

NO. A11-1271

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State of Minnesota  
**In Court of Appeals**

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Rochon Corp.,

*Appellant,*

v.

City of St. Paul,

*Respondent.*

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**APPELLANT'S REPLY BRIEF**

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Appellant Rochon Corp. (“Rochon”) submits this reply brief to respond to the arguments raised by Respondent City of St. Paul (“the City”) in its brief.

### ARGUMENT

I. **A CHANGE TO A BID’S PRICE IS ALWAYS MATERIAL, EVEN IF THE CHANGE DOES NOT AFFECT WHICH BID IS LOW.**

Rochon and the City appear to agree that under competitive bidding law, public entities cannot lawfully make a *material* change to a bid after the bids have been opened. *See Coller v. City of St. Paul*, 223 Minn. 376, 387, 26 N.W.2d 835, 841 (1947). The parties sharply disagree, however, about whether a change to a bid’s price is material. Although the district court ruled that the City violated public procurement law by allowing a change to Shaw Lundquist’s (“Shaw”) bid,<sup>1</sup> it also ruled that the change to Shaw’s bid price after the bid opening was not a *material* change. *See* Add. 10-11. The court reasoned that the change to Shaw’s bid price did not give Shaw a substantial advantage over the other bidders because it did not affect which bid was lowest. *See id.* That is clear and dangerous error that this court should correct, as it has repeatedly done in the past.

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<sup>1</sup> The district court ruled that the City violated competitive bidding law by allowing a change to a bid when the Instructions to Bidders forbade such modifications. *See* Add. 8. Rochon agrees with the district court that the City’s failure to follow its own advertised procedures was a violation of competitive bidding law. *See Griswold v. Ramsey County*, 242 Minn. 529, 535, 65 N.W.2d 647, 652 (1954) (“[H]aving once adopted the competitive bidding method, the county board was required, as long as that method had not been seasonably abandoned, to pursue such method in a manner reasonably designed to accomplish its normal purpose of giving all contractors an equal opportunity to bid and of assuring to the taxpayers the best bargain for the least money.”).

A. **The City and the district court ignored the applicable test for materiality.**

As discussed in Rochon's opening brief, there are two related tests to determine whether a change is material. *See* Appellant's Brief at pp. 21-22. The first test is whether the changed item involves the "substance of a competitive bid, such as those which may affect price, quality or quantity, or the manner of performance." *Foley Bros., Inc. v. Marshall*, 266 Minn. 259, 262, 123 N.W.2d 387, 390 (1963) (emphasis added); *see also Prestex Inc. v. U.S.*, 320 F.2d 367, 372 (Ct. Cl. 1963) (stating same standard in federal procurements). The second related test for materiality of a change is "whether it gives a bidder a substantial advantage or benefit not enjoyed by other bidders." *Coller* at 385, 840. As both tests are stated interchangeably by Minnesota courts, they mean and are intended to accomplish the same thing: minor irregularities may be waived, but changes that affect identified components of a bid (*i.e.* price) or that lead to a competitive advantage (*i.e.* price) are "material," and are not allowed.

The two tests are complementary and are intended to ensure there is necessary flexibility in public procurements, while also divesting public officials of the discretion that can lead to "fraud, favoritism, improvidence, and extravagance." *See id.* "The public should not be denied the benefit of the lowest bidder for every minor technical defect *that does not affect the substance of the bid.*" *Id.* (emphasis added). Put another way, public entities have the ability to waive minor irregularities that do not give one bidder a substantial advantage over other bidders, but they do not have the authority to change the heart of a bid, *i.e.*, its price, because that opens the door for fraud and abuse.

This was illustrated in *Nielsen v. City of St. Paul*, 252 Minn. 12, 88 N.W.2d 853 (1958). In *Nielsen*, the City advertised for bids for some sidewalk work. *Id.* at 14, 856. The call for bids stated that the bids were to be received by the City no later than 2 p.m. on an appointed day in Room 253 at City Hall in downtown St. Paul. *Id.* On the day the bids were due and to be opened, the City's purchasing agent decided that a bigger room was needed for the bid opening, so he moved the bid opening to a room on a different floor. *Id.* at 15, 856. One of the bidders arrived at the new room between one and five minutes after 2 p.m., claiming that he had been delayed because several streets were closed for repaving and he had trouble finding the new room. *Id.* None of the bids for the sidewalk work had yet been opened, so seeing no prejudice to the other bidders, the City decided to accept the bid. *Id.* The late bid was the lowest received and the City awarded the contract to that bidder. *See id.* at 16, 857. The award was challenged by a taxpayer on the grounds that it was not made in conformance with the call for bids and the City's ordinances regarding competitive bidding. *See id.*

The *Nielsen* court recognized that there is an inherent tension in public procurement law caused by its two fundamental purposes. Strict enforcement of bidding requirements prevents the opportunity for fraud, but flexibility allows more bids to be considered, which could result in lower prices for the public entity. The court resolved that tension by holding that public entities have the flexibility to waive minor irregularities, but that flexibility does not extend to the substance of the bid. *See id.* at 20-21, 859-60.

The statute is intended to secure to the city the contracting of the work to the lowest responsible bidder, and mere irregularities in the form of the bid, or details of statement, which do not in any way mislead or injure, are not sufficient to justify the rejection of a such a bid. It is in the interest of the public that the lowest bid, though it be irregular, be accepted, and if necessary, that the bidder have the opportunity to correct an irregularity, while not changing the substance of his bid.

*Id.* (quoting *Faist v. City of Hoboken*, 60 A. 1120, 1121 (N.J. 1905) (emphasis added).

Allowing a bidder to submit his bid a couple of minutes late was a minor irregularity that the City was allowed to waive, provided the others bidders were not prejudiced by that waiver. Changing the price, quantity, quality, or manner of performance, however, is never permissible because that affects the substance of the bid. *See id.*

This rule of law is widely accepted outside of Minnesota. *See, e.g., City of Baltimore v. De Luca-Davis Constr. Co., Inc.*, 124 A.2d 557 (Md. 1956) (concluding that reformation of a bid to correct a bidding error similar to the one in this case is not permissible);<sup>2</sup> *Sinram-Marnis Oil Co., Inc. v. City of New York*, 542 N.E.2d 337 (N.Y. 1989) (refusing to allow change to bid price); *Nielson v. Womer*, 406 A.2d 1169 (Pa. Commw. Ct. 1979) (“[A] defective bid cannot be remedied once the bids have been opened.”). *See also* 10 McQuillin, the Law of Municipal Corporations (3rd Ed.) § 29:75 (“While bids cannot be changed in substance after presentation and the lapse of the

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<sup>2</sup> Most of the case law addressing the issue of bid mistakes reaches the conclusion that material changes cannot be made to bids after the bid opening through a public policy analysis. *See e.g., Collier* at 387, 841. The *De Luca-Davis* opinion is interesting because the court reached the same conclusion based on an analysis using fundamental contract law, framing the issue of correction of bid mistakes in terms of rescission (withdrawing the bid) or reformation (changing the bid).

designated time for opening the bids, mere irregularities in form may after the opening be corrected or disregarded.”).

Here, the district court ignored the substance of the bid test and misapplied the substantial advantage test. The district court’s finding that the change to Shaw’s bid price was not a material change contravenes *Nielsen* and *Foley*. Under those controlling Supreme Court precedents, a change to a bid’s price is always material. The district court’s ruling is clear legal error and should be reversed.

**B. The City’s argument is unsupported.**

The City argues, and the district court ruled, that the change to Shaw’s bid price was not material because it did not affect which bid was low. *See* Resp. Brief at 19-24; Add. 11-12. That position is not supported by law, the facts, or reason. It must be reversed.

1. The City cited no authority that supports its contention.

In its brief, the City cited to only three cases as support for its contention that a change to the apparent lowest bid’s price is allowable so long as that bid remains low. None of those cases actually support the City’s argument.

a. *Byrd v. Indep. Sch. Dist. No. 194*

Rochon cited *Byrd v. Indep. Sch. Dist. No. 194*, 495 N.W.2d 226, 232 (Minn. Ct. App. 1993) in its opening brief for the proposition that *one* of the fundamental purposes of competitive bidding is to get the best bargain for the least money. *See* App. Brief at 25. The *other* purpose is to limit the discretion of public officials in public contracting to prevent “fraud, favoritism, improvidence, and extravagance.” *See id.* (citing *Griswold* at

536, 652). The City argues that it was justified in reviving Shaw's withdrawn bid and allowing the change to Shaw's price because the resulting bid was less than the next lowest bid. *See* Resp. Brief at 19. Essentially, the City is arguing that *Byrd* authorizes a public entity to do anything it wants to get a better deal. Put simply, the end justifies the means. Or even more succinctly, anything goes.

That argument fails because it ignores the second fundamental purpose of competitive bidding, to limit contracting officials' discretion as a defense against fraud and favoritism. As discussed above, competitive bidding is a system of rules that enables the public to get the best price by ensuring a level playing field. Competition is the force that lowers prices. Competitive bidding rules, such as the prohibition against material changes to bids, ensure the competition remains fair. Contractors will only compete if they are confident that the process will be conducted fairly. *See Toyo Menka Kaisha, Ltd. v. U.S.*, 597 F.2d 1371, 1377 (Ct. Cl. 1979) (discussing how the public benefits from enforcement of responsiveness rules in competitive bidding).

After Shaw withdrew its bid, *see* App. 141, the City faced a simple choice. Under the rules of competitive bidding it could either award to the lowest remaining responsible and responsive bidder, Rochon, or it could reject all bids. The City claims it could not have awarded to Rochon because Rochon's price was too high. *See* Resp. Brief at 18. The City also claims that it did not have time to reject all bids and then rebid the project due to the impending expiration of the federal Build America Bonds program. *See id.* at 15-17. In fact the City could have rebid in an expedited period of time to avoid a funding problem. *See* App. 117 at p. 28, line 7 through p. 29, line 2. That meant that the City had

four choices: 1) rebid on an expedited basis; 2) obtain additional funding to award to Rochon; 3) replace the expiring federal funding and rebid on a normal basis; or 4) abandon the project.

Instead of pursuing any of those lawful alternatives, the City chose to break the law by allowing Shaw to change its bid. *See id.* at 18. The City rationalized that illegal action by claiming “that is still giving the public the best price for this Project even with the mathematical error.” *Id.* *Byrd* does not support the City’s rationalization because it does not stand for the proposition that public entities are entitled to sacrifice the rule of law in order to get a better deal.

b. *Lovering-Johnson, Inc. v. City of Prior Lake*

Rochon discussed *Lovering-Johnson, Inc. v. City of Prior Lake*, 558 N.W.2d 499 (Minn. Ct. App. 1997) extensively in its opening brief. *See* App. Brief at 19-24. The City tries to distinguish *Lovering-Johnson* from the case at bar. In *Lovering-Johnson*, the bid price change determined which bidder was lowest, while here the City argues, Shaw was the apparent lowest bidder before and after the bid price change. *See* Resp. Brief at 21. That is a distinction without a difference.

The *Lovering-Johnson* court explicitly ruled that the change to the bid was impermissible precisely because it changed the bid’s price.

Specifically, LJI contends the city had no authority to change Rochon’s alternate 11 bid after it had been opened because the modification affected price, thereby constituting a material and substantive change. We agree.

*Lovering-Johnson* at 502. The court cited *Foley* to support its holding.

Moreover, the supreme court has stated that price, or “other things that go into the actual determination of the amount of the bid,” are all matters “involving the substance of a competitive bid.” *Foley Bros. v. Marshall*, 266 Minn. 259, 263, 123 N.W.2d 387, 390 (1963). The city’s change affected Rochon’s price for alternate 11, thereby affecting its total bid. Under *Foley*, modifications in price affecting a bid’s amount are deemed material.

*Id.* at 503.

*Lovering-Johnson* clearly forbids any change to a bid’s price after the bid opening, and it cannot be read to support the exception to that rule that the City seeks. In fact, the opinion states that “[i]t is precisely this type of inquiry or supplementation of a bid after bids have been opened that undermines the competitive bidding process.” *Id.* *Lovering-Johnson* directly contravenes the City’s argument. Further, it was binding precedent on the district court, which erred by ruling that a modification to a bid’s price was permissible.

c. *Carl Bolander & Sons Co. v. City of Minneapolis*

Rochon cited to *Carl Bolander & Sons Co. v. City of Minneapolis*, 451 N.W.2d 204, 206-07 (Minn. 1990) for the proposition that “second bites” are not allowed in competitive bidding because knowledge of a competitor’s bid necessarily yields a substantial competitive advantage. *See* App. Brief at 23-24. In its brief, the City recited that argument, but did not dispute it. *See* Resp. Brief at 22.

The City did, however, discuss the relief sought in *Bolander*. *See id.* Like here, the plaintiff in *Bolander* moved for injunctive and declaratory relief. *See Bolander* at 206. The trial court denied Bolander’s motion for a temporary injunction and declared the contract was valid and enforceable. *See id.* At the Court of Appeals, Bolander only

asked for a declaration that the low bidder had violated competitive bidding law by making a material change to its bid after the bid opening and for an award of its costs and attorneys' fees. *See Carl Bolander & Sons Co. v. City of Minneapolis*, 438 N.W.2d 735, 738 (Minn. Ct. App. 1989). It does not appear that Bolander asked the court to declare the contract, which was in progress, illegal and void. *See id.* The Court of Appeals reversed the trial court, and the Minnesota Supreme Court affirmed the Court of Appeals. *See id.; Bolander*, 451 N.W.2d at 209. Neither the Supreme Court, nor the Court of Appeals addressed the effect of the declaration on the status of the contract, so in that respect, the *Bolander* cases are not germane here.

2. The record clearly shows the substantial advantage enjoyed by Shaw.

The facts of this case, of course, are the best illustration of why bid prices cannot be changed after the public bid opening. It is undisputed that the City allowed Shaw to change its bid price by \$89,211 more than its alleged bid error.<sup>3</sup> *See* Resp. Brief at 22-23. The City also cited to deposition testimony showing that the City's employees allowed the change to Shaw's bid without any understanding of the justification for that \$89,211. *See id.* at 23. This clearly demonstrates how post-opening changes to bids provide an opportunity for contractors to enrich themselves at the expense of the public.

The City raised the novel argument that the City's award to Shaw of \$89,211 more than Shaw's alleged bid error "does not support an inference of impropriety" because that

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<sup>3</sup> This should not be read as condoning the correction of Shaw's alleged bid error. Under *Foley* and other cases, no changes to bid prices, no matter how well-intentioned and honestly justified, are allowed. The contractor must either withdraw the bid or stand by it.

amount was only approximately one percent of the entire contract amount. *See id.* Eighty-nine thousand two hundred eleven dollars of taxpayer money is not insignificant! And just what amount of post-bid shenanigans would support an inference of impropriety? Of course, it has been well-established by Minnesota's appellate courts that the answer is zero because post-bid changes to price are simply not allowed. *See Coller* at 387, 841; *Lovering-Johnson* at 502-503.

The City also tries to defend its actions by arguing that Shaw's bid change was allowable because it only recouped an unexplained \$89,211, when it could have tried to get even more of the approximately \$700,000 between its allegedly corrected bid price and the price of the next lowest bidder. *See Resp. Brief* at 23-24. That is no different than arguing it is not a crime if the mugger only takes your wallet but leaves you your watch.

C. **The district court's ruling cannot stand because it undermines the safeguards of competitive bidding.**

This is an important issue with ramifications that extend beyond this case. If this court affirms the district court, it will be changing the rules of competitive bidding as stated by the Minnesota Supreme Court in *Nielsen*, *Foley*, *Coller*, *Griswold*, and others. By accepting the rule posited by the district court and advocated by the City, that post-opening changes to the lowest apparent bid are permissible so long as that bid remains the lowest, this court would be setting a nearly automatic limit on the savings that public entities would realize through competitive bidding. Contractors, being inherently creative and resourceful, would seed their bids with enough "errors" to ensure that the

lowest bid could always be “corrected” until it was only \$1 less than the second lowest bid. This is not a fanciful fear. Millions could be made through post bid manipulations, which is why “bright line” rules are needed to prevent gamesmanship from undermining competitive bidding.

Instead, this court should correct the district court’s error by reaffirming the general rule that post-opening changes to bid prices are never permissible and by explicitly holding that that rule pertains even if the change does not affect which bid is lowest.

**II. THIS COURT SHOULD OVERRULE THE DISTRICT COURT AND DECLARE THE CITY’S CONTRACT WITH SHAW TO BE ILLEGAL AND VOID.**

The district court declared that the City violated the Uniform Municipal Contracting Law, Minn. Stat § 471.345, but then the district court declined to declare the contract void and illegal. *See* Add. 3. By doing so, the district court abdicated its responsibility to enforce the law and permitted illegal activity to continue. This is a matter of settled, binding law that does not permit equitable balancing or exercise of discretion. The district court’s ruling is clear error that must be reversed.

**A. Binding authority demands that the City’s contract be declared void.**

It is the duty of the courts to enforce competitive bidding law. *See Griswold* at 535, 651-52. In its opening brief, Rochon cited numerous cases from the Minnesota Supreme Court demanding that public contracts made in defiance of competitive bidding law must be declared void. *See* App. Brief at 26-29 (citing *Diamond v. City of Mankato*, *Gale v. City of St. Paul*, *Griswold v. Ramsey County*, *Village of Excelsior v. F.W. Pearce*

*Corp.*, and *Coller v. City of St. Paul*). This court will have to overrule those cases, and others, to affirm the district court.

The City tried to distinguish the cited cases based on the types of public project involved, claiming that none of the cases dealt with construction of a building. *See* Resp. Brief at 24-25. The City is wrong. *Griswold* dealt with construction of a new building. *See Griswold* at 531, 649. More importantly, the City is wrong because the rule is one of general applicability. The wide variety of project types involved in the cited cases shows that it does not matter what type of project the public entity is accomplishing through the contract. If the public entity does not comply with competitive bidding, the cases uniformly hold that the contract must be declared void.

**B. The City must accept the consequences of its choice to break the law.**

The City tried to gain this court's sympathy by parading a list of alleged consequences to the City if the contract is declared illegal and void. *See* Resp. Brief at 11-13. Those alleged consequences are not relevant to this court's determination for at least two reasons.

First, the procedural posture of this case does not permit equitable balancing. The district court declined to grant injunctive relief based on equitable balancing following Rochon's motion for injunctive relief. *See* Add. 21. Equitable balancing is the proper analytical framework when considering injunctive relief. *See Dahlberg Bros., Inc. v. Ford Motor Co.*, 272 Minn. 264, 274-75, 137 N.W.2d 314, 321-22 (1965). But this is an appeal from a declaratory judgment rendered on undisputed facts at summary judgment.

*See* Add. 2. The issues raised are purely legal that do not require, or indeed, allow equitable consideration.

Second, any consequences about which the City complains are all self-inflicted. The City chose to violate competitive bidding law by allowing Shaw to modify its bid after the bid opening. *See* Resp. Brief at 18. The City then chose to issue a notice to proceed for the contract after the district court clearly indicated at the TRO stage of these proceedings that Rochon was likely to succeed on the merits of its claims. *See* Add. 25 (“Rochon has made a strong case, however, that the City not only failed to follow the Uniform Municipal Contracting Law, but also the City’s own bidding requirements, if Rochon’s claims are proven at trial.”) (internal citation omitted). The City had notice that it was proceeding illegally, and it had opportunity to reverse or change its course. It chose not to, so it must live with the consequences.

The well-respected Judge James Rosenbaum of the United States District Court for the District of Minnesota rejected arguments similar to those raised by the City in *United Tech. Commc’n Co. v. Washington County Board*, 624 F.Supp. 185 (D.Minn. 1985). Although that opinion came from an injunctive relief case that required equitable balancing not applicable here, the court’s reasoning is instructive. United Technologies sought a preliminary injunction against the award of a public contract due to the county’s failure to comply with competitive bidding law. *See id.* at 187. Judge Rosenbaum found that the “loss of the chance to participate in a fair bidding process raises a significant threat of irreparable harm to the plaintiff.” *Id.* at 188. The county claimed that if the injunction issued, it would be subject to delay due to rebidding, the possibility of higher

bids, and potential lawsuits. *See id.* at 189-90. Judge Rosenbaum rejected those potential harms to the county as valid reasons to oppose the injunction.

The flaw in the County's argument is that it would stand equity on its head . . . The Court declines to reach the perverse result that the County's wrongful actions, if any existed, should inure to its benefit by protecting it from an otherwise justified injunction. . . . The harms to the County cognizable for injunctive analysis therefore consist of a) its loss of time in determining the ultimately successful system and the attendant inconvenience and uncertainty; b) a possible but unresolved delay in the construction schedule; and c) an uncertain risk that the bids and the system cost will be higher the second time around. These tenuous injuries are weighed in the balance against the irreparable harm to United Technologies of being deprived of a fair competition against equals, and its chance to succeed or fail in an open and unbiased marketplace. The Court finds that the harm to the County generated by an injunction is decisively outweighed by the harm United Technologies will incur if an injunction does not issue.

*Id.* at 190. Similarly, the City should not be allowed to act illegally just because compliance with the law was inconvenient.

**C. The district court did not have discretion under Minn. Stat. § 555.06 to avoid declaring the City's contract illegal and void.**

The district court's duty to enforce the law is not discretionary. Minnesota Statutes § 555.06 says, "The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding." The City disingenuously argues that the district court had the discretion to not declare the contract void under Minn. Stat. § 555.06 because "its declaration would not terminate the uncertainty or controversy giving rise to the proceedings." *See Resp. Brief* at 26. The City is wrong for at least three reasons.

First, the legality and vitality of the City's contract is the controversy "giving rise to the proceedings." A declaration that the contract was void and illegal would have resolved that controversy. The fact that such a declaration might cause ripples that would spawn new controversies involving Shaw, Shaw's subcontractors, and the Project's financiers is irrelevant. *See* Resp. Brief at 26. Minn. Stat. § 555.06 cannot be interpreted to require a declaration to have absolute finality and certainty throughout the universe because that is an impossibly high standard that renders meaningless a person's right under Minn. Stat. § 555.02 to have a declaration of the validity of a contract. *See* Minn. Stat. § 645.17 ("the legislature does not intend a result that is absurd, impossible of execution, or unreasonable"). The declaration sought by Rochon would have resolved the controversy in this lawsuit. It is immaterial that other controversies between other entities might result.

Second, the district court waived any right it had to decline to make a declaration under Minn. Stat. § 555.06 when it declared that the City had violated competitive bidding law. *See* Add. 2. Once the district court chose to make its declaration, it could not then claim it could remain silent on the consequences of its declaration.

Third, the district court was bound by controlling precedent to declare the contract void. As discussed above, the Minnesota Supreme Court has repeatedly stated, in unambiguous and uncompromising terms, that contracts made in defiance of competitive bidding law are void. The legislature gave the courts the discretion to avoid making a declaration in some instances. *See* Minn. Stat. § 555.06. But the head of the Minnesota judicial branch has repeatedly stated that this is not one of those instances. *See, e.g.,*

*Gale v. City of St. Paul*, 255 Minn. 108, 114-15, 96 N.W.2d 377, 381-82 (1959) (“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.*”) (emphasis added). The district court’s refusal to declare the contract illegal and void is clear error that must be reversed.

**D. The City misrepresented the remedy sought by Rochon.**

The City appears not to understand the remedy sought by Rochon. *See* Resp. Brief at 27. Rochon seeks a declaration that the City’s contract with Shaw is illegal and void because it was made contrary to competitive bidding law. A declaration of the effect of the City’s violation of competitive bidding law on the contract will clarify that the City may not lawfully continue to expend funds on the Project. Rochon is not seeking a positive injunction ordering that work performed under that illegal contract be removed because that would constitute waste. Rochon is seeking an end to the illegal expenditures going forward on this executory contract after this court makes its decision. The remainder of the work can be competitively bid and the Project can be completed – legally.

The City incorrectly argues that this court should limit Rochon’s relief to only recovery of its bid preparation costs, as happened in *Telephone Associates, Inc. v. St. Louis County Board*, 364 N.W.2d 378 (Minn. 1985). *See* Resp. Brief at 27-28. That is inappropriate because the situation here is different than the one faced by the *Telephone Associates* court. This court is faced with an executory contract made in violation of

competitive bidding law. The *Telephone Associates* case was adjudicated after the contract was completed. See *Telephone Associates* at 381. This court has the opportunity to stop the illegal expenditure of public funds while the *Telephone Associates* court was dealing with a *fait accompli*. This court should protect the integrity of the public procurement system by declaring that it was error for the district court to decline to declare the contract between the City and Shaw illegal and void. If the decision is otherwise, there will be no incentive to comply with competitive bidding laws. If enough dollars are at stake, the low bidder and the public entity will happily pay the disappointed second low bidder's bid preparation costs, so that in return they can proceed with their illegal contract. The remedy must be to stop performance of the illegal contract, not just payment of a nuisance amount of bid preparation costs.

### CONCLUSION

The district court's Order contains two errors that must be reversed to protect the integrity of the public procurement system. First, it was error to hold that the price of bids may be changed after the public bid opening provided the change does not affect which bid is lowest. The law is clear that material changes cannot be made to bids after the bid opening and that price is always material. Second, after declaring that the contract between the City and Shaw had been made contrary to public procurement law, it was error to decline to declare that contract illegal and void. By declining to issue that declaration, the district court condoned illegal activity and broke with decades of Minnesota Supreme Court precedent. This court should correct those errors.

Dated: Sept. 1, 2011

**FABYANSKE, WESTRA, HART &  
THOMSON, P.A.**

By:

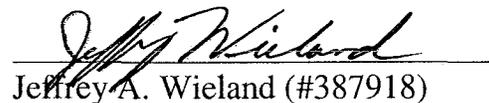


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**CERTIFICATION OF LENGTH**

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs. 1 and 3, for the brief produced with a proportional font. The brief contains 5,085 words. This brief was prepared using Microsoft Word 2007.



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