

Nos. A08-1584 and A08-1994

State of Minnesota
In Supreme Court

Scott Sayer and Wendell Anthony Phillippi,
Appellants,
 v.

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

REPLY BRIEF OF APPELLANTS

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INTRODUCTION

Boiled down to its essence, this appeal presents two issues to this Court. The first is whether the word “responsive,” as it is repeatedly used in Minn. Stat. § 161.3426, has a meaning other than previously pronounced by this Court and countless other state and federal courts.¹ The second is whether the district court improperly granted summary judgment and prevented development of a full factual record when genuine material issues of fact were in dispute.

The concept of responsiveness in public procurement is that public bodies may not grant contracts, and thus obligate the public’s money, to vendors that have gained an unfair competitive advantage by not complying with a material term of the solicitation. That principle of fundamental fairness applies regardless of the particular project delivery method chosen by the contracting agency. There is nothing unique about design-build or best value contracting that requires deviation from the well-understood meaning of responsiveness. In fact, this Court has already applied the concept of responsiveness to a best value procurement in the same manner as Appellants urge.² Because this is a well-established legal doctrine and no contrary definition was supplied in the statute, the legislature intended that it be applied to MnDOT’s design-build procurements.

MnDOT, and the courts below, have thwarted the legislature’s enunciated intent by making responsiveness a question of subjective opinion rather than a matter of objectively determinable fact. By interpreting responsiveness as a function of the

¹ See cases cited at *Plain. Memorandum of Law Supporting TRO* at p. 20.

² See *Telephone Associates, Inc. v. St. Louis County Board*, 364 N.W.2d 378, 381-82 (Minn. 1985).

subjective scoring of the Technical Review Committee (“TRC”), MnDOT has arrogated to itself the power to highly score a proposal for not complying with mandatory requirements stated in a project’s request for proposals. If a public body asks for an apple and a vendor proposes an orange, no matter the technical score assigned to that fruit, the orange is not responsive to the public body’s solicitation. Applying the common law definition of responsiveness, the public body could not buy the orange. Under MnDOT’s interpretation of responsiveness, the public body could buy the orange if it received a high enough technical score. That is manifestly unfair to the vendors who abided by the restrictions announced in the procurement solicitation and undermines the integrity of the procurement system.

MnDOT’s interpretation of responsiveness gives the public body the discretion to buy something other than what it asked for, thus creating many opportunities for “fraud, favoritism, improvidence, and extravagance.”³ That interpretation impermissibly removes a legislatively dictated curb on MnDOT’s contracting discretion. This Court should protect the public fisc by telling MnDOT that it does not have the authority under Minn. Stat. § 161.3426 to enter a contract in response to a proposal that contains a material violation of a requirement stated in the request for proposals, regardless of the technical score the TRC assigns to that proposal.

In this case, MnDOT awarded the contract to Flatiron despite the fact that Flatiron’s proposal contained two material violations of stated requirements. Flatiron

³ See *Griswold v. Ramsey County*, 242 Minn. 529, 536, 65 N.W.2d 647, 652 (1954) (holding that no actual fraud must be shown in order to declare a contract void if the safeguards inherent in the method of public procurement have been circumvented).

proposed work that went outside of the allowable right of way, and the concrete boxes proposed by Flatiron as structural members for the bridge contained only two, instead of the required three, webs. Appellants supported their allegations of Flatiron's non-responsiveness with citations to documentary evidence and admissible affidavits. The lower courts improperly granted summary judgment to Flatiron after applying improper administrative deference and an incorrect interpretation of Minn. Stat. § 161.3426 to that disputed factual record. This Court should correct that error by stating that the meaning of responsiveness does not change when applied to design-build best value contracting and remanding the matter to the district court for further hearings to develop a full evidentiary record to determine whether Flatiron's proposal was responsive under the correct definition of that word.

ARGUMENT

I. RESPONDENTS' INTERPRETATION OF MINN. STAT. § 161.3426 IS WRONG.

A. Contrary to MnDOT's contention, responsiveness cannot be scored.

Scoring responsiveness is an oxymoron. A proposal either is or is not responsive to the terms of the solicitation. Stated in the language of this case, the proposal either is within the right of way or it is not; its box girders either contain three webs or they do not. If a bid is responsive, then - and only then - can it be scored. If one scores responsiveness, the very meaning of the word is destroyed. Someone can give a perfect score to a proposal that complies with none of the solicitation requirements, or conversely, award a score of zero to a proposal that perfectly complies with all the

solicitation's requirements. Determining responsiveness by such scoring vitiates the absolute design requirements that MnDOT's solicitation contained. The whole point of stating design requirements in a solicitation is to ensure that they will be followed. Compliance with as simple a requirement as staying within a right of way is not a matter of variable score – it is an objectively determinable fact.

The concept of responsiveness requires that the agency enforce the requirements it chooses to announce. If it chooses to announce few or no requirements, then it will receive widely varying proposals and it can score them. On the other hand, if the agency states that a constraint must be maintained, then that constraint must be enforced. It cannot be scored into or out of existence. In this case, the agency not only ignored the constraint of right of way that it imposed, but also scored highly Flatiron's violation of that constraint. MnDOT's treatment of responsiveness transforms what MnDOT declares are mandatory solicitation requirements into permissive options that MnDOT can choose to enforce by the scores MnDOT announces after-the-fact.

B. The statute does not authorize the TRC to define responsiveness; it requires the TRC to apply the principle.

MnDOT is correct that the central issue of this appeal is “what constitutes a responsive proposal.”⁴ The question is so important that the statute does not entrust this issue solely to the TRC, but also requires the commissioner to ensure that the winning proposal was responsive. MnDOT complains that this may diminish the central role of

⁴ See MnDOT's Brief at p. 4.

the TRC and diminish its scoring judgment.⁵ In regard to the issue of responsiveness, this is exactly right. The TRC must make a “go or no-go” decision on responsiveness. It has to decide whether a variance from the solicitation requirements affects the price, quality, or manner of performance of a proposal so as to give the proposer a competitive advantage.⁶ If it does, the TRC must reject the proposal, not score it.

Because the TRC is a new legislative construct, it makes sense that the legislature would define that body’s powers. But nothing in the statute says that the TRC *alone* has the power to reject non-responsive proposals. MnDOT’s interpretation of the statute is wrong because it ignores the provisions of § 161.3426 subd. 1(b), 1(c), and 1(d) requiring that MnDOT’s Commissioner, not just the TRC, only select and award the contract to the *responsive* design-builder with the lowest adjusted score. The TRC can be comprised of people not familiar with the legal requirements of responsiveness, so the statute also requires that the commissioner ensure that the award is made only to a responsive proposal. By giving both the TRC and the commissioner the authority and duty to reject non-responsive proposals, the legislature clearly intended a double layer of protection for the process and public.

MnDOT further argues that *de novo* review for responsiveness by the commissioner is unworkable as a practical matter.⁷ That argument is belied by decades of experience. A TRC is only used in design-build contracting. The vast majority of public contracting is done without a TRC, and the commissioner routinely determines

⁵ See MnDOT’s Brief at p. 4.

⁶ See *Foley Bros., Inc. v. Marshall*, 266 Minn. 259, 263, 123 N.W.2d 387, 390 (1963).

⁷ See MnDOT’s Brief at p. 5.

responsiveness in those other procurements. The commissioner has had to enforce this Court's demand that awards only be made to responsive proposals for decades, and the commissioner has not found it "unworkable" in the past. MnDOT was able to evaluate the responsiveness of design-bid-build proposals without a TRC, so there is no practical reason that MnDOT cannot do the same with design-build proposals.

C. Responsiveness is compatible with design-build procurement.

MnDOT claims that because the creation of design-build procurement is statutory, it does not have to follow the judicial precedents construing responsiveness that were developed in the context of design-bid-build procurement. Of course, such a position cannot reconcile the design-build statute's repeated use of the word "responsive." If the legislature did not understand and intend to use the historical meaning of the word "responsive," why did it use it four times? Why did it use it without providing the new definition that MnDOT hopes the Court will construct? By law, if the legislature does not provide a different definition of the term, then the legislature intended that the term be interpreted according to this Court's precedents.⁸ That means that when the legislature used the word "responsive" in Minn. Stat. § 161.3426, it meant "there may be no material variations or deviation from the specifications."⁹

Each design-build procurement will have a unique TRC, comprised of new and different members. Surely, the legislature did not intend the definition of "responsive" to

⁸ Minn. Stat. § 645.17 (4) ("[w]hen a court of last resort has construed the language of a law, the legislature in subsequent laws on the same subject matter intends the same construction to be placed upon such language.")

⁹ *Foley Bros., Inc.*, 266 Minn. at 263, 123 N.W.2d at 390.

be decided a new and unique way each time a new TRC is convened. The only rational conclusion is that the legislature intended that each TRC decide the issue according to long-standing judicial precedent so that MnDOT's responsiveness decisions would be principled and consistent.

MnDOT claims that the traditional understanding of responsiveness cannot work in design-build procurement because the design is not complete at the time of award, and, therefore, MnDOT cannot determine whether all of the yet to be completed design is responsive.¹⁰ This is the same mistake made by the court of appeals. It is, of course, true that the entire design is not complete when design-build proposals are solicited and scored, but this feature is wholly irrelevant to this appeal. If MnDOT had not specified requirements and constraints for the design proposals that it wanted to see, then responsiveness would not be an issue in this appeal. But what MnDOT well knows – and what the court of appeals simply did not appreciate – is that MnDOT did specify hundreds of unique and specific proposal requirements in this Project's solicitation. The proposers and the TRC did possess the same "pre-bid certainty" on those specific requirements (*e.g.* the right of way and three webs constraints) that are present on design-bid-build projects. Because those constraints were known, announced, and clear in this design-build solicitation, there is no reason not to enforce the same law of responsiveness in design-build procurements that applies to design-bid-build procurements. In short, if the design feature is a requirement and stated by the agency, then the principle of

¹⁰ See MnDOT's Brief at p. 6.

responsiveness requires that it be enforced in both design-build and design-bid-build procurement.

The reason that MnDOT cannot cite *any* legal authority to support its argument that design-build procurement is at odds with the principle of responsiveness is obvious: The concept of a specified design requirement becomes meaningless unless the principle of responsiveness is applied to enforce the requirement. When a design-build solicitation imposes multitudinous design requirements, as MnDOT did in this case with a three-inch thick solicitation, there is nothing incompatible with requiring MnDOT to enforce the requirements it chose to articulate. To the contrary, the principle of responsiveness exists to give teeth to the stated requirements. The integrity of the process requires it, and the fundamental purpose of responsiveness is to protect the integrity of the procurement process.¹¹

D. Substitution of the arbitrary and capricious standard for that of responsiveness as advocated by Respondents, won't protect the integrity of the process.

MnDOT's proposal evaluation process cannot stand because once non-responsive proposals are scored, the damage is already done. If MnDOT is allowed to accept and score "oranges" instead of the "apples" it clearly specified, proposers will be misdirected, the procurement will become inefficient (i.e. it will not optimally match demand with supply), and the opportunity for favoritism will exponentially increase. At that point, it will be pointless to argue whether MnDOT was "arbitrary and capricious" in scoring the

¹¹ See *Foley Bros., Inc. v. Marshall*, 266 Minn. 259, 263, 123 N.W.2d 387, 390 (1963); *Griswold* at 536, 652; *United Technologies v. Washington County Bd.*, 624 F.Supp. 185, 193 (D. Minn. 1985).

non-responsive “orange” with six points rather than seven. The point is that the “orange” should not be scored at all according to the repeated use of the word “responsive” in the statute. Appellants contend that this Court should not transmogrify the word “responsive” into the completely different phrase of “arbitrary and capricious.”

MnDOT declared the constraints that it wanted on this project. Once MnDOT declared that proposals had to stay within the right of way and had to use boxes with three webs, MnDOT was obligated to uniformly enforce those restrictions.¹² Otherwise the stated requirements misdirect proposers into proposing what MnDOT said it wants instead of what MnDOT secretly desires.¹³ Failure to reject a proposal that violates any of the design constraints is an illegal waiver of a condition that destroys the integrity of the procurement process. The fact that the 35W procurement was made using a design-build best value process does not invalidate the responsiveness requirement. In fact, because MnDOT used an inherently subjective process, the responsiveness principle must apply to protect the integrity of the procurement system.¹⁴

E. The TRC’s responsiveness determinations are subject to *de novo*, not arbitrary and capricious, review by this Court.

MnDOT argues that the TRC’s determination that Flatiron’s proposal was responsive is only subject to deferential arbitrary and capricious review.¹⁵ That argument fails for two reasons.

¹² See *United Technologies Commc’ns. Co. v. Washington County Bd.*, 624 F.Supp. 185 (D. Minn. 1985).

¹³ See *id.* at 190-92.

¹⁴ See *id.* at 192-93.

¹⁵ See MnDOT’s Brief at p. 8.

First, the TRC's responsiveness determination was based upon a flawed interpretation of a statute. This Court reviews errors of law and questions of statutory interpretation *de novo*.¹⁶ In other words, no deference is due to the TRC's legally incorrect application of the law of responsiveness. Second, MnDOT improperly assumes that the TRC is an administrative agency entitled to deference. But the TRC is not an agency and there is nothing in its statutory charter that shows that it is endowed with any particular expertise.¹⁷ The TRC is not an agency, as that term is defined in Minnesota's Administrative Procedure Act, because it does not have the authority to make rules or to adjudicate contested cases.¹⁸ Further, the statute authorizing the TRC makes it clear that the legislature did not consider the TRC to be an agency.¹⁹ The only requirements on the TRC are that it must have at least five members and at least one of those members must be nominated by the Minnesota Chapter of the Associated General Contractors.²⁰ The TRC could consist of one contractor and four people randomly chosen off of the street, which is hardly an assemblage that requires judicial deference.

As argued in Part II of this Reply, no deference is due the TRC's decision or the affidavits submitted by MnDOT in support of its position because they were not considered in the context of a full factual hearing. In the context of a summary judgment

¹⁶ *In re Denial of Eller Media Co.'s Applications for Outdoor Adver. Device Permits*, 664 N.W.2d 1, 7 (Minn. 2003).

¹⁷ See Minn. Stat. § 161.3420 subd. 2.

¹⁸ See Minn. Stat. § 14.02 subd. 2 (defining an agency).

¹⁹ See Minn. Stat. § 161.3420 subd 2. (making members of the TRC subject to the Minnesota Government Data Practices Act "to the same extent that state agencies are subject to those provisions."). If the TRC were an agency, that statutory language would be superfluous.

²⁰ See *id.*

motion, deference, if any is due, must be applied only after all the facts are elicited at a hearing.²¹ If deference and preference is to be given to MnDOT's affidavits over Appellants' at the summary judgment stage, then the fundamental standard for judging facts in summary judgment motions will have been inverted. Instead of judging contested facts in the light most favorable to the non-moving party, MnDOT wants the contested facts to be viewed in the light most favorable to MnDOT due to the deference supposedly due to the TRC. MnDOT's position, unfortunately followed by the lower courts, is fundamental error. If administrative actions and affidavits were always given deference at the summary judgment stage, no contested administrative action would ever survive summary judgment and judicial review of agency action would be rendered illusory. To the extent deference is due to an agency's version of contested material facts, it is only applicable after all the facts are elicited after a hearing.

Notwithstanding these legal arguments, the TRC's responsiveness determinations *were* arbitrary and capricious. Appellants cited proof that five of the six TRC members did not read the entire request for proposals (RFP).²² Flatiron surprisingly responded to that allegation by stating that there is no statutory requirement for the TRC members to read the RFP!²³ But an arbitrary and capricious ruling, by definition, is one in which the fact finder "failed to consider an important aspect of the problem".²⁴ The RFP requirements themselves are an essential aspect of any determination of whether a

²¹ See *Anderson v. State*, 693 N.W.2d 181, 190-91 (Minn. 2005).

²² See Appellants' Brief at p. 13 with record cites at n. 51.

²³ See Flatiron's Brief at p. 7.

²⁴ See *Citizens Advocating Responsible Dev. v. Kandiyohi County Bd. of Com'rs.*, 713 N.W.2d 817, 832 (Minn. 2006).

proposal met those requirements. Because five of the six TRC members did not even read the requirements, any determination by that body on whether a proposal met those requirements is, by definition, arbitrary and capricious.

But this Court does not need to reach the fact-intensive issues involved in the TRC's evaluation of the proposals. That is a job for the district court. This Court should simply construe § 161.3426 as requiring the TRC to apply the common law definition of responsiveness and requiring an independent responsiveness review by the commissioner. This case should then be remanded to the district court for a full evidentiary hearing to determine whether or not Flatiron's proposal was responsive.

F. Although Flatiron's arguments about the responsiveness of the C.S. McCrossan and Ames/Lunda proposals are improper, those arguments prove Appellants' case.

Flatiron spent a fair amount of its brief attacking the proposals submitted by two other proposers, Ames/Lunda and C.S. McCrossan.²⁵ Those attacks are improper because neither Ames/Lunda nor C.S. McCrossan are parties to this lawsuit,²⁶ so no court can make any rulings on their proposals in this lawsuit without violating those contractors' due process rights. Flatiron's attacks on the other proposers are a transparent attempt to distract the Court from the real issue, the non-responsiveness of the proposal to which MnDOT awarded the contract.

Flatiron's discussion of how C.S. McCrossan's and Ames/Lunda's proposals were non-responsive contradicts its legal argument. Flatiron claims that it is legally

²⁵ See Flatiron's Brief at pp. ii, 8-9, 12-13, 25.

appropriate for the TRC to determine responsiveness by whatever scores the TRC gives a proposal, but then argues that the TRC wrongly scored C.S. McCrossan's and Ames/Lunda's proposals because they were technically non-responsive. Flatiron cannot have it both ways. Nor can Flatiron argue that if C.S. McCrossan's and Ames/Lunda's proposals were non-responsive, then it's acceptable for Flatiron's proposal to have been non-responsive, too. Ames/Lunda and C.S. McCrossan are not the Appellants. The Appellants' lawsuit does not involve and is not affected by C.S. McCrossan's and Ames/Lunda's proposals. Appellants' lawsuit appropriately focused on the actual award that MnDOT made to Flatiron. According to the statute, the award should have been made to a responsive proposal. Flatiron's proposal was materially non-responsive. It is no defense for Flatiron to argue that C.S. McCrossan's or Ames/Lunda's proposals were allegedly non-responsive, too.²⁷ That is legally irrelevant to this appeal.

Flatiron's assertions actually prove Appellants argument in two ways. First, if going outside the right of way renders C.S. McCrossan's proposal non-responsive, then Flatiron's proposal must be held to the same standard. Second, both Ames/Lunda's and C.S. McCrossan's proposals were deemed responsive by the TRC and MnDOT.²⁸ Under the geometric enhancements scoring criterion, both Ames/Lunda and C.S. McCrossan received average scores that were below 49%, which according to MnDOT's definition is

²⁷ Of course, Flatiron's defense that 'everybody else did it too' ignores the proposal submitted by Walsh/American Bridge. There is no evidence suggesting its proposal was non-responsive.

²⁸ See *Wieland Aff.*, Ex. 226 (MnDOT Summary of Design-Build Evaluation Process) at SR-190 – SR- 191.

non-responsive.²⁹ Yet both of those proposals were deemed responsive by the TRC and MnDOT because their *overall* average scores were above 50%.³⁰ In MnDOT's eyes, those proposals scored high enough in other criteria to excuse the findings of non-responsiveness in the geometric enhancements criterion.

That is how MnDOT's interpretation of responsiveness opens the "*opportunity* for fraud and collusion" in violation of this Court's commands in *Telephone Associates*.³¹ A proposal either meets the requirements stated in the request for proposals or it doesn't. Subjectively determined scoring, which can be manipulated to achieve a desired result, does not change a proposal's compliance with mandatory requirements. Because MnDOT's procedures impermissibly expanded MnDOT's discretion by allowing it to excuse instances of non-responsiveness, the contract it awarded to Flatiron through those procedures is void.³² MnDOT's interpretation of responsiveness renders the legislature's command that MnDOT only award a contract to a responsive proposal meaningless.³³

²⁹ See *id.* Ames/Lunda's average geometric enhancements score was 5.8%, while C.S. McCrossan's was 43%

³⁰ See *Wieland Aff.*, Ex. 31 (MnDOT's Proposal Evaluation Plan) at SR-66. Ames/Lunda's overall average score was 55.98%, while C.S. McCrossan's was 65.91. See SR-191.

³¹ *Telephone Associates*, 364 N.W.2d 378, 382 (Minn. 1985).

³² See *Griswold v. Ramsey County*, 65 N.W. 2d 647, 652 (Minn. 1954) ("Any competitive bidding procedure which defeats this fundamental purpose, *even though it be set forth in the initial proposal to all bidders*, invalidates the construction contract although subsequent events establish, as in the instant case, that no actual fraud was present.") (emphasis added). See also, *Telephone Assocs., Inc. v. St. Louis County Bd.*, 364 N.W.2d 378, 382 (Minn. 1985) ("Public officials, however, have no authority to waive defects which affect or destroy competitive bidding.").

³³ See Minn. Stat. § 161.3426 subd. 1(b), 1(c), and 1(d).

II. THIS CASE MUST BE REMANDED TO THE DISTRICT COURT FOR DEVELOPMENT OF A FULL EVIDENTIARY RECORD.

Summary judgment is only appropriate when the evidence, viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.³⁴ Instead of applying that well understood standard, the district court committed reversible error when it granted Flatiron's motion for summary judgment based on a substantial evidence standard.³⁵

Respondents state three reasons why summary judgment should be upheld: there was no error of law by the district court; Appellants' did not present material facts in dispute; and Appellants' experts are not, in fact, experts. Appellants demonstrated in the previous section that the lower courts made an error of law and applied the facts at issue to the wrong legal definition of responsiveness. This alone is enough to reverse the district court's summary judgment decision. No matter what legal standard is applied to the definition of responsiveness, however, sufficient material facts are in dispute to prevent summary judgment.³⁶ Issues of credibility are particularly ill-suited for summary

³⁴ *Stringer v. Minnesota Vikings Football Club, LLC*, 705 N.W.2d 746, 753 (Minn. 2005).

³⁵ See Order, dated August 26, 2008 (A-88), Amended Order, dated October 23, 2008 (A-111); and Opinion at pp. 11-13 (ADD - 11-13).

³⁶ Flatiron incorrectly argues that Appellants violated Minn.Gen.R.Prac. 115.03(d) in the proceedings below by not including a separate section in their opposition brief entitled "Disputed Fact." See Flatiron's Brief at p. 3. But Appellants' Brief did have a section listing and discussing the facts in dispute. (SR-390). And as argued in the Appellate Brief below, Minnesota caselaw does not support the granting of summary judgment in these circumstances when the disputed facts are discussed in the record before the court. See Appellants' Court of Appeals Reply Brief at p. 2-4.

judgment, so Respondents cannot defend the district court's decision by arguing that their experts are more credible than Appellants'.³⁷ Reversal of the grant of summary judgment and a remand to the district court for further proceedings are appropriate because the record, when viewed under the correct standard, shows that Appellants have met their burden to show that material facts are in dispute and that Flatiron is not entitled to summary judgment as a matter of law.

A. The district court's grant of summary judgment must be reversed because the district court improperly applied administrative deference.

At summary judgment, it is not the district court's job to decide issues of fact; the district court's job is only to determine if issues of fact exist.³⁸ In this case, the district court committed reversible error by conducting that review "within the context of the required judicial deference to agency expertise."³⁹

Courts defer to the decisions of agencies when an agency has applied its particular expertise and special knowledge to a set of facts.⁴⁰ But here, no decision of the agency was under review. This was a motion for summary judgment where the question before the district court was whether there were facts in dispute.

The district court improperly gave preference to evidence proffered by MnDOT over affidavits provided by Appellants. In *Anderson v. State*, this Court held that affidavits provided by an agency at summary judgment are not to be given deference.⁴¹

³⁷ See *Forsblad v. Jepson*, 292 Minn. 458, 459-60, 195 N.W.2d 729, 730 (1972).

³⁸ See *Nord v. Herreid*, 305 N.W.2d 337, 339 (Minn. 1981).

³⁹ See Amended Order, dated October 23, 2008 at p. 6 (A-115).

⁴⁰ See *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 824 (Minn. 1977).

⁴¹ See *Anderson v. State*, 693 N.W.2d 181, 190-191 (Minn. 2005).

In that case, the district court, citing administrative deference, preferred the affidavit testimony of an agency official over the affidavit testimony of an expert proffered by the plaintiff and granted summary judgment to the agency.⁴² This Court reversed, reasoning that the agency was not entitled to deference at summary judgment because it was not the agency's decision that was at issue, but whether there were issues of fact in dispute.⁴³

If the district court's application of administrative deference at the summary judgment stage is upheld, this Court will be setting a precedent that will effectively insulate agency action from judicial review based on a full factual record. Administrative deference applied at summary judgment would prevent any plaintiff challenging an agency action from developing a full factual record at a trial.

B. Appellants showed that there are material facts in dispute regarding Flatiron's compliance with the RFP's right of way provisions.

The Project's Instructions to Proposers states, "Proposed work for this project shall not include additional capacity or Right of Way."⁴⁴ Comparing Flatiron's proposal and the Project's Right of Way Map shows that Flatiron proposed work beyond the eastern boundary of the temporary easement along 2nd Street and also outside the 35W right of way.⁴⁵ Flatiron received high technical scores for its bridge profile which was

⁴² *Id.*

⁴³ *Id.* at 191.

⁴⁴ *Wieland Aff.*, Ex. 32 at ¶ 4.3.3.5.1 (SR-118).

⁴⁵ *Compare Wieland Aff.*, Ex. 193 (MnDOT Right of Way Map) at SR-160 and *Dean Aff.*, Ex. L at Appendix A (Flatiron Proposal) (also reproduced as Figure 2 in Appellants' Brief at p. 11).

made possible by its lowering of 2nd Street.⁴⁶ Those undisputed facts show that Flatiron's proposal did not comply with mandatory requirements, and that non-compliance resulted in a scoring advantage. Appellants made a *prima facie* showing of non-responsiveness, so Flatiron was not entitled to summary judgment as a matter of law.

Further showing the impropriety of the district court's grant of summary judgment, is the evidence in the record that MnDOT defined "right of way" differently for Flatiron and actively misled two other proposers. The proposal managers for C.S. McCrossan and Ames/Lunda, both testified that MnDOT verbally confirmed those proposers' understanding that significant lowering of 2nd Street was not allowed because it would go outside of the Project's right of way bounds.⁴⁷ MnDOT argues to this Court that Mr. Sellman's and Mr. Fahland's affidavits need not be considered because the courts below ignored them.⁴⁸ This is exactly what is most disturbing about the lower courts' decisions! In order to reach their result-oriented decisions, both courts ignored the fundamental contested fact in this case. Here we have allegations that Mr. Chiglo, the chairman of the TRC and MnDOT's Project Manager, expressly told Ames/Lunda and C.S. McCrossan that their design must stay within the very narrow MnDOT right of way, which meant that they couldn't use the temporary easement shown on the project map.

⁴⁶ See Plaintiffs' Memo. Supporting Temporary Injunction at p. 23 (SR-29) (citing and discussing the evidence).

⁴⁷ See Aff. of Eric Sellman at ¶3 (SR-404); Supp. Aff. of Eric Sellman at ¶3 (SR-407); Supp. Aff. of Richard Fahland at ¶¶ 3, 5 (SR-401-402). Mr. Sellman and Mr. Fahland were the designated single points of contact for all communications with MnDOT, so it is reasonable to infer that they have personal knowledge of the communications with MnDOT about which they testified. Their affidavits do aver personal knowledge so they are, therefore, admissible, despite MnDOT's assertions to the contrary.

⁴⁸ See MnDOT's Brief at p. 14.

Then Mr. Chiglo and the TRC allow Flatiron to do the very same thing that Mr. Chiglo told Ames/Lunda and C.S. McCrossan they couldn't do! Flatiron gets high scores for its use of the temporary easement, and its competitors get penalized for understandably not doing the same. This goes beyond the "opportunity" for favoritism that was proscribed by this Court in *Telephone Associates*.⁴⁹ Whether it was merely unwitting or intentional, MnDOT's actions resulted in actual favoritism to Flatiron. It is "ivory tower" nonsense to contend that Ames/Lunda and C.S. McCrossan shouldn't have reasonably relied on what Mr. Chiglo told each of them. He was chairman of the TRC and MnDOT's chief administrator for the Project and controlled what MnDOT would accept as the designs developed. It is no wonder, therefore, that Respondents and the lower courts gloss over this disputed part of the factual record. Mr. Chiglo defined the project boundaries one way to two proposers and allowed a third to use a different boundary. There is a giant disputed fact over what the project's boundaries were. That disputed fact is material depending on the definition of "responsive" adopted by this Court. If Appellants' version of the facts are assumed to be true, then under the common law definition of "responsive," MnDOT awarded the project to a non-responsive proposal. Thus, contrary to Flatiron's contention,⁵⁰ it does matter what definition of "responsive" is applied to this case as it affects whether summary judgment should have been granted. As the district

⁴⁹ *Telephone Associates*, 364 N.W.2d at 382.

⁵⁰ See Flatiron Brief at pp. 18-19.

court acknowledged, if Appellants' definition of "responsive" is correct, then Flatiron's proposal was non-responsive.⁵¹

Appellants further showed that there is a genuine issue of material fact about the inconsistencies in Mr. Chiglo's affidavits.⁵² Those factual issues can only be resolved through a weighing of testimony at trial. Credibility disputes cannot be resolved at summary judgment.

There is also a factual dispute about what kind of work may be done in a temporary easement like the one shown on the Right of Way Map along 2nd Street. MnDOT argued that because 2nd Street was to be taken by Commissioner's Orders, Flatiron did not violate any requirements by proposing to lower 2nd Street by using the space marked as a temporary easement.⁵³ Jon Chiglo, MnDOT's project manager, submitted an affidavit testifying that it is generally known in the construction industry that a road taken under Commissioner's Orders may be permanently lowered.⁵⁴ Mr. Sellman testified in his affidavit that C.S. McCrossan wanted to lower 2nd Street, but it did not do so because it did not believe it was permissible to do so, disputing Mr. Chiglo's assertions about what is generally known in the industry.⁵⁵ Appellants also submitted a portion of MnDOT's Right of Way Manual, which was incorporated by reference into the request for proposals, that contradicts MnDOT's arguments to the

⁵¹ This point was acknowledged by the district court. *See* Amended Order at n.12 (A-118).

⁵² *See* Appellants' Brief at p. 49.

⁵³ *See* MnDOT's Brief at p. 12.

⁵⁴ *See* Third Aff. of Jon Chiglo at ¶7 (SR-426-427).

⁵⁵ *See* Supp. Aff. of Eric Sellman at ¶ 3 (SR-407).

contrary.⁵⁶ Viewed in the light most favorable to Appellants, that conflicting evidence shows there is a dispute of material fact about what kind of work was allowed in the temporary easement.

Flatiron argues that the fact that Flatiron's proposed work outside the narrow MnDOT right of way and beyond even the temporary easement shown in the solicitation is excused because Flatiron did not actually use all of the space it proposed when it actually constructed the Project.⁵⁷ That argument fails because responsiveness is determined based on the proposal, not on the project's final as-built configuration.⁵⁸ Similarly, Flatiron's citation of RFP Sections 7.5.4 and 6.1.2 as justification for its use of the temporary easement as additional right of way⁵⁹ in its proposal is unavailing because it confuses description of processes to be used *after* contract award with limitations on what could permissibly be proposed⁶⁰ *before* the award. Flatiron won the competition based on the scores its proposal received, not the bridge it finally built. Because there are numerous material fact issues regarding the right of way requirement, this Court should reverse the district court's grant of summary judgment.

⁵⁶ See *Wieland Aff.*, Ex. 237 (SR-207).

⁵⁷ See Flatiron's Brief at p. 11.

⁵⁸ See *Carl Bolander & Sons v. City of Mpls.*, 451 N.W.2d 204, 206 (Minn. 1990) (requiring determination of responsiveness when bids are opened).

⁵⁹ See Flatiron's Brief at p. 12. Flatiron's citation to § 6.1.2 is incorrect as that section does not exist in the RFP. See *Dean Aff.* at Ex. K.

⁶⁰ See discussion in Memo. Supporting Plaintiffs' Motion for a Temp. Injunction at p. 21 (SR-27).

C. Appellants met their burden to show a genuine issue of material fact regarding Flatiron's violation of the 3 web requirement.

The request for proposals clearly states, "A minimum of 3 webs are required for concrete box designs."⁶¹ Many of the boxes proposed by Flatiron are only designed with two webs.⁶² The fact that Flatiron uses two of those boxes in each bridge span is interesting, but irrelevant. Appellants submitted affidavits from Randy Reiner, P.E., testifying that Flatiron's proposal is non-responsive because it violated the requirement for three web boxes and that Flatiron gained a competitive advantage from that violation.⁶³

MnDOT claims that Mr. Reiner's affidavits are insufficient to support Appellants' burden of proof because MnDOT alleges that Mr. Reiner is not an expert.⁶⁴ Mr. Reiner is a registered professional engineer with more than 20 years of industry experience.⁶⁵ He is the Structures Division Manager at C.S. McCrossan, Inc. and he is a member of the MnDOT/AGC Bridge Committee.⁶⁶ He has managed hundreds of millions of dollars of work for MnDOT.⁶⁷ He is more than qualified to offer an opinion about the intended meaning and effect of a structural requirement in a MnDOT construction document. Further, at the summary judgment stage, evidence must be viewed most favorably for the

⁶¹ See Wieland Aff., Ex. 198 at ¶ 13.3.3.1.2 (SR-176).

⁶² See MnDOT's Supplemental Record at SR-22 (showing a portion of Flatiron's proposal).

⁶³ See Aff. of Randy Reiner, P.E. (SR-410); Supp. Aff. of Randy Reiner, P.E. (SR-414); Third Aff of Randy Reiner, P.E. (SR-332).

⁶⁴ See MnDOT's Brief at p. 18.

⁶⁵ See Supp. Aff. of Randy Reiner, P.E. at ¶ 1 (SR-414).

⁶⁶ See *id.*

⁶⁷ See *id.*

non-moving party,⁶⁸ so any doubts about Mr. Reiner's qualifications must be resolved in Appellants' favor.

The lower courts committed reversible error by resolving the factual dispute over Flatiron's non-compliance with the three web requirement at the summary judgment stage.⁶⁹ Appellants met their burden to show genuine issues of material fact about the non-responsiveness of Flatiron's structural design, so the grant of summary judgment to Flatiron should be reversed.

D. Flatiron may not retain payments in excess of the reasonable value of the bridge if Flatiron's contract is declared illegal.

Flatiron argued below that it was entitled, as a matter of law, to summary judgment on Appellants' declaratory relief claim because the near completion of the bridge rendered Appellants' complaint incapable of redress.⁷⁰ In essence, Flatiron's argument was that even if its proposal was non-responsive, thereby making its contract with MnDOT illegal, Appellants were not entitled to declaratory relief because Flatiron had gotten away with it.

Appellants responded to Flatiron's motion for summary judgment on Appellants' claim for declaratory relief with many arguments,⁷¹ one of which was that if the contract was illegal, then Flatiron would not be entitled to the contract price. Flatiron would only

⁶⁸ See *Fin Ag, Inc. v. Hugnagle, Inc.*, 720 N.W.2d 579, 584 (Minn. 2006).

⁶⁹ See Amended Order, dated October 23, 2008 at p. 10 (A-119) ("The Court concludes that there is substantial evidence supporting the determination of the TRC that Flatiron's proposal satisfied the "3-web" requirement...").

⁷⁰ See Flatiron's Memo. in Support of Its Motion for Complete or Partial Sum. Judgment at pp. 19-22 (SR-353 – 356).

⁷¹ See Memo. of Law Opposing Flatiron's Motion for Sum. Judgment at pp. 15 – 18 (SR-390 – 393).

be entitled to the reasonable value of the benefit it provided to the public, and the court could order repayment of excess funds paid to Flatiron.⁷²

Flatiron argues that repayment is not available as a remedy and that there is no evidence that shows that Flatiron was paid more than the fair value of its work.⁷³ Both of Flatiron's assertions are incorrect.

If Flatiron's proposal is found to be non-responsive, then this case will fall squarely under the repayment cases cited by Appellants.⁷⁴ Those cases hold that if a public contract is illegal and a vendor supplied something of value to the public that cannot be returned, then the vendor may only keep the fair value of what it provided instead of the contract price.⁷⁵ Flatiron's analysis of why repayment is not available under those precedents is incorrect. The first mandatory element cited by Flatiron as a reason for a court to decline to order repayment was that "the attempted contract was within the powers of the public body."⁷⁶ If Flatiron's proposal was non-responsive, then MnDOT did not have the power to award the contract to Flatiron. That is the plain meaning of Minn. Stat. § 161.3426 subd. 1d.

⁷² See Memo. of Law Opposing Flatiron's Motion for Sum. Judgment at pp. 19-21 (SR-394-395).

⁷³ See Flatiron's Brief at pp. 16-17.

⁷⁴ See *Kotschevar v. North Fork Twp. v. Stearns County*, 229 Minn. 234, 236-37, 39 N.W.2d 107, 109 (1949); *Village of Pillager v. Hewitt*, 98 Minn. 265, 266, 107 N.W. 815 (1906).

⁷⁵ See *id.* The rule stated in *Kotschevar* is more favorable to Flatiron than the policy stated in *Coller v. St. Paul*, 26 N.W.2d 835, 841-42 (Minn. 1947) ("Contracts made in defiance of such requirements not only are unenforceable, but afford no basis for recovery by the contractor upon an implied obligation to pay the value of benefits received by the public body.")

⁷⁶ See Flatiron's Brief at p. 16.

Flatiron's contention that the record does not contain any evidence that Flatiron has been paid anything but the fair value of its work is also incorrect. Appellants' Complaint, which was verified through the affidavit of Eric Sellman, shows that the value of the bridge that Flatiron proposed to build was only \$200,000,000.⁷⁷ Flatiron did not provide any evidence, just lawyer argument, to dispute that fact. Appellants do not have to submit additional evidence on this point if Flatiron never submitted contrary evidence. So viewing the evidence in the light most favorable to Appellants, the district court should have rejected Flatiron's unsupported argument.

CONCLUSION

The purpose of the best value design-build statute is not, as Flatiron asserts "to allow the selection of higher priced, higher quality proposals."⁷⁸ As with all MnDOT contracts, the overarching purpose of that statute is "to secure the public benefits of free and open competition and to secure the quality of public works."⁷⁹ MnDOT's interpretation of responsiveness subverts those noble goals. There is no good public policy reason to apply a different definition of responsiveness to design-build best value contracting than to any other type of public procurement. That would simply result in inefficient pricing because proposers would not be able to tell if their proposals were responsive or not before they were scored. A new definition would also open the door to fraud, favoritism, and extravagance by removing a necessary limit to the discretion of the contracting officials. This Court should interpret the word "responsive" in Minn.

⁷⁷ See Complaint at ¶49 (A-17); Supplemental Aff. of Eric Sellman at ¶2 (SR-407).

⁷⁸ Flatiron's Brief at p. i.

⁷⁹ See Minn. Stat. 161.315 subd. 1(1).

Stat. § 161.3426 consistently with its precedents, reverse the district court's grant of summary judgment, and remand this matter to the district court for further hearings.

Dated: January 6, 2010

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

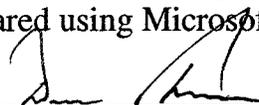
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BRIEF LENGTH CERTIFICATION

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs.1 and 3, for a brief produced with a proportional font. The length of this brief is 6,999 words. This brief was prepared using Microsoft Word 2003.



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