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STATE OF MINNESOTA

CASE TYPE: OTHER CIVIL  
DISTRICT COURT

COUNTY OF ST. LOUIS

SIXTH JUDICIAL DISTRICT

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

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

Plaintiffs,

**MEMORANDUM OF LAW  
IN SUPPORT OF SURETY BOND**

vs.

Independent School District #709, and  
Johnson Controls, Inc.,

Defendants.

**INTRODUCTION**

This matter comes before the Court on the motion of ISD 709 for a surety bond pursuant to Minn. Stat. 562.02. The case involves a challenge to the validity of an action taken by a public body in the making of a contract for public improvement to its school facilities. The claims of the Plaintiffs may result in delay and substantial costs to the District and the public. The surety bond should be required by the Court in such amount as the Court may determine necessary to prevent loss or damage which may result to the public from the pendency of the action. If the bond is not filed within a reasonable time as allowed by the Court, the action should be dismissed with prejudice.

**STATEMENT OF FACTS**

In January 2006 the Duluth School District ("District") issued a request for proposals ("RFP") for professional services to: comprehensively assess the physical condition and functional and educational adequacy of the District's existing school sites and other buildings;

develop a Long-Range Facilities Plan ("LRFP"); and provide and coordinate all professional services required to accomplish initial construction phases of the plan. (Affidavit of Hanson)

Minnesota law does not require competitive bidding for professional service contracts. The School District has a policy and a regulation addressing RFPs for contractual services that exceed \$25,000.00. (Affidavit of Hanson)

The District Selection Committee received eight responses to its RFP. Three applicants were invited to interview with the Committee. In early March 2006, members of the Committee, including the District facilities management department, administration and members of the community heard presentations from the three applicants. The Committee ranked the applicants based upon related experience, ability and capacity to perform the work, anticipated approach and fee, and other considerations. One of the contractors responding to the District's RFP was Johnson Controls Inc. ("JCI"). (Affidavit of Hanson)

On March 13, 2006, the Committee overwhelmingly recommended that the School Board accept the proposal of JCI. The reasons for selecting JCI included: their experience in helping schools with facilities planning; JCI was a respected nation-wide firm with a Duluth office with employees who lived in the District; JCI's previous successful work with numerous other school districts in Minnesota; JCI's proposal took the most comprehensive approach to the project; and JCI possessed the greatest resources for assistance in the project in terms of personnel, communication and finances. The Committee concluded that, "having one firm do the entire project ensure[d] accountability." The Board adopted the Committee's recommendations, directed the District administration to finalize the contract with JCI consistent with the JCI proposal and authorized the board chair to execute the contract. (Affidavit of Hanson)

A contract with JCI was finalized on January 29, 2007. The contract included a description of the scope of the work that included all three phases of the project, including the implementation/actualization phase. The contract contained a fee schedule that required JCI to be paid on a percentage basis for certain aspects of the project. For example, for renovations, repairs and remodels the contract provided compensation to JCI of 2% of the total construction costs, plus 8% of related architectural construction costs, plus 9.5% of related engineering construction costs, etc. It also indicated that the District retained the right to proceed with all, some or none of the Phase III work, in its sole discretion. (Affidavit of Hanson)

Between April 2006 and March 2007, the District, with consultation and assistance from JCI, began the substantial assessment phase of the project. Initial focus groups were formed with parents, teachers, staff, students, and community members to gather input for the project. Between June and December of 2006 the District conducted numerous meetings with local organizations, neighborhood groups, and special interests groups to obtain input on the project. Comprehensive reports were also researched and developed during this time, including: a demographics report, a facilities assessment report, a property value report and an educational adequacy report. These reports were shared with the public in December of 2006 through the media, the District's website, community meetings and a mailing to residents. Members of the public were invited to share their thoughts and input regarding the reports through meetings, emails, letters and phone calls. (Affidavit of Hanson).

The results of the four reports and the feed back received from the public resulted in three options for a long-range facilities plan ("LRFP"). The three options (The "Red", "White", and "Blue" Plans) were shared with the public in March of 2007 via the media, the District's website, community meetings, a mailing to taxpayers and other means. In May 2007, after more than

10,000 hours of expert analysis, nearly 100 meetings with numerous organizations and groups, ten open community meetings, information appearing over 100 times in local media, including television, radio, newspaper, newsletters, websites, and e-blogs, information gathered via e-mail, fax, phone, and one-on-one conversations, and after studying the results of a professional public opinion survey, the Citizens Group and Duluth school administration recommended the "Red Plan" as the long-range facilities plan for the District. After members of the public were again invited to share their thoughts and advice on the recommended Red Plan, the School Board adopted the Red Plan as the long term facilities plan (LTFP) for the District on June 19, 2007. This resolution also confirmed the use of the services of JCI. (Affidavit of Hanson)

Pursuant to Minn. Stat. § 123B.71, the District prepared a Review and Comment Document outlining the District's construction plan pursuant to the Red Plan and submitted it to the Minnesota Department of Education (MDE) for approval in August, 2007. In November, 2007, the MDE, after a thorough and detailed evaluation of the long-range facilities plan, issued a favorable review for the majority of the District's proposal.<sup>1</sup> (Affidavit of Hanson)

After obtaining MDE approval of the LRFP the following actions were taken by the District:

- January of 2008 -- District released a design and construction schedule
- February of 2008 -- District began negotiations for the purchase of property necessary for the completion of the plan
- May of 2008 -- District issued 170 million dollars in bonds for project
- May to September 2008 -- Construction on Stowe and Lakewood elementary schools was initiated and completed on time and on budget
- August 2008 -- School Board approved Long-Range Program Plan; design teams of community members, parents, teachers and others were formed; six local architectural firms were hired by District
- September to November 2008 -- District conducted operating levy campaign and conducted meetings with groups and organizations concerning levy
- November 2008 -- District operating levy was renewed; board election

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<sup>1</sup> While the MDE approved a vast majority of the plan, it temporarily withheld approval on the construction of two new schools (Lincoln/Piedmont Elementary and Western Middle School) because the District had not yet identified the sites for the new schools .

- February 2009 -- District completed negotiations to purchase 40 properties.

(Affidavit of Hanson)

As of January 2009 the District estimates that 10 million dollars of revenue related to the building projects had been put back into the local economy and nearly 700 local people were working in some fashion on the project. Significant portions of the project have been carried out or begun. (Affidavit of Hanson) and (Affidavit from JCI)

On March 9, 2009, the District became aware of commencement of the above legal action challenging the action of the School Board in selecting and contracting with JCI to provide professional services for the LRFP. The Plaintiffs' Amended Complaint requests the Court to declare the JCI contract void and seeks the recovery of payments made to JCI (and apparently all other LRFP expenditures) back to the District. (Affidavit of Hanson)

The Plaintiffs to this action have made it known that the intent of this litigation is to prevent continued construction and implementation of the LRFP. There are numerous postings on the website of LDV (Let Duluth Vote), a web site maintained by the lead Plaintiff, soliciting ideas and alternative causes of action against the District from other members of the public and attorneys to delay or stop construction on school buildings scheduled for renovation this construction season. (Affidavit of Hanson)

The cost of District taxpayers will be substantial if JCI or other contractors slow or suspend work because of these claims. (Affidavit of JCI) (Affidavit of Hoheisel)

To carry out the LRFP in a timely fashion the professional services provided by JCI in coordinating the architects, engineers, construction managers and contract administration are critical. The District relies on JCI's knowledge of the Plan and its expertise to administer the construction. That is the purpose of the District's contracts with JCI. (Affidavit of Hanson)

JCI and other contractors involved in the project are being asked to perform services on an extremely narrow time schedule. The Plaintiffs are also demanding disgorgement of payments. Even though the Plaintiff's cause of action is wholly without merit, the District must protect against the possibility of JCI suspending work or having schedules inhibited by the pendency of this case – resulting in substantial cost increases to the District.

If JCI is unable to maintain the schedule to carry out the project components and services pending the outcome of this litigation, the District would face not only the loss of critical professional services in this project, but it will also face a negative ripple effect among contractors who may not be able to proceed or who choose to suspend services. The District may also suffer a delay in bond sales or increased costs to the District and its taxpayers. (Affidavit of Hoheisel)

Given the limited construction season in Duluth for the types of work included in the LRFP, it is possible, if not likely, that a delay in the process could push some construction projects scheduled for 2009 into 2010 or even later. The resulting cost increases could range between seven and forty million dollars. (Affidavit of Fretland)

In addition to the potential monetary consequences, the District also faces additional unquantifiable costs brought about by the Plaintiffs' cause of action. They include: (1) delay in rectifying safety concerns brought about by attending outdated facilities; (2) adverse educational effects and disruption to students and staff; and (3) significant administrative costs. (Affidavit of Hanson)

Finally, it is noted that the Plaintiffs, as members of the public, were notified and given every opportunity to participate and comment at every stage of the processes they now question. The selection of JCI for the important professional services necessary to carry out construction

