STATE OF MINNESOTA IN DISTRICT COURT

COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT

- File No. CV-07-3425

Scott Sayer and Wendell Anthony Phillippi,

Plaintiffs, **AMENDED 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.

On August 26, 2008, the Court issued an order denying Plaintiffs' motion for a temporary injunction and granting Defendant Flatiron-Manson's motion for summary judgment on Plaintiffs' claim for injunctive relief. At that time, Defendant Flatiron-Mason's motion for summary judgment on Plaintiffs' claim for declaratory relief remained under advisement.

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 Defendant Flatiron-Manson for summary judgment on Plaintiffs' claim for declaratory relief is **GRANTED**.

2. 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.

3. 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.

THERE BEING NO JUST REASON FOR DELAY, LET JUDGMENT BE ENTERED ACCORDINGLY.

BY THE COURT:

Dated: October 23, 2008

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

MEMORANDUM

BACKGROUND

Following the collapse of the I-35W bridge spanning the Mississippi River in Minneapolis, MN, on August 1, 2007, the Minnesota Department of Transportation ("Mn/DOT") accepted proposals for the construction of the replacement bridge pursuant to the "design-build/best value" statute.[1] While four qualified contractors ultimately submitted proposals to Mn/DOT on September 14, 2007, Defendant Flatiron-Manson ("Flatiron") received the highest technical score from the Technical Review Committee ("TRC") on September 20, 2007. Two of the three unsuccessful proposers, C.S. McCrossan and Ames/Lunda, filed protests with the Minnesota Department of Administration ("MDOA"), which affirmed the decision of the TRC. Flatiron was awarded the contract on October 8, 2007.[2]

On October 16, 2007, Scott Sayer and Wendell Anthony Phillippi ("Plaintiffs") commenced litigation against Mn/DOT seeking injunctive and declaratory relief.[3] Plaintiffs also moved for a temporary restraining order to halt construction on the bridge. A hearing was held on that motion on October 24, 2007. Flatiron intervened as a Defendant in the action pursuant to agreement of the parties at that time. The Court denied the request for a temporary restraining order on October 31, 2007, and Flatiron

[1] Minn. Stat. §§161.3410-161.3428 (2007).
[2] In two previous orders dated October 31, 2007, and August 26, 2008, the Court has detailed the chronology that led to the awarding of the contract to Flatiron-Manson.
[3] Section 3.10 of the Instructions To Proposers ("ITP") (dated September 12, 2007) provided in part that if an unsuccessful proposer did not follow the protest remedies set forth in the Request For Proposal ("RFP") as an exclusive remedy, it could be held liable for expenses, costs, and attorney fees incurred by Defendant Mn/DOT. The section provided that "the submission of a Proposal by a Proposer shall be deemed Proposer's irrevocable unconditional agreement with such indemnification obligation." Perhaps as a consequence, litigation was commenced by two individuals rather than proposers C.S. McCrossan and Ames/Lunda, both of which unsuccessfully protested the awarding of the contract to Flatiron.

proceeded with the construction of the new bridge pursuant to the contract awarded by Mn/DOT.

Plaintiffs appealed the order denying the motion for a temporary restraining order to the Court of Appeals on November 7, 2007. In addition, Plaintiffs sought accelerated review of the same appeal by the Minnesota Supreme Court. The Minnesota Supreme Court denied Plaintiffs' motion on December 11, 2007. Plaintiffs then requested accelerated review by the Court of Appeals. On December 27, 2007, Plaintiffs' appeal was ultimately dismissed.

On July 16, 2008, Plaintiffs filed a motion for a temporary injunction seeking to enjoin the final stages of the construction of the bridge by Defendant Flatiron. On the same date, Defendant Flatiron moved for complete or partial summary judgment. On August 13, 2008, a hearing was held to consider Plaintiffs' request for injunctive relief which was opposed by both Defendants Flatiron and Mn/DOT. At that time the Court also considered Defendant Flatiron's motion for complete or partial summary judgment. On August 26, 2008, the Court denied Plaintiffs' request for a temporary injunction and granted Defendant Flatiron's motion for summary judgment on Plaintiffs' claim of injunctive relief.[4] Defendant Flatiron's motion for summary judgment on Plaintiffs' request for declaratory relief remained under advisement at that time. It is Defendants' motion for summary judgment on that remaining claim of the Plaintiffs that will be discussed in this memorandum.

LEGAL ANALYSIS

Plaintiffs allege that they are entitled to declaratory relief because the award of the contract to Defendant Flatiron was illegal and void based on their belief that the

[4] The contents of the Memorandum issued with that Order are incorporated herein.

award was the result of an "arbitrary and capricious process"; "that it was not supported by substantial evidence"; and that it was "based on the consideration and scoring of a nonresponsive proposal."

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. *Minn. 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).

Scope of Review.

An agency decision will be reversed only when it constitutes an error of law, when the findings are arbitrary and capricious, or when the findings are unsupported by substantial evidence. *Fine v. Bernstein*, 726 N.W.2d 137 (Minn. Ct. App. 2007), review denied. An agency's conclusions are not arbitrary and capricious if a rational connection between the facts found and the choice made is articulated. *Id*. Substantial evidence to support an agency's decision is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id*. An agency decision enjoys a presumption of correctness, and deference should be shown by courts to the agencies' expertise and their special knowledge in the field of their technical training, education, and experience.

Minn. Ctr. For Envtl. Advocacy v. Comm'r of Minn. of Pollution Control Agency, 696 N.W.2d 95 (Minn. Ct. App. 2005).

The Court is in agreement with Defendant Flatiron that Plaintiffs have not produced any caselaw to suggest that judicial deference to agency expertise does not apply when a party moves for summary judgment, nor that this deference disappears when a statutory violation is alleged. Judicial deference, rooted in the separation of powers doctrine, is extended to an agency decision maker in the interpretation of statutes that the agency is charged with administering and enforcing. *Krumm v. R.A. Nadeau Co.*, 276 N.W.2d 641, 644 (Minn. 1979). Consequently, while the Plaintiffs correctly state that the standard for summary judgment is to view the evidence in the light most favorable to the nonmoving party and consider whether there is a genuine issue of material fact, this review is nevertheless conducted within the context of the required judicial deference to agency expertise.

This judicial deference to agency expertise appears to the Court to be particularly important in this case, given the stark differences between the traditional "low-bid" approach (design-bid-build) and the "technical" approach (design-build/best value) utilized here. In the first instance, the statutory emphasis is on price, and all proposers are bidding on the same plans and specifications. In that context, "non-responsiveness" is the failure to assure the agency that the proposer will follow the already completed plans and specifications. Under such a statutory scheme, the agency does not have a great deal of discretion in determining the responsiveness of the proposals.

Under the design-build/best value approach, utilized here by Defendant Mn/DOT in part because of the emergency nature of the need for rapid construction, agency

discretion is inherent in the statutory scheme.[5] This is due in part to the legislative decision to vest discretion in a statutorily created "Technical Review Committee," because no detailed plans are provided to the proposers, nor is there any expectation that identical proposals will be submitted. (Indeed, Defendant Flatiron proposed a more expensive concrete bridge while other proposers submitted steel bridge designs, a proposal Flatiron presumably would not have submitted if a low-bid approach had been used.)

The Court agrees with Defendant Flatiron that "responsiveness", as discussed in the cases submitted by the Plaintiffs, has little application to the concept as used in the design-build/best value statute, under which the agency is granted a great deal of discretion by the legislature. The Technical Review Committee, as created by statute (Minn. Stat. §161.3420, subd. 2), and as empowered by statute [Minn. Stat. §161.3426, subd. 1(a)], was created by the legislature to utilize the individual technical expertise of the members to evaluate the many different types of proposals submitted for responsiveness.[6] Unlike the evaluations conducted under the low-bid approach, these evaluations unavoidably involve discretion. Minn. Stat. §161.3420, subd. 2, outlining the membership of the Technical Review Committee, reflects the legislative conclusion that if such discretion is going to be delegated, it is going to be delegated to a committee that

[5] Plaintiffs clearly understand the discretion vested in the members of the Technical Review Committee under Minn. Stat. §161.3426 (2007). Indeed, at the hearing on this motion, Plaintiffs conceded that "the Plaintiffs have always believed that the statute is ambiguous" (Tran. 8/13/08 Hearing p. 34, lines 2-4); that they "wanted to see what the Legislature was going to do and whether the statute could be fixed and clarified" (Tran. p. 21, lines 5-7); and finally, that "there is a high probability this case wouldn't continue to be on this docket if this had been legislatively dealt with" (Tran. p. 23, lines 22-24).

[6] For the qualifications and experience of the six scoring members of the TRC, see Hamilton Dep. (Vollbrecht Aff., Exhibit E, pp. 5-15); Murphy Dep. (Vollbrecht Aff., Exhibit F, pp. 8-16); Strybicki Dep. (Vollbrecht Aff., Exhibit G, pp. 5-16); Ward Dep. (Vollbrecht Aff., Exhibit H, pp. 5-12); Western Dep. (Vollbrecht Aff., Exhibit I, pp. 5-22); and O'Keefe Dep. (Vollbrecht Aff., Exhibit J, pp. 5-11).

has at least one member who will represent contractors[7] and no member who has any kind of financial interest in any of the firms who submit proposals. The clearest objective criteria that would suggest that the committee was not properly evaluating the responsiveness of the proposers would likely be a significant discrepancy between the score of the contractor's representative and the score of the other members of the committee. While such a discrepancy would not be conclusive proof of an abuse of discretion, it would warrant further inquiry. Here, the contractor's representative's scores were similar to those of the other committee members.[8]

Substantial Evidence/Scoring of Proposal.

Defendant Flatiron argues that there is substantial evidence supporting the decision of the Technical Review Committee, and the Court agrees.[9] All proposers received the same "Proposal Evaluation Plan" and there is no evidence of bias or any other impermissible factors influencing the evaluation or scoring process conducted by the TRC.[10] The process oversight committee conducted an initial review of the proposals for basic compliance with the initial requirements of submission; the legal/finance team conducted a more in-depth review of the proposals for compliance with pass/fail evaluation criteria, and the remaining technical subcommittees (visual quality, geometrics, communications, and quality and structures) independently evaluated the

[7] "The Technical Review Committee must include an individual whose name and qualifications are submitted to the Commissioner by the Minnesota Chapter of the Associated General Contractors, after consultation with other commercial contractor associations in the state."

[8] The representative of the Associated General Contractors rated Flatiron's technical proposal score at 88.50. The scores of the other members of the Technical Review Committee ranged from 87.00 to 95.30. Each member of the Committee gave Flatiron the highest technical proposal score by a wide margin.

[9] Pursuant to Rule 115.03(d) of the General Rules of Practice for District Courts, Flatiron submitted a list of forty-five (45) material facts as to which there is no genuine dispute. Plaintiffs provided no opposing submission.

[10] Plaintiffs suggest that the impermissible factor of "ignorance" influenced the outcome because members of the TRC did not completely read the RFP. There is no statutory requirement that each member of the TRC completely read or be familiar with the RFP, and the Court does not view this fact as an impermissible factor.

proposals for each area of interest and reported back to the members of the Technical Review Committee.

The members of the TRC, after conducting interviews of the proposers, and after discussing the proposals, independently computed a technical proposal score for each of the four proposers.[11] In so doing, they also concluded that all four proposers were responsive, as each had an average technical score of over 50.[12] There is no evidence of collusion or favoritism in the computing of these scores.

After the scores were audited by the process oversight committee, the average technical scores of the TRC, the total cost of the project, and the number of days proposed to complete the project, were released publicly. The price proposals were not opened until after the technical scoring was completed.[13] Given the statutory formula, these numbers were sufficient to determine that the successful proposer was Flatiron.

Defendants have suggested that the scoring was arbitrary and capricious in the area of aesthetics in that the unsuccessful proposers were somehow misled into thinking that, due to concern over cost and time to completion, steel rather than concrete had to be used in the construction of the bridge, while the members of the TRC preferred concrete.[14] There is no evidence to back up this claim. The RFP does not address this

[11] Plaintiffs argue that the scores of the members of the TRC were flawed because some members "could not reconstruct" the basis for specific scores based on notes made on score sheets. The Court does not agree that the failure to "reconstruct" the basis for specific scores to the extent sought by Plaintiffs means that the TRC lacked substantial evidence for its decision.

[12] Plaintiffs suggest that a proposal, even under the design-build/best value approach, must be 100% responsive or be disqualified. Under that standard, none of the proposals were "responsive", including the proposals submitted by C.S. McCrossan and Ames/Lunda. The Court has addressed this assertion in the previous Order and Memorandum issued on August 26, 2008, p. 14.

[13] Vollbrecht Aff., Exhibit O (Dep. Exhibit 225).

[14] "…if they wanted a concrete bridge, why didn't they tell us? We could have added another $20 million in and had a concrete bridge." (Plaintiff Sayer quoting an Ames/Lunda representative.) Vollbrecht Aff. Exhibit D, p. 22, lines 16-19.

issue and there is no evidence that any member of the TRC expressed a personal preference over the primary construction material to be used.

Plaintiffs maintain that Flatiron's proposal was nonresponsive because "it exceeded the project's allowed geographic bounds and it used an impermissible box girder design." The Court has addressed these arguments in the previous Order and Memorandum issued on August 26, 2008, pp. 8-10. The Court concludes that there is substantial evidence supporting the determination of the TRC that Flatiron's proposal satisfied the "3-web" requirement and substantial evidence supporting the determination of the TRC that Flatiron did not violate the RFP right-of-way requirements.

In the final analysis, Flatiron received the highest technical scores in the areas of experience, bridge design, aesthetics, enhancements, and public relations.[15] Defendant Mn/DOT applied the statutory formula that addresses technical factors, cost, and time to completion, and designated Flatiron the successful proposer. There is substantial evidence supporting this selection. Specifically, there is substantial evidence supporting the finding that Flatiron earned higher technical scores than the other proposers; that Flatiron's proposal was responsive, specifically within the framework of the design-build/best value statute which grants discretion to the members of the TRC to decide nonresponsiveness absent evidence of arbitrary or capricious scoring, and there is no evidence of such scoring in this case; and, finally, that Defendant Mn/DOT properly computed the "best value" formula in determining that Flatiron was the successful proposer. In the end, Defendant Mn/DOT had only two choices under Minn. Stat.

[15] Plaintiffs also have objected to the score received by Flatiron for "public relations". Minn. Stat. § 161.3422 does not prohibit the use of public relations as a component in the RFP. In any case, even if that score was not considered, Flatiron would still have been the successful proposer.

§161.3426, subd. 1(d), and pursuant to the terms of the RFP. It chose to award the contract to Flatiron rather than reject all proposals and start over.[16]

Request For Declaratory Relief.

Plaintiffs allege that this case presents a justiciable controversy. Defendants disagree and suggest that given that construction of the I-35W bridge has been completed by Flatiron and that the bridge has been in use since mid-September of 2008, Plaintiffs are seeking an impermissible advisory opinion.

When a lawsuit presents no injury that a court can redress, the case must be dismissed for lack of justiciability. *State ex rel Sviggum v. Hanson*, 732 N.W.2d 312, 321 (Minn. App. 2007). Even a request for declaratory relief requires a case or controversy, and the Court is without jurisdiction when a declaratory action does not present a justiciable controversy. *Cincinnati Ins. Co. v. Franck*, 621 N.W.2d 270 (Minn. App. 2001). Plaintiffs argue that this specific procurement is illegal and that they are entitled to declaratory relief. They do not rely on the argument that the issue presented is capable of repetition but likely to evade review, perhaps in recognition of Flatiron's position that any future procurement decision will depend on the facts and circumstances surrounding each such case. Instead, Plaintiffs argue that they should be provided "specific relief" from a finding that the contract between the Defendants was illegal,

[16] As former Deputy Commissioner Lisa Freese stated: "We never seriously considered" re-bidding the project, "…in reviewing the technical details of the proposal, it was by far the best value of all of the proposals submitted, so that is why we awarded the contract and not rejected the bids." Freese Dep., p. 127, lines 6-10, 20-21.

namely disgorgement of money from Flatiron beyond the "fair and reasonable value" of the I-35W bridge.[17]

In support of this position, Plaintiffs cite *Village of Pillager v. Hewitt*, 107 N.W. 815 (Minn. 1906). In that case, decided over a century ago, a municipal corporation, "based upon equitable principles," attempted to recover the consideration paid by them to the bridge contractor "for building a bridge which was accepted by it, and which fully complied with the terms of the contract" because of a violation of the relevant statute. The Court concluded that "it would be most inequitable and unconscionable to compel the (bridge contractor) to return the money and bonds paid to him" after the bridge had become "public property, which from its nature could not be restored to" the contractor. 107 N.W. at 816. The village did not recover any "disgorged" funds paid to the bridge contractor.

Plaintiffs suggest that this case stands for the proposition that Flatiron would be entitled to "the fair and reasonable value" of the bridge under a quasi-contract theory, but that it would not be entitled to "profits". The Court does not read the *Village of Pillager* decision to so hold. In response, Plaintiffs offered another case at the hearing held on August 13, 2008, *Kotschevar v. North Fork TP, Sterns County*, 39 N.W.2d 107 (Minn. 1949). That case involved an action by a contractor to recover the balance due for construction of a road on the basis of an apparent "hand-shake" agreement, without a written contract.

[17] As to where this "disgorgement" of money would go, it appears that it would go to the federal government, not to the State of Minnesota. The federal government, through the General Accounting Office and the Federal Highway Administration, has reviewed the scoring and evaluation process previously and found the process acceptable. The federal government does not seek disgorgement of any funds paid to Flatiron.

In that case, the Court reiterated that when a contractor performs in good faith, even when statutory provisions governing the letting of contracts are not adhered to, the governing unit is liable for benefits actually received and that all payments legally available under a valid contract remained available for payment to the road contractor on a quasi-contractual basis. 39 N.W.2d at 114. Again, the case does little to support Plaintiffs' argument for "disgorgement" of funds paid to Flatiron pursuant to a contract entered into in good faith and without any evidence of an intent to violate or evade the law.

Defendant Mn/DOT waited to award the contract until both the federal government and the Minnesota Department of Administration conducted their own independent reviews of the contract award to Flatiron and confirmed the legitimacy of the process and the selection. Mn/DOT had the authority to award the contract to Flatiron and, as in *Village of Pillager*, the public, not the contractor, now has possession and use of the bridge and will retain the benefit of Flatiron's services. The payments legally available to Mn/DOT, by way of federal legislation, were paid to Flatiron. Finally, the Court agrees with the Defendants that there is no evidence that payments made to Flatiron pursuant to the contract are for anything other than the fair value of Flatiron's work.[18]

Plaintiffs suggested at the hearing held on these motions that declaratory relief should be available in this instance, even though the bridge has been completed, or there is no recourse for a taxpayer challenging the public bidding process. Specifically, the

[18] Plaintiffs appear to suggest that the contractual provision that awarded Flatiron an incentive bonus for early completion of the bridge constitutes "profits" and could not be reflected in the "fair and reasonable value of the bridge." However, there is no evidence to that effect, and any such incentive must be viewed in light of the additional labor and materials cost inherent in completing the bridge in 11 months. See Foti, "Learning lessons from speedy 35W bridgework." Star Tribune, 10/6/2008.

Plaintiffs suggest that in considering injunctive relief in October of 2007, the Court found that the "balance of harms" factor as articulated in *Dahlberg Bros. v. Ford Motor Co.*, 137 N.W.2d 314 (Minn. 1965) weighed in favor of the public due to concerns about additional costs and delay in the construction of the I-35W bridge if construction was halted. So, the Plaintiffs argue, the balance of harms in bridge construction will often outweigh a taxpayer challenge, leaving only declaratory relief after the fact available.

There are two flaws in this argument. First, in denying the request for a temporary restraining order in October of 2007, the Court also found that the Plaintiffs failed to show "the likelihood of success on the merits," the other of the most critical *Dahlberg* factors. The information currently available to the parties was, for the most part, available to them at that early stage. Other taxpayers challenging other public bidding contracts and armed with more persuasive evidence than these Plaintiffs produced may well succeed in obtaining injunctive relief. Second, these Plaintiffs waited over nine and a half months after the Court's denial of their request for injunctive relief before renewing their motion. Indeed, Plaintiffs' motion was only scheduled after the Defendants had scheduled a motion for summary judgment. If the Plaintiffs had uncovered evidence during those months that made the issuance of injunctive relief more likely, they could have brought a motion before this Court before substantial completion of the bridge. They did not, in part because they correctly perceived that the legislature is the proper forum for the remedy they seek, and presumably also because such evidence is not available. Other taxpayers challenging public bidding contracts may well produce such evidence in support of their challenge, either at the initial stage of the litigation or

soon thereafter. The Court does not agree that taxpayers challenging the public bidding process are without recourse.

CONCLUSION

The Court concludes that Defendant Mn/DOT's determination that Defendant Flatiron was "the responsive and responsible design-builder with the lowest adjusted score" pursuant to Minn. Stat. § 161.3426, subd. 1(d), made pursuant to the findings of the TRC, was not the result of an arbitrary and capricious process, and was supported by substantial evidence. Consequently, the Court declines to substitute its judgment for that of Defendant Mn/DOT in awarding the contract for the construction of the bridge to Defendant Flatiron.

In addition, the Court concludes that the Plaintiffs are not entitled to declaratory relief under the facts of this case. The argument put forth by the Plaintiffs in support of their claim that a justiciable controversy remains and that they are entitled to specific relief in the form of "disgorgement" of "profits" received by Flatiron is unsupported by the case law provided. The result is that the Court is being requested to issue an advisory opinion, which is neither advisable nor provided for under the law.

Defendants' motion for summary judgment on Plaintiffs' claim for declaratory relief is granted.

EJC