

Special Review

**Department of Transportation  
Contract for Highway 55/62 Bypass**



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## Financial Audit Division

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OLA's Financial Audit Division annually audits the state's financial statements and, on a rotating schedule, audits agencies in the executive and judicial branches of state government, three metropolitan agencies, and several "semi-state" organizations. The division also investigates allegations that state resources have been used inappropriately.

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- Promote Accountability,
- Strengthen Legislative Oversight, and
- Support Good Financial Management.

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**OFFICE OF THE LEGISLATIVE AUDITOR**  
State of Minnesota • James Nobles, Legislative Auditor

Senator Ann H. Rest, Chair  
Legislative Audit Commission

Members of the Legislative Audit Commission

Elwyn Tinklenberg, Commissioner  
Department of Transportation

David Fisher, Commissioner  
Department of Administration

We have conducted a special review of the Minnesota Department of Transportation's (MnDOT) supplemental agreement with Minnesota Transit Constructors for construction of a temporary bypass at the intersection of Minnesota Highways 55 and 62. The review was prompted by a March 15, 2002, newspaper article that questioned whether MnDOT complied with state contracting requirements when it obtained highway construction services from Minnesota Transit Constructors.

Our objective in conducting this special review was to answer the following questions:

- Did MnDOT comply with state contracting requirements when it contracted with Minnesota Transit Constructors to design and construct a temporary bypass at the intersection of Trunk Highways 55 and 62?
- Did the Department of Administration raise valid contracting concerns regarding MnDOT's supplemental agreement with Minnesota Transit Constructors for the design and construction of the temporary bypass?

This report contains the results of our review. It is intended for the information of the Legislative Audit Commission and the management of the departments of Transportation and Administration. This restriction is not intended to limit the distribution of this report, which was released as a public document on May 28, 2002.

*/s/ James R. Nobles*

James R. Nobles  
Legislative Auditor

*/s/ Claudia J. Gudvangen*

Claudia J. Gudvangen, CPA  
Deputy Legislative Auditor

End of Fieldwork: May 10, 2002

Report Signed On: May 24, 2002

# **Minnesota Department of Transportation**

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## **Audit Participation**

The following members of the Office of the Legislative Auditor prepared this report:

Claudia Gudvangen, CPA	Deputy Legislative Auditor
Tom Donahue, CPA	Audit Manager
Marla Conroy, CPA, CISA	Director of Investigations
Mike Willis, CPA	Team Leader

## **Exit Conferences**

We discussed the findings and recommendations with the following representatives of the departments of Transportation and Administration at exit conferences held on May 15, 2002:

Department of Transportation:	
Elwyn Tinklenberg	Commissioner
Doug Weiszhaar	Deputy Commissioner/Chief Engineer
Margo LaBau	Chief of Staff
Ann-Therese Schmid	Chief of Staff for Passenger Rail Transit
Dick Stehr	Director of Program Support Group
Kevin Gray	Chief Financial Officer
Shannon Beaudin Klein	Director of Public Relations
Department of Administration:	
David Fisher	Commissioner
Kirsten Cecil	Deputy Commissioner
Larry Freund	Director of Financial Management
Judy Hunt	Internal Audit Director

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### **Report Summary**

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#### **Background**

We have conducted a special review of the Minnesota Department of Transportation (MnDOT) supplemental agreement with Minnesota Transit Constructors to design and construct a temporary bypass at the intersection of Minnesota Highways 55 and 62. Department of Administration staff questioned whether MnDOT's decision to contract with Minnesota Transit Constructors for the bypass work violated state contracting requirements.

#### **Key Conclusions**

We found no evidence that MnDOT violated state statutes in acting to address a safety concern at the interchange of Minnesota Highways 55 and 62. However, MnDOT did not show adequate consideration for the oversight role of the Department of Administration when selecting a contractor to build the temporary bypass. Also, in authorizing Minnesota Transit Constructors to begin work before a contract was reviewed and approved, MnDOT did not comply with certain aspects of contracting and accounting policies established by the departments of Administration and Finance. In addition, the Department of Administration was left with few options regarding approval of the agreement, and the state was exposed to potential legal and financial risks.

MnDOT's failure to promptly consider contracting alternatives may have contributed to the need for emergency action. We found inadequate communication between MnDOT's field personnel and its contract management personnel, as well as with staff of the Department of Administration. MnDOT engineers did not discuss possible contracting alternatives with the department's Contract Management Office or with the Department of Administration before directing Minnesota Transit Constructors to begin work on the project. MnDOT could have avoided criticism had it informed the Department of Administration of the situation earlier and requested assistance in evaluating contract alternatives that would have satisfied each agency's objectives.

We think MnDOT's choice of Minnesota Transit Constructors to build the bypass was reasonable in that it was based on the department's assessment of the firm's ability to design and build the bypass before winter, and MnDOT's desire to mitigate potential state liability if the bypass design caused delays in the light rail project. However, we also think the Department of Administration raised valid concerns regarding MnDOT's decision to initiate a supplemental agreement to the light rail contract for highway construction work. Administration officials were appropriately concerned that MnDOT's actions did not provide an open and fair process for awarding road construction work.

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# **Minnesota Department of Transportation**

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### **Chapter 1. Introduction**

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#### **Background**

This special review was prompted by a March 15, 2002, newspaper article that questioned whether MnDOT complied with state contracting requirements when it obtained the services of Minnesota Transit Constructors for work at the intersection of Minnesota Highways 55 and 62. MnDOT initiated a supplemental agreement with Minnesota Transit Constructors, the design-build contractor for the Hiawatha Light Rail Project, to design and build a temporary highway bypass at a cost totaling \$818,393. The newspaper article indicated that Department of Administration personnel questioned the appropriateness of MnDOT's decision to have the light rail transit contractor alter the intersection of Highways 55 and 62 without a signed contract and without a competitive bid process. Department of Administration personnel viewed the design and construction of the bypass as highway construction and, therefore, outside the original scope of the light rail transit contract.

#### **Objectives and Methodology**

Our objective in conducting this special review was to answer the following questions:

- Did MnDOT comply with state contracting requirements when it contracted with Minnesota Transit Constructors to design and construct a temporary bypass at the intersection of Minnesota Highways 55 and 62?
- Did the Department of Administration raise valid contracting concerns regarding MnDOT's supplemental agreement with Minnesota Transit Constructors for the design and construction of the temporary bypass?

In conducting this special review, we researched applicable state statutes governing the contracting process. We reviewed the contracting policies and procedures established by the departments of Transportation and Administration. We obtained contract documentation for the MnDOT Highway 55 Reconstruction and the Hiawatha Light Rail Transit projects. We also interviewed several employees of the departments of Transportation and Administration, including Mr. Elwyn Tinklenberg, Commissioner of Transportation and Mr. David Fisher, Commissioner of Administration. We also interviewed employees of the Metropolitan Council and the Metropolitan Transit Commission assigned to the Hiawatha Project Office.

Chapter 2 provides our conclusions from this special review. Attachment I identifies the timeline of events relating to the project. Attachment II compares contracting requirements for professional/technical, trunk highway, design-build, and light rail transit contracts. Attachment III is a memorandum from the commissioner of Administration to the commissioner of Transportation discussing concerns regarding the contracting process at MnDOT. The agencies' responses to the conclusions in this report are also included.

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## **Chapter 2. MnDOT Contract for Highway 55/62 Bypass**

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### *Chapter Conclusions*

*We found no evidence that MnDOT violated state statutes in acting to address a safety concern at the interchange of Minnesota Highways 55 and 62. However, MnDOT did not show adequate consideration for the oversight role of the Department of Administration when selecting a contractor to build the temporary bypass. Also, in authorizing Minnesota Transit Constructors to begin work before a contract was reviewed and approved, MnDOT did not comply with certain aspects of contracting and accounting policies established by the departments of Administration and Finance. In addition, the Department of Administration was left with few options regarding approval of the agreement, and the state was exposed to potential legal and financial risks.*

*MnDOT's failure to promptly consider contracting alternatives may have contributed to the need for emergency action. We found inadequate communication between MnDOT's field personnel and its contract management personnel, as well as with staff of the Department of Administration. MnDOT engineers did not discuss possible contracting alternatives with the department's Contract Management Office or with the Department of Administration before directing Minnesota Transit Constructors to begin work on the project. MnDOT could have avoided criticism had it informed the Department of Administration of the situation earlier and requested assistance in evaluating contract alternatives that would have satisfied each agency's objectives.*

*We think MnDOT's choice of Minnesota Transit Constructors to build the bypass was reasonable in that it was based on the department's assessment of the firm's ability to design and build the bypass before winter, and MnDOT's desire to mitigate potential state liability if the bypass design caused delays in the light rail project. However, we also think the Department of Administration raised valid concerns regarding MnDOT's decision to initiate a supplemental agreement to the light rail contract for highway construction work. Administration officials were appropriately concerned that MnDOT's actions did not provide an open and fair process for awarding road construction work.*

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In September 2000, MnDOT contracted with Minnesota Transit Constructors to design and build the Hiawatha Light Rail Transit Line for \$291.3 million. MnDOT used a competitive request for proposal process to award the light rail transit design-build contract to Minnesota Transit

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Constructors. The request for proposal process is a solicitation where not all the contract requirements are detailed at the time of the solicitation, and responses are subject to negotiation. Under design-build, one contractor is selected for both the design and construction of the project. Actual construction of the light rail transit line began in January 2001. The light rail transit project will operate along the Hiawatha/Trunk Highway 55 Corridor, linking downtown Minneapolis, the Minneapolis-St. Paul International Airport, and the Mall of America in Bloomington. The light rail transit mainline will be double tracked and will run for 11.6 miles, starting in downtown Minneapolis and going south of the Veterans Medical Center. An elevated structure or flyover will then carry the line over Trunk Highway 55 and Trunk Highway 62 into the Fort Snelling area.

Light rail transit project participants established the Hiawatha Project Office to manage project construction. Employees of the Metropolitan Council and MnDOT, as well as third-party consultants, staff the office. The Hiawatha Project Office prepares budgets and contracts, designs implementation approaches, and administers the various contracts. It works with contractors and other parties to monitor light rail transit progress. The office also reviews invoices to ensure that costs are appropriate and allowable. MnDOT highway construction personnel are in contact with the Hiawatha Project Office whenever highway construction projects intersect or are adjacent to light rail transit construction.

About the same time that MnDOT entered into the light rail transit contract, it initiated a project for reconstruction of Highway 55. MnDOT followed a more “traditional” contracting process for the Highway 55 reconstruction project. The process included awarding a professional/technical service contract for project design followed by a request for bid for the construction work. A request for bid is a solicitation where the terms, conditions, and specifications are detailed at the time of solicitation, and the responses are not subject to negotiations. MnDOT entered into a professional/technical contract with Short Elliott Hendrickson, Inc. for the Highway 55 project design. The designs prepared by Short Elliott Hendrickson, Inc. took into consideration the preliminary alignment of the light rail transit line. In August 2000, after a bid solicitation, MnDOT executed a \$16 million contract with Ames Construction for project construction. The project included grading, surfacing, drainage, signing, lighting, bridgework, and other miscellaneous construction. The Highway 55 reconstruction project started at Trunk Highway 62 and ended south of east 54<sup>th</sup> Street. Ames Construction started construction in the fall of 2000 with a scheduled completion date of August 30, 2002.

The Highway 55 reconstruction project included a sequence of bypasses at the intersection of Minnesota Highways 55 and 62. A temporary bypass is a section of roadway, usually within an existing right of way, that is built to temporarily carry traffic around a specific work site. In the spring of 2001, Ames Construction built a bypass that moved traffic to the newly constructed westbound lanes with a transition to the existing roadway. The bypass was to allow Ames Construction to build the eastbound lanes between the east and west project limits. MnDOT’s project engineer said the bypass was not designed, nor was it intended to be in place, for winter driving conditions. He explained that the bypass had “reverse super elevations” meaning that instead of sloping like a racetrack, the existing bypass was designed with a reverse slope. The project engineer stated that in winter driving conditions, the reverse elevation would tend to pull

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cars off the road. To ensure safe winter driving and make way for light rail transit construction, Ames Construction was to move the existing bypass to another location by the end of the 2001 construction season.

On May 23, 2001, the Minnehaha Creek Watershed District filed a lawsuit to stop MnDOT from “dewatering” (pumping groundwater) at the intersection of Highways 55 and 62 because of the possible effects on Camp Coldwater Springs, a historic site often referred to as the birthplace of Minnesota. It is located along the Mississippi River, northwest of Fort Snelling, in an area identified by several springs. The lawsuit was based on legislation signed by the Governor on May 15, 2001, that prohibited any state action that could diminish the flow of water to or from Camp Coldwater Springs. The watershed district claimed that the dewatering activities might effect the flow of water to the springs. In late May 2001, the court ordered MnDOT to cease pumping for 28 days to allow dye testing. On June 17, 2001, test results indicated that dye had appeared at Coldwater Springs, indicating the springs received groundwater flow from the Highways 55 and 62 interchange area.

MnDOT and the Minnehaha Creek Watershed District began negotiations to revise the drainage design for the interchange area. In a settlement stipulation, MnDOT agreed to submit a revised drainage design to an independent consultant by July 27, 2001. The consultant was to review the MnDOT design for conformance with the design requirements stated in a settlement stipulation. On August 13, 2001, the consultant concluded that MnDOT’s redesign did not conform to the stipulation, and that MnDOT and the watershed district needed to develop a new solution. The consultant’s determination essentially halted the Highway 55 reconstruction project, and on August 30, 2001, MnDOT terminated its contract with Ames Construction. The termination letter stated that due to the uncertainty about the litigation, the department was unable to provide direction on how to construct the project.

MnDOT personnel stated that the department needed to move the existing bypass at the intersection of Highways 55 and 62 to make way for light rail transit construction and to address the safety concerns related to winter driving conditions. MnDOT could not move the existing bypass to its planned location because of the litigation. Therefore, MnDOT determined that a new bypass needed to be designed and constructed. MnDOT’s project engineer said MnDOT contemplated having Ames Construction build the new bypass. However, he was concerned that, due to the location of the light rail transit flyover piers, a new bypass built by Ames Construction potentially could impede light rail transit construction, and MnDOT would be subject to damages under the light rail transit contract. In addition, MnDOT personnel stated that Ames Construction did not have the expertise to design a new bypass, so the department would have had to contract with a design firm or do the work internally. MnDOT decided against this approach because of the concern about time deadlines and because any design firm would need to work closely with Minnesota Transit Constructors to ensure the new bypass did not conflict with the light rail transit alignment.

MnDOT personnel also said that, in their judgment, a competitive solicitation process for a design-build contractor was not feasible because the project needed to be completed before winter. They concluded that a competitive process would take several weeks before a contractor

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could be selected and work could begin on the design and construction of the new bypass. Under this scenario, MnDOT personnel indicated that due to the end of the construction season, the construction of the new bypass would not have started until the spring of 2002.

In September 2001, MnDOT highway construction personnel met with the Hiawatha Project Office to discuss possible solutions to mitigate the impact of the Camp Coldwater Springs litigation on the light rail transit project. The meeting resulted in MnDOT's decision to have Minnesota Transit Constructors design and build a new bypass at the intersection of Highways 55 and 62. MnDOT based its decision on Minnesota Transit Constructor's design capabilities, knowledge of the light rail project, and ability to complete the project in the required timeframe. The department did not question the contractor's highway construction capabilities because Minnesota Transit Constructors is a consortium of several firms, including a large construction company that MnDOT had contracted with in the past.

Documentation of the Hiawatha Project Office Change Management Panel meeting minutes and evaluation documents, dated September 14, 2001, stated:

“Contract with Ames Construction is cancelled to construct the 62/55 interchange. The current by-pass blocks the LRT (light rail transit) alignment. RFQ (request for quote) required to be issued to have MnTC (Minnesota Transit Constructors) relocate the current bypass at a ROM of \$350K, but funded by MnDOT from the TH 55 project. To eliminate potential coordination issues and spring '02 construction sequencing, the by-pass needs (to be) relocated before the end of this construction season.”

“TH (Trunk Highway) 62 traffic is currently running in a location in conflict with LRT bridge construction. In order to allow access for MnTC to build LRT bridge, traffic must be switched to a bypass, which has yet to be constructed. Performing the extra work will allow MnTC unshared access to the area and will provide for a safer traffic configuration than was originally planned under the highway project.”

On September 22, 2001, the Hiawatha Project Office requested a quote from Minnesota Transit Constructors for the design and construction of a new bypass. After negotiations, the Hiawatha Project Office initiated a \$818,393 supplemental agreement to the Minnesota Transit Constructors light rail transit contract for design and construction of the bypass. The supplemental agreement provided that MnDOT would pay Minnesota Transit Constructors \$58,188 for design and \$760,205 for construction of the bypass. Representatives of Minnesota Transit Constructors and MnDOT signed the supplemental agreement on November 6, 2001. The Hiawatha Project office manager and assistant general manager for Transit System Development signed the supplemental agreement on November 7, 2001. On November 8, 2001, MnDOT encumbered \$818,393 in Trunk Highway funds on the state's accounting system. Hiawatha Project Office personnel indicated that Minnesota Transit Constructors began design work for the bypass on October 15, 2001, and actual construction on October 29, 2001. Both lanes of traffic were moved to the new bypass by December 6, 2001.

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The supplemental agreement was not sent to the MnDOT Contract Management Office for review until after it was signed by the Hiawatha Project Office. On November 7, 2001, after reviewing the proposed supplemental agreement, employees of MnDOT's Contract Management Office requested input from the Department of Administration's Materials Management Division. Materials Management personnel responded that the bypass work was beyond the scope of the light rail transit contract and suggested that MnDOT use a design-build approach if the project was a priority, but that the trunk-highway related work should not proceed under the light rail transit design-build contract. However, by this date, the Hiawatha Project Office had already authorized Minnesota Transit Constructors to begin work on the bypass, and a significant portion of the work had been completed.

MnDOT proceeded with the supplemental agreement, sending it to the Department of Administration's Materials Management Division for signature. Materials Management personnel raised concerns that the supplemental agreement violated state contracting requirements. Based on these concerns, Materials Management personnel were uncomfortable signing the supplemental agreement and brought the matter to Commissioner Fisher. Commissioner Fisher reviewed the supplemental agreement and the statutory contracting requirements.

Commissioner Fisher stated he first became aware of the supplemental agreement through a discussion with Commissioner Tinklenberg in early November 2001. At that time, Commissioner Tinklenberg informed Commissioner Fisher of the pending contract and his concern about getting the contract processed in a timely manner. Commissioner Fisher stated that Commissioner Tinklenberg presented the situation as an emergency. After reviewing the matter, Commissioner Fisher was satisfied that there had been no violation of state law and signed the supplemental agreement on December 20, 2001. In a December 21, 2001, memo to Commissioner Tinklenberg (Attachment III), Commissioner Fisher said he had signed the supplemental agreement but expressed concerns with certain aspects of MnDOT's contracting process.

As of April 22, 2002, MnDOT had paid Minnesota Transit Constructors \$609,115 under the supplemental agreement with additional work yet to be completed.

### **Findings and Recommendations**

#### **1. MnDOT officials did not adequately consult with state contracting specialists in MnDOT or the Department of Administration when selecting a firm to build the temporary bypass.**

MnDOT did not adequately consider state contracting requirements or the oversight role of the Department of Administration when it authorized Minnesota Transit Constructors to begin work on the temporary bypass. In late August 2001, MnDOT knew it needed to design and build a new bypass before winter. However, MnDOT field personnel did not discuss the situation with MnDOT contract management staff or the Department of Administration until early November 2001. At that point, Minnesota Transit Constructors had been working on the project for nearly

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four weeks. By not involving MnDOT's Contract Management Office and the Department of Administration early in the process, MnDOT field personnel limited the possible contracting alternatives available to them. When MnDOT, through the Hiawatha Project Office, authorized Minnesota Transit Constructors to begin work on the project without a fully executed contract, it gave the Department of Administration few options regarding approval of the agreement.

In an e-mail dated November 7, 2001, a MnDOT employee overseeing the Highway 55 reconstruction project provided the following information to Hiawatha Project Office personnel:

“Obviously (MnDOT Contract Management personnel) doesn't realize the project (Highway 55/62 bypass) is already 2/3 done by MnTC! Better be prepared to outline the options that were considered and why they were rejected. Emergency contract, SA or force acct with AMES, separate contract, etc. Problem is the reasons are mostly to do with development and processing time and that doesn't sell very good with the contract types. End of construction season reasons along with why work couldn't wait till spring “might” help!”

MnDOT described the need to design and build a new bypass as a “safety emergency,” which exempted the department from competitive solicitation requirements. Minn. Stat. Section 161.32, Subd. 3 states that in an emergency, the commissioner of Transportation or the commissioner's deputy may authorize, in writing, a contract for work without advertising for bids. This section defines an emergency as a condition on a trunk highway that necessitates immediate work in order to keep such highway open for travel. Ultimately, the state relies heavily on the expertise of MnDOT engineers to determine when a safety emergency exists.

Minn. Stat. Section 16C.10 also provides exceptions to the solicitation process in emergencies. An emergency under this section includes situations where there is a threat to the health and safety of people. The Department of Administration's policies provide that agency personnel should work with the department's Materials Management Division before making an emergency purchase, if time permits. If time does not permit, the agency is expected to act promptly to address the emergency and report the incident to the Materials Management Division, in writing, as soon as possible. Although we found no evidence that MnDOT violated state statutes concerning procurement in emergency situations, the department did not comply with the Department of Administration's policies. Under emergency procurement policies, MnDOT should have notified the Department of Administration of the “emergency” at the end of August 2001, when the consultant rejected the department's drainage plan relating to the Camp Coldwater Springs litigation.

MnDOT's construction personnel and contract management personnel have different objectives. In this particular case, MnDOT construction personnel focused on getting a new bypass built before winter to mitigate safety concerns and ensure that light rail transit construction stayed on schedule. MnDOT's decision to have Minnesota Transit Constructors complete the bypass was reasonable in that it was based on the department's assessment of the firm's ability to design and build the bypass before winter, and MnDOT's desire to mitigate potential state liability if the bypass design caused delays in the light rail project.

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### *Recommendations*

- *In emergency situations, MnDOT field personnel should consult with MnDOT's Contract Management Office and the Department of Administration as soon as possible to ensure compliance with state contracting requirements.*
- *MnDOT should ensure better communication between field operations and contract management personnel to address contract issues and concerns at the earliest possible juncture.*

## **2. Department of Administration officials raised important and appropriate questions about MnDOT's proposed contract supplement to build a bypass at the interchange of Highways 62 and 55.**

As the state agency responsible for all state contracts, the Department of Administration raised valid and important questions concerning MnDOT's supplemental agreement with Minnesota Transit Constructors for the bypass work. Administration officials were appropriately concerned that MnDOT's actions did not provide an open and fair process for awarding road construction work. Commissioner Fisher addressed these concerns in his memo to Commissioner Tinklenberg dated December 21, 2001. (Attachment III)

Pursuant to statute, the commissioner of Administration is responsible for all contracting by, for, and between state agencies. The department also performs all contract management and review functions, except those functions specifically delegated to the contracting agency or the Office of the Attorney General. The Department of Administration describes its contracting responsibilities as beginning at the point an agency makes a decision that a contract is required and ending when the contract is complete. Minn. Stat. Section 16C.05 provides that a contract is not valid unless it has been fully executed by the head of the agency or a delegate, it has been approved by the commissioner of Administration and the Office of the Attorney General, and the accounting system shows an obligation in an expense budget or encumbrance for the amount of the contract liability.

Laws of Minnesota 2001, 1<sup>st</sup> Special Session, Chapters 8 and 10, contained provisions that for a six- month period (July 1, 2001 through December 31, 2001) exempted MnDOT from obtaining the Department of Administration's signature on certain contracts. However, throughout the six-month period, MnDOT continued to submit its contracts to the Department of Administration for approval in accordance with an agreement between Commissioner of Transportation Tinklenberg and Commissioner of Administration Fisher.

It is Commissioner Fisher's opinion that MnDOT's supplemental agreement with Minnesota Transit Constructors had to be submitted to the Department of Administration for approval because Administration signed the original contract. There is no evidence that MnDOT ever sought to withdraw the supplementary agreement from Administration's review and MnDOT

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officials assert that the supplementary agreement is legal in part because Commissioner Fisher signed it. In addition, it is our position that in submitting the supplementary agreement to the Department of Administration for approval---whether that was required or not---MnDOT had no basis to expect the Department of Administration to apply standards or legal requirements any different from those used in approving similar agreements.

In performing its contract review function, the Department of Administration questioned the appropriateness of MnDOT's decision to contract with the light rail transit contractor for highway construction work. MnDOT's response was that the bypass did relate to the light rail transit contract because the new bypass was needed to allow light rail transit construction to continue. The Department of Administration questioned this decision by stating that if the contract was related to light rail transit, MnDOT should have paid for the bypass using light rail transit funding sources rather than Trunk Highway funds. In addition, The Hiawatha Project Office (HPO) decided that the supplemental agreement did not have to follow all light rail transit contracting policies and procedures because Trunk Highway funds rather than light rail transit monies funded the bypass work. Therefore, HPO did not complete additional funding agreements and obtain all the signatures required under light rail transit policies and procedures. We found the Department of Administration's concerns in this area to be valid and agree that the design and construction of the bypass related to highway construction rather than light rail. Had MnDOT contacted the Department of Administration earlier in the process, an alternative contracting process may have been available to address the concerns of both agencies.

In addition, the Department of Administration initially questioned MnDOT authorizing work to begin without a fully executed contract. While the commissioner of Administration did not find a statutory violation occurred, he expressed concern about the unnecessary legal risks involved in allowing work to commence without a contract. (A concern we share and will address in a program evaluation currently in process.) Both departments agreed that statutes require a fully executed contract be in place prior to any payment to the contractor. However, MnDOT and the Department of Administration differed in their interpretations of Minn. Stat. Section 16A.15 and its applicability regarding when a contractor can begin work on a project. Minn. Stat. Section 16A.15 pertains to the Department of Finance and the state's accounting system (MAPS). Specifically, Minn. Stat. Section 16A.15 Subd. 3 states, in part:

“(a) A payment may not be made without prior obligation. An obligation may not be incurred against any fund, allotment, or appropriation unless the commissioner (Commissioner of Finance) has certified a sufficient unencumbered balance or the accounting system shows sufficient allotment or encumbrance balance in the fund, allotment, or appropriation to meet it. The commissioner shall determine when the accounting system may be used to incur obligations without the commissioner's certification of a sufficient unencumbered balance.”

There is confusion among state agency personnel regarding when an obligation may be incurred and the corresponding accounting system requirements. MnDOT incurred an obligation when it directed Minnesota Transit Constructors to begin work on the bypass. MnDOT authorized the contractor to begin without having a fully executed contract or an encumbrance on the state's

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accounting system for this vendor. Some agency personnel interpreted Minn. Stat. Section 16A.15 to allow an obligation to be incurred as long as the accounting system showed a sufficient, unencumbered balance at the allotment level. However, other agency personnel interpreted the statute to mean an agency must enter an encumbrance before incurring an obligation. We discussed the requirements of Minn. Stat. Section 16A.15 with Department of Finance staff, who indicated that the department's Operating Policy and Procedure #0702-02 clarifies the requirement about incurring an obligation. According to the Finance policy, agencies may incur small obligations, of \$2,500 or less, without an encumbrance as long as sufficient funds are available at the allotment level. For expenditures exceeding \$2,500, the Department of Finance requires an encumbrance on the state's accounting system prior to incurring an obligation. The Department of Transportation did not comply with the Department of Finance policy because it did not enter an encumbrance in the accounting system for this contract until nearly four weeks after work had begun on the project.

#### *Recommendation*

- *The Department of Administration should work with the Department of Finance to ensure state agencies understand the Minn. Stat. Section 16A.15 requirements as they relate to state contractors and the encumbrance of funds.*

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LIST OF ATTACHMENTS

- I. Timeline
- II. Summary of contracting requirements for professional/technical, trunk highway, design-build, and light rail transit contracts
- III. Memo from Commissioner Fisher to Commissioner Tinklenberg dated December 21, 2001

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## **Timeline MnDOT Contract for Highway 55/62 Bypass**

**5/16/2001**

State law protecting Camp Coldwater Springs becomes effective.

**5/23/2001**

Minnehaha Creek Watershed District (WCWD) files lawsuit concerning Highway 55 project's effect on Camp Coldwater Springs.

**5/30/2001**

Hennepin Count District Court grants injunction to MCWD to stop MnDOT from pumping water from Highway 55/62 construction site.

**6/2001**

MnDOT ceases pumping for 28 days to allow for dye testing to determine effects on Camp Coldwater Springs.

**7/12/2001**

MCWD accepts out of court settlement offered by MnDOT to redesign drainage plan and submit to independent consultant.

**8/30/2001**

After consultant rejects MnDOT's redesign proposal, MnDOT terminates its contract with Ames Construction.

**9/14/2001**

HPO decides to proceed with MnTC to design and build a temporary bypass at the intersection of Highways 55/62.

**10/15/2001**

MnTC begins design work for temporary bypass.

**10/29/2001**

MnTC begins construction of the temporary bypass.

**11/7/2001**

Administration personnel notify MnDOT that Highway 55/62 bypass is beyond the scope of LRT contract.

**11/8/2001**

MnDOT encumbers funds for Highway 55/62 temporary bypass.

**12/6/2001**

Both lanes of traffic had moved to the new bypass

**12/26/2001**

Supplemental Agreement with MnTC for Highway 55/62 temporary bypass is fully executed.

**Minnesota Department of Transportation**  
**Special Review: Contract for the Highway 55/62 Bypass**

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## Comparison of Contracting Procedures

<b>Professional/Technical Contracts In Excess of \$50,000</b>	<b>Trunk Highway Contracts</b>	<b>Design/Build Contracts</b>	<b>Changes to LRT Contract</b>
<p>1 Develop scope of work for a formal request for proposal (RFP). Prepare Department of Administration (DOA) Certification form. If a single source, prepare justification memo and attach to certification form. Obtain approvals for certification form. Draft RFP using developed selection criteria. Obtain DOA approval for certification form, RFP and State Register notice.</p>	<p>Plans and specifications for proposed work must be on file in the Commissioner of Transportation's office prior to advertisement for bids. (Mn. Stat. Sec. 161.32 Subd. 1)</p>	<p>The Commissioner of Transportation may solicit and award a design-build contract for a project on the basis of a best value selection process. Mn. Stat. Sec. 16C.08 – Prof. Tech Services, does not apply to design-build contracts to which the commissioner is a party. (Mn. Stat. Sec. 161.3412 Subd. 1)</p>	
<p>2 Advertise in state register. Obtain responses to RFP.</p>	<p>Advertisement for bids should be published in newspapers and other periodicals of general circulation and may be placed on the internet. (Mn. Stat. Sec. 161.32 Subd. 1)</p>	<p>The commissioner must determine that using the design/build method will serve the public interest using specified criteria. (Mn. Stat. Sec. 161.3414 Subd. 2)</p>	
<p>3 Develop selection committee. Select contractor using best value method (Mn. Stat. Sec. 16C.02 Subd. 4).</p>	<p>Contracts based on specifications prescribed by the Commissioner of Transportation. Each bidder for a contract shall furnish security approved by the commissioner to ensure completion of the contract. (Mn. Stat. Sec. 161.32 Subd. 1a)</p>	<p>The commissioner appoints a technical review committee of at least 5 individuals for the purpose of reviewing and ranking design/build contractors. A request for qualifications (RFQ) is issued to determine qualifications of prospective design-builders. (Mn. Stat. Sec. 161.3420 Subd. 2)</p>	

## Comparison of Contracting Procedures

Professional/Technical Contracts In Excess of \$50,000	Trunk Highway Contracts	Design/Build Contracts	Changes to LRT Contract
4 Select proper contract form. Obtain evidence of workers compensation and certificate of insurance. Draft contract and encumber funds. Obtain all signatures on the contract. (DOA P/T contract checklist.)	Contract must be awarded to lowest responsible bidder, as determined by the commissioner, taking into consideration conformity with the specifications, the purpose for which the contract or purchase is intended, the status and capability of the vendor, and other considerations imposed in the call for bids. (Mn. Stat. Sec. 161.32, Subd. 1b)	The technical review committee evaluates the design/build qualifications of the responding firms and develops a short list of no more than 5 of the most qualified firms in accordance with qualifications criteria described in the RFQ. The commissioner issues a request for proposal (RFP) to the design/builders on the short list. The committee scores the proposals using the selection criteria in the RFP. The committee then submits a technical proposal score for each firm to the commissioner, who divides each design/build price by this score to obtain an adjusted score. The commissioner must award the contract to the responsive and responsible design builder whose score is the lowest, with certain alternatives for contracts under \$5 million. (Mn. Stat. Sec. 161.3420 - 161.3426)	

## Comparison of Contracting Procedures

Professional/Technical Contracts In Excess of \$50,000	Trunk Highway Contracts	Design/Build Contracts	Changes to LRT Contract
5 In emergencies, the commissioner may make any purchase necessary for the repair, rehabilitation, or improvement of a state owned structure or may authorize an agency to do so and may purchase, or may authorize an agency to purchase goods, services or utility services directly for immediate use. Emergency is defined as a threat to public health, welfare or safety. (Mn. Stat. Sec. 16C.10 Subd. 2)	In the case of an emergency, contracts may be let without advertising for bids. Emergency is defined as a condition on a trunk highway that necessitates immediate work in order to keep the highway open for travel. (Mn. Stat. Sec. 161.32 Subd. 3)	No emergency procedures are listed for design/build contracts in Mn. Statute Chapter 161	The HPO can implement emergency procurement contract procedures when required to correct imminent danger safety conditions, or to prevent or mitigate substantial property losses, and generally to protect the health, safety or welfare of the public. Failure to adequately plan for correct sequencing of the design and construction process does not constitute an emergency. An emergency is defined as an event, such as a natural occurrence (flood, tornado, high winds, etc.) or accidents (fires, structural failures, etc.) that could create circumstances that may imperil and jeopardize the general public or the labor work force; or may potentially cause substantial or even catastrophic damage to property. The normal competitive processes are waived in these circumstances. (HPO Policy 890)

## Comparison of Contracting Procedures

Professional/Technical Contracts In Excess of \$50,000	Trunk Highway Contracts	Design/Build Contracts	Changes to LRT Contract
<p>6 Contracts and amendments cannot exceed 5 years unless otherwise provided for by law. The term of the original contract must not exceed 2 years unless the Commissioner of Administration determines that a longer duration is in the best interest of the state. (Mn. Stat. Sec. 16C.08, Subd. 3)</p> <p>Contracts can only be amended within the scope of the original certification and RFP. In addition, amendments need to be in place before the contract expires. An amendment must be clearly identified and written and properly executed any time the contractor and agency agree to a change in any provision of the contract. An agency must detail in the amendment why it was necessary. All amendments must be approved in the same manner as the original contract. (DOA P/T Manual)</p>	<p>Notwithstanding any law to the contrary, when goods or services are provided to the commissioner under an agreement supplemental to a contract for work on a trunk highway, the commissioner or designee may approve the supplemental agreement. (Mn. Stat. Sec. 161.32, Subd. 7)</p>		<p>A Directed Authorization to Proceed is used to authorize work prior to final negotiation. A Supplemental Agreement is a contract document which changes the contract value, time of execution, basic project configuration or contract documents of the design build contract. The documents must be submitted to the Rail Transit Committee and the full Metropolitan Council for approval. Further, and in parallel with this action, the Supplemental Agreement will be signed by the Design-Build Contractor, the Design-Build Project Manager, the Assistant General Manager – Transit Systems Development for Metro Transit, the MnDOT Commissioner or his designee, and the Regional Administrator of the Metropolitan Council or his designee. The documents are forwarded to MnDOT Project Accounting to encumber state funds. A request for approval of a supplemental agreement submitted to the Metropolitan Council should be accompanied by a request for approval of a project funding agreement of an equal amount. (HPO Policy No. 830)</p>



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## MEMORANDUM

**TO:** El Tinklenberg  
**FROM:** David Fisher  
**RE:** TH 55/62 Bypass & Signal System  
**DATE:** December 21, 2001

El, as discussed earlier today, I am signing off on the Supplemental Agreement and Authorization to Proceed for the TH 55/62 safety hazard mitigation work. The pertinent, executed copies accompany this memorandum. I am returning these, however, only after weighing carefully the circumstances under which this work has been undertaken.

There has been tension between our two staffs over the last year in connection with contracts entered into for road construction. I have been open with you about steps Admin has taken to relieve some of that tension, and to address our strongly-held common objective – to get road construction projects underway and completed as expeditiously as possible, with as little red tape as possible.

I cannot say that MnDOT has responded in kind. This Supplemental Agreement is a case in point.

MnDOT decided some time ago that the TH 55/62 work should be done by Minnesota Transit Contractors (“MTC”) under the existing Hiawatha LRT Design/Build contract, as a Supplemental Agreement. This is because MTC already was at or near the work site, and had certain appropriate equipment available. MnDOT also decided to use non-LRT, trunk highway funding for the work.

The TH 55/62 work involves road construction, in the form of road rerouting and resurfacing, and semaphore relocation. This work does not appear to relate to LRT construction, or if so only very peripherally. Furthermore, if it is LRT work then it should be funded through LRT accounts. I am particularly concerned that certain state legislators already have made a public issue of LRT funding, and use of trunk highway funds for LRT work only exacerbates the issue.

The TH 55/62 work was known well in advance and yet MnDOT did not notify its sister agencies or the general public. Since the Supplemental Agreement is valued at approximately \$818,000 it is not an insignificant undertaking, and is of a type that both statute and good policy indicates should be let only after competitive bidding. While I can understand the convenience of using a contractor already located nearby, this is but a factor to take into consideration and cannot itself be determinative.

Lastly, the work was commenced and finished in large part before any attempt was made to frame a contract or seek necessary statutory review. I am confident that had there been some effort at collaboration earlier on in this process, the work needed on the TH 55/62 interchange could have been accomplished expeditiously, without creating unnecessary legal risks.

**Minnesota Department of Transportation**  
**Special Review: Contract for the Highway 55/62 Bypass**

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May 22, 2002

Claudia Gudvangen, CPA  
Deputy Legislative Auditor  
Office of the Legislative Auditor  
Room 140  
Centennial Building  
658 Cedar Street  
St. Paul, MN 55155-1603

Dear Ms. Gudvangen:

The Minnesota Department of Transportation (Mn/DOT) has received the draft report prepared by the Office of the Legislative Auditor (OLA) regarding the supplemental agreement used by Mn/DOT for design and construction services of the Trunk Highway (TH) 55/62 bypass. The finding of this report is that Mn/DOT did not violate any laws of the State of Minnesota in addressing the TH 55/62 bypass. In addition, Mn/DOT also made reasonable decisions to prepare the road for safe winter travel and to clear the way for the Hiawatha Light Rail Transit (LRT) Project, avoiding potential damages due to delay. Mn/DOT is reaffirmed by this conclusion. We are confused, however, by the conclusion of the OLA that Mn/DOT opened the state to unnecessary legal risk. This is contradictory to the OLA's finding of no violation of state law and to the Commissioner of Transportation's responsibility under state law to weigh all risks pertaining to this issue. In Mn/DOT's view, inaction on our part would have exposed the state to great legal risks.

As a department, we have worked diligently to ensure that the contracting policies and procedures instituted by Mn/DOT are in compliance with state law. I am proud of the work performed by Mn/DOT's employees, both in the field and in our administrative offices. These employees make difficult decisions every day, including decisions, like those made in reference to the TH 55/62 bypass, which impact the safety of the traveling public. Mn/DOT's employees are conscientious professionals whose good judgment we rely on every day. I applaud the OLA's staff for its professionalism in conducting this investigation and I am pleased that the OLA has determined that the TH 55/62 bypass supplemental agreement was not in violation of any state law and that the decisions that Mn/DOT made in relation to that supplemental agreement were reasonable.

However, some of the conclusions drawn in the draft report are inaccurate and erroneous. This investigation was an extremely difficult task. The situation that arose at the TH 55/62 bypass was complicated, and it is difficult to look back at such a complex situation and draw conclusions from hindsight. I appreciate the opportunity that the OLA has provided for my concerns to be raised.

In my response, I will address the following six key points: 1) the adequacy of Mn/DOT's consideration of state contracting requirements; 2) the timeliness of Mn/DOT's field personnel's communication with our contract management personnel; 3) the adequacy of Mn/DOT's consideration of the Department of Administration's oversight process; 4) Mn/DOT's concern for the safety of the traveling public at the TH 55/62 bypass; 5) Mn/DOT's decision regarding the funding source for the TH 55/62 bypass; and 6) state agency confusion regarding the interpretation of Minnesota Statutes Section 16A.15.

In its draft report, the OLA makes two findings in addition to the finding that no violation of state law had taken place and that Mn/DOT's decisions related to the TH 55/62 bypass supplemental agreement were reasonable. First, the OLA finds that "Mn/DOT officials did not adequately consult with state contracting specialists in Mn/DOT or the Department of Administration when selecting a firm to build the temporary bypass." The OLA criticizes Mn/DOT for not "adequately" considering the state's contracting requirements or the oversight of the Department of Administration.

#### *Adequacy of Mn/DOT's Consideration of State Contracting Requirements*

While I am pleased that the OLA found that Mn/DOT did not violate any state laws and made reasonable decisions in regards to the supplemental agreement for the bypass at TH 55/26, I disagree with the assessment of the OLA that Mn/DOT did not "adequately" consider the state's contracting requirements. The situation at the TH 55/62 bypass was one that had many elements. This was not simply a contracting issue. This was a legal issue, in which one lawsuit had already been filed. This was an environmental issue; a situation where we did not desire disruption to the delicate environmental ecosystem that exists near the Minnehaha Creek and Mississippi River watersheds. This was a community issue. The neighborhoods along the TH 55 corridor have been experiencing many years of construction. This was an LRT issue. If the bypass had not been reconfigured by early spring of 2002 to accommodate a flyover of the TH 55/62 intersection, the LRT Design/Build (D/B) contract would have been delayed, potentially subjecting the state to damages. And, most importantly, this was an issue of safety of the traveling public. The reverse elevations, curves, and slopes that were a part of the temporary bypass that preceded the work done under the TH 55/62 supplemental agreement would have created hazardous winter driving conditions. These risks, including the risks of a variety of contracting scenarios, were presented at multiple levels of Mn/DOT's organization, to Mn/DOT's Executive Team, and to Mn/DOT's legal counsel. Only once all of the risks and alternatives were considered and assessed at the highest levels of Mn/DOT's organization was a decision made regarding how to move forward with the TH 55/62 bypass.

#### *Timeliness of Mn/DOT's Field Personnel's Discussions with Contract Management Personnel*

Furthermore, the OLA's report is critical of field personnel for not discussing the situation at the TH 55/62 bypass in a timely manner with Mn/DOT's contract management personnel. Presumably, the OLA's reference to "field personnel" is a reference to Mn/DOT staff who are a part of the Hiawatha Project Office (HPO). It must be pointed out that when Mn/DOT created

the HPO, the Hiawatha LRT Project was the first and only transportation project that was using the D/B project delivery method. Therefore, due to the uniqueness of the project, the HPO was set up as a self-contained office. The HPO is the only office in Mn/DOT with D/B expertise and was thus not required to consult with contract management staff. I am aware that the HPO staff did consult with staff in Mn/DOT's Office of Construction and Contract Administration. The Office of Construction and Contract Administration would have been an appropriate office with which to consult since that office is responsible for the procurement of Mn/DOT's road construction contracts. The Office of Construction and Contract Administration is the office within Mn/DOT that is most knowledgeable about how to procure construction contracts and the options that would be available. The HPO staff was the staff in the department that was best positioned to make recommendations regarding how to progress the TH 55/62 bypass through the D/B supplemental agreement process. With the staffs of these two offices working together, I am convinced that many options were reviewed and the best option was recommended for moving forward with the TH 55/62 bypass.

#### *Adequacy of Mn/DOT's Consideration of the Department of Administration's Oversight Process*

I must also refute the OLA's criticism that Mn/DOT did not adequately consider the Department of Administration's oversight process. At the time of the TH 55/62 bypass supplemental agreement, Mn/DOT was subject to Minnesota Statutes Section 161.3205. That statute gave the Commissioner of Transportation the authority and duty to award transportation construction contracts. In light of this law, which came into effect after the 2001 legislative session, and was in effect until January 1, 2002, Mn/DOT was not subject to Department of Administration oversight of its contracts. This was a six-month period during which Mn/DOT was solely responsible for transportation contracts for the state. It was under this authority that Mn/DOT commenced work at the TH 55/62 bypass.

After passage of Minnesota Statutes Section 161.3205, Mn/DOT staff began to draft new contract procedures that reflected the change in the law. These new procedures included removal of the Department of Administration from the contracting process for transportation contracts. Once the Commissioner of Administration became aware of this potential change in Mn/DOT's contracting procedures, he called me personally to request that Mn/DOT not remove the Department of Administration from the transportation contracting process. We agreed, as the chief executives of our two agencies, that, because Minnesota Statutes Section 161.3205 was effective for only six months, Mn/DOT would continue to include the Department of Administration in its contract process. At no time did I state that Mn/DOT's continued inclusion of the Department of Administration in its contracting process was anything more than a courtesy. As a matter of fact, I am unable to delegate away my responsibilities as given to me under state law without a formal or contractual arrangement. It is the legislature that has the authority to determine what responsibilities each head of a state agency possesses. The process to which Commissioner Fisher and I had agreed was an attempt for our two agencies to continue to have a good faith contracting process in place. Any other reading of the inclusion of the Department of Administration in Mn/DOT's contracting process is conjecture and contrary to state law.

*Determination of Emergency Situation*

Again, while I am pleased with the OLA's finding that the TH 55/62 bypass supplemental agreement did not violate any state laws and that Mn/DOT made reasonable decisions in relation to that supplemental agreement, I would also like to address the issue of emergency. As the OLA correctly points out in its report, the Commissioner of Transportation has the authority to let contracts without advertising for bids where there is a condition on a highway that necessitates immediate work in order to keep such highway open for travel. As stated earlier in this response, the previous bypass at the TH 55/62 bypass had reverse elevations, curves, and slopes that would have made winter driving hazardous if the bypass were not repaired. The situation at the TH 55/62 bypass was deemed to be an emergency because, had Mn/DOT followed its procedures for bidding a highway contract, there would have been no way that the two necessary procurements (one for design and one for construction) could have been completed and the bituminous laid before cold weather set in. It is necessary to lay bituminous prior to temperatures falling below a certain level or the condition of the bituminous will be substandard, causing an unsafe driving surface.

The OLA indicates that Minnesota Statutes Section 16C.10 also applies in the instance of an emergency and that Mn/DOT should have notified the Department of Administration of the emergency situation. However, it must be acknowledged that under state law, under Minnesota Statutes Section 161.32, the Commissioner of Transportation has his own authority to act in emergencies to determine that a transportation construction contract will not be advertised, without going to the Department of Administration for approval or input regarding that decision, where that emergency relates to the operations of a highway.

The second finding in the OLA's draft report is that "Department of Administration officials raised important and appropriate questions about Mn/DOT's proposed contract supplement to build a bypass at the interchange of Highways 62 and 55." While Mn/DOT believes that it is important for state employees of any department to raise concerns that they may have, it is important to recall that employees at the Department of Administration did not only raise questions about the decisions that Mn/DOT made regarding the supplemental agreement, certain employees made public baseless accusations that accused Mn/DOT staff, including myself, of willful and intentional illegal acts. Unsubstantiated accusations had become a common practice over the last year with certain Department of Administration staff, with claims of collusion, conflicts of interest, and illegal acts directed at various times not only at state staff, but also at legislators. Clearly, at the point at which concerns were raised about the TH 55/62 supplemental agreement, emotions were running high. But, it must be realized that those emotions may have been tied to personal feelings toward me and my staff, rather than to real concerns about the propriety of the supplemental agreement. In finding that no illegal actions occurred when Mn/DOT moved forward with the supplemental agreement for the TH 55/62 bypass, the OLA highlights that this situation stemmed from a disagreement between two state agencies. When one state agency's staff makes inflammatory and fallacious accusations against the staff of another state agency, not only are barriers created that prevent better working relationships, but

reputations are damaged and public confidence in government is eroded. It is the responsibility of those who of us who work for state government to take that role very seriously.

*Legal Requirements of Mn/DOT Consultation with the Department of Administration*

The OLA draft report also indicates that Commissioner Fisher maintains that, because the original D/B contract had been signed by the Department of Administration, any supplemental agreements under that contract did not fall within the purview of Minnesota Statutes Section 161.3205, but rather remained subject to Department of Administration oversight. At the point of the execution of the original D/B contract, prior to the passage of Minnesota Statutes Section 161.3205, Mn/DOT's contracts were subject to the Department of Administration's oversight. However, Commissioner Fisher's assertion that the supplemental agreement was also subject to the Department of Administration's oversight is an assertion that is contrary to Mn/DOT's interpretation of the law. Under Minnesota law, the clear language of the statute prevails. In other words, legislative intent is what the language of the law is. Only where the words of a law are not explicit may other matters be considered as to the intention of the Legislature.

(Minnesota Statutes Section 645.16.) Additionally, if a subsequent act by the Legislature changes a previous statute, the subsequent act prevails. In the case of Minnesota Statutes Section 161.3205, the language of the law is clear. The Commissioner of Transportation was granted the authority and duty to award transportation construction contracts. This supplemental agreement is a transportation construction contract. A supplemental agreement is a separate contractual document that is to be interpreted in reference to the whole. However, it is a separate document for purposes of execution. Therefore, the Commissioner of Transportation was not subject to Department of Administration oversight of the TH 55/62 supplemental agreement.

The OLA also indicates that Mn/DOT officials have asserted that the TH 55/62 supplemental agreement is legal because the Department of Administration has signed the contract. This is not accurate. What Mn/DOT staff has stated is that Commissioner Fisher's signature on the supplemental agreement is indicative of his belief that the supplemental agreement was legal. We have at no time maintained that Commissioner Fisher's signature made the document a legal document. Under state law at the time, his signature was not necessary to make the document legal.

*Appropriateness of Funding Source for TH 55/62 Bypass Supplemental Agreement*

The OLA's draft report also raises the issue of the appropriateness of the funding source chosen for the work at the TH 55/62 bypass. The work at the TH 55/62 bypass was paid for from the Trunk Highway fund. The OLA's report indicates that Mn/DOT should have involved the Department of Administration when determining what source of funds would be used to pay for the work at the TH 55/62 bypass. Involving the Department of Administration in funding discussions and processes would have been beyond the scope of the Department of Administration's authority. Under state law, the Commissioner of Transportation is charged with use of the Trunk Highway fund. The Commissioner of Transportation is given the responsibility to determine how the Trunk Highway fund will be distributed. The statement by

the Department of Administration that the work at the TH 55/62 bypass should not have been funded with Trunk Highway funds because the work was completed under the D/B contract is unfounded. The determination of whether Trunk Highway funds may be used on a project is related to the work to be completed, not to the vehicle with which the work is progressed. In this case, the work was on two Trunk Highways. The type of work was road construction. The fact that the work was progressed under the D/B contract was irrelevant.

*Interpretation of Minnesota Statutes Section 16A.15*

Lastly, the OLA addresses questions around the interpretation of Minnesota Statutes Section 16A.15, specifically, whether an encumbrance was necessary for this contract prior to the work starting at the TH 55/62 bypass. I agree with the OLA's recommendation that the Departments of Administration and Finance work together to clarify this statute and to ensure that their policies are consistent and communicated to state agency personnel. In the case of the TH 55/62 supplemental agreement, the funds for the work had been encumbered under the initial construction contract for the highway construction work. That encumbrance was then transferred to the supplemental agreement. At no time was there a concern as to whether sufficient funding existed to pay for the work under the supplemental agreement. I would appreciate clarification as to how situations such as this are interpreted under state law and to what extent Department of Finance policies unnecessarily exceed legal requirements.

Contractors have long argued that the state contracting policies are onerous and bureaucratic. This draft report demonstrates that many policies and procedures are beyond what is required for compliance with state law and what is required to ensure fair and competitive contracting. It is critical that these policies be reviewed and, where appropriate, streamlined.

In closing, I would like to reiterate my appreciation to the OLA for conducting this investigation and for the opportunity to respond to the draft report. While I have identified many concerns above, I want to acknowledge the professional nature with which the staff of the OLA have conducted themselves. Please contact me or my staff with any questions regarding this response or if we can assist you in any other way.

Sincerely,



Commissioner Elwyn Tinklenberg  
Department of Transportation



Department of Administration

May 22, 2002

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James R. Nobles, Legislative Auditor  
Office of the Legislative Auditor  
1<sup>st</sup> Floor South – Centennial Building  
658 Cedar Street  
St. Paul, MN 55155

Dear Mr. Nobles:

Thank you for the opportunity to discuss and comment on the recommendations arising from the special review of the Minnesota Department of Transportation 55/62 contract with the Minnesota Transit Constructors.

Recommendation

- *The Department of Administration should work with the Department of Finance to ensure state agencies understand the Minn. Stat. Section 16A.15 requirements as they relate to state contractors and the encumbrance of funds.*

Response

The Department of Administration agrees that there is a need for a consistent interpretation of Minn. Stat. Section 16A.15 as it relates to state contractors and the encumbrance of funds. Included will be a review of contract guidance for emergency situations. We will work with the Department of Finance on this interpretation and work internally toward possible enhancements to the Admin contract manual and training materials.

Person Responsible:  
Larry Freund

Estimated Completion Date:  
August 2002

Very truly yours,

/s/ *David Fisher*

David Fisher, Commissioner  
Department of Administration