

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF ST. LOUIS

SIXTH JUDICIAL DISTRICT

Harry R. Welty, Laurence J. Burda,
Dean Davidson, Robert D. Sershon,
and Art Johnson,

Court File No. 69DU-CV-09-758

Plaintiffs

v.

Independent School District No. 709,
Duluth, and Johnson Controls, Inc.,

Defendants.

AFFIDAVIT OF LEONARD FRETLAND

Leonard Fretland, being first duly sworn under oath, hereby states as follows:

1. I am the Regional Solutions Operations Manager for Johnson Controls, Inc. ("JCI"). I am competent to testify regarding and have personal knowledge of the matters set forth herein, except those stated on information and belief, which I believe such statements to be true.

OVERVIEW OF THE PROGRAM

2. In January 2006, Independent School District No. 709, Duluth (the "District") issued Request for Proposals No. 243 entitled "Professional Services for the Study, Development, and Implementation of a Comprehensive and Strategic Long-Range Facility Plan" (the "RFP").

3. JCI submitted a response to the RFP (the "Response") on or about January 24, 2006. Upon information and belief, the District received numerous responses to the RFP, and utilized a selection committee to analyze all responses and finalize recommendations to the

Duluth School Board for the selection of a vendor. Upon information and belief, as a result of that process, the District and School Board found JCI's Response appropriate and responsive to the RFP, and in keeping with the District's procedures and standards in the industry, and ultimately selected JCI to provide the services requested in the RFP. On March 13, 2006, the School Board directed the District to enter into a contract with JCI consistent with the terms of JCI's Response to the RFP.

4. After JCI's Response was accepted, JCI immediately commenced its services pursuant to the District's direction. On or about January 29, 2007, JCI and the District executed a formal written agreement, captioned the Master Agreement Long-Range Facilities Plan Development & Implementation (the "Agreement"). Pursuant to the Response and Agreement, JCI developed a long-range facilities plan for the District (the "Plan")

5. The Plan was presented to the Duluth School Board. On June 19, 2007, the School Board approved Resolution B-6-07-2452, adopting what was commonly referred to as the "red option" under the Plan (hereinafter the "Program"). Hereinafter, individual projects shall be referred to as "Project" or "Projects" and the group of projects shall be referred to as the Program.

6. The Program contemplates that the District will improve its facilities between 2008 and 2012. The improvements shall consist of retrofit improvements, closing some existing schools, and construction of new schools. Specifically, the following buildings are to be renovated or constructed:

Project Name	Project Type	Budget
Ordean High School	New Construction	\$54,752,777
Laura MacArthur	New Construction	\$18,913,586
Western Middle	New Construction	\$45,144,391
Lincoln Piedmont Elem	New Construction	\$16,942,846
Lester Park Elem	New Construction	\$18,550,944
Denfeld High School	Remodel/Addition	\$38,207,737
Grant Nettleton Elem	Remodel/Addition	\$12,535,441

Eastern Middle School	Remodel/Addition	\$28,428,018
Lakewood	Remodel/Addition	\$2,901,115
Stowe	Remodel/Addition	\$4,221,885
Transportation Bldg	Remodel/Addition	\$2,488,182
Homecroft Elem	Remodel/Addition	\$8,435,044
Congdon Elem	Remodel/Addition	\$9,177,944
Lowell Elem	Remodel/Addition	\$7,533,019
HOTC	Remodel/Addition	\$6,599,511 (estimated)
STC	Remodel/Addition	\$5,235,211 (estimated)

DESIGN AND CONSTRUCTION MANAGEMENT CONTRACTS AWARDED

7. JCI and the District entered into a Program Management Agreement (the "PMA") on or about May 27, 2008. Under the PMA, JCI is to provide the District with certain advisory, organizational, evaluation, and review services related to the implementation of the Program.

8. For each of the individual Projects identified above, JCI and the District entered into a professional services agreement for JCI's design and construction management responsibilities for the given Project. These design agreements were executed between JCI and the District on or around July 25, 2008 and took the form of AIA B141-1997, Parts 1 and 2 contract with a B144-ARCH-CM amendment, as modified by the parties.

9. JCI entered into contracts with an architect subconsultant for each of the Projects. Each of these architects has commenced services under the design agreements to design and administer construction of their respective projects.

10. JCI also retained several design consultants to assist with various aspects of the design such as masonry design, food services design, technology design, hazardous materials consulting, and electrical/mechanical design. Each of these design consultants has undertaken efforts to commence services under their respective contracts.

11. JCI entered into contracts with two construction management firms (Kraus Anderson and Bossardt), with each responsible for construction management on four of the larger Projects. Kraus Anderson and Bossardt each started work under their respective

consulting agreements with JCI in the fall of 2008.

CONSTRUCTION WORK COMPETITIVELY BID AND DISTRICT AWARDED CONTRACTS

12. The District has elected to divide each of the Projects into 10 to 25 discrete pieces to bid and award to separate prime contractors (each of which will have a separate contract with the District).

13. The Project schedule has been structured to allow for construction primarily during the summer months to accommodate the school schedule, as well as phasing for school consolidation/closing, and minimize costly impacts of winter weather in Minnesota. A true and correct copy of the most recent schedule for the Program is attached hereto as Exhibit 1.

14. The District competitively bid construction work for the Lakewood Elementary School and Stowe Elementary School projects, construction of which was completed before the 2008 school year commenced. The Homecroft and Lowell Elementary School projects went out for bid during winter of 2008, construction contracts have been awarded and contractors have mobilized to the project sites to commence work. In May 2009, the District will award contracts for East Middle School, East High School (Ordean), and West High School (Denfeld). Further, the current Plan anticipates a majority of the remaining Projects will be bid by March of 2010 — effectively locking in the prices of construction for the District.

PENDING LAWSUIT CAUSES TENSION AMONG PROJECT TEAM

15. —Plaintiffs have requested the Court disgorge JCI of any amounts paid to JCI for the implementation phase of the Program. JCI, numerous subconsultants, and various contractors and subcontractors have already provided substantial work or services to the District, much of which was provided prior to the commencement of this litigation. Two of the projects are already completed (Lakewood and Stowe Elementary Schools), two of the projects are under

construction (Homecroft and Lowell Elementary Schools), and the remainder of the Projects are either in the design phase, completed with design, or have been released for bid.

16. While JCI believes the Plaintiffs' claims lack merit, JCI was not, and is not, in control of the procurement process. The threat of possible disgorgement, regardless of the merits of that threat, and the existence of this lawsuit ensure that the Program's progress will be impacted during the pendency of this litigation. Further, the existence of the litigation and the Plaintiffs' demand for disgorgement makes management of the Program difficult and has increased the anxiety level among contractors and consultants about the current and future work of the Program.

17. One of JCI's roles in this Program is to assist to the District in managing the Program. The lawsuit has a significant impact on JCI's ability to manage the Program efficiently, in accordance with the schedule because of the threat associated with stopping the Program at any time.

18. Further, the pricing of the design, construction management, and consulting services by JCI's subconsultants is built on the size and duration of the Program as a whole. JCI's design and construction management subconsultants provided a lower per-project cost than otherwise would have been practicable because of the size of the Program. In addition, the actual costs of the materials and manpower will likely increase if the Program is delayed—a cost increase that is the responsibility of the District under the various contracts.

19. Specifically, the design and construction management agreements for each of the Projects specify that if a Project is delayed for more than 30 days, the design and construction management consultants shall be entitled to costs associated with interruption and resumption of services and the consultants shall be entitled to an equitable adjustment in compensation as

necessary arising from the delay.

20. Further, in the event that any Project is delayed for more than 90 days, each of the consultants has the right to terminate their contracts—subjecting the District to additional costs associated with hiring replacement consultants and bringing replacement consultants up to speed on the Project.

21. Under the District's contracts with the construction contractors, each contractor is entitled to an increase in compensation for costs associated with any suspension in the work in excess of 30 days. Further, each construction contractor is entitled to terminate the construction contract in the event that a Project is suspended for more than 30 days—requiring the District to rebid the Projects and suffer increased costs due to price escalation as a result of a later bid date.

MINOR DELAYS WILL HAVE RIPPLE AFFECTS ON SCHEDULE AND BUDGET

22. Due to Duluth's weather challenges, the resulting limited construction season, and the District's need to use its buildings during the school year, any delay in the progress of the Program due to this litigation will likely result in delays throughout other portions of the Program.

23. Currently, with Projects being released for bid, the District is able to avail itself of currently low materials prices and construction labor prices. Delays to the Program will likely see increased costs from rising material prices and construction labor.

24. Further, even a moderate delay in the progress of the Program could create significant schedule delays and resulting cost impacts. Based upon JCI's experience with this Program, it is our opinion that a one to three month delay in the current schedule would impact each Project as follows, with corresponding increases in the cost of the work estimated to be between \$5 Million and \$20 Million:

