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Emergency Megaproject Case Study Protest: The Interstate Highway 35 West Bridge

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Abstract
When a disaster destroys a vital piece of infrastructure, such as an interstate highway or a large bridge, the procurement must be developed in a manner that expedites the restoration of services with the shortest schedule practical. Expediting an emergency restoration of services project event makes the selection of the appropriate procurement procedure complicated by the need to emphasize schedule over cost and quality. The need to waive or limit statutory rules for open competition increases the risk of protests. This paper presents the results of the case study of the emergency restoration of services award protest for the Interstate Highway 35 West in Minneapolis, Minnesota. The paper concludes that the Minnesota Department of Transportation (MnDOT) successfully defended itself against an award protest because it published the details of the project's proposal evaluation plan, making it transparent, and strictly followed the plan throughout the procurement and award process.

Keywords
emergency contract, expedited procurement, protest, best value, design-build

Comments
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EMERGENCY MEGA-PROJECT CASE STUDY PROTEST: THE I-35W BRIDGE

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ABSTRACT

When a disaster destroys a vital piece of infrastructure, like an interstate highway or a large bridge, the procurement must be developed in a manner that expedites the restoration of services with the shortest schedule practical. Expediting an emergency restoration of services project event makes the selection of the appropriate procurement procedure complicated by the need to emphasize schedule over cost and quality. The need to waive or limit statutory rules for open competition increases the risk of protests. This paper presents the results of the case study of the emergency restoration of services award protest for the Interstate Highway 35 West in Minneapolis, Minnesota. The paper concludes that the Minnesota Department of Transportation (MnDOT) successfully defended itself against an award protest because it published the details of the project's proposal evaluation plan, making it transparent and strictly followed it throughout the procurement and award process.

KEYWORDS: emergency contract; expedited procurement; protest; best value; design-build.

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INTRODUCTION

One major legal issue in emergency procurements is the need to waive or limit statutory rules for open competition to expedite the contract award (Gransberg and Loulakis 2012). A delay in the start of emergency restoration construction created by a protest of the award is potentially devastating. This paper will discuss the details of that specific issue by presenting the case study of the emergency restoration of services for the Interstate Highway 35 West (I-35W) bridge over the Mississippi River in Minneapolis below the Saint Anthony Falls Lock and Dam. A stream-lined best value selection process was developed by the Minnesota Department of Transportation (MnDOT) to expedite the award of a design-build (DB) contract to replace the collapsed structure (Warne 2008). The contract was not awarded to the lowest priced proposal, forcing MnDOT to defend a protest of the award by the low bidder in court (Hietpas 2008). MnDOT was successful largely due to past DB award protest experience, which led to the agency strictly disciplining the proposal evaluation process in a manner that contributed to a logical defense of the award decision (Shane et al. 2006).

When a disaster destroys a vital piece of infrastructure, like an interstate highway or a large bridge, the procurement must be developed in a manner that expedites the restoration of services with the shortest schedule practical. Here an emergency services restoration project is defined as "a project initiated as the result of some unexpected circumstance that negatively affected or completely diminished the capacity and/or level of service of a given transportation facility (road, bridge, tunnel, etc.) to the point where the impact is great enough to warrant special treatment in the procurement phase" (Gransberg and Loulakis 2012). Procurement is defined as "the combined functions of purchasing, inventory control, traffic and transportation, receiving, inspection, store keeping, and salvage and disposal operations" (State of Minnesota 2011).

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Emergency procurement procedures are necessary because "during a construction crisis, traditional contracts are inflexible, restrictive and counter-productive" (Loosemore and Hughes 1998). For example, the 2009 and 2010 earthquakes that devastated Christchurch, New Zealand, forced the New Zealand Transport Agency to invent a new project delivery method called "collaborative alliancing" (Gransberg and Scheepbouwer 2014). The earthquakes in Christchurch caused major damage to the horizontal infrastructure across the city. Both the central and local governments considered the challenges posed by the scale of the damage significant, and it was determined that a purpose-built organization was required for the rebuild (Hurley 2013; LeMasurier 2015). The situation asked for a new level of collaboration which posed several unique features. First, the size of the disaster meant that it was too big to handle for any one company. Secondly, with the political/media coverage expected, the risk was too great for a single company. And thirdly, there was a need and political and social pressure to start work immediately, before the scope was entirely clear or defined. By forming a collaborative alliance that included multiple construction companies, engineering consulting firms, and members of involved each governmental entity with jurisdiction in the disaster area, the necessary resources were made immediately available and in a form that permitted both quick and efficient employment (Botha and Scheepbouwer 2015).

Expediting an emergency restoration of services project makes the selection of the appropriate procurement procedure complicated. Time is of the essence, requiring agencies to give schedule priority over quality and cost until the disrupted service has been restored (Houston 2011). Awarding an emergency contract is made more problematic by the high level of emotions and media coverage that surrounds most emergencies. Each project delivery methods utilitzes a unique

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78 standard contract forms, which is then tailored to match the project's characteristics. "Emergency
79 projects, because of their urgent nature, lend themselves well to time-based innovative bidding
80 techniques" (PennDOT 2011).

81

82 To expedite the replacement of a major transportation asset under emergency conditions often
83 requires specific authorization to waive the many procurement rules, permitting gates, and
84 sometimes restrictive contracting policies in a highly compressed period of time to restore lost
85 services (Gransberg 2013). Many public transportation agencies anticipate the need to rapidly react
86 to infrastructure emergencies and have expended significant resources on emergency management
87 plans that include a set of accelerated purchasing procedures (Perry and Hines 2007; Blakemore
88 and Konda 2010; Houston 2011). Routine procurements are rigorously regulated by both state and
89 federal legislation. Most state DOTs must obey both laws and regulations meant to ensure
90 maximum competition between interested contractors (Perry and Hines 2007). To deviate from
91 completely open competition runs the risk that an award protest will be lodged, delaying the swift
92 restoration of services (Bai et al. 2006). Issues ranging from public relations problems created by
93 unwanted media attention to a formal protest of award and subsequent litigation, all carry the threat
94 of delay to the restoration of service.

95 **Background**

96 The Interstate Highway 35 West (I-35W) bridge over the Mississippi River in Minneapolis,
97 Minnesota collapsed without warning on the evening of August 1, 2007, killing 13 travelers and
98 injuring many occupants of the 111 vehicles that were transiting the bridge when it failed. In
99 addition, it also closed the navigation channel below the St. Anthony Falls lock on the Mississippi

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and of course removed 8 lanes of capacity from an urban freeway with an average daily traffic of 140,000 vehicles per day.

The I-35W bridge was originally erected in 1967 and consisted of a steel structure that incorporated welded built-up steel beams for girders and truss members, with riveted and bolted connections (NTSB 2008). The National Transportation Safety Board (NTSB) determined that "the probable cause of the collapse of the I-35W bridge in Minneapolis, Minnesota, was the inadequate load capacity, due to a design error…" (NTSB 2008). While there has been much written about the engineering issues that may have led to the collapse, this paper will focus only on the procurement issues that led to the eventual protest.

Immediately after the collapse, the wheels were set in motion to remove the wreckage from the river, restore the navigation channel and replace the structure, reopening it to traffic as soon as practical. MnDOT is an agency which implemented DB contracting in 1996, obtaining the necessary enabling legislation to use best value award in 2001 (MnDOT 2008). According to Warne (2008), "MnDOT's extensive experience with design-build played an important role in its ability to advance the St. Anthony Falls [I-35W] Bridge so quickly through the procurement process". MnDOT's specifications contained templates that greatly expedited the development of contract documents and furnished a "framework for the contractor's quality management plans … established minimum expectations and provided an outline for the entire [quality management plan] ultimately developed by the contractor" (Warne 2008).

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METHODOLOGY

Case study research is appropriate when the researcher requires an in-depth look at alternative business processes (Eisenhardt 1991). Kohn (1997) proposes that case studies are best used "to describe a process or the effects of an event… especially when such events affect many different parties." The expedited award of a DB mega-project under emergency circumstances qualifies under both authors' propositions. Case studies are also quite useful for discovering the answers to questions on the details and how circumstances influenced key decisions concerning the outcome of the specific case (Yin 2009; Kohn 1997). As such, the use of case study research was essential to capture the rationale behind the process that MnDOT developed to procure design and construction of the I-35W Bridge, as well as the effect of those details that were cited in the eventual protest.

The details of interest were collected via a structured interview protocol containing yes/no questions, checklists and open ended questions. The interview questions were developed using the process proposed by Oppenheim (1992) and coupled with a structured interview protocol adapted from the one used by the Government Accountability Office (GAO 1991). The protocol focused specifically on the capture of causal relationships that were unique to the emergency contract award process. Interviewees were sent the case study report after the interviews to verify the accuracy of the report's information. The case study interview details were also augmented when appropriate from information found both in the I-35W documentation and the literature.

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Interviews were conducted with Tom Ravn, PE, MnDOT's Director of Construction, Jay Hietpas, PE, MnDOT's Director of Innovative Contracting and Amber Blanchard, PE, of the MnDOT Bridge Office, who coordinated the design aspects of the procurement. The interview output from both MnDOT engineers is incorporated in the details contained in subsequent sections of the paper and are collectively cited as "MnDOT" when details from the interviews are provided.

THE PROCUREMENT DETAILS

According to Perry and Hines (2007), "In both federal and state law, the use of emergency procurement procedures allows for limiting competition in selecting a contractor." They go on to provide this cautionary admonition: "however, this limitation must be carefully utilized and fully documented." Expediting the delivery of the I-35W emergency bridge replacement project includes all the facets of emergency procurement procedures of a complex mega-project in a heavily urbanized location (Shane et al. 2015). The emergency procurement process developed by MnDOT was challenged by an award protest. MnDOT was ultimately successful in its defense.

Stream-lined Design-Build Process

The DB contract to rebuild the bridge was valued at $234 million not including Right-of-Way, etc. It contained major incentives and disincentives to encourage minimizing of construction time (Hietpas 2008). The maximum amount of potential time bonuses was set at $27 million, of which the design-builder eventually was awarded a total of $25 million (Warne 2008). A project-specific risk management system was designed. The agency and the design-builder collaborated on the

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assembly of a risk register and allocated each risk to the party that could best handle it. For example, the removal of contaminated soils encountered was assigned to the design-builder who then delivered them to MnDOT for disposal. Approaching risks in this manner enabled a shorter procurement period by eliminating the need to complete a thorough subsurface investigation in order to quantify the scope of contaminated soil processing. MnDOT also abbreviated the short-listing process by limiting the Statement of Qualifications to only key information about the proposed team members, which in turn reduced the level of effort necessary for competitors to responsively submit their statements of qualifications for consideration to make the short-list.

MnDOT requested a "Categorical Exclusion" for the approval factors that were outside the agency's control in order to receive federal funding. "Categorical exclusion means a category of actions which do not individually or cumulatively have a significant effect on the human environment…and…for which, therefore, neither an environmental assessment nor an environmental impact statement is required" (FHWA, n.d.). This forced MnDOT to tightly control the final scope and guarantee that any betterments would not violate the exclusion agreement. For instance, MnDOT decided that it would not entertain proposed design alternatives that required substantial work on the undamaged interchanges on both ends of the bridge since that might defeat the ability to obtain a much needed Categorical Exclusion from FHWA (Warne 2008). Since betterments typically require additional funding, they are ineligible under the provisions of the federal emergency relief funding program, which might further complicate the issue increasing the potential of delays (MnDOT 2008). Table 1 shows the scope of the bridge replacement.

Table 1. I-35 W New Bridge Characteristics (MnDOT, n.d.)

Bridge Length	372.27 meters

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Center River Span Length	159.71 meters
Bridge Deck Width	57.61 meters
Lanes	5 lanes of traffic running each direction
Life Span	100 years
Transit	Light Rail Transport-ready

Right-of-Way

The new bridge needed 3 complete and 10 partial real estate acquisitions. MnDOT executed an expedited two-step process design to obtain expedited access to required parcels and preclude potential right-of-way (ROW) process delays (Warne 2008). The process involved obtaining an early "Right of Entry" easement from each landowner for a nominal payment of $1,000, after which, MnDOT guaranteed a specific time line to each property owner for concluding the financial part of each acquisition. The two-step procedure provided MnDOT the ability to occupy specific parcels to begin both demolition and reconstruction. The process was made easier by the fact that the owners of those parcels were "generally more cooperative [than usual] given the nature of the work and the emotional impact on the community of the failure of the 35W Bridge" (Warne 2008).

Permitting

Ten permits plus an emergency environmental impact analysis were required before reconstruction could begin. The permitting process was driven by the following philosophy: "Build the largest project possible with the smallest environmental process" (MnDOT 2008). NCHRP Synthesis 438 (2012) found that the following procedures were implemented to obtain the necessary permits as quickly as practical:

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• "Held a permitting kickoff meeting with the heads of local, state, and federal permitting authorities to 'ensure buy-in from the top down'. The meeting resulted in agreements or understanding on permitting approvals, mitigation expectations, and submittal requirements, barriers to overcome, and a single point of contact with decision-making authority in each agency."

• "Obtained an agreement from the resource agencies to ensure that each document was immediately reviewed and comments were returned in a very timely manner."

• "Delegated the authority to make project scope and design decisions to the individuals who managed the project and prepared the permit applications."

• "Took full advantage of existing programmatic agreements and categorical exclusions, wherever appropriate."

• "Ensured that any capacity additions were for less than the mandated 1.0 mile in length to avoid the requirement for an Environmental Assessment which is triggered at that length."

• "Convened a meeting with the competing proposers and the affected utility companies during the procurement phase to furnish firsthand information on potential utility relocations rather than rely on the request for information process." (Gransberg and Loulakis 2012).

DB Project Delivery Selection Rationale

The MnDOT decision to use DB project delivery for the I-35W replacement bridge was made based on the agency's extensive DB experience and its belief that the delivery method would

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attract a pool of highly experienced DB teams to the project. MnDOT also felt that DB project delivery provided an equitable mechanism to divide the project's total risk with the winning design-builder. For instance, MnDOT decided to assume the risk of acquiring all but two of the required permits, assigning the design-builder the responsibility for obtaining the National Pollutant Discharge Elimination System and Coast Guard Navigation permits. This approach was successful in that MnDOT obtained all required permits within two weeks of the emergency.

Procurement

Based on its past experience, MnDOT had found that the use of alternative technical concepts (ATC) proposed by competing design-builders at confidential one-on-one meetings provided a potential to unlock the benefit of early contractor involvement in the procurement process and provide innovative solutions that were not contemplated in its RFP (Gransberg et al. 2013). ATCs are a procedure in which competitors propose options to the baseline design found DB Request for Proposals (RFP) (Carpenter 2010). The cornerstone of the MnDOT ATC process was termed Preapproved Elements (PAE). The PAE procurement process allowed competing design-builders to propose changes to the design found in the RFP via "private and confidential preproposal meetings," with the following purpose:

"Each Proposer is invited and encouraged to attend a private preproposal meeting at which the Department will address and respond to the Proposer's concerns and questions regarding details of the project scope, administrative procedures, outstanding issues for the remainder of the bid process, and any other related matters. Each meeting would be private in that only one Proposer

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would meet with MnDOT representatives at a time. Proposers are not required to accept the meeting invitation" (MnDOT 2010).

MnDOT capped the number of ATCs that each competing DB team could submit. MnDOT's purpose for limiting ATCs was driven by the desire to focus its process on high-value ATCs, as well as to eliminate the need to review and approve/disapprove ATCs of inconsequential value. After a design-builder had submitted an ATC, an expert panel, separate from the proposal evaluation team, scheduled a meeting with the team that had made the ATC proposal. "If the ATC was acceptable, it was approved and incorporated into the proposer's scope of work as a PAE, permitting the proposer to include the ATC-turned-PAE in both its technical package and its price proposal" (Gransberg and Loulakis 2012). Flatiron-Manson (FM), the eventual winning DB team, stated that "MnDOT did an excellent job in managing the procurement process. Of particular value ...the one-on-one meetings [got] answers quickly, [and the] responsiveness saved time and effort in putting their [FM's] proposal together" (Warne 2008). FM proposed PAEs that included an integral riding surface and novel method to demolish the existing foundation.

The contractual definition of "best value" was cited as being critical the selection process. The competing design-builders indicated that the transparency of the evaluation plan with the details of the scoring criteria was brilliant. According to Warne (2008), FM felt the scoring process "sent a clear message that the state valued higher quality and not just price." For instance, a 15-point bonus was offered for proposed designs that removed as many as six design exceptions, portraying MnDOT's preference for building the project with no design exception approvals and the agency's

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willingness to compensate the competitors for demonstrating inventive design and construction concepts in their proposals. MnDOT also required three 30-minute individual confidential conference calls and two 2-hour face-to-face meetings per week with each competing team. The bottom-line is that MnDOT invested 27.5 hours per week during the 3-week proposal preparation period (Warne 2008). MnDOT also provided each of the five DB teams a weekly escorted site visit (Hietpas 2008).

Because of the high level of interaction during proposal preparation, MnDOT was able to limit the final proposal to a maximum of 20 pages plus a 20-page appendix as opposed to normal page limits that run from 120 to 150 pages on routine DB proposals. The page limitation focused the competitors on those components of the project's scope that were critical to its success. This is consistent with the latest complex mega-project management theory which requires agencies to "define a complex project's critical success factors early in project development and use those to guide the remainder of the project development and delivery process" (Gransberg et al. 2013). The proposals were evaluated by a Technical Review Committee (TRC) consisting of four MnDOT engineers, representatives from the city of Minneapolis, a member of the Associated General Contractors, as prescribed by Minnesota law and two FHWA members that oversaw the selection process to make sure that it complied with federal requirements.

In line with a study on managing complex mega-projects advocates "incentivizing the key elements of project success" (Shane et al. 2015), MnDOT offered two incentives for the critical project success factor: timely completion. The first incentive was a $7 million no-excuse bonus

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for on-time completion provided the design-builder waived all future claims (Heitpas 2008). The second incentive was an early completion bonus of $2 million for every 10-day period the project was finished ahead of the contract completion date, capped at $20 million total maximum. MnDOT also integrated a disincentive of $200,000 per day for late completion. Both incentives were based on MnDOT's estimated daily user cost of $400,000.

The urgency of the situation drove MnDOT to complete the award of the contact as rapidly as practical, creating a short-term situation without sufficient "time to publish the results of the evaluation before contract award or to debrief unsuccessful offerors.

THE PROTEST

An award protest was asserted, "based primarily on the fact that the winning team also submitted the highest proposed price" (Gransberg and Loulakis 2012). MnDOT's rich base of DB experience had also provided it with a number of opportunities to defend the correctness and integrity of its DB evaluation and award process in both state and federal district courts. In each previous case, it relied on a defense described in a paper by Shane et al. (2006) as follows:

- "The evaluation plan was completely transparent."
- "MnDOT followed it precisely."
- "MnDOT could logically defend the final award decision."

It is not unusual for emergency procurement procedures to lead to objections. These types of objections range from mere public relations problems to the protest of an award and litigation. As

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stated earlier in this paper, MnDOT procured a DB contractor using a best value selection process. Minnesota Statutes Section 161.3410, et seq. provides MnDOT with legislative authorization to use DB best value procurement if it publishes an RFP which includes a description of DB evaluation and selection criteria with each criterion's weight in the final formula. The MnDOT award process calculates "best-value" scoring by dividing each offeror's price by its technical score, resulting in an award metric of "dollars per technical point," which according to Koch et al. (2010) is termed an "adjusted price DB award algorithm." MnDOT must award the contract to the responsive and responsible bidder with the lowest best value score.

MnDOT's first DB project, US 52 in Rochester, stimulated a protest of the method used to arrive at a short-list in the first phase of the 2-phase procurement (Shane et al. 2006). That protest turned on the issue of whether or not including a consideration of past DB experience was fair to local contractors on the state's first DB project. The courts, while finding that the evaluation plan was not airtight, essentially ruled that MnDOT applied the same flawed criteria equally on all the competitors and dismissed the protest as being without merit (Shane et al. 2006).

After the US 52 project and before the I-35W bridge project, MnDOT awarded 6 DB best value contracts without a legal challenge to the procurement process. However, the outcome of the process for the I-35W bridge forced MnDOT to once again defend itself against a protest of award (Hietpas 2008). A lawsuit was filed in October 2007 in Ramsey County District Court to obtain an injunction of all work and to rule the contract as illegal (Faegre et al. 2009). The suit made the following arguments to prove the illegality of the contract:

- MnDOT used improper evaluation criteria.
- MnDOT orally misled some of the bidders regarding permitted construction techniques.

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- The MnDOT TRC had abused its "discretion" by not awarding the contract to the proposal with the lowest proposed price and shortest proposed completion date (Faegre et al. 2009).

The lawsuit was dismissed by the District Court and subsequently appealed to the Minnesota Court of Appeals which upheld the lower court's dismissal as correct. Rather than describe the original court decision and the appellate court decision in chronological order, the facts and logic of each court with regard to the above three allegations will be combined into a separate discussion of each issue. It is hoped that this technique will allow the reader to better focus on the salient points of the case.

Improper Evaluation Criteria

The allegation contested the TRC determination that FM's winning proposal was indeed responsive, thereby constituting improper evaluation criteria for two elements of the proposed design. The first was that MnDOT accepted FM's proposal which included ROW outside the RFP project limits. The second involved a concrete-box design using two instead of the RFP-mandated three webs. The lower court did not specifically rule on the criteria themselves but instead focused on the timing of the suit itself.

First, it noted that the suit was brought at a time when the project was nearly complete thus making it "no longer justiciable" and moot due to an inability to rectify the alleged injustice if the case was found for the plaintiffs. Since the Minnesota DB best value award statute specifically gives the TRC the authority to make responsiveness decisions, the court ruled that the plaintiffs failed to

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establish any abuse of the express statutory discretion by the TRC, which was made moot by the plaintiffs' failure to press the suit in a timely manner.

The primary argument regarding the evaluation criteria made in the appeal was that "responsiveness under the design/build best value statute must be determined exactly like responsiveness is determined under traditional design-bid-build procurements" (Faegre et al. 2009). The appeals court interpreted that argument to mean that the plaintiffs were asserting a "common-law definition of a responsive proposal" and alleging that the FM proposal "materially deviated from specifications." The two alleged deviations were as follows:

- "The proposed work for this project shall not include additional capacity or Right of Way."
- "That concrete-box designs feature a minimum of three webs." (Faegre et al. 2009).

The FM design proposal included two previously approved PAEs. The first provided for a temporary easement to allow FM to extend its operations outside the project limits shown in the RFP. FM agreed to obtain the necessary permission itself and did so. The easement was required to permit FM to optimize its proposed means and methods by staging the machinery necessary to erect the bridge on a parcel of land that was not included in the MnDOT ROW acquisition plan. The RFP also included a statement that permitted the design-builder to submit a written request to MnDOT "if additional ROW is required" The plaintiffs pointed out that the same section in the RFP also includes a passage stating: "Proposed work for this project shall not include additional capacity or Right of Way." This is certainly a potential ambiguity.

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The FHWA definition of an ATC is "a request by a proposer to modify a contract requirement, specifically for that proposer's use in gaining competitive benefit during the bidding or proposal process… [and] must provide a solution that is equal to or better than the owner's base design requirements in the invitation for bid (IFB for DBB) or request for proposal (RFP for DB) document." (FHWA 2012). The essence of an ATC is to require "the agency to alter the baseline design and/or the baseline design criteria because if no deviation is required, the concept would be responsive if proposed as merely the given competitor's preferred design approach" (Gransberg et al. 2013). Thus, the fact was that ATCs/PAEs were allowable and to qualify as an ATC, the proposed changes must literally be a deviation to the "baseline criteria". The assertion that basing a proposal on an approved PAE, in FM's case added ROW and a concrete-box design with only two webs, was ruled to be perfectly responsive despite the potential ambiguity.

Misleading Oral Statements

As previously noted, the MnDOT ATC process involves confidential one-on-one discussions with each competing proposer to iron out the details of ATC concepts and advance them to biddable PAEs. Thus, unlike DBB procurement where every communication between the agency and one of the competing contractors is publicized, DB procurements with ATCs are conducted in conditions of enforced secrecy to preserve each design-builder's competitive edge (FHWA 2012). The ATC process has been integral to the MnDOT DB procurement since its inception in 2001. Therefore, the fact that MnDOT would convey different information to each contractor was well-understood and known to be an established practice well before the 2007 I-35W bridge collapse (MnDOT 2008). The appeals court affirmed the district court's decision regarding the propriety of

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the MnDOT ATC/PAE process citing the fact that the RFP imposed an "equivalent design requirement," and a design analysis to show that any proposed concrete-box design meet or exceed the three web standard. Since FM's concrete-box design exceeded this minimum equivalent design criterion, the appeal court rejected the "misleading oral statements" assertion.

TRC Discretion to Determine Responsiveness

The District Court determined that the statute invested the TRC with the responsibility to make responsiveness determinations. The appeals court went on to cite the fact that the Minnesota state best value statute (Minn. Stat §161.3426, subds. 1(a)) expressly grants authority to the TRC to reject proposals that it finds to be nonresponsive. The court also opined that DB procurements, "by definition, are not based on fully detailed specifications." The court concluded that those two factors defined the intent of the law "to permit the TRC, by applying its judgment based on the advertised selection criteria, to evaluate proposals where no finished design exists to which the proposals must conform" (Faegre et al. 2009). In a nutshell, the court determined that "the TRC has discretion in deciding whether a proposal is responsive." It also noted that the TRC's discretion is not unconstrained and responsiveness determinations must be supported by the weight of the evidence. Hence, the appeal was unsuccessful, and the Court of Appeals determined that there was "no error of law and that substantial evidence supported the TRC's determination that Flatiron's proposal was responsive, leading the court to conclude that dismissal of the lawsuit was proper" (Faegre et al. 2009).

Summary of Protest Results

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As in the US 52 protest on its initial DB project, MnDOT relied on its alternative procurement philosophy to keep every aspect of the procurement's advertisement, evaluation, and award as open to the competing design-builders as time and circumstances would allow. The intense amount of one-on-one interaction associated with this project is unprecedented and amply demonstrates the agency's willingness to take risks that are commensurate with needs of the emergency situation. The principles of complex project management demand that decisions be made as early as possible in the project development process (Gransberg et al. 2013). To mitigate the risks inherent with those decisions on emergency complex mega-projects like the I-35W Bridge, demands early contractor involvement in the planning and design process. MnDOT achieved that via the information rich communications it maintained throughout the proposal preparation phase. Notwithstanding the confidentiality of the ATC/PAE process, MnDOT had a totally transparent evaluation plan/award algorithm that allowed them to withstand the protest. More importantly, it delivered a technically, environmentally, and politically complex mega-project in record time. The I-35W Bridge collapsed on August 1st, 2007 and was reopened on September 18th, 2008, more than three months early. Table 2 contains the timeline for the expedited procurement.

Table 2. I-35W Bridge Replacement Timeline (Gransberg and Loulakis 2013).

Date	Event	Remark
August 1, 2007	Bridge collapses	None
August 2, 2007	MnDOT decides to use DB project delivery	None
August 4, 2007	RFQ issued	None
August 8, 2007	Statement of qualifications received from competitors	None
August 8, 2007	Short list published	Same day as receipt
August 23, 2007	RFP released	None
September 15, 2007	Proposals submitted	None
September 19, 2007	Design-builder selected	49 days to select contractor
October 8, 2007	Notice to proceed	None
September 19, 2008	Project opened to traffic	339 days after start of construction

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SUMMARY AND RECOMMENDATIONS

Completing the I-35W Bridge replacement project 339 days is a noteworthy achievement by both the MnDOT and FM, its design-builder. The process developed to restore services amply demonstrates the value for money to the public from those innovations used. That MnDOT had to defend its process from a protest on this emergency mega-project further testifies to the efficacy of it model for emergency procurement of major infrastructure projects.

MnDOT used the following tools to successfully expedite the emergency replacement of the I-35W Bridge which may prove useful to others with a need to complete an emergency restoration of services project.

- "Used two-step right-of-way acquisition with right of entry easements to provide immediate access to the construction site followed by a guaranteed timeline for financial closure on each parcel;"

- "Obtained single points of contact within each resource agency for all permit communication and a commitment to expedite the issuance of project permits;"

- "Kept tight control of project scope to avoid unintentional delays as the result of exceeding permit constraints;"

- "Encouraged a highly interactive preproposal period, including regularly scheduled one-on-one meetings with each competitor, whose contents were kept confidential;"

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- "Accepted confidential ATC/PAEs prior to proposal submission for review and decision;"
- "Created a completely transparent evaluation plan and award algorithm that withstood a protest; and"
- "Developed incentives that were directly related to the preeminent project success factor, timely completion." (Gransberg and Loulakis 2012).

Limitations

The study reported in this paper has found that the MnDOT successfully defended itself against an award protest. This conclusion is only applicable to this particular project and this particular agency and cannot be generalized to other projects or agencies. However, it does provide a proven model for emergency procurement of major infrastructure projects.

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