

Nos. A08-1584 and A08-1994

State of Minnesota
 In Supreme Court

Scott Sayer and Wendell Anthony Phillippi,
Appellants,

v.

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

BRIEF OF AMICUS CURIAE

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STATEMENT OF THE ISSUE¹

The issue is whether the Court of Appeals erred in interpreting the term “responsive” in Minnesota’s design-build statute, Minn. Stat. § 161.3426, contrary to the well-established meaning of the term applied consistently by this Court to low-bid public procurements.

Court of Appeals ruled: The common-law definition of responsiveness does not apply in the context of design-build, best value procurement, and MnDOT has the discretion in deciding whether a proposal is responsive.

Most Apposite Decisions: *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 647 (1947); *Carl Bolander & Sons v. City of Minneapolis*, 451 N.W.2d 204 (Minn. 1990).

Most Apposite Statutory Provisions: Minn. Stat. § 161.3422; Minn. Stat. § 161.3426, Subd. 1; Minn. Rules § 1230.0150, Subp. 15.

INTRODUCTION

This appeal is this Court’s first opportunity to pronounce the role of responsiveness under new laws expanding the available public procurement options beyond those requiring award to the lowest responsible bidder. As a friend of the Court, the Associated General Contractors of Minnesota (AGC-MN) joins Appellants in asking this Court to reverse the decision of the Court of Appeals rejecting the application of the traditional rule of responsiveness to design-build, best-value public contracting. *Sayer v. Minnesota Dep’t of Transp.*, 769 N.W.2d 305 (Minn. Ct. App. 2009).

¹ Counsel for AGC-MN authored this application; and no person or entity made any monetary contribution to the application’s preparation or submission other than AGC-MN, its members, or its counsel. *See* Minn. R. Civ. App. P. 129.03.

Established in 1919, AGC-MN is a voluntary construction trade association of over four hundred (400) contractors and affiliated members who work in and serve the construction industry throughout Minnesota. With long and deep experience with public bidding, AGC-MN members are well positioned to advise the Court on the continued need for the strict application of the traditional rule of responsiveness to Minn. Stat. § § 161.3410-.3428 and other new bidding laws.

STATEMENT OF FACTS

AGC-MN accepts Appellants' statement of the facts, but will summarize those facts most crucial to the issues on this appeal. Because this is an appeal from summary judgment, all evidence is viewed in a light most favorable to Appellants. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993).

The Minnesota Department of Transportation (MnDOT) awarded Flatiron-Manson the contract to design and build the bridge to replace the Interstate 35W bridge that collapsed on August 1, 2007. MnDOT used the design-build, best value procurement method authorized by Minn. Stat. § 161.3426, Subd. 1. After short-listing the prospective bidders to four, MnDOT issued a Request for Proposals (RFP) and Instructions to Proposers (ITP) to the four bidders. The RFP and ITP contained project-specific requirements and described the weighted criteria by which the proposals would be evaluated by a six-member Technical Review Commission (TRC).

MnDOT imposed significant constraints on all proposals. Two are relevant to this appeal. First, the ITP expressly prohibited the bidders from proposing work beyond the right of way shown on MnDOT's Right of Way Map. *See Wieland Aff. Ex. 32*, at

§ 4.3.3.5.1 (SR-117). Second, Book 2 of the RFP specified that any bidder choosing a steel box girder design must include a minimum of three boxes in each direction of traffic with a minimum of three webs for the concrete box designs. *See Wieland Aff. Ex. 198, at 13.3.3.1.2 (SR-176).*

Flatiron-Manson's proposal violated both of these constraints. Flatiron-Manson proposed extending the roadwork beyond the specified right of way; and its proposed design included several bridge spans using single cell box girders. *See Dean Aff. Ex. L, at App. A.* These violations gave Flatiron-Manson a competitive technical advantage. *See Affs. of Randy Reiner, P.E. (SR-410, SR-414, and SR-332).*

Despite these significant variations from the RFP's constraints, MnDOT did not automatically reject Flatiron's proposal as non-responsive. Rather, as Appellants note, MnDOT's scoring system was structured so that the TRC's "non-responsive" score for one criterion could be offset by higher scores for other criteria, resulting in the proposal being found responsive. *See Appellants' Brief, at 14-15.* "[A] proposal could be completely non-responsive to an entire category of requirements, such as quality control, and still be judged responsive under MnDOT's definition." *Id.* at 15. In other words, compliance with specified RFP constraints was not a condition for a proposal's consideration but was merely a factor in the overall scoring by the TRC.

Flatiron-Manson's proposal had the highest price and tied with another company for submitting the longest delivery time, but received the highest technical score. Applying the weighted criteria, MnDOT awarded Flatiron-Manson the contract. MnDOT awarded the contract to Flatiron-Manson based solely on the TRCs recommendation and without any

independent finding by MnDOT that Flatiron-Manson's proposal was responsive. *See Weiland Aff. Ex. 243, at 62, lines 11-13 (SR-229); Dean Aff. Ex. B.*

Appellants sued to challenge the award on the ground that Flatiron-Manson's proposal was not "responsive" as required by Minn. Stat. § 161.3426 and should have been rejected. *See Compl., ¶¶ 16-48 (A. 5-16).* The District Court granted Flatiron-Manson's motion for summary judgment on the ground that the statutory term "responsive" does not have its traditional common-law meaning but instead grants MnDOT the discretion to define and apply the term. *See Am. Order, (A-110).* The Court of Appeals affirmed, "reject[ing] appellants' argument that the common-law definition of responsiveness applies in the context of design-build best-value procurement and hold[ing] that, under section 161.3426, subdivision 1(a), the TRC has discretion in deciding whether a proposal is responsive." *See Opinion, at 10 (ADD-10).*

ARGUMENT

The issue is whether the Court of Appeals erred in interpreting the term "responsive" in Minn. Stat. § 161.3426 should be interpreted differently than the well-established meaning of the term as applied consistently by this Court to low-bid public procurements. The interpretation of a statute presents a question of law that is reviewed *de novo*. *Harms v. Oak Meadows*, 619 N.W.2d 201, 202 (Minn. 2000). When interpreting a statute, a reviewing court's primary objective is to ascertain and effectuate the intent of the Legislature. *Scott v. Minneapolis Police Relief Ass'n*, 615 N.W.2d 66, 71 (Minn. 2000).

In 2001, the Legislature enacted Minn. Stat. §§ 161.3410-.3428, the design-build statute for highway procurement. 2001 Minn. Laws 1st Spec. Sess. ch. 8, art. 3, § 2, at

2016. By repeating the responsiveness requirement four times, the Legislature emphasized its unambiguous mandate that MnDOT only award best-value design-build contracts under Minn. Stat. § 161.3426, Subd. 1, to bidders whose bids are “responsive” to the request for proposals:

Except as provided in subdivision 2, a design-build contract shall be awarded as follows:

- (a) The Technical Review Committee *shall* reject any proposal it deems *nonresponsive*.
- (b) The design-builder selected *must* be that *responsive* and responsible design-builder whose adjusted score is the lowest.
- (c) The commissioner *shall* select the *responsive* and responsible design-builder whose adjusted score is the lowest.
- (d) Unless all proposals are rejected, the commissioner *shall* award the contract to the *responsive* and responsible design-builder with the lowest adjusted score. . . .

Minn. Stat. § 161.3426, Subd. 1(a) (emphasis added). In addition, the Legislature twice dictated the responsiveness requirement in Subdivision 4, which applies to the award of design-build contracts based on low bid rather than best value. Minn. Stat. § 161.3426, Subds. 4(c)(1) and 4(d). Plainly, the Legislature intended the responsiveness requirement to be unyielding on all of MnDOT’s design-build procurements, whether based on best value or low bid.

Though not defined in the statute, the term “responsive” is a term of art with a well-established meaning that has been consistently applied by this court. Responsiveness requires that bids for public contracts comply in all material respects with the procedural and substantive requirements of the invitation for bid:

A “responsive” bid usually is a bid wherein the bidder promises to do exactly, precisely, and specifically what the Invitation for Bids requests the bidder to do. The question of whether a bid is “responsive” is determined by the contracting agency on the basis of the information submitted by the bidder with his bid and upon facts available at or prior to the time of said opening. The government agency evaluating the bid has little discretion on matters of responsiveness and a bid either complies precisely with the Invitation for Bid and is, therefore, “responsive,” or it fails to comply precisely with the Invitation for Bid and is, therefore, not “responsive.”

City of Rochester v. United States Environmental Protection Agency, 496 F. Supp. 751, 756 (D. Minn. 1980). The test of responsiveness is whether a deviation from the bidding requirements affects price, quality, quantity, manner of performance, or other things that go into the actual determination of the amount of the bid or otherwise “gives a bidder a substantial advantage or benefit not enjoyed by other bidders.” *Carl Bolander & Sons v. City of Minneapolis*, 451 N.W.2d 204, 207 (Minn. 1990); *Coller v. City of St. Paul*, 223 Minn. 376, 387, 26 N.W.2d 835, 840 (1947). If a bid materially varies from the bid solicitation and the bid, “it is the plain duty of the public authority to reject the bid.” *Coller*, 26 N.W.2d at 840; *Bolander* 451 N.W.2d at 206; *Griswold v. Ramsey County*, 242 Minn. 529, 65 N.W.2d 647 (1947). Responsiveness has long been one of the bedrock principles ensuring integrity, competition, and fairness in public procurement.

The repeated use of the term “responsive” in Minn. Stat. § 161.3426, Subd. 1, can only mean that the Legislature intended the term to have the meaning traditionally applied to other public procurement statutes. “When a court of last resort has construed the language of a law, the legislature in subsequent laws on the same subject matter intends the same construction to be placed upon such language.” Minn. Stat. § 645.17(4). Having

applied the term consistently to other procurements, the Legislature could hardly have intended its meaning to be something different in the design-build best-value statute.

The Court of Appeals, however, held that the term “responsive” should not be afforded its traditional meaning in the context of best-value design-build bidding due to the discretion otherwise vested in public owners in considering factors other than price. The rule of responsiveness was first applied to laws requiring governments to award contracts to the “lowest responsible bidder” enacted in response to widespread corruption, favoritism, and extravagance in public contracting. *Coller*, 26 N.W.2d 835 at 841. By making price the sole, objective criterion for award, the Legislature intended to limit or divest public owners of discretion and thereby eliminate the evils that the laws were enacted to prevent. *Id.* The Court of Appeals would restrict the traditional meaning of responsiveness to low-bid contracting and allow MnDOT unguided discretion to determine responsiveness in all other types of public procurement.

By placing significant constraints in the new design-build and best-value laws, however, the Legislature demonstrated that it is as concerned as ever about curbing the abuses of discretion that first motivated its adoption of competitive bidding laws. The Legislature has cautiously and incrementally expanded the award criteria available to public officials awarding contracts. In limited circumstances, price need no longer be the only factor in selecting a contractor. *See, e.g.*, Minn. Stat. §§ 161.3410-3428; Minn. Stat. § 16C.02-.03 (best-value state contracts); Minn. Stat. § 16C.28, Subd. 1a (extending best-value to local governments); Dean B. Thomson, Mark Becker & Jeffrey Wieland, *A Critique of Best Value Contracting in Minnesota*, 34 Wm. Mitchell L. R. 25, 50-54 (2007)

(listing bidding laws). In those new laws, however, the Legislature imposed restrictions to offset the attendant risks of fraud, favoritism, and corruption; ensure the transparency of the selection and the honest exercise of discretion; and thereby promote confidence in public procurement. These protections include the mandatory use of trained evaluators and the mandatory listing in the bid advertisement of the award criteria to be considered and the weight to be given to each listed criterion. *See* Minn. Stat. § 161.3426; Minn. Stat. § 16C.02-.03. *In one statute, the one here under consideration, the Legislature expressly mandated that “nonresponsive” bids be rejected and that contracts only be awarded to “responsive” bidders.* These restrictions ensure that all bids meet the same published criteria and prevent public bodies from awarding contracts using evaluation criteria that are unstated, unweighted, ambiguous, or arbitrarily applied. The Legislature does not want fraud and favoritism to re-infect public procurement.

The traditional principle of responsiveness is an important protection in best-value contracting. *See* Thomson, *supra* at 63-64. The Minnesota Department of Administration incorporated the traditional meaning of the term in its administrative rule requiring that the award of all state contracts, including best-value contracts, “must be made in conformity with Minnesota Statutes and with no material variance from the terms and conditions of the solicitation document.” Minn. Rules § 1230.0800, Subp. 3. Those same rules define “material variance” in traditional terms, as “a variance in a response from specifications or conditions that allows a responder a substantial advantage or benefit not enjoyed by all other responders or gives the state something significantly different from what the state requested in the solicitation document.” Minn. Rules § 1230.0150, Subp.

15. Because recent legislation broadens the State's best-value authority and extends the same authority under Minn. Stat. § 16C.28 to most local governments, 2007 Minn. Sess. Law Serv. 1734-44, local best-value procurements should be subject to the traditional responsiveness requirement incorporated into the administrative rules. The test of responsiveness for all public procurements, therefore, is whether a deviation "gives a bidder a substantial advantage or benefit not enjoyed by other bidders." *Coller* 26 N.W.2d at 840.

There is no statutory or policy basis for holding, as the Court of Appeals did, that responsiveness applies differently to design-build best-value contracts under Minn. Stat. § 161.3426, Subd. 1, than it does for all other best-value or low-bid procurements. Regardless whether the selection criterion is low-bid or best-value, set guidelines give all prospective contractors an equal opportunity to bid on the same basis and to assure taxpayers of the best bargain. *See Nielsen v. City of St. Paul*, 252 Minn. 12, 20, 88 N.W.2d 853, 858 (1958). In addition to the plain wording of the statute, public policy favors the application of the traditional meaning of the term "responsiveness" to design-build best-value contracting. The traditional meaning serves as a check on public officials and bolsters the contracting community's confidence in the honesty of public procurements.

In this case, MnDOT was not required to impose specific design constraints in the solicitation. Having imposed them, however, MnDOT was not free to change its mind after the fact. *Cf. Griswold v. County of Ramsey*, 242 Minn. 529, 65 N.W.2d 647, 650-51 (1954) (public bodies are bound to apply any bidding procedures they voluntarily adopt).

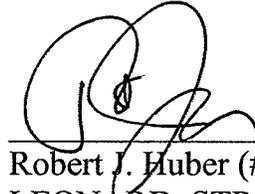
The grant of discretion to select evaluation criteria does not include the discretion to ignore those criteria when evaluating bids. MnDOT, therefore, was obligated to consider only those proposals whose designs kept the bridge within the right of way and included the minimum number of box girders. MnDOT, however, effectively abandoned its own published criteria after reviewing Flatiron-Manson's non-conforming proposal. The variation in Flatiron-Manson's proposal gave Flat-Iron a substantial competitive advantage and unfairly rewarded Flatiron-Manson for flouting the stated criteria. The other bidders were denied the opportunity to submit a proposal without the design constraint. Flatiron-Manson's bid should have been rejected as materially non-responsive, as the statute expressly requires. The award was contrary to law and cannot be allowed to stand. If MnDOT had changed its mind about the constraint, it should have rejected all bids and re-solicited proposals without the constraint. *J. L. Manta, Inc. v. Braun*, 393 N.W.2d 490, 494 (Minn. 1986). The public could have then received four competitive proposals and the best value.

CONCLUSION

The Court of Appeals erred in “reject[ing] appellants' argument that the common-law definition of responsiveness applies in the context of design-build best-value procurement.” *Sayer*, 769 N.W.2d at 310-11. Unless reversed, the Court of Appeals' opinion will undermine competitive bidding and pave the way for future abuses. This Court should reverse the Court of Appeals and announce that the term “responsive” in Minn. Stat. 161.3426, Subd. 1, should be given its traditional meaning. The rule of responsiveness has been and should continue to be an important protection against procurement abuse

regardless of the procurement method. AGC-MN, therefore, asks this Court to reverse the Court of Appeals and remand the case to the trial court for further proceedings.

Dated: November 24, 2009

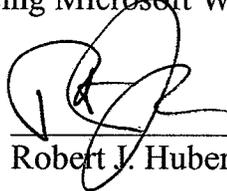


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BRIEF LENGTH CERTIFICATION

I certify that this brief conforms to the requirements of Minn. R. Civ. P. 132.01, Subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 2,749 words. This brief was prepared using Microsoft Word 2003.



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