

Nos. A08-1584 and A08-1994

9

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.

BRIEF AND ADDENDUM OF APPELLANTS

FABYANSKE, WESTRA, HART
& THOMSON, P.A.
Dean B. Thomson (#141045)
Jeffrey A. Wieland (#387918)
800 LaSalle Avenue South, Suite 1900
Minneapolis, MN 55402
(612) 359-7600

Attorneys for Appellants

MINNESOTA ATTORNEY
GENERAL'S OFFICE
Richard L. Varco, Jr.
Office of the Attorney General
1800 Bremer Tower
445 Minnesota Street
St. Paul, MN 55101-2134
(651) 297-2134

*Attorneys for Respondent
Minnesota Department of Transportation*

FAEGRE & BENSON, LLP
Thomas J. Vollbrecht (#17886X)
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402
(612) 766-7000

Attorneys for Respondent Flatiron-Manson

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

TABLE OF CONTENTS

	Page
ADDENDUM TABLE OF CONTENTS.....	III
APPENDIX TABLE OF CONTENTS	IV
SUPPLEMENTAL RECORD TABLE OF CONTENTS.....	VI
TABLE OF AUTHORITIES	IX
STATEMENT OF THE ISSUES.....	1
STATEMENT OF THE CASE.....	3
INTRODUCTION.....	5
FACTS	6
STANDARD OF REVIEW	17
ARGUMENT	18
I. The lower courts erred in their statutory construction because their interpretation of Minn. Stat. §161.3426 contradicts its plain language, settled legal meaning, and statutory scheme.....	19
A. Minn. Stat. §161.3426 must be viewed in the context of existing procurement law.....	19
1. Responsiveness protects the public from fraud, waste, and extravagance.....	19
2. Best value and design-build are evolutions, not revolutions in public contracting.....	22
B. Minn. Stat. §§161.3410 - .3428 authorize MnDOT to use a new project delivery method and contractor selection mechanism, but the common-law definition and requirement of responsiveness still applies.....	27
1. Normal statutory construction demands that the common-law definition of “responsive” apply to Minn. Stat. §161.3426.	28
2. Minn. Stat. §161.3412 does not authorize departure from the common-law definition of “responsiveness.”	29
3. The lower courts’ construction of Minn. Stat. §161.3426 impermissibly nullifies provisions of the statute, frustrating the legislature’s intent.	31
C. The common-law definition of responsiveness is completely compatible with the inherently greater discretion of contracting officials in best value design-build contracting.....	35
II. The district court incorrectly granted summary judgment despite the presence of genuine issues of material fact as to responsiveness and flatiron’s defenses.....	41

A. The lower courts improperly deferred to MnDOT..... 42

B. Regardless of the posture of this case, MnDOT is not entitled to deference because it acted contrary to statute..... 45

C. The district court improperly granted summary judgment because the record shows that material issues of fact are in dispute. 46

III. Because MnDOT Illegally awarded the contract to flatiron, further proceedings are required at the district court to determine what amount that flatiron may retain from the proceeds of that illegal contract..... 51

CONCLUSION 52

ADDENDUM TABLE OF CONTENTS

Opinion of the Court of Appeals dated July 28, 2009

ADD-1

Minn. Stat. §§161.3410 - .3428

ADD-14

APPENDIX TABLE OF CONTENTS

Summons and Complaint	A-1
Plaintiffs' Notice and Motion for a Temporary Restraining Order	A-31
Notice and Motion to Intervene	A-34
Verified Answer of Minn. Dept. of Transportation	A-36
Order dated October 31, 2007	A-50
Defendant Flatiron's Answer to the Complaint	A-79
Plaintiffs' Notice and Motion for a Temporary Injunction	A-83
Defendant Flatiron's Notice and Motion for Summary Judgment	A-85
Order dated August 26, 2008	A-87
Notice of Appeal to Court of Appeals	A-107
Amended Order dated October 23, 2008	A-110
Certificate as to Transcript Filing and Delivery	A-125
Notice of Entry of Judgment and Judgment	A-126
Notice of Entry of Judgment and Judgment	A-147
Notice of Appeal to Court of Appeals	A-163
Order dated November 20, 2008	A-165
Order dated October 20, 2009	A-167
Minn. Stat. §161.315	A-170
Minn. Stat. §§555.01-16	A-172
Minn. Stat. §645.08	A-175

Minn. Stat. §645.16	A-176
Minn. Stat. §645.17	A-177
Minn. Stat. §645.44	A-178
<i>Siemens Transp. Sys., Inc. v. Metro. Council</i> , 2001 WL 682892	A-181

SUPPLEMENTAL RECORD TABLE OF CONTENTS

Notice of Appeal to Court of Appeals	SR-1
Stip. and Order Dismissing Appeal Without Prejudice	SR-3
Order, dated December 27, 2007	SR-6
Memo. of Law Supporting Plaintiffs' Motion for Temporary Injunction	SR-7
Aff. of Jeffrey Wieland in Support of Plaintiffs' Motion for a Temp. Inj.	SR-51
Ex. 31 (Proposal Evaluation Plan)	SR-55
Ex. 32 (Instructions to Proposers)	SR-98
Ex. 113 (Terry Ward's Scoresheet for Flatiron's Proposal)	SR-129
Ex. 120 (Terry Ward's Scoresheet for C.S. McCrossan's Proposal)	SR-135
Ex. 127 (Terry Ward's Scoresheet for Ames/Lunda's Proposal)	SR-141
Ex. 171 (Wayne Murphy's Notes from the Flatiron Interview)	SR-147
Ex. 173 (Quality Subcommittee Report Annotated by Wayne Murphy)	SR-154
Ex. 180 (Quality Subcommittee Report Annotated by Wayne Murphy)	SR-157
Ex. 193 (Right of Way Map)	SR-160
Ex. 194 (RFP Clarification #1)	SR-161
Ex. 196 (Book 2, Section 7 (Right of Way) of the RFP)	SR-165
Ex. 198 (Book 2, Section 13 (Structures) of the RFP)	SR-168
Ex. 226 (MnDOT Summary of Design-Build Evaluation Process)	SR-188
Ex. 227 (MnDOT Summary of Best Value Determination)	SR-193
Ex. 232 (Letter from Jon Chiglo, dated October 1, 2007)	SR-194
Ex. 235 (Letter from Jon Chiglo, dated October 2, 2007)	SR-197

Ex. 236 (Memo. from Jon Chiglo to Carol Molnau, dated Sept. 19, 2007)	SR-204
Ex. 237 (MnDOT Right of Way Manual § 114.2)	SR-207
Ex. 238 (Summary of Previous Design-Build Scoring)	SR-208
Excerpt from Ex. 240 (Deposition Transcript of Jon Chiglo)	SR-209
Excerpt from Ex. 241 (Deposition Transcript of Lisa Freese)	SR-221
Excerpt from Ex. 242 (Deposition Transcript of Heidi Hamilton)	SR-224
Excerpt from Ex. 243 (Deposition Transcript of Robert McFarlin)	SR-228
Excerpt from Ex. 244 (Deposition Transcript of Carol Molnau)	SR-230
Excerpt from Ex. 245 (Deposition Transcript of Wayne Murphy)	SR-232
Excerpt from Ex. 246 (Deposition Transcript of Tom O'Keefe)	SR-249
Excerpt from Ex. 247 (Deposition Transcript of Tom Styrbicki)	SR-256
Excerpt from Ex. 248 (Deposition Transcript of Terry Ward)	SR-264
Excerpt from Ex. 249 (Deposition Transcript of Kevin Western)	SR-273
Flatiron's Memo. Opposing Plaintiffs' Motion for a Temporary Injunction	SR-279
Defendant MnDOT's Memo. in Opp. to Plaintiffs' Request for a Temp. Inj.	SR-299
Plaintiffs' Reply Memo. Supporting Their Motion for a Temporary Injunction	SR-325
Third Aff. of Randy Reiner, P.E.	SR-332
Flatiron's Memo. in Support of its Motion for Complete or Partial Sum. J.	SR-335
Aff. of Thomas Vollbrecht in Support of Motion for Sum. J.	SR-358
Excerpt of Ex. C (Deposition Transcript of Wendell Anthony Phillippi)	SR-361
Excerpt of Ex. D (Deposition Transcript of Michael Scott Sayer)	SR-366
Ex. O-502 (Purchase Order from Flatiron to Traffic Technologies)	SR-372

Ex. P (Column from Star Tribune, July 8, 2008)	SR-375
Memo. of Law Opposing Flatiron's Motion for Summary Judgment	SR-376
Aff. of Wendell Anthony Phillippi	SR-397
Aff. of Charles McCrossan	SR-399
Supplemental Aff. of Richard Fahland	SR-401
Aff. of Eric M. Sellman	SR-404
Supplemental Aff. of Eric M. Sellman	SR-406
Aff. of Randy Reiner, P.E.	SR-410
Supp. Aff. of Randy Reiner, P.E.	SR-414
Supp. Aff. of Jon Chiglo	SR-419
Third Aff. of Jon Chiglo	SR-422

TABLE OF AUTHORITIES

MINNESOTA STATUTES AND RULES

Minn. Stat. § 161.315 subd. 1	29, 54
Minn. Stat. § 161.3410	7, 20, 29
Minn. Stat. § 161.3410 subd. 3 (2008).....	22
Minn. Stat. § 161.3412	31
Minn. Stat. § 161.3412 subd. 1	30, 31
Minn. Stat. § 161.3422(2)	33
Minn. Stat. § 161.3426	passim
Minn. Stat. § 161.3426 subd 1(d).....	35
Minn. Stat. § 16C.02 subd. 4a	22, 31
Minn. Stat. § 645.08 (3)	31
Minn. Stat. §§ 161.3420	8
Minn. Stat. §§ 16C.25	41
Minn. Stat. §161.3410-.3428.....	5
Minn. Stat. §161.3422	1
Minn. Stat. §161.3426, subd.1 (a).....	34
Minn. Stat. §645.16	29, 34, 35
Minn. Stat. §645.17	29, 30
Minn. Stat. §645.17(4)	1
Act of July 1, 2001, ch. 8, art. 3, 2001 Minn. Sess. Law Serv. 2015 (West).....	24
Minn. R. Civ. P. 56.03	42, 47
Minn. R. Civ. P. 65.01	3
Minn. R. Civ. P. 65.02	3
Minn. Rules § 1230.0800	41

MINNESOTA CASES

Barna, Guzy & Steffen, Ltd. v. Beens,

541 N.W.2d 354 (Minn. Ct. App. 1995)

52

Carl Bolander and Sons v. Minneapolis,

451 N.W.2d 204 (Minn. 1990).....

1, 26

<i>Coller v. St. Paul,</i> 26 N.W.2d 835 (Minn. 1947).....	1, 2, 52
<i>Doe v. Minnesota State Bd. of Medical Examiners,</i> 435 N.W.2d 45, 48 (Minn. 1989).....	18
<i>Elliot v. City of Minneapolis,</i> 59 Minn. 111, 114, 60 N.W. 1081, 1083 (1894).....	36
<i>Elzie v. Comm’r of Public Safety,</i> 298 N.W.2d 29 (Minn. 1980).....	51
<i>Fabio v. Bellomo,</i> 504 N.W.2d 758 (Minn. 1993).....	19
<i>Fine v. Bernstein,</i> 726 N.W.2d 137 (Minn. Ct. App. 2007).....	44
<i>Foley Bros., Inc. v. Marshall,</i> 266 Minn. 259, 263, 123 N.W.2d 387, 390 (1963).....	26, 32
<i>Griswold v. Ramsey County,</i> 242 Minn. 529, 534-35, 65 N.W.2d 647 (1954).....	27, 28, 36
<i>Griswold v. Ramsey County,</i> 65 N.W.2d 647 (Minn. 1954).....	1
<i>Hibbing Educ. v. P.E.R.B.,</i> 435 N.W.2d 45, 48 (Minn. 1985).....	18
<i>In re Application of Gau,</i> 41 N.W.2d 444 at 447 (Minn. 1950).....	29
<i>In re Denial of Eller Media Co.’s Applications for Outdoor Adver. Device Permits,</i> 664 N.W.2d 1, 7 (Minn. 2003).....	18, 45
<i>Kotschevar v. North Fork Twp.,</i> 229 Minn. 234, 39 N.W.2d 107 (1949).....	2, 53
<i>Krumm v. R. A. Nadeau Co.</i> 276 N.W.2d 641 (Minn., 1979).....	44
<i>Lovering-Johnson, Inc. v. City of Prior Lake,</i> 558 N.W.2d 499, 502 (Minn. Ct. App. 1997).....	26, 27, 32
<i>Minn. Ctr. For Envtl. Advocacy v. Comm’r of Minn. Pollution Control Agency,</i> 696 N.W.2d 95 (Minn. Ct. App. 2005).....	44
<i>Modrow v. JP Foodservice, Inc.,</i>	

656 N.W.2d 389, 393 (Minn. 2003).....	18
<i>Scheeler v. Sartell Water Controls, Inc.</i> ,	
730 N.W.2d 285 (Minn. Ct. App. 2007)	52
<i>Schroeder v. St. Louis County</i> ,	
708 N.W.2d 497 (Minn. 2006).....	1, 19, 42, 43
<i>Siemens Transp. Systems, Inc. v. Metropolitan Council</i>	
Docket No. C8-00-2213, 2001 WL 682892, (unpublished).....	39
<i>State by Cooper v. French</i> ,	
460 N.W.2d 2, 4 (Minn. 1990).....	19
<i>State v. Sports and Health Club, Inc.</i> ,	
370 N.W.2d 844, 854 (Minn. 1985).....	45
<i>Waller v. Powers Department Store</i> ,	
343 N.W.2d 655, 657 (Minn. 1984).....	45
<i>Weber v. Albrecht</i> ,	
437 N.W.2d 77 (Minn. Ct. App. 1989)	51

FEDERAL CASES

<i>Scanwell Labs. v. Shaffer</i> ,	
424 F.2d 859, 874 (D.C. Cir. 1970)	46
<i>Toyo Menka Kaisha, Ltd. v. United States</i> ,	
597 F.2d 1371, 1377 (Ct. Cl. 1979)	27

SECONDARY AUTHORITIES

1 BRUNER & O’CONNOR ON CONSTRUCTION LAW § 2:22 at pp. 85-86.....	25
1 BRUNER & O’CONNOR ON CONSTRUCTION LAW §2:74, pp. 181-182 (2002).....	26
2 BRUNER & O’CONNOR ON CONSTRUCTION LAW § 6.2 at pp. 502-03.....	21
BLACKS’S LAW DICTIONARY 966 (8th ed. 2004).....	21
Omer Dekel, <i>The Legal Theory of Competitive Bidding for Government Contracts</i> , 37 Pub. Cont. L. Journal 237, 258-259 (Winter No. 2 2008).....	28

STATEMENT OF THE ISSUES

1. Where the settled legal meaning of the term “responsive” in the context of public procurement requires “strict conformity with each and every requirement” of a Request for Proposals (“RFP”), and the Minnesota Legislature has enacted a public procurement statute for design-build projects, Minn. Stat. §161.3426, which requires MnDOT to award best value design-build projects only to proposals that are “responsive” to the mandatory, weighted selection criteria published in an RFP, can the appellate court ignore the plain language, settled meaning, and overall scheme of the statute to reinterpret the statutory term “responsive” to grant MnDOT discretion to award a design-build contract to a proposal that deviated from the requirements of MnDOT’s RFP?

Appellate Court Ruling: In affirming the district court, the appellate court ruled that MnDOT had discretion to define “responsive” differently under §161.3426.

Most Apposite Cases: *Coller v. St. Paul*, 26 N.W.2d 835 (Minn. 1947); *Griswold v. Ramsey County*, 65 N.W.2d 647 (Minn. 1954); *Carl Bolander and Sons v. Minneapolis*, 451 N.W.2d 204 (Minn. 1990).

Most Apposite Statutory Provisions: Minn. Stat. §161.3422; Minn. Stat. §161.3426, subd. 1; Minn. Stat. §645.17(4)

2. Did the appellate court err by affirming the district court’s orders granting Flatiron’s motion for summary judgment despite evidence showing genuine issues of material fact as to Appellants’ claims for injunctive and declaratory relief, on the grounds that “substantial evidence” supported MnDOT’s decision, instead of construing the facts in the light most favorable to Appellants, the non-moving parties?

Appellate Court Ruling: In affirming the district court, the appellate court determined that “substantial evidence” supported summary judgment, disregarding numerous disputed material fact issues.

Most Apposite Cases: *Schroeder v. St. Louis County*, 708 N.W.2d 497, 507 (Minn. 2006)

Most Apposite Statutory Provisions: Minn. R. Civ. P. 56.03; Minn. Stat. §161.3426.

3. If an illegal contract is entered into as a result of an illegal public procurement, is the contractor only entitled to the fair market value of its services as opposed to the illegal contract price?

Appellate Court Ruling: In affirming the district court, the appellate court did not expressly address this issue, although the district court held that Flatiron was entitled to its contract price and that there was no factual dispute regarding the

difference between the fair market value of the Project and its contract price, despite factual disputes regarding this issue.

Most Apposite Cases: *Kotschevar v. North Fork Twp.*, 229 Minn. 234, 39 N.W.2d 107 (1949); *Coller v. St. Paul*, 223 Minn. 376, 26 N.W.2d 835 (1947).

Most Apposite Statutory Provisions: Minn. Stat. §161.3426.

STATEMENT OF THE CASE

This case concerns Respondent Minnesota Department of Transportation's ("MnDOT's") illegal contract with Respondent Flatiron-Manson ("Flatiron") to design and build the new I 35W bridge ("the Project"). Appellants Scott Sayer and Tony Phillippi ("the Appellants") commenced this action on October 16, 2007, as Minnesota taxpayers and private attorneys general, seeking a declaratory judgment and a temporary injunction under Minn. R. Civ. P. 65.02 to stop work on the Project.¹

Appellants' complaint alleged that MnDOT illegally awarded the contract to Flatiron's non-responsive proposal in violation of Minn. Stat. §161.3426.² Appellants served and filed a motion for a temporary restraining order ("the TRO Motion").³ The district court, Judge Edward Cleary, presiding, denied the TRO Motion and construction on the new bridge commenced.⁴

Plaintiffs moved for a temporary injunction ("the Motion"),⁵ and supported the Motion with affidavits and exhibits.⁶ Flatiron concurrently moved for summary judgment,⁷ which Plaintiffs opposed.⁸

¹ Complaint at p. 22 (A-23).

² Complaint at ¶¶ 16-48 (A-5 – A-16).

³ Plaintiffs' Notice of Motion and Motion for a Temporary Restraining Order (A-31).

⁴ Appellants initially appealed the denial of the TRO, but then dismissed that appeal without prejudice when its motion for expedited review was denied in order to develop a factual record through discovery. *See* Stipulation and Order Dismissing Appeal Without Prejudice (SR-3); Order, dated December 27, 2007 (SR-6).

⁵ *See* Plaintiffs' Motion for a Temporary Injunction (A-83).

⁶ *See* Aff. of Jeffrey Wieland in Support of Plaintiffs' Motion for a Temporary Injunction ("Wieland Aff.") (SR-51).

⁷ *See* Defendant Flatiron's Motion for Summary Judgment (A-85).

The district court denied the Motion for temporary injunction on August 28, 2008,⁹ and granted in part Flatiron's motion for summary judgment regarding part injunctive relief.¹⁰

Appellants filed appeal number A08-1584 on September 4, 2008, appealing the district court's denial of the temporary injunction and the summary judgment order.¹¹ The district court then issued a second order on October 23, 2008, granting Flatiron's motion to dismiss Appellants' request for declaratory relief, and entering judgment on November 7, 2008.¹² On November 14, 2008, Appellants filed appeal number A08-1994 appealing the final judgment and requested that the court of appeals consolidate the two appeals.¹³ The court of appeals consolidated the appeals on November 20, 2008.

On July 28, 2009, the court of appeals affirmed the district court's dismissal of Plaintiffs' claims.¹⁴ Appellants petitioned this Court for review of the court of appeals opinion, which was granted on October 20, 2009.¹⁵

⁸ See Memorandum of Law Opposing Flatiron's Motion for Summary Judgment (SR-376); Aff. of Wendell Phillippi (SR-397); Aff. of Charles McCrossan (SR-399).

⁹ See Order, dated August 26, 2008 (A-87).

¹⁰ *Id.*

¹¹ See Notice of Appeal to Court of Appeals (A-107).

¹² See Amended Order, dated October 23, 2008 (A-110).

¹³ See Notice of Appeal to Court of Appeals (A-163).

¹⁴ Opinion, dated July 28, 2009 (ADD-1).

¹⁵ See Order, dated October 20, 2009 (ADD-14).

INTRODUCTION

The definition of a “responsive” proposal as used in public procurements has been repeatedly articulated by this Court.¹⁶ A responsive proposal is one that responds to all material requirements of a solicitation, and a material requirement is one that affects the price, quality, or manner of performance of a proposal or gives one proposer a competitive advantage over another.¹⁷ This common law definition and the principle of responsiveness must be applied to MnDOT’s design-build procurements under Minn. Stat. §161.3410-3428, not only because this Court’s precedent and good public policy require it, but also because the statute expressly mandates it.¹⁸

MnDOT illegally awarded the Project to Flatiron because Flatiron’s proposal was materially non-responsive to MnDOT’s Request for Proposals (“RFP”) in two respects: (1) MnDOT prohibited proposers from exceeding the Project right of way that MnDOT established, but Flatiron’s proposal went far beyond that right of way which allowed Flatiron to favorably adjust the vertical height of its design; (2) Flatiron’s concrete box girders had 2 webs and the RFP required 3 webs and this variance allowed Flatiron to save money by providing a less safe design.¹⁹ Rather than reject Flatiron’s proposal, MnDOT claimed to have discretion to score – and score highly – Flatiron’s non-responsive proposal, which gave Flatiron a huge competitive advantage.

¹⁶ See Argument, Part I.A, *infra*.

¹⁷ *Id.*

¹⁸ *Id.* at I. Band C.

¹⁹ See Facts, *infra*.

The lower courts erred in determining that because the new design-build statute gives MnDOT some discretion, it somehow also gave MnDOT the discretion to redefine this court's long standing definition of "responsive" and the design-build statute's express use of the word. The principle of responsiveness is not at odds with the discretion granted MnDOT in the design-build statute; the principle only requires that MnDOT actually enforce the proposal requirements it chooses to adopt.²⁰

Finally, the lower courts erred when they granted Flatiron's motion for summary judgment in the face of contested facts sufficient to defeat the motion. MnDOT's decision on the definition of "responsive" was a conclusion of law that was not due any deference. In addition, deference is not due factual findings in the context of summary judgment.²¹

This court should establish the meaning of "responsive" for this and all future MnDOT design-build projects. After declaring that definition, this Court should remand this case to a district court for a factual hearing pursuant to that legal standard.

FACTS

Following the collapse of the 35W bridge, MnDOT used its authority under Minn. Stat. §§161.3410-.3428 to procure the replacement bridge using best value design-build contracting. MnDOT had used this procurement method six times before and plans to

²⁰ See Argument, Parts I.A and B. *infra*.

²¹ See Argument, Part II, *infra*.

use it on more projects in the future.²² MnDOT awarded the contract to Flatiron, the proposer with the highest-priced proposal and the longest construction schedule. MnDOT's internal cost estimate for the design and construction of the Project was \$182,238,000.²³ Two of the four competing teams, C.S. McCrossan and Ames/Lunda, submitted proposals with prices that were below MnDOT's estimate.²⁴ Flatiron's proposal, which MnDOT determined was the best value, had a price of \$233,763,000.²⁵ To understand how MnDOT came to consider the highest priced, longest duration proposal the best value requires a detailed look at the procedures MnDOT used in this procurement.²⁶

MnDOT issued a Request for Qualifications ("RFQ") for the new 35W bridge and pre-qualified the four teams submitting proposals because they possessed the "vast experience" necessary to successfully complete the Project.²⁷

MnDOT's subsequent Request For Proposal ("RFP") and the Instructions to Proposers ("Instructions") were delivered to the proposers on August 23, and contained

²² See Wieland Aff., Ex. 238 (SR-208); Wieland Aff., Ex. 240 (Jon Chiglo depo.) at p. 51, lines 12-23 (SR-214).

²³ See Wieland Aff., Ex. 235 (SR-197).

²⁴ See Wieland Aff., Ex. 227 (SR-193). C.S. McCrossan's proposed price was \$176,938,000 and Ames/Lunda's proposed price was \$178,489,561.

²⁵ See *id.*

²⁶ The legislature defined the best value design-build process MnDOT must use in Minn. Stat. §§ 161.3420 - .3426. See also Dean B. Thomson, et al., *A Critique of Best Value Contracting in Minnesota*, 34 WM. MITCHELL L. REV. 25, 35-39 (2007) (discussing the statutorily defined process).

²⁷ See Wieland Aff., Ex. 245, p. 18, line 7 through p. 20, line 21 (SR-233).

293 pages of requirements.²⁸ MnDOT also wrote the Proposal Evaluation Plan²⁹, which outlined the Technical Review Committee's ("TRC") proposal evaluation process and procedures at that time.

In the Instructions, MnDOT disclosed to the proposers its scoring criteria and the weights assigned to those criteria.³⁰ The Instructions specified the financial, temporal, and geographic bounds on the project. The Instructions expressly prohibited the contractors from proposing work that would be performed beyond the right of way shown on MnDOT's Right of Way Map.³¹ As its name indicates, the Right of Way Map provides the areas in which construction of the new bridge could occur.

Book 2 of the RFP contained the Project's detailed technical requirements.³² In it, MnDOT specified the allowable types of bridges, placing further restrictions on the structural design of the bridge by stating, "If the Contractor chooses a steel box girder design, a minimum of 3 boxes in each direction of traffic is required. A minimum of 3 webs are required for concrete box designs."³³

Design of the 35W roadway profile (*i.e.* its elevation at various points) presented significant challenges to the proposers. Near the north end of the Project, the new 35W roadway had to pass *under* the University Avenue bridge overpass with at least 16', 4" of

²⁸ See Aff. of Aaron Dean in Support of Plaintiffs' Motion for a Temporary Restraining Order ("Dean Aff."), Ex. K.

²⁹ See Wieland Aff., Ex. 31 (SR-55).

³⁰ See Wieland Aff., Ex. 32, at §§ 4.3.3.3 through 4.3.3.6 (SR-117).

³¹ See *id.* at §4.3.3.5.1 (SR-117). The Right of Way Map is attached as Wieland Aff., Ex. 193 (SR-160). See also RFP Clarification #1-3 (SR-162); Supp. Aff. of Richard Fahland at para. 5 (SR-402); Supp. Aff. of Eric Sellman at para. 3 (SR-405).

³² See Dean Aff., Ex. K.

³³ Wieland Aff., Ex. 198 at §13.3.3.1.2 (SR-176).

clearance to allow passage of traffic. Continuing farther south, the new roadway had to pass over 2nd Street with at least 14' of clearance. Connecting those dots seems unimportant until one considers that the slopes of the vertical curves are also constrained by MnDOT's roadway design standards, which specify the maximum change in roadway elevation over a length at a given speed.³⁴

The proposers could not use the original 35W roadway profile because MnDOT directed them to assume that the University Avenue overpass will become three feet deeper, to accommodate a future redesign of that interchange.³⁵ That three feet of additional depth made design of a vertical profile with an acceptable slope difficult, as Figure 1 illustrates.³⁶

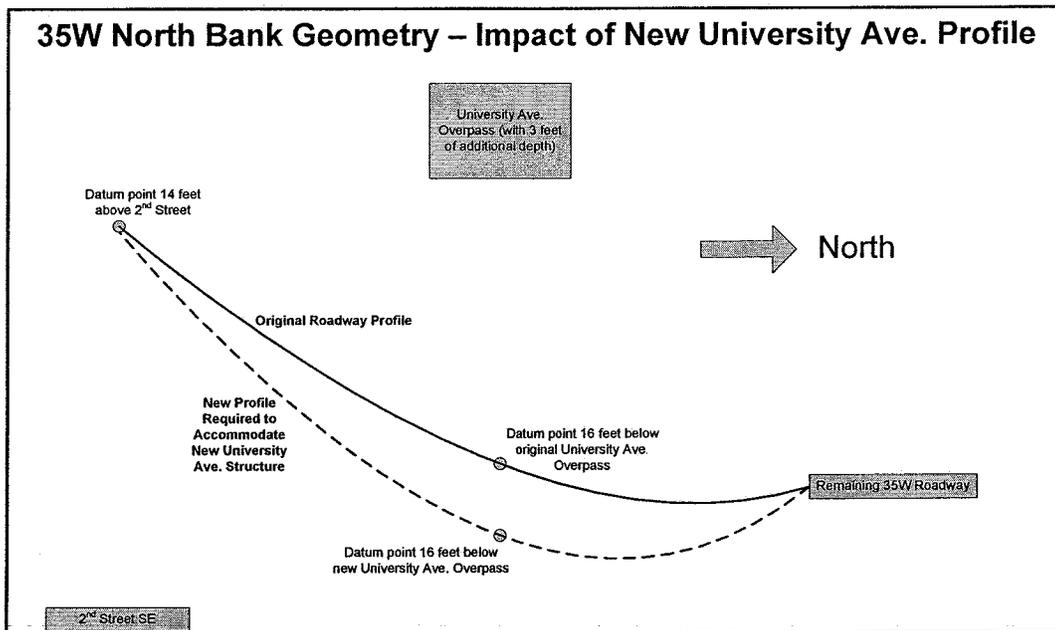


Figure 1

MnDOT held regular meetings with the four competing teams while they were

³⁴ See Wieland Aff., Ex. 240 at p. 54, line 1 through p.61, line 18 (SR-215).

³⁵ See Wieland Aff., Ex. 32 at § 4.3.3.5.1 (SR-117).

³⁶ The sketch in Figure 1 is roughly to scale.

preparing their proposals. During these meetings, both the Ames/Lunda and C.S. McCrossan teams asked if they could lower 2nd Street beyond the confines of the defined 35W right of way defined on the Right of Way Map.³⁷ MnDOT told both teams that they could not work on 2nd Street outside of the right of way. Because MnDOT had indicated that it would not be receptive to a requested change to the RFP and the topic was not one on which an Alternative Technical Concept could be submitted, Ames/Lunda and C.S. McCrossan did not pursue the idea of lowering 2nd Street outside the right of way.³⁸ Ames/Lunda and C.S. McCrossan received lower scores because their designs had higher profiles, driven in part by the required clearance over 2nd Street.³⁹

Despite MnDOT's directions, Flatiron's proposal addressed the profile problem by lowering 2nd Street three feet. That change in elevation under the 35W roadway, however, required that Flatiron rework 2nd Street well outside of the 35W right of way. If Flatiron had not exceeded the right of way, 2nd Street would have dropped too much in elevation in too short a horizontal distance within the right of way, creating a bathtub profile under 35W, in violation of roadway standards.⁴⁰ This is best described in the plan view taken from Flatiron's proposal shown below in Figure 2.⁴¹ The Right of Way Map only showed the right of way extending close to the edge of 35W, the horizontal road in

³⁷ See Supp. Aff. of Richard Fahland at para. 5 (SR-402); Supp. Aff. of Eric Sellman at para. 3 (SR-405).

³⁸ See Complaint paragraphs 31, 33 (A-10 – 11); Supp. Aff. of Richard Fahland at paragraph 5 (SR-402); Supp. Aff. of Eric Sellman at para. 3 (SR-405).

³⁹ See, e.g., Wieland Aff. at Exs. 120 (SR-139) and 127 (SR-145) (Terry Ward's scoresheets for C.S. McCrossan and Ames/Lunda).

⁴⁰ See Supp. Aff. of Eric Sellman at paragraph 3 (SR-405).

⁴¹ Figure 2 is taken from Flatiron's Proposal. See Dean Aff., Ex. L (showing extent of Flatiron's proposed work on 2nd Street outside of the 35W right of way).

Figure 2.

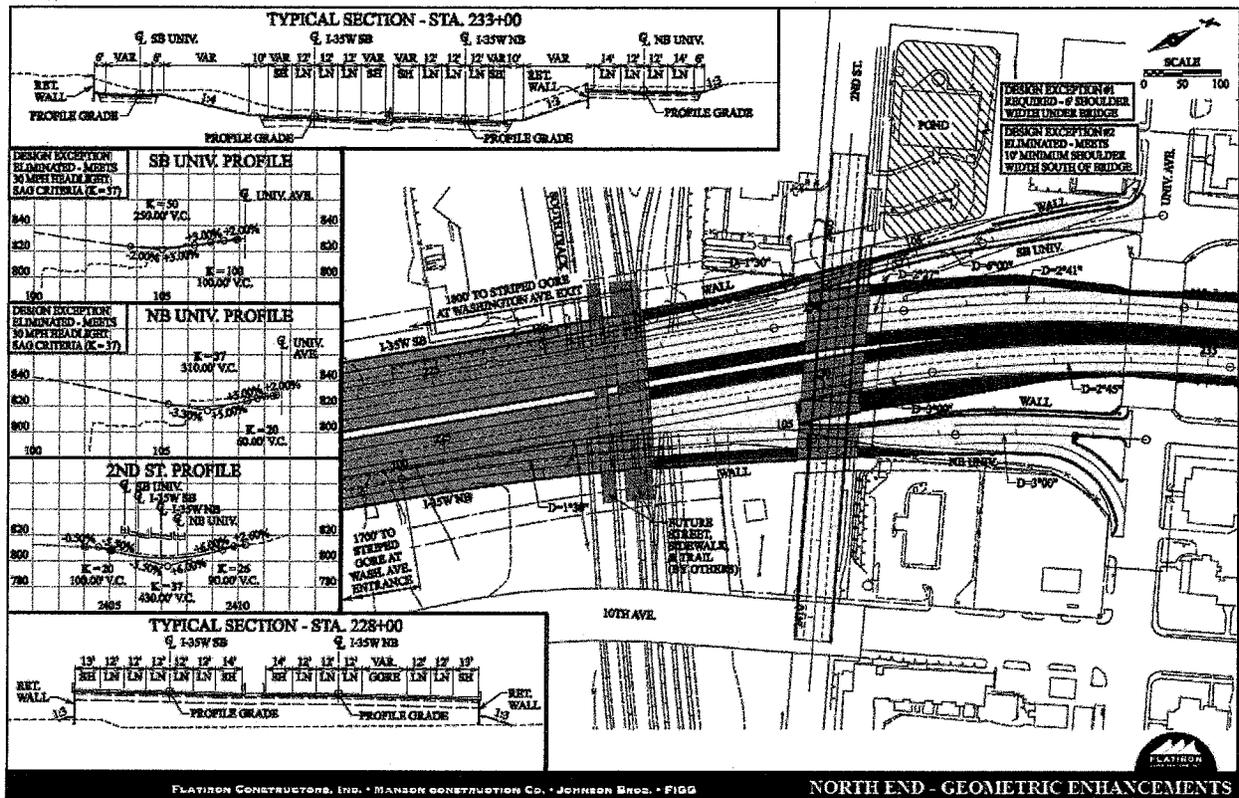


Figure 2

By extending the roadwork on 2nd Street beyond the 35W right of way,⁴² Flatiron was able to smooth the 35W bridge profile while also maintaining a smooth profile on 2nd Street. The competitive advantage that Flatiron gained by this violation of the RFP is the roadway profile, shown in Figure 3, which has a curvature that is very similar to the original 35W roadway and is much less steep than if 2nd Street were not lowered beyond the right of way.⁴³ Flatiron garnered much higher scores because of its proposed bridge profile. Wayne Murphy, one of the TRC members who scored the proposals, testified that Flatiron's profile caused the large disparity in technical scores between Flatiron and

⁴² See Complaint, Ex. B (A-25) and Dean Aff., Ex. L at Appendix A.

⁴³ See Figure 1 *supra*.

the other proposers.⁴⁴

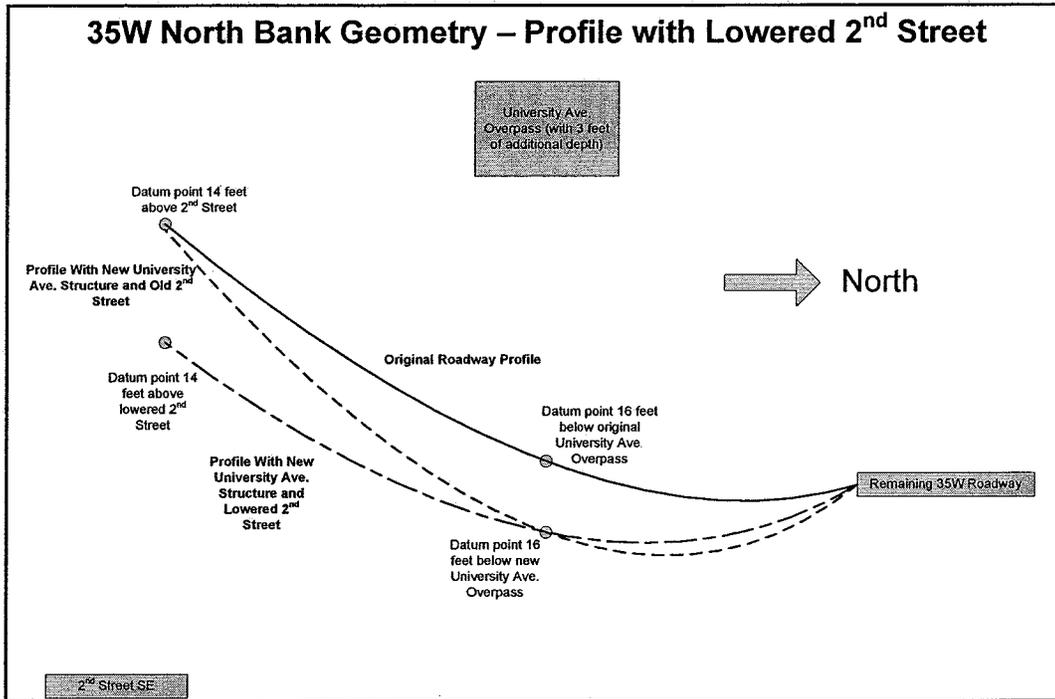


Figure 3

The structures proposed by Flatiron also violated the RFP's requirements because they included several bridge spans using single cell box girders.⁴⁵ Flatiron used two such box girders on each span, but each box girder only has two, not three, webs as required in the RFP. Appellants provided the district court with three affidavits from a registered professional engineer testifying that Flatiron's design violated the RFP's requirements and gave Flatiron a competitive advantage.⁴⁶

MnDOT described its internal process for evaluating the proposals in its Proposal

⁴⁴ See Wieland Aff. at Ex. 245 at p. 158, lines 5-9 (SR-248) (TRC member Wayne Murphy testifying that Flatiron's profile led to the large disparity in technical scores between Flatiron and the other proposers).

⁴⁵ See Complaint, Ex. A (A-24); Dean Aff., Ex. L at Appendix A.

⁴⁶ See Aff. of Randy Reiner, P.E. (SR-410); Supplemental Aff. of Randy Reiner, P.E. (SR-414); Third Aff. of Randy Reiner, P.E. (SR-332).

Evaluation Plan.⁴⁷ Under MnDOT's process, its "Legal Subcommittee" conducted a Pass/Fail review of the strictly administrative requirements of the proposals for matters such as the maximum number of pages and inclusion of the proper forms.⁴⁸ After that, the Technical Review Committee ("TRC") chairman, who is not a scoring member of the TRC, conducted another non-technical administrative check.⁴⁹ Finally, the proposals were given to the scoring members of the TRC.

In their depositions, the TRC members described how each member was given a copy of the Instructions and had access to a copy of the RFP.⁵⁰ But five of the six TRC members testified that they did not read the entire RFP, which described in detail the criteria by which they were to score the proposals.⁵¹

The TRC members scored the proposals according to MnDOT's process described in the Proposal Evaluation Plan.⁵² The TRC members assigned a qualitative rating, ranging from "Excellent" to "Fails," for each criterion to each proposal.⁵³ Appendix H of the Proposal Evaluation Plan contained descriptions of each of the qualitative ratings that the TRC members were to score for each sub-criterion.⁵⁴ Those descriptions, however, are very short and only include an incomplete and abbreviated description of the

⁴⁷ See Wieland Aff., Ex. 31 (SR-55).

⁴⁸ *Id.* at § 4.2 (SR-62) and Appendix A (SR-67).

⁴⁹ *Id.* at § 4.3 (SR-63) and Appendix B (SR-71).

⁵⁰ See, e.g., Wieland Aff., Ex. 245 at p. 29, line 8 through p. 60, line 20 (SR-235).

⁵¹ See Wieland Aff., Ex. 242 at p. 43, line 21 through p. 44, line 18 (SR-225); Wieland Aff., Ex. 245 at p. 32, line 6 through line 24 (SR-236); Wieland Aff., Ex. 246 at p. 29, line 2 through line 20; Wieland Aff., Ex. 247 at p. 28, line 3 through p. 29, line 6 (SR-257); Wieland Aff., Ex. 249 at p. 71, line 8 through p. 73, line 3 (SR-274).

⁵² See Wieland Aff., Ex. 31 at § 4.4 (SR-63).

⁵³ *Id.* at § 5.0 (SR-65).

⁵⁴ *Id.* at Appendix H (SR-92).

requirements in the RFP for the same sub-criterion. For example, a Very Good rating for the Extent of Quality Control/Quality Assurance sub-criterion is described in the Proposal Evaluation Plan as, “Proposer commits to several enhancements to the Design Quality templates that provide significant added value to the Design and Construction interaction on this project.”⁵⁵ That description does not capture the myriad requirements contained in the 19 pages in the RFP devoted to quality control/quality assurance.⁵⁶

After assigning the qualitative ratings, the TRC members assigned a point score within the range defined for that rating to each of the scoring criteria. The “Fails” rating, which had a numeric range of 0 to 49 percent, was defined as, “The Proposal is considered to not meet the RFP requirements or is non-responsive.”⁵⁷ Note that one non-responsive proposal could be given a score of 0, while another non-responsive proposal could be given a score of 49. MnDOT gave the TRC no guidance on how to make those distinctions. Also, a failing score on one criterion did not mean that the proposal’s overall score would be less than 49. Higher scores in the other scoring criteria could effectively offset a Fails rating in one criterion. Each TRC member’s total score for each proposal was calculated by applying the defined weight to the point scores and then adding the weighted scores for each criteria. The scores of the six TRC members were averaged to determine the final technical score for each proposal.⁵⁸

MnDOT’s proposal scoring process in its Proposal Evaluation Plan did not include

⁵⁵ *Id.*

⁵⁶ *See* Dean Aff., Ex. K.

⁵⁷ *Wieland* Aff., Ex. 31 (SR-66).

⁵⁸ *See* *Wieland* Aff., Ex. 226 (SR-188).

a verification that the proposals complied with all the technical requirements in Book 2 of the RFP.⁵⁹ No one, including the scoring members of the TRC, made a determination of the responsiveness of the proposal, other than the limited administrative checks noted above, before the proposals were scored by the TRC.⁶⁰ Instead, according to MnDOT, responsiveness was solely determined based on the TRC's scoring: a proposal that garnered an overall average score of 50 or above was considered responsive; proposals with scores of 49 or lower were not responsive.⁶¹ Thus, a failing score for one criteria or component of a proposal did not render that proposal non-responsive according to MnDOT; only an averaged failing score for all criteria or components of a proposal could render that proposal non-responsive. Put another way, a proposal could be completely non-responsive to an entire category of requirements, such as quality control, and still be judged responsive under MnDOT's definition.

The TRC scored the technical proposals and awarded Flatiron an average score of 91.47.⁶² Flatiron's bid price was \$233,763,000, which was \$56,825,000 higher than the lowest priced proposal.⁶³ MnDOT applied the statutory formula, which adds \$200,000 for each day of work proposed by the contractor to the price and divides the resulting adjusted price by the proposal's technical score and declared Flatiron the apparent

⁵⁹ See *Wieland Aff.*, Exs. 225 and 247 at p. 48, line 14 through p. 49, line 12 (SR-259).

⁶⁰ See *Wieland Aff.*, Ex. 31 at § 4.1 (SR-62).

⁶¹ See *Wieland Aff.*, Ex. 31 at § 5.0 (SR-65) and Ex. 236 at p. 2 (SR-205); *see also* *Wieland Aff.*, Ex. 240 at p. 40, line 7 through p. 43, line 1 (SR-211).

⁶² See *Wieland Aff.*, Ex. 226 (SR-188).

⁶³ See *Wieland Aff.*, Ex. 227 (SR-193).

winner.⁶⁴

Critical to Flatiron's high score was Flatiron's proposal to lower 2nd Street three feet, even though the work would extend beyond the permitted right of way.⁶⁵ Flatiron's proposal was highly scored because Flatiron violated the requirements of the RFP and the TRC found Flatiron's bridge profile to be superior to the proposers who did not violate the project bounds.⁶⁶

Minn. Stat. §161.3426 requires that MnDOT best value contracts only be let to responsive proposers. In fact Minn. Stat. §161.3426 subd. 1(d) expressly states, "[T]he commissioner shall award the contract to the responsive and responsible design-builder with the lowest adjusted score."⁶⁷ After the TRC completed its scoring of the proposals, no effort was made by the Commissioner of the Department of Transportation, her Deputy, or assistant to determine if the proposals were responsive.⁶⁸ MnDOT awarded and executed the contract to design and build the replacement 35W bridge to Flatiron-Manson on October 8, 2007 based solely on the TRC's recommendations.⁶⁹ MnDOT deemed Flatiron's proposal to be the best value, despite the fact that it was the highest priced and longest duration proposal submitted and it violated the requirements stated in

⁶⁴ *See id.*

⁶⁵ *See* Wieland Aff., Ex. 245, p. 158, lines 5-9 (SR-248).

⁶⁶ *See* Supp. Aff. of Eric Sellman at para. 3.

⁶⁷ Minn. Stat. § 161.3426 subd. 1(d) (emphasis added).

⁶⁸ *See* Wieland Aff., Ex. 243 at p. 62, lines 11 through 13 (SR-229); Wieland Aff, Ex. 241 at p. 116, line 23 through p. 117, line 9 (SR-222); Wieland Aff., Ex. 244 at p. 39, lines 17 through 22 (SR-231).

⁶⁹ *See* Dean Aff., Ex. B.

the RFP and Instructions.⁷⁰

STANDARD OF REVIEW

This Court's standard of review for summary judgment is *de novo*.⁷¹ Appellants also raise questions of law, which this Court also reviews *de novo*, regarding the application of Minnesota statutes and case law to a publicly bid construction project.⁷² This Court owes no deference to the conclusions of the district court or the court of appeals on questions of law.⁷³

MnDOT's interpretation of the statute is subject to *de novo* review.⁷⁴ The central dispute in this lawsuit is over the proper legal interpretation of the term "responsive" as it is used in Minn. Stat. §161.3426 subd. 1 and whether MnDOT and its Technical Review Committee ("TRC") followed the requirements of that statute. When an agency decision is the result of an erroneous legal interpretation, the decision is not accorded any deference and is subject to *de novo* review.⁷⁵ Because MnDOT and the TRC incorrectly interpreted the statutory requirement of responsiveness, an error of law, MnDOT and the TRC are not accorded any deference.

⁷⁰ See *Wieland Aff.*, Ex. 235 (SR-197).

⁷¹ *Sentinel Management Co. v. Aetna Cas. and Sur. Co.*, 615 N.W.2d 819, 827 (Minn. 2000).

⁷² *Doe v. Minnesota State Bd. of Medical Examiners*, 435 N.W.2d 45, 48 (Minn. 1989); *Hibbing Educ. v. P.E.R.B.*, 435 N.W.2d 45, 48 (Minn. 1985).

⁷³ *Modrow v. JP Foodservice, Inc.*, 656 N.W.2d 389, 393 (Minn. 2003).

⁷⁴ *In re Denial of Eller Media Co.'s Applications for Outdoor Adver. Device Permits*, 664 N.W.2d 1, 7 (Minn. 2003) ("We retain the authority to review *de novo* errors of law which arise when an agency decision is based upon the meaning of words in a statute.").

⁷⁵ See *id.*

Likewise, the district court's grant of summary judgment is reviewed *de novo* to determine whether there are any genuine issues of material fact.⁷⁶ On appeal, the court reviewing summary judgment must view the evidence in the light most favorable to the party against whom judgment was granted.⁷⁷ As this Court recently noted, the "substantial evidence" test applied by the lower courts does not apply to summary judgments:

A party need not show substantial evidence to withstand summary judgment.

Instead, summary judgment is inappropriate if the nonmoving party has the burden of proof on an issue and presents sufficient evidence to permit reasonable persons to draw different conclusions.⁷⁸

The lower courts erred when they failed to apply this well-settled standard.

ARGUMENT

The lower courts erred in interpreting Minn. Stat. §§161.3410-.3428, which govern MnDOT's use of best value design-build contracting. Because the understood meaning of the word "responsive" is central to this appeal, Appellants will begin Part I by discussing that term and then explaining why the concept of responsiveness must be applied to design-build procurement. The lower courts' error of law on this critical legal issue will be addressed first, followed by discussions of the lower courts' inappropriate application of the summary judgment standard and the monetary remedies applicable to illegal contracts. In Part II, Appellants will review the lower courts' inappropriate

⁷⁶ *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990).

⁷⁷ *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993) (citation omitted).

⁷⁸ *Schroeder v. St. Louis County*, 708 N.W.2d 497, 507 (Minn. 2006) (citations omitted, emphasis added)

application of the summary judgment standard and in Part III discuss the monetary remedies applicable to illegal contracts.

I. THE LOWER COURTS ERRED IN THEIR STATUTORY CONSTRUCTION BECAUSE THEIR INTERPRETATION OF MINN. STAT. §161.3426 CONTRADICTS ITS PLAIN LANGUAGE, SETTLED LEGAL MEANING, AND STATUTORY SCHEME.

Minnesota Statutes §161.3426 requires MnDOT to state and weight the criteria upon which MnDOT will award a design-build proposal, and allows MnDOT to award design-build work only to proposals that are responsive to the mandatory, stated requirements. The lower courts, however, erroneously interpreted Minn. Stat. §161.3426 to allow MnDOT “discretion” to redefine “responsiveness” thereby rendering irrelevant the legislature’s use of the word and the stated requirements that proposers must satisfy.⁷⁹ The lower courts’ interpretation of the statute allows MnDOT to selectively waive compliance with stated requirements, thus opening the door to fraud, favoritism and extravagance.

A. Minn. Stat. §161.3426 must be viewed in the context of existing procurement law.

1. Responsiveness protects the public from fraud, waste, and extravagance.

The concept of responsiveness has a well-settled legal meaning in the context of public procurement. Public procurement statutes have developed over the years in order to protect the integrity of government contract awards.⁸⁰ Sixty years ago, in *Coller v. City of St. Paul*, this Court stated that “laws requiring competitive bidding . . . ought not

⁷⁹ See Order, dated Aug. 26, 2008 at p. 14 (A-100); Opinion, dated July 28, 2009 at p. 10 (ADD-10).

⁸⁰ 1 BRUNER & O’CONNOR ON CONSTRUCTION LAW § 2:22 at pp. 85-86.

to be frittered away by exceptions,” declaring a rule of “[s]tern insistence upon positive obedience” to procurement statutes.⁸¹

To protect these important policies, Minnesota law has long restricted state agencies to awarding public contracts only to a “responsive” proposer or bidder – in other words, to a contractor whose proposal responds to all *material* terms of a public body’s solicitation.⁸² A term is material if it affects a proposer’s price, time, quality or manner of performance, or if it gives one proposer a competitive advantage over another.⁸³ The requirement of bid responsiveness thus protects the fundamental fairness of the bid process. As one court has explained:

These principles rest upon and effectuate important public policies. Rejection of irresponsible bids is necessary if the purposes of formal advertising are to be attained, that is, to give everyone an equal right to compete for Government business, to secure fair prices, and to prevent fraud. The requirement that a bid be responsive is designed to avoid unfairness to other contractors who submitted a sealed bid on the understanding that they must comply with all of the specifications and conditions in the invitation for bids, and who could have made a better proposal if they imposed conditions upon or variances from the contractual terms the government had specified. The rule also avoids placing the contracting officer in the difficult position of having to balance the more favorable offer of the deviating bidder against the disadvantages to the government from the qualifications and conditions the bidder has added. In short, the requirement of responsiveness is designed to avoid a method of awarding government contracts that would be similar to negotiating

⁸¹ *Coller v. City of St. Paul*, 223 Minn. 376, 385, 26 N.W.2d 835, 841-842 (1947).

⁸² *Foley Bros., Inc. v. Marshall*, 266 Minn. 259, 263, 123 N.W.2d 387, 390 (1963); *Lovering-Johnson, Inc. v. City of Prior Lake*, 558 N.W.2d 499, 502 (Minn. Ct. App. 1997).

⁸³ *Carl Bolander and Sons v. Minneapolis*, 451 N.W.2d 204, 206-07 (Minn. 1990); *see also* 1 BRUNER & O’CONNOR ON CONSTRUCTION LAW §2:74, pp. 181-182 (2002) (stating the same standard).

agreements but which would lack the safeguards present in either that system or in true competitive bidding.⁸⁴

The requirement for responsiveness is a bedrock principle at the foundation of public procurement law. Because responsiveness relates to whether the proposal conformed with the RFP requirements, it must be determined at the time the bid is opened.⁸⁵ Responsiveness, therefore, promotes competition by ensuring a level playing field for all competitors because everyone must conform to the same requirements.⁸⁶ Increased competition tends to decrease prices, which directly benefits the public.⁸⁷

Most importantly, responsiveness prevents fraud, waste, and abuse in public procurement by limiting the discretion of public officials – in this case by requiring MnDOT to apply the enabling statute.⁸⁸ Minnesota law provides that the determination of whether a bid is “responsive” allows for no discretion on the part of the public official.⁸⁹ Because the determination of responsiveness prevents the public official from making such discretionary determinations, responsiveness maintains the integrity of the public procurement system because the issue of responsiveness becomes one of strict

⁸⁴ *Toyo Menka Kaisha, Ltd. v. U. S.*, 597 F.2d 1371, 1377 (Ct.Cl. 1979) (citing R. NASH & J. CIBINIC, FEDERAL PROCUREMENT LAW, 260 (3d Ed. 1977) (other citations and quotations omitted).

⁸⁵ *Carl Bolander & Sons*, 451 N.W.2d at 206; *Lovering-Johnson, Inc. v. City of Prior Lake*, 558 N.W.2d 499, 502 (Minn. Ct. App. 1997).

⁸⁶ *See Toyo Menka Kaisha, Ltd. v. United States*, 597 F.2d 1371, 1377 (Ct. Cl. 1979).

⁸⁷ *See id.* *See also Griswold v. Ramsey County*, 242 Minn. 529, 534-35, 65 N.W.2d 647, 651 (1954).

⁸⁸ *Griswold* at 536, 652.

⁸⁹ *See, e.g., Lovering-Johnson, Inc.*, 558 N.W.2d at 501 (determining that a public official could not be given discretion to determine whether a bidder had intended to include a minus sign rather than a plus sign on a portion of its bid, which change would have made the bid the lowest).

compliance with the RFP's material terms, *i.e.* the government agency's requirements. "[T]he preservation of integrity is the primary objective that the public tender mechanism is meant to achieve, and it clearly outweighs the public tender's two other objectives [equality of opportunity and the attainment of economic efficiency]." ⁹⁰

Minnesota courts have never tolerated erosion of the responsiveness principle. ⁹¹ Public procurements that do not strictly follow these principles undermine the public's faith in the government's integrity and undermines the proposers' confidence that competing for a contract is worth the cost, thereby eroding competition. ⁹² "The requirement that a bid be responsive is designed to avoid unfairness to other contractors who submitted a sealed bid on the understanding that they must comply with all of the specifications and conditions in the invitation for bids, and who could have made a better proposal if they imposed conditions upon or variances from the contractual terms the government had specified." ⁹³

2. Best value and design-build are evolutions, not revolutions in public contracting.

Minnesota Statutes §§161.3410 - .3428 authorize MnDOT to procure projects using the relatively new design-build project delivery method, *and* to select a contractor using a best value rather than the traditional lowest responsible bidder process. These are

⁹⁰ Omer Dekel, *The Legal Theory of Competitive Bidding for Government Contracts*, 37 Pub. Cont. L. Journal 237, 258-259 (Winter No. 2 2008).

⁹¹ *Griswold* at 535-36, 652.

⁹² See *Toyo Menka Kaisha, Ltd.*, 597 F.2d at 1377 ("In short, the requirement of responsiveness is designed to avoid a method of awarding government contracts that would be similar to negotiating agreements but which would lack the safeguards present in either that system or in true competitive bidding").

⁹³ *Id.*

related, but separate, concepts that deserve some explanation.

Traditionally, governmental bodies contract for construction projects using a delivery method called design-bid-build. In the design-bid-build method, the public body contracts with an architect or engineer to design the project and prepare complete construction plans and specifications. The governmental entity then releases those plans and specifications to construction contractors for bidding. Finally, the governmental entity enters into a second contract with the winning bidder for the construction of the project.⁹⁴

Historically, public contracts have been governed by competitive bidding rules that required that the design-bid-build contract be awarded to the lowest responsible bidder.⁹⁵ “Lowest responsible bidder” is a term of art, defined as “[a] bidder who has the lowest price conforming to the contract specifications and who is financially able and competent to complete the work as shown by the bidder’s prior performance.”⁹⁶ Under traditional competitive bidding, price and responsibility are the sole selection criteria for bids that are responsive.

Governmental bodies have recently begun to use a different project delivery method called “design-build.” In a design-build project, instead of entering separate, sequential contracts for design and construction, the governmental body enters into only

⁹⁴ 2 BRUNER & O’CONNOR ON CONSTRUCTION LAW § 6.2 at pp. 502-03.

⁹⁵ See Dean B. Thomson, et al., *A Critique of Best Value Contracting in Minnesota*, 34 WM. MITCHELL L. REV. 25, 27-28 (2007)

⁹⁶ BLACKS’ S LAW DICTIONARY 966 (8th ed. 2004).

one contract that combines design and construction.⁹⁷ Because the value and desirability of competing designs must be evaluated in this type of combined delivery, the award of design-build contracts are often made on a “best value” basis.⁹⁸

On the 35W Project, MnDOT used the relatively new best value selection method to choose its design-builder. Under best value procurement, the governmental body may base its contractor selection on factors other than price, such as quality and technical merit.⁹⁹ While price is a rigidly objective selection criterion, factors such as quality are subjective. Inclusion of subjective selection criteria injects some discretion into the public contracting process.¹⁰⁰ What is key is that, although best value procurement allows some subjectivity in the selection process, it does not, and was not intended to, change the requirement that proposals be responsive to the requirements that MnDOT decides to impose in the solicitation document.

The statute granting MnDOT best value design-build authority does not grant MnDOT unbound discretion. The legislature expressly placed boundaries on MnDOT’s discretion to protect the integrity of the process and the state’s taxpayers from improvidence. For example, the statute requires that MnDOT: (1) state and weight its selection criteria; (2) score the proposals according to those criteria; and (3) award the project according to those weighted scores.¹⁰¹ MnDOT is not given the discretion to

⁹⁷ See *e.g.*, Minn. Stat. §161.3410 subd. 3 (2008).

⁹⁸ 2 BRUNER & O’CONNOR ON CONSTRUCTION LAW § 6.15 at pp. 517-18.

⁹⁹ See, *e.g.*, Minn. Stat. §16C.02 subd. 4a (defining best value procurements for construction projects).

¹⁰⁰ See Thomson, *supra* n. 95, at p. 26.

¹⁰¹ See Minn. Stat. §§161.3422 and .3426.

waive or alter the criteria it established after proposals are received. Simply put, while MnDOT is given discretion initially to determine to choose the criteria it can score and what weights to give them, it is not given the discretion to ignore them when it comes time to score a proposal.¹⁰² Thus, if a proposer ignores a material requirement that comprises one of the criteria – *e.g.* the geographic limits established by MnDOT’s right of way – then MnDOT does not have the discretion to redefine or waive that requirement when it receives the submitted proposal. To do so would give an unfair competitive advantage to the proposer who violated the RFP’s requirement and penalize the proposers who played by the rules.

This is why the principle of responsiveness must be applied to procurements under the design-build statute. The concept is so central that the statute specifically uses the word “responsive” four times.¹⁰³ By insisting that the award only be made to a proposal that is responsive to the requirements stated in the RFP, the legislature ensured the integrity of the process and that it would produce the most competition. Indeed, if MnDOT does not insist on receiving responsive proposals, then proposers will be misled about what requirements are important to MnDOT, competition will become inefficient, and taxpayers will end up paying too much for a project. Regrettably, that is exactly what happened on this Project because MnDOT arrogated discretion which the statute strictly proscribed and awarded a project to a proposal that was not only non-responsive, but was also \$70,000,000 more expensive.

¹⁰² See Minn. Stat. §161.3426.

¹⁰³ See *id.*

The Legislature granted MnDOT the authority to use best value procurement on design-build projects in 2001.¹⁰⁴ MnDOT used that authority six times before the 35W Project. In four of those six previous procurements, the lowest priced proposal also had the highest technical score.¹⁰⁵ Price, not the technical score, was determinative in five of the six previous design-build competitions.¹⁰⁶

There has only been one previous MnDOT design-build project in which the technical score, rather than price, determined the winner.¹⁰⁷ But in that procurement, the technical scores did not overwhelm the consideration of price. The difference in price between the winning proposal and the lowest-priced proposal was less than 1%.

The best value scoring results on the 35W Project significantly departed from historical norms. Flatiron's proposed price was \$56,825,000 or 32% higher than C.S. McCrossan's, the lowest priced, shortest duration proposal.¹⁰⁸ If the cost of time is added, valued at \$200,000 per day, then Flatiron's price was \$70,825,000 higher than C.S. McCrossan's when considering the shorter duration of C.S. McCrossan's proposed

¹⁰⁴ Act of July 1, 2001, ch. 8, art. 3, 2001 Minn. Sess. Law Serv. 2015 (West). *See also* Dean B. Thomson, et al., *A Critique of Best Value Contracting in Minnesota*, 34 WM. MITCHELL L. REV. 25, 35-39 (2007).

¹⁰⁵ *See* Wieland Aff., Ex. 238 (SR-208). On the TH 212, TH 52 (Rochester), TH 52 (Oronoco), and I-494 projects, the lowest priced proposals also had the highest technical score.

¹⁰⁶ In those five procurements, the same result is reached under both the lowest bid and best value selection methods.

¹⁰⁷ *See id.*

¹⁰⁸ *See* Wieland Aff., Ex. 227 (SR-193).

construction schedule.¹⁰⁹ Flatiron won, however, because its proposal was scored an unprecedented 25.56 points higher than C.S. McCrossan's. In the six previous design-build projects, the largest difference in technical scores between the first and second place proposers was only 7.12 points.¹¹⁰

The aberrant and extravagant scoring result on the 35W Project shows why the concept of responsiveness, as it has been understood in Minnesota for more than sixty years, must be applied to all public procurements, including best value design-build projects. Otherwise, scoring will proceed contrary to statute because MnDOT will score responses to its RFP that violate its own stated criteria and requirements. By improperly assuming discretion to ignore the requirement of responsiveness by "deeming" the word to be whatever MnDOT wanted, MnDOT gave an extraordinary competitive advantage to Flatiron that resulted in its high technical score and Minnesota's taxpayers paying \$70,000,000 more for the Project.

B. Minn. Stat. §§161.3410 - .3428 authorize MnDOT to use a new project delivery method and contractor selection mechanism, but the common-law definition and requirement of responsiveness still applies.

The over-arching objective of all judicial interpretation of statutes is to ascertain and effectuate the intent of the legislature.¹¹¹ In this case, we need not speculate about the legislature's intent because the legislature explicitly stated. That the "preservation of

¹⁰⁹ *See id.* If one uses the \$400,000 daily cost to road users cited by Jon Chiglo in his Affidavit, then the Flatiron proposal is \$84,825,000 more expensive than C.S. McCrossan's.

¹¹⁰ *See* Wieland Aff., Ex. 238 (SR-208). The T.H. 212 project held the previous record.

¹¹¹ Minn. Stat. §645.16.

the integrity of the public contracting process of the Department of Transportation is vital.”¹¹²

The legislature’s repeated use of the word responsive in Minn. Stat. §161.3426 is the mechanism the legislature chose to achieve its aspirations.

1. Normal statutory construction demands that the common-law definition of “responsive” apply to Minn. Stat. §161.3426.

The legislature used the word “responsive” no fewer than four times in Minn. Stat. §161.3426, but it did not supply a definition for that term.¹¹³ It did not need to. It is well-settled that the legislature is deemed to use words according to their well-settled meaning, in light of common law decisions on the same subject matter.¹¹⁴ According to Minn. Stat. §645.17:

- (4) when 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.¹¹⁵

In the field of public procurement law, this Court has construed the term “responsive” the same way in scores of cases for well over half a century.¹¹⁶ The legislature is presumed, by statute, to know the interpretation placed on a word by this Court.¹¹⁷ Put another way, if the legislature wanted the term “responsive” to be understood and applied in any way other than it is used in the common-law, it would have supplied an alternative definition

¹¹² *Id.*

¹¹³ See Minn. Stat. §161.3410 (providing definitions for best-value procurement statute).

¹¹⁴ *In re Application of Gau*, 41 N.W.2d 444 at 447 (Minn. 1950).

¹¹⁵ Minn. Stat. §645.17 (4).

¹¹⁶ See, e.g., *Coller, Griswold* and their progeny.

¹¹⁷ See Minn. Stat. §645.17.

of the term in the statute. Because the legislature did not define “responsive” in the statute, the common-law definition controls.

2. Minn. Stat. §161.3412 does not authorize departure from the common-law definition of “responsiveness.”

Flatiron argued below that the legislature excused MnDOT from observing the dictates of this Court, thereby allowing MnDOT to define responsiveness in any way and at any time it chooses in contracts procured through the best value process.¹¹⁸ Flatiron based its argument on Minn. Stat. §161.3412 subd. 1 which states, “Notwithstanding sections 16C.25, 161.32, and 161.321, or any other law to the contrary, the commissioner may solicit and award a design-build contract for a project on the basis of a best value selection process...”¹¹⁹ Flatiron’s theory fails for a number of reasons.

First, as a matter of statutory construction, the phrase “or any other law to the contrary” does not refer to common-law interpretations of public procurement requirements (or responsiveness). Rather, this phrase must be interpreted in the light of the preceding words: “sections 16C.25, 161.32, and 161.321,” which are sections of Minnesota statutes. According to the canons of statutory construction, the general phrase “or any other law to the contrary” must be restricted by the preceding and more specific terms, *i.e.*, “sections 16C.25, 161.32, and 161.321.”¹²⁰ The phrase “or any other law to

¹¹⁸ See, e.g., Flatiron’s Memo. Opposing Plaintiff’s Motion for a Temp. Injunction at p. 11 (SR-289).

¹¹⁹ See Minn. Stat. §161.3412 subd. 1 (emphasis added).

¹²⁰ Minn. Stat. § 645.08 (3) (codifying the concept of *ejusdem generis*, “general words are construed to be restricted in their meaning by preceding particular words”).

the contrary” therefore only refers to any other *statutes* because the preceding list of items consists solely of statutes affecting public procurements.

Second, the language in Minn. Stat. §161.3412 upon which Flatiron relies does not define responsiveness at all, let alone give it the revised definition that Flatiron and MnDOT assert.¹²¹ The statute does not state that all previous law on the issue of public procurement contracts or responsiveness may be ignored. Rather, what it plainly states is that notwithstanding “any law to the contrary,” design-build contracts may be awarded using the best value selection process.¹²² Section 161.3412 simply gives MnDOT the authority to use best value selection on its design-build projects. It does not authorize MnDOT to invent a new definition of “responsive.”

Third, and most importantly, the common-law definition of “responsiveness” is completely consistent with best value selection on design-build projects. “Best value,” as defined in Minn. Stat. §16C.02, means that MnDOT may use criteria other than price to select a contractor.¹²³ It does not mean that MnDOT may change the criteria after the bids are open thereby leaving the proposers to guess what may or may not be considered responsive. The doctrine of responsiveness merely ensures a level playing field by mandating that once MnDOT has identified the requirements of its scoring criteria then

¹²¹ See Minn. Stat. § 161.3412 subd. 1.

¹²² See *id.*

¹²³ See Minn. Stat. § 16C.02 subd. 4a (defining best value on construction contracts).

proposers may not unfairly gain competitive advantages by circumventing those requirements.¹²⁴

3. The lower courts' construction of Minn. Stat. §161.3426 impermissibly nullifies provisions of the statute, frustrating the legislature's intent.

The lower courts erroneously ignored the settled legal meaning of “responsiveness” in their decisions. Rather than follow the well-settled meaning of responsiveness in Minnesota law, the district court instead determined that responsiveness needs to be “understood in the context of the statutory framework which mandates the procedure for a best-value design-build procurement, rather than in a layman’s or common law understanding of that term” and that it “cannot ignore the plain language of the statute which clearly leaves the determination of the responsiveness of a proposal in the hands of the TRC.” The district court concluded that “[r]esponsiveness then is not determined based on a proposal’s strict conformity with each and every requirement of the RFP.”¹²⁵ In its October 23, 2008 Amended Order, the district court similarly stated that responsiveness “had little application to the concept as used in the design-build/best-value statute, under which the agency is granted a great deal of discretion by the legislature.”¹²⁶

The court of appeals followed the reasoning of the district court and determined that, despite the statute’s explicit use of the word “responsive,” the use of the word “deem” in the statute allowed the TRC to redefine the word “responsive” as it saw fit.¹²⁷

¹²⁴ See *Foley Bros., Inc. v. Marshall*, 266 Minn. 259, 263, 123 N.W.2d 387, 390 (1963); *Lovering-Johnson, Inc. v. City of Prior Lake*, 558 N.W.2d 499, 502 (Minn. Ct. App. 1997).

¹²⁵ Order, dated August 26, 2008 at p. 14 (A-100).

¹²⁶ Amended Order, dated October 23, 2008 at p. 7 (A-116).

¹²⁷ See Opinion at p. 10 (A-10) (ADD-10).

The lower courts' interpretation of responsiveness effectively renders irrelevant the statutory requirement that MnDOT state and weight the scoring criteria in its RFP.¹²⁸ In short, the statute requires the agency to inform the bidders expressly what is required to render the bid responsive and then requires that the scoring be consistent with the requirements set forth.¹²⁹ If MnDOT has "discretion" to determine responsiveness as a function of scoring after-the-fact, then the stated and weighted criteria can be completely circumvented by MnDOT's TRC. Instead of *rejecting* a proposal that materially deviates from a stated requirement (which is what the statute requires happen to a non-responsive proposal), under MnDOT's interpretation of the statute, the TRC can arbitrarily ignore that deviation, score the deviation (and in this case, score it quite highly), and thereby "deem" the proposal responsive. That discretion renders the stated and weighted scoring criteria meaningless, because the TRC can accept any proposal it wants, effectively allowing MnDOT to re-state the requirements of its award criteria after it has seen the competing proposals. In other words, if violation of a weighted and stated RFP requirement would result in a rejected proposal, MnDOT can, according to the district court, simply "deem" the proposal as "responsive" and give the proposal a very high score! The district court's interpretation thus opens the door to fraud, favoritism, or undue influence by allowing MnDOT to score a non-responsive, but favored, proposal more highly and ignore violations of the RFP, giving its favored proposer an unfair competitive advantage.

¹²⁸ See Minn. Stat. §161.3422(2).

¹²⁹ See Minn. Stat. §161.3426 subd. 1.

This Court should not read the term “responsive” out of the statute because “every law shall be construed, if possible, to give effect to all its provisions.”¹³⁰ If the TRC has discretion to ignore responsiveness, or define the term however it wants, then there is no reason for the statute to have used the understood term. Yet, as noted above, the statute uses the term ‘responsive’ repeatedly, applying it to the TRC’s scoring as well as to the MnDOT Commissioner’s ultimate award of a proposal based on the results of the scoring.

The lower courts determined that MnDOT had “discretion” in this context based on statutory language that requires the TRC to “reject any proposal it *deems* non-responsive.”¹³¹ The lower courts’ reading of the statute ignores the remainder of §161.3426, subd. 1, which requires responsiveness at each stage of the scoring and award process. The language the lower courts cited is from subdivision 1(a), which *only* concerns *the TRC’s* scoring of the proposals: the TRC must reject non-responsive proposals as part of its duties. The TRC is not infallible, however, and it is possible that there will be items of non-responsiveness that the TRC fails to recognize or mistakenly decides to allow.

The remainder of subd. 1, therefore, serves as a check against mistakes in evaluating responsiveness by the TRC, by continuing to require MnDOT, not just the TRC, to ensure responsiveness throughout the process. Under subd. 1 (b), when the scores of competing proposers are announced, the lowest-scoring “responsible and

¹³⁰ See Minn. Stat. §645.16 .

¹³¹ See Opinion at p. 9 (ADD-9) and Order, dated August 26, 2008 at p. 14 (A-100) (analyzing Minn. Stat. §161.3426, subd.1 (a))

responsive” bidder “must be” selected to perform the project. The TRC does not make that selection, MnDOT does. But if responsiveness were only a result of TRC scoring, there would be no need for this additional requirement, because non-responsive proposals already would have been rejected by the TRC. The lower courts’ placement of the determination of responsiveness solely with the TRC renders the legislature’s use of the term in subd. 1(b) meaningless, in clear violation of the canons of statutory construction.¹³²

Subdivision 1(d) subsequently provides that, independently of how the proposals are scored by the TRC pursuant to 1(a), and which is selected pursuant to 1(b) or 1(c), MnDOT’s commissioner “*shall* award the contract to the *responsive* and responsible design-builder with the lowest adjusted score.”¹³³ This final protection further ensures that, regardless of the scoring method, MnDOT’s commissioner has an independent obligation to award the contract only to a responsive proposer. Because they ignored these statutory commands, the lower courts’ decisions should be overturned.

¹³² See Minn. Stat. §645.16.

¹³³ See Minn. Stat. §161.3426 subd 1(d) (emphasis added).

C. **The common-law definition of responsiveness is completely compatible with the inherently greater discretion of contracting officials in best value design-build contracting.**

This Court has long recognized that the discretion of public officials in awarding contracts is often the root of fraud, abuse, waste, and extravagance at the public's expense.¹³⁴ The traditional low bid award system solved that problem by making price, which is objectively determinable, the main award criterion.¹³⁵

Because plans and specifications are not completely developed at the time of award in a design-build procurement, price alone cannot serve as the sole selection criterion. The acceptability of the design must be evaluated, and that requires the use of some discretion. The court of appeals used the fact that the plans are incomplete in a design-build procurement to conclude that MnDOT should be able to use its discretion to define responsiveness.¹³⁶ The error in the appellate court's decision is that it equates the need for *some* discretion with a grant of *total* discretion in all areas, bounded only by the lax standard that the discretion not be arbitrarily or capriciously applied. The statute simply does not grant complete discretion to MnDOT to do whatever it wants as long it is not arbitrary or capricious. The statute limits MnDOT's discretion by requiring it to

¹³⁴ See, e.g., *Griswold v. Ramsey County*, 242 Minn. 529, 536, 65 N.W.2d 647, 652 (1954).

¹³⁵ See *Elliot v. City of Minneapolis*, 59 Minn. 111, 114, 60 N.W. 1081, 1083 (1894) (advocating the lowest responsible bidder method of contractor selection). Some discretion still remains in the lowest responsible bidder method. The contracting body can eliminate a bid if it finds that the bidder is not responsible, that is, not capable of performing the contract.

¹³⁶ See Opinion at p. 10 (ADD-10).

apply the principle of responsiveness. While the statute does allow MnDOT discretion to *evaluate* and score relative merits of competing responsive proposal, the statute first limits that discretion by requiring that MnDOT evaluate only responsive proposals.

The court of appeals ultimate holding that MnDOT has discretion to evaluate proposal where no finished design requirements or criteria exist simply misses the point of this appeal.¹³⁷ If there are no design requirements or criteria in the RFP that proposers must satisfy, then indeed MnDOT does have the discretion to evaluate the merits of the design. In this case, however, MnDOT specified two design requirements that proposers were required to satisfy and that Flatiron did not. Once MnDOT chooses to state a requirement, the MnDOT must obey its statutory charge to award only to responsive proposals.

Not only does this statute require MnDOT to respect the principle of responsiveness, but there are also strong policy reasons supporting the legislature's insistence on the concept. The statute properly gives MnDOT discretion in appropriate areas. MnDOT gets to decide what selection criteria it wants to use and how those criteria should be weighted. MnDOT also gets to decide what specific requirements comprise its RFP. If a proposal meets the requirements that MnDOT has chosen to specify (*i.e.* is responsive), then MnDOT is given the discretion to score how well that proposal has met the criteria.

Indeed MnDOT can expand its discretion by simply reducing the number of requirements in its RFP. If MnDOT truly wanted open-ended proposals with no

¹³⁷ See Opinion at p. 9-10 (ADD-9-10).

constraints, it could have issued a five page RFP stating that MnDOT will consider all bridge proposals and there are few constraints on what will be accepted. MnDOT could have made this protest unnecessary had it said we *desire* that a proposal remain in the right of way, but we will not require it, and we will score proposals outside the right of way to the extent we think it provides value. Likewise, MnDOT could have said we would *prefer* three web concrete girder designs, but we won't require them and girder designs will be scored to the extent MnDOT believes they add value to the Project. The point is, MnDOT used its discretion and expressly chose not to do this. Instead, MnDOT issued and imposed 293 pages of requirements in its RFP that it required the proposers to satisfy. All Appellants contend is that once MnDOT specifies a material requirement, MnDOT is required to enforce that requirement according to the principle of responsiveness.

MnDOT cannot be allowed to change, overlook, or highly score a material requirement that a proposal failed to satisfy. Here Appellants have offered evidence that two proposers were expressly told that they could not go outside the Project's defined right of way.¹³⁸ Those proposers, therefore, thought they could not lower 2nd Street by very much. As a result, their bridge profiles were more varied and their proposals received lower scores. Flatiron, on the other hand, apparently decided that it's easier to seek forgiveness than ask for permission. Flatiron went outside the right of way, was

¹³⁸ See Supp. Aff. of Eric Sellman at para. 3 (SR-405); Supp. Aff. of Richard Fahland at para. 5 (SR-402).

able to flatten its bridge profile by lowering 2nd Street a great deal, and received a high score.

Not only must non-responsive proposals be rejected by the statute, it is also good policy. Every stakeholder in the process loses if non-responsive proposals are not rejected. The public loses because there is effectively less competition over material features and requirements. Because Flatiron was the only proposer given the competitive advantage of extending the right of way, it received a high score and the taxpayers spent \$70,000,000 more than they had to. Had the other proposers been allowed to work outside of the defined right of way, they would have submitted more competitive proposals and the savings to the public would have been enormous. The contractors lose when responsiveness is not enforced because they don't know what requirements are mandatory. As a result, they will start gaming their proposals with non-responsive changes in hopes of getting the reward that MnDOT gave Flatiron in this case. MnDOT is damaged as well because it will lose the confidence of the public and the contracting community that its design-build procurement system is being run according to law.¹³⁹

Had the legislature intended to grant complete discretion to MnDOT, even over responsiveness, it could have done so. This option was clearly laid out by the court of appeals decision in *Siemens Transp. Systems, Inc. v. Metropolitan Council*.¹⁴⁰ In that case, the Metropolitan Council conducted a best value procurement, awarding a contract

¹³⁹ The concern of the contracting community is shown through the participation of the Minnesota Associated General Contractors in this appeal.

¹⁴⁰ Court of Appeals file no. C8-00-2213, 2001 WL 682892, (unpublished) (Minn. Ct. App. June 19, 2001). In accordance with Minn. Stat. §480A.08 subd. 3, a copy of this opinion is included in the Appendix. (A-184).

for Light Rail Vehicles to the contractor with the second best technical score. In that case, mandatory language requiring award to the highest scoring proposal was qualified by a caveat, as follows:

The Council will award a contract to the Bidder whose Best and Final Offer yields the highest combined score in accordance with the evaluation criteria in Section 1.12 and, when considered in its entirety, best conforms to the overall long term interests of the Council.

Siemens argued the proposal language required the Council to award only to the proposer with the highest score. The court disagreed, concluding that Siemens' position would read the qualifying language out of the contract.:

The council argues that the express language of the request gives the council discretion to consider the scores in relation to its overall long-term interests before making an award. We agree. The district court correctly noted that nothing in the request required the council to award the contract to the bidder with the highest score and that the contract language and evaluation panel would be superfluous under Siemens's reading of the request.

In this case, §161.3426 governs the contract award, and that provision does not contain any qualifying language as found in the *Siemens* procurement. If the legislature wanted to grant discretion to MnDOT to re-define responsiveness, it could have easily appended similar language onto subdivision 1(b), (c), or 1(d) and expressly stated MnDOT could reject proposals that were “inappropriate” or that “did not conform to the overall interests of MnDOT.” In short, the legislature would not have chosen to use the well understood word “responsive.”

But §161.3426 contains no such caveats admitting to any discretionary interpretation of responsiveness. The statute instead provides simply and plainly that the

commissioner “shall award the contract to the responsive and responsible design-builder with the lowest score.” The district court believed that “discretion is inherent in the statutory [design-build] scheme.”¹⁴¹ This is true in the respects already discussed, but not in the specific way stated by the lower courts. MnDOT’s discretion lies in its ability to select, state, and weight the criteria it decides to include in the RFP. This is significant discretion. Once the criteria are stated and weighted, however, MnDOT must reject proposals that are non-responsive to those required criteria and score only responsive proposals. MnDOT even retains discretion to timely amend its criteria before proposals are received or reject all proposals and re-solicit the project. But MnDOT does not have the discretion to redefine the term ‘responsive’ after-the-fact so it can select whatever proposal it wants irrespective of whether it conforms to the stated criteria in the RFP. Both lower courts erred when they found otherwise and disregarded the settled meaning of this phrase.

Finally, it is worth noting that MnDOT is not the only Minnesota agency that has best value authority. The Minnesota Department of Administration (“MnDOA”) also has the authority to use that selection method on its building and construction contracts.¹⁴² MnDOA mandated that the common-law definition of responsiveness applies to its best value contracts.¹⁴³ That shows that the common-law definition of responsiveness is

¹⁴¹ Amended Order dated October 23, 2008 p. 7 (A-116).

¹⁴² See Minn. Stat. §§16C.25 and .28 subd. 1(2) (applicable to MnDOA contracts) and subd. 1a (applicable to state agencies, counties, cities, and school districts).

¹⁴³ See Minn. Rules §1230.0800 (“Award of contracts must be made in conformity with Minnesota Statutes and *with no material variance from the terms and conditions of the*

desirable in best value contracts and that MnDOT's interpretation of the term is at odds with the rest of the administrative branch.

II. THE DISTRICT COURT INCORRECTLY GRANTED SUMMARY JUDGMENT DESPITE THE PRESENCE OF GENUINE ISSUES OF MATERIAL FACT AS TO RESPONSIVENESS AND FLATIRON'S DEFENSES.

The district court erred when it failed to apply the correct standard of review on a motion for summary judgment and the court of appeals erred in affirming the district court on this issue. The district court granted summary judgment in two phases. In its August 2008 Order, the district court granted summary judgment against Appellants as to Count I of Appellants' Complaint, which sought injunctive relief.¹⁴⁴ In its October 2008 Order, the district court granted summary judgment against Appellants as to Count II, the sole remaining count, which sought declaratory judgment.¹⁴⁵ The court of appeals affirmed the district court's grant of summary judgment.¹⁴⁶ In each instance, the lower courts weighed the evidence in the record against a substantial evidence standard instead of deciding if Appellants had presented genuine issues of fact for trial.¹⁴⁷ The question posed by Flatiron's summary judgment motion was not whether the TRC made the correct scoring decision, but whether Appellants had presented sufficient contested facts so that they could proceed to develop a full trial record because material facts were

solicitation document.) (emphasis added). This is the essential definition of responsiveness.

¹⁴⁴ See Order, dated August 26, 2008 at p. 2 (A-88).

¹⁴⁵ See Amended Order, dated October 23, 2008 at p. 2 (A-111).

¹⁴⁶ See Opinion at p. 13 (ADD-13).

¹⁴⁷ See, e.g., *id.* at pp. 11-13 (ADD-11 – 13) (applying a substantial evidence test to the evidence in the record).

disputed.¹⁴⁸ A proper analysis of the record demonstrates that summary judgment should have been denied, and reversal is appropriate.

A. The lower courts improperly deferred to MnDOT.

The district court adopted and followed the incorrect standard of review with regard to each of its summary judgment determinations. The district court applied a substantial evidence standard to MnDOT's decision to award the contract to Flatiron because it mistakenly believed MnDOT was entitled to administrative deference.¹⁴⁹ And the court of appeals did not correct that error.¹⁵⁰ As this Court recently explained, "*A party need not show substantial evidence to withstand summary judgment.*" In *Schroeder v. St. Louis County*,¹⁵¹ this Court specifically held that the district court erred when it refused to consider disputed evidentiary testimony because the plaintiff had not presented "substantial evidence" in support of its claims. This Court determined that substantial evidence was the wrong standard for a summary judgment motion, noting that summary judgment is inappropriate if the nonmoving party presents sufficient evidence to permit reasonable persons to draw different conclusions.¹⁵²

In this case, however, the district court and the court of appeals did exactly the opposite, determining that MnDOT was entitled to deference for its administrative

¹⁴⁸ See Minn. R. Civ. P. 56.03.

¹⁴⁹ See Amended Order dated October 23, 2008 at p. 10 (A-119).

¹⁵⁰ See Opinion at p. 10 (ADD-10).

¹⁵¹ 708 N.W.2d 497, 507 (Minn. 2006).

¹⁵² *Schroeder v. St. Louis County*, 708 N.W.2d 497, 507 (Minn. 2006)

decisions and that the “substantial evidence” test should apply.¹⁵³ This error turns the standard of review for summary judgment on its head. The district court assumed that judicial deference to administrative decisions empowered it to ignore the summary judgment standard and consider the disputed evidence proffered by Flatiron – the moving party – in the most favorable light. This error lies at the heart of the court’s decisions on summary judgment, which should be reversed on this basis alone.

The district court may have been aware that its use of the substantial evidence test was questionable, as it devoted several pages of the October 2008 Order to a discussion of judicial deference in the context of summary judgment.¹⁵⁴ While the district court noted that Appellants “correctly state the standard for summary judgment is to view the evidence in the light most favorable to the nonmoving party,” the district court asserts that “this review is nevertheless conducted within the context of the required judicial deference to agency expertise.”¹⁵⁵ In a word, no.

The district court offered no pertinent case law to support this legal authority, however, as none of the district court’s citations on this point concern cases that referenced summary judgment motions, much less the interplay between agency deference and the summary judgment standard.¹⁵⁶ All the cases relied upon by the

¹⁵³ See Order, dated August 26, 2008 at p. 14 (A-100); Amended Order, dated October 23, 2008 at p. 10 (A-119); Opinion at p. 10 (ADD-10).

¹⁵⁴ See Amended Order, dated October 23, 2008 at pp. 5-7 (A-114 – 116).

¹⁵⁵ See *id.* at p. 6 (A-115).

¹⁵⁶ *Fine v. Bernstein*, 726 N.W.2d 137, 142 (Minn. Ct. App. 2007) (certiorari review of administrative law judge’s determination, after evidentiary hearing, that Bernstein violated the Fair Campaign Practices Act, Minn. Stat. § 211B.06); *Minn. Ctr. For Env’tl. Advocacy v. Comm’r of Minn. Pollution Control Agency* 696 N.W.2d 95, 100 (Minn. Ct.

district court discussed deference to administrative findings after a contested evidentiary hearing where all the facts were able to be presented, which is a completely different procedural posture than the instant case. None of the cases cited by the district court supports overturning Minnesota's standard of review for summary judgments in district courts. The court of appeals' analysis barely even acknowledged that this case came to it from an appeal of a grant of summary judgment, and it also did not apply the correct summary judgment standard.¹⁵⁷ This Court should reverse accordingly.

Indeed, the cases cited by the district court are examples of judicial review of determinations that had been made by the agency after an adversarial hearing process.¹⁵⁸ In this case, both Commissioner Molnau and her Deputy, Lisa Freese, admitted that no such process occurred.¹⁵⁹ Administrative deference is inappropriate as a result.

The lower courts erred by according MnDOT deference at the summary judgment stage of the litigation. The lower courts should have applied the normal Rule 56 summary judgment standard without deference to MnDOT.

App. 2005) (certiorari review under the APA of MPCA decision to grant a permit, after contested hearing before the MPCA Board); *Krumm v. R. A. Nadeau Co.* 276 N.W.2d 641, 642 (Minn., 1979) (certiorari review of decision of Workers Compensation Court of Appeals on stipulated facts, following determination by compensation judge of Department of Labor and Industry).

¹⁵⁷ See Opinion at pp. 10-13 (ADD-10 - 13)

¹⁵⁸ See n. 156 *supra*.

¹⁵⁹ See *Wieland Aff.*, Ex. 241 at p. 116, line 23 through p. 117, line 9 (SR-222); Ex. 244 at p. 38, line 15 through p. 40, line 9 (SR-231).

B. Regardless of the posture of this case, MnDOT is not entitled to deference because it acted contrary to statute.

The crucial, indeed dispositive, issue in this lawsuit is whether MnDOT's interpretation of the responsiveness provisions in Minn. Stat. §161.3426 is legally correct. That is a question of law. And it is a fundamental tenet of administrative law that courts do not defer to agencies on questions of law.¹⁶⁰ An agency's interpretation of a statute is reviewed *de novo*.¹⁶¹ Thus, the excuse of administrative deference that the lower courts used to grant summary judgment on disputed issues of law was clear error.

That lack of judicial deference to agencies on questions of law arises from the separation of powers. Agencies may only act in the manner prescribed by their legislative authorization.¹⁶² But that authorization is only a meaningful restriction on an agency's power if someone other than the agency itself determines the legislature's intent when it granted the agency authority to act.¹⁶³ The United States Court of Appeals for the D.C. Circuit addressed this issue in a case arising from a responsiveness dispute in a Federal Aviation Administration procurement by stating:

¹⁶⁰ See *State v. Sports and Health Club, Inc.*, 370 N.W.2d 844, 854 (Minn. 1985) (“In reviewing issues of law, the reviewing court is not bound by the decision of the agency and need not defer to the agency’s expertise.”)

¹⁶¹ See *In re Denial of Eller Media Co.’s Applications for Outdoor Adver. Device Permits*, 664 N.W.2d 1, 7 (Minn. 2003) (“We retain the authority to review *de novo* errors of law which arise when an agency decision is based upon the meaning of words in a statute.”).

¹⁶² *Waller v. Powers Department Store*, 343 N.W.2d 655, 657 (Minn. 1984).

¹⁶³ See *id.* (“Neither agencies nor courts may under the guise of statutory interpretation enlarge the agency’s powers beyond that which was contemplated by the legislative body.”)

[I]t is incontestable that many areas of government contracting are properly left to administrative discretion; the courts will not invade the domain of this discretion, but neither can the agency or official be allowed to exceed the legal perimeters thereof. Contracting officials can exercise discretion upon a broad range of issues confronting them; they may not, however, opt to act illegally. When the bounds of discretion give way to the stricter boundaries of law, administrative discretion gives way to judicial review.¹⁶⁴

In this case, MnDOT usurped the authority to award a best value contract by defining the term “responsive” contrary to the legislature’s clear and express intent.¹⁶⁵ MnDOT acted illegally by awarding the 35W Project contract to Flatiron’s proposal, which was non-responsive in at least two major respects. Because MnDOT actions were predicated on its legal interpretation of its enabling statute, this Court does not owe MnDOT any deference.

C. The district court improperly granted summary judgment because the record shows that material issues of fact are in dispute.

The record Appellants presented to the district court in response to Flatiron’s summary judgment motion persuasively demonstrates that MnDOT awarded the contract to a proposal that was materially non-responsive to the RFP in at least two major respects: 1) Flatiron proposed work significantly outside of the Project’s right-of-way;¹⁶⁶ and 2) Flatiron proposed a design that used concrete box girders with only two webs each, contradicting the RFP’s requirement that concrete box designs contain a minimum

¹⁶⁴ *Scanwell Labs. v. Shaffer*, 424 F.2d 859, 874 (D.C. Cir. 1970)

¹⁶⁵ See Part I.B *supra*.

¹⁶⁶ See Memo. of Law Supporting Plaintiffs’ Motion for a Temporary Injunction at p. 20-24 (SR-26).

of three webs.¹⁶⁷ In support of the first point, Appellants presented the relevant requirements from the RFP and Instructions;¹⁶⁸ Flatiron's Proposal;¹⁶⁹ MnDOT's Right of Way Map;¹⁷⁰ MnDOT's Right of Way Manual;¹⁷¹ the TRC's scoresheets for the Flatiron proposal;¹⁷² affidavits from Jon Chiglo,¹⁷³ Richard Fahland,¹⁷⁴ and Eric Sellman,¹⁷⁵ and deposition testimony from Jon Chiglo,¹⁷⁶ Tom O'Keefe,¹⁷⁷ and Wayne Murphy;¹⁷⁸ and a letter from Jon Chiglo to Tom Sorrel.¹⁷⁹ In support of the second point, Appellants presented the structural requirements from the RFP,¹⁸⁰ Flatiron's proposal,¹⁸¹ deposition testimony from Tom Styrbicki,¹⁸² and affidavits from Randy Reiner.¹⁸³ Those exhibits, affidavits, and deposition testimony excerpts show that there are material facts in dispute rendering summary judgment inappropriate.¹⁸⁴ Whether or not Flatiron violated the RFP

¹⁶⁷ Wieland Aff. Ex. 198 at § 13.3.3.1.2 (SR-176); *see also* Memo. of Law Supporting Plaintiffs' Motion for a Temporary Injunction at p. 25-26 (SR-31).

¹⁶⁸ *See* Wieland Aff., Ex. 32 at § 4.3.3.5.1 (SR-117); Ex. 194 at p. 2 (SR-162); Ex. 196 at §§ 7.5.1 and 7.5.4 (SR-166).

¹⁶⁹ *See* Dean Aff., Ex. L.

¹⁷⁰ *See* Wieland Aff., Ex. 193 (SR-160).

¹⁷¹ *See* Wieland Aff., Ex. 237 (SR-207).

¹⁷² *See* Dean Aff., Exs. D, E, F, G, H, and I.

¹⁷³ *See* Supp. Aff. of Jon Chiglo at para. 3 and 4 (SR-420).

¹⁷⁴ *See* Aff. of Richard Fahland at para. 5 (SR-402).

¹⁷⁵ *See* Supp. Aff. of Eric Sellman at para. 3 (SR-405).

¹⁷⁶ *See* Wieland Aff., Ex. 240 at p.54, line 1 through p. 55, line 14 (SR-215), p. 99, line 9 through p. 104, line 10 (SR-218), and p. 149, line 7 through p. 151, line 21 (SR-220).

¹⁷⁷ *See* Wieland Aff., Ex. 246 at p. 99 lines 16-20 (SR-255).

¹⁷⁸ *See* Wieland Aff., Ex. 245 at p. 157, line 21 through p. 158, line 9 (SR-247).

¹⁷⁹ *See* Wieland Aff., Ex. 232 (SR -194).

¹⁸⁰ *See* Wieland Aff., Ex. 198 at § 13.3.3.1.2 (SR-176).

¹⁸¹ *See* Dean Aff., Ex. L.

¹⁸² *See* Wieland Aff., Ex. 247 at p. 191, line 6 through p. 194 , line 14 (SR-262).

¹⁸³ *See* Aff. of Randy Reiner, P.E. (SR-410); Supp. Aff. of Randy Reiner, P.E. (SR-414); and Third Aff. of Randy Reiner, P.E. (SR-332).

¹⁸⁴ *See* Minn. R. Civ. P. 56.03.

was subject to multiple competing affidavits, which should have prevented summary judgment.¹⁸⁵

Further, this evidence demonstrated that Flatiron gained a competitive advantage by violating the right of way requirement in the RFP. The record demonstrates that Flatiron's proposal was highly scored because the TRC found Flatiron's bridge profile to be superior to the proposers who did not violate the project bounds.¹⁸⁶ One TRC member, Wayne Murphy, went so far as to say that the difference in profiles was the key discriminator between the proposals.¹⁸⁷

Flatiron was able to lower its profile because it went outside the right of way.¹⁸⁸ The evidence thus shows a direct correlation between this violation and Flatiron's high score. This is the very definition of a non-responsive bid: something that affects the price, quantity, quality and score of a proposal.¹⁸⁹ Flatiron's solution to the problem presented by the profiles was to violate the RFP and the TRC was, therefore, required to reject Flatiron's proposal.¹⁹⁰

Notably, Appellants cited the Affidavits of Jon Chiglo, MnDOT's project manager, to establish that material facts were in dispute. Mr. Chiglo submitted his affidavits, at least in part, to rebut the allegations from Eric Sellman, of C.S. McCrossan,

¹⁸⁵ *Pl's Mem. Opp. S.J.* at p. 17; *Pl's Mem. Supp. Temp. Inj.* at pp. 20-26 (SR-26 to SR-32).

¹⁸⁶ *Pl's Mem. Supp. Temp. Inj.* at p. 23 (SR-29) (citing and discussing the evidence).

¹⁸⁷ *Id.*

¹⁸⁸ *See, supra*, text accompanying Figures 1-3.

¹⁸⁹ *See* n. 83, *supra*.

¹⁹⁰ *Pl's Mem. Supp. Temp. Inj.* at p. 23-24 (SR-29 - 30).

and Richard Fahland, of Ames/Lunda, that MnDOT directed those two proposers not to work outside of the 35W right of way.¹⁹¹

Mr. Chiglo's affidavits directly conflict with those of Mr. Sellman and Mr. Fahland showing a factual dispute that can only be resolved by weighing trial testimony. Mr. Chiglo's affidavits are also in conflict with themselves. In his October 29, 2007 affidavit, he asserted that the proposers were prohibited from relying on the oral direction they received from MnDOT.¹⁹² But in his August 4, 2008 affidavit, his story changed. There he asserts that MnDOT had no discussions with the proposers about lowering 2nd Street outside of the right of way.¹⁹³ Appellants should have had the opportunity to use that inconsistency to impeach Mr. Chiglo's credibility at trial.

MnDOT's argument that the Instructions prohibited the proposers from relying on anything not in writing from MnDOT is wrong on at least two counts. First, MnDOT's comments to the proposers about the right of way are evidence of how MnDOT interpreted its own RFP. Therefore, its statements are relevant to the disputed contentions involving the right of way. Second, MnDOT is essentially arguing that the Instructions acted as an integration clause commonly found in contracts purporting to prohibit parties from relying on representations not in the contract.¹⁹⁴ But Minnesota case law is clear that a party cannot disclaim responsibility for false statements by hiding

¹⁹¹ See Supp. Aff. of Eric Sellman at para. 3 (SR-405); Supp. Aff. of Richard Fahland at para. 5 (SR-402); Supp. Aff. of Jon Chiglo at para. 2 (SR-419); Third Aff. of Jon Chiglo at para. 3. (SR-423).

¹⁹² See Supp. Aff. of Jon Chiglo at para. 2 (SR-419).

¹⁹³ See Third Aff. of Jon Chiglo at para. 8 (SR-427).

¹⁹⁴ See Supp. Aff. of Jon Chiglo at para. 2 (SR-419) (citing §3.6 of the Instructions).

behind an integration clause.¹⁹⁵ The purpose of strict compliance with competitive bidding laws is to avoid even the *potential* for fraud or favoritism.¹⁹⁶ MnDOT cannot hide behind an integration clause when to do so would create not only the appearance of favoritism, but actually *result* in favoritism.

Similarly, the record shows a factual dispute over whether Flatiron gained a competitive advantage from its violation of the RFP requirements on structures.¹⁹⁷ Appellants presented credible and admissible evidence that Flatiron gained a competitive advantage by using a structural type that was prohibited by the RFP.¹⁹⁸ That evidence shows that there is a genuine issue of material fact in dispute that precludes summary judgment.

In addition to the improper evidentiary standard applied, the district court and the court of appeals did not evaluate all this contested evidence under the proper legal definition of responsiveness. The decisions below are erroneous because they accord unwarranted deference to the non-moving party and are based on an unlawful statutory interpretation. The grant of summary judgment must be reversed accordingly, and the matter sent back to the district court with an order to re-evaluate the facts in light of the proper interpretation of the legislature's use of the word responsive in Minn. Stat. §161.3426.

¹⁹⁵ See, e.g., *Thompson Co. v. Schroeder*, 131 Minn. 125, 127-28, 154 N.W. 792, 793 (1915).

¹⁹⁶ See *Telephone Assocs., Inc. v. St. Louis County Brd.*, 364 N.W.2d 378, 382 (Minn. 1985).

¹⁹⁷ 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); Aff. of Alan Phipps, P.E.

¹⁹⁸ See Third Aff. of Randy Reiner, P.E. (SR-332).

III. BECAUSE MNDOT ILLEGALLY AWARDED THE CONTRACT TO FLATIRON, FURTHER PROCEEDINGS ARE REQUIRED AT THE DISTRICT COURT TO DETERMINE WHAT AMOUNT THAT FLATIRON MAY RETAIN FROM THE PROCEEDS OF THAT ILLEGAL CONTRACT.

In this case, Appellants seek a declaration that MnDOT violated Minn. Stat. §161.3426 by contracting with a party that submitted a non-responsive proposal. If such a declaration were made in this case, it would create collateral legal consequences for the parties by voiding the Flatiron-MnDOT contract as illegal.¹⁹⁹

As Appellants argued to the district court, Minnesota law provides that if the contract is void, the contract price cannot be paid. Instead, the correct payment is either nothing, or the *quantum meruit* value of the work, but not the contract price. In *Coller v. St. Paul*, this Court ruled that a public contract that was illegally awarded was void, and could not support *any* recovery for the contract:

Since they are based upon public economy and are of great importance to the taxpayers, laws requiring competitive bidding as a condition precedent to the letting of public contracts ought not to be frittered away by exceptions, but, on the contrary, should receive a construction always which will fully, fairly, and reasonably effectuate and advance their true intent and purpose, and which will avoid the likelihood of their being circumvented, evaded, or defeated. Stern insistence upon positive obedience to such provisions is necessary to maintain the policy which they uphold. *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.*²⁰⁰

¹⁹⁹ See, e.g., *Scheeler v. Sartell Water Controls, Inc.*, 730 N.W.2d 285, 288-89 (Minn. Ct. App. 2007) (“a ‘contract violating law or public policy is void.’”) (quoting *Barna, Guzy & Steffen, Ltd. v. Beens*, 541 N.W.2d 354, 356 (Minn. Ct. App. 1995)).

²⁰⁰ *Coller v. St. Paul*, 26 N.W.2d 835, 841-42 (Minn. 1947) (emphasis added).

On the other hand, other authorities provide that if a construction contract is held illegal and void, but the contractor had in good faith provided something of value to the public which could not be returned, the contractor may be allowed to recover in quasi-contract the value of what it provided to the public body.²⁰¹ The “reasonable value” of the work issue presents an additional fact question that the trial court should not have resolved. The court held, “there is no evidence that payments made to Flatiron are for anything other than the fair value of Flatiron’s work.”²⁰² To the contrary, the fair value of Flatiron’s work was early put at issue and was contested.²⁰³ If the contract between MnDOT and Flatiron was indeed illegal, the fair market value of the bridge was disputed and must be determined. If the determined *quantum meruit* value is less than the amount already paid to Flatiron, then it necessarily follows that Flatiron must return its unjust enrichment to the state’s taxpayers. If this court finds that the lower courts used the wrong definition of “responsive,” then the Court should clarify the collateral legal consequence that would flow from a declaration of the contract’s illegality.

CONCLUSION

Appellants have brought this appeal because the integrity of public contracting is a vital concern. As this Court has done so many times in the past, it should defend the principle of responsiveness from attack and thereby ensure the integrity of MnDOT’s design-build process.

²⁰¹ E.g., *Kotschevar v. North Fork Twp.*, 229 Minn. 234, 39 N.W.2d 107 (1949); *Village of Pillager v. Hewitt*, 98 Minn. 265, 107 N.W. 815 (1906).

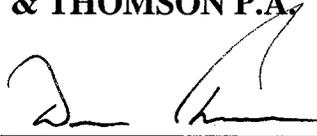
²⁰² Amended Order, dated October 23, 2008 at p. 13 (A-122).

²⁰³ Complaint at paragraph 49 (A-17); and Aff. of Eric Sellman at para. 5 (SR-405).

For the foregoing reasons, Appellants respectfully request this Court to declare that the common-law definition of responsiveness established in this Court's precedents applies to Minn. Stat. §161.3426. Appellants also respectfully request this Court to reverse the court of appeals' findings on the district court's grant of summary judgment and to remand the case to the district court for a full factual hearing based on the definition of "responsive" as determined by this Court.

Dated: November 19, 2009

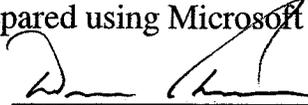
**FABYANSKE, WESTRA, HART
& THOMSON P.A.**

By: 

Dean B. Thomson (#141045)
Jeffrey A. Wieland (#387918)
800 LaSalle Avenue South, Suite 1900
Minneapolis, MN 55402
(612) 359-7600 (P)
(612) 359-7602 (F)
ATTORNEYS FOR APPELLANTS

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 **13,902** words. This brief was prepared using Microsoft Word 2003.


Dean B. Thomson