



BEST & FLANAGAN

Who Bears Risk of Loss When  
Information in Bid Package for  
Public Projects is Inaccurate?

# Inaccurate Info in Bid Package: Who Bears Risk of Loss?

- Ongoing issue that has been raising concerns in the construction industry for several years.
- Bid packet contains information provided to prospective bidders such as geotechnical reports, but specs (or argument) that contractors can't rely upon that information.
- Information turns out to be wrong resulting in additional cost and/or time.
- Who bears the risk for those additional costs and delays?

# Inaccurate Info in Bid Package: Who Bears Risk of Loss?

- *Ames Construction vs. City of Moorhead* – currently before MN Ct. of Appeals.
- \$51M plus underpass project in City of Moorhead, MN.
- March 2018, City solicited bids for project. Bid solicitation included 1,894 page pdf bid packet.
- Bid Packet included 283-page geotechnical engineering report from Braun regarding the soil conditions at the Project site.

# Inaccurate Info in Bid Package: Who Bears Risk of Loss?

- Braun Report included soils analysis based upon its:
  - 575 moisture content tests;
  - 110 dry-density tests and unconfined-compressive strength tests;
  - 51 Atterberg limits tests;
  - 53 grain size analyses;
  - 4 consolidation tests;
  - 5 direct shear tests;
  - 47 in-situ vane shear tests;
  - 2 laboratory moisture density relationship tests (standard Proctor); and
  - 2 laboratory R-value tests.
- Braun Report included a table of its analysis and stated that the table was provided to “*enable the design of the temporary structures.*”

# Inaccurate Info in Bid Package: Who Bears Risk of Loss?

- Ames was low bidder and awarded contract. Work started July 2018.
- City's engineer, SRF, designed the permanent structures, but design of temp structures delegated to Ames who subcontracted with EPI to design the temp retaining walls.
- Ames was to design, install, and utilize temporary earth retention systems (“ERS”) to support its excavations and construct the permanent improvements.

# Inaccurate Info in Bid Package: Who Bears Risk of Loss?

- EPI relied on information in the Bid Packet, including the Braun Report, to design the temporary retaining walls.
- EPI communicated with SRF throughout the design of the temporary retaining walls and made clear it was using the soil parameters in Braun Report for design.
- Soils information in Braun Report was inaccurate, which led to a 2 plus year delay in substantial completion and \$15M plus in additional construction costs.
- Issue is whether Ames gets additional contract time and compensation as a differing site condition?

# Inaccurate Info in Bid Package: Who Bears Risk of Loss?

- Arguments by Ames, MAPA, AGC, City of Moorhead and MnDOT.

## City's/MnDOT position:

- The Braun Report was not part of the Contract Documents.
- Instructions to bidders stated “Bidders shall make all necessary investigations to satisfy themselves as to the conditions and nature of the soil and other characteristics of the proposed site or sites of the project. . . . and
- “. . . . all available information in the possession of the City Engineer will be shown to the bidders but the correctness of any such information is not guaranteed.”

# Inaccurate Info in Bid Package: Who Bears Risk of Loss?

## City's/MnDOT position (con't):

- MnDOT Spec 1205.2. addresses inclusion of boring logs & other subsurface investigation records and expressly states that such documents are provided *for informational purposes only, and not part of the Contract.*
- Section 1205.2 states that the public agency may provide information such as borings in each possession to prospective bidders, however, Bidders shall understand that this additional information is not part of the Proposal Package and will not become part of the Contract. The Department makes this additional information available for the Bidders' information only and warns the Bidders not to rely on any included estimates or quantities. . . . Bidders are solely responsible for all assumptions, deductions, and conclusions that they may reach. The Department does not make or imply a warranty as to the accuracy, sufficiency, or reliability of this additional information.

# Inaccurate Info in Bid Package: Who Bears Risk of Loss?

## Ames/MAPA/AGC Position

- Bid Packet, stated that “[t]he specifications, plans, general and special conditions, special provisions, and all supplementary documents herein are essential parts of the contract and a requirement occurring in one is as binding as though occurring in all.”
- Braun Report was a supplementary document contained in bid packet.
- Braun report set forth calculations that were specifically provided to “enable the design of the temporary structures” at the Project.
- Braun Report was based on extensive soils testing and analysis performed by Braun and provided to bidders to bid the project.
- SRF was advised and knew that EPI was using and relying upon the Braun Report to design the ERS for the project.

# Inaccurate Info in Bid Package: Who Bears Risk of Loss?

- Oral arguments set before Ct. of Appeals on January 7<sup>th</sup>, 2026.
- Legal arguments.
- Equitable arguments.
- Public Policy considerations.
- Decision will have implications on bidding public projects regardless of the outcome.

# Update on Mid-America Milling Co., LLC v. USDOT and USDOT DBE Program

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# Mid-America Milling Case Context

- US Constitution 14<sup>th</sup> Amendment:
  - “No State shall ... deny to any person ... the equal protection of the laws.”
- *Students for Fair Admissions, Inc. v. Presidents and Fellows of Harvard College*, 600 U.S. 181 (2023):
  - “Eliminating racial discrimination means eliminating all of it. And the Equal Protection Clause, we have accordingly held, applies ‘without regard to any differences of race, of color or of nationality’ – it is ‘universal in its application.” *Id.* at 207.

# Mid-America Milling Case Recap

- Challenge to: (1) racial based discrimination and (2) gender based discrimination in the DBE program on federal highway construction projects. 15 U.S.C. § 637, 49 CFR Part 26
- Challengers bid on DOT funded projects with DBE goals, but did not hold DBE status. They lost out to DBE firms, even when their price was lower.
- Challengers sought injunctions preventing the application of race and gender based classifications in the DBE program.
- Challengers heavily relied on *Students for Fair Admissions*

# Mid-America Milling Case Recap

- Injunction 1: “The Plaintiffs are entitled to a preliminary injunction.”
  - “The scope of the preliminary injunction shall apply to the Plaintiffs in the states within which they operate, Kentucky and Indiana.”
- Injunction 2:
  - “The Court further clarifies that this injunction reaches all states in which the Plaintiffs operate or bid on DOT contracts impacted by DBE goals, not merely Indiana or Kentucky”
- USDOT and Mid-America file motion to approve Consent Order

# Mid-America Milling Case Recap

- Highlights of proposed Consent Order
  - Stipulation: USDOT has “determined that the program’s use of race- and sex-based presumptions is unconstitutional.”
  - Stipulation: “DBE program’s use of race- and sex-based presumptions of social disadvantage” is unconstitutional.
  - Proposed Order: “the Court hereby holds and declares that [USDOT] may not approve any federal, state or local DOT-funded projects with DBE contract goals where any DBE in that jurisdiction was determined to be eligible based on a race- or ex-based presumption.”

# Mid-America Milling Case Status

- Court has not yet ruled to approve.
- Groups of state attorneys general, various associations, and governmental entities have intervened and have filed amicus briefs to argue for or against the approval of the proposed Consent Order.
  - 22 AGs (against) – procedural argument against scope of injunction.
  - 21 AGs (in favor) - “For decades now, the federal [DBE] program has required the States to discriminate against non-DBE contractors ... thereby demeaning both the States and their contractors and stealing thousands of contractors’ economic opportunities based entirely on their race and sex.”
  - Local governments (against) – “trades local governments’ inherent ability to self-govern and trades it in favor of permanently imposing the current Administration’s policies through a coercive ban on funding.”
  - DBE Association: “If the Court approves the proposed Consent Order, it will seriously hamper the DBE program, ensuring a swift return to openly discriminatory practices of the past.”

# Interim Final Rule – Meanwhile .



- October 3, 2025, 49 CFR Parts 23 and 26, Docket No. DOT-OST-2025-0897
- **KEY POINTS**
  - Eliminates the presumption of disadvantage based on race and gender on grounds that such presumptions are unconstitutional.
  - Requires UCPs to overhaul DBE program by reevaluating all DBEs and recertifying them.
  - DBEs to seek certification and/or recertification using a new format, which requires DBEs to provide a Personal Narrative proving disadvantage based on individualized proof on a case-by-case basis.
  - DBE contract or participation goals cannot be used in new procurements until the overhaul and recertification process is complete.

# Interim Final Rule – Latest

- Most recent guidance on IFR – 12/1/25
- “Official Frequently Asked Questions (FAQs) on the U.S. Department of Transportation’s [DBE] Program ...”
  - Issued by General Counsel of the Department of Transportation.
- Observations
  - “4. Can recipients implement their own race- and sex-neutral small business enterprise programs on federally assisted contracts?” A. “ Yes. ... Certification for eligibility in a recipient’s small business enterprise program cannot be based in whole or in part on race or sex.”
  - “6. ... if a DBE performing work on a contract is not recertified” what should the recipient do? A. Recipient must “take all measures to ameliorate unconstitutional actions” – determined case-by-case

# Interim Final Rule – Latest

- Q. Does IFR affect projects that are already awarded and have DBE goals?
  - Jobs advertised, but bids not opened: DBE goals must be removed.
  - Jobs advertised, bids opened, job not awarded: DBE goal must be “zeroed out” – contracts can be amended without re-advertising.
  - Jobs awarded before 10/3/25 – DBE participation cannot be counted towards DBE goal until the reevaluation process is completed.
  - Jobs ongoing – if all DBEs recertified – continue as is.
  - Jobs ongoing – if some DBEs not recertified – recipient must “take appropriate action to discontinue effect of unconstitutional certification, and if they don’t, DOT will not make payment for the contract.

# Interim Final Rule – Latest

- Should recipients set DBE goals to zero until recertification is completed? A. Yes.
  - NOTE (not on the FAQ): When will DOT recertification of State DBE program occur? Unknown
- What is the deadline for MN to complete recertification process? “as quickly as practicable.”
- Can a deadline be given to current DBEs to submit recertification? No. But, firms can’t be recertified until they provide resubmission.
- Can all DBEs just be decertified, and a State not do the reevaluation? No.

# Interim Final Rule – Latest

- Personal Narrative to establish existence of disadvantage

Education -- factors such as denial of equal access, compared to all similarly situated persons, to institutions of higher education and vocational training, exclusion from social and professional association with students or teachers, denial of educational honors rightfully earned, and social patterns or pressures that discouraged the individual from pursuing a professional or business education.

Employment -- factors such as unequal treatment compared to all similarly situated persons in hiring, promotions and other aspects of professional advancement, pay and fringe benefits, and other terms and conditions of employment; retaliatory behavior by an employer or labor union; and social patterns or pressures that have channeled the individual into non-professional or non-business fields; or

# Interim Final Rule – Latest

- Personal Narrative to establish existence of disadvantage

Business history – factors such as unequal access, compared to all similarly situated persons, to credit or capital, acquisition of credit or capital under commercially unfavorable circumstances, unequal treatment in opportunities for government contracts or other work, unequal treatment by potential customers and business associates, and exclusion from business or professional organizations.

Other relevant evidence may be considered, but the incidents or experiences discussed in the narrative must not rely, in whole or in part, on race or sex.

# Interim Final Rule – Latest

**11. Should the personal narrative span the full scope of the owner’s life experiences related to economic disadvantage, from childhood through to the present, including both the time before and after starting the business? (added 12/01/2025)**

The personal narrative can discuss incidents and experiences of economic hardship, systemic barriers, and denied opportunities from any point in the owner’s life within American society that impeded the owner’s progress or success in education, employment, or business opportunities, including obtaining financing on terms available to similarly situated, non-disadvantaged persons. However, the incidents or experiences discussed in the narrative must not rely, in whole or in part, on race or sex.

# Progress Payments/Release of Claims

- Not much of an issue on MnDOT projects.
- More of an issue on municipal projects.
- “Contractor certifies that the foregoing amount covers all labor, materials and equipment provided through the date of the pay application.”
- Is this language equivalent to a lien release if the quantities are later determined to be off?

# Justin P. Short

Justin P. Short is a partner in the firm's Construction, Real Estate and Litigation practice groups where he represents contractors, real estate developers, and commercial landowners. Mr. Short specializes in construction claims pertaining to highway and bridge contracts, Department of Transportation claims, federal MATOC agreements, mechanic's liens, bond claims, bid protests, indemnity obligations, construction contract disputes and commercial and multi-family residential construction defects. He has represented contractors on these construction matters throughout Minnesota, North Dakota, South Dakota, Iowa, Illinois, Arizona, Texas, Colorado, Arkansas, New Mexico, Mississippi, Florida and North Carolina.

Justin is a frequent lecturer on construction and real estate industry topics through the State Bar Association, Thompson-West Corporation, HalfMoon Education Inc., as well as private seminars to contractors, real estate developers and commercial landowners.



# HOW TO COMBAT FRAUD IN GOVERNMENT CONTRACTING!

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# Minnesota False Claims Act

- Minn. Stat. § 15C.01, et seq.
  - What does fraudster have to pay:
    - 3X actual damages, (2X if the fraudster admits before being sued) (Minn. Stat. § 15C.02)
    - civil penalties (Minn. Stat. § 15C.02) (\$14,308 to \$28,619 per claim)
    - attorneys' fees (Minn. Stat. § 15C.12)
    - expert consultant and expert witness fees (Minn. Stat. § 15C.12)
  - What does whistleblower get?
    - 15-30 percent of the recovery (Minn. Stat. § 15C.13.)

# Minnesota False Claims Act

- What constitutes a false claim?

(1) knowingly presents, or causes to be presented, a false or fraudulent **claim for payment or approval**;

(2) knowingly makes or uses, or causes to be made or used, a **false record** or statement material to a false or fraudulent claim;

(3) knowingly **conspires** to commit a violation of clause (1), (2), (4), (5), (6), or (7);

(4) has possession, custody, or **control of property or money used**, or to be used, by the state or a political subdivision and knowingly delivers or causes to be delivered less than all of that money or property;

(5) is authorized to make or deliver a document certifying receipt for money or property used, or to be used, by the state or a political subdivision and, intending to defraud the state or a political subdivision, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the state or a political subdivision who lawfully may not sell or pledge the property; or

(7) knowingly makes or uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the state or a political subdivision, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the state or a political subdivision.

# Minnesota False Claims Act

- How should a whistleblower come forward?
  - Go to attorney first to preserve whistleblower status.
- Minn. Stat. § 15C.05(f)

A court must dismiss an action or claim under this section, unless opposed by the prosecuting attorney, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed:

- (1) in a criminal, civil, or administrative hearing in which the state or a political subdivision or its agent is a party;
- (2) in a report, hearing, audit, or investigation of the legislature, the governing body of a political subdivision, the legislative auditor, or the state auditor; or
- (3) by the news media.

This paragraph does not apply if the action or claim is brought by the prosecuting attorney or the person bringing the action or claim is an **original source of the information.**