STATE OF MINNESOTA IN DISTRICT COURT

COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT

- File No. CV-07-3425

Scott Sayer and Wendell Anthony Phillippi,

Plaintiffs, **ORDER**

v.

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

Defendants.

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The above-entitled matter came on for hearing before the Honorable Edward J. Cleary, a Judge of District Court, on August 13, 2008, upon the motion of the Plaintiffs for a temporary injunction, and upon the motion of the intervening Defendant Flatiron-Manson, for complete or partial summary judgment.

Dean B. Thomson, Esq., and Jeffrey A. Wieland, Esq., appeared on behalf of the Plaintiffs. Richard L. Varco, Esq., appeared on behalf of the Defendant Minnesota Department of Transportation, and Thomas J. Vollbrecht, Esq., appeared on behalf of the Defendant Flatiron-Manson.

The Court, having reviewed all of the files and records herein, and having heard the arguments of counsel, and being fully advised on the premises, hereby makes the following order:

IT IS HEREBY ORDERED that:

1. The motion of the Plaintiffs for a temporary injunction is hereby **DENIED.**

2. The motion of Defendant Flatiron-Manson, for summary judgment on Plaintiffs' claim for injunctive relief is **GRANTED**.

3. The motion of Defendant Flatiron-Manson, for summary judgment on Plaintiffs' claim for declaratory relief remains under advisement.

4. The attached memorandum is incorporated herein and made a part of this order and constitutes findings of fact and conclusions of law to the extent required by Rule 52.01 of the Minnesota Rules of Civil Procedure.

5. A copy of this Order shall be served by U. S. Mail upon the attorney for the Plaintiff, Dean B. Thomson, FABYANSKE, WESTRA, HART & THOMSON, P.A., 800 LaSalle Avenue South, Suite 1900, Minneapolis, MN 55402; upon the attorney for the Defendant Minnesota Department of Transportation, Richard L. Varco, Assistant Attorney General, 445 Minnesota Street, Suite 1800, Saint Paul, MN 55101; and upon the attorney for the Defendant Flatiron-Manson, Thomas J. Vollbrecht, FAEGRE & BENSON LLP, 2200 Wells Fargo Center, 90 South Seventh Street, Minneapolis, MN 55402, and said service shall constitute due and proper service for all purposes.

IT IS SO ORDERED.

BY THE COURT:

Dated: August 26, 2008

_____/S/_____
Edward J. Cleary
Judge of District Court

DOCUMENTS SUBMITTED AND REVIEWED

In addition to documents submitted earlier by both the Plaintiffs and Defendants, the Court has reviewed the following affidavits and depositions:

Affidavits:

Plaintiff Wendell Anthony Phillippi	08/04/08
Charles McCrossan	08/04/08
Randy Reiner, P.E.	08/07/08
Peter Sanderson	07/10/08, 08/08/08
Jeffrey Wieland	07/15/08
Clifford Freyermuth	07/21/08
Karl Teater	07/30/08
Jon Chiglo	08/04/08
Kevin Western	08/04/08

Depositions:

Plaintiff Wendell Anthony Phillippi	3/13/08
Plaintiff Scott Sayer	3/21/08
TRC Member Thomas O'Keefe	2/14/08, 04/02/08
TRC Member Tom Styrbicki	2/29/08
TRC Member Terry Ward	03/03/08
TRC Member Wayne Murphy	03/11/08
TRC Member Kevin Western	03/14/08
TRC Member Heidi Hamilton	03/31/08
Jon Chiglo	04/11/08
Lisa Freese	06/05/08
Robert McFarlin	06/18/08
Carol Molnau	06/25/08

MEMORANDUM

BACKGROUND

On August 1, 2007, the citizens of Minnesota suffered a severe tragedy with the collapse of the I-35W bridge, which resulted in 13 fatalities and numerous injuries, and which dealt a blow to the transportation infrastructure of Minneapolis, the state of Minnesota, and beyond. I-35W is a main artery of the interstate highway system and the portion traversing the Mississippi river in Minneapolis is critical to managing the significant traffic demands in the area.[1] In recognition of the critical need for the acquisition of a permanent replacement, the Minnesota Department of Transportation ("Mn/DOT") formally sought proposals for the construction of a replacement bridge within three days of the collapse. This was done pursuant to the statutory framework which details the proper procedure to be followed in awarding what was to be a "best-value design-build" contract for the reconstruction of the bridge.[2] Four qualified contractors ultimately submitted proposals to Mn/DOT on September 14, 2007: Ames/Lunda; C.S. McCrossan; Flatiron-Manson; and Walsh/American Bridge.[3] Flatiron received the highest technical score from the Technical Review Committee ("TRC") on September 20, 2007. Both C.S. McCrossan and Ames/Lunda filed protests with the Minnesota Department of Administration ("MDOA"), which affirmed the TRC's

[1] The Deputy Commissioner for Mn/DOT at the time, Lisa Freese, stated that the bridge had "140,000 trips a day" and was the "largest most highly traveled bridge in the state." (Freese Dep., p. 32, lines 5-7).
[2] Minn. Stat. §§ 161.315 – 161.40 (2007). Mn/DOT chose to pursue a "best-value design-build" procurement, instead of lowest responsible bidder approach which is further governed by Minn. Stat. §§ 161.3410 – 161.3428 (2007). This was done because other states had used "design-build as a procurement for an emergency response" and because it was considered the "best approach to get the bridge constructed in a timely manner." (Freese Dep., p. 32-33, lines 5-7, 22-24).
[3] "Qualified" in this instance means that all four proposals were found to have "passed" by a financial/legal team (under a pass/fail grading system) by meeting the requirements of the Instructions to Proposers ("ITP"). (Ward Dep., p. 42, lines 15-19).

decision. Flatiron was awarded the contract on October 8, 2007. [4]

On October 16, 2007, Scott Sayer and Wendell Anthony Philippi ("Plaintiffs") commenced the instant action against Mn/DOT, seeking injunctive relief and a declaratory judgment that the contract awarded to Flatiron was the result of an arbitrary and capricious process, was not supported by substantial evidence, was based on the consideration and scoring of a nonresponsive proposal, and was therefore illegal and void. Plaintiffs moved for a temporary restraining order to halt any construction on the allegedly illegal contract award. A hearing was held on that motion on October 24, 2007, and at that hearing Flatiron intervened as a defendant in the action pursuant to an agreement of the parties. The Court denied the request for a temporary restraining order on October 31, 2007, and Flatiron proceeded with construction of the new bridge pursuant to the contract awarded by Mn/DOT.

After the Court's denial of Plaintiffs' motion for injunctive relief, Plaintiffs appealed the order to the Court of Appeals on November 7, 2007. Plaintiffs also sought accelerated review of the appeal by the Minnesota Supreme Court, but the Minnesota Supreme Court denied Plaintiffs' motion on December 11, 2007. Plaintiffs then requested accelerated review by the Court of Appeals. Plaintiffs' appeal was ultimately dismissed on December 27, 2007 and the litigation resumed at the District Court level.[5] On July 16, 2008, Plaintiffs filed the present motion for a temporary injunction, again seeking to enjoin the reconstruction of the I-35W bridge by Flatiron. On that same day,

[4] The chronology of Mn/DOT's procurement of qualified contractors and its award of the contract pursuant to the applicable statutory framework was presented in great detail in the Court's previous order issued on October 31, 2007, and while that framework and chronology is relevant to the present motion, and will be appropriately discussed in the Court's analysis, it will not be repeated here.

[5] Two separate discovery disputes have been considered by this court since the denial of Plaintiffs' motion for a temporary restraining order.

Defendant Flatiron moved for complete or partial summary judgment. On August 13, a hearing was held to consider Plaintiffs request for injunctive relief which was opposed by both Defendants Flatiron and Mn/DOT. Defendant Flatiron argued for summary judgment which was opposed by Plaintiffs. Defendant Flatiron's motion for summary judgment on Plaintiffs' claim for declaratory relief is currently under advisement by the Court and will not be discussed herein; the subject of this order of the Court is Plaintiffs' motion for a temporary injunction and Defendant Flatiron's motion for summary judgment on the claim for injunctive relief.

RELEVANT ADDITIONS TO THE FACTUAL RECORD

Plaintiffs' basis for seeking injunctive relief at this juncture is little changed from what was presented to this Court last October. However, Plaintiffs have undertaken discovery, the results of which are relevant to their renewed motion for injunctive relief. *See* "Discovery Submitted and Reviewed." First, the Court takes notice of the most obvious change in the factual landscape of this case, which involves the reconstruction efforts of Flatiron on the bridge itself. For the last 10 months, work has been ongoing 24 hours a day and the bridge has a projected substantial completion date of September 14, 2008. The project which is the subject of this lawsuit and of the instant motion is now nearly completed. [6]

[6] As of the hearing date, August 13, 2008, the project was projected to be 92.6% complete. (Sanderson Aff. 07/10/08).

Through depositions, Plaintiffs learned that not all members of the Technical Review Committee ("TRC") charged with evaluating and scoring the proposals, read the entire 307 page RFP prior to scoring the proposals.[7] Five of the six TRC members appear to have referred to both the RFP itself and a 5 page manual which Mn/DOT had prepared to assist the TRC members in evaluating the proposals ("Proposal Evaluation Plan"). TRC members also reviewed and took notes on the report handouts of the technical sub-committees which reported on the strengths and weaknesses of each proposal. One hour interviews were also conducted by the TRC with each proposer, at which time a number of questions were posed to each of them. Upon completion of the interview process, the TRC qualitatively scored the proposals, and then assigned a point score within the range correlated to that qualitative score.[8] Plaintiffs suggest that the sizeable difference in technical scores given to the proposal was "unprecedented." While the difference in scores may have been unusually large, the pool of contracts awarded pursuant to this statute is small, and at least as it pertains to one of those awards, the discrepancy between the winning proposal and the lowest rated proposal was comparable to the gap between the scores found here. (Wieland Aff., Ex. 238.)

Additionally, Plaintiffs have alleged that Mn/DOT had meetings with the proposers to discuss ideas they were considering, ostensibly so the proposers could avoid

[7] Minnesota Statute § 161.3426 subd. 1(a) instructs that the TRC "shall score the technical proposals using the selection criteria in the . . . (RFP). The [TRC] shall then submit a technical proposal score for each design-builder to the commissioner. The [TRC] shall reject any proposal it deems nonresponsive." There is no statutory requirement that each TRC member must read the entire RFP.

[8] A score of 0-49 was a "Fail": meaning the proposal did not meet RFP requirements or was non-responsive; 50-60 "Fair": proposal marginally met RFP requirements; 61-75 "Good": proposal adequately met RFP requirements and was of acceptable quality; 76-90 "Very Good": proposal had a unique or innovative approach which exceeded requirements; 91-100 "Excellent": proposal had a unique or innovative approach which significantly exceeded requirements with a consistently outstanding level of quality.

expending time and money on ideas that Mn/DOT would reject outright.[9] Plaintiffs allege that at such meetings, both Ames/Lunda and C.S. McCrossan asked about lowering 2nd Street beyond the confines of the right-of-way outlined in the RFP and were told that extension of the right-of-way would not be allowed.[10] This is significant because it is Plaintiffs' contention that Flatiron went outside the right-of-way outlined in the RFP, rendering their proposal nonresponsive and giving Flatiron a competitive advantage.[11]

Plaintiffs' assertion that Flatiron's proposal went outside the right of way outlined in the RFP and that that fact, in and of itself, required the TRC to deem Flatiron's proposal nonresponsive is also based on Section 4.3.3.5.1 of the ITP which states "proposed work for this project shall not include additional capacity or Right-of-Way." To begin with, it is instructive to note that none of the proposers objected to this provision or sought written clarification prior to submitting a proposal. Jon Chiglo, Mn/DOT's project manager for the I-35W bridge reconstruction project, has stated, in reference to this assertion, that "[t]he limited purpose of this added language was to inform proposers that Mn/DOT did not want additional right-of-way impacts at University Avenue and Fourth Street and Washington Avenue[,]" and that such direction was "not a Project-wide directive to proposers on right-of-way limitations. To read this

[9] Even if such conversations took place, the proposers could not reasonably rely on such conversations, given Section 3.5 of the Instructions to Proposers ("ITP") which provides that proposers are not to make oral requests for clarification or interpretation of the RFP. (Third Chiglo Aff. ¶3). This section also provides that only written inquiries will be accepted, and that proposers should not rely on any oral communications unless verified in writing. (*Id.*).

[10] This is directly contradicted by Jon Chiglo, Mn/DOT's Project manager, who in a sworn affidavit stated "I am aware that Plaintiffs alleged that representatives from the Ames Lunda and C.S. McCrossan proposal teams were told that they could lower 2nd Street only within the confines of the I-35W right-of-way and that any lowering of 2nd Street could not extend into the temporary easement. I made no such communications and am not aware of any being made by any Mn/DOT employee." (Third Chiglo Aff. ¶8).

[11] Plaintiffs contend that in order to lower 2nd Street, work outside the right of way outlined in the RFP would be required.

sentence as imposing a Project-wide limitation is to expand it far beyond its intended scope. Neither ITP, Section 4.3.3.5.1 nor the RFP prohibits any proposer from obtaining right-of-way on 2nd Street outside of the temporary easement on the Right-of-Way Work Map."[12] (Third Chiglo Aff. ¶4) Defendants argue that Flatiron's proposal did not require additional right-of-way at 2nd Street since the lowering of the street could and did take place within the existing right-of-way. They also point out that: 1) every proposer included a line item and dollar amount for acquiring additional right-of-way in its proposal, reflecting that none of the proposers or Defendant Mn/DOT believed that additional right-of-way mandated proposal rejection; 2) three of the four proposals required the lowering of 2nd Street; and 3) two of the three unsuccessful proposals required work outside of the right-of-way map. (Sanderson Aff. ¶ 3).[13]

Plaintiffs also allege that Flatiron's proposal was nonresponsive because it proposed an insufficient number of webs for a concrete box design. Section 13.3.3.1.2 of the RFP states, in relevant part, "[i]f the contractor chooses a steel box girder design, a minimum of three boxes in each direction of traffic is required. A minimum of three webs are required for **concrete box designs**." (emphasis added). This requirement meant, according to its drafter,[14] that a minimum of three webs are required for each direction of traffic if a concrete box design is utilized. (Western Aff. ¶ 2). Flatiron's

[12] This language was added by Mr. Chiglo himself to the ITP to clarify that the scope of the project would not be increased to include work on University Avenue and Fourth Street, once he was aware of Ames/Lunda's interest in such an increase. (Third Chiglo Aff. ¶ 5).

[13] Since the RFP provided that proposers would receive a stipend of $500,000 for submitting a responsive proposal that was not selected, and since each of the unsuccessful proposers received this stipend, it appears that the members of the TRC and Mn/DOT acted consistently in concluding that a proposal that required the lowering of 2nd Street or that required work outside of the right-of-way map was nevertheless responsive, as long as the proposal passed the legal/financial review and the alternate technical concept review and the overall scoring of the proposal was 50 or above. (See Chiglo Dep. p. 39, lines 23-25; p. 40, lines 1-12.)

[14] Kevin Western, Assistant State Bridge Engineer in charge of design for Mn/DOT, wrote or directed the writing of this Section of the RFP himself.

proposal utilized a concrete box design having 2 webs per box girder and 2 such box girders per direction of traffic, resulting in 4 webs per direction of traffic.

Plaintiffs' have restated the language of Section 13.3.3.1.2, as requiring 3 webs per **concrete box girder**.[15] This interpretation defies both the plain language of the RFP as well as commonly understood engineering concepts. As stated by the drafter, "[t]he concrete box design that Flatiron proposed and is constructing contains four webs in each direction of traffic. As such, it exceeds the minimum requirement in . . . Section 13.3.3.1.2 [of the RFP.]" (*Id.*) This is bolstered by the sworn statements of both Flatiron's project manager for the I-35W Bridge Design Build[16] and Clifford L. Freyermuth.[17] Both state that Flatiron's proposed design clearly exceeded the plain language of the proposal.

Plaintiffs also argue that no one from the Commissioner of the Department of Transportation's office independently evaluated the responsiveness of Flatiron's proposal above and beyond the findings of the TRC. Defendants point out that Minn. Stat. §161.3426 does not require such an "independent" evaluation.

[15] In support of Plaintiffs' "interpretation" of the minimum web requirement, they have submitted the affidavit of Randy Reiner, P.E., who has "been interpreting contract language for over 20 years" including contracts for Mn/DOT, and worked with C.S. McCrossan on the I-35W bridge bid. (Reiner Aff. ¶¶1, 2). Mr. Reiner stated, in reference to Section 13.3.3.1.2, that "Flatiron wrongly interpreted that requirement as allowing the use of concrete box girders having only two webs as long as at least two such box girders were used in each direction of traffic." (*Id.* at ¶5). This conclusory statement based on Mr. Reiner's contract interpretation skills is insufficient to persuade the Court that Section 13.3.3.1.2 of the RFP meant something other than what it said.

[16] Peter Sanderson, a civil engineer with 38 years of experience.

[17] Mr. Freyermuth is a structural engineer with over 50 years of experience and is the President of Clifford L. Freyermuth, Inc., a structural consulting firm focused on "post-tensioned prestressed concrete buildings and bridges. The firm also provides management and technical services to the American Segmental Bridge Institute." (Freyermuth Aff., Ex. A).

ANALYSIS AND DECISION

A. Plaintiffs' Motion for Temporary Injunction

Applicable Legal Standards

Injunctive relief is an extraordinary equitable remedy that should be granted sparingly.[18] *AMF Pinspotter, Inc., v. Harkins Bowling, Inc.,* 110 N.W.2d 348, 351 (Minn. 1961).

> "Injunctive relief should be awarded only in clear cases, reasonably free from doubt, and when necessary to prevent great and irreparable injury. The burden of proof rests upon the complainant to establish the material allegations entitling him to injunctive relief." *Id.* at 351.

Such a request for relief in the context of public-contract procurement policies requires even greater judicial restraint.

> "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." *Onan Corp. v. United States,* 476 F.Supp. 428, 433 (D.Minn. 1979).

Given the extraordinary remedy requested and the judicial restraint required, an award of a public contract will be enjoined only if illegal, arbitrary, capricious, or unreasonable, or where there is actual fraud, collusion, or bad faith, or where the procedures employed are so flawed as to "emasculate the whole system of competitive bidding." *Griswold v. City of Ramsey*, 65 N.W.2d 647, 652 (Minn. 1954); *R.E. Short Co. v. City of Minneapolis,* 269 N.W.2d 331, 342 (Minn. 1978). Here, as before, Plaintiffs do

[18] Plaintiffs' current motion for a temporary injunction involves application of the same legal analysis applied to their previous motion for a temporary restraining order and differs only in that the remedy of a temporary injunction is provided for under Minnesota Rule of Civil Procedure 65.02, while that of a temporary restraining order is provided for under Minnesota Rule of Civil Procedure 65.01. The differences in the rule provisions are procedural in nature.

not claim fraud, but suggest that the possibility for fraud existed based on their position that Defendant Mn/DOT did not follow proper procedures in awarding the contract.

"A temporary injunction may be granted if by affidavit, deposition testimony, or oral testimony in court, it appears that sufficient grounds exist therefor." Minn. R. Civ. P. 65.02(b). The party seeking an injunction must establish that the applicable legal remedy is inadequate, and that the injunction is necessary to prevent "great and irreparable injury." *Howe v. Howe*, 384 N.W.2d 541, 544 (Minn. App. 1986) (citing *Cherne Industrial, Inc. v. Grounds & Associates, Inc.*, 278 N.W.2d 81, 92 (Minn.1979)). The Court must consider five factors as articulated in *Dahlberg Bros. v. Ford Motor Co.*, 137 N.W.2d 314 (Minn. 1965), in determining whether the temporary injunction should issue. The *Dahlberg* factors to be considered are as follows:

1. The nature and background of the relationship between the parties pre-existing the dispute giving rise to the request for relief.
2. The harm to be suffered by plaintiff if the temporary restraint is denied as compared to that inflicted on defendant if the injunction issues pending trial.
3. The likelihood that one party or the other will prevail on the merits when the fact situation is viewed in the light of established precedent fixing the limits of equitable relief.
4. The aspects of the fact situation, if any, that permit or require consideration of public policy expressed in the statutes, state and federal.
5. The administrative burdens involved in judicial supervision and enforcement of the temporary decree.

Id. at 321-322.

Caselaw suggests that the likelihood of success on the merits and the respective harms suffered by the parties should be the two primary considerations for the Court in considering the issuance of the temporary relief requested.

Likelihood of Success on the Merits

Plaintiffs' argue that the contract awarded to Flatiron for reconstruction of the I-35W bridge was illegally awarded, and therefore void, because Mn/DOT did not comply with the statutory framework for a best-value design-build procurement.[19] The thrust of Plaintiffs' argument is that Flatiron's proposal was not responsive in that it did not have the required number of webs for a box girder design, and because its proposal for lowering 2nd Street impermissibly extended beyond the right-of-way. As a threshold matter, the Court must consider the meaning of responsiveness in this context.

Plaintiffs' first assert that the long-standing common law definition of "responsive" is the standard which should have been used by the TRC in determining responsiveness; that is, that a proposal is responsive if it materially complies with all provisions of the solicitation documents, in this case the RFP, and that any deviation is material if it gives a proposer a competitive advantage. *Carl Boland & Sons Co. v. City of Minneapolis*, 451 N.W.2d 204, 207 (Minn. 1990); *Foley Bros., Inc. v. Marshall*, 123 N.W.2d 387, 390 (1960).

Flatiron argues that this common law understanding of responsiveness is irrelevant in a "best-value design-build" procurement, based on the language of Minn. Stat. §161.3412 subd. 1, which states "[n]otwithstanding . . . 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 . . ." and upon that of Minn. Stat. §161.3426 subd. 1(a), stating "[the TRC] shall reject any proposal it deems nonresponsive."

[19] Minn. Stat. §§ 161.3412; 161.3426.

Plaintiffs' assertion that any material deviation from the RFP should render a proposal nonresponsive ignores the statutory framework.[20] Responsiveness should 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 commonlaw understanding of that term. The Court 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.[21] The scoring system employed by the TRC, as mandated in the ITP, illustrates the TRC's understanding of nonresponsiveness as any proposal which had an overall failing score, evidenced by the language in the ITP describing the scoring system where a score of 0-49 was a "Fail"; meaning the proposal did not meet RFP requirements or was non-responsive.[22] The status of a proposal as responsive or nonresponsive under this process is a product of the scoring methodology. Responsiveness then is not determined based on a proposal's strict conformity with each and every requirement of the RFP.[23] The evidence provided by Plaintiffs is insufficient to persuade the Court that Flatiron's proposal should have been rejected outright as nonresponsive.

In support of Plaintiffs' argument that the scoring decisions of the TRC were arbitrary and capricious, Plaintiffs' argue that the TRC members did not all fully read the RFP; that the TRC members' notes do not support their scoring decisions; and that the

[20] It is worth noting that 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).

[21] Plaintiffs' recent attempts to have the statute amended reflect their understanding of the broad language found in the statute.

[22] Not a single member of the TRC scored Flatiron's proposal as within this range.

[23] At its core, Plaintiffs' argument amounts to a substitution of their own belief of what was meant by responsive or nonresponsive and the articulation of multiple ways the TRC didn't follow Plaintiffs' understanding of the process.

disparity in the consistently high scores of Flatiron's proposal, versus the universally lower scores given to other proposers, shows bias. The Court does not find these arguments persuasive. The statute did not require that each TRC member review all the RFP documents nor keep comprehensive notes to support their scoring decision; there is precedent for the "disparity" in technical scores, as noted earlier; and there is no evidence of bias.[24]

As to the evaluation criteria, including the criteria of public relations, all proposers were aware in advance of the factors to be considered by the TRC and none objected. The statute that governs the process did not require consideration of specified criteria or preclude other criteria.

The bulk of evidence proffered by Plaintiffs in support of their assertion that Flatiron's proposal was nonresponsive and should have been rejected, is only useful if their interpretation of what is meant by "responsive" is accepted. Given the relative clarity of the statute,[25] and the deference to be given to administrative decisions of this nature, the Court finds this *Dahlberg* factor weighs in favor of denial of the requested injunctive relief.

Balance of Harms

Plaintiffs argue that the application of the "balancing of harms" *Dahlberg* factor is "inappropriate" in this case because they are alleging a statutory, rather than a common

[24] As argued by Flatiron, this disparity, particularly in light of the deference to which administrative agencies are entitled, more properly is evidence of a superior proposal than of collusion. Indeed, there is no evidence that the members of the TRC colluded in any way in computing technical scores for the proposals, and three independent reviews of the evaluation and scoring process concluded that the TRC and Mn/DOT acted within the law.

[25] In the Court's previous order, it was noted that the statute section referenced here (Minn. Stat. §161.3426 subd. 1(a)), was inartfully written as it included language mandating the rejection of nonresponsive proposals while simultaneously giving the TRC broad discretion to determine what is responsive or nonresponsive. However unsatisfied the Plaintiffs may be, that statute, as written, does make the responsiveness determination within the purview of the TRC.

law, violation. However, they offer no support for this proposition under Minnesota caselaw and fail to acknowledge that in promulgating this statute the legislature did not specifically circumscribe the Courts' equitable authority. Plaintiffs further suggest that halting completion of the bridge "does not prejudice the non-moving party" because 65.03 of MRCP requires them "to post security to compensate the enjoined party if the injunction is later found to be unwarranted." They do not however, discuss the issue of the bond that they would be required to post in their moving papers.[26]

Ten months ago the Court held that "the more distinct harm of additional costs and delay to the public and direct harm to the Defendants outweigh Plaintiffs' potential harm." The Court agrees with Defendant Flatiron that Plaintiffs have not produced any appreciable new evidence to support their claims that the balance of harms now favor them. As to the federal cases cited by the Plaintiffs, *Wilderness Soc'y v. Morton*, 479 F.2d 842 (D.C. Cir. 1973) and *Tennessee Valley Authority v. Hill*, 437 U.S. 159 (1978), neither case leads the Court to conclude that Plaintiffs' argument has merit under these facts. Since these cases were decided, the United States Supreme Court, as argued by Defendant Mn/DOT, has retreated from the language in *Wilderness Society*. Even if the Court had found a likely statutory violation, which it has not, such a finding would not automatically mean that it should skip consideration of equitable relief pursuant to analysis of the balance of harms approach. See *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982). The facts in *Wilderness Society* involved the proposed construction of a pipeline with a 200 foot right-of-way in violation of a 54 foot statutory limitation found

[26] It should be stated that the Court has already concluded that "a large bond in the millions of dollars" would be required of the Plaintiffs if the temporary restraining order had been issued in October of 2007. This would be true in the event of a temporary injunction as well. Plaintiffs have failed to provide evidence to counter the estimate provided by Defendants that the cost consequences of an interruption in construction at this juncture would exceed $40 million. (Sanderson Aff. ¶ 5).

in a law passed a half a century earlier. Here, neither Defendant acted boldly in defiance of the relatively recent design-build statute. The likelihood of success of the Plaintiffs on the merits here is not remotely comparable to that of the Plaintiff in that case. As to *Hill*, which involved construction already underway, the basis claimed for that proposed injunction, as noted by Defendant Flatiron, had just been discovered, leading to a shutdown request. The basis for the injunction here has not appreciably changed from last October before construction commenced, and the Court does not find that case instructive under these facts either.

Nothing in the statute or under Minnesota caselaw prevents the Court from considering the balance of harms *Dahlberg* factor in analyzing Plaintiffs' request for a temporary injunction. The Court continues to believe that the harm of additional costs and delay to the public, and direct harm to the Defendants, outweigh potential harm to the Plaintiffs.

Other Dahlberg Factors

As to the other factors to be considered under *Dahlberg*, little has changed in the Court's opinion since the October, 2007 order, rejecting Plaintiffs' request for a temporary restraining order. As to public policy, the Court continues to believe that "a consideration of public policy as codified in the design-build statutory framework, specifically the discretion given to the TRC by the legislature under Minn. Stat. §161.3426 subd. 1(a), weighs against the issuance" of a temporary injunction. Further, the Court cannot conclude that the relationship of the parties favors the issuance of a temporary injunction since the *status quo* at this late stage would in fact be altered by the issuance of a temporary injunction. Finally, the Plaintiffs' cursory conclusion that "to

halt work on the 35W bridge contract will not result in an administrative burden on the Court" is belied by the facts. Plaintiffs suggest that only Defendant Mn/DOT would have numerous headaches, but they fail to acknowledge the likelihood that Defendant Mn/DOT and Defendant Flatiron would look to the Court to help address the disruption inherent in the ceasing of construction of a project of this magnitude.

B. Defendant Flatiron's Motion for Summary Judgment

Summary Judgment Standard

Summary judgment is appropriate when there is no genuine issue of material fact, and a party is entitled to judgment as a matter of law. *M.R.Civ.P. 56.03*. A party opposing summary judgment may not rely merely on its pleadings but must present specific facts demonstrating that there is a genuine issue of material fact. *W.J.L. v. Bugge*, 573 N.W.2d 677, 680 (Minn. 1998). The Court must view the facts in the light most favorable to the nonmoving party. "Where the record as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997).

Injunctive Relief Claim

Related to the request of the Plaintiffs' for a temporary injunction is Defendant Flatiron's request for dismissal of the injunctive relief claims of the Plaintiff. In addition to the reasons already stated which weigh in favor of denial of the request for a temporary injunction, Flatiron argues that Plaintiffs' claim for injunctive relief should be barred because it comes too late; because Plaintiffs delayed unreasonably in seeking equitable relief (laches); and because Plaintiffs' claim is barred by "unclean hands."

In response, Plaintiffs argue that just because the bridge is over 90% complete, injunctive relief is not precluded; that the defense of laches is not available to Defendant Flatiron; and that Plaintiff does not have unclean hands.

As to the issue of the lateness of the request for injunctive relief, Plaintiff did seek such relief unsuccessfully in October of 2007. However, Plaintiffs do not provide any caselaw suggesting injunctive relief remains timely when construction work is substantially complete. Further, Plaintiffs have waited over nine months to renew their request for injunctive relief, in part because they instead sought a legislative solution to the problems they felt were inherent in the design-build statute. The Court agrees that Plaintiffs have failed to show grounds for injunctive relief under these circumstances.

As to the equitable defense of laches, Plaintiffs' suggest that Flatiron's argument fails because it voluntarily intervened in the case and because it has failed to prove "inexcusable delay" or prejudice caused by the delay. Flatiron immediately intervened in this lawsuit, and its position was not "independent" of the pending suit, so the Court believes that Flatiron can raise the defense of laches. Further, it appears to the Court that Defendant Flatiron has shown that a delay of this length is inexcusable given that Flatiron has substantially completed the bridge in the interim. Finally the Court, while not relying solely on the doctrine of laches for its decision, believes that it may consider this defense in ruling on a motion for summary judgment pertaining to injunctive relief. Defendant Flatiron is indeed prejudiced by the delay, if the Court is to consider Plaintiffs' argument that Flatiron is liable for disgorgement of profits.

As to the equitable defense of unclean hands, there is no question that Plaintiff Phillippi benefited to some degree from the bridge construction, however small, while

maintaining a claim of irreparable harm; that Charles McCrossan suggested to a media representative that he initiated the lawsuit on behalf of an unsuccessful bidder, though he didn't "commence" it;[27] and that Plaintiffs have, in the Courts opinion, accurately acknowledged that the real issue is the language of the statute itself, in explaining that they were acting with "the best of motives."

The motion of the Plaintiffs for a temporary injunction is denied. Further, the Court concludes that there are no genuine issues of material fact remaining as it pertains to Count I of Plaintiffs' Complaint seeking injunctive relief. Defendant Flatiron's motion for summary judgment on Plaintiffs' claim for injunctive relief is granted.

Defendant Flatiron's motion for summary judgment on the remaining count of the Complaint seeking declaratory relief remains under advisement.

EJC

[27] The Court would be more inclined to believe that the Plaintiffs are looking out for the "taxpayers" (albeit federal taxpayers, not Minnesota State taxpayers), as they argue, if they had sought refunds of the $500,000 stipend check paid to each unsuccessful bidder, including C.S. McCrossan and Ames/Lunda. As Defendant Flatiron accurately points out, the unsuccessful bids would be deemed "nonresponsive", and thus ineligible for the stipends, under Plaintiffs' analysis.