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NO. A11-1271

State of Minnesota
In Court of Appeals

Rochon Corp.,

Appellant,

v.

City of St. Paul,

Respondent.

APPELLANT'S BRIEF, ADDENDUM AND APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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STATEMENT OF THE ISSUES

1. When competitively bidding a contract under the Uniform Municipal Contracting Law (Minn. Stat. § 471.345), does a city have the discretion to violate the common law definition of responsiveness or to give the apparent low bidder a substantial advantage not enjoyed by other bidders if the city allows that bidder to increase its bid price after the public bid opening by an amount that still leaves it as the lowest bidder?

Appellant moved for summary judgment seeking a declaration that Respondent's contract for the Lofts at Farmers Market project was void because Respondent had, among other things, violated the Uniform Municipal Contracting Law and several Minnesota Supreme Court rulings by allowing the apparent low bidder to increase its bid price after the public bid opening. (App. 34; App. 38). The district court granted Appellant's motion in part, ruling that while the City violated its own stated bidding rules by allowing the bidder to amend its bid, it did not violate the common law of responsiveness or give the low bidder an advantage not enjoyed by the other bidders by doing so. (Add. 11-12). Appellant filed its Notice of Appeal on July 14, 2011. (App. 200).

Apposite Authority:

Foley Bros., Inc. v. Marshall, 266 Minn. 259, 123 N.W.2d 387 (1963)

Coller v. City of St. Paul, 223 Minn. 376, 26 N.W.2d 835 (1947)

Lovering-Johnson, Inc. v. City of Prior Lake, 558 N.W.2d 499 (Minn. Ct. App. 1997)

2. After determining that a city had violated its own public contracting ordinance and the Uniform Municipal Contracting Law (Minn. Stat. § 471.345) in the letting of a public contract, did the district court err by refusing to declare that illegal contract void?

Appellant moved for summary judgment seeking a declaration that Respondent's contract for the Lofts at Farmers Market project was void because Respondent had, among other things, violated the Uniform Municipal Contracting Law and several Minnesota Supreme Court rulings by allowing the apparent low bidder to increase its bid price after the public bid opening. (App. 34; App. 38). The district court granted Appellant's motion in part by declaring that the award violated the law, but the court declined to declare the contract void even though it found that allowing the bidder to modify its bid after the public bid opening was illegal. (Add. 12, 14-16). Appellant filed its Notice of Appeal on July 14, 2011. (App. 200).

Apposite Authority:

Gale v. City of St. Paul, 255 Minn. 108, 96 N.W.2d 377 (1959)

Griswold v. Ramsey County, 242 Minn. 529, 65 N.W.2d 647 (1954)

Coller v. City of St. Paul, 223 Minn. 376, 26 N.W.2d 835 (1947)

STATEMENT OF THE CASE

The City of St. Paul (“the City”) solicited bids for construction of the Lofts at Farmers Market project in downtown St. Paul (“the Project”). The City estimated this Project would cost roughly \$8 million, and so was subject to the Uniform Municipal Contracting Law (Minn. Stat. § 471.345) and St. Paul Ordinance 82.02 (requiring competitive bidding). The Project’s solicitation documents specified that the contract would be awarded to the lowest responsible, responsive bidder whose bid did not exceed available funds.

The City publicly opened the bids on November 22, 2010. Shaw-Lundquist Associates’ (“Shaw”) bid was the apparent lowest responsible, responsive bidder, with a bid of \$7,333,000. Rochon Corp. (“Rochon”) was the second lowest responsible, responsive bidder. The day after the bids were opened, Shaw asked to withdraw its bid because it claimed to have made a material error in its bid and that its bid price should have been \$8,041,411. The day after the bid opening, Shaw submitted documents to the City purporting to show that Shaw had entered \$68,800 in its bid spreadsheet instead of the intended \$688,000, an error of \$619,200. The City decided to allow Shaw to increase its bid to \$8,041,411. That increased Shaw’s bid by \$708,411, which is \$89,211 more than the alleged bidding error. The City awarded the Project’s contract to Shaw on December 15, 2010.

Rochon and two other bidders on the Project jointly protested the contract award on December 21, 2010. The City denied the protest on December 27, 2010. Rochon commenced this lawsuit against the City on January 6, 2011, seeking injunctive and declaratory relief.

Rochon immediately moved for a temporary restraining order and a temporary injunction. The district court heard argument on Rochon's injunctive relief motion on January 11, 2010. Rochon argued that the Project should be stopped because the City had violated the Uniform Municipal Contracting Law and St. Paul Ordinance 82.02 by allowing Shaw to make a material change to its bid, *i.e.* an increase in price, after the bids had been opened. The City argued that the modification to Shaw's bid was not material because it did not change which bidder was the lowest and that the balance of harms weighed in the City's favor. On January 21, 2011, the district court issued an order in which the court noted that Rochon was likely to prevail on the merits but denied Rochon's motion for injunctive relief on balance of harms grounds. The harm noted by the Court was that the City might lose federal funding for the Project unless it was allowed to proceed with the illegally entered contract.

On or about January 24, 2011, the City issued a Notice to Proceed to Shaw. Construction of the Project commenced and is scheduled to be completed in January 2012.

Rochon then moved for summary judgment on its declaratory relief claim. The district court heard argument on March 30, 2011. Notably, the City did not

argue that any facts were in dispute – because they were not. On June 23, 2011, the district court granted in part and denied in part Rochon’s motion for summary judgment. The court held that the City had violated public procurement law by allowing Shaw to modify its bid after the bid opening and awarded Rochon its bid preparation costs, but the court refused to declare the contract void.

Construction on the Project continues. This appeal follows.

STATEMENT OF THE FACTS

I. BIDDING ON THE PROJECT

On or about November 3, 2010, the City's Housing and Redevelopment Authority ("HRA") solicited sealed bids for the construction of the Project. (App. 3 at ¶ 4; *see* App. 30 at ¶ 5). The bid advertisement disclosed that the City's estimated price for the Project was approximately \$7.5 million. (*See* App. 115 at p. 19, lines 6 through 19). The Project's Instructions to Bidders stated that "A bid may not be *modified*, withdrawn, or canceled by the Bidder for a period of sixty (60) days following the time and date designated for the receipt of bids, and each Bidder so agrees in submitting a bid." (App. 3 at ¶ 6 (quoting App. 16 at para. 3.10.1 (emphasis added))); *see* App. 30 at ¶ 6).

The City received and opened six bids for the Project at the public bid opening on November 22, 2010. (App. 4 at ¶8; *see* App. 30 at ¶ 5). The results of the bid opening are summarized in the table below.

Bidder	Lump Sum Bid Amount
Shaw-Lundquist Associates Inc.	\$7,333,000.00
Doran Construction	\$8,298,000.00
Sand Companies, Inc.	\$8,394,983.00
Rochon Corp.	\$8,725,000.00
Stahl Construction Co.	\$8,900,000.00
Morcon Construction Co., Inc.	\$9,652,568.00

(App. 4 at ¶8; *see* App. 30 at ¶ 5). Shaw-Lundquist was the apparent low-bidder. (App. 137 at ¶ 2). The City determined that the next two lowest bids from Doran Construction and Sand Companies, Inc. were non-responsive because they

allegedly failed to include a required form regarding participation of women and minority-owned businesses. (*Id.* at ¶ 4). Rochon's bid was the second lowest responsive bid received by the City. (App. 5 at ¶ 13; *see* App. 31 at ¶ 11).

Rochon expended money and effort assembling its bid for the Project. (*See* App. 4 at ¶ 7; Add. 18 at Finding No. 6). Rochon estimated that it spent \$33,652.00 to prepare and submit its bid for the Project. (App. 197 at ¶ 10).

II. THE PROJECT'S BUDGET AND FINANCING

The City's budget for construction of the Project was \$7.6 million with an additional \$700,000 contingency fund. (App. 96 at Answer to Interrogatory No. 6; App. 126 at p. 18, lines 13 through 19). The City could not precisely define an upper bound on its construction budget because it could use some of the contingency fund for the initial construction contract. (*See id.* at p. 19, line 8 through p. 20, line 3). The City could not apply all of the contingency fund to the construction contract because it wanted to retain at least 4-5% of the contract price as a reserve to cover costs that might arise during construction. (*See id.*). Assuming a 4% contingency reserve on a \$7.6 million contract, that means that the City could apply roughly \$400,000 of its contingency fund to the construction budget. (*See id.*). Therefore, the highest construction price the City could afford was approximately \$8 million. (*See id.*).

The City determined the budget for the Project based on the amount of debt that could be serviced by the expected cash flow from rents on the Project. (*See* App. 124-25 at p. 13, line 22 through p. 15, line 13 and App. 126-27 at p. 20, line

4 through p. 22, line 24). But the projected rental income was insufficient to cover the expected cost to finance the construction, so the City had to subsidize the Project using tax increment funding. (*See* App. 124-25 at p. 13, line 22 through p. 15, line 13). And even then, the Project was only feasible if the bulk of its financing was through Build America Bonds. (*See* App. 139 at ¶ 3; App. 126-27 at p. 20, line 4 through p. 22, line 24). The Build America Bonds (“BAB”) program was part of the American Recovery and Reinvestment Act that allowed public entities to issue bonds for construction projects. (*See* App. 124 at p. 13, lines 3 through 18). The benefit to using BAB financing was that the U.S. Treasury would repay 35% of the interest paid on the bonds for use on the financed project, effectively increasing that amount of capital available for the financed project. (*See id.*). The BAB program was temporary, and it expired on December 31, 2010. (*See id.*; App. 139 at ¶ 2).

III. SHAW-LUNDQUIST’S REQUEST TO WITHDRAW ITS BID

On November 23, 2010, Shaw faxed a letter to Susan Feuerherm, the City’s buyer for the Project stating that “we have discovered a mathematical error in our bid spreadsheet. Our correct bid total should be \$8,041,411. We hereby request that our bid be withdrawn.” (App. 141; *see* App. 137 at ¶ 3).

Ms. Feuerherm notified Diane Nordquist, the HRA’s project manager for the Project, of Shaw’s request to withdraw its bid. (App. 137 at ¶ 6; App. 115 at p. 19, line 20 through p. 20, line 14). Ms. Nordquist asked if it was possible to hold Shaw to its bid or to proceed against Shaw’s bid bond. (App. 137 at ¶ 6).

After consulting with the City Attorney's office, Ms. Feuerherm advised HRA that the City would not hold Shaw to its bid or proceed against its bid bond. (App. 115-16 at p. 21, line 20 through p. 22, line 13). Ms. Feuerherm then called Shaw and spoke with Mr. Thomas Meyers, the Shaw vice-president who sent her the letter requesting to withdraw the bid, to discuss the reason why Shaw asked to withdraw its bid. (App. 138 at ¶ 7; App. 116 at p. 22, line 14 through p. 23, line 19). Mr. Meyer told Ms. Feuerherm that the error in Shaw's bid resulted from incorrectly entering a bid for Heating, Ventilation, and Air-Conditioning ("HVAC") into Shaw's bid spreadsheet. (App. 138 ¶ 7; App. 116 at p. 23, line 22 through p. 24, line 5). Mr. Meyers did not give any other reason why Shaw's bid should be withdrawn; the sole justification he provided was the erroneous entry of the HVAC bid. (See App. 116 at p. 24, lines 6 through 17). Ms. Feuerherm then requested that Shaw provide documents to support its allegation that it had made a bid entry error. (App. 138 at ¶ 7, App. 116 at p. 24, lines 18-25).

Shaw faxed several documents to Ms. Feuerherm shortly thereafter. (See App. 138 at ¶ 7). The fax coversheet said, "HVAC # should be \$688,000 not \$68,800." (*Id.*; see also App. 142). The other documents sent by Shaw to Ms. Feuerherm appear to a bid from Bostrom Sheet Metal for "Division 23 – HVAC" in the amount of \$688,000.00, (see App. 143), and a bid spreadsheet that Shaw had prepared, (see App. 144-47). The third page of Shaw's spreadsheet shows a circled entry for "Div. 23 – HVAC" for \$68,8000 with an annotation saying "error." (See App. 146). Ms. Feuerherm received no other documents or any

other communications from Shaw regarding the alleged error in its bid. (*See* App. 116-17 at p. 25, line 1 through p. 26, line 12).

Note that Shaw claimed to the City that its HVAC number should have been \$688,000, but that it had entered only \$68,800 on its bid sheets. (*See* App. 92 at Response to Request for Admission No. 4). Subtracting \$68,800 from \$688,000 shows that Shaw's alleged error caused its bid to be \$619,200 lower than Shaw alleges it intended. (*See id.* at Response to Request for Admission No. 5; App. 117 at p. 26, line 22 through p. 27, line 5; App. 119 at p. 34, lines 6 through 8; App. 130 at p. 36, line 23 through p. 37, line 23).

IV. MODIFICATION OF SHAW'S BID AFTER THE BID OPENING

On November 23, 2010, after Shaw sent the City its request to withdraw its bid, several City officials met to decide what to do with the Project. (*See* App. 129 at p. 32, line 21 through p. 34, line 25). Diane Nordquist attended the meetings, as did Luz Frias, the director of the Department of Human Rights and Equal Employment Opportunity (the department that oversees the City's Contract and Analysis Services group), and Erin Dady, Mayor Coleman's Chief of Staff. (*See id.*). Cecile Bedor, the Director of the City's Department of Planning and Economic Development and the Executive Director of the HRA, was also involved in those discussions. (*See* App. 135 at p. 55, lines 3 through 24).

The City officials meeting about Shaw's request to withdraw its bid discussed what effect Shaw's withdrawal would have on the Project. (*See* App. 129-30 at p. 32, line 21 through p. 34, line 25). Diane Nordquist determined that

Rochon's bid, the lowest responsive bid after Shaw's, exceeded the Project's budget. (*See* App. 140 at ¶ 4). The group then decided to ask Shaw if it would not withdraw its bid if the City allowed Shaw to increase its bid from \$7,333,000 to \$8,041,411. (*See* App. 130 at p. 34, line 7 through p. 36, line 10; *see also* App. 31 at ¶ 10; App. 92 at Response to Request for Admission No. 6). The group made that decision with the advice of counsel and knowing that allowing such a modification after the public bid opening was, at a minimum, unusual. (*See* App. 130 at p. 34, line 7 through p. 36, line 20).

Director Frias then ordered Ms. Feuerherm to call Mr. Meyers and ask him if Shaw would do the Project for \$8,041,411. (*See* App. 138 at ¶ 10; App. 118 at p. 32, line 4 through p. 33, line 11). Ms. Feuerherm has been the City's construction buyer for the last 23 years. (App. 112 at p. 6, lines 4 through 11). In that time, she has done hundreds, if not thousands, of sealed competitive bid procurements for the City. (*See id.* at p. 8, line 23 through p. 9, line 7). This was the first time that she had ever seen the City allow a bidder to change its bid after the public bid opening. (*See* App. 114 at p. 15, lines 16 through 19).

Ms. Feuerherm called Mr. Meyers and asked if Shaw would do the Project for \$8,041,411. (*See* App. 118 at p. 32, line 4 through p. 33, line 11). Mr. Meyers responded, "Yes, that they would take the bid for that amount." (*Id.* at p. 32, line 24 through p. 33, line 1). Ms. Feuerherm then sent an email to Mr. Meyers confirming that Shaw had agreed to the City's offer of \$8,041,411. (*See* App. 109).

Note that the City allowed Shaw to increase its bid by \$708,411,¹ but the alleged error claimed by Shaw was only \$619,200.² That means that the City allowed Shaw to increase its bid by \$89,211 more than can be explained by Shaw's alleged HVAC bid entry error.³ Neither Ms. Nordquist nor Ms. Feuerherm were aware of any justification for that additional \$89,211 when the City allowed Shaw to increase its bid after the public bid opening. (*See* App. 118-19 at p. 33, line 22 through p. 34, line 17; App. 130 at p. 36, line 23 through p. 37, line 23).

V. EVENTS AFTER THE BID-LETTING

A. Funding Approval and Contract Award

When the City allowed Shaw to increase its bid, the HRA had not yet issued any bonds for the Project. (*See* App. 133-34 at p. 46, line 13 through p. 52, line 10). HRA did not receive final approval to issue any bonds for the Project until the December 2, 2010 meeting of the HRA Board of Commissioners. (*See id.*). When Cecile Bedor presented the resolutions requesting authority to issue bonds for the Project to the HRA Board, she did not mention that Shaw had requested to withdraw its bid and that the City had allowed Shaw to increase its

¹ \$8,041,411 (Shaw's increased bid) minus \$7,333,000 (Shaw's original bid) is \$708,411.

² \$688,000 (Shaw's alleged "correct" HVAC number) minus \$68,800 (the number Shaw alleges it entered on its bid spreadsheet) is \$619,200.

³ \$708,411 (increase to Shaw's bid allowed by the City) minus \$619,200 (the amount of the error alleged by Shaw) is \$89,211.

bid after the public bid opening, nor were those facts presented in any of the documents submitted in support of the resolutions. (*See* Aff. of Jeffrey Wieland Supporting Plaintiff's Motion to Compel Deposition of Cecile Bedor at ¶¶ 17, 24, 30). The HRA Board granted approval to HRA to issue up to \$9 million in bonds for the Project. (App. 92 at Response to Request for Admission No. 7.) The City awarded the contract for the Project to Shaw on December 15, 2010, for a base amount of \$8,041,411 ("the Contract"). (*See* App. 4 at ¶ 11; App. 31 at ¶ 10).

B. Administrative Protest

On December 21, 2010, Rochon and two other bidders on the Project jointly protested the award of the Project to Shaw at the increased price. (App. 5 at ¶ 14; *see* App. 30 at ¶ 5). The City denied the protest on December 27, 2010. (App. 23; App. 5 at ¶ 15; *see* App. 31 at ¶ 12).

C. Temporary Restraining Order and Temporary Injunction Motion

Rochon commenced this lawsuit on January 6, 2011, and immediately moved for a temporary restraining order or a temporary injunction. (*See* App. 1 and Plaintiff's Notice of Motion and Motion for TRO). The injunctive relief motion hearing was held on January 11, 2011, and the Court issued an order denying Rochon's motion for a temporary restraining order and a temporary injunction on January 21, 2011. (*See* Add. 17). The district court denied injunctive relief even though it found that "Rochon is likely to succeed on the merits." (Add. 26).

After the district court denied injunctive relief to Rochon, the City issued a Notice to Proceed for the Project on January 24, 2011. (*See* App. 186). Construction is not scheduled to be complete until mid-January 2012. (App. 128 at p. 27, line 16 through p. 29, line 16).

D. Discovery

Plaintiff conducted extensive discovery to develop the factual record in this case. Rochon served the City with written discovery including requests for admissions, interrogatories, and requests for production of documents. (*See* App. 89). Rochon deposed Susan Feuerherm and Diane Nordquist. (*See* App. 110; App. 121).

Rochon sought to depose Shaw, but Shaw refused to produce witnesses and documents. (*See* App. 187-94). Shaw scheduled a motion to quash subpoena and Rochon scheduled a motion to compel deposition of Shaw for March 30, 2011. The parties reached a negotiated agreement, and the Court signed a Stipulated Order allowing Rochon to conduct limited discovery from Shaw. (*See* Stipulated Order, dated April 8, 2011).

Rochon also sought to depose Cecile Bedor, the Executive Director of the HRA. (*See* Aff. of Jeffrey Wieland Supporting Plaintiff's Motion to Compel Deposition of Cecile Bedor at Ex. E.) The City refused to produce Ms. Bedor for deposition upon oral examination. (*See id.* at Ex. F). The City filed a motion for a protective order, and Rochon filed a motion to compel the deposition of Cecile Bedor. Those motions were heard on March 30, 2011. The Court granted

Rochon's motion, but limited Rochon's permitted scope of inquiry. (*See* Order, dated April 6, 2011).

E. Summary Judgment Motion

On March 30, 2011, Rochon moved for summary judgment, seeking a declaration that the City had violated public procurement law and that the Contract was void as a result. (*See* App. 34; App. 38). The City did not claim there were any genuine issues of material fact that would preclude summary judgment. (*See* App. 59). In fact, during the hearing, the court specifically asked the City if there were any genuine issues of material fact in dispute. Counsel for the City agreed that the dispute was legal and not "factually driven at this point." (Hearing Transcript at p. 21, line 20 through p. 22, line 6).

The district court issued its ruling on the summary judgment motion on June 23, 2011. (*See* Add. 2-3). The court granted Rochon's motion in part and denied it in part. The court declared that the City had violated public bidding law and awarded Rochon its uncontested bid preparation costs. (Add. 3). But the court refused to declare the City's Contract void. (*Id.*).

Rochon filed notice of this appeal on July 14, 2011. (App. 200).

ARGUMENT

I. STANDARD OF REVIEW

This is an appeal from a declaratory judgment rendered from undisputed facts. On appeal from a declaratory judgment, the Court of Appeals applies a clearly erroneous standard to the lower court's factual findings, but reviews questions of law *de novo*. *Lovering-Johnson, Inc. v. City of Prior Lake*, 558 N.W.2d 499, 502 (Minn. Ct. App. 1997). When the material facts are undisputed, as here, the district court's application of the law is not entitled to deference. *Id.*; *see also Hubred v. Control Data Corp.*, 442 N.W.2d 308, 310 (Minn. 1989) ("The parties agree the material facts are not in dispute and the only questions before us are questions of law. Thus, no deference need be given to the decisions below.").

The issues before the Court in this appeal are legal, not factual. It is undisputed that the City allowed Shaw to substantially increase its bid price after the public bid opening. Whether an increase to a bid's price after the public bid opening is a material change is a legal issue. Similarly, it is undisputed that the City did not comply with competitive bidding law when it allowed Shaw to increase its bid after the public bid opening. Whether the City's failure to comply with competitive bidding law rendered the Contract void is also a legal issue.

The district court's denial in part of Rochon's motion for declaratory relief should be reversed and the Contract should be declared void. The district court erred, as a matter of law, because controlling precedent shows that the district

court was required to declare the Contract void once it found that the City had not complied with competitive bidding law.

II. THE DISTRICT COURT ERRED BY FINDING THAT A CHANGE TO THE LOWEST BIDDER'S PRICE IS NOT A MATERIAL CHANGE PROVIDED THAT BID REMAINS THE LOWEST RECEIVED.

The district court correctly found that the City violated competitive bidding law in this procurement. *See* Add. 3. The court reasoned that the City's Instructions to Bidders prohibited changes to bids. *See* Add. 4 (citing Instructions to Bidders section 3.10.1 (App. 16)). When the City allowed Shaw to modify its bid, the City violated its stated procedures, and the court consequently held that the City had violated competitive bidding law. "Once a public authority elects a method to use in a competitive-bidding process, that method must be followed unless it has been seasonably abandoned." Add. 9 (citing *Byrd v. Indep. Sch. Dist. No. 194*, 494 N.W.2d 226, 231 (Minn. App. 1993)).

But then the district court analyzed whether the change to Shaw's bid price after the bid opening was a material change that is prohibited under Minnesota Supreme Court precedent regarding competitive bidding. *See* Add. 10-11. The district court erroneously determined that the change was not material because it did not give Shaw a substantial advantage. Add. 11 ("In this case, Shaw was able to modify its bid after the bids were opened, but it had no substantial advantage over its competitors because to this date (and even with the modification) it is the lowest responsible bidder.") That reasoning is wrong and dangerous because it

implies that public bodies may permit apparent lowest responsible and responsive bidders to modify their bid prices after the public bid opening by increasing their price as long as it is one dollar less than the next lowest bid. That would open the “floodgates” to a tsunami of potential for fraud and collusion. This court should correct the district court’s error and explicitly hold that changes to a bid price after the bid opening are not permissible, even if that change does not affect which bid is the lowest.

A. Material changes to bids are not allowed under Minnesota law.

In a landmark case involving the City of St. Paul, the Minnesota Supreme Court defined the boundaries of discretion in public competitive bidding. *See Coller v. St. Paul*, 26 N.W.2d 835, 840 (Minn. 1947). The *Coller* court held that once bids are opened, public officials do not have the authority to make *material* changes to any bid. *See id.* at 841.

It is well established law that any matters involving the “substance of a competitive bid, such as those which may affect the price, quality or quantity, or the manner of performance” are material and cannot be changed.⁴ *Foley Bros., Inc. v. Marshall*, 123 N.W.2d 387, 390 (Minn. 1963). In fact, when Ms. Feuerherm, the City’s buyer for the Project, was asked during her deposition

⁴ There are cases that seem to allow changes to bids after the bid opening. Those cases, however, only allow changes to matters of *responsibility*, i.e., additional information is added to show that the bidder is capable to perform the work. They do not allow changes to matters regarding *responsiveness*, such as price. *See, e.g., City of Rochester v. EPA*, 496 F.Supp. 751, 767 (D.Minn. 1980) (discussing the difference between responsibility and responsiveness and how bids may only be changed after the bid opening to prove responsibility).

“[w]hat factors do you consider material in a bid?”, the first factor she listed was price. (App. 115 at p. 18, lines 6-8). Price is a material component in determining the responsiveness of a bid, so it cannot be changed after the public bid opening. *See Collier* at 840 (Minn. 1947).

B. The change to Shaw’s bid cannot be excused as an inconsequential correction of an error.

The City’s stated intention for this project was to award to the lowest responsive responsible bidder, (*see* App. 18 at para 4.3), but the City reserved the right to waive minor irregularities in bidding. (*See* App. 17 at para. 4.2). That reservation of rights does not excuse or justify the City’s actions because correction of a material error cannot be considered an immaterial irregularity.

This fact pattern is not novel or open to debate; it is settled law. *Lovering-Johnson, Inc. v. Prior Lake*, 558 N.W.2d 499 (1997), involved a public procurement governed by Minn. Stat. § 471.345 in which the public owner reserved the right to waive irregularities, just like this one. Following the bid opening, Prior Lake corrected an apparent clerical error on one of the bidder’s bid sheets, changing an amount from an add to a deduct. *Id.* at 501. That change caused the modified bid to be low, and Prior Lake awarded the contract to the bidder with the modified bid. *Id.* The district court ruled that Prior Lake had not violated Minnesota’s competitive bidding law because the error was a minor clerical error that the city was permitted to waive. *Id.* at 502. This court reversed and held that correction of a bid entry modifying the price of the bid is not a minor

irregularity, and that making such a change violates our state's public bidding law.

Id. at 504. In so doing, the court stated, in relevant part:

Once a bid has been opened, *the public entity has no authority to make any material changes* or modifications to the bid. The rule prohibiting material changes once a bid has been opened applies despite provisions in the bid instructions that allow the public entity to waive irregularities.

Lovering-Johnson at 502 (emphasis in the original and internal citations omitted).

In short, this court ruled that Prior Lake violated Minnesota's competitive bidding laws by making a material change to a bid after the bids had been opened even though the change was made to correct a clerical error. *See id.* at 504.

In its letter denying the joint protest on this Project, the City tried to distinguish the facts in this case from those in *Lovering-Johnson* by noting that Shaw was the low bidder with or without the change to its bid, so the change did not affect the determination of the lowest responsive bid. (*See* App. 24; *see also* App. 98 at Answer to Interrogatory No. 15.) The district court adopted that argument in its Order. (*See* Add. 11). The City and the district court are wrong for at least two reasons.

First, the *Lovering-Johnson* court did not find that the city's change was material because it determined the low bidder. Instead, the court explicitly held that *any* change is material if it affects price *or* gives a bidder a substantial advantage not enjoyed by the other bidders. *See Lovering-Johnson* at 503. It does not matter if the change determines who is the lowest responsible bidder; any

material change is impermissible under Minnesota law because it is the change itself that undermines the competitive bidding process.

Although Oertel stated that it was apparent to him that Rochon intended its bid to be a deduct, this only came to light following an inquiry after bid opening. It is precisely this type of inquiry or supplementation of a bid after bids have been opened that undermines the competitive bidding process

Id.

Second, the change to Shaw's bid did in fact determine the lowest responsible bidder in this case. Shaw asked to withdraw its bid. (App. 137 at ¶ 3). The City determined that it could not hold Shaw to that bid and that it could not proceed against Shaw's bid bond. (See App. 116 at p. 22 lines 9-13). With Shaw's bid withdrawn, Rochon's bid was the lowest responsible and responsive bid remaining. It was only the City's change to Shaw's bid that resurrected Shaw's bid. Put another way, but for the City's material change to Shaw's bid price after the public bid opening, Rochon's bid was the lowest responsible bid. The City's actions after the public bid opening determined which bid was the lowest.

C. **The City's change to Shaw's bid price gave Shaw an advantage not enjoyed by the other bidders.**

There are two independent tests that determine what is material in a bid. The first test is whether something goes to the substance of the bid, *i.e.* whether it affects price, quality, quantity, or manner of delivery. See *Foley Bros., Inc. v. Marshall*, 123 N.W.2d 387, 390 (Minn. 1963). Obviously, under this test, a

change to a bid's price is material and, therefore, impermissible. *See* Add. 10 (quoting *Griswold v. Ramsey County*, 242 Minn. 529, 536 65 N.W.2d 647, 652 (1954) (“It is for this reason that no material change may be made in any bid after the bids have been received and opened since to permit such change would be to open the door to fraud and collusion.”)). The district court ignored this test even though it was cited and briefed. (*See* App. 50).

Instead, the district court focused solely on the second test: whether a change gives a bidder a substantial advantage not enjoyed by its competitors. (*See* Add. 11). The district court wrongly opined that the City's change to Shaw's bid price did not give Shaw a substantial advantage not enjoyed by its competitors. *See id.*

1. Knowledge of the other bid prices is a competitive advantage.

The City's action in this procurement constitutes a particularly corrosive unlawful practice. In both *Lovering-Johnson* and this case, the public contracting agency gave one bidder a substantial advantage by allowing that bidder to modify its bid after the opening. The substantial advantage is knowledge of the price of the winning bid. The *Lovering-Johnson* court found:

In the instant case, we conclude that the city materially modified Rochon's alternate 11 bid by ignoring the plus signs after it had been read as “+\$21,500.” Once Oertel read the bids, Rochon had a substantial advantage over its competitors because Rochon knew the bid of the lowest responsible bidder. As a result, Rochon was in a position to become the lowest responsible bidder by lowering its bid to the “intended” price. *Based on Rochon's certain knowledge of the lowest bid after bid opening, we believe Rochon had an impermissible unfair advantage over the other bidders.*

Lovering-Johnson at 502-03 (emphasis added).⁵

Once the bids are opened, the bidder with an “error” in its bid has the option to seek to withdraw its bid (as Shaw did here), seek to change its bid, or to stay silent, whichever is in its best interest. If the City’s change to Shaw’s bid is not held illegal on these grounds, it is not difficult to imagine contractors seeding their bids with multiple “errors,” any combination of which could be raised to ensure that the contractor’s price was as high as possible while still ensuring it was the lowest. That bidder gets a meaningful second bite at the apple that provides a significant economic and competitive advantage. All a bidder has to do is initially be low – *i.e.* submit an astoundingly low bid – and then seek to add back the difference that made it low through a series of “errors” that it would seek to establish through spreadsheets “proving” these allegedly clerical errors. If this court thinks this fear is far-fetched, Appellant wants to remind the court that hundreds of millions of dollars are at stake in competitive bidding and if bidders are allowed to earn more by adjusting their bids upwards, they will avail themselves of any opportunity by which this court allows them to do so.

The Minnesota Supreme Court held that “second bites” are illegal in *Carl Bolander & Sons Co. v. Minneapolis*, 451 N.W.2d 204, 206-07 (Minn. 1990), because knowledge of competitors’ prices gained after the bid opening yields a competitive advantage. Similarly, the *Lovering-Johnson* court ruled that is

⁵ In an interesting coincidence, Rochon was the bidder in *Lovering-Johnson* whose bid was unlawfully changed by the city. As a further historical side note, counsel for the current appellant represented *Lovering-Johnson* in that case.

impermissible, even if there is not even a whiff of fraud or dishonesty, because it opens the door to the possibility of fraud and collusion. *See Lovering-Johnson* at 503 (“[T]he courts are obliged to scrupulously guard the competitive bidding process to protect against the possibility of such fraud.”).

2. Allowing any change to bid prices after the public bid opening undermines the value of competitive bidding to the public.

The purpose of the bright line rule prohibiting material changes to bids after the opening is to eliminate the opportunity for “fraud, favoritism, extravagance, and improvidence.” *See Collier* at 841. By modifying Shaw’s bid after the bid opening, the City created the appearance of impropriety. In fact, the opportunity for fraud is much clearer in this case than it was in *Lovering-Johnson*, in which this court refused to condone the post-bid opening bid change. In *Lovering-Johnson*, the alleged bid error was apparent on the face of the submitted bid, so the contractor had no opportunity to alter or fabricate evidence of the alleged error. *See Lovering-Johnson* at 502-03. In contrast, in this case, the evidence of the alleged error was not within the four corners of the bid, but was found within documents provided by the contractor the day *after* the bid opening. (*See App. 22*).

Note that Rochon does not allege, and need not prove, that Shaw or the City engaged in actual fraud. Nonetheless, the record shows that the City permitted Shaw to increase its bid by \$89,211 more than Shaw’s alleged bid entry error. That fact further shows the impropriety of the City’s actions. There is no

justification for the \$89,211 windfall that Shaw is receiving from the City's taxpayers.

The argument raised by the City, and adopted by the district court, that the change to Shaw's bid was allowable because Shaw's bid remained the lowest bid ultimately fails because it undermines the very purposes of competitive bidding. Those purposes are : (1) to provide the public with "the best bargain for the least money," *Byrd v. Indep. Sch. Dist. No. 194*, 495 N.W.2d 226, 232 (Minn. Ct. App. 1993); and (2) "to deprive or limit the discretion of contract making officials in the areas which are susceptible to such abuses as fraud, favoritism, improvidence, and extravagance," *Griswold* at 536, 652. The City was required by both the Uniform Municipal Contracting Law, Minn. Stat. § 471.345 subd. 3, and St. Paul Ordinance 82.02 to use competitive sealed bidding for this procurement. Instead, the City engaged in a negotiated procurement with Shaw by making an offer to award the Project to Shaw for more than Shaw's sealed bid price. (*See* App. 138 at ¶10; App. 109). By doing so, the City gave Shaw the opportunity to recoup some of the money it had left on the table with its initial bid. That created the opportunity for favoritism (which is the kindest way to describe Shaw's \$89,211 windfall), so the City's award to Shaw is unlawful.

The Minnesota Supreme Court has explicitly prohibited such behavior:

There has been no showing or suggestion here of fraud or wrongdoing, but only a failure on the part of the city officials to observe the requirements of the charter as to competitive bidding. It is not necessary to show fraud or such other wrongdoing. Failure to comply with requirement of the charter as to competitive bidding

compels decision that the bid, the attempted modification of it, and the award of the contract on the bid as modified were void. To hold otherwise would ‘emasculate’ the charter requirements for competitive bidding.

Coller v. St. Paul, 26 N.W.2d at 842.

This court should explicitly correct the district court’s erroneous holding that a change to the price of the lowest bidder is permissible so long as that bidder remains lowest. Further, as discussed below, this court should declare the Contract void because the City violated competitive bidding law.

III. THIS COURT MUST DECLARE THE CITY’S CONTRACT WITH SHAW VOID BECAUSE THE CITY VIOLATED COMPETITIVE BIDDING LAW.

After finding that the City had violated public procurement law, the district court granted only one of the two remedies sought by Rochon. The court awarded Rochon the costs it had incurred preparing its bid for the Project, as allowed by Minn. Stat. § 471.345 subd. 14. (*See Add. 3*). More importantly, the district court declined to declare the Contract void. (*See id*). That was error that this court must correct to protect the public procurement system.

A. Controlling precedent mandates that the contract must be declared void.

The Minnesota Supreme Court has repeatedly held that contracts made in violation of competitive bidding law are void. It is not a matter left to a judge’s discretion or equitable consideration. It is a bright-line rule. That rule must be strictly enforced to accomplish its purpose, protection of the public fisc.

The rule that violation of competitive bidding law causes the public contract to be void *ab initio* is long-standing in Minnesota. In 1903, the Minnesota Supreme Court addressed the consequences of a municipality offering a contract to the lowest bidder that differed from the advertised contract terms. *See Diamond v. City of Mankato*, 89 Minn. 48, 93 N.W. 911 (1903). The *Diamond* court held the resulting contract was void as a matter of law and the reason for the deviation from published contract terms did not matter.

If, however, the forbidden act was in fact done, *the contract is void without reference to the intent with which it was done*, for the purpose of the rule is to secure fair competition upon equal terms to all bidders, and to remove all temptation for collusion and opportunity for gain at the expense of the property owners by the municipal authorities.

Id. at 53-54, 913 (emphasis added).

The Minnesota Supreme Court has broadened the holding in *Diamond* to encompass any violation of competitive bidding law. For example, in *Gale v. City of St. Paul*, 255 Minn. 108, 96 N.W.2d 377 (1959), the court stated:

In view of the policy and purpose of competitive bidding to promote honesty, economy, and aboveboard dealing in the letting of public contracts, *there must be rigid adherence to the requirements to accomplish this purpose and a violation of the requirements compels a decision which nullifies the contract awarded.*

Id. at 114-15, 381-82 (emphasis added). Similarly, the *Griswold* court mandated that violation of competitive bidding law voids a public contract, even when there is no showing of actual fraud.

Generally, it is presumed that public officials have entered into public contracts in good faith and actual fraud in a particular

instance must be proved, but this rule has no application in a determination of whether the requirements of competitive bidding have been met in the letting of a contract and, as a matter of sound public policy, *such a contract is void*, without any showing of actual fraud or an intent to commit fraud, if a procedure has been followed which emasculates the safeguards of competitive bidding.

Griswold, at 535-36, 652 (emphasis added and internal citations omitted). The court in *Village of Excelsior v. F.W. Pearce Corp.*, 303 Minn. 118, 226 N.W.2d 316 (1975) stated the rule succinctly. “In construing public bidding rules as mandatory, this court has supported the policy of holding that failure to comply will invalidate a public contract.” *Id.* at 122, 319.

The Minnesota Supreme Court went even farther in *Coller v. City of St. Paul*, 223 Minn. 376, 26 N.W.2d 835 (1947). The *Coller* court found that the City had violated competitive bidding by accepting a bid that materially differed from the requirements in the specifications. *See id.* at 384-85, 840. The court declared the resulting contract void. *Id.* at 389, 842. The *Coller* court also adopted the rule that contractors that enter a public contract made in defiance of competitive bidding law cannot recover in *quasi-contract*.

Since they are based upon public economy and are of great importance to the taxpayers, laws requiring competitive bidding as a condition precedent to the letting of public contracts ought not to be frittered away by exceptions, but, on the contrary, should receive a construction always which will fully, fairly, and reasonably effectuate and advance their true intent and purpose, and which will avoid the likelihood of their being circumvented, evaded, or defeated. Stern insistence upon positive obedience to such provisions is necessary to maintain the policy which they uphold. *Contracts made in defiance of such requirements not only are unenforceable, but afford no basis for recovery by the contractor*

upon an implied obligation to pay the value of benefits received by the public body.

Id. at 388, 841-42 (quoting and adopting the rule stated in 43 AmJur., Public Works and Contracts, § 26) (emphasis added).

Note that these holdings are stated in mandatory, uncompromising terms. They do not say that the “contract *may* be held void.” Instead, they state that avoidance of the contract is the mandatory result of a public entity’s breach of competitive bidding law. Once the district court found that the City had violated competitive bidding law, it was required by controlling precedent to declare the Contract void. The district court’s refusal to declare the Contract void contravenes that mandatory precedent and must, therefore, be reversed.

B. The district court’s own analysis compels a declaration that the City’s contract is void.

The district court’s refusal to declare the Contract void is surprising because the court’s memorandum correctly describes and analyzes the law showing that the Contract was not entered on the basis of competitive bidding at all. And the court specifically cited authority stating that, in that situation, the resulting contract is void.

The district court began its reasoning by noting that, given the estimated \$8 million price of the contract, competitive bidding was required both by the Uniform Municipal Contracting Law and St. Paul Ordinance 82.02. *See* Add. 9. The court then cited *Coller* for the proposition that “[a] bid constitutes a definite offer that a municipality may accept without further negotiations.” *Id.* (citing

Coller at 385, 840). Then the court noted that bids must comply with the solicitation requirements “and the call for bids,” *id.* (citing *Nielsen v. City of St. Paul*, 252 Minn. 12, 17, 88 N.W.2d 853, 857 (Minn. 1958), and that a bid that does not comply with the call for bids is, in reality, a new offer, *id.* (citing *Sutton v. City of St. Paul*, 234 Minn. 263, 269, 48 N.W.2d 436, 440 (Minn. 1951). The district court concluded that, “A contract entered into based on a new offer is void because it was not arrived at by competitive bidding, as required by statute.” *Id.* (citing *Griswold* at 536, 652).

Applying the rules stated above to the undisputed facts, one inescapably reaches the conclusion that the Contract is void as a matter of law. The “call for bids” dictated that sealed bids had to be received by 2:00 on November 22, 2010. (App. 12). Shaw submitted a bid for \$7,333,000 at that time. (*See* App. 4 at ¶ 8; App. 30 at ¶ 5). But the City did not award a contract to Shaw for the amount of that bid. Instead, the City awarded the contract to Shaw for the base amount of \$8,041,411, an amount that was agreed to on November 23, 2010, after further negotiation with the City. (*See* App. 109; *see also* Statement of the Facts at Part IV *supra.*). The \$8,041,411 number from Shaw was not obtained through competitive bidding, but rather through a private negotiation process. Shaw did not submit the \$8,041,411 amount as a sealed bid; it was a “new offer” because it was submitted at a time and in a manner other than that specified in the call for bids. Applying the rule stated in *Griswold* cited by the district court, the Contract must be declared void as a result.

C. **None of the reasons cited by the district court justify failing to declare the City's contract void.**

The district court explained it was concerned about the effect such a declaration would have on Shaw, a non-party to the lawsuit, and on the Project itself. *See* Add. 13-16. As discussed below, even if the district court had the discretion to consider those factors, and it did not, those reasons are not sufficient to justify allowing the City to continue expending public money on an illegally entered public contract.

1. **Shaw had notice of the lawsuit and entered the contract with the City at its own risk.**

A declaration that the Contract is void will undoubtedly have an impact on Shaw, but that is in no way unjust. Shaw had full notice of the lawsuit, but it chose not to intervene. Shaw also chose to enter and perform under a contract that it knew was the subject of a protest. Shaw made its choices and now it must live with the consequences, just like the rest of us.

Shaw had full knowledge that it was entering a contract that was not based on its sealed bid. (*See* Statement of the Facts, Part IV *supra*). Diane Nordquist notified Shaw about this lawsuit shortly after it was commenced and before the City issued its Notice to Proceed. (*See* App. 127 at p. 27, line 16 through p. 29, line 3.). Shaw was subpoenaed and served with a notice of deposition in January 2011. (*See* App. 187-92). Shaw's attorney corresponded with Rochon's attorney about this lawsuit. (*See* App. 193-94). In that correspondence, Rochon's attorney offered to stipulate to Shaw's joinder if it wanted to intervene so that Shaw would

not have to wait for an opening on Judge Ostby's calendar to make a motion. (See App. 194). Shaw's attorney was even present at the summary judgment motion hearing. (See Add. 2). Shaw had ample notice of the lawsuit and it had opportunity to intervene, so its deliberate choice to sit on the sidelines is not a valid reason to withhold the legally required declaration that the Contract is void.

Furthermore, the fact that declaring the Contract void will have an impact on Shaw is also legally irrelevant. "[I]t is a general and fundamental principle of law that all persons contracting with a municipal corporation must, *at their peril*, inquire into the power of the corporation or its officers to make the contract." *State v. Minn. Transfer Ry. Co.*, 80 Minn. 108, 116, 83 N.W. 32, 35 (1900) (emphasis added). Shaw knew that it was entering the Contract with the City under questionable circumstances, so it had a duty to inquire if the Contract was valid. Shaw proceeded to enter and work on the Contract at its own risk. In *City of St. Paul v. Dual Parking Meter Co.*, 229 Minn. 217, 39 N.W.2d 174 (1949), the court held that the contractor was not entitled to recover money allegedly owed on a public contract, even though the contract was not declared illegal until after work on the contract had been completed. *See id.* at 225-26, 178-79. The *Dual Parking* court reasoned that the contractor had notice that the contract might be declared illegal because there was on-going litigation, so the contractor had proceeded to work on the contract at its own risk. *See id.* The court denied the contractor recovery under *quasi-contract* because the contractor's knowledge that the contract might eventually be declared illegal meant that the contractor had worked

on the contract in bad faith and the contractor should not profit at the public's expense. *See id.*

Shaw is in the same situation here. Like the *Dual Parking* court, this court should be unafraid to recognize that Shaw took a chance and lost when the district court declared that the City had violated competitive bidding law on this public procurement. Declaring the City's Contract with Shaw void is mandatory, and that duty cannot be avoided as an accommodation to a contractor that knowingly entered an unlawful public contract. Even if this court finds that Shaw should be entitled to recover in *quantum meruit* for the work it has performed to date, this court should still declare performance of the remainder of its contract illegal and order its completion to be rebid.

2. The impact to the Project also does not justify the district court's refusal to declare the contract void.

The district court noted that a declaration that the Contract is void would halt the Project after the City had already spent at least \$1.3 million on the Project. (*See Add. 15*). That is true, but stopping the expenditure of public funds on an illegal contract is a good thing.

The district court cited two cases that it claimed supported its denial of a declaration that the contract was void. (*See Add. 15-16*). Neither does.

The district court relied on *City of Staples v. Minn. Power & Light Co.*, 196 Minn. 303, 306, 265 N.W. 58, 59 (1936), for the proposition that "a City may be estopped or prevented by laches from later claiming that a contract is void after a

party has begun performance, even if the contract violated law.” Add. 15. The underlying principle in *Staples* is that one party to an illegal contract cannot use the contract’s illegality as a weapon against the other party. *See Staples* at 306, 59. The *Staples* court denied the City’s attempt to avoid its obligations under the contract on laches, estoppel, and ratification grounds. *See id.* None of those legal theories is involved in this case. *Staples* is inapposite because it is Rochon, acting as a private attorney general, not the City, that is seeking to have the Contract declared void. Further, *Staples* only addresses the parties’ right to complain about the contract’s illegality; it says nothing about the power and responsibility of the courts to police the public procurement system. *See Griswold* at 535, 651-52 (holding that the courts are to determine whether a public procurement was made lawfully). *Staples* only talks about the city’s right to avoid paying money; it does not abrogate this court’s power and duty to declare the Contract void and continued performance of it illegal.

The district court also cited *Telephone Associates v. St. Louis County Bd.*, 364 N.W.2d 378, 381 (Minn. 1985) as support for the idea that declaring the Contract void would lead to economic waste. The *Telephone Associates* court refused to order the removal of the telephone system that was installed under an illegally entered public contract. *See id.* at 383. Appellant Rochon is not asking for removal of the work that has already been completed. It is asking that the Contract be declared void. This means that the court should prohibit performance of the *remaining* work under the Contract. It also leaves a question for this court

to decide or remand to the district court for decision – *i.e.* whether or how much Shaw should get to keep of what it has been paid under this illegal contract. But no matter how this question of *compensation* for Shaw’s work is decided, Rochon is not asking that Shaw’s work to date be torn out, so the district court’s reliance on *Telephone Associates* is misplaced.

D. Declaring contracts void is the only remedy that ensures compliance with competitive bidding law.

The Minnesota Supreme Court, as discussed above, has repeatedly held that a public entity’s failure to comply with competitive bidding law results in a void contract. *See, e.g., Griswold*, at 535-36, 652. Applying that remedy takes strength of character because public contracts are often let to fulfill pressing public needs. The temptation is to excuse noncompliance with competitive bidding law to reap some immediate benefit. In this case, for example, declaring the Contract void will probably lead to an interruption in construction of the Project, and it might cause the City to lose some advantageous federal funding. But the alternative is far worse. If the Court refuses to declare the Contract void, the Court will be telling public entities that they can violate competitive bidding law with relative impunity.

Without strict adherence to the rule stated in *Griswold*, *Coller*, *F.W. Pearce*, and *Gale*, public entities will have no reason to comply competitive bidding law because courts have no other effective remedies available. The courts do not have the power to force public entities to enter contracts with a particular

party, they can only prevent public entities from performing on contracts entered unlawfully. *Queen City Constr., Inc. v. City of Rochester*, 604 N.W.2d 368, 374 (Minn. App. 1999) (review denied Mar. 14, 2000).

The courts also do not have the power to levy significant monetary penalties on public entities for contracting in defiance of competitive bidding law. They are prohibited by Minn. Stat. § 471.345 subd. 14 from awarding damages or attorneys' fees. Courts may only award an unsuccessful bidder that challenges the procurement its bid preparation costs. *Id.* The \$33,652 that the district court awarded to Rochon as bid preparation costs is an insignificant and inadequate deterrent to illegal conduct – as proven by the City's actions in this case.

If courts cannot enforce competitive bidding law through positive injunctions (*i.e.* telling the public entity with whom it must contract), or through meaningful monetary awards, then the only thing the courts can do is stop public entities from expending public funds on illegal contracts. *See Queen City Constr.* at 374. Declaring such contracts void is the only effective means to ensure that public entities will obey the law. It is that remedy that ensures the public gets “the best bargain for the least money” and that public money is not squandered through “fraud, favoritism, improvidence, and extravagance.” *See Byrd* at 232; *Griswold* at 536, 652. Failure to declare an unlawfully entered contract void undermines that deterrent and erodes the protections afforded by competitive bidding. By failing to stop the City from expending money on a contract that it found was entered illegally, the district court told public entities that they can violate

competitive bidding law for a token payment of bid preparation costs. That cannot stand.

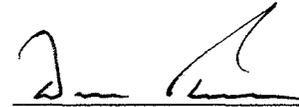
CONCLUSION

Appellant respectfully asks this Court to correct the two errors committed by the district court to preserve the integrity of Minnesota's public contracting system.

Dated: July 18, 2011

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CERTIFICATION OF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for the brief produced with a proportional font. The brief contains 9,493 words. This brief was prepared using Microsoft Word 2007.



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