No. A08-1584 and A08-1994

STATE OF MINNESOTA
IN SUPREME COURT

Scott Sayer and Wendell Anthony Phillippi,

Appellants,

vs.

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

Respondents.

RESPONDENT MINNESOTA DEPARTMENT OF TRANSPORTATION'S BRIEF

FABYANSKE, WESTRA, HART
& THOMSON, P.A.
Dean B. Thomson (#141045)
Jeffrey A. Wieland (#387918)
800 LaSalle Avenue South, Suite 1900
Minneapolis, Minnesota 55402
(612) 359-7600

Attorneys for Appellants

LORI SWANSON
Attorney General
State of Minnesota

RICHARD L. VARCO, Jr.
Assistant Attorney General
Attorney Reg. No. 0112471
445 Minnesota Street, Suite 1800
St. Paul, MN 55101-2134
(651) 757-1363 (Voice)
(651) 282-2525 (TTY)

ATTORNEYS FOR RESPONDENT
MINNESOTA DEPARTMENT OF TRANSPORTATION

FAEGRE & BENSON, LLP
Thomas J. Vollbrecht (#17886X)
220 Wells Fargo Center
90 South Seventh Street
Minneapolis, Minnesota 55402
(612) 766-7000

ATTORNEYS FOR RESPONDENT
FLATIRON-MANSON

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF FACTS 1

LEGAL ISSUES 2

I. WHEN THE COMMISSIONER OF THE MINNESOTA DEPARTMENT OF TRANSPORTATION ACTING THROUGH A TECHNICAL REVIEW COMMITTEE CONCLUDES THAT A DESIGN-BUILD PROPOSAL SUBMITTED PURSUANT TO MINN. STAT. §§ 161.3410 TO 161.3428 (2008) IS RESPONSIVE, IS THE APPLICABLE STANDARD OF JUDICIAL REVIEW WHETHER THAT AGENCY DECISION WAS ARBITRARY AND CAPRICIOUS? 2

II. IN OPPOSING FLATIRON-MANSON'S ("FLATIRON") MOTION FOR SUMMARY JUDGMENT, DID APPELLANTS FAIL TO DEMONSTRATE, THROUGH ADMISSIBLE EVIDENCE, THAT ANY MATERIAL FACTS WERE IN DISPUTE? 2

ARGUMENT 2

I. MINN. STAT. § 161.3426, SUBD. 1(A) (2008) AUTHORIZES THE TECHNICAL REVIEW COMMITTEE ("TRC") TO SCORE PROPOSALS FOR DESIGN-BUILD CONTRACTS AND IN SO DOING TO REJECT ANY PROPOSAL IT DEEMS NON-RESPONSIVE. IN SO SCORING PROPOSALS, THE TRC IS NOT BOUND BY THE COMMON LAW DEFINITION OF "RESPONSIVE" DEVELOPED IN LITIGATION INVOLVING DESIGN-BID-BUILD CONTRACTS 2

II. THE DISTRICT COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT 9

A. The Law To Be Applied 10

B. Work Within The Right-Of-Way 11

C. The Three Web Requirement 16

CONCLUSION 20

TABLE OF AUTHORITIES

Page

STATE CASES

Carl Bolander & Sons Co. v. City of Minneapolis,
451 N.W.2d 204 (Minn. 1990) 5

Citizens Advocating Responsible Development v. Kandiyohi County Bd. of Comm'rs,
713 N.W.2d 817 (Minn. 2006) 8

City of Morris v. Sax Investments, Inc.,
749 N.W.2d 1(Minn. 2008) 10

Clark v. Pawlenty,
755 N.W.2d 293 (Minn. 2008) 11, 12

Edward Thompson Co. v. Schroeder,
131 Minn. 125, 154 N.W. 792 (1915) 16

Enright v. Lehmann,
735 N.W.2d 326 (Minn. 2007) 7

Fairview Hosp. & Health Care Servs. v. St. Paul Fire & Marine Ins. Co.,
535 N.W.2d 337 (Minn. 1995) 19

Goeb v. Tharaldson,
615 N.W.2d 800 (Minn. 2000) 11, 19

Grondahl v. Bulluck,
318 N.W.2d 240 (Minn. 1982) 10

Gross v. Victoria Station Farms, Inc.,
578 N.W.2d 757 (Minn. 1998) 11

Murphy v. Country House, Inc.,
307 Minn. 344, 240 N.W.2d 507 (1976) 10, 14

Osborne v. Twin Town Bowl, Inc.,
749 N.W.2d 367 11

Reserve Mining Co. v. Minnesota Pollution Control Agency,
267 N.W.2d 720 (Minn. 1978) 8

Stringer v. Minnesota Vikings Football Club, LLC,
705 N.W.2d 746 (Minn. 2005) 10

Swanson v. City of Bloomington,
421 N.W.2d 307 (Minn. 1988) 8

Teffeteller v. Univ. of Minn.,
645 Minn. 420, 427 (Minn. 2002 ..... 18, 19

W.J.L. v. Bugge,
573 N.W.2d 677 (Minn. 1998) 10

STATE STATUTES

Minn. Stat. § 160.02 12

Minn. Stat. § 160.07 12

Minn. Stat. § 161.16 12

Minn. Stat. § 161.32 1

Minn. Stat. § 161.341 ..... 1, 7

Minn. Stat. § 161.342 5

Minn. Stat. § 161.3426 ..... passim

Minn. Stat. § 16C.28 ..... 5, 6

Minn. Stat. § 16C.32 6

Minn. Stat. § 16C.33 6

Minn. Stat. § 16C.34 6

Minn. Stat. § 16C.35 6

Minn. Stat. § 471.345 5

Minn. Stat. § 645.17(4) 6

STATE RULES

2001 Minn. Laws ch. 8, art. 3 § 1 1

Minn. R. Civ. P. 56.03 10

Minn. R. Evid. 702 ..... 11, 18

STATEMENT OF FACTS

In 2001, the legislature authorized the Commissioner of the Minnesota Department of Transportation ("Commissioner") and ("MnDOT") to obtain "the architectural or engineering and related design services, as well as the labor, material, supplies, equipment, and construction services" necessary to build or rebuild Minnesota's transportation infrastructure. Act of June 30, 2001, ch. 8, art. 3, § 1, 2001 Minn. Laws 2015. This method of public procurement is known as a design-build contract. Minn. Stat. § 161.3410, subd. 3 (2008). As implemented by MnDOT, design-build is an alternative to the approach long employed by the department, i.e. the design-bid-build model. Minn. Stat. § 161.32 (2008). In this traditional approach, the design, procurement, and construction of a MnDOT project proceeded sequentially. Bids were submitted on the basis of previously published specifications and the contract for construction awarded to the lowest responsible bidder on the project. *Id.* The design-build model does not reward the low bid *per se*. Minn. Stat. § 161.3426, subd. 1(b) (2008). A design-build proposal is first scored on technical merit by the Technical Review Committee ("TRC"). *Id.* at subd. 1(a). Then each of those technical scores is divided by its corresponding price proposal. *Id.* at subds. 1(b) and 1(d). The Commissioner can then select only the proposal of the responsive and responsible design builder with the lowest adjusted score. *Id.*

LEGAL ISSUES

I. WHEN THE COMMISSIONER OF THE MINNESOTA DEPARTMENT OF TRANSPORTATION ACTING THROUGH A TECHNICAL REVIEW COMMITTEE CONCLUDES THAT A DESIGN-BUILD PROPOSAL SUBMITTED PURSUANT TO MINN. STAT. §§ 161.3410 TO 161.3428 (2008) IS RESPONSIVE, IS THE APPLICABLE STANDARD OF JUDICIAL REVIEW WHETHER THAT AGENCY DECISION WAS ARBITRARY AND CAPRICIOUS?

The Court of Appeals held in the affirmative.

Most apposite case: *Reserve Mining Co. v. Minnesota Pollution Control Agency,* 267 N.W.2d 720, 723 (Minn. 1978).

II. IN OPPOSING FLATIRON-MANSON'S ("FLATIRON") MOTION FOR SUMMARY JUDGMENT, DID APPELLANTS FAIL TO DEMONSTRATE, THROUGH ADMISSIBLE EVIDENCE, THAT ANY MATERIAL FACTS WERE IN DISPUTE?

The Court of Appeals held in the affirmative.

Most apposite cases: *Murphy v. Country House, Inc.,* 240 N.W.2d 507, 511 (Minn. 1976); *Goeb v. Tharaldson,* 615 N.W.2d 800, 814 (Minn. 2000).

ARGUMENT

I. MINN. STAT. § 161.3426, SUBD. 1(A) (2008) AUTHORIZES THE TECHNICAL REVIEW COMMITTEE ("TRC") TO SCORE PROPOSALS FOR DESIGN-BUILD CONTRACTS AND IN SO DOING TO REJECT ANY PROPOSAL IT DEEMS NON-RESPONSIVE. IN SO SCORING PROPOSALS, THE TRC IS NOT BOUND BY THE COMMON LAW DEFINITION OF "RESPONSIVE" DEVELOPED IN LITIGATION INVOLVING DESIGN-BID-BUILD CONTRACTS.

Minn. Stat. § 161.3426, subd. 1(a) (2008) provides that technical proposals for design-build contracts are scored by the TRC and submitted to the Commissioner. As part of that scoring, the TRC is required to reject any proposal it "deems non-responsive." *Id.* The parties differ on the standard to be used by the TRC in judging responsiveness.

Continuing an argument that succeeded before neither the district court nor the court of appeals, Appellants urged this Court to construe the term "responsive" in light of judicial decisions involving public procurement via design-bid-build contracts. Appellants' Brief ("App. Br.") at 27-34.

The district court considered the requirement in Minn. Stat. § 161.3426 (2008) that a design-build contract cannot be awarded to a non-responsive proposer. Appellants' Appendix ("A. App.") at 99-101, 103. The district court concluded that Minn. Stat. § 161.3426 (2008) confers authority on the TRC 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 as responsive or non-responsive under this process is a product of the scoring methodology"). Because the design-build procedure was, as correctly viewed by the district court, statutorily created, reliance upon the common law definition of responsiveness found in the design-bid-build model was neither necessary nor appropriate. By allowing the TRC to determine responsiveness, the legislature did not anchor them to a court developed definition of that term. The district court therefore appropriately rejected Appellants' argument that the TRC's determination as to responsiveness was circumscribed by decisional law construing that concept. The district

court correctly identified, from both a procedural and a 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 whom the TRC has found to be non-responsive. *Id.* at subds. 1(b), (c), and (d).

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 33-34. In other words, he must, on his own, cross check every aspect of that proposal against every section of the Request for Proposals ("RFP") and the Instructions To Proposers ("ITP"). *Id.*

The initial flaw in this argument is that it is a red herring. The issue before this Court is not who determines responsiveness but what constitutes a responsive proposal. Petition for Review at 1. Assuming for the sake of argument that the Commissioner has to conduct an independent review of the responsiveness of a proposal does not shed any light on the standard of responsiveness that the TRC is to apply.

Next, a second, independent, *de novo* decision by the Commissioner on responsiveness diminishes, if not eliminates, the central role of the TRC. The TRC is composed of at least five individuals, one of whom is a representative of the Minnesota

Chapter of the Associated General Contractors, an industry group. Minn. Stat. § 161.3420, subd. 2 (2008). The TRC therefore brings to the scoring and to its consideration of responsiveness a broad range of talent, considerable experience, and informed judgment. It is unlikely that the legislature wished to dilute or to do away with those benefits through independent *de novo* review by the Commissioner. The proper reading of the requirements for responsiveness in Minn. Stat. § 161.3426, subds. 1(b), (c), and (d) (2008) is that they prevent the Commissioner from choosing a proposal that the TRC has rejected as non-responsive.

Although Appellants' view of the Commissioner's role in the design-build process is practically unworkable, the major flaw in this argument is that it simply misreads Minn. Stat. § 161.3426 (2008). The TRC determines whether a proposal is responsive. The Commissioner must act in accordance with that determination. 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 28-29. Judicial decisions as to the meaning of those terms grew out of litigation over "design-bid-build contracts." *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"). [1]

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 28. The statute upon which they rely provides in pertinent part that because this 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 a unique combination of "architectural or

[1] 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. Minn. Stat. § 16C.33, subd. 5(d) (2008).

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. 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 counterpart 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 did not adopt the common law definition of responsiveness urged by Appellants. *Enright v. Lehmann,* 735 N.W.2d 326, 334 (Minn. 2007) (incompatibility between earlier common law and latter adopted statute abrogates the former).

Finally, Appellants correctly observe that the requirement of responsiveness protects the integrity of contract awards by MnDOT. App. Br. at 28. This protection can exist without resort to the common law meaning of responsiveness. Appellants quite properly point out that the purposes of the responsiveness requirement include ensuring that all proposers compete by the same rules and suppressing favoritism by those who

award public contracts. App. Br. at 21. Neither of these goals becomes unachievable if a common law meaning of responsiveness is not used by the TRC.[2]

Decisions by the TRC as to whether a proposal is non-responsive must be neither arbitrary nor capricious. 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. The "arbitrary and capricious" standard is long standing and has been applied to informal agency decisions, i.e., those not the product of a contested case. *Reserve Mining Co. v. Minnesota Pollution Control Agency,* 267 N.W.2d 720, 723 (Minn. 1978); *Citizens Advocating Responsible Development v. Kandiyohi County Bd. of Comm'rs,* 713 N.W.2d 817, 832 (Minn. 2006) (a determination by county as to need for environmental impact statement); *Swanson v. City of Bloomington,* 421 N.W.2d 307, 313 (Minn. 1988) (decision by the city council denying application to subdivide residential lot). The court of appeals' use of that standard should be affirmed. [3]

---

[2] Improper, however, is Appellants' technique of linking the cost, the proposed construction time, and the technical score given Flatiron's proposal with the suggestion that the company gamed the system. App. Br. at 15-16, 26-27, and 38. First, Appellants cannot on one hand argue that summary judgment was inappropriately granted because of material fact disputes as to responsiveness and on the other treat the same facts as proven in order to label Flatiron's proposal non-responsive. Second, if the Flatiron proposal was responsive, the cost and time it proposed to reconstruct the I-35W Mississippi River Bridge have no relevance to this lawsuit. *See* Minn. Stat. § 161.3426, subd. 1 (2008).

[3] Appellants argue that unless the common law definition of responsiveness is utilized by the TRC, the committee can ignore its statutory obligations and "selectively waive compliance with stated requirements." App. Br. at 19. Such an action would certainly be deemed arbitrary and capricious by any reviewing court.

II. THE DISTRICT COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT.

In separate orders, the district court granted summary judgment to Flatiron. The first denied Appellants' request for injunctive relief; the second, their claim for declaratory relief. A. App. at 87 and 110. The Court of Appeals affirmed. Appellants seek reversal, arguing to this Court that Flatiron's proposal was non-responsive to the RFP "in at least two major respects," i.e., Flatiron proposed to work outside of the permissible right-of-way and proposed to build a bridge using concrete box girders with one less web than the RFP required webs. App. Br. at 46. We examine each in turn.[4]

As a preliminary matter, however, we address Appellants' argument that in affirming the district court's grant of summary judgment, the court of appeals applied an incorrect standard, i.e., summary judgment was appropriate because Appellants did not produce substantial evidence in support of their position. App. Br. at 42. The appellate court made this mistake, Appellants argue, by improperly deferring to the TRC's determination that Flatiron's proposal was responsive. *Id.* at 42-44. This is an incorrect reading of the court of appeals' decision.

Although that court noted judicial deference is due to an agency decision involving the agency's special expertise, that observation did not inform its opinion. Appellants' Addendum ("A. Add.") at 10-13. The court of appeals concluded, without any deference to the TRC, that disputed facts did not exist in either of the right-of-way or box girder

[4] The revelations promised by "in at least two major respects" come to naught as the reader progresses through Appellants' arguments. They advance no other reason why Flatiron's proposal was non-responsive.

issues. In any event, as the record shows and as we demonstrate below, whichever of the two definitions of responsiveness applies and using the correct standard of review for summary judgment motions, i.e., are there material facts in dispute, the court of appeals decision on Flatiron's summary judgment motion should be affirmed.

A. The Law To Be Applied.

This Court's review of a summary judgment motion is *de novo* and asks two questions. Are there material facts in dispute? Did the district court commit an error of law? *City of Morris v. Sax Investments, Inc.,* 749 N.W.2d 1, 5 (Minn. 2008); *Stringer v. Minnesota Vikings Football Club, LLC,* 705 N.W.2d 746, 754 (Minn. 2005). Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that either party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03. When a summary judgment motion is brought, the court's view of the facts must be that which most favors the non-moving party. *Grondahl v. Bulluck,* 318 N.W.2d 240, 242 (Minn. 1982). Nonetheless, in the face of a properly supported motion for summary judgment, the non-moving party must present facts that show a dispute over material facts exists. *W.J.L. v. Bugge,* 573 N.W.2d 677, 680 (Minn. 1998).

Equally as important is the burden on the non-moving party of demonstrating the existence of a material fact dispute through admissible evidence. *Murphy v. Country House, Inc.*, 307 Minn. 344, 349, 240 N.W.2d 507, 511 (1976). If a non-moving party must demonstrate a disputed material fact through expert testimony and fails to do so,

summary judgment may appropriately be granted. *Osborne v. Twin Town Bowl, Inc.*, 749 N.W.2d 367, 386 (cases cited therein) (Gildea, J., dissenting); *Gross v. Victoria Station Farms, Inc.*, 578 N.W.2d 757, 762 (Minn. 1998).

Finally, for an expert to be considered as such, he or she must be properly qualified. Simply put, expert testimony cannot be so designated unless it comes from an expert. Minn. R. Evid. 702; *Goeb v. Tharaldson,* 615 N.W.2d 800, 814 (Minn. 2000). How then do Appellants' challenges to the district court's grant of summary judgment fare when measured against these standards? They cannot meet them. Summary judgment was appropriately granted. *Clark v. Pawlenty,* 755 N.W.2d 293, 309 (Minn. 2008) (when affiant was not properly presented as expert, testimony was inadequate). We turn now to the two issues Appellants claim contain disputed material facts.

B. Work Within The Right-Of-Way.

Appellants argue that Flatiron's proposal violated the RFP and the ITP because it proposed work that required additional right-of-way and was to occur "significantly outside" of boundaries on the Right-of-Way Work ("ROW") Map. App. Br. at 46.[5]

First, Appellants argue that the temporary easement designation on the ROW Map of a portion of 2nd Street neither authorized nor allowed proposers to lower that roadway. App. Br. at 48. This is not accurate. Chiglo Third Aff. at para. 9, Appellants'

---

[5] The Right-of-Way Work Map is Exhibit A to the RFP, Book 2. Appellants' Supplemental Record at 165. Because of its size, the map is best viewed online. http://www.dot.state.mn.us/designbuild/35Wproject.html and is found in Sec. 7- ROW as an exhibit.

Supplemental Record ("S.R.") at 428-429; Teater Aff., MnDOT's Supplemental Record ("MnDOT S.R.") at 1-2. The ROW 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, S.R. at 426-427. As such, it would be taken and known in the industry to be taken by Commissioner's orders. *Id.*; Minn. Stat. § 161.16 (2008) (authority for 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, no later than December 1, 2010. Teater Aff. at para. 2-3, MnDOT S.R. at 1-2. 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, S.R. at 426-27.

While it was in the Commissioner's possession, 2nd Street could be lowered. *Id.;* S.R. at 218-219; 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, S.R. at 426-27. Not only did the ROW 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-1, MnDOT S.R. at 5.

Appellants argue that MnDOT's Right-of-Way Manual did not allow the lowering of 2nd Street. App. Br. at 48. This is an incorrect reading of that document. Teater Aff.

at para. 3, MnDOT S.R. at 2; Chiglo Third Aff. at para. 7, S.R. at 426-427. Appellants seek to conflate 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. The portion of the manual upon which Appellants rely 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 through a temporary easement. *Id.*

Next, Appellants demonstrate that Flatiron's proposal for 2nd Street involved land beyond the eastern boundary of the temporary easement. App. Br. at 48 and n. 188. This was not non-responsive. 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, S. R. at 425. In any event, the design that Flatiron proposed to implement on 2nd Street roadway outside the temporary easement's eastern boundary and for which it was scored by the TRC was eventually built within the 2nd Street temporary easement set out on the ROW Map. Chiglo Third Aff. at para. 6, S.R. at 426. Contrary to Appellants' claim, Flatiron therefore realized no competitive advantage through a purported violation of the RFP.

Next, Appellants suggest that Flatiron was allowed to so use the temporary easement in 2nd Street while other proposers were told that "they *could not* work on 2nd Street outside of the right of way." App. Br. at 10 (emphasis in original). That argument has mistakenly been presented to this Court.

In granting Flatiron's motion for summary judgment on the right-of-way work issue, the court of appeals did not address questions as to what other proposers asked and were told regarding construction on 2nd Street outside of the right-of-way. A. Add. at 11-12. Moreover, the district court's opinion is similarly silent on this issue. A. App. at 94-95, 119. The appellate court did not opine on whether material facts were in dispute regarding communications between proposers other than Flatiron and MnDOT as to work outside the 2nd Street right-of-way. Whether Flatiron's proposal to work outside of the right-of-way limits set in the RFP and whether Flatiron proposed additional capacity of right-of-way in violation of Section 4.3.3.5.1 of the ITP were decided on the trial and appellate court's interpretation of those documents. As did those courts, this Court need not decide whether material factual issues exist as to communication between Jon Chiglo, Richard Fahland, and Eric Sellman.[6]

Putting aside our discussion of undisputed material facts that support the award of summary judgment on the right-of-way issue, we examine Appellants' brief for its identification for disputed material facts on that point. We look in vain. Although claiming that summary judgment was improperly granted because the material facts are in dispute, Appellants reveal none. At best, they point out documents, affidavits, and

---

[6] The Fahland and Sellman affidavits contain two evidentiary problems. First, neither affidavit establishes that the affiant is competent to testify about the communications. Second, without knowing whether either Sellman or Fahland was present at the conversations, that testimony is either single or double hearsay. Such inadmissible testimony should not be considered on a summary judgment motion. *Murphy,* 307 Minn. at 349, 240 N.W.2d at 511.

deposition testimony that are supposed to contain the required disputes. App. Br. at 46-47. They contend that these materials "show that there are material facts in dispute rendering summary judgment inappropriate." *Id.* at 47. No such facts are thereafter identified. *Id.* at 47-50.

Instead, what Appellants have proffered is as follows:

First is an argument that if the RFP and the ITPR are interpreted as they believe they should be, Flatiron's proposal was for work outside of the right-of-way, was non-responsive, and was the basis for the score it received from the TRC. *Id.* at 48. The district court and court of appeals rejected that interpretation. Appellants have not pointed out any disputed material facts overlooked by those tribunals in so holding. Appellants have not identified any disputed material facts that would undermine those decisions.

Second, Appellants note a conflict between the affidavits of Sellman and Fahland on one hand and of Chiglo on the other as to whether representatives from Ames/Lunda and C.S. McCrossan were told by MnDOT that they could not work outside of the right-of-way. *Id.* at 49. That is not a dispute about a material fact. Even if the district court assumed that Ames/Lunda and C.S. McCrossan received such instructions, the court could have concluded that Flatiron's proposal did not violate the right-of-way provisions of either the RFP or the ITP. More important, however, Judge Cleary's decision did not

rest on a conclusion that these Ames/Lunda, C.S. McCrossan, and MnDOT right-of-way discussions were undisputed facts.[7]

In summary then, MnDOT has demonstrated that its interpretations of the right-of-way instructions in both the ITP and RFP are reasonable. The district court agreed. In this appeal, Appellants have not identified legally sufficient evidence of disputed material facts as to the right-of-way work question. Summary judgment was correctly granted.

C. The Three Web Requirement.

The second material violation that Appellants assign to Flatiron's proposal is that its concrete box girder design does not have the RFP required minimum of three webs. App. Br. at 46-47. Section 13.3.3.1.2 of the RFP gave proposers options as to the superstructure they could choose for their bridge designs. S.R. at 176. The choices 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 argued that Flatiron proposed and was improperly allowed to use a design with only two webs for each

---

[7] The district court did observe that these proposers could not rely upon the oral communications given Section 3.5 of the ITP (oral requests for clarification of the RFP not allowed). A. App. at 94 and n.9. Citing *Edward Thompson Co. v. Schroeder,* 131 Minn. 125, 127-28, 154 N.W. 792, 793 (1915), Appellants argue that MnDOT cannot be protected by this provision. App. Br. at 50. That case is inapposite. Unlike the plaintiff in *Schroeder*, MnDOT has not sought to disclaim responsibility for a false statement. At best, it has contested whether such statements were made.

concrete box girder. App. Br. at 46. Appellants assert that whether Flatiron violated the RFP by proposing an improper design depends upon facts that are in dispute. *Id.* at 47.

Appellants interpret the RFP as requiring three webs for each box girder underlying the bridge roadway. App. Br. at 46-47. Contrary to that assertion, Clifford Freyermuth, Kevin Western, and Alan Phipps provided competent convincing testimony that the RFP did not require three webs for each concrete box girder and that Flatiron's design has four webs for each roadway or direction of traffic. Freyermuth, Western, and Phipps Affs., MnDOT S.R. at 15-30.

What then do Appellants rely upon as the basis for their claim that material facts are in dispute on the three web requirement? Four sources are named: "the structural requirements in the RFP; Flatiron's proposal; deposition testimony from Tom Strybicki, [sic] and affidavits from Randy Reiner." App. Br. at 47. The first two documents create no material fact dispute, setting out as they do, the RFP's requirement for a concrete box design and Flatiron's proposal. Likewise, the quoted portion of Strybicki's testimony presents no material factual dispute. Indeed, when questioned as to what the RFP meant when it required a minimum of three webs for concrete box designs, Strybicki interpreted it as meaning "that a concrete box design needs to provide at least three webs in each direction of traffic." S.R. at 262-63; p. 192, line 14-p. 193, line 3. Not surprisingly, he then agreed with Appellants' counsel that "an individual box [girder] does not necessarily have to have three webs". *Id.* at 263, p. 193, lines 8-15.

What then remains as the source of disputed material facts? It is the testimony of Randy Reiner set out in three affidavits. S.R. at 410, 414, and 332. The flaw in this testimony is that it is not competent evidence. Reiner's qualifications do not reveal that he has designed a single bridge. This record is devoid of any experience Reiner has in managing the construction of a bridge. Reiner has no apparent experience with or education in, not only bridge design and construction, but also with the post-tensioned concrete box design proposed by Flatiron. None of his affidavits establishes a connection between Reiner's undergraduate degree in civil and environmental engineering or his registration as a professional engineer and the knowledge necessary to opine as he does on the meaning of the RFP's requirement that a concrete box design must have a minimum of three webs. His testimony does not qualify as expert testimony on that issue. Minn. R. Evid. 702. Lacking as he did, "sufficient scientific knowledge" and "practical experience", Reiner was neither competent nor qualified to give expert testimony on the web requirements of the RFP. *Teffeteller v. Univ. of Minn.*, 645 Minn. 420, 427 (Minn. 2002).

In its August 26, 2008, order granting Flatiron's motion for summary judgment on the claim for injunctive relief, the district court rejected Appellants' arguments regarding the three web requirement, observing their interpretation that each box girder have three webs "defies both the plain language of the RFP as well as commonly understood

engineering concepts." A. App. at 96. The trial court expressly rejected an argument, based on Reiner's contract interpretation skills, that each concrete box girder needed three webs. *Id.* at n. 15. The court found "this conclusory statement . . . insufficient to persuade [it] . . . that Section 13.3.3.1.2 of the RFP meant something other than what it said." *Id.* Likewise, the district court's adoption of Flatiron's view of "commonly understood engineering concepts" regarding web design is a rejection of Reiner's contrary testimony on that subject.[8] Given Reiner's lack of expertise, the trial court correctly concluded that no material facts were in dispute as to the meaning of the three web requirement in the RFP. *Teffeteller,* 645 N.W.2d at 427; *Goeb v. Tharaldson,* 615 N.W.2d at 814. Summary judgment was appropriately granted on that issue.

---

[8] The district court's evidentiary rulings are reviewed against an abuse of discretion standard. If the district court did not make such a ruling, review by this Court is *de novo. Fairview Hosp. & Health Care Servs. v. St. Paul Fire & Marine Ins. Co.,* 535 N.W.2d 337, 341 (Minn. 1995).

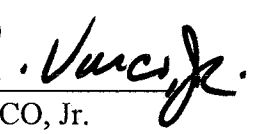
CONCLUSION

For all the reasons set out above, the Court of Appeals' decision should be affirmed.

Dated: December 21 - 2009

Respectfully submitted,

LORI SWANSON
Attorney General
State of Minnesota



RICHARD L. VARCO, Jr.
Assistant Attorney General
Attorney Reg. No. 0112471

445 Minnesota Street, Suite 1800
St. Paul, MN 55101-2134

(651) 757-1363 (Voice)
(651) 282-2525 (TTY)

ATTORNEYS FOR MINNESOTA
DEPARTMENT OF TRANSPORTATION