
NO. A06-109

State of Minnesota
In Court of Appeals

Allen Javinsky, P.E.,

Appellant,

v.

Commissioner of Administration, Dana Badgerow,
in an official capacity as head of the Minnesota
Department of Administration,

Respondent.

APPELLANT'S BRIEF

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LEGAL ISSUES:

1. Did the court below err by rejecting as a matter of law Appellant's claims for mandamus and declaratory relief, on grounds that Minn. Stat. § 16B.33, *et seq.*, does not give the State Designer Selection Board jurisdiction over a construction project involving sewer and wastewater tunnels on the grounds of, and connected to the buildings of, the Minnesota Correctional Facility at Faribault?

2. Did the court below err by granting summary judgment against Javinsky's promissory estoppel claims, basing its decision solely on grounds that as a matter of law that Javinsky did not suffer enough injustice to warrant special judicial action?

STATEMENT OF THE CASE

Commencing in 1999, several construction projects were commenced involving a deep sewage and storm water tunnel which is underneath and connected to the Minnesota Correctional Facility at Faribault. Appellant Allen Javinsky, P.E. ("Javinsky") was involved in these projects as a subcontractor. The project was administered by the state Department of Administration ("the Department"), and the selection of designers and contractors for this project were made by the State Designer Selection Board ("Designer Selection Board").

In 2003 the Department decided to break out some of the work separately, and issued a new Request for Proposals covering that specific portion of the project (the separate portion is referred to as "Project 04-01"). Initially the Department intended to select the contractor for Project 04-01 itself, without using the Designer Selection Board. However, after receiving criticism that all previous part of the Faribault project had previously used the Designer Selection Board, the Department reversed itself and asked the Designer Selection Board to pick the successful contractor. At the request of the Department, the Designer Selection Board issued a Request for Proposals in early 2004.

In April 2004 the Designer Selection Board picked Javinsky to do Project 04-01. Javinsky was promptly informed in writing by both the Designer Selection Board and the Department of Administration that he had been chosen to do the work on Project 04-01.

However, one of Javinsky's competitors, who had not been selected by the Designer Selection Board, submitted a protest to the Department alleging various flaws in

the process which resulted in Javinsky's selection. In response to this protest, the Commissioner decided to place a hold on execution of the contract. This hold on Javinsky's contract remained in place from May 2004 until September 2004.

In September 2004 the Commissioner upheld the protest of Javinsky's competitor, withdrew Javinsky's selection, formally withdrew Project 04-01 from the jurisdiction of the Designer Selection Board, and initiated a new selection process to be handled exclusively by the Department. Javinsky protested this decision, but his protest was denied. A new Request for Proposals was issued in October 2004. Javinsky submitted a response to the new Request for Proposals. However, in early November 2004, the Department selected Javinsky's competitor for Project 04-01.

On November 10, 2004, Javinsky commenced this lawsuit in Ramsey County District Court. The matter was assigned to the Honorable Teresa Warner. In his action against the Commissioner, Javinsky sought a writ of mandamus and declaratory judgment, and also asserting claims for breach of contract and promissory estoppel. Javinsky sought a temporary restraining order in connection with the writ of mandamus, arguing that the Commissioner had violated his express duty to refer Project 04-01 to the Designer Selection Board pursuant to Minn. Stat. § 16B.33.

The court below rejected Javinsky's claim for writ of mandamus and declaratory judgment by Order and Memorandum dated December 16, 2004.

Legislative authorization for the funds for Project 04-01 was set to expire by December 31, 2004, if a contract had not been finalized by that date. Consequently, prior

to the court's decision, the parties agreed to treat the decision on Javinsky's application for a temporary restraining order as final judgment on Javinsky's mandamus and declaratory judgment claims.

Discovery then proceeded on the remaining claims. Javinsky withdrew his breach of contract claim. The court below granted summary judgment against Javinsky on his sole remaining claim of promissory estoppel on October 27, 2005. Judgment was entered pursuant to this Order on November 14, 2005.

STATEMENT OF THE FACTS:

1. **Background.** The project at issue in this case is a portion of a larger tunnel project which was commenced in 1999 at the Minnesota Correctional Facility - Faribault. In 1999 a need for work on the deep tunnel at MCF-Faribault was identified, and the Department of Administration referred the project out to the State Designer Selection Board ("SDSB") to select an engineering firm to complete the work.

Prior to the time this case arose, the Department of Administration did not have a firm policy on whether or when infrastructure projects would be referred to the SDSB for selection of a designer and/or engineer. A number of purely infrastructure projects had been referred to the SDSB by the Department immediately prior to this Project.

Supporting Material in the Record:

App. at 364-65; Lamb Depo., at 4, lines 15-24 (Lamb was Commissioner of Administration at relevant times); App. at 365 -- at 11, lines 1-15 (Department policy prior to CNA protest was to refer infrastructure projects to the SDSB on a case-by-case basis).

App. at 342; Christofferson Depo., at 16, lines 5-21 (initial Faribault project had gone to SDSB for selection even though it was infrastructure); App. at 352 -- at 105, line 15 to 106, line 9 (As of June 30, 2004, the Department had no firm policy on whether or not to refer non-building projects to the SDSB).

App. at 382; Rooney Depo., at 5, line 7-14 (Rooney was project manager for Faribault project); App. at 382 -- at 6, lines 12-22 (Faribault project was originally referred to the SDSB “in due course”).

App. at 360; Ferrin Depo., at 4, lines 11-14 (Ferrin has been principal mechanical engineer at State Architect’s Office since 1987); App. at 361 -- at 13, lines 9-17 (Ferrin designed several infrastructure projects over the last 7-8 years that had used the SDSB selection process); App. at 362 -- at 37, line 16 to 38, line 19 (Ferrin unaware of any discussion about the distinction between building projects and infrastructure projects in determining whether or not a project had to be referred to the SDSB).

2. The First RFP. In 2003, the specific project at issue in this project (“the Project”) was separated off from the main project, and a separate proposals were

requested from four specific engineering firms for the work (the "First RFP"). The plaintiff, Allen Javinsky, was one of the four engineering firms or businesses who received a specific invitation to respond. Gordon Christofferson, then Assistant Director of the State Architect's Office, had decision-making authority for the Department of Administration for the Project at this time. Christofferson decided to award the Project to the firm who had finished second in the original selection process in 1999. Javinsky orally protested this decision, contending there was no authority for the Department to go back and pick the second-place finisher from the 1999 selection process.

Supporting Material in the Record:

App. at 347-48; Christofferson Depo., at 60, line 12 to 62, line 5 (Javinsky orally complained to Christofferson about the First RFP for the Project); App. at 348 -- at 62, line 19 to 63, line 5 (Christofferson had authority to make decisions for the Department regarding whether or not SDSB should be used for selection process).

App. at 382; Rooney Depo., at 8, lines 13-16 (Rooney's immediate supervisor for the Project was Christofferson); App. at 383 -- at 12, lines 2-5 (Christofferson had authority to refer the Project to the SDSB for selection).

App. at 373; Myers Depo., at 4, line 20 (Myers is Director of the State Architect's Office); App. at 374 -- at 8, lines 15-25 (Christofferson had responsibility for supervising work on the Project).

3. **“Grand-fathering.”** Christofferson agreed with Javinsky’s objection. In particular, Christofferson felt that the SDSB and not the Department of Administration should select the engineer because the Project was “grand-fathered” into the SDSB because the initial Faribault project has used the SDSB to select the original engineering firm in 1999.

Supporting Material in the Record:

App. at 342; Christofferson Depo., at 16, lines 5-21 (Christofferson felt that the Project should have gone to SDSB because it was “grand-fathered” into SDSB -- the initial Faribault project had gone to SDSB even though it was likely outside SDSB jurisdiction); App. at 347-48 -- at 60, line 12 to 62, line 5 (Christofferson agreed with Javinsky that the Project had been “grand-fathered” in to the SDSB)

App. at 383; Rooney Depo., at 11, line 4 to 12, line 1 (Christofferson told Rooney that the Second RFP needed to be referred to SDSB; Rooney recalls Christofferson using the word “grandfathering” in discussing why he uphold Javinsky’s protest).

App. at 375; Myers Depo., at 10, lines 12-22 (very vaguely recalls that the Project may have referred to the SDSB because it was a “continuation” of prior work).

4. **The Second RFP.** Because of his conclusion that the Project had been grand-fathered into the SDSB process, Christofferson sent the Project to the SDSB to choose a consultant in February 2004. The SDSB issued a Request for Proposals for the Project, which it designated Project 04-01 (“the Second RFP”). In late April 2004, after

evaluating the proposals it received, the SDSB chose Javinsky to do the Project. Javinsky was notified in writing that he had been selected, and because he was selected he was required to reserve enough time to complete the Project promptly once the contract was executed (the terms requiring Javinsky to make time available were contained in the RFP). Javinsky promptly entered into discussions regarding his fee schedule and other matters related to the Project, and contract negotiations between Javinsky and the Department were substantially completed on or before May 13, 2004.

Supporting Material in the Record:

App. at 343; Christofferson Depo., at 21, lines 16-18 (Christofferson was the decision-maker who referred the Project to the SDSB for the Second RFP); App. at 349 -- at 39, lines 11-15 (after selection, negotiations with Javinsky were completed by May 13, 2004, at the latest); App. at 348 -- at 62, line 19 to 63, line 5 (Christofferson had the authority to make decisions for the Department about referring the Project to the SDSB).

5. CNA's Protest Results in a "Hold" on Javinsky's Contract. One of the other firms which submitted a proposal, CNA Consulting Engineers ("CNA") immediately protested the SDSB's selection of Javinsky on a number of grounds. CNA ultimately contacted the Commissioner of Administration, Brian Lamb, directly to register its protest. In response to CNA's protest, in a meeting with his staff on May 11, 2004, Commissioner Lamb decided to continue processing the contract with Javinsky but not to finalize it pending his decision. Commissioner Lamb sent a letter to CNA on May

14, 2004, indicating the the Department would continue with its plan to execute a contract with Javinsky notwithstanding CNA's complaints about the SDSB's decision. CNA requested more time to submit additional information in connection with its protest, which it ultimately did on June 14, 2004. While waiting for CNA's information, final execution of Javinsky's contract was put on hold.

Supporting Material in the Record:

App. at 345; Christofferson Depo. at 34, line 5 to 36, line 3 (staff meeting with Commissioner Lamb on May 11, 2004; Commissioner placed a hold on final execution of contract; hold was still in place as of June 11, 2004); App. at 344 -- at 32, lines 11-15 (Commissioner sent letter on May 14, 2004, indicating that he would uphold SDSB's selection of Javinsky); App. at 351 -- at 91, line 16 to 94, line 5 (Christofferson and others grant and extension of time until June 14, 2004, for CNA to submit its formal protest of the SDSB's selection of Javinsky).

6. Javinsky Waits, Holding His Schedule Open. Because Javinsky had been selected, he was required under the terms of the RFP to hold open sufficient time on his schedule to complete the Project once the contract was executed. The delay caused by the Commissioner's decision to put the contract on hold required to Javinsky to wait, without the ability to take on replacement work while he waited. As late as August 2004, Javinsky was reminded of his commitment to keep sufficient time available by decision-makers in the Department.

Supporting Material in the Record:

App. at 353; Christofferson Depo., at 118: lines 14-21 (Javinsky was required to reserve sufficient time to complete project between time he was selected in April and time CNA protest was upheld in September).

App. at 321; Javinsky S.J. Aff., at 6, ¶ 12 (Javinsky was aware that he had to reserve time once he was selected by the SDSB; responses to RFP must include “[a] statement of commitment to enter into the work promptly, if selected, by engaging the consultants and assigning the persons named in the proposal along with adequate staff to meet the requirements of the work.”); App. at 322-23 -- at 6-7, ¶¶ 15-15 (Javinsky told Christofferson three separate times during the summer of 2004 that he had cleared his calendar for the Project - and Christofferson never released him from this commitment); *Id.*, ¶ 15 (Javinsky met with Heidi Myers on August 3, 2004, and told her of his commitment to keep time available - Myers did not respond and did not tell Javinsky that he was released from this commitment of time).

7. The Delay Lengthens. After CNA’s additional information was received on June 14, 2004, Commissioner Lamb decided that the contract should not be finalized pending his review of the SDSB selection process. Very soon after he received CNA’s additional protest information on June 14, 2004, Commissioner Lamb requests that the SDSB provide him information relating to its selection of Javinsky. In the meantime internal Department of Administration e-mails suggest that CNA’s protest was viewed as

an opportunity for the Department to fix certain ambiguities in its statutory relationship with the SDSB.

Supporting Material in the Record:

App. at 350; Christofferson Depo., at 85, line 20 to 86, line 22 (After receiving CNA's protest letter on June 14, 2004, Commissioner Lamb quickly concluded that the SDSB's selection process was potentially flawed and subject to challenge, and decided to continue the "hold" which had been placed on final execution of the contract with Javinsky pending a request to the SDSB to explain the criteria they used in selecting Javinsky).

App. at 357; Plaintiff's Deposition Exhibit 19 (attached to, and verified in Christofferson Depo., at 75, lines 12-20) (internal Department e-mail, dated May 16, 2004, criticizing the SDSB's selection criteria for the Project, and concludes "It may be time to address the underlying issue with the SDSB's authority. Are they exempt from the statutory rules and requirements of contracting, or are they simply a designated evaluating body?").

8. Javinsky is Misled About the Nature of the Delay. No one in the Department tells Javinsky that Commissioner Lamb has decided to investigate the basis of the SDSB's decision to select him for the Project. Throughout the summer of 2004, no one in the Department tells Javinsky that the Department is contemplating use of CNA's complaint as a vehicle to revise its handling of referrals to the SDSB for infrastructure

projects or as a way to assert the Department's authority to review the sufficiency of the SDSB selection process. In fact, Javinsky is lead to believe that CNA's protest is without merit and will be dismissed.

Supporting Material in the Record:

App. at 350; Christofferson Depo., at 85, line 20 to 86, line 22 (No one told Javinsky that the Commissioner had determined on or about June 15, 2004, that the SDSB's decision to select him might be seriously flawed); App. at 346 -- at 53, line 11 to 54, line 3 (Christofferson never felt a need to warn Javinsky that CNA's protest might succeed, and no one else in the Department discussed warning Javinsky that CNA's protest might succeed); App. at 354-55 -- at 124, line 12 to 125, line 2 (In response to Commissioner's request, the SDSB convened in July 2004 to review the validity of its selection of Javinsky; Christofferson never informs Javinsky that the SDSB is reconsidering its selection of him, but Christofferson does inform Javinsky's competitor, CNA, that the SDSB is meeting to reconsider); App. at 346 -- at 56, lines 17-21 (no one in the Department discussed a possible need to give Javinsky a chance to respond to allegations made against him by CNA in its protest); App. at 347 -- at 57, line 15-24 (no one in the Department informed Javinsky when CNA filed its protest letter, nor did anyone inform him of the substance of CNA's protest).

App. at 371; Lewko Depo., at 19, line 23 to 20, line 2 (Lewko was Executive Secretary of the SDSB at relevant times); at 11, line 23 to 12, line 4 (Lewko admits that it's possible that he told Javinsky that CNA's protest would not stand).

App. at 377; Ouska Depo., at 4, lines 17-24 (Ouska was Assistant Commissioner of Administration at relevant times); App. at 378 -- at 27, lines 17-24 (Ouska has no idea if any discussion occurred about whether or not Javinsky should be warned that the SDSB's authority to select him was under challenge by the Department).

App. at 367; Lamb Depo., at 23, lines 8-15 (Commissioner admits that it was "highly unusual" for him to pull back a project from the SDSB).

App. at 319-20; Javinsky S.J. Aff., at 4-5, ¶¶ 10-11 (Javinsky had "full faith and confidence" that the Department would give him the contract, for six reasons: (1) prior use of the SDSB for infrastructure projects; (2) the RFQ published in the State Register in May 2002, which indicated that the Department would refer all projects of a certain size to the SDSB; (3) the Executive Secretary of the SDSB, Terry Lewko, told him that "the Commissioner can't interfere with the SDSB process"; (4) to his knowledge the State Architect's Office had never cancelled a contract without cause, once the contractor had been selected; (5) Gordon Christofferson told him that the Commissioner had "no compelling reason to overturn [the SDSB's decision]"; and (6) Kath Ouska told him that the SDSB is independent of the Department, and that the SDSB selects the consultant (contemporaneous notes of Javinsky's conversations with Christofferson and Ouska are attached to his affidavit as Exhibit A); App. at 322 -- at 7, ¶ 15 (On eight separate occasions between late May and late August 2004, Department officials made numerous oral statements to Javinsky, indicating that he would be able to proceed in a short time with the Project) (these statements included "Admin is proceeding with the contract",

“Commissioner will make the decision in 3 days” or “4 days”) (these statements convinced Javinsky that commencing the Project was “just around the corner.”).

9. Over Four Months Later, CNA’s Protest is Upheld. In September 2004, over four months after CNA’s protest had been filed, Commissioner Lamb decided that the SDSB procedures were improper, pulled the Project back from the SDSB and initiated a new RFP process. The basis for Commissioner Lamb’s decision has nothing to do with the specific qualifications of Javinsky or CNA, but is solely based on his decision to resolve statutory ambiguity about the role of the SDSB in the state procurement process.

Supporting Material in the Record:

App. at 366; Lamb Depo., at 18, lines 1-14 (Commissioner’s decision to reverse SDSB’s selection of Javinsky had nothing to do with specific qualifications of either Javinsky or CNA - it was a general question relating to Departmental authority and SDSB procedures).

10. The Impact on Javinsky of Delay and then Retroactive Application of New Policy Was Never Considered. Neither Commissioner Lamb nor anyone else in the Department ever considered whether the delay caused by CNA’s protest was harmful or unfair to Javinsky. No one in the Department ever evaluated whether it was harmful to Javinsky to wait more than four months without work, holding time available for the

Project while CNA's protest was pending. No one in the Department ever considered whether retroactively pulling the Project from the SDSB (and thereby pulling it away from Javinsky) was unfair or harmful to Javinsky. There was no discussion of "grand-fathering" the Project into the SDSB during the Department's debate over the CNA protest, and consequently no discussion about whether it was it was unfair to Javinsky to reverse Christofferson's prior decision to refer the Project to the SDSB on the basis that it had been grand-fathered into the SDSB process.

Supporting Material in the Record:

App. at 353; Christofferson Depo., at 111, line 24 to 113, line 4 (there was no discussion in the Department about possible unfairness to Javinsky which might result from retroactive application of new rule prohibiting referral of non-building projects to the SDSB); App. at 353 -- at 114, line 2 to 115, line 1 (despite Christofferson's prior decision to refer the Project to the SDSB, there was no discussion in the Department about whether or not the Project had been "grand-fathered" into the SDSB process in connection with CNA's protest); App. at 353 -- at 117, line 23 to 118, line 1 (there was no discussion in the Department about whether de-selecting Javinsky and re-opening the RFP process was potentially unfair to Javinsky); App. at 353 -- at 118, line 22 to 119, line 5 (there was no discussion in the Department about whether it was unfair or harmful for Javinsky to wait and hold his schedule open during the four-and-a-half delay in the contract caused by the debate over CNA's protest).

App. at 384; Rooney Depo., at 20, lines 16-20 (project manager does not recall any discussion of whether delay caused by CNA's protest was fair or unfair to Javinsky).

App. at 379; Ouska Depo., at 33, lines 8-23 (Assistant Commissioner does not recall any discussion of whether or not delay caused by CNA's protest might have an adverse effect on Javinsky); at 36, lines 4-10 (does not recall any discussion of whether or not it might be unfair to Javinsky for the Commissioner to pull the Project back out of the SDSB and re-open the RFP process)

App. at 365; Lamb Depo., at 9, line 16 to 10, line 25 (Commissioner is not aware of any discussion about whether the long delay in the Project might be unfair or harmful to Javinsky); at 21, lines 5-13 (acknowledges that fairness is an issue when putting a prospective contractor on hold indefinitely); at 21, line 14 to 22, line 2 (does not recall any issues relating to fairness being discussed with respect to possibly expediting his decision on CNA's protest);

11. The Third RFP. The Department issued its own RFP for the Project in response to Commissioner Lamb's decision to reverse the decision of the SDSB. That RFP was issued in October, and responses were submitted by November 3, 2004. Javinsky and CNA both submitted proposals in response to the Third RFP. CNA was selected over Javinsky in the Third RFP process.

Supporting Material in the Record: These facts are undisputed.

ARGUMENT:

I. THE COURT BELOW COMMITTED REVERSIBLE ERROR BY REJECTING APPELLANT’S CLAIMS FOR MANDAMUS AND DECLARATORY JUDGMENT

The court below committed reversible error by mistakenly reading an “infrastructure exclusion” into Minn. Stat. § 16B.33, *et seq.*, which establishes and defines the jurisdiction of the State Designer Selection Board.

A plain reading of the statute shows that Project 04-01 was a “project” to “remodel” an existing “building” and its related infrastructure, and thus the Commissioner was required to honor the decision of the Designer Selection Board to pick Javinsky.

For that reason, Javinsky respectfully requests that this Court to vacate the trial court’s Order denying his mandamus and declaratory relief, and remand the case to the court below for proceedings consistent with the plain language of Minn. Stat. § 16B.33 *et seq.*

A. STANDARD OF REVIEW - DE NOVO

De Novo review is the appropriate standard when the basis for the trial court’s decision on mandamus is an issue of law. *Demolition Landfill Services, LLC v. City of Duluth*, 609 N.W.2d 278, 280 (Minn. App. 2000), review denied (Minn. July 25, 2000)

(When the district court's decision on a petition for mandamus is based only on questions of law, however, *de novo* review is appropriate); *Fay v. St. Louis County Board of Commissioners*, 674 N.W.2d 433 (Minn. App. 2004) (*de novo* review of a writ of mandamus is appropriate on appeal, citing *McIntosh v. Davis*, 441 N.W.2d 115, 118 (Minn. 1989)).

Whether the Commissioner was statutorily bound to honor the Designer Selection Board's selection of Javinsky is a pure question of law. The appropriate standard of review is therefore *de novo*. Note that Javinsky is not seeking on appeal to reverse the trial court's denial of his application for a restraining order. The contract funds for Project 04-01 have been disbursed, and there is no judicial order or relief which could undo that fact.

The question to be decided on appeal, therefore, is whether, as a pure question of law, the Commissioner was bound by Minn. Stat. § 16B.33, *et seq.*, to honor the Designer Selection Board's decision to pick Javinsky for Project 04-01.

B. APPELLANT'S MANDAMUS AND DECLARATORY RELIEF CLAIMS ARE NOT MOOT

The imminent expiration of legislative authority for Project 04-01 appropriations prevented any meaningful review of the trial court's decision on Javinsky's mandamus and declaratory reliefs claims. Review of the trial court's decision on these claims occurs well after Project 04-01 was awarded to Javinsky's competitor, and presumably completed.

Nonetheless this Court has jurisdiction to consider Javinsky's claims. The fact pattern in the present case is a classic example of the exception to the mootness doctrine for claims which are "capable of repetition, yet evading review." In addition, the collateral effects of the judgment against Javinsky also operate to create an exception to the mootness doctrine.

It is well-established that a moot case may be reviewed if it raises issues "capable of repetition yet evading review." *In re Peterson*, 360 N.W.2d 333, 335 (Minn. 1984) (citing *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U.S. 498, 515, 31 S.Ct. 279, 283 (1911)). An issue falls into this exception if it is not a live controversy "but due to its nature may reoccur." *In re McCaskill*, 603 N.W.2d 326, at 328 (Minn. 1999).

Application of the mootness doctrine is flexible. The Minnesota Supreme Court observed in 1998:

We have held that "the mootness doctrine is a flexible discretionary doctrine, not a mechanical rule that is invoked automatically whenever the underlying dispute between particular parties is settled or otherwise resolved," *State v. Rud*, 359 N.W.2d 573, 576 (Minn. 1984). However, we have also required the issue to be functionally justiciable before we exercise jurisdiction. "A case is functionally justiciable if the record contains raw material . . . traditionally associated with effective judicial decision making." *Id.*

State v. Arens, 586 N.W.2d 131 (Minn. 1998) (holding mootness doctrine did not apply because of the lack of material in the record for the court to review).

Javinsky's situation is a paradigm example of an issue which is not live, yet is capable of reoccurring. Legislative appropriations for construction projects have expiration dates. Anytime a dispute arises after the Designer Selection Board has picked a designer/contractor, but before the Department has finalized and executed a contract with the person or entity chosen, the expiration date for the appropriation forces the parties into an expedited process. The repetition of the problem occurs regardless of whether an aggrieved contractor or the Department prevails in the initial restraining order/injunction hearing. The Department has to spend the money on the construction project before its authority to do so expires -- and if Javinsky had prevailed in obtaining a restraining order, the Department's appeal of that decision would likewise have been moot.

Repetition of this problem is even more likely in situations where the Department takes several months to respond to a protest to the award of a contract by the Designer Selection Board.

There is another exception to the mootness rule under which Javinsky's mandamus and declaratory relief claims are reviewable: the collateral consequences exception. The Minnesota Supreme Court elaborated on the elements of the collateral consequences exception as follows:

Where an appellant produces evidence that collateral consequences actually resulted from a judgment, the appeal is not moot. . . . Further, if "real and substantial" disabilities attach to a judgment, we do not require actual evidence of collateral consequences but presume such consequences will result. *Morrissey v. State*, 286 Minn. 14, 16, 174 N.W.2d 131, 133 (1970)

(holding collateral consequences attach to criminal conviction because "the consequent disabilities flowing from the stigma of conviction remain"); *see also Sibron v. New York*, 392 U.S. 40, 55 (1968) ("The Court thus acknowledged the obvious fact of life that most criminal convictions do in fact entail adverse collateral legal consequences. The mere 'possibility' that this will be the case is enough to preserve a criminal case from ending 'ignominiously in the limbo of mootness.'") (citation omitted).

In re McCaskill, *supra*.

The primary collateral consequence of the judgment against Javinsky is its impact on his other claim, promissory estoppel. As discussed below, the trial court agreed that Javinsky had offered summary judgment evidence as to all elements of his promissory estoppel claim, except for the element of injustice, *i.e.*, that injustice resulted from the Department's broken promise. *See* Trial Court Order and Memorandum of October 27, 2005, App. at 467-70. If, as alleged by Javinsky's mandamus and declaratory relief claims, the Department violated its statutory obligation to finalize and execute a contract with him, that certainly informs the injustice element of his promissory estoppel claim.

The secondary consequences of the judgment against Javinsky is the stigma of his unsuccessful protest, and the possible impact on his ability to obtain future contracts from the Department. Javinsky has testified that he has suffered retaliation for asserting his legal rights to receive the contract for Project 04-01. *See, e.g., Javinsky Aff.*, ¶¶ 4-7, App. at 43-44 (irreparable harm allegations, including allegation that failure to obtain contract will hurt Javinsky's reputation with his subcontractors and sub-consultants -- obviously Javinsky's reputation with his subcontractors and sub-consultants will suffer

less damage if it is established that he had a legal right to the contract for Project 04-01 in the first place).

There is also the stigma of the charges contained in the initial protest by Javinsky's competitor to consider. That protest contained allegations challenging Javinsky's integrity. *See, e.g.*, Javinsky Summary Judgment Aff., ¶¶ 19-21, App. at 323-24 (Javinsky's competitor made disparaging claims about Javinsky as part of protest, and Javinsky has reason to believe that he is being punished for asserting his claim to the Project 04-01 contract). As in the case of a criminal conviction, judicial review of Javinsky's de-selection by the Commissioner still has salience for Javinsky's reputation in the Department and in the community at large.

Lastly, having ruled against him on all claims, the court below taxed costs against Javinsky in the amount of \$2,899.30. App. at 471. Were Javinsky to prevail on his mandamus and declaratory reliefs claims, he would not be subject to taxation of costs even though injunctive relief at this point would be moot. Certainly taxation of costs is a collateral consequence sufficient to support an exception to the mootness doctrine.

For all these reasons, Javinsky's mandamus and declaratory relief claims are not moot, and may be considered by this Court.

C. THE COURT BELOW ERRED IN REJECTING APPELLANT'S MANDAMUS AND DECLARATORY RELIEF CLAIMS

There is no ambiguity about the reversible error committed by the trial court -- a plain reading of the statute illustrates that the Commissioner violated his duty to award the Project 04-01 contract to Javinsky.

The facts are not disputed. On February 3, 2004, the Department referred Project 04-01 to the Designer Selection Board, for the purpose of selecting a designer. The Board issued a Request for Proposals, evaluated the responses it received, and on April 20, 2004, selected Javinsky. After considering the protest of a competitor of Javinsky, the Commissioner withdrew the selection of Javinsky and conducted a new selection process without the participation of the Designer Selection Board, ultimately awarding Project 04-01 to Javinsky's competitor.

1. The Plain Language of the Selection Board Statute Required the Commissioner to Execute a Contract with Javinsky.

State law requires that construction or design projects above a certain size must be referred to the State Designer Selection Board to select the primary designer. The relevant provisions are as follows:

Subd. 3. Agencies must request designer. (a) Application. Upon undertaking a **project** with an estimated cost greater than \$2,000,000 or a **planning project** with estimated fees greater than \$200,000, every user agency . . . **shall** submit a written request for a primary designer for its project to the commissioner, who **shall** forward the request to the [State Designer Selection B]oard . . .

Minn. Stat. § 16B.33, Subd. 3(a) (emphasis supplied). There is no dispute that Project 04-01 met the financial threshold to establish mandatory referral to the Selection Board. *See, e.g.*, Order and Memorandum of December 16, 2004, App. at 224 (“The monetary threshold has been met in this case.”).

Once Javinsky was picked by the Designer Selection Board, the Commissioner had a mandatory duty to finalize and execute a contract with Javinsky for Project 04-01. The statute which created the State Designer Selection Board reads as follows:

[Upon notification of the selection of a designer] The commissioner **shall** promptly notify the designer and the user agency. The commissioner **shall** negotiate the designer’s fee and prepare the contract to be entered into between the designer and the user agency.

Minn. Stat. § 16B.33, Subd. 4(a) (emphasis supplied).

Critically the statute does not grant the Commissioner the ability to refuse the selection of the Designer Selection Board, for any reason. Nor does the statute empower the Commissioner to review Selection Board policies and procedures. The only circumstances under which the Commissioner is permitted to avoid executing a contract with a person or entity chosen by the Selection Board are outlined in Subd. 4(d):

Second selection. If the designer selected for the project declines the appointment or is unable to reach an agreement with the commissioner on the fee or terms of the contract, the commissioner shall, within 60 days after the first appointment, request the [Designer Selection Board] to make another selection.

Minn. Stat. § 16B.33, Subd 4(d).

The Selection Board's jurisdiction over Project 04-01 was not initially controversial. In fact, having considered the issue, the Department itself conceded that Project 04-01 was a "project" covered by Minn. Stat. § 16B.33. By letter dated February 3, 2004, the Department admitted it had no jurisdiction over designer selection for Project 04-01:

[A] subconsultant to the original design firm, after consulting with legal counsel, . . . [asserted] that the authority for selecting an alternate design firm remains with the Designer Selection Board, not the State Architect's Office. In light of this challenge, **we reviewed the statute and agree that, technically, we did not have the authority to solicit proposals and make an alternate selection.**

See Letter of Gordon Christofferson, February 3, 2004, App. at 53 (Christofferson was Assistant Director of the State Architect's Office, which is part of the Department of Administration).

Nothing could have been clearer -- under a plain reading of the statute, Project 04-01 was a "project" under the jurisdiction of the Designer Selection Board. This was in fact the formal position of the Department at the time. The Commissioner's failure to negotiate with Javinsky after his selection is a violation of the express terms of the statute.

2. Project 04-01 is Not "Infrastructure" Outside the Jurisdiction of the Selection Board statute.

The decision of the trial court turned on the question of whether Project 04-01 was "infrastructure" and therefore outside the jurisdiction of the Selection Board as

established in Minn. Stat. § 16B.33. The trial court's focus on infrastructure is a clear error of law.

The Designer Selection Board statute defines "project" as follows:

Subd. 1(h): "Project" means an undertaking to construct, erect, or remodel a building by or for the state or an agency.

Minn. Stat. § 16B.33, Subd. 1(h). The term "building" is not defined in the statute.

However, the term "building" is defined elsewhere by the Legislature. The statute authorizing the State Building Code defines a "public building" as a "building and its grounds." Minn. Stat. § 16B.60, Subd. 6.

The Designer Selection Board has jurisdiction over Project 04-01. Because Project 04-01 involves improvements to sewage and drainage tunnels located on the grounds of the Faribault prison, it is a project to "remodel" a "building" under the terms of the statute. The fact that these tunnels are connected to the buildings, and are located immediately underneath them, indicates they are part of the overall building complex.

The physical relationship of the tunnels to the prison buildings is significant. A map of the grounds of the Faribault Correctional Facility is contained in the record, App. at 46, showing the tunnel and its connections to the buildings. Maintenance workers at the prisons have access to the tunnel system, and part of Project 04-01 was to install a radio communication system for use by prison maintenance workers in the tunnel. Javinsky Aff., ¶ 10, App. at 45.

Lastly, the Request for Proposals drafted by the Department itself makes it clear that Project 04-01 is related to buildings on the grounds of MCF-Faribault. The title of the Request refers to the prison:

Request for Proposals for Designer Selection for Reshape and Grout of the Deep Tunnel at the Faribault Correctional Facility (Project 04-01).

See Request for Proposals, App. at 54 (emphasis added).

3. The Commissioner's Re-Definition of Project 04-01 as "Infrastructure" is Fatally Flawed and Deserves No Deference.

The trial court deference to the Commissioner's distinction between a "building" and "infrastructure" is reversible error.

No judicial deference to the Commissioner's interpretation of either statutes or rules is appropriate for pure questions of law. "When a decision turns on the meaning of words in a statute or regulation, a legal question is presented." *St. Otto's Home v. State Dep't of Human Serv.*, 437 N.W.2d 35, 39 (Minn. 1989) (citations omitted). Reviewing courts are not bound by the decision of the agency and need not defer to agency expertise when considering questions of law. *Id.*, at 39-40. No deference is given to agency interpretation of its own regulations if the language of the regulation is clear and capable of understanding. *Id.*, at 40 (citations omitted).

The question of whether the term "building" includes "a building and its grounds" is not a close call -- the Legislature, in establishing the State Building Code, has already answered it in the affirmative. See above, Minn. Stat. § 16B.60, Subd. 1(h).

For that reason, the Commissioner's effort to define "building" as mutually exclusive of "infrastructure" is inherently flawed. As the trial court correctly observed, there is nothing about the terms "building" or "infrastructure" which indicate that they are definitional opposites:

Two dictionaries define "building" as follows:

Merriam-Webster: a usually roofed and walled structure built for permanent use (as for a dwelling)

American Heritage: something that is built, as for human habitation; a structure.

These definitions indicate that a building is a structure built, as for human habitation or a dwelling. The dwelling and human habitation language appears to be provided as examples. . . . **[These definitions] do not clearly indicate that an underground tunnel cannot be a building.**

Trial Court Order, App. at 225. Unfortunately, based on this, the trial court mistakenly went on to declare an ambiguity in the definition of building, which led the trial court to give deference to the Commissioner's effort to exclude infrastructure.

But there is no ambiguity here for the Commissioner to resolve. **The trial court asked the wrong question.** The abstract question "Is an underground tunnel a building?" bears no relationship to the facts of the present case. Project 04-01 involved sewer and wastewater tunnels directly connected to the Faribault prison, and located on the prison grounds. The right question is "Does the legal definition of a building include infrastructure located on the building's grounds?" And as far as the State Building Code is concerned, as defined by state statute, the answer to that question is yes.

The trial court also did not consider the issue of estoppel -- that the Department would be estopped from changing its mind about whether Project 04-01 was covered by Minn. Stat. § 16B.33 or not. Remember that the Department had two different and mutually exclusive interpretations of Minn. Stat. § 16B.33 within an eight month period: In February 2004, after careful review, the Department concluded that only the Designer Selection Board had jurisdiction over Project 04-01; in September 2004, it came to the exact opposite conclusion.

For these reasons, the trial court committed reversible error by concluding as a matter of law that she should defer to the Commissioner's definition of "building" as excluding "infrastructure."

For these reasons, Javinsky asks this Court to vacate the trial court's Order and Memorandum of December 16, 2004, and interpreting the plain language of Minn. Stat. § 16B.33, direct the trial court to enter judgment in Javinsky's favor on his claims of mandamus and declaratory relief.

II. THE COURT BELOW COMMITTED REVERSIBLE ERROR BY GRANTING SUMMARY JUDGMENT AGAINST APPELLANT'S CLAIM OF PROMISSORY ESTOPPEL

Reliance by Javinsky on false or reckless promises made to him by high-ranking agents and employees of the Department is replete in the record. For months Javinsky waited, reserving his time and resources to execute a contract which was promised to him but which never came.

For that reason, the trial court committed reversible error when it granted summary judgment against Javinsky's promissory estoppel claim, on grounds that he not shown evidence of injustice.

A. STANDARD OF REVIEW – *DE NOVO*

Because summary judgment is purely an issue of law, decisions of the court below are reviewed *de novo*. See, e.g., *Fairview Hosp. & Health Care Serv. v. St. Paul Fire & Marine Ins. Co.*, 535 N.W.2d 337, 341 (Minn. 1995)

On appeal from summary judgment, this Court determines "(1) whether there are any genuine issues of material fact and (2) whether the [district] court erred in [its] application of the law." *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990) (citation omitted).

The evidence must be viewed "in the light most favorable to the party against whom judgment was granted." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993) (citation omitted); see also, e.g., *Grondahl v. Bulluck*, 318 N.W.2d 240, 242 (Minn.

1982). Doubts regarding the existence of a material fact must be resolved in favor of the party opposing summary judgment. *Faimon v. Winona State*, 540 N.W.2d 879, 881 (Minn. App. 1995) (citing *Wartnick v. Moss & Barnett*, 490 N.W.2d 108, 112 (Minn. 1992)).

The respondent, as the moving party, bears the burden of showing that no genuine issues of material fact exist. *Id.* (citing *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1980)).

B. REVERSIBLE ERROR WAS COMMITTED BY DISMISSING JAVINSKY'S PROMISSORY ESTOPPEL CLAIM VIA SUMMARY JUDGMENT

The trial court correctly found that Javinsky had submitted summary judgment evidence to support the first two elements of promissory estoppel, *i.e.*, a clear and definite promise, and detrimental reliance.

The trial court committed reversible error when it concluded that Javinsky did not present summary judgment evidence with respect to the third element, injustice. In doing so, the trial court improperly weighed the summary judgment evidence against Javinsky, thereby violating its duty to give Javinsky the benefit of every doubt as the party opposing summary judgment.

1. Elements of Promissory Estoppel

"[A]pplication of promissory estoppel requires the analysis of three elements: (1) Was there a clear and definite promise? (2) Did the promisor intend to induce reliance, and did such reliance occur? (3) Must the promise be enforced to prevent injustice?" *Olson v. Synergistic Technologies Business Systems, Inc.*, 628 N.W.2d 142 (Minn. 2001) (citing *Ruud v. Great Plains Supply, Inc.*, 526 N.W.2d 369, 372 (Minn. 1995) and *Martens v. Minn. Mining & Mfg. Co.*, 616 N.W.2d 732, 746 (Minn. 2000)). A "reasonable expectation" that the promise will induce action or forbearance is sufficient to show that the Defendant intended to induce detrimental reliance. *Martens, supra*, 616 N.W.2d at 746 (citing *Grouse v. Group Health Plan, Inc.*, 306 N.W.2d 114, 116 (Minn. 1981) and *United Elec. Corp. v. All Serv. Elec., Inc.*, 256 N.W.2d 92, 96 (Minn. 1977)).

The Minnesota Supreme Court has held that promissory estoppel is a valid cause of action when a government agency makes a mistake:

To provide an appropriate measure of relief, we adopt the rule set forth in *Owen of Georgia, Inc. v. Shelby County*, 648 F.2d 1084 (1981): "One may recover in promissory estoppel those damages it sustained by reason of its justifiable reliance upon the County's promise . . . "

Telephone Associates, Inc. v. St. Louis County Board, 364 N.W.2d 378, 383 (Minn. 1985).

In fact, the facts of the present case argue for a far broader recovery than what the plaintiff in *Telephone Associates* received: in that case the plaintiff was an unsuccessful bidder challenging the fact that it lost. Javinsky has a far greater promissory estoppel

claim because he was selected to receive the contract, left out to dry for months, misled about the likelihood of getting the contract, and was then de-selected.

2. Summary Judgment Evidence Supports All Three Elements of Promissory Estoppel.

Javinsky has presented summary judgment evidence sufficient to support all three elements of his promissory estoppel claim.

A Clear and Definite Promise. The actions of the Department, past and present, as well as misrepresentations made by decision-making employees of the Department, led Javinsky to the reasonable conclusion that he had been promised the contract for the Project. The summary of the evidence above need not be repeated here in its entirety. *See, e.g.,* Statement of Facts, ¶ 6, at 9-10 above; ¶ 8 section 8, at 11-14 above. *See also* App. at 319-322 - Javinsky S.J. Aff., ¶¶ 10-16 (*e.g.,* the Department is proceeding with [my] contract, CNA's protest will not stand, etc.). It is an undisputed fact that Commissioner Lamb sent a letter on May 14, 2004, to CNA telling them that the Department was going to proceed with the Javinsky contract notwithstanding their protest, and it is mostly undisputed that through the summer of 2004 Department personnel failed to warn Javinsky that CNA's protest might succeed, and/or presented falsely optimistic statements to him about getting the contract, despite the fact that the Commissioner had expressed serious reservations about the validity of the SDSB selection process as early as June 15, 2004.

Detrimental Reliance. There is no dispute as to the second element of a promissory estoppel claim. Javinsky undoubtedly relied on the Department's promises to his detriment. Javinsky cleared his calendar and turned down other work in order to clear space for the Project. Given the express language of the RFP, requiring a contractor who is selected to set aside sufficient time, there is also no doubt that Javinsky's detrimental reliance was both foreseeable and reasonable.

Injustice. The summary judgment evidence above shows a disturbing lack of concern on the part of Department decision-makers about whether their decisions had a harmful or unjust impact on Javinsky. *See* Statement of Facts, ¶ 10, page 12 above. There is no doubt that the Department's action had a harsh and unjust outcome for Javinsky. As the "selected" consultant, Javinsky was required to hold his calendar open and turn down work for the entire time CNA's protest was being debated inside the Department. Once the Department decided to de-select Javinsky, he was required to participate in a new RFP process stacked against him given that his competitors had seen his "winning" proposals previously submitted.

3. The Trial Court Committed Reversible Error by Finding that No Injustice Resulted as a Matter of Law

The trial court's decision relied heavily on *Faiman v. Winona State University*, 540 N.W.2d 879, 883 (Minn. App. 1995), in concluding that as a matter of law Javinsky's reliance on the Department's promises was reasonable "enough" to support a claim for injustice. *See* Order and Memorandum, App. at 467-70.

Faimon is distinguishable from the present case. *Faimon* is a simple case of a policy change which had an adverse effect on the plaintiff. The sole promise was future consideration for employment in a tenure track position -- a promise which could not be kept when the position was reclassified to require a Ph.D. *Id.* In fact, the uniquely weak fact pattern in *Faimon* was recognized in the opinion:

We can find no precedent for application of the doctrine of promissory estoppel to enforce **a promise with benefits as uncertain as these**, and we conclude that this is not the kind of commitment calling for special judicial action in the name of avoiding injustice.

Id. (emphasis supplied).

The fact situation in the present case is completely different. Unlike *Faimon*, the benefits of the promise to Javinsky were specific, concrete, and immediate: the Department was telling Javinsky "you will receive this contract, and be able to commence work once your competitor's protest is dismissed." Based on that promise, and based on the express language of the Request for Proposals requiring him to do so, Javinsky reserved sufficient time and resources to commence Project 04-01 immediately after the contract was executed. And, unlike *Faimon*, the Department was talking out of both sides of its mouth to Javinsky about whether it was going to honor its promise. Furthermore, the Department strung Javinsky along all summer long, knowing that he was setting aside time and resources while he was waiting.

Drawing all inferences in favor of Javinsky, as the Court must in reviewing a grant of summary judgment, it is possible to conclude that the Department was either

intentionally deceiving Javinsky or was utterly indifferent to the possibility that Javinsky might detrimentally rely on its promises. This is a far cry from the simple reclassification of an academic teaching position that was at issue in *Faimon*.

The trial court also erroneously concluded that public policy dictated that it would be unjust to punish the Department for its conduct, stating “[m]uch of Plaintiff’s argument stems from its [*sic*] desire for Defendant to conduct the selection process consistent with how it was done in the past.” Order and Memorandum, App. at 469. This is a mischaracterization of the summary judgment evidence -- Javinsky is claiming that specific statements by the Department’s high-ranking agents and employees led him to rely on their promises that he would get the contract. Javinsky is not asserting that past performance is a guide for future behavior. Rather the claim he was consistently told throughout the summer of 2004 that he would get the contract.

In any event, the trial court’s assessment of the summary judgment evidence is constitutes reversible error. Whether “much” of Javinsky’s argument is based on the Department’s prior conduct is irrelevant. The question is whether there is **any** genuine dispute of material fact relating to the injustice element of Javinsky’s claim. The summary judgment evidence as a whole paints a much broader picture than the narrow question of whether Javinsky is entitled to rely solely on the Department’s prior conduct.

Construing all evidence and making all inferences in favor of Javinsky, as is required in evaluating this motion for summary judgment, it is evident that a plethora of genuine issues of material fact support Javinsky’s claim for promissory estoppel.

III. CONCLUSION:

The trial court committed reversible error in rejecting Javinsky's mandamus and declaratory relief claims; and by granting summary judgment against Javinsky's promissory estoppel claims.

For the reasons cited above, Javinsky respectfully requests that this Court vacate the judgment below, and remand the case to the trial court with instructions to enter judgment in Javinsky's favor on the legal question of mandamus and declaratory relief, and for trial on Javinsky's claim of promissory estoppel.

Dated: April 26, 2006

Respectfully submitted,

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