

STATE OF WISCONSIN

CIRCUIT COURT

OZAUKEE COUNTY

PRN ASSOCIATES LLC
and PGN ASSOCIATES LLC
4107 Gazebo Hill Blvd.
Mequon, Wisconsin 53092

Plaintiff-Petitioner,

Case No. 05-CV-312
Case Code: (30601) Admin-
istrative Review

vs.

STATE OF WISCONSIN
DEPARTMENT OF ADMINISTRATION
101 East Wilson Street
Madison, Wisconsin 53707

Honorable Paul V. Malloy

Defendant-Respondent.

**PLAINTIFFS'/PETITIONERS'S RESPONSE
TO DEFENDANT'S MOTION TO DISMISS**

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Plaintiffs, PRN Associates, LLC and PGN Associates, LLC (collectively “Prism”) submit the following in opposition to the State Department of Administration’s (“DOA”) motion to dismiss.

I. INTRODUCTION

Prism filed a petition for review in this matter on July 6, 2005. The State successfully severed a companion action through a motion for change of venue decided by the Court on November 30, 2005. At that time, the State had already filed a “motion to dismiss.” The State has now filed a second motion to dismiss and supporting brief. This matter is set for hearing by the Court on June 27, 2006.

This matter comes to the Court after numerous efforts to obtain meaningful review of the actions of UW-System to improperly abandon its award of a state contract with Prism.¹ The record (languishing at the DOA because the State has not yet supplied it for the Court), does not lend itself to quick digestion. The State’s current filing only adds to the confusion. Although there has been no formal discovery in this case, in response to an open-records request Prism has obtained over 7,000 pages of documents relating to the Kenilworth project. Buried in this pile were documents which indicate that it was Marc J. Marotta (“Marotta”), Secretary of the Department of Administration (“DOA”) who made the improper decision to abandon the selection of Prism. These documents show that it was not lack of support on the State Building Commission (“Building Commission”) that hurt Prism, as asserted by the State in its briefing (and by Secretary Marotta in his public correspondence and underlying decision). Rather Prism’s demise was the result of actions taken at a behind-the-scenes meeting eight days prior to the Building Commission’s February 18, 2004, public hearing. In the wake of those actions, former-

¹ As in the petition, *Prism* is used here to refer to PGN Associates and/or PRN Associates, LLC, as appropriate.

Secretary Marotta also apparently directed that a second *ad hoc* RFP process be established for Kenilworth with a new evaluation committee. Four political appointees, two of whom did not even work for the State, were placed on the evaluation committee which eventually selected Weas Development as the winning developer over runner-up Prism. As the record shows, it was former-Secretary Marotta who then considered Prism's appeal of both its abandonment and the subsequent selection of Weas.

The State concedes that it is deemed to have admitted the factual allegations of the Petition. Defendant's Brief in Support of Motion to Dismiss, May 8, 2006, p.1. (hereinafter "Brief at ___"). However, the State then proceeds to spin a tale completely at odds with the facts set forth in the petition by citing to the facts asserted within the June 6, 2005, letter/decision of former DOA Secretary Marotta (the "Decision"). The State argues that the attachment of the Decision to the Petition makes the Decision part of the Petition, at least for reference to the facts contained therein. Brief at 1-2. But the only meaningful fact established by the Decision is that the DOA Secretary gave the reasons set forth in the Decision as the grounds for his denial of Prism's protest. It is largely because such reasons are erroneous that this action has been brought. The State cannot bootstrap its own version of the facts into being Prism's version of the facts which the State then admits are true.

Another pervasive fallacy in the State's story is that there were two RFP processes.² The State uses this charade in an attempt to avoid the requirement of Wis. Admin. Code Adm. §10 that any contract award shall be made to the firm selected by the evaluation committee. The charade also allows the State to attempt to justify the disclosure to Weas of Prism's winning proposal, something absolutely prohibited in the RFP process. The fact is that there was but a single project for which proposals were sought. The State simply

² Prism itself from time to time refers to the first process and the second process for ease of reference, but Prism does not concede that there were in fact two separate RFP processes.

opted for a *Mulligan*, or do-over, when the winner, Prism, was not politically popular with the person who made the key decision. Such is exactly the behavior which the statutes and regulations are intended to bar.

The law is very serious about making sure that the State obtains the best possible deal for the State, not the best possible deal for the individuals making procurement decisions. In fact, an employee of the DOA was convicted at trial this month in federal court in Milwaukee on a charge that she deprived the State of honest services in the procurement of a travel contract. The alleged benefit to her was only that she acted to improve her standing with her political-appointee bosses, not that she personally received payment from a proposer. However, she now faces up to twenty years in prison. The harsh sentence reflects the serious damage done to the State if the procurement process is perceived as being nothing more than the modern-day embodiment of the ancient philosophy, *to the victors go the spoils*.

Prism's claim arises under the clear language of the applicable public contracting statutes (Ch. 16 Stats.) and administrative regulations (Adm 10 and Adm 7) and is very appropriately analyzed as a breach-of-contract claim. The State promised the proposers that if someone spent enough ingenuity, time, money, and effort to submit the winning proposal, then that person would have the exclusive right to negotiate with the State. Prism relied upon the State's promise and spent heavily, to its detriment. The State then reneged on its promise.

II. FACTS³

A. The original RFP process.

1. In the fall of 2002, the University of Wisconsin-System (“UW-System”) in conjunction with the DOA issued a Request for Proposals (“RFP”) to redevelop the Kenilworth Building located on Milwaukee's east side, south of the University of Wisconsin-Milwaukee (“UWM”). Petition at ¶ 2.

2. The RFP was issued pursuant to Wis. Stats. §§ 16.705 and 16.75 and Wis. Admin. Code. Ch. Adm 10, and sought to establish a contract with a private party to provide real estate development services to UW-System and the DOA to redevelop the Kenilworth building into a multi-use facility, including student housing, retail, and other uses. Petition at ¶ 3.

3. After substantial review and consideration, Prism was selected by the RFP evaluation committee established under Adm. 10.08 in August of 2003 to be the developer for Kenilworth. This selection was confirmed by the Board of Regents through its resolution No. 8731 passed on September 5, 2003, which granted to UW-System the authority to negotiate with Prism. Petition at ¶ 4.

4. UWM's Vice-Chancellor Monica Rimai issued a letter to Prism dated August 28, 2003. The Vice-Chancellor stated:

... I am pleased to inform you that, after careful review and consideration of the final proposals, the University and the Evaluation Team has selected Prism Development Company as the Developer

³ Limited facts are set forth here to offset the impression of the process that the State attempts to convey, that everything was done properly and above board. However, a motion to dismiss is converted to a motion for summary judgment if facts outside the pleadings are considered. Wis. Stat. § 802.06(2)(b). In the event that this motion is converted to one for summary judgment, Plaintiffs will move for the opportunity to take discovery should the court deem there to be any contested and genuine disputes of material fact. Wis. Stat. § 802.08(4).

UWM would like to pursue negotiations with re-
garding the Kenilworth redevelopment project...

See Affidavit of Counsel at Tab 1 (references to exhibits to this affidavit are sometimes referred to simply as “Tab ___”).

5. In early 2004, UW-System sought to have the Kenilworth redevelopment project and Prism’s proposal reviewed by the Building Commission. The review was initially set for January 19, 2004, but was rescheduled by the Building Commission for February 18, 2004. Petition at ¶¶ 5, 6.

6. Without informing Prism in advance, and with no explanation, UW-System withdrew its request for Building Commission review of Prism’s winning proposal at the Building Commission’s public hearing on February 18, 2004. Petition at ¶ 6.

7. When the request for approval was withdrawn, Building Commission sub-committee Chairman Dan Vrakas told Prism before the entire crowd that he had never advised anyone to sue the State but that he thought that Prism would have a good case if it sued. Petition at ¶6.

8. The Madison *Capital Times* reported on February 19, 2004: “Asked if UWM was ordered to agree that the DOA would issue a new request for proposal, she [Monica Rimai, vice chancellor for administrative affairs of UWM] said, ‘It was strong advice.’” See Tab 16; Copy of *Capital Times* report From February 19, 2004.

9. According to documents provided to Prism under an open records request, it was former DOA Secretary Marotta who gave that strong advice. Marotta pressured UWM to withdraw its request for approval of Prism at a meeting held on February 10, 2004, in the office of State Representative Jon Richards. The records also indicate that Milwaukee Alderman Michael D’Amato attended, and that former Secretary Marotta and his deputy Laura Engan, were present, as well as other UWM representatives. Affidavit of

Counsel at Tab 2; Memorandum E-mail dated February 11, 2004, prepared by Nancy Ives, Assistant Vice President of the UW-System.

10. The Ives memo does not mention opposition to the selection of Prism on the Building Commission, but rather suggests that Prism should be rejected over purported concerns about litigation. It further indicates that Alderman D'Amato and Representative Richards favored UWM's withdrawal of the request for approval of Prism. *Id.*

11. In the wake of UW-System's action to abandon its contract with Prism, Prism (via PRN) attempted to mitigate its damages by participating in the second, *ad hoc* RFP process. Prism also filed Notices of Intent to Protest during the spring and summer of 2004. In correspondence with Prism in spring and summer of 2004, UW-System and DOA refused to take up Prism's protest and instead informed Prism as follows:

You have also indicated that you believe Adm. 10.15(1) Code, allows you to both protest and appeal the decision of the University not to proceed further with the procurement. Section Adm. 10.15, Code, allows a protest to be filed within 10 days after issuance of a solicitation or after issuance of the letter of intent to award a contract. The solicitation in this matter was issued in October 2002. Thus, your opportunity to protest and appeal decisions relating to the issuance of the solicitation are passed. No letter of intent has been issued.

See Petition at 9; Affidavit of Counsel at Tab 3; Letter from Secretary Marotta April 30, 2004.

12. At the time of this correspondence, neither UW-System nor the DOA asserted or adopted a position (as the State now has) that Adm. 10 did not apply to either or both of the RFPs issued for Kenilworth, and therefore that no Letter of Intent would be issued. Rather, their position was that no Letter of Intent to contract had been issued as of that time. Adm. 10.15(1) provides that the issuance of the Letter of Intent is required in order to initiate a pro-

test. Adm. 10.15(6) also provides that any further activity on the subject contract is stayed pending disposition of the protest and any appeal under that section. Petition at ¶ 10.

13. During the second/reissued RFP process, Prism continued to correspond with DOA and UW-System and repeatedly put the State on notice that it intended to protest the withdrawal of the contract award from Prism, and/or the ultimate award of the contract to someone other than Prism. Petition at ¶ 11.

14. Prism participated in the reissued RFP process during the spring of 2004. Petition at ¶ 11.

15. A review of the public records documents show that the political appointees on the second evaluation committee graded Prism's proposal far more harshly than did the career civil servants. Even with the harsh grading of the political appointees, Prism's proposal received the highest score of all proposals submitted. Affidavit of Counsel at Tab 4; Evaluation Committee Scoring Records.

16. After Prism was scored highest when done in accordance with the factors set forth in the (re-issued) RFP, the evaluation committee abandoned the use of such factors and used factors not specified in the RFP to make its final determination based only on oral interviews. In doing so, the committee ignored Wis. Stat. § 16.75(2m)(g), which states in relevant part: "The department's determination shall be based only on price and the other evaluation factors specified in the request for proposals." Affidavit of Counsel at Tab 5; Oral Scoring Records.

17. Recently, and in the wake of the *U.S. v. Thompson* matter, the Governor signed Executive Order # 137 on February 3, 2006. It read:

Executive Order # 137

Relating to the Use of Evaluation Committees in
State Procurement Processes

WHEREAS, Wisconsin state government agencies regularly procure goods and services for a variety of state government purposes; and

WHEREAS, Chapter 16 of the Wisconsin Statutes authorizes competitive negotiations utilizing a “Request for Proposal” process whenever several vendors are qualified to furnish the State of Wisconsin with a product or service, but a contract cannot be awarded strictly on the basis of specifications or price; and

WHEREAS, the Request for Proposal process specified in Chapter 16 of the Wisconsin Statutes involves the establishment of an evaluation committee to review all vendor proposals submitted for consideration in awarding procurement contracts; and

WHEREAS, in keeping with, and expanding upon, current procurement policies intending to avoid even the appearance of any conflict of interest in State of Wisconsin procurements; and

WHEREAS, public confidence in Wisconsin state government depends on public confidence in state government procurement practices;

NOW, THEREFORE, I, JIM DOYLE, Governor of the State of Wisconsin, by the authority vested in me by the Constitution and the laws of this State, do hereby direct all state agency heads appointed by the Governor to ensure that where a procurement contract is to be awarded pursuant to a Request for Proposal as specified in Chapter 16 of the Wisconsin Statutes, *the evaluation committee shall exclude any employee of the Office of the Governor, and any unclassified Agency Head, Commissioner, Deputy Agency Head, Executive Assistant, or Division Administrator.*

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the Great Seal of the State of Wisconsin to be affixed. Done at the Capitol in the City of Madison this second day of February, in the year two thousand six.

JIM DOYLE Governor By the Governor:

DOUGLAS LA FOLLETTE Secretary of State

http://www.wisgov.state.wi.us/journal_media_detail.asp?locid=19&prid=1686

(italics added).

18. The executive order was an instance of closing the gate after the horse was out. In the case of the second evaluation committee under the reissued RFP, four of the eight members of the committee were political appointees. Two of them, Patrick J. Farley and Rob Cramer, were Division Administrators at the DOA. Two of them did not even work for the State, and thus had conflicting interests. One who did not work for the State, Jim Plaisted, previously worked for Milwaukee Alderman D'Amato. Affidavit of Counsel at Tab 4; Evaluation Committee Scoring Records.

19. The facts regarding the nature of the scoring during the second evaluation committee were unknown to Prism during summer of 2004. During this period Prism awaited notice of the evaluation committee's selection and also planned to protest, if it was not selected, upon receiving a copy of the letter intent issued to the eventual winner. Petition at ¶¶ 11, 13.

20. In response to an earlier open records request made by a member of Prism in July of 2004 – well after the February abandonment of Prism and the March 2004, issuance of the second RFP – general counsel for the DOA made clear that, at that time, the DOA viewed the second RFP process as being governed by Adm. 10, and that a Letter of Intent would be forthcoming:

I am responding to your July 23, 2004 public records request for a copy of the Weas proposal for the UW-Milwaukee Kenilworth building project. ... We are redacting a portion of the proposal relating to financial strategy as the contract is still being negotiated with the proposer. In the event that negotiations can not be successfully concluded so that *an intent to award* may be issued, additional negotiations may be undertaken with other *proposers* on the project. Therefore, we have determined that the release of the financial data at this time would

jeopardize the State's ability to negotiate with proposers under the pending proposal process.

(emphasis added). Affidavit of Counsel at Tab 6; August 25, 2004, Letter From DOA General Counsel to Ken Nelson.

21. Actions of the Defendant and other officials of the DOA and UW-System lulled Prism into a belief that a Letter of Intent pursuant to Adm 10.08 would be forthcoming with respect to the process of selecting a developer for Kenilworth. The issuance of the Letter of Intent would trigger Prism's right to Protest under Adm. 10.15. It also would have imposed an automatic stay to any activity in furtherance of awarding the final contract to another proposer until Prism's protest and any appeal were resolved. The DOA and its Secretary and General Counsel knew that Adm. 10.15 provided for an automatic stay when a protest is filed. Petition at ¶ 12.

22. The actions of the Defendant and other officials to ignore the application of and misapply Adm 10 to the Kenilworth contractor selection process caused the rights to protest and appeal and the right to be granted an automatic stay, available to all qualified proposers under Adm 10, to be denied to Prism. This denial wrongly and improperly deprived Prism of a valuable, substantial, and vested right to which Prism was and is entitled to under the laws of the state. Petition at ¶¶ 12, 24.

23. After receiving the letter of August 25, 2004, Prism continued to correspond and inquire with UW-System and DOA, seeking a copy of the Letter of Intent to contract. At the same time, Prism provided notice to the proper parties of its intent to protest the award of the contract to anyone other than Prism. Petition at ¶¶ 10, 11.

24. During this period, no one with knowledge that Weas had already been selected as the developer informed Prism of that fact. Finally, in response to a January 26, 2005 letter from undersigned counsel for Prism to the DOA, the DOA general counsel issued a letter dated February 3, 2005, indicating

that the contract for the Kenilworth project had been awarded to another developer as of November, 2004. The DOA also asserted for the first time that Adm 10 did not apply to the process used to select the other developer and that there was no automatic stay of the Kenilworth project based on Prism's protest. Petition at ¶ 14; Affidavit of Counsel at Tab12; February 3, 2005, Letter From DOA.

25. Prism reasonably viewed the Defendant's assertion that Adm 10 did not apply as obviously incorrect and incredible, and also reasonably took the Defendant's correspondence as establishing an intent by the State to award the Kenilworth redevelopment contract to someone other than Prism. Pursuant to Adm 10.15, Prism timely filed its Notice of Intent to Protest and subsequent Protest with DOA and UW-System in February of 2005. Petition at ¶ 15.

26. UW-System denied Prism's Protest by its decision of March 25, 2005. Petition at ¶ 17.

27. Pursuant to Adm 10.15(5) Prism timely appealed UW-System's decision to the DOA and its Secretary on March 31, 2005. Petition at ¶ 21

28. On June 6, 2005, the Defendant through its Secretary issued a decision denying Prism's appeal. Petition at 22. A true and correct copy of the June 6, 2005, decision is attached hereto at Tab 13.

B. The Reissued RFP Process

1. The disclosure of Prism's winning proposal to Weas.

29. Weas requested a copy of Prism's winning proposal by e-mail dated April 15, 2004. On April 22, 2004, Prism's proposal was sent to the DOA by UWM Vice-Chancellor Rimai, apparently in response to a DOA request. Ri-

mai advised DOA that UWM had refused to disclose Prism's proposal.⁴ Affidavit of Counsel at Tabs 7 ad 8; Copies of Email from Weas Employee To DOA and Correspondence from Monica Rimai.

2. The preordained selection of Weas.

30. Andy Richards was and is UWM's Director of Business and Finance Services, and sat on the evaluation committee for the re-issued RFP. On June 11, 2004, after the oral interviews of developers, Andy Richards sent a memo to Peter Maternowski, a DOA employee coordinating the evaluation process. In the memo he describes that the discussions within the evaluation committee indicate that one developer is significantly "better" than the others. (quotes in original). Andy Richards also informs Maternowski that if the Secretary (Marotta) "wants another developer," there will be a need for more discussion. Affidavit of Counsel at Tab 9; E-mail From Andy Richards ⁵

31. The price of the project proposed by Prism was far better than that proposed by Weas. The capitalized cost of the lease entered into with Weas is \$89 million, and the State is at risk for the lease payments. The cost of the project proposed by Prism was \$57 million, and the State would not have been at risk. The Weas project also contains fewer rooms than the Plaintiffs' proposed project. Affidavit of Counsel at Tabs 10; Weas Proposal.

⁴ Wis. Stat. § 16.75(2m)(f) states: "In opening, discussing and negotiating proposals, the department may not disclose any information that would reveal the terms of a competing proposal."

⁵ The use of scare quotes suggests that Andy Richards believed that this developer may not in fact have been the better developer. Further, the request suggests that the evaluation committee, or at least Mr. Richards, believed that the evaluation committee's objective was to formalize the DOA Secretary's pre-determined selection of a particular developer.

3. The State's assurance that injunctive relief need not be sought.

32. Prism was concerned that the State would make the argument it now has – that money damages are not available. While Prism believed and argues that Adm 10 and contract law allow for a damages settlement of Prism's claim, Prism communicated with the State regarding its position on the need to seek injunctive relief after finally receiving a written notice that the project was going forward on February 3, 2005. The State was clearly interested in avoiding an injunction, and thus provided Prism with a letter and correspondence that could only have been intended to assure Prism that it did not need to seek injunctive relief. *See* Record at November 2005, Affidavit of Counsel; Correspondence Submitted Between Counsel Regarding Injunctive Relief.

III. ARGUMENT

A. Standard for deciding a motion to dismiss.

This case arises under Wis. Stats. §§227.52 and 227.53, which contemplate an on-the-record review under the well-known, four-pronged *certiorari* standard. A “motion to dismiss,” is not contemplated, except in the instance of a defense of no standing – not an issue here. *See* Wis. Stats. 227.53(4). The State feels otherwise and has brought this “motion to dismiss.”

As is well settled, for purposes of a motion to dismiss, the facts alleged in the petitioner's pleading are taken as true. However, because of the nature of the arguments made by the State, and in particular its reference and citation to facts that are flatly false and outside the petition, Prism has been compelled to supply large portions of the record, including newly-discovered documents demonstrating questionable conduct on the part of State and City officials, in order to prepare a coherent response to the State's motion.

The Court may need to consider the record materials and other facts submitted. To the extent such facts are considered by the Court, the Court owes no deference to the State's asserted version of the facts, in particular DOA Secretary Marotta's factual assertions within his June 6, 2005, decision. *See* Wis. Stats. §227.57(7). Only if a contested case proceeding has taken place does the Court apply the substantial evidence test (i.e. upholding the agency's facts if there is substantial evidence in the record). Wis. Stats. § 227.57(6). That has not occurred in large part because the DOA denied Prism's request for a contested case. *See* Affidavit of Counsel at Tab 14. However, as will be described below, while numerous facts reflected in the Petition and the record materials call for the relief sought by Prism, they are not in genuine dispute. This matter may be disposed of as a matter of law – at least with respect to the State's wrongful breach of its obligation to Prism. As Prism explains herein, the Court may well conduct further fact finding in determining the nature and amount of the damages/remedy owed to Prism.

B. The procurement decisions in this case are entitled to no deference.

The State initially argues that procurement decisions like those made in this matter are entitled to “great deference” and are not subject to second-guessing by the courts. Brief at 4. The State is clearly in error as to the authority it cites for this proposition. More fundamentally, framing the core issue before the Court as one of deference is highly misplaced. The actions of the DOA and UW-System before it to abandon the already approved selection of Prism were in obvious violation of express law. The primary issue raised for the Court is legal – whether the state and its officials acted in violation of law – not whether they balanced the facts as to whether Prism should or should not win the contract. Indeed, that had already been decided and Prism had won. As will be described below, the mandatory language of the applica-

ble statutes and rules require that Prism *shall* be awarded the contract. There was no discretion to exercise.

In addition, while the abandonment of the original RFP is a core legal issue in this case, Prism has also claimed throughout this matter that the ultimate selection of Weas over Prism was in violation of Adm 10 and improper in its own right. But a review of the filings and agency decisions in this matter demonstrates that Prism's claim that the Weas proposal was dramatically more expensive and also in violation of other RFP selection standards has yet to even be addressed by either UW-System or DOA. Instead both agencies have made legal conclusions that, 1) the Building Commission "issued" the second, or reissued, RFP under which Weas was selected, and 2) because Adm 10 does not apply to the Building Commission, any claim challenging the selection of Weas fails. The issue of whether the Building Commission's involvement acts to shield UW-System and DOA from following its own contracting rules – it clearly does not – is a purely legal conclusion to which the court owes no deference.

Moreover, the great deference standard described by the State as controlling has been abrogated for 30 years. The modern standard for reviewing procurement decisions is whether the exercise of discretion was arbitrary or unreasonable. *Glacier State Distrib. Servs. v. Wisconsin DOT*, 221 Wis. 2d 359, 368, 585 N.W.2d 652 (Wis. Ct. App. 1998), citing *Aqua-Tech, Inc. v. Como Lake Protection & Rehabilitation District*, 71 Wis. 2d 541, 239 N.W.2d 25 (1976).⁶ The Court of Appeals' discussion in *Glacier State* is highly pertinent to this matter and a lengthy excerpt is quoted below:

⁶ The statute governing the RFP process, Wis. Stat. § 16.75, has but a single annotation on the State's website - *Glacier State*. (<http://www.legis.state.wi.us/statutes/Stat0016.pdf>). Furthermore, the State is not unaware of the underlying decision, *Aqua-Tech*, 71 Wis.2d 541, the case which established the modern standard of review, as the State cites the case twice. *Brief at 6*.

We are also satisfied of the appropriateness of such a standard. As the supreme court said in Aqua-Tech, “Statutory bidding requirements are designed to prevent fraud, collusion, favoritism and improvidence in the administration of public business, as well as to insure that the public receives the best work or supplies at the most reasonable price practicable.” Id.at 550, 239 N.W.2d at 30. We agree with the Aqua-Tech court that “it would be inconsistent with these objectives to deny all means of judicial review” of bidding decisions. Id.

We also believe that setting the judicial-review standards so high as to require affirmance in all cases but those involving “fraud” on the part of the bidding authority is inconsistent with the public-policy goals underlying regulation of the public-works bidding process. Public contract laws are designed for the benefit and protection of the public, and among those benefits is the fostering of competition, which lowers the cost to the public. If bidding authorities could freely accept or reject bids for whatever reason-however arbitrary or unreasonable-and be insulated in doing so except in the rare situation where their conduct could be said to be so “flagrant” as to amount to “fraud,” an appearance of favoritism could well emanate that could discourage bidders’ participation in the process, resulting in fewer bids and higher prices. At worst, such a standard could encourage preferential treatment in the awarding of bids. An “arbitrary or unreasonable” standard, on the other hand, fosters a more balanced atmosphere, where courts, while still paying considerable deference to the authority’s exercise of discretion in administering the bidding process, would still retain the ability to ensure that the public is protected from unreasonable, capricious or biased actions.

Glacier State, 221 Wis. 2d at 368.

Prism’s Petition alleges arbitrary and unreasonable conduct by UW-System and DOA in abandoning Prism and in continuing to lull it into a belief that it would be able to protest that action. Petition at ¶¶ 6, 7, 8, 12. It

also alleges that the reason that the State gave for withdrawal of the request for Building Commission approval was false. Petition at ¶ 7.

Moreover, as described above, the reasons given to Prism by UW-System and DOA as justifying its abandonment of Prism were clearly a pretext and false. See Tab 2. The State's conduct in this matter is certainly the equivalent of fraudulent conduct, and has tainted the entirety of the State's administration of this matter. The Court owes no deference in reviewing the State's legal conclusions nor should it defer to the elemental facts asserted by the State from Secretary Marotta's Decision, nor the State's ultimate procurement decisions to abandon Prism and select Weas.

C. The State's abandonment of the selection of Prism is a clear violation of Wisconsin's public contracting statutes and administrative code, and is in violation of basic principles of contract law.

1. The State's conduct was in violation of both Adm 10 and Wis. Stat. § 16.75.

As described in the Petition and is not in dispute, UW-System selected Prism to be the developer of Kenilworth in August of 2003. UWM Vice-Chancellor Rimai issued a letter of intent to Prism on August 28, 2003 stating:

... I am pleased to inform you that, after careful review and consideration of the final proposals, the University and the Evaluation Team has selected Prism Development Company as the developer UWM would like to pursue negotiations with regarding the Kenilworth redevelopment project...

See Tab 1.

The State simply misreads the August 28th letter as only stating that Prism could be the "potential developer." Brief at 2. The State may argue over

the meaning of the letter but not over what it says, which is that Prism was selected by the evaluation committee as the “developer” for the Kenilworth. Pursuant to statute, Prism was entitled to be awarded the Kenilworth contract once it was selected. The requirement that the contract be awarded to the person who submitted the proposal selected by the evaluation committee is statutory. Wis. Stat. § 16.75(2m)(g):

...the department shall determine which proposal is most advantageous and *shall* award the order or contract to the person who offered it.

(emphasis added). Wis. Admin Code Ch. Adm 10, *Contractual Services*, confirms this requirement:

(7) CONTRACT AWARD. Award *shall* be based on the evaluation committee recommendation unless, after review by the department of the award or of a protest by a bidder or proposer, a change in an award is approved because:

(a) Mathematical errors were made in scoring proposals;

(b) The award was recommended to a proposer who should have been disqualified as not responsive to all mandatory requirements of the RFP;

(c) Evidence of collusion or fraud involving either the proposer or an evaluation committee member is found;

(d) The evaluation committee failed to follow the evaluation criteria as set forth in the RFP; or

(e) Violations of this chapter or the statutes have occurred.

Wis. Adm. Code § Adm 10.08(7) (emphasis added).⁷

⁷ The application of Adm 10 (A copy is attached at Tab 17) is broad, as it includes even the Legislature:

Adm 10.03 Definitions.

The public contracting rules under 16.75(2m)(g) and Adm 10.08(7) mandate that the winner of the selection process shall be awarded the contract. There is no discretion. Indeed, the DOA's own sample RFP directs that "The contract must be awarded to the highest scoring proposal." *See* Affidavit of Counsel at Tab 16; Excerpt of Sample RFP (October 2005) p.12, Instructions to Administrators.

In addition, this very issue – the binding nature of the rules under Adm 10 – was raised by Defendant Georgia Thompson in her pre-trial defense motions. In denying those motions, Magistrate Judge Gorence, in reviewing the same language as is before this Court, found that:

The defendant further asserts that the Department of Administration retains the authority to reject an evaluation committee's recommendation or to reject all proposals, citing Wis. Admin. Code, Adm §§ 7.09(5) and 10.08(7). Wis. Admin. Code, Adm § 10.08(7) provides that the contract award "shall be based on the evaluation committee recommendation." Although § 10.08(7) does allow for a change in an award, it does so only on five bases none of which the defendant specifically asserts in this case.

The defendant asserts that no misapplication occurred because the evaluation committee of which she was a member had no authority to award a contract. However, as previously explained, the

(7) "Procuring agency" means the state agency which conducts the purchasing transaction.

(13) "State agency" or "agency" means any department, board, commission, independent agency, or any other separate entity established by statute or by constitution in the state government, including the legislature.

evaluation committee not only scores the proposals, but also makes a recommendation based on its scoring. Wis. Admin. Code, Adm § 10.08(4). The eventual contract award “shall be based on the evaluation committee recommendation.” *Id.* at subsection (7). Thus, the evaluation committee all but signs the contract awarded.

See Tab 18; *United States v. Thompson*; Memorandum and Order dated May 30, 2006, at pp. 8 and 13.

In the face of this language, the State sets up a straw man when it argues that Adm 10.08, “presumably subsection (1)(g),” does not address the award of the contract but only that a statement as to award of the contract must be included in the RFP. Brief at 11. However, the Petition (and every previous filing of Prism) have made clear what the relevant provisions are, the State has simply ignored those provisions. The State’s argument that “award” refers to something other than the subject contract is negated by the title of Adm 10.08(7); *Contract Award*. And while Adm 10.08 lists certain exceptions to this requirement, the State has never suggested that any of them were applicable to Prism’s selection, and none are.

The State essentially concedes that Adm 10 applied to the procurement under the original RFP – and established an obligation for the State to negotiate in good faith with Prism once it was selected as winner. Brief at 10. However, the State continues to argue that Adm 10 allowed UW-System to abandon and reject Prism’s winning proposal even after Prism won, and apparently without review. Brief at 11-12. The State’s argument is wrong on two counts: 1) the State confuses the right to reject a proposal with the right to reject the winner of the selection process; and, 2) the State overlooks that there must be cause to reject a proposal.

The State argues that Adm 10.08(1)(f) permitted the State to reject Prism's proposal.⁸ But that provision only allows the State to reject a proposal, not to reject the evaluation committee selection. In other words, the State has the right to determine that all proposals are, say, too expensive, and, accordingly, reject them all. Alternatively, the State can reject a proposal for failing to meet mandatory requirements.⁹ Of course, rejection is not what happened in this case. Instead of rejecting Prism's proposal, the evaluation committee selected it. The State is not given the right to reject the selection of the evaluation committee as that would render Adm 10.08(7) (indeed, the entire selection process) meaningless.

Secondly, the State must have cause to reject proposals. The only cause that the State has alleged is lack of support on the Building Commission meeting on February 18, 2004, a cause that is insufficient in any event and has been shown to be false; the Secretary's decision to abandon Prism was made eight days earlier at the meeting of February 10, 2004, wherein he referenced potential litigation as the reason. *See* Tab 2; Ives Memo.

Adopting the interpretation of Wis. Stats. Sec. 16.75(2m)(g) and Adm 10.08 suggested by the State would totally undermine the entire statutory and regulatory scheme put in place to protect against political and other improper influences in the award of public contracts. The provisions of Ch. 16 Stats., and §§ Adm 10 and Adm 7 govern all contracts for "contractual services." The State is arguing that the head of a procuring agency that seeks contractual services can issue an RFP and have a winner selected, and can then simply reject the winner out of hand and without review. The State offers no expla-

⁸ In reality, this provision simply requires the inclusion of such a statement in the RFP, but for purposes of this argument Prism will assume that the State does have the right to reject proposals for cause.

⁹ The Weas proposal failed to meet a mandatory requirement that operating costs of Peck Center and other costs be paid but Weas was still selected, a clear indication that the second evaluation committee failed to function as required by law. *See* Tab 10; Weas Proposal.

nation of why allowing such a rule would be sensible public policy, primarily because there is none.

2. Building Commission Review and Approval were not Conditions of Prism's Contract.

No doubt because the law is so favorable to Prism's position the State continues to try to inoculate its unsupported actions (as did UW-System and the DOA Secretary before it) by arguing that the lack of Building Commission approval is fatal to Prism's claim. Brief at 11, 12.

First, and most damaging to the State, former-Secretary Marotta himself recognized that Building Commission review of Prism's selection was not required for UW-System to follow through with negotiating the definite terms of the final contract with Prism. Secretary Martotta admitted as much in his correspondence with Prism:

First, with respect to the issue that you raise concerning the relationship of the State Building Commission to the process, the University wisely included in its procedure a checkpoint in the process to determine whether the Building Commission was comfortable proceeding with further negotiation on the project. While it is true that perhaps they could have eliminated that step, completed negotiations and then brought the proposal back to the Building Commission...

See Tab3.

Secondly, even if the Building Commission had to approve of Prism (and not just the project), it did not even get a chance to do so. The State paints a picture of it attempting to deal in good faith but the project falling victim to opposition on the Building Commission. However, that is not the case. In reality, the State abandoned the selection of Prism for political reasons, gave

Prism a false reason for the abandonment, and then eventually purported to select Weas by considering factors not properly considered in the selection.¹⁰

Not only does the State misrepresent the facts, the State has the audacity to accuse Prism of twisting the message of President Lyall's letter confirming UW-System's abandonment of Prism.¹¹ President Lyall's letter states, in relevant part:

It is my understanding that at the February 18, 2004, Building Commission meeting that it became apparent that there was no support for continuing with the project. As a result the project was withdrawn and the Higher Education Subcommittee of the Building Commission took an action instructing the Department of Administration to prepare a new request for proposal (RFP) and to begin the project anew.

See Tab 11; April 2, 2004, Letter From Lyall To Prism.

Whoever drafted this letter for President Lyall was careful not to say that there was no support for the project, but only that such was President Lyall's understanding. There is no suggestion as to how, or from whom, she obtained such understanding. Nevertheless, the State now boldly asserts that "it was *clear* to President Lyall that the proposal would not get Building Commission approval..." Brief at 12 (emphasis added). But the project was not discussed

¹⁰ It was the consideration of factors other than those set forth in the RFP that resulted in the conviction of Georgia Thompson.

¹¹ The State argued: "In her letter advising Prism that the First RFP had been abandoned, UW President Lyall explained there was not sufficient support for the Project at the Building Commission to proceed. (Complaint at ¶ 7). Prism argues this cannot be true, because the Building Commission immediately ordered issuance of the Second RFP. *Id.* Prism, conveniently, twists the message of President Lyall's letter. It is obvious there was support at the Building Commission for the Project, there just was no support, or not enough support, for Prism's proposal. That is why the first procurement effort was abandoned." Brief at 11. The Court should note that Prism is not suggesting that counsel for the State has made any intentional misrepresentations. Rather, it is likely that he has merely relied upon representations made to him.

at the February 18, 2004, meeting of the Building Commission as UW-System withdrew its request as soon as the agenda item was called. There was no discussion to indicate a lack of support. The only “discussion” was Chairman Vrakas suggesting that Prism had grounds to sue the State for withdrawing the request.

President Lyall clearly told Prism that the lack of support at the meeting was the cause for the withdrawal (“As a result...”). However, as the public records show, the cause for the withdrawal was the pressure exerted by former-Secretary Marotta at the February 10, 2004, private meeting in Rep. Richards’ office.¹² The reason stated in President Lyall’s letter is an obvious fabrication. Given that the State chose to conceal from Prism the true reason that the State abandoned its selection, it is very reasonable to conclude that the State was aware that what it was doing was wrong. There is no need to use a pretext when one’s conduct is proper. *State v. Ladson*, 979 P.2d 833, 837 (1999) (“In the case of pretext, the actual reason for the stop is inherently unreasonable, otherwise the use of pretext would be unnecessary.”)

Given these very damaging facts, the State’s argument is beyond bold:

Prism received the award contemplated by the RFP—the right to negotiate a contract. *It just was not able to do so.* The procuring agency, UW-System, ultimately withdrew its effort to get Prism’s proposal approved, obviously feeling it was not the best qualified.

Brief at 6 (emphasis added).

It is Orwellian for the State to blame Prism for not being able to persuade the Building Commission when it was UW-System that prevented Prism from even having the opportunity to do so. Confusingly, the State actually admits in the quote above that it was not the Building Commission that took

¹² Of course, if the Building Commission was not going to approve the selection of Prism, then there was no reason for Marotta to press UWM to withdraw the request for approval from the agenda.

the core action at issue, but rather the “procuring agency, UW-System,” and in doing so changes the basis for the abandonment yet again, from no support at Building Commission to, an “obvious” (and again pretextual) conclusion by UW-System that Prism was not best qualified. *Id.*

As a procuring agency, UW-System had the duty to award the contract to Prism under Wis. Stats. 16.75(2m)(g) and Adm. 10.08(7). Even if the Building Commission did not approve of the specific transfer of a state-owned facility called for by Prism’s proposal, that only meant that the procuring agency and the winning contractor would have gone back and devised a new solution that satisfied Building Commission.

Finally, the Building Commission is not some black box where any decision that is made is not subject to review. While DOA clearly issued the second/reissued RFP, even if the Building Commission could be considered the entity which issued it, the Building Commission would then become obligated under the same provisions as any other procuring agency. The definition of *procuring agency* does not exclude the Building Commission, *see* Adm 10.01, n.7, *supra*. Nor does the definition of *agency* in the enabling statutes. *See* Wis. Stats. §16.07(1). Indeed, the definition could not do so, as the sole case authority in this area makes clear. In order to avoid a violation of the constitutional separation of powers, when the Building Commission acts to review and decide on a specific project, its decisions are executive or adjudicatory in nature and may be challenged. *J.F. Ahern v. State Building Commission*, 114 Wis.2d 69, 104-107, 336 N.W.2d 679 (Ct.App.1983) (It seems beyond dispute that the right to grant or withhold approval of a construction contract is an executive function).¹³

¹³ While the contract at issue in this matter is not a construction contract, the same rule would obviously apply. The State did initially suggest that the contract at issue was a construction contract in its original August 2005 motion to dismiss. but has since withdrawn that argument, which is incorrect in

In order to try to skirt the clear requirements of Adm 10, the State pins its hopes to the Building Commission. The State argues that either the Building Commission had to approve Prism under the first RFP and did not do so, or that the Building Commission issued the second/reissued RFP and its actions in doing so are not regulated by Adm 10, so Prism has no right to protest. Both arguments are wrong on the facts and on the law. Adm 10 applied to what was in effect a single RFP issued in this matter and required that the contract be awarded to Prism. The failure to do so was an erroneous interpretation of law.

There was no legal justification for the State's abandonment of the selection of Prism. The abandonment was erroneous as a matter of law and Wis. Stats. §227.57(5) empowers the court to "set aside or modify" UWM/UW-System's action if it finds that:

...the agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action,

Wis. Stats. §227.57(5).

The Court is clearly empowered to and should set aside the DOA's and the UW-System President's determinations below, as well as the underlying action of UW-System to abandon Prism as the winner of the Kenilworth RFP selection. As will be further described herein, under the clear statutory language and given the circumstances in this matter, the Court should proceed to set this matter for further proceedings so that it may consider what relief is appropriate pursuant to its power under §227.57(9) to:

...provide whatever relief is appropriate irrespective of the original form of the petition.

See Wis. Stats. §227.57(9).

any event. The State has not addressed the separation of powers issues raised, and answered, by the *J.F. Ahern* decision.

3. The State's conduct was in violation of basic principles of contract law.

The State essentially concedes that the selection of Prism constituted a letter of intent and an obligation on the part of the State to negotiate in good faith with Prism (Brief at 10-11) but then argues that Wisconsin does not enforce agreements to agree. Brief at 12, citing *Witt v. Realist, Inc.*, 18 Wis.2d 282, 297-98, 118 N.W.2d 85 (1962). However, a letter of intent can have binding terms. *Skycom Corp. v. Telstar Corp.*, 813 F.2d 810, 817 (7th Cir. 1987). The *Skycom* court did recognize *Witt* for the proposition that an agreement to agree is not binding. *Id.* at 814. However, the *Skycom* court also recognized that the agreement-in-principle at issue had some terms that became immediately effective. *Id.* at 817. Those binding terms had to do with how negotiations were to be conducted. *Id.*

While it might be reasonable to exempt the State from the liability created by its representations that Prism was selected winner if the State were enforcing public health and safety rules. But it was not. Rather it was acting in a proprietary and essentially private capacity to develop one of its properties. There is no good reason not to hold the State to the same standards as private-sector real estate professionals. In that industry, and in private business generally, letters of intent are indeed meaningful and binding. *See e.g., RGC Int'l Investors, LDC v. Greka Energy Corp.*, 2001 Del. Ch. LEXIS 107, 50-51 (Del. Ch. Aug. 22, 2001) (finding that a term sheet gave rise to an enforceable obligation to deal in good faith on an expedited basis, and that neither party could in good faith insist upon a term that contradicted a provision of the term sheet) (Copy attached at Tab 19).

The State recognizes this duty to deal in good faith. Brief at 12. And while the State's brief argues otherwise, the DOA recognizes the binding nature of contracts that are established through the RFP process within its own State

procurement manual, as well as through the terms and conditions set out in the State's sample RFP document. *See* Tab 15.

A contract to negotiate exclusively was entered into by the State. The State made an offer, an offer that anyone willing to expend the considerable effort needed to submit a winning proposal would be given the opportunity to enter into exclusive negotiations with the State for a final agreement to develop the Kenilworth building. Prism accepted that offer and was selected. The State's offer and Prism's acceptance constituted a contract. In Wisconsin every contract includes the duty of good faith and fair dealing and cooperation on the part of both parties. *In re Estate of Chayka*, 47 Wis. 2d 102, 107, 176 N.W.2d 561 (Wis. 1970).

It is now abundantly clear that the State did not deal in good faith. According to documents obtained from the State, former Secretary Marotta pressed UW-System to withdraw the request for approval of Prism at a private meeting prior to the meeting of the Building Commission. There was no need to withdraw the request unless Building Commission approval of the selection of Prism was likely. Recognizing that it could not give the true reason for the withdrawal, the State created a pretext. The State then rejected Prism's protest and appeal, and went on to select another developer whose proposal failed to meet a mandatory RFP requirement. That is not good faith dealing under any definition of the term.

4. Alternatively, the State's conduct gives rise to a claim under the doctrine of promissory estoppel.

Even if the Court were to determine that the State did not enter into a contract to negotiate exclusively with Prism, the State was still bound to negotiate exclusively with Prism under the doctrine of promissory estoppel. "Even when a contract fails to become effective as a whole, particular terms

may bind under the doctrine of promissory estoppel.” *Skycom*, 813 F.2d at 817.

A cause of action may be grounded upon promissory estoppel when the following three conditions are met: 1. The promisor must make a promise which he should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee; 2. the promise must induce such action or forbearance; and, 3. injustice can only be avoided by enforcement of the promise. The first two requirements are issues of fact while the third requirement, that enforcement of the promise is necessary to avoid injustice, involves a policy decision by the court. *Kramer v. Alpine Valley Resort, Inc.*, 108 Wis. 2d 417, 422, 321 N.W.2d 293 (Wis. 1982).

All three conditions are met in this case. The State promised to enter into exclusive negotiations with the developer selected by the evaluation committee, and the State should reasonably have expected that promise to induce definite and substantial actions on the part of Prism to be selected. The State’s promise did induce such actions by Prism. Injustice can be avoided only by enforcement of the State’s promise. Thus, even if the RFP did not result in the formation of a contract between the State and Prism, the State is still liable under the doctrine of promissory estoppel.

¹⁴ The statute governing the RFP process, Wis. Stat. § 16.75, *Buy on low bid, exceptions*, as reproduced on the State’s own website, has but a single case cited, and that case is *Glacier State* (<http://www.legis.state.wi.us/statutes/Stat0016.pdf>). Furthermore, the State is not unaware of *Aqua-Tech*, 71 Wis.2d 541, the case which established the modern standard of review, as the State cites the case twice. Brief at 6.

¹⁵ In the event that the Court determines that the complaint does not adequately allege an abuse of discretion, Plaintiffs hereby move the Court for leave to amend the complaint to so allege. Wis. Stat. § 227.53(1)(b) provides that: “The petition may be amended, by leave of court, though the time for serving has expired.” The law favors allowing opportunity to amend. “P21 Second, we consider the few cases we have found that discuss either Wis. Stat. §§ 227.53(1)(b) or 227.56(3) and conclude that they favor allowing petitioners an opportunity to correct a petition that does not meet the require-

D. The case is not moot.

The State argues that because the contract was awarded to Weas well over a year ago, and is likely nearing completion, Prism can obtain no relief and this effectively moots Prism's primary claims. Brief at 5. The ability of Prism to act as developer may be moot, but the State is clearly wrong that Prism's claims that the procurement process was irregular and did not comply with applicable law are moot. Further, it is these determinations that trigger the Court's power to order an appropriate remedy, including an award of damages, pursuant to Wis. Stats. Sec 227.57(9).

1. The State Constitution does not make the State immune from a suit for economic damages.

The State's mootness argument is based on its threshold position that the State is immune from suit for economic damages absent specific statutory authority. Brief at 7-8. However, the cases cited stand for the proposition that the State is immune from any suit, *absent its consent*. As the State concedes, the consent to this action is given by the Legislature by means of ch. 227. Brief at 9, citing *Turkow v. DNR*, 216 Wis.2d 273, 281, 576 N.W.2d 288 (Ct.App.1988).

Significantly, the State Constitution does not limit the remedies available to a plaintiff, but just the *manner* in which suit may be brought and *in what courts* suit may be brought.

The legislature shall direct by law in what manner and in what courts suits may be brought against the state.

Wisconsin Constitution, art. IV, § 27 (emphasis added).

ments of § 227.53(1)(b).” *Jackson v. Labor & Industry Review Commission*, Appeal No. 2005AP2123 (April 27, 2006)(publication recommended), 2006 Wisc. App. Lexis 343, 17.

2. Chapter 227.57 provides authority for whatever relief is appropriate, and this statute has been interpreted to permit the entry of a money judgment.

The State admits that Wis. Stat. § 227.57(9), authorizes the Court to “provide whatever relief is appropriate.” Brief at 9. However, the State argues that whatever relief is appropriate is not express authority for entry of a money judgment because the language is not sufficiently clear and definite. Brief at 9. The subsection reads:

227.57. Scope of review.

(9) The courts decision shall provide whatever relief is appropriate irrespective of the original form of the petition. If the court sets aside agency action or remands the case to the agency for further proceedings, it may make such interlocutory order as it finds necessary to preserve the interests of any party and the public pending further proceedings or agency action.

Wis. Stat. § 227.57 (emphasis added).

The State’s argument must be rejected for several reasons. First, the State confuses consent to be sued, which must be clearly and expressly stated, with consent to the remedies available to a plaintiff. The State cites authority for the proposition that the State must consent to being sued. Brief at 7. However, the States cites no authority for the proposition that the State must clearly and expressly consent to the remedy sought.

Secondly, the language of Wis. Stat. § 227.57(9) has been interpreted to allow entry of a money judgment for attorney fees.

Section 227.20, Stats., governs the trial court's review of administrative ~~Subsections~~ (9) states that “[t]he court's decision shall provide whatever relief is appropriate irrespective of the original form of the petition.” We construe these

two provisions as granting the trial court the power to hear requests for attorney fees and to grant fees where appropriate.

Tatum v. LIRC, 132 Wis. 2d 411, 424-25, 392 N.W.2d 840 (Ct. App. 1986). Significantly, *Tatum* has been recognized as a correct interpretation of the law. *State ex rel. Delavan v. Circuit Court for Walworth County*, 167 Wis. 2d 719, 731, 482 N.W.2d 899 (Wis. 1992).

Thirdly, even if express authority for a particular remedy were necessary, Wis. Stat. § 227.57(9) expressly provides for whatever relief is appropriate. Money judgments are the most common remedy granted by courts, so to suggest that the Legislature did not mean to include money judgments when it allowed whatever relief is appropriate borders on the absurd.

If the meaning of a statute is clear from its language, the courts are prohibited from looking beyond such language to ascertain its meaning. *Lake City Corp. v. Mequon*, 207 Wis. 2d 155, 163, 558 N.W.2d 100 (Wis. 1997). The meaning of the statute is clear. The word “whatever” means – 1 a: anything or everything that, b: no matter what. *Webster’s Seventh New Collegiate Dictionary* (1972). There is no ambiguity. The Legislature could only have intended to expressly authorize money judgments, as the language could not be broader. In addition, it is a basic rule of statutory construction that effect is to be given to every word of a statute if possible, so that no portion of the statute is rendered superfluous. *Lake City*, 207 Wis.2d at 162. The State would render not only the word “whatever” superfluous but essentially make the entire subsection toothless and nugatory.

3. Adm 10.15 contemplates entry of a money judgment.

The State’s Administrative Code also contemplates that relief other than the award of the contract is available. During a protest and appeal, Adm 10.15 gives express authority to both the head of a procuring agency and the

DOA Secretary to settle and resolve any protest. See Adm 10.15(2) and (5). During the appeal itself, Adm 10.15(5) provides that:

...The Secretary or his designee, shall take necessary action to settle and resolve the protest and shall promptly issue a decision in writing ...

Again, the language used is mandatory and requires that the DOA Secretary *shall* settle and resolve any appealed protest. This requirement is not discretionary as to whether a settlement need be established.

Further, the State is barred from proceeding with a procurement if a timely notice of intent to protest is filed. Adm 10.15(6):

In the event of the filing of a timely notice of intent to protest, protest or appeal under sub (1), the state shall not proceed further with the solicitation or with the award of the contract until a decision is rendered in response to the protest or appeal.

However, the State may proceed with a procurement if the DOA Secretary makes a determination “that the award of the contract without delay is necessary to protect substantial interests of the state.” *Id.* Of course, proceeding with the award eliminates the possibility of the aggrieved proposer being awarded the contract. If the award of a contract were the only remedy available to an aggrieved proposer, the ability to proceed with a procurement in the face of a protest would eliminate the sole remedy of the aggrieved proposer, thereby rendering the protest process a meaningless façade. Any construction which renders a provision meaningless is to be rejected.¹⁶ *Wagner v. Milwaukee County Election Comm'n*, 2003 WI 103, 263 Wis. 2d 709, 738, 666 N.W.2d 816 (2003). The State’s interpretation would also allow state agencies to violate the procurement statutes and regulations with impunity.

¹⁶ The construction of administrative rules is the same as that of statutes. Wis. Stat. § 227.27.

4. *The State is estopped from asserting that money damages are not available in this case.*

The State can be estopped by its actions. *R.W. Docks & Slips v. Department of Natural Resources*, 145 Wis. 2d 854, 863, 429 N.W.2d 86 (Wis. Ct. App. 1988). Plaintiffs were concerned that the State would make the argument that money damages are not available, and thus communicated with the State regarding the need to seek injunctive relief before the commencement of the project. The State was clearly interested in avoiding an injunction, and thus provided Prism with correspondence which could only have been intended to assure Prism that it did not need to seek injunctive relief, or lull it into not doing so. See Record at November 2005 Affidavit of Counsel and attached correspondence from the State.

5. *The cases cited by the State are not on point.*

The State cites two cases for the proposition that money judgments are barred. Brief at 9. *Kegonsa Joint Sanitary Dist. v. Stoughton*, 87 Wis. 2d 131, 147, 274 N.W.2d 598 (1979), does not bar money judgments. The *Kegonsa* court addressed the availability of tort damages and held that § 227.57(d) did not waive tort immunity. *Id.* (“It is true that ch. 227 does not contain the type of clear and definite language of consent to suit required in order to find a legislative waiver of the state's *tort immunity* defense.”) (emphasis added). The State apparently overlooked the emphasized phrase. Nor does *Keip v. DHFS*, 232 Wis. 2d 380, 398-399, 606 N.W.2d 543 (Ct. App. 1999), bar money judgments. The *Keip* court addressed a situation in which the petitioner had not shown an erroneous interpretation of law pursuant to Wis. Stats. Sec. 227.57(5). *Keip*, 232 Wis.2d 399; *Froebel v. DNR*, 217 Wis.2d 652,667(Ct.App 1998)

That is not the case here. As thoroughly explained above, the State's actions in this matter clearly invoke a determination by the Court under

227.57(5) based on its improper abandonment of Prism after it had won the RFP selection process. As contemplated by *Keip*, in such a case, the broad language of 227.57(9) allows the circuit court to fashion an order whatever relief is appropriate.

E. This claim is not time barred.

1. This claim is timely.

Although the State argues that Prism is challenging the February 2004, abandonment of the selection of Prism and the ordering of a second RFP, the State concedes that it is former Secretary Marotta's June 6, 2005, denial of Prism's appeal that is the subject of this Petition for Review. Brief at 3. This action was timely filed on July 6, 2005. The State claims that the applicable statute of limitations is six months. Brief at 10. Thus, it is hard to understand how the State can argue that this action is not timely.

Further the contract was not awarded to Weas until March 16, 2005. Brief at 10. This action was filed well within six months of that award. Thus, even if the protest and appeal of that award are ignored, this action is timely.

The State argues that, "By letter dated November 3, 2005 [sic], Prism was advised that Weas Development ("Weas") had been selected as the developer and that the Building Commission intended to award a contract to Weas. (Complaint at ¶¶ 14 & 16). " Brief at 3. However, that State has confused the dates. The letter at issue was not sent on November 3, but on February 3, 2005. Petition, ¶ 24. Thus, 2005 is not a typographical error, but rather the State used November instead of February. This action was filed five months after the February notice.

Also, administrative remedies must be exhausted prior to bringing an action pursuant to § 227. *Schlieper v. State Dep't of Natural Resources*, 188 Wis. 2d 318, 323, 525 N.W.2d 99 (Wis. Ct. App. 1994). The State must issue a let-

ter of intent to contract to all proposers at least five days before it intends to award a contract. Adm 10.08(6). The administrative remedy, a protest, cannot be filed until such a letter issued. Wis. Adm. Code Adm 10.15(1). Thus, the State controlled the date on which Prism could begin to seek a remedy and cannot now argue that Prism is untimely because it took the State at its word that a letter of intent was forthcoming. *See* Tab 6; August 25, 2004 letter from John Rothschild. Further, Prism regularly inquired of the State as to when a letter of intent to contract was to be issued. In retrospect, it appears that the State never intended to issue a letter of intent to contract and was merely attempting to lull Prism into inaction. Prism made inquiries as to the status of the contract several times. Petition at ¶¶ 11, 13. After several requests as to when a letter of intent would be issued, the State notified Prism by letter dated February 3, 2005, that it would not issue a letter of intent. Prism notified the State in February, 2005, that Prism would consider the State's letter of February 3, 2005 to be a letter of intent to contract. Prism then promptly protested and appealed. Prism filed this action on July 6, 2005. Thus, Prism acted as soon as it was provided a notice of intent to contract, as the State had essentially instructed Prism to do.

The State argues that what Prism is really challenging is the abandonment of the first RFP and the ordering of the second RFP.¹⁷ Brief at 10. This is another instance in which the State attempts to use the charade of two RFP processes to its advantage. Of course Prism is challenging its abandonment. But because the process conducted by UW-System and DOA was actually a single RFP, in particular with respect to the issuance of the letter of intent, Prism could not challenge that "abandonment" until it received the letter of intent. The abandonment of the selection of Prism and the ordering of a second RFP were certainly wrongful when they occurred. But when Prism tried to protest at that time, the UW-System and DOA told Prism that

¹⁷ Although the State makes this argument, the State concedes that it is the June 6, 2005 decision of Marotta which is the subject of this review.

Adm 10 did not allow one to file a protest of such events and essentially that it needed to wait for the letter of intent to issue.¹⁸

The State argues that former Secretary Marotta effectively told Prism in 2004 that its protest and appeal were untimely *because they were late*. Brief at 10. However, what Marotta actually said was that the protest and appeal were untimely because no letter of intent to contract had yet been issued. See Tab 3; April 30, 2004, Letter from Marotta to Prism.

Further, even if Prism had brought suit in 2004, it is certain that the State would have argued that the action was premature for two reasons: 1) administrative remedies had not been exhausted; and, 2) Prism suffered no injury prior to the contract being awarded to someone other than Prism. Indeed, it is the lack of harm that is the rationale underlying the requirement in Adm 10.15 that a letter of intent to contract is needed to file a protest. If protests and court actions were permitted at every step of the way, procuring agencies could be crippled by a multitude of protests filed at every step of the process.

2. The State is estopped from asserting any statute of limitations.

When a defendant has been guilty of inequitable conduct, the doctrine of equitable estoppel may preclude him from asserting the statute of limitations. *Hester v. Williams*, 117 Wis. 2d 634, 644-45, 345 N.W.2d 426 (1984). The Supreme Court enumerated six rules that should be applied in determining the applicability of the doctrine: (1) The doctrine may be applied to preclude a defendant who has been guilty of fraudulent or inequitable con-

¹⁸ Even if the Court were to accept the State's argument that an action should have been commenced when the selection of Prism was abandoned, that argument applies only to PGN Associates. PRN Associates, LLC was not even formed until after the abandonment of Prism (PGN Associates) in the first RFP. The only wrongs suffered by PRN Associates, LLC were the wrongs committed in the second process. As noted, these claims have been made in the Petition, see, Petition at ¶ 24(g), but have not been addressed.

duct from asserting the statute of limitations; (2) The aggrieved party must have failed to commence an action within the statutory period because of his or her reliance on the defendant's representations or act; (3) The acts, promises or representations must have occurred before the expiration of the limitation period; (4) After the inducement for delay has ceased to operate, the aggrieved party may not unreasonably delay; (5) Affirmative conduct of the defendant may be equivalent to a representation upon which the plaintiff may rely to his or her disadvantage; and (6) Actual fraud, in a technical sense, is not required. *Id.*

Here the State's conduct precludes it from asserting the defense of the statute of limitations. Prism was itching for the chance to challenge the selection of Weas and the State and its officials knew it. It was only because the State led Prism to believe that the State would issue the letter of intent to contract necessary to commence a protest that Prism held off as long as it did. The State had denied Prism's previous protests on the grounds that they were premature because no such letter of intent to contract had been issued—not on the merits.

F. Appropriate Relief

The appropriate remedy in this matter is for the Court to set aside the decisions below pursuant to Wis. Stats. 227.57(5) and order further proceedings pursuant to its broad powers under 227.57(9) so that the Court may consider the facts and “settle and resolve” Prism's protest by awarding appropriate contractual damages.

Prism had a right to due process during its protests and appeal. The right to due process includes the right to an impartial decision maker, and that right extends to an administrative hearing.

A basic element of constitutional due process, ... is a fair hearing conducted before a fair tribunal. “It is . . . undisputable that a minimal rudiment of due

process is a fair and impartial decisionmaker.” The United States Supreme Court and Wisconsin courts have held that an adjudicator in an administrative hearing comes within the ambit of the due process requirement of an unbiased decision-maker. Furthermore, violations of due process are not limited to bias or unfairness in fact, but in very limited circumstances may occur “when the risk of bias is impermissibly high.”

Marder v. Bd. of Regents of the Univ. of Wis. Sys., 2005 WI 159, 706 N.W.2d 110, 119-20 (Wis. 2005) (citations omitted).

The Wisconsin Supreme Court has also held that courts have the power to fashion a remedy when an adequate forum does not exist. *Hortonville Education Ass'n v. Hortonville Joint School Dist.*, 66 Wis. 2d 469, 497, 225 N.W.2d 658 (Wis. 1975), reversed on the ground that the school board was not shown to be impartial, 462 U.S. 482 (1976) (“When an adequate remedy or forum does not exist to resolve disputes or provide due process, the courts, under the Wisconsin Constitution, can fashion an adequate remedy.”) When the school board which would otherwise have decided certain questions was not impartial, the Wisconsin Supreme Court determined that the teachers were entitled to obtain a de novo determination of the issues in any court of record in that county. *Id.* at 498.

1. Prism was denied due process.

Here there is evidence that it was former-Secretary Marotta who decided that the selection of Prism should be abandoned, and who should sit on the second evaluation committee. Further there is evidence that the second evaluation committee was told that it should select Weas. See Tab 9; Andy Richards Memo. Any one of these facts is sufficient to destroy DOA’s impartiality. As Prism was denied due process, the denials of the appeals of the protests by Marotta should be given no deference whatsoever.

Furthermore, according to the documents obtained, the denials of the protests themselves were made on false pretenses which can only indicate a lack of impartiality. UW-System denied Prism's initial protest by the letter of President Lyall. The letter stated that the request for Building Commission approval was withdrawn for lack of support on the commission. However, the documents now show that the decision to withdraw was made eight days earlier because of pressure by former-Secretary Marotta. There is no need for an impartial decision maker to give false reasons for a decision. Given that Lyall's letter gave a reason that has been shown to be false, UW-System lacks impartiality. Thus, the DOA's denial of Prism's appeal, as well as UW-System's denial of the initial protest, were clearly tainted and should also be reversed and set aside for lack of due process.

2. The Court's review should be de novo.

Consistent with its powers under §227.57, the Court can fashion an adequate remedy when an adequate forum does not exist, as discussed above. Just as the Hortonville teachers were allowed to use any court of record in their county, this court should determine the issues presented and fashion an order resolving and settling Prism's protest and appeal. The denials of protests and appeals must be rejected. To remand to any State agency for a re-determination would be a waste of time.

No political appointee can be expected to find the conduct of former-Secretary Marotta to be improper. The Governor has recognized that political appointees should not even serve on evaluation committees. Indeed, determining propriety of the conduct of another evaluation committee's conduct may be even more fraught with conflicts than serving on a committee itself.

No career civil servant can be expected to be impartial. Such state workers hope for raises and promotions just like anyone else.¹⁹ Thus, no such individual can be expected to find that the conduct of Marotta or the president of UW-System was improper. The damages in this case may exceed \$5 million. No career civil servant can be expected to find the State liable for that amount.

There is no State agency which can provide an adequate forum for reviewing of the procurement decisions regarding the Kenilworth Building. Accordingly, the Court should undertake a *de novo* determination of the issues itself. To remand this case to the agency would be a waste of everyone's time.²⁰

¹⁹ Georgia Thompson, the DOA employee convicted for deprivation of honest services, is alleged to have committed her crime just to please her political-appointee superiors.

²⁰ In the event that the Court declines to undertake a *de novo* review, the Court should remand this matter to the division of hearings and appeals for assignment to an administrative law judge to hold contested proceedings relative to the appropriate damages and remedy to be granted to Prism.

IV. CONCLUSION

For all of the reasons set forth above, the State's motion to dismiss should be denied. The Court should order and set this matter for a *de novo* review, where the court can hear evidence relative to cause of and nature of the damages incurred by Prism, and so that the Court may settle and resolve Prism's protest and appeal in an amount of damages to be determined by the Court

Respectfully submitted this __ day of June, 2006.

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