

Small Business Notes

New Law Gives Original Jurisdiction to Minnesota District Courts on Disputes Relating to Public Procurement

In this issue:

- **New Law Gives Original Jurisdiction to Minnesota District Courts on Disputes Relating to Public Procurement**
- **Still No Movement on Small Business Administration Rules on Small Business Runway Extension Act**
- **Federal Trade Commission Announces First Enforcement Decisions and Orders in Enforcement of the Consumer Review Fairness Act**

In the context of public procurement contracts, disputes can arise between a contractor, potential contractor, or bidder and the State of Minnesota or a local municipality as the contract awarding party. These disputes can, for example, take the form of bid protest, solicitation content protests, or award protests. State or local administrative procedures are the first venue for resolution of these disputes. For agencies of the State of Minnesota, this involves a contested case hearing under the Minnesota Administrative Procedure Act (APA). For municipalities it involves their own administrative procedures—though many municipalities have adopted at least some of the procedures of the Minnesota APA.

If the contractor potential contractor, or bidder is still aggrieved by the administrative decision, it can seek judicial review of the decision. Such decisions are “quasi-judicial” in that they involve the rights a few individuals; involve an investigation into a disputed claim and the weighing of evidentiary facts; application of those facts to a prescribed standard; and a binding decision regarding the disputed claim. Such a quasi-judicial action, the Minnesota Supreme Court has held, may only be challenged by a writ of *certiorari* to the Minnesota Court of Appeals [See *Rochester City Lines, Co. v City of Rochester*, 868 N.W. 2d 655, 662-663 (Minn. 2015) and see also Keppel, *Minnesota Administrative Practice*, 11.01].

2019 *Minn. Laws*, Chapter 21, (signed May 9, 2019) now gives the Minnesota district court original jurisdiction “...over any action seeking equitable or declaratory relief arising under or based upon the alleged violation of any law governing public procurement requirements, public procurement procedures, or the award of any public contract.” The new law amends Minn. Stat. Chapter 16C to make the new law applicable to State of Minnesota procurement contracts; and Minn. Stat. Chapter 471, subd14(b) and subd. 21 to make the law applicable to municipal procurement contracts. The standard of review to be applied by the district court or any appellate court is not altered by the new law.

Small Business Notes

Still No Movement on Small Business Administration Rules on Small Business Runway Extension Act

As first noted in *Small Business Notes* for January, 2019, in December of 2018 the President signed the “Small Business Runway Extension Act of 2018.” Among its provisions was a new formula for computing a business’ revenue for purposes of qualifying as a federal contractor in various federal programs. The change would have the effect of allowing small firms with changing revenues each year to use a five year average revenue (rather than the current three year average) to reach a number which still met the maximum revenue threshold for small business status.

Immediately on the signing of the law, however, the Small Business Administration announced that it would not enforce the new averaging provision until it had made rules to implement the legislation. As of May 15, 2019 –and despite a Congressional House Small Business Committee hearing in March that encouraged speedy rulemaking – the rules have not been forthcoming and the Small Business Administration indicates that it will not be publishing them until end of summer 2019. Failure to implement the new averaging has the potential to cause some federal contractors to lose their small business status.

Federal Trade Commission Announces First Enforcement Decisions and Orders in Enforcement of the Consumer Review Fairness Act

Consumer reviews of businesses, goods, and services have become an increasingly important part of many consumers’ buying decisions—especially for online purchases or large, expense purchases. The federal Consumer Review Fairness Act prohibits businesses from inserting clauses in consumer contracts that seek to prevent consumers from writing, posting online, or releasing in any media negative reviews of the business or its products or services. It also prohibits a business with threatening consumers with legal action for such reviews.

On May 9, 2019, the United States Federal Trade Commission announced its first administrative complaints and orders enforcing the prohibition on non-disparagement consumer form contracts.

The enforcement actions were directed against:

- A Waldron HVAC, LLC, a heating and cooling contractor, whose consumer form contract contained language classifying all the terms of the contract as private and confidential and prohibiting release of those terms to anyone, including the Better Business Bureau. Any release by the consumer would require payment to the company of liquidated damages and counsel fees and costs.
- National Floors Direct, Inc., a seller of flooring materials and services, whose consumer form contract contained language specifying “By signing this purchase order you are agreeing under penalty of civil suit...not to publicly disparage or defame National Floors Direct in any way or through any medium.”

Continued...

Small Business Notes

- LVTR LLC, the operator of Las Vegas Trail Riding, whose consumer form contract contained language requiring the rider – among other things – “ ...not to call Animal Control or any governmental agency...as to how horses/animals are taken care of.”

Past issues of Small Business Notes are available on the Department of Employment and Economic Development website at

[Small Business Notes](#)

The settlement orders enjoined the businesses from offering any consumer form contract that includes a review limiting clause or which requires a customer to accept such terms as a condition of the contract. The orders further require the businesses to notify customers who had signed contracts with such non-disparagement clauses that such provision were not enforceable, to acknowledge that relevant company personnel have been informed or the FTC’s order, and to file compliance reports with the FTC for three years from the date of the order.

Small Business Notes is published to offer timely, accurate, and useful information on topics of concern to small businesses in Minnesota. It is for general information purposes only. It is not legal advice and should not be relied on for resolution or evaluation of legal issues or questions. Readers are advised to consult with their private legal advisors for specific legal advice on any legal issues they may have.

Information in Small Business Notes on tax matters, both federal and state, is not tax advice and cannot be used for the purposes of avoiding federal or state tax liabilities or penalties or for the purpose of promoting, marketing or recommending any entity, investment plan or other transaction. Readers are advised to consult with their private tax advisors for specific tax advice on any tax related issues they may have.



Department of Employment and Economic Development

1st National Bank Building, 332 Minnesota, Suite E200, Saint Paul, MN 55101-1351
651-259-7114 | Toll Free: 800-657-3858 | Fax: 651-296-5287 | TTY/TDD: 651-282-5909 | <https://mn.gov/deed/>

An Equal Opportunity Employer and Service Provider