

NO. A11-1271

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State of Minnesota  
**In Court of Appeals**

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Rochon Corp.,

*Appellant,*

vs.

City of St. Paul,

*Respondent.*

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**RESPONDENT'S BRIEF 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. Should the Trial Court's Order Which Found That a Change to the Lowest Bidder's Price Was Not a Material Change Where the Bid after Revision Remained the Lowest Bid Received Be Affirmed?**

Appellant Rochon ("Rochon") moved for summary judgment seeking a declaration that Respondent City of St. Paul's ("City") contract with Shaw-Lundquist ("Shaw") for construction of the Lofts at Farmers Market Project was void because the City allegedly violated Minn. Stat. § 471.345, the "Uniform Municipal Contracting Law" as well as Minnesota case law. The trial court granted Rochon's motion in part, ruling that the City violated Minn. Stat. § 471.345 entitling Rochon to its bid costs pursuant to Minn. Stat. § 471.345, subd. 14. However, the trial court further ruled that the City's permitting Shaw to revise its bid to correct a clerical error after bids were opened was not a material change, where even with the revision Shaw's revised bid was approximately \$700,000 lower than Rochon's bid of \$8,725,000.

Apposite authority:

Minn. Stat. § 471.345

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

**2. Should the Trial Court's Decision Not to Declare the Contract Between the City and Shaw to Be Void or Illegal Be Affirmed?**

While the trial court granted Rochon's Motion for Summary Judgment in part by declaring that the City violated Minn. Stat. § 471.345 and awarded Rochon its bid costs,

the trial court refused to declare the contract between the City and Shaw to be void as requested by Rochon.

Apposite authority:

Minn. Stat. § 471.345

Minn. Stat. § 555.02 and § 555.06

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

*Tel. Associates, Inc. v. St. Louis County Bd.*, 364 N.W.2d 378 (Minn. 1985)

**STATEMENT OF THE CASE**

Rochon's Verified Complaint dated January 6, 2011 (App. 3-8), alleged that Rochon was one of six bidders who submitted a sealed bid to the City to perform work as general contractor on the Lofts at Farmers Market Project ("Project"). Rochon claimed that after the sealed bids were opened on November 22, 2010, its bid amount was \$8,725,000 with the low bidder Shaw submitting a bid of \$7,333,000. Plaintiff alleged that after Shaw provided the City with additional documentation supporting a bid error, the City awarded the contract for the Project at an increased bid amount of \$8,041,411.

Rochon in Count One of its Complaint requested that the trial court issue an injunction stopping work on the Project due to the City's alleged violation of Minnesota's Public Contracting Laws, as well as the rule set forth by the Minnesota Supreme Court in the case entitled *Griswold v. Ramsey County*, 242 Minn. 529, 65 N.W.2d 647, 652 (1954). In Count Two of its Complaint, Rochon requested a declaration by the trial court that the

contract awarded by the City to Shaw was the result of an illegally conducted public procurement and was therefore illegal and void. Rochon as damages asked for its costs incurred in preparing its bid.

Rochon filed a Notice of Motion and Motion for a Temporary Restraining Order dated January 6, 2011. (RA 1-2). Rochon requested an order restraining and enjoining the City from incurring any costs or expenses under the construction contract between the City and Shaw until such time as the Court could fully determine the legality of the contract. (RA 17-18). Rochon in its Memorandum argued that the City must be enjoined from proceeding on the alleged illegal contract to protect the integrity of the public procurement process. (RA 3-16).

The City served its Memorandum of Law in Opposition to Rochon's Motion for a Temporary Restraining Order dated January 10, 2011. (RA 19-23). Attached in support of the City's Memorandum were Affidavits of Susan Feuerherm of the City's Contract and Analysis Services Division, as well as an Affidavit of Diane Nordquist, a Project Manager for the City's Department of Planning and Economic Development. (RA 24-27). According to the Affidavit of Susan Feuerherm, the bids for the Project were open on November 22, 2010, with the apparent low bidder being Shaw with a bid of \$7,333,000. (RA 24). On November 23, 2010, Ms. Feuerherm received a faxed letter from Shaw-Lundquist requesting that their bid be withdrawn due to a mathematical error, and that the correct bid total should have been \$8,041,411. (RA 24, 28). Ms.

Feuerherm's Affidavit indicates that of the remaining five bids, two bids were nonresponsive for failing to complete a required form for inclusion of women and minority owned businesses, leaving Rochon as the next lowest bidder at \$8,725,000. (RA 24).

Ms. Feuerherm contacted Shaw to verify the stated reason for requesting withdrawal of their bid and was advised that there was a mathematical error due to incorrectly inputting the HVAC subcontractor's bid. (RA 25). Shaw provided documentation on November 23, 2010, stating that the HVAC price should have been \$688,000 rather than the \$68,800 amount entered on the spreadsheet. (RA 25, 29-34). Ms. Feuerherm indicated that after discussing this matter with the City's Housing and Redevelopment Authority ("HRA"), it was determined that there was no time to rebid the Project because the funding source required that there be a contract in place by the end of 2010, and that the Rochon bid was too high to permit the City to contract with them. (RA 25).

The Affidavit of Diane Nordquist supporting the City's Memorandum in Opposition to Plaintiff's Motion for a Temporary Restraining Order indicates that Ms. Nordquist was the Project Manager regarding the Project. (RA 26). She noted that in order to make the Project financially feasible to construct, the City needed to issue over \$7 million of Build America Bonds with that program having an expiration date of December 31, 2010. (RA 26). Ms. Nordquist stated: "This project would not have

moved forward without this favorable financing, nor would the HRA have proceeded to issue bonds without a construction contract in place.” (RA 26, item 2).

Ms. Nordquist’s Affidavit also indicated that a prior effort to develop the property had been terminated due to a dispute between a contractor and a developer. She noted the following:

The City was left with a site that has been partially excavated and construction started. The City has already expended over \$4 million on this site, including land acquisition, holding costs, soft costs and hard construction costs associated with the failed project. If this project did not move forward, the existing hole on the site would have to be filled in at a cost of approximately \$450,000.

(RA 26-27, item 3).

Ms. Nordquist’s Affidavit confirmed her belief that Rochon’s bid at \$8,725,000 was higher than the Project budget allowed. She further stated that without a signed contract in place, the City would not have been able to proceed on their request for Build America Bonds. (RA 27). She further indicated that there was not time to rebid the Project, nor was there any assurance that new bids, if sought, would have been within the Project budget. Ms. Nordquist stated that now that the Build America bond proceeds have been issued to the City, any delay in the construction schedule would cost the City approximately \$43,000 per month in additional interest costs. (RA 27, item 6). She noted that the fully executed construction contract between the City and Shaw was in an amount of \$8,059,011 based on construction starting in January 2011 and being completed in January 2012. Ms. Nordquist’s Affidavit concludes: “If the project does not move

forward, the City/HRA would be required to repay all of the bond proceeds, both principle and interest, for the next ten years. The cost to the City/HRA would be \$10,201,000.” (RA 27, item 8).

By Order and Memorandum dated January 21, 2011, the trial court denied Rochon’s Motion for Injunctive Relief. (Add. 17-27). The trial court’s Findings of Fact stated that the City allowed Shaw to modify its bid from the original bid of \$7,333,000 to \$8,059,011 (which was still considerably less than Rochon’s bid of \$8,725,000). (Add. 19, item 11). The trial court noted that on December 21, 2010, Rochon and others protested the award to Shaw and that on December 27, 2010, the City denied the protest and refused to rebid the project “apparently because it would stand to lose the federal stimulus money which was being used to finance the Project if the Project was not in place by December 31, 2010. The Project would create jobs, improve the Lowertown area of St. Paul, provide housing and complete a stalled project.” (Add. 19, item 14).

The trial court in its Memorandum of Law weighed Rochon’s hardship against the harm to be suffered by the City if the injunction was granted. The trial court then commented:

The City maintains that if the injunction is granted, the project will, at a minimum, be delayed or not go forward at all due to lack of funding. It will be stuck with a giant hole in the ground. The City estimates that the result of delaying the construction schedule will cost \$43,000 per month in additional interest costs if there is any delay in the construction schedule. If the project does not proceed, the City will be required to repay the bond proceeds, in a total amount of \$10,201,000 and will have nothing to show for the expenditure. In addition, it will leave a large eyesore or blight on

the area, deprive residents of additional housing downtown, cost taxpayers a great deal of money, and affect the livability of the City.

(Add. 23). At page 8 of the trial court's Memorandum, the trial court stated: "In this case, even after the error was corrected, the bid by Shaw was still the lowest bid.

Taxpayers have a right to receive the best bargain for the least amount of money.

Rochon's bid is still not the best bargain for the least amount of money." (Add. 24). In

citing the case of *Carl Bolander & Sons Co. v. City of Minneapolis*, 451 N.W.2d 204, 206

(Minn. 1990), the trial court commented as follows:

The Supreme Court held in *Carl Bolander & Sons, Co. v. City of Minneapolis*, that when a city's bidding documents require a bidder to specify how it intends to comply with goals for subcontracting with female and minority-owned businesses, and the bidder does not include such information, the city is entitled to treat the bid as non-responsive. *Id.* at 207-08. Here, the bids of Doran and Sand clearly were non-responsive. Rochon's bid was also substantially higher than even the amended bid by Shaw. This is an entirely different situation than one where the low bidder is passed over in favor of a higher bidder. *See, e.g. W.V. Nelson Construction, Co. v. City of Lindstrom*, 565 N.W.2d 434 (Minn. Ct. App. 1997).

(Add. 25).

Judge Ostby in her January 21, 2011, Order and Memorandum indicated that Rochon had made a strong case that the City not only failed to follow Minn. Stat. § 471.345, but also the City's own bidding requirements. (Add. 25). Regarding the public interest" prong of the *Dahlberg Bros., Inc. v. Ford Motor Co.*, 272 Minn. 264, 137 N.W.2d 314 (1965), analysis, the court commented as follows:

Public policy favors both awarding contracts to lowest bidders and awarding them to contractors who provide opportunities to get the job done at the most reasonable price. In this case, the result is economic stimulus for the city and job creation, as opposed to having to repay bond proceeds of over \$10,000,000 with nothing to show for the expenditure. The Courts finds that application of these policies here favors denying the injunction.

(Add. 26). Rochon brought a Motion for Summary Judgment which was heard by the trial court on March 30, 2011. The trial court then issued an Order and Memorandum dated June 23, 2011. (Add. 2-16). Rochon's Motion was granted on the issue of whether the City violated Minn. Stat. § 471.345. The trial court specifically found that the City had violated the public bidding law. However, as a remedy, the trial court ordered that Rochon be awarded its bid preparation costs in the amount of \$33,652, but declined to declare the contract between the City and Shaw to be null and void. (Add. 3). The trial court noted that pursuant to the case of *Griswold*, 65 N.W.2d at 652, no material change may be made in a bid after the bids have been received and opened since to permit such change would be to open the door to fraud and collusion. (Add. 10). The trial court stated that the issue was whether a change or modification is "substantial or material."

(Add. 11). The trial court then commented:

The test for determining whether a change or variance is material is whether the change gives a bidder a substantial advantage or benefit not enjoyed by other bidders. *Bolander*, 451 N.W.2d at 207 (quoting *Coller*, 23 Minn. at 385, 26 N.W.2d at 840); *Telephone Assocs.*, 364 N.W.2d at 382 (quoting *Duffy v. Village of Princeton*, 240 Minn. 9, 12, 60 N.W.2d 27, 29 (1953)). 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.

(Add.11). At page 11 of the trial court's June 23, 2011, Order and Memorandum, it is stated:

In this case, there is no issue of material fact and dispute as to whether the City followed the competitive bidding law. The City's bidding procedures were improper. The bidding process was implemented in a manner that arbitrarily allowed Shaw to modify its bid. The City illegally allowed Shaw to modify its bid, not just by the amount of the error. However, this gave Shaw no unreasonable advantage – Shaw had the lowest bid even with the modification.

(Add. 12). The trial court declined to declare the contract between the City and Shaw to be void, commenting as follows:

In a declaratory judgment action brought under Minn. Stat. § 555.02, “the court may refuse to tender 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.*” Minn. Stat. § 555.06 (2010) (Emphasis added). Rochon claims that it is entitled to an order from the Court on summary judgment declaring the contract with Shaw void from the start and asks this Court to stop the Project, by prohibiting the City from any further expenditure of public funds under the contract. However, stopping the Project at this point would not terminate the uncertainty or controversy giving rise to the proceeding. On the contrary, it would likely create a whole host of additional lawsuits, not only with respect to Shaw, but also with all of the subcontractors who are working on the project. Moreover, the future of the project would be uncertain since the funds for the project were provided in part by Build America Bonds.

(Add. 14).

The trial court addressed the rationale of Rochon in seeking to void the contract between the City and Shaw as follows:

Rochon claims that it is trying to protect the sanctity of the bidding process, an admirable public interest. However, whatever Rochon's motives, there is also a significant public interest in preventing the waste of millions of

taxpayer dollars. At the time of oral arguments on this motion, the City had already expended \$1.3 million on the contract one month before oral arguments, as well as \$4 million in expense that were already in the project before it was repackaged in its current form. There were additional costs which the Court already found in its previous Order denying a temporary injunction.

(Add. 15).

The trial court also considered the potential impact on Shaw if the contract was voided, commenting as follows: “Shaw has expended considerable sums of money and may have detrimentally relied on the contract for the project. If the Court now denies the contract’s validity, the losses suffered by Shaw may be considerable.” (Add. 15). In this regard, the trial court cited the case of *City of Staples v. Minnesota Power & Light Co.*, 196 Minn. 303, 265 N.W. 58, 59 (1936) for a holding 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 trial court was also concerned about the issue of whether public funds would be squandered if the contract was declared to be void. The trial court observed that in the case of *Tel. Associates, Inc. v. St. Louis County Bd.*, 364 N.W.2d 378, 381 (Minn. 1985), the Minnesota Supreme Court held that despite irregularities in the bid-letting process, where a county phone system was installed and operating, ordering its removal would not be in the public interest. (Add. 16).

During the March 30, 2011, hearing (RA 35-65) regarding Rochon's Motion for Summary Judgment, Rochon's counsel addressed the City's concern in the event that the court declared the contract void as follows:

The City's last argument is that the remedy would be a hardship to the City, and that is – it is very true. If you issue the declaration, that is going to kill the project. That is unfortunate, that is sad, but under *Coller* and *Griswold*, I don't believe the Court has any choice.

(RA 52).

Rochon filed a Motion for Expedited Appellate Review on January 19, 2011. Rochon's counsel submitted an Affidavit in Support of said Motion. (RA 66-67). In Rochon's counsel's Affidavit, he stated the following:

Construction on the Lofts at Farmers Market Project ("the Project") is ongoing. I observed the Project on Saturday, July 9, 2011 from the grounds of the St. Paul Farmers Market. Construction on the Project has started, but it appears to be far from complete. The building appeared to be framed, but the exterior sheathing was not complete, windows and doors were not installed, and the interior walls of the ground floor were bare studs.

(RA 66, item 2).

The City's Memorandum dated July 25, 2011, in Opposition to Rochon's Motion for Expedited Review included the Affidavit of Diane Nordquist. (RA 68-70). In her Affidavit, Ms. Nordquist stated that at the present time, the City has paid out or has incurred costs for materials on order in an amount of approximately \$4 million to Shaw. (RA 68, item 3). She noted that this amount was roughly half of the City's contract with Shaw. Ms. Nordquist stated that in the event that the City's contract with Shaw is

declared illegal, the City would have to stop the Project and rebid it according to the public bidding law which would probably cause a six month delay detailed as follows: Two months to shut down the Project, secure the site and prepare bid documents for the balance of the work, two months to rebid the Project to make an award and finally, two months to negotiate and sign a new contract and get a new contractor mobilized. (RA 69, item 4).

Ms. Nordquist's Affidavit further indicated that based on today's construction market, she anticipated an increase in the cost of the remaining contract price in the range of 10 to 15 percent or \$800,000 to one million dollars in additional expense to the City. In addition, the City would incur additional architectural and engineering costs to document the Project and prepare plans for another bid that would cost approximately \$100,000, plus additional owner's rep services costing approximately \$50,000. (RA 69, item 5). Ms. Nordquist's Affidavit further stated that in the event that the contract with Shaw is declared illegal, the City would incur costs for maintaining security at the site during the six month period in the form of site barricades, fencing, doors and security guards at an additional cost of \$50,000. She estimated additional capitalized interest costs of \$314,000 on the outstanding bond debt during this six month time frame, as well as additional legal costs for new contracts. (RA 69-70, item 6).

At paragraph 7 of Ms. Nordquist's July 25, 2011, Affidavit, she commented as follows:

From a practical standpoint, if the current contract is declared to be void, it would be very difficult if not impossible, for the City/HRA to get warranties for HVAC, plumbing, fire sprinklers and electrical work done on this project unless the same subcontractors were used by the new general contractor. It is also doubtful that a new general contractor would be willing to take on a job mid-project and assume liability for a partially completed project.

(RA 70). Based on this, Ms. Nordquist believed that if the contract is declared to be void, this will result in the Project being terminated with the building left incomplete. (RA 70).

### **STATEMENT OF THE FACTS**

The deposition of Susan Feuerherm was taken on February 23, 2011. In her deposition, Ms. Feuerherm indicated that she has been a construction buyer for the City for the past 23 years. (App. 112). At pages 12 and 13 of her deposition, Ms. Feuerherm indicated that in regard to the bidding process, she had no reason to disfavor Rochon or any reason to prefer Shaw. (App. 113).

Ms. Feuerherm noted that six bids for the Project were received by the City on November 22, 2010, through sealed, competitive bidding. (App. 114). Ms. Feuerherm confirmed that on November 23, 2010, she received a faxed letter from Shaw requesting its bid be withdrawn due to a mathematical error, and stating that the corrected total should be \$8, 041,411. (App. 114).

Ms. Feuerherm examined the bids on behalf of the City and determined that the next two low bids from Doran Construction and Sand Companies, Inc. were

nonresponsive as they failed to complete a required form for inclusion of women and minority owned businesses. (App. 114).

Prior to soliciting bids, the City announced an expected bid range of \$7.5 million. The Project budget was also \$7.5 million. (App. 115). Ms. Feuerherm was questioned as to whether the City announced an expected bid range in its bid solicitation in the fall of 2010. Ms. Feuerherm indicated that the City did indicate an expected bid range of \$7.5 million. (App. 115).

On November 23, 2010, Ms. Feuerherm had a telephone conversation with a representative of Shaw who said that Shaw had reviewed its bid and bid tabulations, and discovered an error in the form of a discrepancy between the HVAC contractor's bid and their spread sheet. (App. 116). Thereafter, Shaw provided documentation via fax on November 23, 2010, which demonstrated that the HVAC price should have been \$688,000 rather than the \$68,800 entered on Shaw's spreadsheet. (App. 117).

Ms. Feuerherm was questioned by Rochon's counsel as to whether the City could have allowed Shaw to withdraw its bid and then rebid the Project. Ms. Feuerherm indicated that a normal bidding process typically takes five weeks to complete. She commented that the Competitive Bidding Act provides that a project be advertised for two consecutive weeks. She also noted that the City would have had to get all new documents and have them all reprinted which would take probably a week to complete. She then commented: "We would have to get everything coordinated and then you have

to let, we believe you have to let the contractor have enough time to review it again. A lot of the bidders might have already destroyed their documents.” (App. 117). Ms.

Feuerherm was directed by the HRA through her director to confirm that Shaw would perform the work for the corrected amount of \$8,041,411. (App. 118).

The deposition of Diane Nordquist was taken on February 23, 2011. Ms. Nordquist, at pages six and seven of her deposition (App. 123), confirmed that she was the Project Manager for the project in question. As Project Manager, Ms. Nordquist helped put together a team for development of the Project which included financing of the Project, designing the development and then bidding it out for construction. Ms. Nordquist was involved when Flannery Construction was the original contractor on the Project prior to the City’s rebidding in November 2010. (App. 123).

Ms. Nordquist noted that regarding the Project, the HRA approved the final budget which included Build America Bonds as a financing tool. Said bonds were only offered to projects that were publicly owned “and they were temporary, so those bonds have sunsetted.” (App. 124).

Regarding the use of Build America Bonds, Ms. Nordquist stated that using these bonds was “a way to complete a project, fill in a hole that we had in Lowertown and do it in the most financially feasible way.” (App. 125). She noted that the City had limited financing available to construct the Project. In this regard, she commented that the

Project itself as a rental project could only support so much debt so gap financing in the form of tax increment financing was necessary. (App. 125).

Ms. Nordquist stated that the City approved issuance of approximately \$7.7 million in Build America Bonds. (App. 125). Ms. Nordquist confirmed that prior to November 2010, the City had already expended \$4 million in attempting to construct the previous version of the Project. As to the previous effort which was unsuccessful, Ms. Nordquist stated that the previous developer and contractor could not agree on financing for the Project, and the contractor walked off the job. (App. 125).

Ms. Nordquist explained that in the event that the Project did not move forward, the City would incur a cost of approximately \$450,000 to bring fill in or to fill up the hole, to compact it and to build a surface parking lot, curbing and an adjoining alley. (App. 125-126).

Regarding the repackaged Project, Ms. Nordquist stated that the City had a budget of \$7.6 million for the Project for hard construction costs with a \$700,000 contingency. The \$700,000 contingency number was intended to cover any cost overruns. (App. 126). She stated that the Project could only support approximately \$7.7 million in debt. (App. 126). The \$7.7 million in supportable debt was calculated based on 1.2 percent debt coverage ratio on project net operating income and current marketing rates. (App. 126).

Ms. Nordquist was questioned regarding Rochon's bid of \$8,725,000 which Ms. Nordquist stated was higher than the Project budget. She then indicated that the

maximum budget for construction was \$7.6 million plus the \$700,000 contingency for a total of \$8.3 million. (App. 127).

Ms. Nordquist confirmed that the HRA would not have proceeded on the request for Build America Bonds without a signed contract in place. Because the City had to close on the bond financing before the end of the year in 2010, there was not time to rebid the Project, nor was there any assurance that the bids would have been within the Project budget if the City had rebid the Project. She commented: “So between the time that we received the bids back and the time we closed on the bond financing there was not enough time to rebid the Project.” (App. 127). Ms. Nordquist estimated that it would take at least three weeks to close on the bond financing and another week to actually sell and close on the bonds. (App. 127).

Ms. Nordquist stated that any delay in the construction schedule would cost the City approximately \$43,000 per month in additional interest costs relating to the \$7.7 million in Build America Bonds that were issued to the City. (App. 127). Ms. Nordquist then was questioned as follows:

Q. How does the delay of the project cost \$43,000 per month in added interest? A. That is based on when the income starts coming in to pay off the debt service on the bonds. If there is any delay in that, we would have to come up with more interest to start paying the interest cost on the bonds.”

(App. 127-128). Ms. Nordquist stated that interest was accruing whether the Project proceeded or not, and that until the Project was actually built, the City had no rental income to service the debt. (App. 128).

On January 25, 2011, Ms. Nordquist issued a Notice to Proceed to Shaw to commence the Project. This notice was issued four days after the trial court's order denying Rochon's Motion for Injunctive Relief. Actual work on this site started at the same time. There was a delay of approximately a week prior to the issuance of the notice while the City waited for the Court to issue its order in relation to Plaintiff's Temporary Restraining Order Motion. (App. 128).

Ms. Nordquist estimated at the time of her February 23, 2011, deposition, the City had expended probably a million dollars in additional funding on the Project. She also noted that Shaw had submitted a pay application for \$300,000 which was due from the City within 10 days of the date of submission. (App. 129).

Ms. Nordquist was questioned as to why the City did not allow Shaw to withdraw its bid. She responded as follows: "Because the next lowest bid, we wouldn't have been able to go forward with the Project. It was over our budget." (App. 129).

Ms. Nordquist was then questioned as to why the City allowed Shaw to correct their mathematical error. She responded: "The discussion was letting them correct the mathematical error, they are still the low bidder. And that is still giving the public the best price for this Project even with the mathematical error." (App. 130).

## ARGUMENT

### **1. The Trial Court's Finding That a Change to the Lowest Bidder's Price Was Not a Material Change Provided That the Bid Remained the Lowest Bid Received Should Be Affirmed.**

Rochon in asserting that the trial court erred in finding that the change in Shaw's bid was not material argues that if the decision is affirmed, it would open the flood gates to a "tsunami of potential for fraud and collusion. This Court should correct the district court's error and explicitly hold the changes to a bid price after the bid opening are not permissible, even if that change does not affect which bid is the lowest." (Rochon's Brief, p. 18).

Rochon's expressed concern lacks merit where Rochon concedes that the Shaw bid even after correction for the mathematical error was clearly the lowest bid for the Project.

At page 25 of Rochon's Brief, it cites the case of *Byrd v. Indep. Sch. Dist. No. 194*, 495 N.W.2d 226, 232 (Minn. Ct. App. 1993) for the proposition that one of the purposes of competitive bidding is to provide the public with "the best bargain for the least money." In the present case, it is undisputed that Shaw's bid, even after correction, was more than \$700,000 less than Rochon's bid. The taxpayers of the City of St. Paul received the best bargain for the least amount of money when the City accepted Shaw's revised bid.

Rochon's theoretical concern about the potential for future fraud does not exist under the unique facts of this case. The City in its fall 2010 bid solicitation announced an

expected bid range to potential bidders such as Rochon in the amount of \$7.5 million. Rochon with this knowledge chose to submit a bid that was more than \$1.2 million in excess of the bid range. Further, Rochon does not dispute that the maximum City budget for the Project was \$8.3 million, more than \$400,000 less than Rochon's bid. Even though Rochon technically was the second lowest bidder after two lower bids were disqualified, there was never any possibility that the City would take Rochon's bid in light of its limited Project budget.

Despite this, Rochon argues at page 21 of its Brief that after Shaw withdrew its bid after discovering its error, Rochon's bid was the lowest responsible and responsive bid remaining. The statement implies again that Rochon was somehow deserving of an award of the contract. This belies the evidence in the case and it demonstrates that Rochon's bid was well beyond the top limit of the City's budget for the Project.

At page 19 of Rochon's Brief, it cites the case of *Lovering-Johnson, Inc. v. City of Prior Lake*, 558 N.W.2d 499, 502 (Minn. Ct. App. 1997). Rochon argues that according to *Lovering-Johnson*, the correction of a bid entry modifying the price of a bid is a material change for which a public entity has no authority after a bid has been opened. In the *Lovering-Johnson* case, the City of Prior Lake awarded a contract to Rochon Corporation for construction of a maintenance and storage facility after a competing bidder submitted a bid of \$2,589,700. The city official interpreted arguably ambiguous terms contained in Rochon's bid as lowering Rochon's total bid from \$2,625,601 to

\$2,582,601. The city then found that Rochon's modified bid was the lowest bidder by the sum of approximately \$7,000. The *Lovering-Johnson* decision is clearly distinguishable based on the facts where the contractor whose bid was modified after bids were open was able to become the low bidder by a tiny amount due to ambiguity in its own bid. In the present case, there was a clear clerical error in Shaw's original bid where Shaw inadvertently dropped a zero from an HVAC subcontractors proposal, as opposed to ambiguous terms. More importantly, Shaw's modified bid was still more than \$700,000 less than Rochon's bid even after Shaw's bid was corrected.

At page 20 of Rochon's Brief, it is argued that the *Lovering-Johnson* decision held that any change is material if it affects price or gives a bidder a substantial advantage not enjoyed by other bidders. In fact, the *Lovering-Johnson* court at page 503 stated the following:

Thus, the issue becomes whether a change or modification to the bid is "substantial or material." The test for determining whether a change or variance is material is whether the change gives a bidder a substantial advantage or benefit not enjoyed by other bidders. *Bolander*, 451 N.W.2d at 207 (quoting *Coller*, 223 Minn. at 385, 26 N.W.2d at 840); *Telephone Associates*, 364 N.W.2d at 382 (quoting *Duffy v. Village of Princeton*, 240 Minn. 9, 12, 60 N.W.2d 27, 29 (1953)). 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 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, Inc.*, 558 N.W.2d at 502-503.

Here, Shaw did not displace Rochon as the lowest bidder but was always the low bidder by a large amount. The trial court's determination that Shaw's modified bid did not give Shaw a substantial advantage not enjoyed by other competitors is supported by the record and should be affirmed by this Court.

At page 23 of Rochon's Brief, it is argued that "second bites" are illegal pursuant to the case of *Carl Bolander & Sons Co.*, 451 N.W.2d at 206-07, because knowledge of competitors' prices gained after the bid opening yields a competitive advantage. At page 207 of the *Bolander* decision, the court noted that the essential question was whether the variance was substantial or material, i.e. did the variance in bids give a bidder a substantial advantage or benefit not enjoyed by other bidders. At page 208 of the *Bolander* decision, the court commented: "Bolander requests costs and attorney's fees since performance on this contract, we assume, has already been completed by McCrossan." Presumably this is a reference to the issue of whether the underlying contract could be voided. Here, while the Project has yet to be completely finished, it is apparent that any order of this Court nullifying the contract will end the Project. Such a result is not in the public interest.

At page 24 of Rochon's Brief, Rochon asserts that while it does not allege actual fraud, the fact that the contract as awarded by the City to Shaw was \$89,211 more than

the clerical error between the original Shaw bid and the revised bid “shows the impropriety of the City’s actions.” At page 25 of its Brief, Rochon describes this extra payment as a “windfall” from the City’s taxpayers.

Rochon’s counsel inquired of Susan Feuerherm at her deposition as to why Shaw was paid an additional \$89,211 beyond the error amount in the initial bid. When asked if there was any justification for the additional amount, Ms. Feuerherm stated: “I have no way of knowing that.” (App. 119).

Similarly, Rochon’s counsel inquired of Diane Nordquist as to her awareness of the \$89,000 differential. When asked if she was aware of that amount, she stated “I am now, yes” and explained that she learned of the difference after Rochon commenced litigation against the City. (App. 130). It is apparent from the testimony of the City officials that this relatively small amount paid to Shaw above and beyond the amount of the error in bids was not known to either of them. From a practical standpoint, the increased payment is approximately one percent of the entire contract amount between the City and Shaw, and certainly does not support an inference of impropriety on the part of the City.

At page 25 of Rochon’s Brief, it is argued that the City gave Shaw “the opportunity to recoup some of the money it had left on the table with its initial bid.” Thus, the City’s award to Shaw is described as “unlawful.” Shaw clearly knew that its bid even as corrected was more than \$700,000 less than Rochon’s bid as the next lowest

bidder. Obviously if Shaw's motive was to obtain the maximum amount of money under the contract it could have revised its bid to be much closer to Rochon's bid, which it did not do.

**2. The Trial Court's Decision Denying Rochon's Request That it Declare the City's Contract with Shaw to Be Void Should Be Affirmed.**

At page 26 of Rochon's Brief, it is argued that this Court should declare the City's contract with Shaw void because it violated Competitive Bidding Law. As discussed, the trial court found specifically that the City had violated the Uniform Municipal Contracting Law, Minn. Stat. § 471.345 and awarded Rochon its bid costs. At page 36, Rochon admits that this statute prohibits courts from awarding damages and attorneys fees, but only allows unsuccessful bidders to receive their bid costs. Plaintiff describes this statutory remedy as "an inadequate deterrent to illegal conduct." Rochon's proposed remedy is to kill the Project at a cost to City taxpayers of millions of dollars. The City asserts that the trial court properly denied Rochon's request for a declaration that the contract between the City and Shaw was illegal based on the record.

Rochon has offered for the Court's consideration a number of different decisions regarding its argument that the contract should be voided. None of these decisions involve construction of a building over a lengthy time frame which is the case here. For instance, at page 27, Rochon cites the case of *Diamond v. City of Mankato*, 89 Minn. 48, 93 N.W. 911 (1903) which involved a homeowner's challenge to a city tax rising out of street asphalt contract. The *Gale v. City of St. Paul* decision cited at page 27 of Rochon's

Brief involved a one-time purchase of material. 255 Minn. 108, 96 N.W.2d 377 (1959). The *Village of Excelsior v. Pearce Corp.*, 303 Minn. 118, 226 N.W.2d 316 (1975), decision cited at page 28 of Rochon's Brief involved a sewer construction Project. At page 28, Rochon cites the case of *Coller*, 26 N.W.2d 835, which involved a contract for installation of parking meters. The current scenario involving the City of St. Paul and its contract with Shaw is very different than a one-time contract for purchase of materials or services.

At pages 31 through 33 of Rochon's Brief, Rochon agrees that there will be an adverse affect on Shaw if this Court declares the City's contract with Shaw to be void, but states that this is not an unjust result where it is claimed that Shaw knew it was entering into a contract with the City under questionable circumstances. At page 33 of its Brief, Rochon argues that even if this Court finds that Shaw is entitled to recover in *quantum meruit* for work performed on an illegal contract, this Court should still declare performance on the remainder of the contract to be illegal, and order the contract to be rebid. While Rochon agreed that voiding the contract would "halt the project," it asserted that "stopping the expenditure of public funds on an illegal contract is a good thing." In this regard, Rochon arrogates to itself the role of deciding what is in the City taxpayers' best interest.

As discussed, the trial court in its June 23, 2011, Order and Memorandum at page 13 (Add. 14) expressed its concern that if it were to declare the City's contract with Shaw

to be void, its declaration would not terminate the uncertainty or controversy giving rise to the proceeding as indicated in Minn. Stat. § 555.06. Instead, the trial court determined that the declaration sought by Rochon would likely create a whole host of additional lawsuits, not only with respect to Shaw, but also with regard to all of the subcontractors who are working on the Project. The trial court then cited at page 14 of its Order and Memorandum (Add. 15) the case entitled *City of Staples*, 265 N.W. at 59 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 the law.

While Rochon attempts to distinguish the *Staples* decision on the facts, Rochon deliberately does not address the crucial issue raised by the trial court, which is whether a declaration that the contract is void will result in a host of future litigated matters.

Rochon itself admits at page 35 of its Brief that a declaration that the contract is void will probably lead to interruption in construction of the Project and “might cause the City to lose some advantageous federal funding.” In fact, the possibility exists that there might be litigation involving the City and the federal authority which issued the Build America Bonds, especially where the contract which the City referenced in obtaining the funds is now declared illegal.

At pages 34 and 35 of Rochon’s Brief, it is noted that the trial court cited the case of *Tel. Associates, Inc.*, 364 N.W.2d at 381, as support for the idea that declaring the contract void “would lead to economic waste.” Rochon then states that it is not asking

that Shaw's work on the Project be "torn out." Rochon then argues therefore that the trial court's reliance on the *Tel. Associates* decision is "misplaced."

In the *Tel. Associates* case, the court at page 382 cited *McQuillan, The Law of Municipal Corporations*, § 29.83 at 426 (3<sup>rd</sup> Ed. 1981) for the following proposition:

Since the power of letting public contracts must be exercised for the benefit of the public and not the bidder, it is generally held that an award of a contract to one other than the lowest bidder does not entitle the lowest bidder to recovery of damages from the municipality, nor to an action to recover profits which he might have made had his bid been accepted . . . the rationale underlying this rule is that the authority for letting public contracts is derived for the public benefit and is not intended as a direct benefit to the contractor.

(Emphasis added).

The court in *Tel. Associates* while finding that the county engaged in improper bidding procedures, stated the following: "The phone system is installed and operating. To order its removal now would not be in the public interest." This reasoning is applicable to the present situation. If the contract is declared void, the City in all likelihood will not be able to complete the Project, and will end up with a half finished building after an expenditure of more than \$8 million to date. Such a result is not in the public interest. Rochon's purported interest as a "private attorney general" in seeking to destroy the Project does not trump the City's legitimate public interest in completing the Project without interruption and without crippling additional cost.

It should also be noted that even if the trial court had determined that Shaw's modification of its original bid was substantial or material, the *Tel. Associates* decision

would still provide support for the City's argument that the public interest does not justify removal or termination of the Project. In fact, the *Tel. Associates* case specifically noted at page 382 of its decision, the general rule that the government entity has no authority to waive defects which affect or destroy competitive bidding, commenting as follows: "The test of whether a variance is substantial is 'whether it gives a bidder a substantial advantage or benefit not enjoyed by other bidders.' *Duffy v. Vill. of Princeton*, 240 Minn. 9, 12, 60 N.W.2d 27, 29 (1953)." The Minnesota Supreme Court thereafter made a specific finding that while the county's action in that case gave one bidder an unfair advantage over others, the sole remedy under the circumstances was an award of bid costs. Such a result is mandated in the present case.

### **CONCLUSION**

Respondent City of St. Paul requests that the Minnesota Court of Appeals affirm the order of the trial court in all respects. In this regard, it is asserted that the trial court did not err in finding that a change of the lowest bidder's price was not a material change where the bid remained the lowest received on the record. In addition, the City requests that this Court declare that the City's contract with Shaw is valid and enforceable and not void as claimed by Rochon.

Dated: August 19, 2011.

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## CERTIFICATE OF COMPLIANCE

This Brief complies with the word limitations of Minn. R. Civ. App. P. 123.01, subd. 1 and subd. 3. The Brief was prepared using a proportional 13-point font using WordPerfect Office - Version 12.0, which reports that the brief contains 7687 words.

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