STATE OF MINNESOTA
RAMSEY COUNTY

DISTRICT COURT
SECOND JUDICIAL DISTRICT

In Re Temporary Funding of Core Functions of the Executive Branch of the State of Minnesota Caption Body	Court File No. 62-cv-11-5203 Judge Kathleen Gearin

Brief in support of reconsideration/clarification by the Associated General Contractors of Minnesota and other construction and design industry groups

The Minnesota Chapter of the Associated General Contractors ("MnAGC") is joined in this motion by organizations representing all aspects of Minnesota's design and construction industry (collectively, Minnesota's construction & design "Consortium").[1] The Consortium asks the Court to clarify, or in the alternative reconsider, its June 29, 2011 order (the "Order") to streamline the process of defining the Executive Branch's constitutional obligations as they regard construction and design projects throughout Minnesota.

The Court's order raises the following three issues of immediate concern to the Consortium:

- The Court held that the State's failure to satisfy its funding obligations under certain federal programs violates the Supremacy Clause because the State's duty to fulfill these agreements is a core function. Because the Court has mandated funding for these programs, the Consortium asks the Court to order the Executive

[1] The Consortium consists of the Minnesota chapters of the following national organizations: Associated General Contractors; American Institute of Architects; Association of Women Contractors; American Subcontractors Association; American Council of Engineering Companies, Mechanical Contractors Association; the Solar Energy Industries Association; and the Midwest Chapter of the National Association of Minority Contractors.

Branch to identify such construction and design projects or, alternatively, empower and direct the Special Master to affirmatively identify and order funding for any joint federal and state programs or agreements that the State should fund in order to avoid violating the Supremacy Clause.

- To clarify what is implicit in the Court's order—that the State, in performing its "core functions" must necessarily fund any ancillary operations needed to carry out those functions, even though they may not be considered, by themselves, a "critical core function."

- Clarifying that the Executive Branch has the discretion to issue deductive change orders on any existing contract that has been financed by appropriated funds and use savings from the appropriated amounts to fund the "missing piece" of all stalled construction and design projects—i.e., state administrative and inspection services.

I. Standard for review

This is a motion under Rule 115.11 of the Minnesota General Rules of Practice. As such, this Court enjoys broad discretion to reconsider or clarify its prior order and its decision will rarely be disturbed in the unlikely event of an appeal. *See, e.g., Peterson v. Hinz*, 605 N.W.2d 414, 417-18 (Minn. App. 2000).

II. Based on the Court's finding that the State may be violating the Supremacy Clause, the Order should be clarified in order to establish a protocol for identifying and correcting those violations

In paragraph 24 of the Order's Findings of Fact, the Court stated, "[w]ithout funding as of July 1, 2011, the State will violate the Supremacy Clause of the U.S. Constitution" by not satisfying its funding obligations under certain federal agreements and programs. "The duty to fulfill these agreements, etcetera, constitute core functions for state government under the United States Constitution."

Paragraph 1 of the Order requires the Commissioner of the Department of Management and Budget to "pay for the performance of the critical core functions of government." The Consortium interprets paragraph 1 of the Order to encompass payment of the State's obligations under those federal agreements and programs referenced in paragraphs 24 to 26 of the Court's Findings of Fact.

Having identified a constitutional violation if the State does not fund its portion of required federal programs, the Court could assist all affected by this lack of funding by establishing a protocol for identifying and remedying these violations. Two solutions to this problem suggest themselves. Currently, the Special Master is hearing individual requests for funding on various projects, and she could review any separate request from the parties to each contract in order to determine whether the contract involves a federal program that the State must continue to fund. But this option appears to be the least efficient and likely to impose the most burden on all involved because it only solves any constitutional problems on a piecemeal basis and only for those citizens with the wherewithal and resources to advance their case.

A better option to redress, wholesale, any harm caused by any possible constitutional violation would be to order the Executive Branch to timely identify those federal programs and agreements that the State must fund to avoid a violation of the Supremacy Clause. For example, the Court could use its injunctive powers to issue a mandatory injunction to the Commissioners of Administration or Transportation to identify those projects that involve federal programs that the State must continue to fund. *See Bellows v. Ericson*, 233 Minn. 320, 325-26, 46 N.W.2d 654, 658 (1951); *Hideaway, Inc. v. Gambit Investments Inc.*, 386 N.W.2d 822, 824 (Minn. App. 1986).

Alternatively, an order of mandamus could be based on the Court's previous finding that the State has a duty to fund those obligations. *Breza v. City of Minnetrista*, 706 N.W.2d 512, 518 (Minn.App.2005) (Mandamus appropriate "when the petitioner shows that there is a clear and present official duty to perform a certain act"). The Court's original order appears to establish the factual predicate for mandamus relief: (1) the failure of an official to perform a legal duty clearly imposed by law; (2) a public wrong specifically injurious to petitioner; and (3) no other adequate legal remedy. *Demolition Landfill Servs., LLC v. City of Duluth*, 609 N.W.2d 278, 280 (Minn. App. 2000).

The American Recovery and Reinvestment Act of 2009 (ARRA) and Federal Highway Act are only two examples of federal programs that potentially require State funding under the Court's order. The ARRA program, for example, provides for billions of federal dollars to be spent on, among other things, state infrastructure projects. Minnesota Statutes § 161.36, subd 7., which expires on June 30, 2013, appropriates all federal funds made available to the Commissioner of the Department of Transportation and states that "[t]he money is available until expended," and that "[t]he commissioner shall make every reasonable effort to seek and utilize all funds available under title XII" of the ARRA.

The text of ARRA runs over 400 pages and is supplemented by various guidelines and regulations and, presumably, federal-state agreements about the disposition of those funds. Given ARRA's byzantine nature, the State seems better suited than any individual contractor or designer to explain and account for the State's obligations under ARRA and, more importantly, whether the State's failure to fund the myriad

construction and design projects financed under ARRA violates the Supremacy Clause.

III. The State cannot frustrate the legislative acts and appropriations of prior legislatures by refusing to fund inspection and administrative services necessary for otherwise fully funded construction and design projects

In its July 7, 2011 letter to the Court, the Governor's Office acknowledges that the State's "inspection and administration services" represent a missing piece on every construction project. This "missing piece" is currently at issue in numerous petitions before the Special Master because numerous state-aid city and county projects have stalled in the absence of the State's inspection, permitting, and other administrative services.

Paragraph 38 of the Court's Findings state that the State need not "pay for certain projects such as road construction ... without a specific legislative appropriation." This is true, but not on point in regard to *existing* contracts. Most, if not all, existing construction and design contracts **have already been funded by past legislative appropriations.** MnDOT has allocated these past appropriations to certain contracts. Without the approved appropriations and MnDOT's allocation of it to certain projects, it would have been unconstitutional for the State to enter into the contracts that currently exist. In other words, the appropriations for all the existing state design and construction contracts at issue have already been funded by past legislatures and allocated by MnDOT to existing contracts, and the only reason they are not being performed is that the government has not yet funded the small appropriation necessary for ongoing state administration and inspection required under the contract.

Notably, it would be unconstitutional for the current legislature to pass a law unfunding these current contracts because to do so would unconstitutionally impair existing contract rights. As the Court knows, the federal and Minnesota constitutions prohibit any legislature from passing a law that impairs a contract. U.S. Const. art. I, § 10, cl. 1; Minn. Const. art. I, § 11; *see also Christensen v. Minneapolis Mun. Employees Ret. Bd.*, 331 N.W.2d 740, 750-51 (Minn.1983) (the state must demonstrate, among other things, a significant and legitimate public purpose behind legislation that results in a substantial impairment of contract rights); *see also Zuehlke v. Indep. Sch. Dist. No. 316*, 538 N.W.2d 721, 727 (Minn.App.1995) (stating that courts should "closely scrutinize" state statutes affecting public contracts to ensure that a state is not attempting to escape its financial obligations).

Yet, by not funding a minor portion of the cost necessary to perform the administration of these contracts, the legislature is doing by inaction what it is constitutionally prohibited to do by express action. If the legislature cannot pass a law directly impairing these existing contract rights, the legislature cannot be allowed to accomplish the same thing by not acting. The end result of each approach is the same – impairment of contract – and both are unconstitutional. The Court cannot resolve this unconstitutional impairment by ordering the funding of the minor "missing piece."

IV. The State is denying contractors and designers their due process rights protected by the 14th Amendment to the U.S. Constitution.

While the State may argue that any construction and design projects have been contractually "suspended" by necessity, the factual predicate for the State's right to

do so appears to be missing. Without a basis for suspending these contracts, the State's refusal to fund administrative and inspection services necessary for both sides to perform under those contracts violates the constitutional rights of those contractors and designers that have contracted with the State.

A. Those contracting with the State have a vested property right

"It is recognized that contractual rights are a form of property within the meaning of the due process clause." *C.O. v. Doe*, 757 N.W.2d 343, 349 (Minn. 2008); *see also Bd. of Regents of State Colleges v. Roth,* 408 U.S. 564, 576, 577, 92 S.Ct. 2701, 2709 (1972) (stating that tenured professors have a protected contractual property interest in continued employment). "The due process protection provided under the Minnesota Constitution is identical to the due process guaranteed under the Constitution of the United States." *Sweet v. Commissioner of Human Services*, 702 N.W.2d 314, 319 (Minn. App. 2005), quoting *Sartori v. Harnischfeger Corp.,* 432 N.W.2d 448, 453 (Minn.1988).

Here, there is no question that such contracts exist between the State and many contractors and designers, each of whom has a vested interest in receiving timely payment for the work to be performed under these contracts.

B. The suspension of contracts offends due process

It is axiomatic that due process requires adequate notice and a meaningful opportunity to be heard. Thus, once it is determined that a property interest is at stake, courts must determine what process is due pursuant to the United States Supreme Court test set forth in *Mathews v. Eldridge,* 424 U.S. 319 335, 96 S.Ct. 893 (1976). In applying the *Mathews* test, courts must consider three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest, through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substantive procedural requirement would entail.

Sweet v. Commissioner of Human Services, 702 N.W.2d at 320. "All that is necessary is that the procedures be tailored, in light of the decision to be made, to the capacities and circumstances of those who are to be heard, to insure that they are given a meaningful opportunity to present their case." *Id.*, quoting *Mathews*, 424 U.S. at 332, 335, 96 S.Ct. at 901, 903.

Here, the first provision is met. Contract rights are impacted by the refusal of the State to continue to fund already executed and appropriated contracts. Members of Minnesota's construction and design industry have been deprived of substantial sources of revenue during a harsh economic climate. The contractors and designers, in order to keep their work force, must continue to pay salaries and other costs even if they have no project on which to work.

The second factor also weighs against a total work stoppage. No procedures have been created to address the property interests of contractors or designers. Rather, an across the board decision to suspend construction and design contracts was made without any process at all.

As discussed in the next subsection IV. C, the State, by not funding the necessary administration of these contracts, effectively deprives all contractors and designers of their rights under their contracts without due process.

C. The State has not established that the wholesale suspension of construction and design contracts is in the public's interest or consistent with due process

The State may argue that contractors and designers do not have a property right in their contracts that deserves Constitutional protection under the 14th Amendment because the State retains the contractual right to suspend or terminate them for convenience. This argument is incorrect.

State contracts found to be protected property interests generally fall into two categories:

> [T]he first type arises where the contract confers a protected status, such as those "characterized by a quality of either extreme dependence in the case of welfare benefits, or permanence in the case of tenure, or sometimes both, as frequently occurs in the case of social security benefits." The second, albeit related type of property interest arises where the contract itself includes a provision that the state entity can terminate the contract only for cause.

Omni Behavioral Health v. Miller, 285 F.3d 646, 652 (8th Cir. 2002) (brackets & quotations in original). Here, the contractors' property rights fall into the second category because MnDOT does not have unfettered rights to terminate or suspend the contracts without cause.

While the State may elect to terminate contract for convenience, the contracts still require the State to compensate the contractor for a "convenience" termination. The fact that the contractor or designer is entitled to a monetary payment upon any termination for convenience establishes that the contractor has a vested property right to damages similar to the one created by a contract allowing termination only for cause.

The contractor or designer also has protected contractual property rights even though the State can, in limited circumstances, suspend performance of the

contracts. To put the issue in context, section 1501.02 in MnDOT's Standard Specifications allows the owner to "suspend the work for such periods as deemed necessary due to unsuitable weather, for conditions considered unsuitable for prosecution of the work, or for any other conditions or reasons deemed to be in the public interest."

Accordingly, any suspension of the State's construction and design contracts for transportation requires that suspension "be in the public interest." The State cannot make this showing. The shutdown of Minnesota's construction and design projects do not advance the public interest. Stopping all work not only cripples the construction and design industry, but will result increase the cost of all projects affected because the State will be required to pay for increased costs attributable to delays in the work. Moreover, the current suspension is attributable to political differences between the Governor and the Minnesota's legislature, not because of any overriding public interest. The inability of the State to pass a budget "has, at best, attenuated and dubious connections to the public interest." *Haley v. Pataki*, 883 F.Supp. 816, 822 (N.D.N.Y. 1995). Thus, the State cannot invoke its contractual suspension rights, and the designers and contractors are effectively in the same position of those who have contracts that cannot be terminated except for cause.

Because designers and contractors have protected contractual property rights, the State must not "deprive any person of life, liberty or property without due process of law," yet this is what the State has effectively done by not funding the administration necessary for these existing contracts to be performed. To prevent this unconstitutional depravation of property rights, the State should be ordered to

fund the administration and inspection of the previously funded State construction projects.

V. The Executive Branch has the discretion to issue Change Orders that create a pool of already appropriated and allocated funds, which can be used to fund the "missing piece" of State administration.

The project contracts themselves can provide the needed funding for the State's administrative and inspection services. Therefore, the Consortium asks the Court to clarify that the Governor has the executive discretion, for projects that are *already funded* to eliminate portions of the work through deductive change orders and use the savings to fund the administrative and inspection services necessary to continue these projects through the government shutdown.

Based on the Office of the Governor's July 7, 2011 letter it appears that the Executive Branch may not appreciate the discretion it possesses to fund construction and design projects despite the current budgetary impasse. In its letter, for example, the Governor raises concerns that it has no legal basis for using deductive change orders to obtain funding for inspection and administrative services because such action would amount to "new law." Second, the Governor's Office raises the concern that funding required inspection and administrative services would "force the Court to intrude" on those activities and, therefore, place unnecessary administrative burdens on this Court.

But state and federal law, and this State's own contracts, recognize the government's broad executive right to order changes in the scope of a contract, including deductive changes. In fact, the Governor's Office could free up already

appropriated and allocated funds by deleting portions of the project under the contract's "changes" clause.

For example, the Standard Specifications incorporated into every contract administered by the Minnesota Department of Transportation expressly reserve the right to order changes in the contract, including eliminating portions of it, through a deductive change order. This right is spelled out in Section 1402:

> **1402.1 ALTERATION OF THE WORK**
>
> The Department may alter the details of construction as necessary for proper completion of the Project and as desired for reasons of public interest. Alterations may be made at any time during the progress of the work, but will not involve added work beyond the limitations imposed by law, nor beyond the termini of the proposed construction except as may be necessary to satisfactorily complete the project.
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> A. Altered Work
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> The work as altered may:
>
> (1) Require performance of increased or decreased quantities,
>
> ...
>
> (4) Eliminate unnecessary Contract items, subject to 1905.
>
> **1402.2 CHANGED CONDITION**
>
> ...
>
> C Significant Changes In The Character of Work
>
> The Engineer reserves the right to make, in writing, at any time during the progress of the work, such changes in quantities and such alterations in the work as are necessary to satisfactorily complete the Project. Such changes in quantities and alterations shall not invalidate the Contract nor release the Surety, and the Contractor agrees to perform the work as altered.

(Underlining added).

The Governor's Office is right to be cautious and "tread lightly" when proceeding during the shutdown. This is why the Consortium believes it is vital for this Court to make clear, for the benefit of the Governor, that it is not unconstitutional for the Executive Branch to exercise this contractual discretion.

To be clear, the Consortium is not asking for an order requiring the Executive Branch to use this discretion. After all, it would not be "discretion" if it were required. Instead, the Consortium is only asking that the Court make clear that the Executive Branch has the power to use appropriated and allocated dollars through deduct change orders for other contract purposes. The Consortium is confident that the Executive Branch will wisely use that discretion once the Court rules that it is available. By extension, the Consortium is not asking the Court to involve itself in managing how the Executive Branch uses this discretion on each project. Once the Court declares that the discretion exists, the Court no longer needs to be involved in how the Executive Branch wields it.

Conclusion

For these reasons, the Minnesota Construction & Design Consortium asks the Court to clarify its June 29, 2011 order as follows:

- Mandating that, within 7 days, the State affirmatively identify to the Special Master and fund those design and construction programs or agreements referenced in paragraphs 24 to 26 of the Court's June 29, 2011 Findings of Fact.

- Mandating that the State must fund any administrative and inspection services necessary for the performance of any State construction and design contracts because to withhold funding would violate the constitutional prohibition against the impairment of contracts and procedural due process.

- Clarifying that the Executive Branch has the discretion to fund the "missing piece" of all stalled construction and design projects—i.e, administrative and inspection services—through deductive change orders on projects that already have been funded by past appropriations.

Respectfully submitted,

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