

Nos. A08-1584 and A08-1994

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State of Minnesota  
**In Supreme Court**

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Scott Sayer and Wendell Anthony Phillippi,  
*Appellants,*

v.

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

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**BRIEF AND ADDENDUM OF RESPONDENT FLATIRON-MANSON**

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

## INTRODUCTION

When the Court reviews the record, the best value statute and long-standing Minnesota law, it will conclude that the district court properly dismissed appellants' injunctive and declaratory relief claims. That review will confirm that the procurement (by MnDOT) and construction (by Flatiron) of the I-35W replacement bridge deserve praise, not the callow criticisms proffered by appellants.

Within two months of the bridge collapse on August 1, 2007, MnDOT initiated, organized, conducted and completed a best value, design/build procurement for a replacement bridge. The procurement process scrupulously followed the requirements of Minn. Stat. §161.3410, *et seq.*, was closely monitored by the Federal Highway Administration and the Minnesota Department of Administration, and withstood independent reviews by those entities and the General Accounting Office.

MnDOT appointed a six-member Technical Review Committee ("TRC") to evaluate and score proposals, including MnAGC and City of Minneapolis members. All were highly qualified and experienced Minnesota professional engineers. None were biased or acted improperly. Each individually concluded that Flatiron's technical proposal was significantly better than any other. The TRC also found that the Ames/Lunda and McCrossan proposals contained significant flaws, had unrealistic schedules and were unacceptable to the City of Minneapolis and Hennepin County. Pursuant to the statutory formula, Flatiron's proposal provided the best value. These facts are undisputed. Flatiron's proposal was priced the highest, but the entire purpose of the best value statute is to allow the selection of higher priced, higher quality proposals.

Flatiron completed construction so efficiently that the new bridge was opened to the public less than fourteen months after the collapse. The record is bare of evidence that Flatiron's compensation exceeded the reasonable value of its remarkable work, and its proposal was fully responsive to the RFP. Flatiron did not rework 2<sup>nd</sup> Street outside of the 35W right of way, and its concrete box bridge has eight webs, four in each direction of traffic, in response to the RFP requirement that: "A minimum of 3 webs are required for concrete box designs." These facts are undisputed.

In sum, the Court's review will confirm that the statutorily-required best value procurement process worked and worked extraordinarily well.

That review will also confirm that appellants' appeal is fueled by material misrepresentations. It is not true that the "change in elevation under the 35W roadway, however, required that Flatiron rework 2<sup>nd</sup> Street well outside of the 35W right of way." Appellants' brief, p. 10. It is not true that McCrossan and Ames/Lunda were precluded from submitting proposals that went outside the right of way; indeed, it was McCrossan's proposal—which appellants champion—that flatly violated a crystal clear prohibition in the RFP that: "[a]ny work that is proposed to be constructed on 1-35W with this project shall not extend beyond the 4<sup>th</sup> Street Bridge to the north ...". These facts are undisputed.

The record of appellants' constantly shifting and fatally inconsistent positions and practices is equally clear and damning. Appellants claim to be taxpayer representatives suffering irreparable harm from every dollar spent on the replacement bridge, yet they personally took some of those dollars for themselves. They also refused to demand recovery of \$1million paid to McCrossan and Ames/Lunda that, under their theory of the

case, was clearly improper and provided zero benefit to the public—in contrast to the substantial benefits the public continues to receive from Flatiron’s work. Not incidentally, McCrossan and Ames/Lunda have offered to finance appellants’ lawsuit and have provided all of their ‘supporting’ affidavits. Appellants also ask this Court to credit alleged oral statements to McCrossan and Ames/Lunda despite the RFP’s express prohibition against reliance on any such statements.

In sum, appellants ask this Court to accept untrue facts and apply non-existent RFP requirements against Flatiron and MnDOT and, at the same time, ignore actual RFP provisions and undisputed facts that disprove their claims.

Finally, appellants’ actions belie their claim of irreparable harm *and* their claim that judicial intervention is required. Appellants waited through almost ten months of around-the-clock construction before moving for a temporary injunction. They waited, in part, because they knew the appropriate venue for their complaints was the Legislature, not the courts.<sup>1</sup> Only after the Legislature rejected their request to ‘fix’ the statute, did they again change direction, return to court, and claim that the ‘problem’ is not the statute, but MnDOT’s utilization of it.

Dismissal of appellants’ claims was proper and should be affirmed.

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<sup>1</sup> See Order dated August 26, 2008 at A-100 (“after the Court’s denial of the request for a temporary restraining order, Plaintiffs and others attempted to see that legislation was enacted to amend the design-build statute in part to ‘constrain the discretion given to Mn/DOT to select the design-build criteria on which construction contracts could be evaluated’ and to make the process ‘more objective,’ but were unsuccessful in doing so [Pln. Mem. Of Law Opp. Flatiron’s Motion for Summary Judgment, p. 13]”).

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## STATEMENT OF THE ISSUES

In conformance with Minn. R. Civ. P. 128.02, subd. 2, respondent Flatiron-Manson, a Joint Venture (“Flatiron”) submits the following reformulation of the issues presented by appellants to provide: “[a] concise statement of the legal issue or issues involved, omitting unnecessary detail.”

1. DID THE COURT OF APPEALS IMPROPERLY AFFIRM DISMISSAL OF APPELLANTS’ INJUNCTIVE AND DECLARATORY RELIEF CLAIMS?

Appellate Court Ruling:

Affirming the district court, the Court of Appeals agreed that appellants presented no genuine issues of material fact that precluded dismissal.

Most Apposite Cases:

*DHL, Inc. v. Russ*, 566 N.W.2d 60 (Minn. 1997); *Brookfield Trade Center, Inc. v. County of Ramsey*, 584 N.W.2d 390 (Minn. 1998)

Most Apposite Statutory Provisions and Rules:

Minn. R. Civ. P. 56.05.

2. DID THE COURT OF APPEALS ALLOW MnDOT DISCRETION TO AWARD TO A NON-RESPONSIVE PROPOSER?

Appellate Court Ruling:

The Court of Appeals held that the plain language of the statute allows some discretion (a point conceded by appellants), held that the discretion is not unbounded, but did not hold that a non-responsive bid could be accepted.

Most Apposite Cases:

*Sayer, et al. v. MnDOT and Flatiron-Manson*, 769 N.W.2d 305 (Minn. Ct. App. 2009)

Most Apposite Statutory Provisions:

Minn. Stat. § 161.3410, *et seq.*

3. ARE ANY GENUINE ISSUES OF MATERIAL FACT REGARDING THE FAIR MARKET VALUE OF FLATIRON'S SERVICES BEFORE THIS COURT?

Appellate Court Ruling:

Appellants admit that this issue was not addressed by the Court of Appeals.

Most Apposite Cases:

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

Most Apposite Statutory Provisions and Rules:

Minn. R. Civ. P. 56.05.

**STATEMENT OF THE CASE**

Pursuant to Minn. R. Civ. App. P. 128.02, subd. 2, Flatiron submits the following clarifications to appellants' Statement of the Case:

Appellants' request for a temporary restraining order was denied on October 31, 2007, yet they failed to schedule and hold a temporary injunction hearing until August 13, 2008. In the interim, appellants sought but failed to obtain legislative changes to the best value statute.<sup>2</sup> The evidence at the August 2008 hearing was little different from that presented ten months earlier, apart from the evidence that "[t]he project which is the

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<sup>2</sup> Order dated August 26, 2008 at A-105.

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subject of this lawsuit and of the instant motion is now nearly complete.”<sup>3</sup>

Flatiron’s earlier-noticed motion for summary judgment was heard at the same time and was supported by a recitation of forty-five material, undisputed facts.<sup>4</sup> See Rule 115.03(d) of the General Rules of Practice for District Courts. Appellants failed to comply with their obligation under that same Rule to provide the district court with a separate recitation of any material fact they claimed to be in dispute. Nor, as is established in the following Statement of the Facts, did appellants otherwise establish any genuinely disputed material facts. The district court therefore entered summary judgment dismissing appellants’ claims, and the Court of Appeals affirmed that dismissal.

#### **STATEMENT OF THE FACTS**

In conformance with Minn. R. Civ. App. P. 128.02, subd. 1 (c), Flatiron submits the following concise and fair statement of facts material to this appeal, grouped in relation to the following issues:

1. MnDOT’s compliance with statutory and RFP procurement requirements;
2. The responsiveness of Flatiron’s proposal;
3. The absence of material disputed facts regarding appellants’ injunctive relief claim;
4. The absence of material disputed facts regarding appellants’ declaratory relief claim; and
5. The absence of facts that would justify this Court substituting

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<sup>3</sup> *Id.* at A-92.

<sup>4</sup> SR-338 to SR-347.

its judgment for MnDOT, the other agencies who have reviewed the procurement or the Legislature which declined appellants' request for statutory changes.

## **I. MnDOT COMPLIANCE WITH STATUTORY AND RFP REQUIREMENTS**

In relevant part, the best value statute, Minn. Stat. § 161.3410, *et seq.*, included the following provisions/requirements:

1. Notwithstanding any law to the contrary, MnDOT could solicit and award a design/build contract on the basis of a best value selection process. *See* Minn. Stat. § 161.3412, subd. 1.
2. MnDOT had to appoint a Technical Review Committee ("TRC") of at least five members, including an individual nominated by the Minnesota chapter of the Associated General Contractors ("MnAGC"). *See* Minn. Stat. § 161.3420, subd. 2.
3. MnDOT had to issue a request for proposals ("RFP") that included a description of the selection criteria, including the weight or relative order of each criterion. *See* Minn. Stat. § 161.3422.
4. Each proposal had to be segmented into two parts: a technical proposal and a price proposal. *Id.*
5. The TRC had to score the technical proposals using the selection criteria in the RFP and had to reject any proposal it deemed nonresponsive. *See* Minn. Stat. § 161.3426, subd. 1.
6. The price proposals could not be opened until after the TRC scored the technical proposals. *Id.*
7. An adjusted score had to be obtained for each proposal by dividing each design-builder's time-adjusted price by the technical score given by the TRC. *Id.*
8. Unless it chose to reject all proposals, MnDOT had to award the contract to the responsive and responsible design-builder with the lowest adjusted score. *Id.*

The record before the district court contained the following undisputed material facts regarding MnDOT's compliance with its statutory obligations:

1. MnDOT chose to solicit and award a design/build contract for reconstruction of the I-35W bridge on the basis of a best value selection process. Appellants have never challenged this fact.
2. MnDOT appointed a six member TRC consisting of four MnDOT representatives, a City of Minneapolis representative and a MnAGC representative, all of whom were highly qualified and experienced licensed professional engineers in the State of Minnesota. *See* Relevant Undisputed Fact No. 18, SR-341 to SR-342.
3. MnDOT issued an RFP that included a description of the selection criteria, including the weight or relative order of each criterion. *See* Instructions to Proposers, SR-117 to SR-118. *See also* appellants' brief, p. 8 ("MnDOT disclosed to the proposers its scoring criteria and the weights assigned to those criteria.").
4. The RFP expressly defined and described how responsiveness would be determined by the TRC. *See* Instructions to Proposers, ¶ 5.3 "Responsiveness and Pass/Fail Review," SR-123.
5. The TRC scored each of the technical proposals using the selection criteria in the RFP and determined that all proposals were responsive using the responsiveness criteria in the RFP. *See* Relevant Undisputed Fact No. 19, SR-342. *See also* appellants' brief, pp. 13 ("The TRC members scored the proposals according to MnDOT's process described in the Proposal Evaluation Plan.") and 14 ("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 (sic).").
6. The TRC's work was overseen by the Federal Highway Administration and the State of Minnesota Department of Administration, and its results withstood independent reviews by both of those agencies and the General Accounting Office. *See* Relevant Undisputed Fact Nos. 21 and 22, SR-343. There was no evidence of bias or improper action by any TRC member in the scoring of the proposals. *See* Relevant Undisputed Fact Nos. 30-32, SR-344.
7. Although the TRC members each scored the proposals privately, all of their individual scores were consistent, and they unanimously agreed that

Flatiron's technical proposal was significantly better than all other technical proposals. *See* Relevant Undisputed Fact Nos. 25, 27 and 34, SR-343 to SR-345.

8. The TRC found substantial evidence that the Ames/Lunda proposal contained a design error that could require MnDOT to rebuild major portions of the new bridge, that the McCrossan proposal would require the removal of other bridges and the permanent closing of City of Minneapolis streets, that the City of Minneapolis and Hennepin County would not have accepted the Ames/Lunda or McCrossan proposals and that the Ames/Lunda and McCrossan schedules were not realistic. *See* Relevant Undisputed Fact Nos. 37 and 38, SR-345 to SR-346.
9. MnDOT accurately inputted the TRC's technical scores and the bidders' price and time proposals into the statutory best value formula and, pursuant to that formula, Flatiron's proposal provided the best value. *See* Relevant Undisputed Fact Nos. 40 and 41, SR-346 to SR-347. *See also* appellants' brief, pp. 15-16 ("MnDOT applied the statutory formula . . . and declared Flatiron the apparent winner.").
10. If the scores of the MnDOT-employed TRC members were eliminated, leaving only the MnAGC and City of Minneapolis scores, the result would have been the same: Flatiron's proposal would have provided the best value under the statutory formula. *See* Relevant Undisputed Fact No. 33, SR-344 to SR-345.
11. MnDOT's award of the contract to Flatiron after it was determined to be the best value proposal under the statutory formula violated no RFP provision. *See* Relevant Undisputed Fact No. 43, SR-347.

It is not true that MnDOT awarded the contract to Flatiron "based solely on the TRC's recommendations."<sup>5</sup> MnDOT obtained concurrence from the Federal Highway Administration<sup>6</sup> and also waited for the results of the Minnesota Department of Administration's investigation of a bid protest filed by McCrossan and Ames/Lunda

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<sup>5</sup> Appellants' brief, p. 15.

<sup>6</sup> Deposition of Jon Chiglo at p. 24, SR-210 ("We need to get a concurrence from federal highways before we can award.").

before awarding the contract.<sup>7</sup>

There is no requirement in the statute or the RFP that each TRC member read every page of the RFP or that they verify having done so. Nor did appellants present evidence of any analogous requirement under the Minnesota public procurement processes that preceded enactment of the best value statute. Similarly, there is no requirement in the statute or the RFP that the Commissioner of MnDOT conduct an independent evaluation of proposal responsiveness. Nor did appellants present evidence of any analogous requirement under pre-existing Minnesota public procurement processes. Appellants' attempt to create such new and additional requirements lacks any factual support in the record.

The same absence of factual support dooms appellants' attempted reliance on hypotheticals about how MnDOT or the TRC *could have acted* if facts different from those reflected in the record had occurred, including appellants' predictions about how MnDOT and the TRC *might* score non-responsive proposal elements. *See* Appellants' brief, p. 14. No TRC member scored any element of Flatiron's proposal to be non-responsive, so appellants' hypothetical cannot support an attack on Flatiron's contract.

Finally, the fact that Flatiron's proposal price was higher and its proposed contract duration was longer than those proposed by McCrossan and Ames/Lunda is irrelevant. This was not a low price bid, and the entire purpose of the best value statute is to allow higher priced, higher quality proposals to succeed if they provide the best value under the

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<sup>7</sup> *Id.* at p. 23 (“The other reason would have been the protest by C.S. McCrossan and Ames/Lunda. We waited on the results of that protest to award.”).

statutory formula, which is precisely what occurred here.

Appellants also fail to acknowledge that the TRC found material flaws and errors in the Ames/Lunda and McCrossan proposals that fully accounted for their low technical scores. Both proposals had unrealistic schedules. McCrossan's proposal would have required the closing of City of Minneapolis streets and the removal of existing bridges. Ames/Lunda's design was so flawed that major portions of its proposed bridge would have required replacement. Because of those flaws, the TRC found that the City of Minneapolis and Hennepin County would not have consented to construction under either of their proposals. *See* Relevant Undisputed Fact Nos. 37 and 38, SR-345 to SR-346. In short, acceptance of either proposal would have exposed MnDOT and the public to significant additional costs and delays above and beyond their initially proposed contract prices and durations.<sup>8</sup>

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<sup>8</sup> *See* deposition of Wayne Murphy, the MnAGC-appointed TRC member at SR-244 to SR-247. Mr. Murphy gave McCrossan and Ames/Lunda scores of zero on one major proposal criterion because of design errors that he judged to be uncorrectable. With respect to McCrossan, he noted, among other things:

- A. . . . Profile grade said one thing at University Avenue and their computations had figured something else. I don't recall their exact numbers.
- Q. Were those errors recoverable?
- A. No.
- Q. You didn't see any way that during detail design they could fix those problems?
- A. Absolutely no way when you had to remove 2<sup>nd</sup> Street, for example, and all the design revolved around this one grade line. There is no

In sum, there is no evidence in the record that MnDOT's procurement process for the I-35W bridge violated its obligations under the best value statute or the RFP. There is no evidence of any abuse of discretion. None of the Minnesota professional engineers who comprised the TRC—not even the member appointed by *amicus* MnAGC—deviated from the unanimous conclusion that Flatiron's proposal provided the best value. The Federal Highway Administration concurred in award of the contract to Flatiron, and three separate audits of the procurement (by the General Accounting Office, the Federal Highway Administration and the Minnesota Department of Administration) uncovered no defects in the procurement process or the contract award to Flatiron.

## II. THE RESPONSIVENESS OF FLATIRON'S PROPOSAL

Appellants' lawsuit hinges on two factual assertions: (1) Flatiron was allowed to

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way that you could stop and go back. You would have delayed the job another three, four, five, six months or maybe a year depending upon how you could get steel in a timely manner.

SR-244. With respect to Ames/Lunda, he noted, among other things:

- A. I know I did give a zero on a major, major item in the proposal. It happened to be the grade line. And I think I marked it a zero because it absolutely did not meet their contract requirements . . .

SR-243. He also testified about how Ames/Lunda later reacted:

- A. Ames came in at 1:00, just Dick Ames and Todd Goderstad were the only two that came in. I pointed out the major error in the grade of Ames and said, you got zero. You guys never, never had submitted a proposal that's this disgraceful. And Dick's comment was, "We really let you down on this one."

SR-247.

“rework 2<sup>nd</sup> Street well outside of the 35W right of way,”<sup>9</sup> thereby gaining a substantial advantage denied to all other bidders; and (2) Flatiron violated the RFP requirement that: “[a] minimum of 3 webs are required for concrete box designs,” again gaining a substantial advantage denied to all other bidders. Both assertions are false and disproved by undisputed facts in the record.

A. RIGHT OF WAY AT 2<sup>ND</sup> STREET

Appellants contend that any proposal that included the acquisition of additional right of way had to be rejected based on the following RFP provision:

4.3.3.5.1 Geometric Enhancements (10%)

\* \* \* \*

. . . Any work that is proposed to be constructed on I-35W with this project shall not extend beyond the 4<sup>th</sup> Street Bridge to the north and shall not extend beyond the project limits shown on the Preliminary Design Drawing to the south . . .

No proposed work shall occur with this project on Washington Ave., University Ave., and 4<sup>th</sup> Street beyond the ramp termini shown on the Preliminary Design Drawing. Proposed work for this project shall not include additional capacity or right of way.

\* \* \* \*

SR-118.

Appellants contend that Flatiron violated this requirement at 2<sup>nd</sup> Street and gained a substantial advantage over McCrossan and Ames/Lunda who claim they were orally told not to propose additional right of way. These contentions are proved false by undisputed facts in the record.

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<sup>9</sup> Appellants’ brief, p. 10.

**1. Flatiron requested and acquired no additional right of way at 2<sup>nd</sup> Street.**

Flatiron acquired no additional right of way at 2<sup>nd</sup> Street, proposed no acquisition of additional right of way at 2<sup>nd</sup> Street and performed no work outside of the right of way at 2<sup>nd</sup> Street. *See* affidavit of Peter Sanderson, dated August 8, 2008:

. . . Flatiron's proposed work at 2<sup>nd</sup> Street never contemplated additional right of way, and Flatiron's actual work required no additional right of way. As noted in my October 22, 2007 affidavit, Flatiron's preliminary plan indicated the possibility that a small portion of Flatiron's work reconstructing 2<sup>nd</sup> Street (a street that was, of course, closed by the collapse of the I-35 bridge) *might* extend beyond what was shown on the right of way map. In fact, the actual work did not extend beyond the right of way map. Moreover, no additional right of way would have been needed even if the work had extended that far. The work at issue shown on the preliminary plan was never contemplated to make a permanent change to 2<sup>nd</sup> Street that would have required the acquisition of additional right of way. In short, Flatiron's proposal never contemplated or required additional right of way at 2<sup>nd</sup> Street. Plaintiffs' claim to the contrary is simply not true.<sup>10</sup>

Since Flatiron did not request or obtain additional right of way at 2<sup>nd</sup> Street, it cannot have violated any purported RFP prohibition against obtaining such right of way. Nor could Flatiron have obtained an unfair advantage over any other proposer from not doing what the appellants falsely accuse it of doing.

**2. McCrossan and Ames/Lunda were not precluded from proposing additional right of way.**

Conclusive proof that McCrossan and Ames/Lunda were not precluded from submitting proposals that included additional right of way is provided by the undisputed

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<sup>10</sup> R-ADD-2 to R-ADD-3 (emphasis in original).

fact that each of them did submit proposals that included additional right of way.<sup>11</sup> In fact, McCrossan submitted a proposal that flatly violated RFP ¶ 4.3.3.5.1 by including work that extended beyond the 4<sup>th</sup> Street Bridge to the north.<sup>12</sup> McCrossan and Ames/Lunda do *claim* to have received oral instruction from MnDOT not to propose additional right of way. Even if that is true, they clearly ignored the instruction.

Moreover, McCrossan and Ames/Lunda could not have reasonably relied on any such oral instruction. The RFP expressly prohibited reliance upon any instruction or representation that was not in writing. *See* Instructions to Proposers, ¶ 3.6: “Mn/DOT will not be bound by, and Proposers shall not rely on, any oral communications regarding the Project or RFP documents.”<sup>13</sup> Appellants cannot pick and choose the RFP provisions that they want to apply and those they want to ignore.

**3. The RFP did not prohibit requests for additional right of way or state that such requests would render proposals non-responsive.**

The RFP did not prohibit requests for additional right of way. Multiple RFP provisions addressed the acquisition of additional right of way. *See, e.g.*, RFP ¶ 7.5.4 “Identification of Additional R/W” and RFP ¶ 6.1.2 “Access to Right of Way Not

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<sup>11</sup> *Id.* at R-ADD-3 (“Every proposer included a line item and dollar amount for acquiring additional right of way in its proposal.”) (emphasis in original).

<sup>12</sup> *Id.* (“Both the Ames and McCrossan proposals included preliminary plans that required work outside of the right of way map. In fact, the McCrossan preliminary plan . . . included work north of the 4<sup>th</sup> Street bridge, despite the clear ITP statement at 4.3.3.5.1 that: ‘Any work that is proposed to be constructed on I35W with this project shall not extend beyond the 4<sup>th</sup> Street Bridge to the north . . .’”).

<sup>13</sup> SR-108.

Identified on R/W Work Map.”<sup>14</sup> By its express terms, RFP ¶ 4.3.3.5.1 (dealing with geometric enhancements) only restricted right of way at the project’s northern and southern limits and on Washington Ave., University Ave. and 4<sup>th</sup> Street. McCrossan violated those restrictions, but Flatiron did not. Appellants, however, do not claim that McCrossan’s actual violation rendered its proposal non-responsive.

To recap: Flatiron never requested or obtained additional right of way at 2<sup>nd</sup> Street; Flatiron performed no work outside of the right of way at 2<sup>nd</sup> Street; McCrossan and Ames/Lunda were not precluded from requesting additional right of way; and McCrossan is the only proposer who violated RFP ¶ 4.3.3.5.1.

Finally, the fact that Flatiron performed no work outside of the right of way at 2<sup>nd</sup> Street conclusively disproves appellants’ assertion that it was impossible to provide a proper design staying within the right of way at that location. Flatiron provided a proper design and earned the appropriate scoring benefit. McCrossan and Ames/Lunda submitted fatally flawed designs and reaped the appropriate scoring detriment.

B. “MINIMUM OF 3 WEBS” REQUIREMENT

If possible, the second ‘pillar’ of appellants’ non-responsiveness claim against Flatiron is even weaker than the first. Appellants assert: “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.”<sup>15</sup> This assertion is flatly false. It is also quite possibly defamatory.

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<sup>14</sup> See affidavit of Peter Sanderson, dated October 22, 2007 at ¶ 4. R-ADD-12 to R-Add-13.

<sup>15</sup> Appellants’ brief, p. 5.

RFP ¶ 13.3.3.1.2 directed that: “[a] minimum of 3 webs are required for concrete box designs.”<sup>16</sup> Flatiron was the only bidder who proposed a concrete box design; all other bidders proposed steel, so the provision was not applicable to their proposals.

It is undisputed that Flatiron’s concrete box design included eight webs, four in each direction of traffic. *See* Affidavit of Peter Sanderson, dated August 8, 2008:

Flatiron’s concrete box design—and the bridge that Flatiron has, in fact constructed—has 8 webs, 4 in each direction, which satisfies the plain language of the RFP requirement. As much as plaintiffs would like to pretend otherwise, there is no language in the RFP requiring 3 webs for each box girder. I am also unaware of any evidence that Flatiron gained a competitive advantage by proposing four 2-web box girders rather than two 3-web box girders or perhaps even one 3-web box girder.<sup>17</sup>

*See also* Affidavit of Alan Phipps, P.E., dated October 23, 2007:

Flatiron’s proposal for spans 1-3 has a total of eight webs, four in each direction, in response to the RFP requirement of “[a] minimum of 3 webs.”<sup>18</sup>

Appellants’ attempt to manufacture a genuine issue of disputed fact by asserting that the RFP requires three webs per box girder is wholly without factual support. The RFP contains no such provision, and no amount of affidavits from McCrossan or Ames/Lunda personnel can change that plain fact. Nor can those affidavits create a genuine issue as to whether eight webs satisfies the “minimum of 3 webs” requirement.

Finally, brief comment is appropriate in response to appellants’ assertion that

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<sup>16</sup> SR-176.

<sup>17</sup> R-ADD-2.

<sup>18</sup> R-ADD-7. *See also* affidavit of Peter Sanderson, dated October 22, 2007 at ¶ 3. R-ADD-11 to R-ADD-12.

Flatiron chose a less safe design to save money.<sup>19</sup> That claim is ironic (given appellants' complaints that Flatiron's design was too expensive); it is also deeply offensive and likely defamatory. It has no basis in fact and falsely impugns Flatiron's business practices and reputation. That appellants are reduced to reliance upon such improper and desperate measures before this Court is additional proof of the fatal weakness of their claims.

### **III. ABSENCE OF DISPUTED MATERIAL FACTS REGARDING APPELLANTS' INJUNCTIVE RELIEF CLAIM**

The essential factual linchpin to appellants' request that this Court reinstate their injunctive relief claim is evidence that Flatiron submitted a non-responsive proposal. Appellants' claims of an illegal contract and irreparable harm flow directly from—and are wholly reliant upon—their assertions that Flatiron violated an RFP requirement prohibiting the acquisition of additional right of way at 2<sup>nd</sup> Street and that Flatiron violated an RFP requirement that its concrete box design have a minimum of three webs.

As demonstrated above, there is no factual support for either assertion. Absent such evidence, appellants cannot support a claim that Flatiron was improperly awarded the contract. And, without evidence of an improper award, it is impossible for appellants to establish entitlement to injunctive relief.<sup>20</sup>

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<sup>19</sup> Appellants' brief, p. 5.

<sup>20</sup> Appellants' injunctive relief claims were also appropriately dismissed as untimely, based appellants' voluntary decision to wait through ten months of around-the-clock construction before moving for a temporary injunction only weeks before the bridge would be opened to the public. Statement of Relevant Undisputed Facts Nos. 1 through 11, SR-338 to SR-340.

#### IV. ABSENCE OF DISPUTED MATERIAL FACTS REGARDING APPELLANTS' DECLARATORY RELIEF CLAIM

Appellants' inability to establish non-responsiveness also dooms their declaratory relief claim. Moreover, the factual record establishes that appellants would not be entitled to seek disgorgement of the compensation paid to Flatiron even if they had been able to establish some sort of violation during the procurement process.

The relevant disgorgement cases, which appellants purported to rely upon before the district court, are *Village of Pillager v. Hewitt*, 98 Minn. 265, 107 N.W. 815 (1906) and *Kotschevar v. North Fork TP, Stearns County*, 229 Minn. 234, 39 N.W.2d 107 (1949). In those cases, this Court declined to allow disgorgement claims so long as:

1. the attempted contract was within the powers of the public body;
2. the attempted contract was carried out without intent to evade the law;
3. the public body retained the benefit provided by the contractor under the attempted contract; and
4. the public body had dollars legally available to cover the payments received by the contractor.<sup>21</sup>

All of those factors are present here. MnDOT had authority to procure the I-35W replacement bridge. MnDOT acted in good faith without intent to evade the law, as proved by the fact that it waited for federal concurrence and the Minnesota Department of Administration's decision on the McCrossan and Ames/Lunda bid protest before entering into the contract. The public retains the benefits of Flatiron's work, and MnDOT had legally available dollars (through a federal grant—Minnesota tax dollars were not

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<sup>21</sup> See *Kotschevar*, 229 Minn. at 234 and 238, 39 N.W.2d at 108 and 110.

involved) to cover all payments made to Flatiron.

There is also no admissible record evidence that Flatiron was paid anything other than the fair value of its work. All that appellants can point to in an attempt to manufacture that required evidence is an allegation in its Complaint (which, of course, is not evidence) and a wholly conclusory—and entirely non-specific—affidavit from an individual stating that he “believes” the Complaint’s allegations regarding Flatiron’s proposal.<sup>22</sup> The affidavit does not even reference the particular paragraph of the Complaint that appellants purport to rely upon. For reasons further discussed in the Argument section herein, that ‘evidence’ could not sustain appellants’ claim in opposition to Flatiron’s summary judgment motion.

**V. ABSENCE OF FACTS JUSTIFYING SUBSTITUTION OF THIS COURT’S JUDGMENT FOR THAT OF THE INVOLVED AGENCIES OR THE MINNESOTA LEGISLATURE**

At bottom, appellants ask this Court to substitute its judgment on the issue of whether Flatiron’s proposal was responsive and provided the best value for that of: (1) the TRC, six highly qualified and experienced Minnesota professional engineers who unanimously determined after days of intensive study that Flatiron’s proposal was responsive and significantly superior to all other proposals; (2) MnDOT, the agency charged with conducting the procurement ; (3) the Federal Highway Administration, who concurred in awarding the contract to Flatiron which was funded by federal dollars; (4) the Minnesota Department of Administration, who determined that the procurement process complied with the requirements of the RFP and Minnesota law; and (5) the

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<sup>22</sup> Appellants’ brief, p. 52, n. 203.

Minnesota Legislature, who enacted the best value statute and statutory formula under which Flatiron was determined to have submitted the best value proposal and who declined appellants' request to amend the statute in light of that determination.

There are no facts to support such a step. Instead, for reasons discussed more fully in the remainder of this brief, the facts fully support affirmance by this Court of the orders dismissing appellants' claims.

## ARGUMENT

### I. SUMMARY OF ARGUMENT

This case presents the Court with two issues. One is concrete and retrospective in application—was Flatiron entitled to dismissal of appellants' claim that its proposal was non-responsive? The other is more speculative and prospective in application—did the Court of Appeals' decision improperly grant MnDOT unbridled discretion to ignore the law and its own RFPs when awarding future contracts under the best value statute?

With respect to the first issue, the central dispute is not “the proper legal interpretation of the term ‘responsive’ as it is used in Minn. Stat. § 161.3426, subd. 1.”<sup>23</sup> Instead, the central issue is whether appellants satisfied their obligation under Minn. R. Civ. P. 56.05<sup>24</sup> to establish genuine issues of material fact as to whether Flatiron violated RFP ¶ 4.3.3.5.1 or RFP ¶ 13.3.3.1.2. Absent admissible evidence that Flatiron violated those RFP provisions, it simply does not matter how the TRC, MnDOT, the district court

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<sup>23</sup> Appellants' brief, p. 17.

<sup>24</sup> “[O]pposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.”

or the Court of Appeals interpreted the term ‘responsive,’ because Flatiron’s proposal complied with whatever definition one might choose to apply.

Appellants clearly failed to satisfy that burden. There is no genuine issue as to whether Flatiron complied with FRP ¶ 4.3.3.5.1, because Flatiron did not propose acquisition of additional right of way at 2<sup>nd</sup> Street and did not perform work outside of the right of way at 2<sup>nd</sup> Street.<sup>25</sup> There is also no genuine issue as to whether Flatiron complied with RFP ¶ 13.3.3.1.2’s requirement that “[a] minimum of 3 webs are required for concrete box designs.” Flatiron’s concrete box design—and the bridge it actually constructed—has eight webs. As a matter of elementary math, eight webs satisfies the “minimum of 3 webs” RFP requirement.

In sum, regardless of how one might interpret “responsiveness” under the RFP and the best value statute, Flatiron’s proposal met the definition. Dismissal of appellants’ lawsuit seeking to invalidate Flatiron’s contract and to obtain return of contract payments made to Flatiron under that contract was therefore appropriate and should be affirmed.

Appellants devote most of their brief to the issue of whether MnDOT will someday try to avoid legal obligations that appellants summarize as follows:

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<sup>25</sup> RFP ¶ 4.3.3.5.1 does not even reference 2<sup>nd</sup> Street, but instead calls out 4<sup>th</sup> Street, Washington Avenue and University Avenue. If its restriction on additional capacity or right of way was meant to be Project-wide (as proposed by appellants), no purpose was served by listing those specific locations. Accepting appellants’ interpretation would also require the Court to ignore all of the other RFP provisions authorizing and describing how additional right of way could be acquired for the Project. *See Brookfield Trade Center, Inc. v. County of Ramsey*, 584 N.W.2d 390, 394 (Minn. 1998) (“we are to interpret a contract in such a way as to give meaning to all of its provisions”). It would also require the Court to ignore the fact that every proposer included additional right of way in its proposal. Even McCrossan and Ames/Lunda acted contrary to appellants’ interpretation.

Simply put, while MnDOT is given discretion initially to determine to choose (sic) 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. Thus if a proposer ignores a material requirement that comprises one of the criteria . . . then MnDOT does not have the discretion to redefine or waive that requirement when it receives the submitted proposal.<sup>26</sup>

Flatiron does not disagree with this summation of MnDOT rights and responsibilities, all of which were complied with in this case. The best value statute gave MnDOT discretion to choose and weight the selection criteria. The TRC scored the proposals using those criteria and weights. MnDOT did not change the criteria or weighting or change the TRC scores; it did not redefine or waive RFP requirements; and it correctly applied the statutorily-mandated formula under which Flatiron's proposal provided the best value.

Furthermore, the Court of Appeals did not hold that MnDOT would be free of these same responsibilities on future procurements. That court instead held that:

section 161.3426 permits the award of contracts only to responsive proposals, as evidenced by the repeated use of the word "responsive" in that section.<sup>27</sup>

It further held that:

The TRC is required to score the technical proposals using the selection criteria that are defined in the RFP, to submit a technical score for each proposal to the commissioner, and to "reject any proposal it deems nonresponsive."<sup>28</sup>

It also held that:

Our interpretation of the design-build statute does not allow the TRC to exercise unfettered discretion in determining whether a proposal is responsive . . . reversal of an agency decision is appropriate when the

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<sup>26</sup> Appellants' brief, p. 25.

<sup>27</sup> Opinion of the Court of Appeals, dated July 28, 2009 at Add-9.

<sup>28</sup> *Id.* at Add-8.

decision constitutes an error of law, when findings are arbitrary and capricious, or when the findings are unsupported by substantial evidence.<sup>29</sup>

The Court of Appeals recognized that procurements under the best value statute differ from traditional public procurements—absent those differences, that statute would be superfluous—but its interpretation of those differences cannot call into question the validity of Flatiron’s contract. Nor, for reasons discussed herein, does that interpretation appear to jeopardize the validity of future procurements under the best value statute.

## II. STANDARD OF REVIEW

The Court of Appeals’ decision affirming dismissal of appellants’ injunctive and declaratory relief claims is reviewed *de novo* by this Court to determine whether there were any genuine issues of material fact or errors in application of the law. *Stringer v. Minnesota Vikings Football Club*, 705 N.W.2d 746, 754 (Minn. 2005).

The facts in the record must be viewed in the light most favorable to appellants, but appellants must have done more than rest on averments or denials in their pleadings.<sup>30</sup> To avoid summary judgment, appellants must have presented the district court with specific facts giving rise to a genuine issue of material fact. *W.J.L. v. Bugge*, 573 N.W.2d 677, 680 (Minn. 1998); *DHL, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997):

[W]e hold that there is no genuine issue of material fact for trial when the nonmoving party presents evidence which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with

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<sup>29</sup> *Id.* at Add-10.

<sup>30</sup> *Id.* See also Minn. R. Civ. P. 56.05 (“opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein . . . If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.”).

respect to an essential element of the nonmoving party's case to permit reasonable persons to draw different conclusions.<sup>31</sup>

The Court of Appeals' interpretation of the best value statute is also reviewed *de novo*, *Harms v. Oak Meadows*, 619 N.W.2d 201, 202 (Minn. 2000); and, if the statute is clear in its application to this situation, the letter of the law cannot be disregarded under the pretext of pursuing the spirit. Minn. Stat. § 645.16. Similarly, interpretation of the two RFP provisions presents a question of law,<sup>32</sup> and the Court is charged to interpret those provisions in such a way as to give meaning to all of the RFP's provisions.<sup>33</sup>

Finally, appellants' injunctive relief claim was a request for an extraordinary equitable remedy that should only be awarded in clear cases, reasonably free from doubt when necessary to prevent great and irreparable injury. *AMF Pinspotter, Inc. v. Harkins Bowling, Inc.*, 110 N.W.2d 348, 351 (Minn. 1961). Judicial restraint is especially appropriate because this case directly involves the expertise, technical training, education and experience of the six Minnesota professional engineers who comprised the TRC, MnDOT and the Federal Highway Administration regarding the procurement of a

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<sup>31</sup> See also Rule 115.03(d) of the General Rules of Practice for District Courts ("For summary judgment motions, the memorandum of law shall include . . . [a] recital by the moving party of the material facts as to which there is no genuine dispute, with a specific reference to that part of the record supporting each fact . . . a party opposing the motion shall, in like manner, make a recital of any material facts claimed to be in dispute."). (emphasis added). Appellants failed to provide any such recital in opposition to Flatiron's recital of forty-five material undisputed facts.

<sup>32</sup> *Brookfield*, 584 N.W.2d at 394.

<sup>33</sup> *Id.* ("we are to interpret a contract in such a way as to give meaning to all of its provisions."); *Chergosky v. Crosstown Bell, Inc.*, 463 N.W.2d 522, 525-526 (Minn. 1990) ("We construe a contract as a whole and attempt to harmonize all clauses of the contract . . . we will attempt to avoid an interpretation of the contract that would render a provision meaningless.").

design/build best value contract for the I-35W replacement bridge, a heavily used, urban interstate highway bridge over a major navigable river:

When reviewing agency decisions we adhere to the fundamental concept that decisions of administrative agencies enjoy a presumption of correctness, and deference should be shown to the agencies' expertise and their special knowledge in the field of their technical training and experience.

*In the Matter of Excess Surplus Status of Blue Cross and Blue Shield of Minnesota*, 624 N.W.2d 264, 278 (Minn. 2001). *See also Onan Corp. v. United States*, 476 F.Supp. 428, 433 (D. Minn. 1979):

Cases involving disputes over government procurement contracts almost invariably emphasize that the courts should be extremely reticent to interfere with government procurement policies, given the complexity of procurement decisions, the lack of expertise possessed by the courts, the discretion invested in the procurement officer, and the potential confusion, inefficiency, delay, and increased expense that can result.

### III. ARGUMENTS

#### A. DISMISSAL OF APPELLANTS' INJUNCTIVE AND DECLARATORY RELIEF CLAIMS WAS PROPER

Appellants' Complaint in this action was wholly dependent upon their ability to present admissible evidence that Flatiron's proposal violated RFP ¶ 4.3.3.5.1 or RFP ¶ 13.3.3.1.2. Absent evidence that Flatiron's proposal was non-responsive—such that award of the contract to it was arguably improper—appellants could not establish entitlement to injunctive or declaratory relief and, hence, summary judgment dismissing their claims was appropriate.<sup>34</sup>

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<sup>34</sup> *See DHL, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997) (Minn. R. Civ. P. 56 is designed to secure the just, speedy and inexpensive determination of an action by

Following the completion of discovery, Flatiron moved the district court for entry of summary judgment and supported its motion by providing the district court with a recital of forty-five material undisputed facts to establish, among other things, that it did not violate either RFP provision.

To survive Flatiron's motion, appellants were obligated as a matter of law to present the district court with opposing affidavits, made on personal knowledge, setting forth facts admissible in evidence upon which the affiants were competent to testify, raising genuine disputes of material fact.<sup>35</sup> They utterly failed to do so. There was and is no admissible evidence in the record to contest the plain facts that Flatiron did not propose additional right of way at 2<sup>nd</sup> Street, did not acquire additional right of way at 2<sup>nd</sup> Street, did not perform work outside of the right of way at 2<sup>nd</sup> Street but did propose and construct a concrete box design with more than three webs. Summary judgment was therefore appropriate and should be affirmed.<sup>36</sup>

Moreover, the Court is bound to interpret the RFP in such a way as to give meaning to all of its provisions, avoiding interpretations that would render a provision

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allowing the district court to dismiss it on the merits if there is no genuine dispute regarding the material facts and a party is entitled to judgment under the law applicable to those facts).

<sup>35</sup> Minn. R. Civ. P. 56.05. *See also* Rule 115.03(d) of the General Rules of Practice for District Courts, the requirements of which appellants ignored.

<sup>36</sup> *DHL, Inc.* at 69. *See also* Minn. R. Civ. P. 56.05 (“When a motion for summary judgment is made and supported as provided in Rule 56, an adverse party may not rest upon the mere averments or denials of the adverse party’s pleadings but must present specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.”).

meaningless or lead to an absurd result.<sup>37</sup> Appellants' interpretations of RFP ¶ 4.3.3.5.1 and RFP ¶ 13.3.3.1.2 violate these precepts.

Appellants interpret RFP ¶ 4.3.3.5.1 as prohibiting the acquisition of additional right of way anywhere on the 1-35W bridge reconstruction project. To accept that interpretation, the Court would have to render meaningless all of the provisions in other sections of the RFP that specifically authorize and exactly describe how additional right of way can be acquired on the Project.<sup>38</sup> Moreover, the painstaking listing of limited, specific locations in RFP ¶ 4.3.3.5.1 (the 4<sup>th</sup> Street Bridge to the north, the project limits shown on the Preliminary Design Drawing to the south, Washington Ave., University Ave., and 4<sup>th</sup> Street<sup>39</sup>) would be rendered entirely superfluous if that provision was interpreted to preclude the proposing of additional right of way—not just at those specified locations—but anywhere on the entire project.

Furthermore, appellants have not acted in accordance with their own purported interpretation. They have consistently asserted that the McCrossan and Ames/Lunda proposals are responsive, and that one of those proposals could—and should—have been accepted by MnDOT.<sup>40</sup> But it is undisputed that both McCrossan and Ames/Lunda proposed additional right of way on the project, including McCrossan's proposed work beyond the 4<sup>th</sup> Street Bridge to the north.<sup>41</sup> Apparently, appellants' interpretation of RFP

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<sup>37</sup> *Brookfield*, 584 N.W.2d at 394; *Chergosky*, 463 N.W.2d at 525, 526.

<sup>38</sup> *See, e.g.*, affidavit of Peter Sanderson, dated October 22, 2007 at ¶ 4. R-ADD-12 to R-Add-13.

<sup>39</sup> SR-118.

<sup>40</sup> *See, e.g.*, appellants' Complaint, ¶¶ 6 and 14. A-3 and A-14.

<sup>41</sup> Affidavit of Peter Sanderson, dated August 8, 2008 at R-ADD-3.

¶ 4.3.3.5.1 is only designed to apply to Flatiron, not to the proposers they favor.

Appellants' interpretation of RFP ¶ 13.3.3.1.2 is even more strained and would lead to exactly the type of absurd result that this Court is bound to avoid.<sup>42</sup> There simply is no requirement in that provision that each and every girder utilized in Flatiron's concrete box design have three webs. And it is difficult to conceive of a more absurd result than an interpretation that a concrete box design with eight webs violates an RFP requirement that concrete box designs have "[a] minimum of 3 webs."

In sum, Flatiron presented the district court with undisputed evidence that its proposal did not violate RFP ¶ 4.3.3.5.1 or RFP ¶ 13.3.3.1.2. Appellants did not—and could not—present any contrary admissible evidence. Nor did appellants present an interpretation of those RFP provisions that could legally be accepted. Consequently, summary judgment dismissing appellants' injunctive and declaratory relief claims was appropriately entered by the district court and affirmed by the Court of Appeals. This Court should also affirm that dismissal.

**B. THE LOWER COURTS PROPERLY INTERPRETED  
AND APPLIED THE STATUTORY AND RFP  
RESPONSIVENESS REQUIREMENTS**

Flatiron moved for summary judgment to protect its right to perform the contract and to be paid for that performance. Its paramount interest was to defeat the actual claims made against it on this project by the appellants, and it has done so conclusively. Flatiron had, and has, less interest in appellants' professed concerns about how MnDOT might act or might be allowed to act on undefined future best value procurements, despite

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<sup>42</sup> *Brookfield*, 584 N.W.2d at 394.

the fact that those concerns consume the majority of appellants' brief. Flatiron is, however, constrained to note for the benefit of the Court that it simply is not true that the Court of Appeals' decision has opened a Pandora's Box that provides MnDOT with license to award to non-responsive proposers and to ignore or make after-the-fact changes to its stated and weighted evaluation criteria.

The Court of Appeals did not rule that MnDOT or the TRC has unfettered discretion to determine responsiveness or that MnDOT has any discretion to waive, ignore or change its RFP requirements after bid opening:

The TRC is required to score the technical proposals using the selection criteria that are defined in the RFP, to submit a technical score for each proposal to the commissioner, and to "reject any proposal it deems nonresponsive."<sup>43</sup>

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section 161.3426 permits the award of contracts only to responsive proposals, as evidenced by the repeated use of the word "responsive" in that section.<sup>44</sup>

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Our interpretation of the design-build statute does not allow the TRC to exercise unfettered discretion in determining whether a proposal is responsive . . . reversal of an agency decision is appropriate when the decision constitutes an error of law, when findings are arbitrary and capricious, or when the findings are unsupported by substantial evidence.<sup>45</sup>

The Court of Appeals went on to make specific—and correct—findings that there was no evidence of MnDOT or TRC errors of law, arbitrary or capricious acts, or acts that were

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<sup>43</sup> Opinion of the Court of Appeals, dated July 28, 2009 at Add-8.

<sup>44</sup> *Id.* at Add-9.

<sup>45</sup> *Id.* at Add-10.

unsupported by substantial evidence in this case.<sup>46</sup>

The best value statute also retains numerous built-in safeguards against any arbitrary or capricious action by MnDOT in the procurement of best value contracts, none of which are adversely affected by the Court of Appeals' decision. Under the statute, MnDOT is required to publicly announce its stated and weighted selection criteria prior to the submission of proposals. It cannot secretly or after-the-fact change those criteria or weights. MnDOT is required to appoint a TRC with at least one member selected by *amicus curiae* MnAGC, thereby providing a check against any potential MnDOT bias. Of course, in this case, the MnAGC-selected member, Mr. Murphy, was perhaps the harshest critic of McCrossan and Ames/Lunda. The TRC must score the proposals using the publicly stated and weighted selection criteria. The scoring is undertaken before the price and time proposals are opened so that the scoring is not influenced by those factors. Under MnDOT's process, the scoring is also done privately by each TRC member so that there cannot be collusion in the scoring. Once the TRC's scores are revealed, they cannot be modified by MnDOT (which is additional proof that MnDOT cannot change or ignore the criteria or weighting after-the-fact); instead, the scores, prices and durations are loaded into the statutorily-mandated formula, and MnDOT's sole discretion is to award to the proposer who provides the best value pursuant to the statute or else reject all bids.<sup>47</sup>

If MnDOT tries in the future to change the criteria or the weighting after-the-fact, that attempt can be legally challenged. If the publicly-announced TRC scoring indicates

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<sup>46</sup> *Id.* at Add-11 to Add-13.

<sup>47</sup> *See infra.*, p. 4.

a possible flaw in the procurement process—for example, if there is a large discrepancy in the scoring of the individual TRC members—that also could possibly justify legal intervention. The same is true if a proposal is accepted that is non-responsive under the defined terms of the RFP or otherwise substantially deviates from the RFP requirements in a way that provides a substantial advantage not enjoyed by other proposers. There was no such evidence in this case, but that does not preclude such a finding in a future case.<sup>48</sup>

In sum, best value procurement under the statute and under the decision of the Court of Appeals has not been transformed into the Wild West. If an aggrieved party can produce evidence of a statutory violation or an arbitrary or capricious act, judicial intervention remains available which, perhaps, explains why the Legislature declined appellants' requests for changes. In any event, this case was not dismissed because judicial review was unavailable; it was dismissed because judicial review properly concluded that the appellants failed to present viable claims.

C. THERE IS NO GENUINE DISPUTE REGARDING THE FAIR VALUE OF FLATIRON'S SERVICES

Appellants' final argument, that further proceedings are required at the district court to determine what amount Flatiron may retain from the proceeds of its contract,<sup>49</sup> is also meritless. Flatiron's proposal was responsive, so there was no illegal contract and, hence, there can be no grounds upon which to seek "disgorgement" from Flatiron.

Moreover, binding precedent from this Court applied to the undisputed facts

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<sup>48</sup> See district court order, dated October 23, 2008 ("Other taxpayers challenging other public bidding contracts and armed with more persuasive evidence than these Plaintiffs produced may well succeed in obtaining injunctive relief."). A-123.

<sup>49</sup> Appellants' brief, p. 51.

conclusively establishes that disgorgement would not be available even if appellants were able to establish some legal infirmity in Flatiron's contract. Those cases, *Village of Pillager v. Hewitt*, 98 Minn. 265, 107 N.W. 815 (1906) and *Kotschevar v. North Fork TP, Stearns County*, 229 Minn. 234, 39 N.W.2d 107 (1944), which appellants cited to the district court in a misguided attempt to support their disgorgement argument, actually compel the opposite conclusion as was correctly determined by the district court.<sup>50</sup>

*Kotschevar* contains no language supportive of disgorgement. Instead, it quotes approvingly from *Village of Pillager* for the proposition that disgorgement is improper and unavailing:

The defendant in good faith received the money and bonds in payment of the bridge which he had built for the plaintiff. The consideration for such payment was full and fair, and, in equity and good conscience, it ought to have been made by the plaintiff. Such being the case, it would be most inequitable and unconscionable to compel the defendant to return the money and bonds paid to him under the circumstances found by the trial court, and we hold that the plaintiff cannot maintain this action to recover them.<sup>51</sup>

*Kotschevar* stands for—and confirms—the following Minnesota rule:

. . . where a municipal corporation receives money or property of another under and pursuant to a contract upon a subject within its corporate powers, and the contract was made and carried out in good faith and without purpose or intent to violate or evade the law, but is invalid because not entered or ratified by the officers of the corporation having power to contract, or for some other failure to comply with the statutory requirements, and money or property so received is retained by the corporation and devoted to a legitimate corporate purpose, resulting in

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<sup>50</sup> District Court order, dated October 23, 2008 at A-124 (“The argument put forth by Plaintiffs . . . that they are entitled to specific relief in the form of ‘disgorgement’ of ‘profits’ received by Flatiron is unsupported by the case law provided.”).

<sup>51</sup> *Kotschevar*, 229 Minn. at 240, 39 N.W.2d at 111 (quoting *Village of Pillager*, 98 Minn. at 266, 107 N.W. at 816).

benefits to the corporation, the one so furnishing the money or property may recover in quasi contract to the extent of the benefits received by the corporation.<sup>52</sup>

*Kotschevar* also provides that all dollars legally available for payment under a valid contract remain available for payment to the contractor in quasi contract:

3. Court did not err in instructing jury that cash on hand in road and bridge fund at time contract to construct the road in question was entered into was available for application on the contract.<sup>53</sup>

The fact that MnDOT waited until both the Federal Highway Administration and the Minnesota Department of Administration confirmed that award of the contract to Flatiron was appropriate demonstrates that the contract was entered into in good faith, and there is no contrary evidence. It is undisputed that entering into the contract was within MnDOT's authority, that MnDOT and the public have retained the benefits of Flatiron's work and that MnDOT had dollars legally available to cover full payment to Flatiron for the work it performed.

Finally, there is no admissible evidence in the record that the fair value of Flatiron's work was anything other than what it was actually paid. All that appellants can point to in an attempt to manufacture that required evidence<sup>54</sup> is an allegation in its Complaint which, as a matter of law, cannot defeat summary judgment<sup>55</sup> and a wholly conclusory affidavit in which an individual states that he "believes" the Complaint's allegations. That affidavit does not reference the particular allegation upon which

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<sup>52</sup> *Kotschevar*, 229 Minn. at 238, 39 N.W.2d at 110.

<sup>53</sup> *Id.* at 234, 39 N.W.2d at 108.

<sup>54</sup> Appellants' brief, p. 52, n. 203.

<sup>55</sup> Minn. R. Civ. P. 56.05 ("an adverse party may not rest upon the mere averments or denials of the adverse party's pleadings").

appellants purport to rely; it contains no affirmative showing that the affiant was competent to testify regarding that allegation; it sets forth no facts that would be admissible in evidence.<sup>56</sup> The district court acted correctly in not relying upon it.

In sum, for a host of reasons, appellants are not entitled to have this matter returned to the district court for further proceedings on their legally and factually unsupported “disgorgement” theory. That claim was appropriately dismissed by the district court, and that dismissal should be affirmed by this Court.

### CONCLUSION

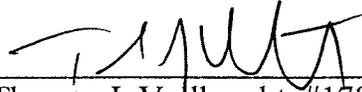
For the above-stated reasons, respondent Flatiron-Manson, a Joint Venture, respectfully requests that this Court affirm in all respects the district court’s dismissal with prejudice of appellants’ claims in this action and the Court of Appeals’ decision affirming that dismissal.

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<sup>56</sup> *Id.* (“opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein”). *See also Conlin v. City of Saint Paul*, 605 N.W.2d 396, 402-403 (Minn. 2000) (conclusory affidavits do not satisfy the burden of proof).

Dated: December 23, 2009

FAEGRE & BENSON LLP

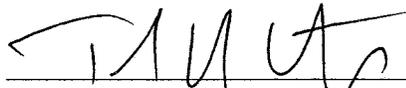


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**BRIEF LENGTH CERTIFICATION**

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App.  
P. 132.01. This brief contains 9,049 words and was prepared using Microsoft Office  
Word 2003.

  
Thomas J. Vollbrecht

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