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 October 24, 2007 upon the motion of the Plaintiffs for a Temporary Restraining Order.

Dean B. Thomson, Esq., Jeffrey A. Wieland, Esq., and Aaron A. Dean, 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. At the outset of the hearing, Defendant Flatiron-Manson was allowed to intervene as an additional defendant by agreement of the parties.

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 Restraining Order is hereby

DENIED.

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.

IT IS SO ORDERED.

BY THE COURT:

Dated: October 31, 2007

/S/
Edward J. Cleary
Judge of District Court

CHRONOLOGY

- 08/01/07 I-35W Bridge Disaster.
- 08/04/07 Mn/DOT issues Request For Qualifications (RFQ).
- 08/08/07 Statements of Qualifications Received by Mn/DOT.
- 08/23/07 Mn/DOT issues a Request For Proposal (RFP) to five companies deemed qualified.
- 09/12/07 Mn/DOT issues further Instructions to Proposers (ITP).
- 09/13/07 Preliminary meeting of evaluators including six members of the Technical Review Committee (TRC).
- 09/14/07 Four of five qualified responders submit technical proposals. Members of the Process Oversight Committee conduct an initial review of the proposals for responsiveness. All four proposals are determined to have met these initial requirements. Members of the TRC and others review the proposals in depth. The "Legal-Finance Team" makes its report.
- 09/15/07 Review of the proposals continues. The "Communications (Public Relations) Team" makes its report to the TRC, followed by the "Quality (Structural Enhancement) Team" and the "Visual Quality (Aesthetics) Team".
- 09/16/07 Review of the proposals continues. The "Geometric (Roadways) Team" reports as does the "Quality Team".
- 09/17/07 TRC engages in group discussions.
- 09/18/07 Financial and Disadvantaged Business Enterprise (DBE) submissions are made by the responders. Interviews of the responders conducted randomly.
- 09/19/07 TRC members meet for last time to complete discussions, write comments, and submit final scores. Process Oversight Committee member audits and enters scores. Information concerning the average technical scores of the TRC; the total cost of the project; and the number of days proposed to complete the project, is released to the public.
- 09/20/07-10/01/07 Protest made by two of the unsuccessful bidders – C.S. McCrossan and Ames/Lunda to Minnesota Department of Administration (MDOA). Mn/DOT responds on September 28.
- 10/05/07 City of Minneapolis grants approval of Mn/DOT's proposed layout.
- 10/08/07 MDOA releases Protest Determination recommending "that the Commissioner of Transportation affirm the original determination to select the Flatiron proposal consistent with the evaluation team's technical review and application of the design-build statutory formula." However, MDOA also notes that proposals and evaluation data are "sometimes" released – "particularly in instances where unsuccessful vendors have asked to review the data. This frequently satisfies the unsuccessful vendors' concerns in that she or he now sees how the decision was made. If the

vendor remains dissatisfied, she or he can raise their specific concerns before the state has taken on the legal and financial obligations of a signed contract." The Protest Determination went on to advise: "This will be one of the highest-profile procurement decisions that the state will make, and the media and public have raised reasonable questions regarding the 'best value' process applied in this instance. The protesters also raise a valid point regarding the expectation that they assert their claims without access to all relevant information. In light of these unique circumstances, Mn/DOT may wish to issue a 'written acceptance' of Flatiron's proposal (constituting an 'award') prior to signing a contract. Although not required by law, Admin's practice as described above has created the precedent, and Mn/DOT may conclude that an earlier release of evaluation materials would be in the public interest." (Dean Aff. Ex. O).

Ignoring MDOA's "precedent" and advice in the Protest Determination, Mn/DOT not only "accepts" Flatiron's proposal but signs a contract with Flatiron on the same day, October 8, 2007, before releasing the scoring data, the designs, and the technical proposals submitted by all four responders.

- 10/16/07 Plaintiffs file the Summons and Complaint, commencing litigation. Plaintiffs seek injunctive and declaratory relief.
- 10/23/07 Hearing on request for Temporary Restraining Order (TRO) scheduled before Ramsey County District Court Judge Steven D. Wheeler. Wheeler unexpectedly recuses at the hearing.
- 10/24/07 Hearing on request for TRO held before Ramsey County District Court Judge Edward J. Cleary. Flatiron-Manson, a Joint Venture (Flatiron) intervenes in the litigation as an additional Defendant by agreement of the parties. Plaintiffs are allowed to file a reply brief in response to Defendant Flatiron's opposition brief within 24 hours.
- 10/25/07 Plaintiffs file a post-hearing brief with accompanying affidavits. The Court finds that the filings go beyond a reply brief to Defendant Flatiron's opposition brief.
- 10/26/07 In response, Defendant Flatiron is allowed to also file a post-hearing brief and does so. Defendant Mn/DOT is allowed to file a responsive affidavit on October 29, 2007.
- 10/29/07 Defendant Mn/DOT files a responsive affidavit. The Court takes the request for a TRO under advisement.

DOCUMENTS SUBMITTED AND REVIEWED

Plaintiffs:

- Summons and Complaint and Exhibits
- Motion and Memorandum in Support of Motion for Temporary Restraining Order and attachments including affidavits from Randy Reiner, Eric Sellman, and Richard Fahland.
- Affidavit of Aaron Dean with Exhibits A-R (including Exhibit K (RFP)).
- Reply Memorandum to Defendant Mn/DOT's brief.
- Post-Hearing Brief and attachments including additional affidavits from Randy Reiner, Eric Sellman, Richard Fahland, Erik Beggs and Pat Nelson.

Defendant Mn/DOT:

- Verified Answer
- Memorandum in Opposition to Plaintiff's Motion for a Temporary Restraining Order and attachments (including MDOA's Protest Determination) and an affidavit from Jon Chiglo.
- Post-Hearing Affidavit from Jon Chiglo.

Intervening Defendant Flatiron:

- Motion and Memorandum Seeking to Intervene
- Memorandum in Opposition to Plaintiff's Motion for a Temporary Restraining Order and attachments including affidavits from Peter Sanderson and Alan Phipps.
- Post-Hearing Brief

MEMORANDUM

INTRODUCTION

Flatiron-Manson, a joint venture of Flatiron Constructors Inc., Manson Construction Co., Johnson Bros., and FIGG Bridge Engineers, Inc. (collectively "Flatiron"), submitted a bid for a design-build contract to design and build a bridge over the Mississippi river on Interstate 35 West ("I-35W") in Minneapolis, Minnesota.[1] The State of Minnesota, through the Department of Transportation ("Mn/DOT"), awarded the contract to Flatiron over other bids. Scott Sayer and Wendell Anthony Phillippi ("Plaintiffs") are taxpayers in the State of Minnesota and have brought the present action against Mn/DOT seeking a declaratory judgment that the contract awarded to Flatiron by Mn/DOT 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 is therefore illegal and void. Additionally, Plaintiffs seek injunctive relief to prevent Mn/DOT from proceeding with, performing, or paying amounts under, the design-build contract awarded to Flatiron.

FACTS

This dispute arises in the wake of the disastrous collapse of the I-35W bridge spanning the Mississippi river in Minneapolis, Minnesota which occurred on August 1, 2007, resulting in the deaths of thirteen people and injuries to countless others. Assisting the individual Minnesotans and the families who were involved was obviously the paramount focus of the rescue and relief efforts of the people and the institutions of the State of Minnesota reacting to that disaster. Secondary to those most immediate

[1] This new bridge is sometimes referred to as the Saint Anthony Falls Bridge.

concerns, were those surrounding the impact on the transportation infrastructure of the city of Minneapolis and the entire State of Minnesota, as I-35W is a main artery of that system and, as such, its substantial interruption due to the loss of the bridge had serious economic and traffic implications needing to be addressed as expeditiously as possible. Minnesota has a statutory framework which outlines the process to be followed by Mn/DOT when awarding public contracts for construction projects on trunk highways.[2] For the Saint Anthony Falls Bridge project, Mn/DOT adopted a "best-value design-build" procurement process, which is further governed by statute[3] and is an alternative to the lowest responsible bidder approach.[4] In keeping with the need for efficient progress on construction of the new bridge, Mn/DOT issued its Request for Qualifications ("RFQ") to interested contractors for construction of a new bridge within 3 days of the collapse on August 4, 2007. The RFQ included general specifications on the scope of the project. After review of the responses to the RFQ, Mn/DOT issued the more detailed Request for Proposal ("RFP"), which included some of the evaluation methodology by which proposals would be selected, to the five qualified contractors on August 23, 2007.[5] Finally, further Instructions to Proposers ("ITP") were issued on September 12, 2007, to the shortlisted contractors. Four proposals were received by Mn/DOT by September 14, 2007 and included proposals from: Ames/Lunda; C.S. McCrossan; Flatiron; and Walsh/American Bridge.

Minn. Stat. §161.3420, subd. 2, provides that a Technical Review Committee

[2] Minnesota Statutes §§ 161.315 - 161.40 (2007).
[3] Minnesota Statutes §§ 161.3410 – 161.3428 (2007).
[4] Plaintiffs make much of the $57 million disparity between the successful Flatiron bid and the lowest bid received by Mn/DOT which is unhelpful, given that this is a "best-value design-build" procurement, where cost alone is non-determinative.
[5] See Minn. Stat. § 161.3422 (2007).

(“TRC”) shall be appointed by the commissioner and that it “must include an individual whose name and qualifications are submitted to the commissioner by the Minnesota chapter of the Associated General Contractors [(“AGC”)], after consultation with other commercial contractor associations in the state.”[6] The TRC formed to evaluate proposals under the RFP for the Saint Anthony Falls Bridge project included Wayne Murphy of the AGC, and the following 5 individuals: Tom O’Keefe from Mn/DOT; Tom Styrbicki from Mn/DOT; Terry Ward from Mn/DOT; Kevin Western from Mn/DOT; and Heidi Hamilton from the City of Minneapolis. The TRC first met to review the proposals on September 13, 2007.

The evaluation system used by the TRC listed scored categories including quality, aesthetics, geometric and structural enhancements, and public relations. Each of those categories had sub-categories and were scored on a scale of 0 to 100.[7] The scores given by the evaluators for each sub-category were then averaged, and that average was multiplied by the weight assigned to the particular sub-category to determine the final technical proposal scores. 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.”

On September 19, 2007, the TRC submitted the final scores for each of the

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[6] In addition to the TRC, a Process Oversight Committee was appointed, as were five technical subcommittees, to evaluate the proposals and report to the TRC to reinforce the stated purpose of Mn/DOT’s evaluation system “to provide a fair and uniform basis for the evaluation of the design-build proposals” and to “protect the integrity of the process.” (Dean Aff. Ex. C).

[7] 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.

proposals. Those scores, the total cost of the project, and the projected number of days to complete the project were released to the public.[8] Flatiron received the highest technical proposal score and on September 20, both C.S. McCrossan and Ames/Lunda filed protests with the Minnesota Department of Administration ("MDOA"). On October 8, 2007, MDOA released its determination on these protests and recommended the affirmation of the TRC's decision. However, MDOA also observed that evaluation data is sometimes released to satisfy the concerns of unsuccessful bidders by revealing how the decision was made, allowing those bidders to pursue their protest before the State has taken action and incurred "the legal and financial obligations" of a signed contract. The MDOA's determination went on to advise Mn/DOT that it may conclude "that an earlier release of evaluation materials would be in the public interest." (Dean Aff. Ex. O).

Despite MDOA's signal to Mn/DOT that release of the evaluation data prior to execution of the contract may be prudent, Mn/DOT apparently reached a different conclusion as to what "would be in the public interest," and announced Flatiron would be awarded the contract and then executed that contract on the same day, October 8, 2007. Mn/DOT only released the scoring and evaluation data as well as the designs and technical proposals submitted by the qualified contractors in response to the RFP after execution of the contract.

Eight days later, on October 16, 2007, Plaintiffs commenced the present action against Mn/DOT in their capacity as taxpayers in the state of Minnesota alleging that

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[8] The technical proposal scores were adjusted by using the following formula: taking the proposed price ("A") and adding that to the projected number of days for completion ("B") (multiplied by $200,000). That adjusted score is then divided by the technical proposal score ("X"). The lowest score was deemed the best value and awarded the contract. ((A + (B * $200,000))/ X = low score (best value)). The formula thus allowed for what eventually occurred in this case; that is, a high bid with a longer time to completion received the lowest score and became the "best value" due to a high technical proposal score.

Mn/DOT illegally awarded the "design-build" contract for the Saint Anthony Falls Bridge project to Flatiron in contravention of the statutorily mandated process for awarding such contracts.

STANDING

As a threshold matter, Defendants raise the issue of Plaintiffs' standing to pursue this litigation. "Standing is the requirement that a party has a sufficient stake in a justiciable controversy to seek relief from a court." *State by Humphrey v. Philip Morris, Inc.*, 551 N.W.2d 490, 493 (Minn. 1996). A sufficient stake may exist if the party has suffered an "injury-in-fact", or if the legislature has conferred standing by statute. *Id.* The standing requirement also applies to citizens who bring lawsuits in the public interest, in that it requires either (1) damages distinct from the public's injury or (2) express statutory authority. *Channel 10, Inc., v. Ind. Sch. Dist. No. 709*, 215 N.W.2d 814, 820 (Minn. 1974). However, "it is well-settled that a taxpayer may, when the situation warrants, maintain an action to restrain unlawful disbursements of public moneys; to recover for the use of the public subdivision entitled thereto, money that has been illegally disbursed, as well as to restrain illegal action on the part of public officials." *McKee v. Likins*, 261 N.W.2d 566, 571 (Minn. 1977). Defendant Mn/DOT concedes that standing may be granted to a citizen whose interest is in preventing the payment of tax money pursuant to illegal or unconstitutional acts or laws. *Arens v. Village of Rogers*, 61 N.W.2d 508, 514 (Minn. 1953). Mn/DOT also notes that "illegal" in this context, means an "arbitrary, capricious, or unreasonable exercise of power." *Queen City Constr., Inc., v. City of Rochester*, 604 N.W.2d 368, 374 (Minn.Ct.App. 1999) *rev. denied* (Minn.,

March 14, 2000). In support of its position that Plaintiffs do not have standing, Mn/DOT cites an unpublished Court of Appeals decision involving a suspended lawyer's attempt to challenge the cancellation of a service contract with the state's voter registration system. *Nathan v. Ritchie*, 2007 W.L. 1322644 (Minn.Ct.App. May 8, 2007). In that case the Court of Appeals found that the plaintiff had not shown a direct injury distinct from the public's injury; had not identified express statutory authority to bring the action; and had not shown that the state agency had acted illegally.

In response, the Plaintiffs have cited six Minnesota Supreme Court cases issued between 1902 and 1958 for the proposition that taxpayer lawsuits against public bodies and the award of public construction contracts are generally allowed to proceed.

Here, the Plaintiffs have not demonstrated that they have an injury distinct from the public.[9] Defendants urge further that the Plaintiffs should not be allowed to "stand in the shoes of dissatisfied or unsuccessful project contract bidders."[10] Second, Plaintiffs have provided no express statutory authority or constitutional provision that permits them to pursue this litigation. Consequently, Plaintiffs must be able to show, as Defendants suggest, that Mn/DOT acted illegally in the sense of engaging in an arbitrary, capricious, or unreasonable exercise of power.[11] Defendants dismiss Plaintiffs' allegations as

[9] Indeed, Plaintiff Phillippi conceded at oral argument through counsel that he is providing subcontractor services for work already underway on the new construction site, apparently receiving a direct benefit from a contract he seeks to enjoin.

[10] Defendant Mn/DOT disingenuously suggests that unsuccessful bidders were not deprived of the opportunity to contest the Project contract. They were, however, deprived of the details of the proposals and the evaluation data at the time they were allowed to protest. Further, as noted previously, Mn/DOT ignored the advice of the Minnesota Department of Administration, and rather than issuing a "written acceptance" of Flatiron's proposal allowing time for meaningful protests by unsuccessful bidders, signed a contract on the same day.

[11] Plaintiffs claim that they have standing as private attorneys general to pusue this action based on Minn. Stat. §8.31, subd. 3(a). To qualify under that statutory provision, Plaintiffs must show that the private action taken benefits the public and they must allege a violation of Minnesota law. Defendant Mn/DOT concedes that an action of this type arguably benefits the public but argues that no law has been violated. Thus an analysis under this provision also requires a review of alleged violations of law.

disagreements with Mn/DOT's Request For Proposal (RFP). As will be discussed further, Plaintiffs' allege that Mn/DOT acted arbitrarily, capriciously, and unreasonably in failing to deem Flatiron's proposal nonresponsive in violation of Minn. Stat. § 161.3426.

As the Court noted at oral argument, Minn. Stat. §161.3426, subd. 1(a) is inartfully written, providing in part, that "the Technical Review Committee (TRC) **shall** reject any proposal **it deems** nonresponsive," thus combining mandatory conduct with discretionary judgment (emphasis added). While this appears to give the TRC discretion, this provision cannot be read to allow the Technical Review Committee to ignore the requirements found in the remaining portions of subdivision 1 that, "the design-builder selected must be … responsive…." If the legislature had intended that the Technical Review Committee had unfettered discretion, the provision would presumably have read "the Technical Review Committee **may** reject any proposal it deems nonresponsive." On the other hand, if the legislature had intended that the discretion of the Technical Review Committee be severely circumscribed, then the provision would likely have read, "the Technical Review Committee **shall** reject any proposal that **is** nonresponsive." While the latter provision may not appear to be distinguishable from the provision as written, it seems clear the legislature intended to allow the TRC some discretion ("it deems") in judging the nonresponsiveness of proposals, but not full discretion ("shall reject"). Further, the remaining provisions of subdivision 1 provide that the commissioner "shall" select a "responsive" design-builder.

Defendant Mn/DOT argues that, as in *Rukavina v. Pawlenty*, 684 N.W.2d 525 (Minn. 2004), the Plaintiffs' primary issue here is one of "disagreement with policy or the

exercise of discretion by those responsible for executing the law…." *Id.* at 531. However, the other subdivisions of Minn. Stat. §161.3426, subd. 1, provide that the commissioner must select a design-builder who is "responsive," although the statute does not define the term "responsive." Plaintiffs allege that the Technical Review Committee's failure to deem Flatiron's proposal nonresponsive was an abuse of discretion leading to the arbitrary, capricious, and unreasonable act of the Mn/DOT commissioner in selecting a nonresponsive design-builder as the successful bidder.

Given that there is at least some evidence to support Plaintiffs' allegations of "arbitrary, capricious and unreasonable" behavior on the part of Defendant Mn/DOT in violation of Minn. Stat. § 161.3426, subd. 1, the Court concludes for purposes of further analysis that the Plaintiffs have standing to proceed.

LAW

It is presumed that public officials are properly performing their duties when they make decisions as to a particular project that serves a public purpose. *Short v. City of Minneapolis*, 269 N.W.2d 331, 337 (Minn. 1978). Consequently, the scope of review of governmental decisions is narrow, and the District Court may set aside a governmental decision only under specific and well-defined circumstances.

Injunctive relief is an extraordinary equitable remedy that should be granted sparingly. *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 Plaintiffs do not claim fraud, but suggest that a possibility for fraud existed based on their position that Defendant Mn/DOT did not follow proper procedures in awarding the contract.

The injunctive relief sought here by the Plaintiff in the form of a temporary restraining order ("TRO") may be granted by the Court to prevent immediate and irreparable injury, loss, or damage to the moving party. Minn. R. Civ. P. 65.01. 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 TRO 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.

Case law 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.

ANALYSIS

As a preliminary matter, it should be noted that both Defendants challenge Plaintiffs' complaint and suggest that it is unverified and not evidence. Plaintiffs have filed three affidavits in support of their allegations prior to the hearing and have been allowed to file additional affidavits with more specificity from the same affiants along with a post-hearing brief.[12] A review of the affidavits submitted by the Plaintiffs satisfies the Court that the complaint has been verified sufficiently to bring the issues before the Court and to lead to the *Dahlberg* analysis.

1) Likelihood of Success on the Merits.

To summarize, Plaintiffs argue that the Technical Review Committee and the commissioner of Defendant Mn/DOT violated the provisions of Minn. Stat. § 161.3426

[12] Given that Plaintiffs post-hearing filings went beyond that specifically authorized by the Court, the Court allowed Defendant Flatiron to file a post-hearing brief and Defendant Mn/DOT to file an additional affidavit from the same affiant.

by awarding the building contract for the I-35W bridge to Defendant Flatiron. It should be emphasized that Defendant Mn/DOT elected to use Minn. Stat. § 161.3426 in soliciting proposals, which involves a best-value design-build procurement process rather than a lowest responsible bidder approach.[13] In support of their argument that Defendant Mn/Dot was required by Minnesota law to reject Flatiron's proposal as nonresponsive to the RFP, and/or that Flatiron's nonresponsive components should not have received positive scores, Plaintiffs allege specific instances of nonresponsiveness in violation of Minn. Stat. § 161.3426, subd. 1. Plaintiffs' allegations and Defendants' response to those specific charges are as follows:

a) Mn/DOT's RFP required Flatiron to have a minimum of three webs for its concrete box design. Plaintiff argues that since spans one to three of Flatiron's bridge design only have box girders with two, not three webs, Flatiron's proposal is nonresponsive and that it should have been rejected or at least should not have resulted in any positive technical points for Flatiron. In the alternative, Plaintiffs suggest that Flatiron was required to have sought approval from the TRC by way of an Alternative Technical Concept ("ATC") for this "deviation." In support of that position, Plaintiffs offer the affidavit of Randy Reiner, P.E., who is employed by the unsuccessful bidder C.S. McCrossan, Inc.. Reiner maintains that the box girders with only two exterior webs failed to meet "the intent of the RFP." Defendant Flatiron offers

[13] In other words, Defendant Mn/DOT was under no obligation to award the contract to the lowest bidder and could award the contract to the highest bidder, as it did, and still remain well within the parameters of the statute. Apparent confusion over this issue has led some members of the public to believe that an award to the highest bidder was improvident at best and illegal at worst. Improvident, perhaps, but definitely not illegal under this statute.

the affidavit of Alan Phipps, P.E., who helped prepare the bridge design for Flatiron. Phipps maintains that "proposing a total of eight webs, four in each direction, is not a deviation from the RFP's requirement that 'a minimum of three webs are required for concrete box designs.' There was no deviation so there was no need for an ATC."

b) Plaintiffs also contend that Flatiron's proposal requires work outside the public right-of-way in violation of the RFP. Plaintiff relies in part on the affidavit of Eric Sellman, an engineer with the unsuccessful bidder, C.S. McCrossan, Inc. Sellman states that Flatiron was given a "competitive advantage by going outside the defined Right of Way for this project." Plaintiffs also offered the affidavit of Richard Fahland, an engineer with the unsuccessful bidder, Ames Construction, Inc., who states that Mn/DOT personnel confirmed that proposals were to stay within the existing right-of-way boundaries.[14] Defendant Flatiron responds by arguing that while a very small portion of the work may extend beyond the marked existing right-of-way, the actual performance of that work will likely stay "within the marked right-of-way" and that there has been no sign that the work will require the acquisition of any additional right-of-way by Mn/DOT. Further,

[14] Plaintiffs cite oral communications with Mn/DOT employees a number of times in support of their argument that they relied in whole or in part on these oral communications in submitting their proposal. However, § 3.5 of the Instructions to Proposers ("ITP") states unequivocally: "Mn/DOT will not be bound by, and Proposers shall not rely on, any oral communication regarding the Project or RFP documents; and Proposer shall not rely on any Mn/DOT or other communication except the RFP documents, addenda, and clarification notices." (Dean Aff. Ex. J).

Flatiron argues, that if a small amount of additional right-of-way needs to be acquired, it would be at Flatiron's expense pursuant to § 7.5.4 of the RFP. Moreover, Defendant Flatiron notes that both §§ 7.1 and 7.5.4 of the RFP address the right-of-way and appear to anticipate the need for the acquisition of additional right-of-way, which, as noted in Sanderson's affidavit, is done at the contractor's expense. Finally, § 4.3.3.5.1 of the RFP addresses geometric enhancements, and Flatiron suggests that its proposal is directly responsive to these provisions in its drawing and proposal.

c) Plaintiffs also contend that Flatiron was deficient in its organizational chart as it regards quality control/quality assurance ("QC/QA") personnel assigned to the project. Again, Defendant Flatiron counters with the Sanderson affidavit and a copy of the organizational chart, which suggests that the QA/QC are separate and independent from the Project Manager and that the chart addresses the requirements of a direct reporting relationship with Flatiron's executive management. Further, Flatiron maintains that the RFP does not require that the chart actually list Mn/DOT personnel involved in the reporting relationship.

d) Plaintiffs also believe that Flatiron submitted new information during its oral interview with the TRC to correct deficiencies with its proposal. They suggest that this was prohibited by the RFP and that no other proposer was given this opportunity. Defendant Flatiron maintains that nothing in the RFP or Minnesota law prohibited

Mn/DOT from inquiring about the specifics of the quality management plan during the oral interview.[15] Flatiron maintains, by way of the Sanderson affidavit, that the only topics or issues that were discussed had already been addressed in Flatiron's proposal.

e) Finally, as it pertains to the RFP, Plaintiffs argue that Flatiron's proposal was deficient in that it did not identify any "hold points" when construction would stop, be inspected, and be documented before work was allowed to proceed. Plaintiffs rightly frame this as a safety issue, and suggest that it is critical to prevent further infrastructure failures and loss of life. In response, Defendant Flatiron argues that the RFP never mandated that "hold points" be explicitly identified and suggests that the failure to identify specific hold points cannot render a proposal nonresponsive by law. In support of its position, Flatiron offers Sanderson's affidavit noting that Flatiron, in executing the contract with Mn/DOT, expressly agreed to comply with all requirements of the RFP and any "hold point" requirements would be pursuant to that agreement as would required quality audits. Sanderson suggests that he has never seen a requirement to respond specifically and individually to each and every RFP requirement in any public contract. By expressly agreeing to comply with all

[15] Flatiron also points out that § 5.3.1 of the ITP specifically provides that Mn/DOT has the discretion to allow bidders to submit "additional supporting material" to obtain a passing grade on the technical requirements of the RFP. (Dean Aff. Ex. J).

requirements of the RFP, Defendant Flatiron argues that they have complied with this provision.

Plaintiffs further argue that several Minnesota cases involving the awards of public contracts for telephone systems under a "best value" procurement, rather than a low bid procurement, support the overturning of contracts that have been awarded to nonresponsive bidders. *Telephone Associates, Inc., v. St. Louis County Board*, 364 N.W.2d 378 (Minn. 1985) and *United Technologies Communications Co. v. Washington County Board,* 624 F.Supp. 185 (D.Minn. 1985). In response, Defendants cite Minn. Stat. § 161.3426, subd. 1(a), and suggest that the awarding of telephone systems under different statutory provisions are inapposite and unhelpful to an analysis of public bidding on a design-build contract for a bridge.[16]

Plaintiffs' examples of alleged nonresponsiveness on the part of Flatiron are countered by Flatiron's own arguments and affidavits. While the Court has reviewed the evidence provided in support of these allegations and the two cases cited on the issue of "best value" as it relates to the awarding of public contracts on telephone systems, it cannot conclude, based on the information provided, that Plaintiffs are likely to succeed in showing that Defendant Mn/DOT violated Minn. Stat. §161.3426 subd. 1. The Court believes that Defendants have offered reasonable responses to Plaintiffs' claims of alleged deficiencies in Flatiron's proposal. These responses were offered in the form of expert affidavits countering Plaintiffs' experts and specific references to provisions in the

[16] As MDOA notes in its Protest Determination, with a "best value" design-build procurement process, factors other than cost must be weighed. The statutory provisions governing design-build transportation projects (Minn. Stat. §§161.3410-161.3428) attempt to limit the amount of subjectivity inherent in such a weighing.

RFP and ITP. Given this belief, the Court cannot conclude that Flatiron was nonresponsive in its proposal to the extent that the members of the TRC abused their discretion by not rejecting Flatiron's proposal pursuant to Minn. Stat. § 161.3426, subd. 1(a).

Plaintiffs rely heavily on *Griswold v. Ramsey County*, 65 N.W.2d 647 (1954) for their position that Mn/DOT could not "waive" any mandatory requirements under the RFP. They argue that Minn. Stat. § 161.3426, subd. 1(a), does not provide complete discretion to the TRC to define responsiveness in a way that ignores mandatory requirements under RFP. While the Court is in agreement that the discretion of the TRC is not unlimited (see the Court's discussion of that statutory provision in the "standing" section of this Order), it nevertheless concludes that the TRC's discretion, and, consequently, the commissioner of Mn/DOT's discretion, is not as completely circumscribed as Plaintiffs suggest.

As noted earlier, the Technical Review Committee is made up of "at least five individuals" pursuant to Minn. Stat. § 161.3420, subd. 2. In this case, the Technical Review Committee was made up of six members, four from Mn/DOT, one from the City of Minneapolis, and one from the Associated General Contractors.[17] The six representatives of the TRC, including the representatives from the City of Minneapolis and the representative from the Minnesota chapter of the Associated General Contractors,

[17] At the oral argument, this Court noted that one of the Plaintiffs, Plaintiff Phillippi, had been affiliated with the Associated General Contractors at one point in his career, thus proposing that having a representative from that group on the TRC would suggest that at least one independent voice was heard in evaluating the proposals. In response, Plaintiffs filed a post-hearing affidavit of a Pat Nelson suggesting that Mr. Murphy had only worked for the Minnesota Associated General Contractors from 1998 to 2002, and that he has worked only as a consultant since. In addition, the affidavit states that Mr. Murphy worked for Mn/DOT for many years. This affidavit was apparently offered to minimize Mr. Murphy's independent contribution to the TRC. Without more, the Court does not find the affidavit to be of much value to its analysis.

all found Defendant Flatiron to have the highest technical proposal score by far. Flatiron scored highest under all of the technical proposal measures, including quality, aesthetics, enhancements, and public relations.[18]

Indeed, the final technical proposal scores reflect that Flatiron was the overwhelming favorite of each member of the TRC.[19] Much has been made of the fact that Flatiron had the highest bid and the longest time to completion. What does not seem to have been considered fully, however, is that design-build projects are not "low bid" or "fastest to completion" projects. Because Flatiron had such a high technical proposal score, it offset the price proposal and length of time to completion, which led to the lowest score (best value) and the successful bid. As the Protest Determination states, "these wide scoring differences on the technical proposals are central to understanding why the most costly proposal was successful after applying the statutory "best value" formula.[20] (Dean Aff. Ex. O, p. 13).

In summary, as it pertains to the first *Dahlberg* factor, the likelihood of success on the merits, the court cannot conclude that Plaintiffs have shown that they are likely to succeed on the merits and on their claim of arbitrary, capricious, and unreasonable action on the part of Defendant Mn/DOT in awarding the contract to Defendant Flatiron.

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[18] As an aside, the post-contract conduct of the successful bidder, Defendant Flatiron, calls into question whether Flatiron fully understands, as an out-of-state organization, the concept of public relations as it is understood in the State of Minnesota. See Coleman "I-35W bridge is local, but new Flatiron trucks are imported." *Star-Tribune*, 10/23/2007.

[19] The technical proposal average scores were as follows: Flatiron: 91.47 (Excellent); C.S. McCrossan: 69.51 (Good); Walsh AB: 67.88 (Good); Ames/Lunda: 55.98 (Fair).

[20] The Court notes that in the Sellman and Fahland supplementary affidavits supplied by Plaintiffs, two unsuccessful bidders indicate that they were told by unidentified representatives of Defendant Mn/DOT not to mention memorials. Flatiron mentioned memorials in a number of portions of its proposal. The Court has not been made aware of any provision in the RFP that expressly prohibited any mention of a memorial. See also § 3.5 of the ITP, warning proposers not to rely on "any oral communication regarding the Project." (Dean Aff. Ex. J).

<u>2) Balance of Harms</u>

The parties are in agreement that the second most important *Dahlberg* factor is the balancing of harms to the respective parties.

Contrary to the argument of the Plaintiffs, the Court believes that this factor must be viewed independently from the other factors. The Plaintiffs rather circular argument is that because illegal conduct occurred (i.e. that they are likely to prevail), then harms cannot be weighed or balanced. Further, Plaintiffs suggest that any harm to Defendants is essentially self-inflicted. As to the possible financial loss, Plaintiffs argue that Defendant Mn/DOT could possibly save money by now selecting the lowest or lower bidder, and that Mn/DOT has a Termination for Convenience clause limiting its liability to actual out-of-pocket expenses incurred by Flatiron up to the date of termination. Finally, they suggest that a finding by the Court that the contract was illegal may protect Defendant Mn/DOT from liability under the contract.

In response, Defendant Mn/DOT, through Affiant Chiglo, suggests that a combination of total construction delay impact costs and miscellaneous total costs of approximately $10 million would be incurred with a one-week delay and that $47 million would be lost with a six-week delay. Flatiron submits that the high estimate is a result of the upfront expenses incurred for a project of this type.

Putting aside the direct harm to the two individual Plaintiffs, which is minimal, and the harm to Defendant Mn/DOT and Defendant Flatiron, which, while substantial, was brought on in part by Mn/DOT's failure to heed the advice of the Department of

Administration, the real party in interest is arguably the public. Plaintiffs argue that the public will suffer if a contractor is allowed to proceed under an illegal contract. Plaintiffs, however, concede that "the I-35W bridge is part of a major interstate highway, and it is important that it reopen as soon as possible." The target date for completion of the contract now in place is December of 2008. Defendants suggest that any further delay would inevitably push the completion of the I-35W bridge into the spring of 2009. It is likely that any further delay will result in a negative economic impact on the State economy. In addition, if construction of the bridge is delayed, thousands of members of the public who commute may suffer. Given that the Court cannot conclude, based on the evidence before it, that the Plaintiffs are likely to succeed on the merits, Plaintiffs' argument that the alleged illegal nature of the contract should be the Court's primary focus in balancing harms is inapplicable. Since there is not enough evidence in the Court's mind to conclude that the contract is likely illegal, the more distinct harm of additional costs and delay to the public and direct harm to the Defendants outweighs Plaintiffs' potential harm.

3) Public Policy

An analysis of the previous *Dahlberg* factor segues into a consideration of public policy. As stated, Plaintiffs contend that the public has a strong interest in insuring the integrity of public procurement contracts. This is undoubtedly accurate as far as it goes. Defendants counter that the public procurement process was fair and unbiased; that it was upheld after protest by the Minnesota Department of Administration; and that it was

conducted properly pursuant to the legislative expression on the issue, Minn. Stat. §161.3426. Defendants further argue that the public's interest in the orderly and expeditious replacement of the I-35W bridge without further costs and delay outweighs Plaintiffs' argument with regard to the public interest. Again, since this Court has not made a finding that the Plaintiffs are likely to succeed on the merits, the Plaintiffs' version of the public interest cannot carry great weight in this setting. 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 restraining order in this case.

4) Relationship of the Parties

Plaintiffs note, accurately, that this entire litigation may have been avoided had Mn/DOT followed the advice of the Department of Administration, and allowed sufficient time for the public and the unsuccessful bidders to review the data that led to the selection of Defendant Flatiron before Mn/DOT executed the contract on October 8, 2007. While a lawsuit may have occurred in any case, those who brought the lawsuit would not have been forced to bring an action to stop performance of an executed contract, and much of the alleged expense that would occur if a restraining order is issued would not have existed. There is no question in the Court's mind that Mn/DOT acted precipitously in signing the contract with Defendant Flatiron before releasing the underlying data that led to its decision. In doing so, it appears that Mn/DOT was attempting to give the selection of Defendant Flatiron an air of inevitability, and the

result was that Mn/DOT made judicial review virtually certain, while raising the stakes considerably as to the incurring of large damages if the project were to be halted.

Plaintiffs believe that preserving the *status quo* can only be accomplished by issuing a temporary restraining order prohibiting performance of the contract. Defendant Mn/DOT points out that the *status quo* now would be severely altered by the issuance of a restraining order. Mn/DOT argues that Plaintiffs are in effect seeking a *writ of mandamus* which is not appropriate when the issue at stake is within the discretion of a public official. However, the design-build statute, Minn. Stat. §161.3420 curbs the discretion of the public officials involved to such an extent, as noted previously, that the discretion of these particular public officials is not unfettered. Nevertheless, the Court agrees with the Defendants that the *status quo* at this stage would in fact be altered considerably by the issuance of a restraining order. Thus, the Court cannot conclude that the relationship of the parties favors the issuance of a temporary restraining order.

5) Administrative Burdens

Finally, Plaintiffs would have the Court believe that no administrative burdens would result from the issuing of this temporary restraining order, an order which would have the effect of stopping the performance of a quarter of a billion dollar contract to replace the I-35W bridge. Perhaps, as Plaintiffs suggest, violation of such an order "can be easily detected and Defendant parties are subject to sanction," but the Court is doubtful that it would not be drawn into further disputes between the parties, both as to issues raised by the shutting down of the contract and as to further requested judicial

intervention in other disputes surrounding the impending construction of the I-35W bridge. This factor also weighs against the issuance of a temporary restraining order.

BOND

Although the Court need not address the issue of a bond since the *Dahlberg* factors do not weigh in favor of the issuance of an temporary restraining order, it should be noted that the Court disagrees with the Plaintiffs that a nominal bond would have been sufficient if the order had issued. That bond must be "in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained." 65.03(a) Minnesota Rules of Civil Procedure. Clearly, the potential costs and damages to Defendants Mn/DOT and Flatiron resulting from a shut down of the contract currently in place would need to be addressed by a very large bond, in the millions of dollars.

Plaintiffs, in support of their request for a nominal bond in the amount of several thousand dollars, cite a number of federal environmental cases that the Court finds distinguishable. The Court is quite aware of the thrust of Plaintiffs' argument that if the Court were to find the *Dahlberg* factors weighed in favor of a temporary restraining order, then ordering the posting of a large bond would have made such an order illusory, and that as a result, alleged illegal government action could not have been stopped. However, for the reasons previously discussed, the Court does not find that the *Dahlberg* factors weigh in favor of a temporary restraining order and simply notes that a large bond would have been required in this case had the Court decided otherwise.

CONCLUSION

The Court has included a chronology of events, as well as a list of the documents submitted and reviewed, to make a clear record of how events have led to this point. A mere 90 days has elapsed since the collapse of the I-35W bridge, and replacement of that bridge remains a matter of great concern to the public, as does the method by which the successful contractor was chosen.

The Court has concluded that the Plaintiffs have standing to pursue this matter. However, after review of all of the information provided within the framework of the *Dahlberg* factors, the Court has found that it could not conclude that the Plaintiffs were likely to succeed on the merits; that the potential harm to be suffered by the Defendants (and the public) was considerably greater than the potential harm to the Plaintiffs; and, finally, that neither the relationship between the parties, further analysis of public policy, or the issue of potential administrative burdens, weighs in favor of the issuance of a temporary restraining order in this matter.

In the Court's opinion, it is unfortunate that Mn/DOT chose to ignore the advice given to it by its sister agency, the Minnesota Department of Administration. By signing a contract with the successful bidder before releasing the underlying data that led to that decision, Mn/DOT cloaked the decision in secrecy.

Instead, Mn/DOT could have taken the opportunity to explain its decision. This was a design-build award, not a low bid award, and the public is paying a premium in both time and money due to the clear and obvious beliefs of the members of the Technical Review Committee that Flatiron's technical proposal was by far the best submitted.

Selecting an out-of-state contractor who offers the highest bid and projects the longest time of completion is bound to raise questions and concerns. Mn/DOT should have felt secure enough in its selection to allow for a legitimate protest, making all information that led to the selection of Flatiron available to the unsuccessful contractors prior to the execution of the contract. Nevertheless, the Court does not believe, based on the evidence presented, that there is a likelihood that the members of the Technical Review Committee abused the discretion delegated to them by the legislature in Minn. Stat. §161.3420 and §161.3426 in selecting Flatiron as the successful bidder for the construction of the I-35W bridge. For that reason, and for the reasons previously cited, the motion of the Plaintiffs for a temporary restraining order is denied.

EJC