



---

St. Anthony Falls (I-35W) Bridge Replacement Project

Protest Determination

Submitted by:

Kent Allin, Chief Procurement Officer  
Betsy Hayes, Contracts Manager  
Department of Administration  
Materials Management Division

October 8, 2007

# ST. ANTHONY FALLS (I-35W) BRIDGE REPLACEMENT PROJECT

## PROTEST DETERMINATION

### EXECUTIVE SUMMARY

Significant findings and conclusions of this report:

- All responders are experienced and capable designers and builders of bridges.
- Mn/DOT followed the “best value” design/build selection process as prescribed in state law. This process ultimately determines a successful responder based on a predetermined statutory formula that considers both cost and technical evaluations.
- Each of six technical evaluators, including the representatives from the City of Minneapolis and the Associated General Contractors of Minnesota (AGC), rated the Flatiron proposal significantly higher than any other responder.
- Protesters assert that they were misled to believe that the cost and construction schedule were the key objectives. Although those are key objectives, the Request for Proposals (RFP) detailed other essential criteria (e.g. design, safety, impact on other roadways, community involvement, etc.) and precisely how all these elements would be weighed in the final formula.
- The process, as implemented, adhered faithfully to the details published in the RFP for all prospective responders.
- Although reasonable people may be disappointed that the lower-cost responders were not selected as the “best value,” Mn/DOT’s two statutorily lawful options are to either negotiate a contract with the top-ranked responder or reject all responses. Other reasonable people may conclude that advantages and strengths of Flatiron will be worth the extra costs of its proposal.
- Investigation of this protest revealed no evidence of predisposition to select a concrete bridge rather than a steel bridge as alleged by the protesters.
- Protesters suspected that evaluation criteria tied to aesthetics and public relations resulted in Flatiron’s first place finish and argued that public relations services should not have been included in a design/build project. However, investigation showed that removing all scores in either one or both of these two areas would have had no impact on Flatiron’s first-place finish.
- Mn/DOT has applied state data practices laws to its treatment of vendor responses and evaluation materials. However, after concluding its negotiations with Flatiron, Mn/DOT will have some flexibility to release previously nonpublic data before signing a contract if it so chooses.
- Efforts have been made to assure the objectivity of the evaluation of this protest, including walling off the protest officials from all elected and appointed individuals.
- No formal judgment is made with respect to the protesters’ belief that they are entitled to additional due process in the courts.
- All evidence known to the protest officials clearly indicates that Mn/DOT staff and their partners from the City of Minneapolis and the Associated General Contractors of

Minnesota, conducted this evaluation process with seriousness of purpose, professionalism and integrity.

- No aspect of this process, including the selection of Flatiron as the top-ranked responder, is found to have been arbitrary or capricious.

## **INTRODUCTION**

In advance of addressing the substantive issues regarding the evaluation process, it is important to discuss a few preliminary points. First, the protest letter highlights that C.S. McCrossan and Ames/Lunda are experienced and qualified companies and, consequently, should have received higher ratings. Mn/DOT confirmed its positive view of these businesses by certifying their qualifications to participate in the second phase of the selection process. Nothing in this evaluation process should be interpreted to suggest that these businesses will not continue to serve the state well as top-ranked responders in future design/build initiatives. Evaluation criteria tend to be case-specific and focus more on the detailed needs of a particular project rather than on a company's overall capabilities and reputation. If McCrossan or Ames/Lunda had proposed a different configuration of personnel and/or different design concepts, either might well have become the top-ranked responder for the St. Anthony Falls Bridge. In fact, had Flatiron not responded, McCrossan, as the second highest-rated responder, would now be the prospective awardee.

Second, the public and the media are asking a very reasonable question: "How does the highest priced proposal with the longest construction schedule end up in first place?" Indeed, on its face it is counter-intuitive for this result to have occurred. It necessitates a discussion about the procurement method that was used in this selection process and the term that the media and others have been talking about – "best value." It is hoped that once this report is reviewed in full, it will create a better understanding of how price and qualitative factors work together to arrive at a result that takes into account not only the monetary aspect of a proposal, but other factors that are critical to the success of a project and bear directly on the total cost of ownership over the life of the state's investment.

Finally, it goes without saying that the enormity of the I-35W bridge tragedy has understandably resulted in unprecedented scrutiny of every aspect of the removal and rebuilding processes and has been the focus of intense public dialogue. Consequently, it is essential to provide assurance that significant efforts have been made to ensure that this protest response is as independent, objective and free of politics as possible. Specifically, the individuals signing it are its sole authors. Both are civil service employees who are protected in their jobs even if they happen to displease their agency head or other stakeholders. No elected or appointed officials were involved in any way with this document's content. None attempted to influence the outcome. None requested or received a draft copy. None were aware of the findings and conclusions prior to its publication. The only other individuals who saw this document prior to its release were legal counsel assigned to this matter by the Office of the Attorney General and a state manager and an in-house legal resource in the Administration Department's Materials Management Division who reviewed for form and clarity.

## **THE PROCESS**

Because protesters have asserted that the state's actions were arbitrary and capricious, a review of the evaluation process may be instructive. A detailed description follows.

A preliminary meeting of the individuals involved in the evaluation process was held on Thursday, September 13, 2007, from approximately 1:00 p.m. to 2:30 p.m. This meeting entailed a gathering of nearly 30 people who were about to engage in an evaluation process that is likely unequaled in Minnesota in terms of public interest and level of scrutiny. The attendees at the meeting included the actual scorers, a group called the "Technical Review Committee" (TRC), along with its technical advisors. The TRC is comprised of six individuals from both state and non-state organizations. The TRC members are well credentialed with engineering degrees, various advanced degrees in areas such as structural and infrastructure systems engineering, and decades of relevant experience among them.

The meeting further included members of the "Process Oversight Committee" as well as individuals serving on five separate "Technical Subcommittees" (referred to hereafter as "teams") comprised of subject matter experts in the areas of visual quality (aesthetics), geometrics (roadways), communications (public relations), quality and structures, and legal/financial. These groups were brought together at the September 13 meeting to kick off the proposal review process, execute confidentiality forms, receive an overview of the project, and engage in a walk-through of the evaluation manual that they were to follow.

The evaluation manual, called the "Proposal Evaluation Plan," contained detailed information and forms including an introduction and purpose statement, nondisclosure requirements, itemized responsibilities of the various groups, and detailed instructions regarding the evaluation procedure. The Plan also contained an organizational chart of the evaluation organization and eight separate appendices that would be used to aid in the process. These appendices included forms to be used by the teams to detail strengths and weaknesses of the proposals, guides that described the various qualitative assessment ratings achievable, and score sheets that would be used by the TRC after the review and input from the teams was complete.

Each of the four short-listed responders timely submitted their technical proposals the next day, September 14, 2007, between 7:00 a.m. and 8:00 a.m. Immediately after the receipt of the proposals, members of the Process Oversight Committee conducted an initial review of the proposals for responsiveness. This review entailed a preliminary check for compliance with such things as timely submittal, adherence to page limits, number of copies required, whether CDs had been provided as required, whether the appendices were included and properly completed, and other initial matters that needed to be assessed before proposals could be passed along for further review. All four proposals were determined to have met these initial requirements. Beginning at 12:00 p.m. that same day, all members of the TRC, the subject matter experts, and all of the technical teams proceeded to their separate assigned rooms to begin their reviews of the four proposals.

The legal/finance team completed its review late in the afternoon of September 14<sup>th</sup>. The team had reviewed each proposal against a three-page checklist that encompassed a broader review than had been conducted when the proposals were received. The review entailed making sure the proposals included the required elements and sections, that the responders had delivered adequate surety commitments, that none of the major participants and key personnel had changed, and that all required forms, certifications and other documents were complete, accurate and responsive. The legal review prompted several requests for clarification from several responders along with interviews to assess conflict of interest potential, all of which were well-documented and reasonably handled.

All teams except for the legal/finance team assembled at the Transportation Building the next morning, Saturday, September 15<sup>th</sup>. All of the subcommittees again gathered in different rooms and continued their respective reviews and discussions throughout the morning. All teams were instructed to take the time they needed to conduct a thorough review. The Communications Team (also referred to as Public Relations) was the first to indicate it was ready to report to the TRC. The Communications Team provided written remarks to the TRC detailing perceived strengths and weaknesses of each respective proposal. The Communications team also verbally discussed its impressions of each proposal in this area and responded to questions posed by the TRC.

By late afternoon that day, the Quality Team had presented its report to the TRC as it related to the structural enhancement section of the RFP, and the Visual Quality Team (also referred to as Aesthetics) had also presented its observations. In light of the hour, and the fact that both the Quality and Geometrics Teams needed additional time to complete their evaluations, the teams agreed to assemble two hours earlier on Sunday than had been previously planned.

Late Sunday morning, September 16<sup>th</sup>, the Geometrics Team (also referred to as Roadways) presented its observations to the TRC. Several hours of questions and discussions took place. The Quality Team needed additional time for its group discussions and review and did not report to the TRC until late in the afternoon on Sunday. The TRC members utilized this gap in time, as well as previous gaps, to continue their own independent reviews and to study the information provided by the teams that had already presented their observations.

On Monday morning, September 17, 2007, the TRC convened to begin its group discussions of the proposals. These discussions took place well into the evening and culminated with discussion of questions necessary for the next day's interviews. The following morning, price proposals and Disadvantaged Business Enterprise (DBE) submissions were due between 7:00 a.m. and 8:00 a.m. Submissions from all four responders were timely. At 9:00 a.m. interviews of the responders began. The order of interviews was determined randomly by drawing from a hat. Each responder was engaged in one hour and fifteen minutes of questions and answers, followed by an opportunity for each responder to narrate a computer-generated visualization of its proposed structure. Given that two of the responders shared a common Public Information Coordinator, this person was asked to sit outside the room during the first firm's Q & A process (with the option of calling her in if the responder decided they needed her to respond to a question), because many of the questions were being asked of all responders. This step was taken to avoid the potential that the second firm would be given an unfair advantage.

The next day, Wednesday, September 19, 2007, the evaluators met for the last time to complete discussions, write out comments on their score sheets, and submit their final scores. Discussions occurred for several more hours that morning followed by each TRC member independently writing comments and deciding on his or her final scores. As score sheets were handed in, a Process Oversight Committee member reviewed the scores to make sure that numbers were properly transferred from the 11x17 individual rating/scoring sheets to the 8-1/2x11 scoring summary sheets. After a Process Oversight Committee member audited each set of scores, the scores were given to members of the technical advisory team who entered the numbers into a spreadsheet as they were presented.

At 3:00 p.m. that day, a public event entailed the release of the following information for each responder: 1) the average technical scores of the TRC; 2) the total cost of the project; and 3) the number of days proposed to complete the project. These numbers provide all the data necessary per the statutory formula to identify the apparent winning proposal and this was done electronically, live, before the proposers themselves and other members of the media and public. The joint protest was received within 24 hours thereafter.

## **THE PROTEST**

An error in the written protest procedures made unclear the deadline for filing a protest of the apparent award with the protest official. The initial protest letter was received within 24 hours after the opening of the price proposals, which is the earliest point in time the language in the RFP could have been interpreted to require. To resolve the error, all responders were notified that they would be given until Tuesday, September 25, 2007, to submit a protest, if they felt it was warranted. Within that timeframe, no additional protests were received; however, a supplement was provided by the same responders elaborating on the issues raised in the initial protest. The initial letter and its supplement were both received as timely with respect to any issues addressing the pending award. A response from Mn/DOT was received on September 28, 2007, as well as a third letter from the protesters on October 1, 2007. All correspondence has been reviewed and made part of the record. Because the supplemental information provided by protesters is an elaboration of the first letter, all letters are hereinafter referred to collectively as “the protest.” For the sake of clarity and in an attempt to provide a comprehensive, responsive report, issues are addressed in the order presented by the protesting parties.

### **1. C.S. McCrossan and Ames/Lunda Protest MNDOT’s Refusal to Release the Detailed Scoring of the Respective Proposals for the Project.**

As with numerous other statutes, Minnesota’s data practices laws attempt to strike a reasonable balance among a number of conflicting interests. With respect to prospective vendors’ responses to RFPs and the resulting evaluation data, the public clearly has a right to know what various prospective vendors offered and how the state made its decision with respect to which response provided the “best value.” However, state agencies also have a strong interest in not disclosing that information until they are certain that a contract will be awarded and to whom. Similarly, prospective vendors have an interest in assuring that their competitors do not have access to their

proposals or the state’s judgments on their strengths and weaknesses until the competitive process has been fully concluded.

Until scope, pricing, options and all other terms and conditions are agreed to in a signed contract document, there is no certainty that a contract will even be awarded. If final terms and conditions cannot be agreed upon with the prospective awardee, state agencies will in some instances proceed to negotiate with the second-place responder. In other situations, they may reject all responses and start the process over. If the latter occurs – which is an option specifically allowed under the terms of the Mn/DOT RFP – the resolicitation could be fatally compromised by the premature disclosure of information.

In this instance, Mn/DOT has reasonably interpreted the statutory requirements in its determination not to release the requested information until after the evaluation process (defined as the point in time when negotiations are complete) and an award is made. Mn/DOT is bound by the state laws that attempt to balance the competing interests described above.

That being said, there is some ambiguity in the statutes that allows a degree of flexibility after negotiations have been completed with the selected vendor. Most typically, the first “written acceptance” of a vendor’s proposal is the actual contract. However, the relevant statutes are not that precise. After negotiations are completed, the Department of Administration (Admin) will sometimes release proposals and evaluation data before signing a contract – particularly in instances where unsuccessful vendors have asked to review the data. This frequently satisfies the unsuccessful vendor’s 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 following provisions within the chapter on Government Data Practices control the situation [emphasis added]:

**13.72 TRANSPORTATION DEPARTMENT DATA.**

Subd. 11. **Design-build transportation project.** When the Department of Transportation undertakes a design-build transportation project as defined in section 161.3410, subdivision 6 , the statement of qualification evaluation criteria and scoring methodology, statement of qualification evaluations, technical proposal evaluation criteria and scoring methodology, and technical proposal evaluations are classified as protected nonpublic data with regard to data not on individuals and as confidential data on individuals. The statement of qualification evaluation criteria and scoring methodology and statement of qualification evaluations are public when the Department of Transportation announces the short list of qualified contractors. The technical proposal evaluation criteria, scoring methodology, and technical proposal evaluations **are public when the project is awarded.**

**13.591 BUSINESS DATA.**

Subd. 3. **Business as vendor.**

\* \* \*

(b) Data submitted by a business to a government entity in response to a request for proposal, as defined in section [16C.02, subdivision 12](#), are private or nonpublic until the responses are opened. Once the responses are opened, the name of the responder is read and becomes public. **All other data** in a responder's response to a request for proposal **are private or nonpublic data until**

**completion of the evaluation process. For purposes of this section, "completion of the evaluation process" means that the government entity has completed negotiating the contract with the selected vendor.** After a government entity has completed the evaluation process, all remaining data submitted by all responders are public with the exception of trade secret data as defined and classified in section [13.37](#). A statement by a responder that submitted data are copyrighted or otherwise protected does not prevent public access to the data contained in the response. If all responses to a request for proposal are rejected prior to completion of the evaluation process, all data, other than that made public at the response opening, remain private or nonpublic until a resolicitation of the requests for proposal results in completion of the evaluation process or a determination is made to abandon the purchase. If the rejection occurs after the completion of the evaluation process, the data remain public. If a resolicitation of proposals does not occur within one year of the proposal opening date, the remaining data become public.

Subd. 4. **Classification of evaluative data; data sharing.** (a) Data created or maintained by a government entity as part of the selection or evaluation process referred to in this section are protected **nonpublic data until** completion of the selection process or **completion of the evaluation process** at which time the data are public with the exception of trade secret data as defined and classified in section [13.37](#).

The protesters assert that the contract has been “constructively, if not actually awarded.” They further argue that a “de facto contract award was made.” However, the relevant statutes do not make such a distinction. They do however define an “award” as follows:

#### **16C.02 DEFINITIONS.**

Subd. 3. **Award.** "Award" means a commissioner's written acceptance of a bid or proposal to provide goods, services, or utilities.

To date, there is no “written acceptance” of Flatiron’s proposal. The provisions cited above acknowledge that until a meeting of the minds has been documented in writing, things can and frequently do change. This is consistent with Mn/DOT’s use of the phrase “apparent bid winner” in its press release of September 19, 2007. Because the data practices laws are not optional, Mn/DOT is required to treat the requested information as non-public until the Commissioner has issued a written acceptance of the bid and has completed negotiating the contract with the selected vendor.

Furthermore, in asking for remedies to alleged process flaws, the protesters effectively concede that the issue of the awardee is not fully settled. Specifically, the protesters assert that the technical scores should be re-evaluated and “these new technical scores could then be used to determine the award” – presumably to a responder other than the current highest-scored responder. Alternatively, the protesters ask that “all proposals be rejected and the procurement be resolicited with different technical criteria and weighting.” Although contending that the contract has been “effectively” awarded, the protesters are clearly envisioning viable outcomes that do not involve the award to Flatiron.

There may be no perfect time to release the requested information, but the legislature has attempted to balance competing public interests and has provided instruction to Mn/DOT that it is required to follow. Mn/DOT is clearly attempting to do so, and its actions and decisions with respect to release of information are consistent with a reasonable interpretation of relevant statutes.

Nonetheless, 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.

## **2. C.S. McCrossan and Ames/Lunda Protest the Arbitrary and Capricious Scoring of Their Proposals.**

The protest asserts that in light of what is known about the protesters’ national reputations and experience “any scoring...that gave materially different scores in the areas of experience, competence, personnel, quality control or safety programs is...arbitrary and capricious.” Further, the protest alleges that “as the proposers must (or should) have had scores similar to Flatiron’s in the areas of experience, competence, personnel, quality control, or safety programs, the difference in scoring must have been in the area of aesthetics or public relations.”

The underlying record shows that the various responders *did* receive materially different scores in most of the noted quality areas including experience, authority, and quality control. The record also demonstrates that the difference in total scores was not simply attributable to the scores given in the areas of aesthetics or public relations.

In response to the more general allegation that the scoring was arbitrary and capricious, it is helpful to look to Minnesota case law to gain a better understanding of what is meant by the commonly used phrase “arbitrary and capricious.” The Minnesota Supreme Court has stated that conclusions are not arbitrary and capricious so long as a rational connection between the facts found and the choice made has been articulated. *In re Excess Surplus Status of Blue Cross & Blue Shield of Minnesota*, 624 N.W.2d 264, 277 (Minn. 2001). In other cases, the court has held that an agency’s decision is arbitrary and capricious if it is an exercise of the agency’s will, rather than its judgment, *Markwardt v. State, Water Resources Bd.*, 254 N.W.2d 371, 374 (Minn. 1977), or if the decision is based on a whim, or is devoid of articulated reasons. *Mammenga v. State Dept. of Human Services*, 442 N.W.2d 786, 789 (Minn. 1989). In this case, the procurement file shows that the scores were exhaustively supported by detailed comments that provided a rationale for the individual scores. The following provides a summary of aspects of the supporting documentation, but does not attempt to capture the very complete and comprehensive details that a review of the full record reveals.

### **QUALITY**

Under the category of quality, the evaluators assessed four sub-criteria, which in total comprised 50 of the 100 available points. The first sub-criterion the evaluators assessed involved the experience and authority of key individuals. This specific area was worth 20 of the 100 points. Flatiron received an average of 18.83 out of the possible 20 points. In other words, Flatiron

achieved an average of 94.2 percent of the available points in this category. Independently, all six evaluators ranked Flatiron the highest in this category. The next closest responder, Walsh/American Bridge, achieved an average of 71.7 percent of the possible points in this area. The comments cited in support of Flatiron's score include notes on the extent project members have worked together in the past, the level of authority believed to be vested with the project manager, leadership qualities in individuals, and the overall portrayal of a likelihood of success on this project. Concerns raised with respect to lower scoring proposals in this area included such things as an individual's lack of experience on a major river crossing project, comparatively less experience working together as a team, and a lack of communicated emphasis on quality.

Also under the category of quality, the evaluators assessed the extent of quality control/quality assurance. Specifically, the responders were asked to describe the design and construction relationships necessary to meet the project goals. This criterion was worth 10 points out of the possible 100 points. Flatiron achieved an average of 8.8 points in this area, and again had the highest combined average of 88 percent of the total possible points. The next highest responder, C.S. McCrossan, averaged 71.2 percent. Four of the six evaluators ranked Flatiron the highest in this area with one evaluator giving equal points to Walsh and another evaluator giving a higher score to the C.S. McCrossan team. Comments supporting favorable scores in this area included awards received, the degree to which professional staff would be on site, the degree of integration between design and construction, and the overall communicated emphasis on quality. As to less favorable comments for the lower scoring proposals, several reviewers commented on lack of coordination and interaction between design and construction teams as well as an apparent lack of understanding of the Mn/DOT processes. One reviewer noted that a responder's team seemed disorganized.

The third subcategory under the umbrella of quality was the topic of safety. Proposers were instructed to include their approach and commitments toward implementing a safety incentive program on the project. This category was also worth ten points. Flatiron received the highest score in this area by only two of the six evaluators. Two evaluators scored Ames/Lunda higher in this category and two others gave equal scores to Ames/Lunda and Flatiron. However, Flatiron still received the highest overall average in this category earning 86 percent of the points, but was followed by Ames at a very close second with an average of 85.7 percent. Positive comments included awards received in this area, past bridge experience of the safety officer and comprehensive scope of training. Negative comments resulting in lower points for one or more responders included fewer safety audits, less involvement of subcontractors, and concerns regarding the level of pre-work training.

The final category in the quality area involved a description of the measures to evaluate performance in construction. Here, proposers were instructed to describe objective measures that will be performed to insure the constructed product meets or exceeds the requirements. This sub-category was worth 10 points and again, Flatiron received the highest average in this area achieving an average of 7.9 of the 10 points or 79 percent of the possible points. Three of the evaluators ranked Flatiron the highest. C.S. McCrossan was the next highest in this area achieving 77.8 percent of the points. Two of the six evaluators ranked C.S. McCrossan the highest. One evaluator's highest score in this area had Flatiron tied with Walsh. The lowest scoring responder in this category received an average score of 57.8 percent. Some positive

comments in this area focused on the levels of staff assigned, apparent authority of individuals to stop work, and the degree of collaboration with Mn/DOT on the measures. Concerns noted with respect to one or more proposals that resulted in lower points given include the lack of stop-work orders written on previous projects, the degree to which executive level commitment was demonstrated, timeliness of reports, and a perceived lack of role for the design team.

## **AESTHETICS**

In the area of aesthetics, worth a total of 20 points, the evaluation team looked at the proposers' level of commitment to enhance the aesthetic requirements stated in the RFP. Proposers were also required to include a narrative describing their approach and commitment to involving stakeholders into the design process and to describe enhancements to the aesthetic features using context sensitive design. In this area, Flatiron's scores were significantly higher than the other responders. Flatiron received 97.8 percent and 97.2 percent of the points possible in the two subcategories. The next closest responder in the area of aesthetic enhancements achieved only 68.3 percent of the possible points, and the next closest responder in the area of stakeholder involvement achieved only 61.3 percent of the possible points. Comments supporting the high scores for Flatiron in the area of aesthetic enhancements noted Flatiron's nationally known designer, positive remarks about its use of lighting and landscaping, and a favorable view of the execution of its design theme. Concerns expressed in the written comments in one or more of the other proposals noted the limited time that a team had worked together, a viewpoint that the design did not enhance the public space, lack of attention to landscaping, opinions that a particular design raised security/graffiti issues, that a proposal resulted in a poor visualization effect, and that a proposal failed to connect visual quality with geometrics.

The second area assessed under the category of aesthetics involves the approach and level of commitment shown to involve stakeholders in the design process. Flatiron's high scores in this area are supported by positive comments regarding its stakeholder input and decision making process, with more than one evaluator expressing opinions that Flatiron provided the best public input model. Positive comments were also noted regarding the Flatiron team's demonstrated communications skills. Several evaluators noted concerns about alternative approaches that appeared to entail educating the public, but not embracing its input. Even more concerns were noted about one or more of the lower scoring proposals showing little flexibility in reaction to public input. Another concern noted was a lack of actual commitment made with respect to public input.

Protesters assert that they were misled to believe that low cost and expedited construction were the state's primary objectives which, in their view, necessitated use of steel rather than concrete. Because one of the steel bridge proposals entailed the same number of construction days to complete the project as Flatiron's proposal, the record does not support the protestor's premise that a concrete bridge necessarily takes longer to build.

Although low cost and expedited construction are, in fact, key objectives, all responders had equal access to information clearly indicating that they were by no means the state's only critical objectives. Media reports confirm that state and municipal officials publicly expressed interest in other priorities including traffic flow, design aesthetics and regional consensus on key

decisions. Minneapolis city officials were quoted as being particularly concerned that design and aesthetic considerations not be short-changed (“Sketchy plan has 10 lanes, fast timeline,” StarTribune, August 15, 2007). Legislators were especially vocal in insisting that the bridge not be built too quickly, because safety and future transportation needs were actually more critical (“Lawmakers voice concerns about bridge project’s haste,” StarTribune, August 15, 2007). The governor was subsequently quoted as assuring stakeholders that quality would not be compromised by the project’s urgency (“Pawlenty urges leaders to move swiftly on new bridge plan,” StarTribune, August 17, 2007).

Even more significantly, whatever assumptions the interested vendors made with respect to the state’s primary objectives, there is only one definitive source for information on which to base their proposals – the RFP. The RFP laid out all of the technical and other criteria as well as the formula for how the various elements are combined to determine the highest-ranked responder.

The RFP also makes clear that it is the responders’ responsibility to understand the RFP and request clarification as needed. Specifically, provisions in the RFP stated:

### **3.2 Examination of RFP and Requests for Clarification**

Proposers shall be solely responsible for (1) reviewing and examining, with appropriate care, all RFP documents, including any supplements, addenda, and clarification notices issued, (2) requesting clarification or interpretation of any material discrepancy, deficiency, ambiguity, error, or omission in the RFP documents, or of any provision Proposer fails to understand and (3) informing itself with respect to any and all conditions that may in any way affect the cost or nature of the proposal or the performance of the Work after Contract award. Failure of Proposer to inform itself as described herein shall be at its sole risk and no relief for error or omission will be provided by Mn/DOT.

Further, **Section 3.6** provides in part:

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 MnDOT or other communication except the RFP documents, addenda, and clarification notices.

Because it was explicit in the RFP, responders knew or should have known precisely how the cost proposal and timeline would be evaluated in conjunction with other technical considerations. If there was any ambiguity or uncertainty, the responders had an affirmative obligation to address it.

The protesters also state that they were misled with respect to an aesthetic preference for concrete over steel. Investigation failed to disclose any such preference. The RFP is silent on the issue. The media quoted the project manager as stating that the bridge might be either a “concrete box or a steel structure” (“Sketchy plan”). More significantly, in response to this protest, a protest official interviewed each evaluator. Each one independently asserted that there was never a discussion of one structural component being inherently more desirable and that they had no personal aesthetic or other preference for one over the other. The evaluators indicated that the only discussion with respect to a comparison of concrete and steel concerned the maintenance needs involved in painting a steel bridge and the associated life cycle costs.

## GEOMETRIC AND STRUCTURAL ENHANCEMENTS

The most significant differences in scoring occurred in the area of geometric and structural enhancements. These areas encompassed very technical aspects of the project and significant levels of discussion focused on these areas during the evaluation process. To demonstrate the technical complexity involved in these areas, the following is an excerpt taken from the RFP instructions to proposers:

*The Proposal shall include the Proposer's commitments to enhance the geometric features of the project and eliminate or minimize design exceptions. Proposers are encouraged to develop vertical profiles to avoid an increase in elevation of University Avenue and 4<sup>th</sup> Street Interchange in the future. Proposers are to assume that a future structure on University and 4<sup>th</sup> Street will have an additional three feet of depth.*

As to structural enhancements, the RFP continued:

*The Proposal shall include commitments that will provide innovative procedures and/or materials to minimize the life cycle costs of maintaining the corridor and to maximize the benefits to road users taking into consideration context sensitive design features.*

Geometric enhancements were given a value of 10 points out of the possible 100. The extremely wide margin between responders' scores in this area is demonstrated by the striking fact that the highest average score received was 92.5 percent of the available points whereas the lowest average score received only 5.8 percent of the points. To be clear, these percentages do not represent any single evaluator's score, but rather the average score of the group. All six evaluators independently ranked Flatiron the highest in this category. In addition, all six evaluators gave their lowest score to the same responder in this area. To show the level of focused concern, four of the six evaluators gave zeros as their lowest score to the same responder. This same responder's highest score offered was 2.5 out of the possible 10 points. The second lowest responder in the geometric enhancements area received a somewhat better, but still overall low average score of 43 percent of the total possible points. The comments supporting these scores are quite technical in nature. Oral interviews with some evaluators helped clarify the rationale behind the consistent scoring patterns in this area. The problems involved design issues as serious as having to replace the 2<sup>nd</sup> Street Bridge and even some reconstruction of portions of the new river bridge in order to be consistent with future conditions. Repeated concerns were also expressed regarding pond and storm drainage capacity problems. These issues brought on associated concerns regarding right of way difficulties and roadway closures. Concerns were also raised with respect to the future interstate grade.

Structural enhancements is also an area where vastly different scores were assessed by the evaluators with Flatiron receiving the highest average score of 94.7 percent of the possible points and the lowest scoring responder receiving an average score of 27.7 percent. Other proposals fell in between at 63.2 percent and 59.3 percent of the possible 5 points. Each evaluator independently scored Flatiron the highest in this category. Flatiron's proposal was commented upon favorably with respect to future maintenance needs over the life cycle of the bridge. Notes were also favorable regarding a proposed sensor and monitoring system as well as the

completion of an owner's manual for inspection and maintenance purposes. Concerns expressed in one or more of the other proposals also included maintenance concerns, scour potential, deck drainage and impact to the 2<sup>nd</sup> Street Bridge.

## **PUBLIC RELATIONS**

Finally, the area of public relations was worth a total of 15 points of the possible 100. Proposers were instructed to describe the qualifications and experience of their Public Information Coordinator and describe their approach and commitment to involving stakeholders, designers, and construction personnel in the public relations process. They were also asked to describe their approach and commitment to mitigate nighttime noise. Flatiron received the highest overall average in this category receiving an average of 13.85 points out of the 15 total. The other responders followed with average points of 11.35, 10.80 and 10.75. Positive comments provided in regard to the Flatiron scores included a broad array of public outreach methods noted in its proposal and perceptions that Flatiron offered a comprehensive approach to renewing public confidence in the transportation system. Notations in one or more of the other proposals receiving lower scores involved concerns regarding adequacy of staffing levels, degree of team integration and perceived shortcomings with respect to the proposed noise mitigation plans.

In conclusion, a review of evaluation data revealed detailed and well-documented rationale for the evaluators' scores. It also showed a high degree of overall consistency among evaluators whether from Mn/DOT, the City of Minneapolis or the AGC. For example, all evaluators gave their highest scores to Flatiron's technical proposal. The evaluators were also unanimous in awarding their lowest scores, although there were differences of opinion regarding second and third place. Every evaluator scored Flatiron at least 13 points higher (on a scale of 100) than the highest-rated protesting responder, with the average difference between Flatiron and the highest-rated protester being 25.6 points. The non-Mn/DOT evaluators, on average, scored a wider difference between Flatiron and the highest-ranked protester (26.9 points) than did the Mn/DOT evaluators (24.9 points). Every evaluator scored Flatiron at least 19 points higher than the lower-ranked protester, with the average difference being 35.5 points. 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.

### **3. Certain Inquiries Must be Undertaken and Their Answers Made Public or the Contemplated Award to Flatiron Will Likely Produce an Arbitrary and Capricious Result.**

Protesters question whether Flatiron's proposal "actually included the liquidated damages into its bid..." A review of this matter found that Flatiron asked for a cap on liquidated damages. The inquiry was communicated via the approved communications channels that were afforded all proposers. Many other requests were made by other responders and acted upon by Mn/DOT during the course of this procurement including such things as changing insurance requirements, seeking permission to establish office space further away from the project site than originally required, and raising the stipend. Flatiron's request was based on similar caps they had experienced in connection with other projects. The request for a cap was considered by multiple professional staff within Mn/DOT and the Federal Highway Administration and determined to be

reasonable in that it allowed for a large sum of \$27 million and covered a sufficiently long period of time (135 days). Thereafter, an amount of \$3,500 per day, Mn/DOT's standard liquidated damages amount, was still imposed indefinitely. The cap was agreed to, applied to all responders, and communicated via an addendum to the RFP.

A review of Flatiron's price proposal and information provided by Mn/DOT leaves no reason to believe that liquidated damages are somehow incorporated into Flatiron's price. But even if this allegation is assumed to be true, Flatiron's proposal fell into Mn/DOT's predetermined price and timeline parameters and still "wins" the award based on the statutory formula.

The protest also asserts that an investigation is needed regarding the "different scores the different teams received for public relations." Specifically, protesters state, "if that difference [in award] is due to Flatiron receiving a public relations score six points higher than C.S. McCrossan's, then the public is paying more than \$85,000,000 in costs for Flatiron's proposal due to a perceived public relations benefit."

As discussed previously, Flatiron did not receive a score that was six points higher in the area of public relations. Of the total 15 points available in this area, Flatiron's average score was 13.85 followed by other scores of 11.35, 10.80 and 10.75. While Flatiron did receive the best scores in this area, the records shows that this alone did not determine Flatiron's selection as the apparent successful responder. In fact, if the public relations scores are eliminated from consideration completely, the outcome in this case does not change.

Finally, protesters assert that using public relations as an evaluation criterion is not authorized by the design-build statute. The definition of a design-build contract in Minnesota Statute 161.3410, subd. 3, does not prohibit an evaluation of such an offering. The fact that public relations services are not called out specifically in sections 161.3420 or .3422 does not prohibit the inclusion of such services. In fact, none of the particular evaluation criteria are called out or required to be part of the RFP. The statute only requires that the RFP contain "the selection criteria, including the weight or relative order, or both, of each criteria."

Furthermore, the assertion that public relations is not authorized to be used as an evaluation criteria under relevant statute is a claim that the RFP exceeds the authority of Mn/DOT. Under the terms of the RFP, this type of assertion is required by the protest procedures to be raised as soon as the issue is known, but in any event, must be received no later than 7 days before the proposal due date. No justifiable reason has been given why this issue was not raised in a timely manner – in time for the issue to be corrected had a review found any merit to the argument. Additionally, the record shows that public relations services have been included in past design-build RFP's, including several that resulted in contract awards to the protesters.

#### **4. The Difference in Cost to the Taxpayers Between Flatiron's Proposal and C.S. McCrossan's Proposal is So Vast that it is Arbitrary and Capricious for MnDOT to Contend that it Represents Best Value" to the State.**

With some specific exceptions, Minnesota laws require vendor selection on the basis of "best value." "Best value" is an alternative to "low-bid." Although the "low-bid" method works well

when all requirements can be precisely specified and the state wishes to identify the lowest cost supplier, “best value” is the preferred method when, as here, factors other than cost must be weighed. This is especially critical in assessing factors such as the experience and skills of professionals. Few would argue that the state should necessarily contract with the cheapest available licensed physician, attorney or bridge designer.

Although “best value” is a well-established practice in public sector procurement, it does inherently involve more subjectivity than “low-bid” awards. To insure a fair and open process, “best value” determinations must be based on criteria that are determined and published in advance, so that all prospective vendors have the same understanding of how the various components, including price, will be evaluated.

Design/build transportation projects involve highly prescriptive statutory requirements (Minnesota Statutes sections 161.3410 through 161.3428) that detail how the process will be conducted. These laws, passed in 2001, reflect the work of a broad coalition of interested parties including lawmakers and construction industry representatives, as well as transportation and procurement officials. The law provides the specific formula that determines how cost and scheduling will be weighed against other qualitative factors. The only factor in the formula over which Mn/DOT has any control is the amount for the “Daily Road User Cost,” which is a figure that is ultimately multiplied by the number of days proposed pursuant to the statutory formula. This number is disclosed in advance in the RFP and thus known to all responders. (In situations where the statute is silent on the formula to be applied, Admin policy prescribes that price be weighted a minimum of 40 percent of the total among qualified responders.)

Consequently, although Mn/DOT is responsible for applying the formula that determines the relative significance of cost versus technical factors, Mn/DOT did not create that formula. In this instance, Flatiron was consistently ranked the highest on technical elements such as experience of staff, bridge design, quality control and safety assurances, geometrics, and citizen input. Flatiron also submitted the most costly proposal. If a perception exists that the state will be paying too high a premium for technical excellence, the problem lies with the formula in statute, not with Mn/DOT’s implementation. In fact, based on statute and language of the RFP, Mn/DOT is left with two choices – award a contract to the top-ranked responder or reject all responses. Even if Mn/DOT chose the latter, the statutory formula would remain the same.

## **5. MnDOT’s RFP’s Protest Procedures are Illegal and Unconstitutional.**

No purpose will be served by the protest officials offering a conclusion as to the sufficiency of the protest process described in the RFP. It is not within the role or authority of the protest officials to rule on the legal or constitutional sufficiency of these protest procedures. Additionally, unlike the issues of data practices or “best value,” state statutes are silent with respect to protest procedures. The protesters are on record as asserting that their due process and legal recourse have been inappropriately limited and a court may ultimately address that issue if protesters choose to pursue the matter in a judicial forum.

Regardless whether this protest determination is the final word on the matter, steps have been taken to maximize its fairness and objectivity. As noted in the introduction, measures were taken

to remove this protest review process from any real or perceived political influence. In addition, the role of protest official in this procurement was expanded to two individuals. The RFP defines the protest official as “Betsy Hayes, or another official as designated by the Director of the Materials Management Division” (MMD, a division of the Minnesota Department of Administration with responsibility for procurement and contracting oversight within the executive branch). Ms. Hayes is a licensed attorney and contracting manager within the MMD. Kent Allin is the MMD Director.

On September 13, 2007, Ms. Hayes was requested by Mn/DOT to participate more directly in the evaluation and selection process for the design-build project. Beginning on September 14, 2007, she served along with Kevin Kleithermes and Romeo Garcia of the Federal Highway Administration and Jay Hietpas of Mn/DOT on the Process Oversight Committee. In that capacity, she provided consultation and advice with respect to matters such as appropriate communication with responders and avoiding any conflicts of interest. In light of her role on the oversight team and after receiving the initial protest on September 20, 2007, Ms. Hayes submitted the following statement to Mr. Allin on September 21, 2007:

This confirms our discussion regarding potential protests with respect to the 35W Bridge rebuild project. The protest official is listed as myself or “or another official as designated by the Director of the Materials Management Division.” In the event any protests are received that entail any question regarding a decision or action that I offered advice or guidance upon in my role on the project’s Process Oversight Committee, then any such issue needs to be reviewed and addressed by a designee of your choice to avoid any actual conflict or appearance of conflict. It is important that in my role as the protest official that I not render determinations on the propriety or lack thereof of any decisions or actions that I made, participated in, or offered advice about.

The issues raised in the initial protest letter and an expanded set of issues submitted on September 25, 2007, do not relate to decisions, actions, advice or guidance that Ms. Hayes provided in her oversight committee role. Consequently, as it relates to the preceding pages, she is not making judgments as a protest official with respect to her own past work. However, to further avoid any potential appearance of a conflict, Mr. Allin – who had no past involvement with respect to the process being protested – served as joint protest official. The judgments expressed in this document were reached by both individuals.

### **ADDITIONAL NOTES AND OBSERVATIONS**

No procurement process of this magnitude and complexity is perfect. Too many variables, both human and technical, are in play. But perfection is not required. If it were, state work could never proceed. Nonetheless, to thoroughly investigate this protest, a number of process issues were tested to see if different decisions would have impacted the outcome of the process. None of the issues tested affected the outcome. Even if there had been such an effect, the high standard required to declare state action to be “arbitrary and capricious” would not necessarily have been met. But failing to find any variable that would have led to a different result supports a conclusion that Mn/DOT’s evaluation process was fundamentally sound.

For example, evaluation scores were recalculated with each of the evaluators removed from the process. No individual evaluator's scores made the difference between first and second place for the top-ranked responder.

Additionally, the evaluation team had internally discussed the intent of quality factor 4.3.3.3.4 (measures to evaluate performance in construction). Because the team discerned some ambiguity there, it is possible that responders did as well. Consequently, there might be inconsistency in responses or how those responses were judged by the team. In light of that possibility, the scores were recalculated with that evaluation criterion eliminated. Again, it had no impact on which responder received the highest ranking.

Another area scrutinized involved the protest officials' assessment of the fact that any score below 50 on a scale of 100 was considered a "fail" for that category. This is not unreasonable given past precedent and the requirement that a responder receive a "passing" score to be eligible for a significant monetary stipend. However, to see if any possible inconsistency among evaluators within that wide range of zero to 49 affected the outcome, scores were recalculated with every responder who "failed" any category being given 49 points. Since the highest-rated vendor had not been given a single failing score in any category by any evaluator, this recalculation only affected the other three responders. Although it narrowed the range of technical scores, it did not impact the first-place result.

Lastly, it is important to point out the degree to which attention has been paid to protecting the integrity of the evaluation process. All involved in the evaluation process were educated about the procurement rules and processes and were monitored closely for adherence to very high standards of conduct. The promotion of fair and equal opportunity was an overriding goal throughout the process. There is no evidence of manipulation or other improper tactics. To the contrary, the fact that the evaluators were very consistent in both their high and low ratings, including the representatives from the Associated General Contractors of Minnesota and the City of Minneapolis, provides additional assurance that the process was not compromised.

## **CONCLUSION**

Based on the preceding, it is recommended 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.