

The Journal

Arguments heard in Gag vs. ISD 88

NEW ULM — Fifth District Judge Todd William Westphal heard arguments Wednesday morning from both sides of a bidding controversy surrounding the New Ulm Middle School.

Gag Sheet Metal Incorporated (GSM) sought a temporary restraining order (TRO) to prevent ISD 88 from opening bids Thursday, Dec. 29.

Roger Hippert, attorney for the plaintiff, began arguments. The plaintiff said Tremco Incorporated's involvement in preparing the roofing plans unfairly disadvantaged Gag and put an undue cost on taxpayers.

Hippert emphasized two points: first, that an engineer did not prepare the plans and specifications; and second, the unreasonable increase of costs on ethylene propylene diene monomer (EPDM) rubber roofs led to a preference for Tremco's product.

Hippert argued that because the plans had been drawn up by the unnamed BDK and approved by Ryan Palmer, a Tremco senior field representative, instead of a licensed engineer, the plans do not fall in line with state law.

The later copies of the plans had the e-signature of Terrance Duffy who is a licensed engineer hired by Tremco. His signature was part of a stamp that stated he had reviewed the plans.

Because the statement did not say "*prepared*" and the plans were be identical to those prepared by BDK, Hippert argued they were not legal.

Later James Strommen, attorney for the defense, said he had been informed by Palmer that the plans signed by Duffy were different than the BDK ones.

An affidavit provided by Duffy said that the stamped signature used is standard for him and complies with his understanding of the law.

Strommen argued that the plaintiffs were quibbling with the verbiage of the law. The plans did meet legal standards, he said.

As for the alleged unfair costs, Hippert cited the plan's discrepancies between the slope of the roofs (one-quarter inch for rubber versus one-eighth inch for built-up) meaning the rubber would need more insulation.

He also pointed to rubber roofs needing to strip the roof down to the structural deck and

that installers needed double the years of experience for rubber versus built-up.

In response Strommen pointed to Palmer's and Facilities Director Patrick Lang's affidavits which detailed that the discrepancies were not, as the complaint alleged, with *"no scientific or engineering reason."*

The difference in slope is due to EPDM roofs performing best at one-quarter inch per foot slopes, stated Lang's affidavit.

Lang's affidavit also explained that the structure's roof is flat. To accommodate for the required slope, insulation would have to be removed and reapplied to avoid complications.

The plaintiffs pointed to the higher costs for EPDM as a way to favor Tremco Incorporated, who was involved in the preparation of the plans.

Tremco was hired for consultation; however, the defense argued that Tremco has been a consultant on numerous projects and its services have rarely been used for those it was consulted on.

The defense pointed to the high school roof. Tremco had been consulted on that roof but Gag had won the bid anyway.

Additionally it is within the district's rights to decide the type of material it wants for a project, the plaintiffs admitted.

In his affidavit, Lang argued that the built-up style of roof was better because the multiple felt layers allowed for greater leak resistance and held up better to foot traffic.

Preferring built-up roofing does not equate preferring Tremco, the defense argued. In its memoranda, the defense listed four other companies that could provide the materials and service.

It also argued that there were six companies, including Gag, expected to bid on the roof. Therefore, the defense concluded, while the built-up style was preferred, it was Gag's insistence on only submitting an EPDM bid that could hurt the company's chances. Even then it could still get the bid.

As part of the requirement of a TRO, Westphal had to consider the harm that would come to the plaintiff if the TRO was not passed, as well as harm to the defendant if it did.

The plaintiffs argued that serving the injunction would not harm the process of getting the roof fixed on time.

The work is not schedule to begin until June and a roofing project often only takes a few weeks. Thus the work would be done well before the end of summer, Hippert argued.

The defense said that was unreasonable because along with the roof, the gym floor needed repairs as well.

The floor was damaged when a water pipe expansion coupler burst, flooding parts of the building.

Contractors refuse to fix the floor until the roof is finished. The defense argued that meant any delay could prevent the floor from being repaired in time.

In addition, the defense argued that a delay in opening bids could increase the lowest bid 5-10 percent. Considering the project is expected to cost \$500,000 a 10 percent increase could be \$50,000.

The increase would come from construction companies filling their summer schedule. Some of the preferred companies may not even bid if it takes too long to revise, the defense argued.

The plaintiffs responded by arguing that if the plans were produced in a legal and responsible way, the cost would decrease enough to offset that effect.

At the end of the hearing, Westphal said he would release a decision Wednesday, Dec. 28, to avoid complications with the bidding process happening Thursday, Dec. 29.

As of the end of Brown County Courthouse business hours no decision had been filed.

Connor Cummiskey can be emailed at ccummiskey@nujournal.com.

