants’ argument that the TRC’s determination as to responsiveness was circumscribed by decisional law. The district court correctly identified, from both a procedural and substantive viewpoint, the TRC’s role in the evaluation of design-build proposals.

First, we look to procedure. Among the roles assigned the TRC in the statutory framework of a design-build contract is that it submits to the Commissioner “a technical score for each design-builder.” Minn. Stat. § 161.3426, subd. 1(a) (2008). In so doing, the TRC “shall reject any proposal it deems nonresponsive.” *Id.* The Commissioner, after computing the scores of TRC, cannot award a design-build contract to a proposer who is either nonresponsive or nonresponsible. *Id.* at subd. 1(b) and (c).

Appellants suggest that, after receiving the TRC score, the Commissioner must make an independent judgment as to the responsiveness of the apparent winning proposal. App. Br. at 21-22. In other words, she must, on her own, cross check every aspect of that proposal against every section of the RFP and ITP. *Id.* Such an interpretation overlooks the purpose of the Technical Review Committee, i.e., evaluation

of the design-build proposals by “at least five individuals”, one of whom must be a member of the Minnesota Chapter/Associated General Contractors. Minn. Stat. § 161.3420 (2008). Although Appellants’ view of the Commissioner’s role in the design-build process is practically unworkable, the major flaw of this argument is that it simply misreads Minn. Stat. § 161.3426 (2008). The TRC, determines whether a proposal is responsive. The district court’s reading of Minn. Stat. § 161.3426 (2008) was correct.

Second, Appellants argue that, as a matter of substantive law, the district court erred by not construing the terms “nonresponsive” and “responsive” in Minn. Stat. § 161.3426 (2008) in accordance with their developed common law meanings. App. Br. at 16-25. Judicial decisions as to these terms upon which Appellants rely grew out of “design-bid-build contracts.” *See Carl Bolander & Sons, Co. v. City of Minneapolis*, 451 N.W.2d 204, 206 (Minn. 1990) (contract bids listed pursuant to Minn. Stat. § 471.345, subd. 3 (1988) (Minnesota Uniform Municipal Contracting Law)). Unlike that law and its state counterpart, Minn. Stat. § 16C.28 (2008), the design-build statute imposes the duty of determining responsiveness on an administrative body, i.e., the TRC. Minn. Stat. § 161.3426, subd. 1(a) (2008) (“the Technical Review Committee shall reject any proposal it deems nonresponsive”). These decisions are made in light of earlier language giving MnDOT’s commissioner the authority to award “a design-build contract for a project on the basis of a best value selection process” without regard to the State’s bid-build process “sections 16C.25, 161.32, and 161.321, or any other law to the contrary.” Minn. Stat. § 161.3412 (2008).

Appellants argue that because the definition of responsiveness by the Minnesota Supreme Court is both long standing and unequivocal, the canons of statutory construction required the district court to adopt that meaning. App. Br. at 16-17. The statute upon which they rely provides in pertinent part that because the supreme court has construed responsiveness, the legislature, “when enacting subsequent laws on the same subject matter, intends the same construction to be placed upon such language.” Minn. Stat. § 645.17(4) (2008). Design-bid-build contracts are not, however, the same subject matter as design-build contracts. In a design-bid-build contract, each bidder knows exactly what product, service, or building will be delivered and is judged as to whether any material deviation exists between a bid and specifications and considerations imposed in the call for bids. Minn. Stat. § 16C.28, subd. 1(a)(1) (2008).

That same degree of pre-bid certainty does not exist in design-build contracts awarded by the Commissioner. The Commissioner does not award a contract on the basis of a fully realized set of plans for the design and construction of, for example, a bridge. Instead, each design-proposer provides their own unique combination of “architectural or engineering or related design services as well as the labor, materials, supplies, equipment, and construction services” needed to realize that particular design. Minn. Stat. § 161.3410, subd. 3 (2008). Against this backdrop, the legislature required

the TRC to determine whether design-build proposals are responsive.³ The legislature recognized that design-build proposals should be evaluated by a method different from that used to determine responsiveness in a traditional design-bid-build contract. The professional subjectivity that the TRC uses to analyze and to score a design-build proposal has no counter-part in a decision as to the responsiveness of a design-bid-build bid. Given the differences between design-build contracts and design-bid-build contracts, as well as between the procedures by which contracts for each are awarded, the district court could not have adopted the common law definition of responsiveness urged by Appellants.

Finally, Appellants correctly observed that the concept of responsiveness protects “the integrity of the award of contracts by the government.” App. Br. at 17. Those protections are still in place without resort to the common law meaning of responsiveness. Decisions by the TRC as to whether a proposal is non-responsive must be neither arbitrary nor capricious. *See, e.g., In re Max Schwartzman & Sons, Inc.*, 670 N.W.2d 746, 753 (Minn. Ct. App. 2003); *Minn. Ctr. for Envtl. Advocacy v. Minn. Pollution Control Agency*, 632 N.W.2d 230, 235 (Minn. Ct. App. 2001), *rev'd on other*

³ The Commissioner of the Minnesota Department of Administration is also authorized to enter into design-build contracts. Minn. Stat. §§ 16C.32 - 16C.35 (2008). Unlike MnDOT design-build contracts however, the legislature did not require that agency to make a responsiveness review of design-build proposals. *Id.*

grounds, 644 N.W.2d 457 (Minn. 2002).⁴ An “arbitrary and capricious” standard protects the public against government favoritism, fraud, or irrationality as well as the “responsiveness” standard Appellants asked the district court to adopt.

CONCLUSION

Appellants did not demonstrate to the district court that they were likely to succeed on the merits of their claims of non-responsiveness. The district court properly balanced the competing harms in determining whether to grant the requested injunction. For these reasons, as well as all the reasons set forth above, the district court’s order refusing to grant a temporary injunction should be affirmed.

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Respectfully submitted,

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⁴ Appellants argue that unless the common law definition of responsiveness is utilized by the TRC, it can ignore its statutory obligations and “restate its award criteria after it has seen the competing proposals.” App. Br. at 20. Such an action would certainly be deemed arbitrary and capricious by any reviewing court.