

STATE OF MINNESOTA

COUNTY OF RAMSEY

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By  Deputy

DISTRICT COURT

SECOND JUDICIAL DISTRICT

CASE TYPE: CONTRACT

Court File No. 62-cv-11-5203

Judge: Kathleen Gearin

In Re Temporary Funding of Core
Functions of the Executive Branch
of the State of Minnesota

**ASSOCIATED GENERAL CONTRACTORS
OF MINNESOTA'S MEMORANDUM
IN SUPPORT OF ITS MOTION TO
INTERVENE OR FILE AMICUS
CURIAE BRIEF**

Pursuant to Minn. R. Civ. 24 and the discretion of the court to accept amicus curiae submissions, the Associated General Contractors of Minnesota (the "MnAGC") respectfully petitions this Court for leave to intervene in this action or in the alternative to file a brief as amicus curiae.

I. IDENTITY AND INTEREST OF MNAGC

The MnAGC was the first recognized chapter of the Associated General Contractors of America. It has more than 400 members, including general contractors, specialty contractors, and businesses interested in the construction industry. The MnAGC represents its members on industry-related issues, and has a long standing interest in providing the view of the industry to state agencies and the public. At the Minnesota Appellate and Supreme Courts, the MnAGC has been granted leave many times to file amicus curiae briefs reflecting the views of the industry on matters before the court.

The MnAGC has many members that currently are parties to state contracts which are in danger of being suspended or terminated during the threatened state government shutdown.

II. INTERVENTION OR APPROVAL TO SUBMIT AN AMICUS CURIAE BRIEF IS WARRANTED

A. Under Minn. R. Civ. P. 24.01, MnAGC is Entitled to Intervene as a Matter of Right

As a preliminary matter, MnAGC has standing to intervene as a representative of its members whose interests are at stake in this action. *See, e.g., Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 629 F.3d 387 (4th Cir. 2011).

The right of intervention is well-recognized under both principles of law and equity. *See Faricy v. St. Paul Inv. & Sav. Soc.*, 110 Minn. 311, 125 N.W. 676 (1910). Minn. R. Civ. P. 24.01 permits intervention in this action as a matter of right if MnAGC's members claim an interest relating to the subject matter of the action and MnAGC is so situated that it may not be able to adequately protect that interest without being a party. Minn. R. Civ. P. 24.01.

Minnesota courts construe and apply Rule 24 liberally to encourage intervention. *Nash v. Wollan*, 656 N.W.2d 585, 591 (Minn. App. 2003). Courts apply Rule 24 liberally to further its purpose of protecting nonparties from having their interests adversely affected by litigation conducted without their participation. *See Id.*

MnAGC's right to intervene is governed by a four-factor test:

1. Timely application for intervention;
2. An interest relating to the property or transaction which is the subject of the action;
3. Circumstances demonstrating that the disposition of the action may as a practical matter impair or impede the party's ability to protect that interest; and
4. A showing that the party is not adequately represented by the existing parties.

Luther v. Luther, 596 N.W.2d 278, 280-81 (Minn. App. 1999).

1. MnAGC's motion is timely

The determination of the first factor—timeliness—is made on a case-by-case basis. Courts may consider several factors, including: (1) how far subject suit has progressed; (2) reason for delay in seeking intervention; and (3) any prejudice to existing parties because of delay. *Halverson ex rel. Halverson v. Taflin*, 617 N.W.2d 448, 450 (Minn. Ct. App. 2000).

Here, MnAGC's motion is timely. This action began with the petition of the Minnesota Attorney General, filed only recently. No court hearings have occurred and no party can claim prejudice based on MnAGC's intervention.

2. MnAGC has a significant interest in this action

MnAGC's members claim “an interest relating to the property or transaction which is the subject of the action.” MnAGC more than satisfies this factor.

At the heart of the Attorney General's petition is the request that this Court order the identified Government Entities to identify their “core functions,” verify that they are being performed, and then pay for them. Building and construction services performed for, among other Government Entities, the Minnesota Department of Transportation, are a well-recognized core function of Minnesota's government. For example, the Attorney General's petition expressly identifies both “construction projects” and “protection and maintenance of lands, buildings, waterways, transport property” as among those “core functions” of the government established in prior court decisions. *See* Attorney General Petition at p. 3, ¶ 11; *see also id.*, p. 4 ¶ 15 (stating that Governor has an obligation to ensure the maintenance and safety of government property such as buildings and roads). The importance of building and construction to the core function of our state government is repeated by the Federal Office of Management and Budget, also cited in the Attorney General's petition. *Id.*, p. 6.

The members of the MnAGC who perform under state contracts are not merely contractors; they are considered agents of the State because they carry out the State's core functions. The Minnesota Supreme Court has previously found that the construction of state highway projects "is not merely authorized; it is directed."

The highway commissioner is the agent of the state for that purpose. Mandatory is his duty to construct roads and the bridges necessary to make them complete. Once he has contracted for their construction, it is the legal duty of the contractor to perform his contract. Such a contract makes the contractor the agent of the state and clothes him with something more than mere authority to proceed. It puts upon him the legal duty to do so.

Nelson v. McKenzie-Hague Co., 256 N.W. 96, 98 (Minn. 1934) (emphasis added); *accord Watson Constr. Co. v. City of St. Paul*, 109 N.W.2d 332 (Minn. 1961) (same).

This rule is not limited to Minnesota. *See, e.g., Wiggs v. City of Phoenix*, 10 P.3d 625, 629 (Ariz. 2000) ("[W]here one has a non-delegable duty, the one with whom the principal contracts to perform that duty is as a matter of law always an agent for purposes of applying the doctrine of *respondeat superior*"); *Township of Springfield v. New Jersey State Highway Dept.*, 221 A.2d 766, 772 (N.J. 1966) ("for all intents and purposes, there is no contest with respect to the agency relationship arising out of contract between the Highway Department and [highway contractor]"); *accord* Restatement (Second) Torts § 418 (1965) (public owner's "liability for physical harm caused by the negligence of the contractor in failing to put or maintain the highway in safe condition is the same as though the employer were doing the work of construction, maintenance, or repair himself."); *cf. Township of Springfield*, 221 A.2d at 773 (because the "State does not have the necessary massive machinery to construct modern highways ... it contracts with private enterprise to ... act in its stead.").

The Attorney General's petition for an order directing our State's Government Entities to identify, perform, and pay for the core functions of government that the State Government directly implicates the interests of MnAGC's members as the State's contractors who carry out these functions. Accordingly, it cannot be disputed that MnAGC has a dog in this fight.

3. This lawsuit will impair or impede the interests of MnAGC's members

Rule 24 only requires that there be some impairment or impeding of the potential intervenor's ability to protect that interest "as a practical matter." This language establishes a simple, flexible test intended to broaden the circumstances under which intervention is allowed. *Avery v. Campbell*, 279 Minn. 383, 157 N.W.2d 42 (1968).

An order shutting down state construction contracts would impair not only core functions of government, but would impair the interests of MnAGC's members. Similarly, an adjudication of the identity and performance of the core functions of government threatens to impair the interests of MnAGC's members who are currently performing contracts with the government. As explained below, the cessation of this State's core construction activities will result in massive disruptions to project schedules, significantly impacting MnAGC's members performance of these functions. Moreover, a shutdown would have disastrous financial consequences on MnAGC's members as payments for work already performed would presumably stop.

Excluding MnAGC from this case would deprive all parties of MnAGC's expertise on the importance and impact of its members' performance of our State's core construction activities.

4. MnAGC's interests are not adequately represented

Finally, intervention as a matter of right should be granted because this is not a case where MnAGC's interests are being vigorously protected by a party to this lawsuit. *See Miller v. Astleford Equipment Co., Inc.*, 332 N.W.2d 653 (Minn. 1983).

Governmental entities are not contactors. There is reason to doubt that any of these bodies will be familiar with the nuances of construction, and as an intervenor MnAGC will be able to offer its perspectives and knowledge that the existing parties may overlook or undervalue.

B. MnAGC is Entitled to Permissive Intervention

Not only is MnAGC entitled to intervene as a matter of right, but the Court should also grant permissive intervention under Minn. R. Civ. P. 24.02. Under this rule, "anyone may be permitted to intervene in an action when an applicant's claim or defense and the main action have a common question of law or fact." Under this standard, the burden of proof is far lower: MnAGC need not establish that they have a protectable interest in the outcome of this lawsuit; instead, it can simply point to the fact that its members are implicated in relief requested by the Attorney General and that the issues about which they are concerned involve a common question of fact or law applied to fact.

Moreover, MnAGC's participation will also significantly contribute to the full development of the underlying factual issues in the lawsuit and to the just and equitable adjudication of the questions presented. It is essential that MnAGC's contribution to, and perspective on, this dispute receive full attention. Early intervention would significantly contribute to the resolution of these important matters.

The early presence of intervenors may serve to prevent errors from creeping into the proceedings, clarify some issues, and perhaps contribute to an amicable settlement. Postponing intervention in the name of efficiency until after the original parties have forged an agreement or have litigated some issues may, in fact, encourage collateral attack and foster inefficiency.

Kleissler v. U.S. Forest Serv., 157 F.3d 964, 974 (3d Cir. 1998); *see also Forest Conservation Council v. United States Forest Serv.*, 66 F.3d 1489, 1496 n.8 (9th Cir. 1993) (“A liberal policy in favor of intervention serves both efficient resolution of issues and broadened access to the courts.”).

C. If MnAGC is Not Permitted to Intervene, Then Leave Should be Granted to File an Amicus Brief to Inform the Court

The purpose of such briefs is to “inform the court of facts or matters of law that may have escaped its consideration.” Roger S. Haydock & Peter B. Knapp, *MINNESOTA PRACTICE SERIES, Methods of Practice*, v. 5A § 1:93 at p. 112 (West 4th ed.); *see also State v. Finley*, 242 Minn. 288, 64 N.W.2d 769 (1954) (impliedly approving receipt of amicus briefs by district court in civil matter).

Amicus briefs are particularly appropriate in cases where, as here, “constitutional questions are presented ... or where troublesome legal principles are being considered.” Haydock & Knapp, *METHODS OF PRACTICE* at 112; *see also, e.g., Erie Min. Co. v. Commissioner of Revenue*, 343 N.W.2d 261 (Minn. 1984) (constitutionality of taconite tax).

MnAGC’s request for leave to file an amicus brief is not a case of a trade association attempting to supplement the arguments of one of its members who is also a party to the lawsuit. Rather, MnAGC is in a unique position to offer factual and legal considerations that the current parties to this lawsuit would not be expected to make. Because the position of MnAGC’s members as private companies performing core government functions, leave should be granted to allow MnAGC to file an amicus brief.

III. CERTAIN CONSTRUCTION PROJECTS AND ACTIVITIES ARE CORE FUNCTIONS NECESSARY FOR THE GOVERNMENT TO CONTINUE FUNDING

Later sections of this brief will demonstrate that continued funding of all state construction contracts is an essential or critical government function due to the perilous economic condition of the state's construction industry and the general harm to citizens that suspension of design and construction contracts would cause. At a minimum, however, it cannot be denied that certain construction projects and certain construction activities constitute "essential" or "critical" government services that must be funded during any government shutdown.

For example, the Minnesota Department of Transportation ("MnDOT") has signed a contract to replace the Lafayette Bridge due to public safety concerns. Preventing another bridge collapse is surely a critical, core government function that protects the life, health and safety of its citizens. Which contracts have such unique concerns must be determined on project by project basis, but because so many projects affect the life safety concerns of their users, the entire slate of design and construction contracts must be reviewed to determine that public safety concerns are being met.

Furthermore, even a short government shutdown will have unintended and apparently unconsidered consequences that will be devastating to the public. Continuing the prior example, if the order for steel on the Lafayette Bridge is delayed due to a shutdown, the manufacturer will likely remove that steel from the plant's manufacturing cycle and put it at the end of the plant's schedule. Faced with the choice of servicing a reliable client or one that has suspended its contracts, manufacturers will not hold places in their production schedules for uncertain projects. Thus, even if the government is optimistically shut down for only a week, the steel for this project will likely be delayed for months, forcing the project to be delayed by another year once

winter conditions set in. If the project is critical to the health and safety of its citizens, this delay would be intolerable. The same situation will be played out in myriad other state funded projects. Delays in material orders due to the shutdown will not simply extend the project for the length of the shutdown; instead, such delays will likely cause months of material delivery delays and could lead to painfully long delays to the great detriment of the public.

Moreover, Minnesota has a notoriously short construction season to begin with, so the ripple effect from any extended shutdown could kick over completion of suspended projects until next summer. Construction labor will not sit idle. They have to try to support their families, and they will travel to other states where work is available. Thus, when and if the state decides to fund its contracts again, any remobilization may be substantially delayed. Again, a project by project review is necessary to avoid the exponential material, equipment and labor delays that can be caused by even a short shutdown.

As another example, MnDOT has also sent a form letter to Contractors on state highway contracts instructing them that the “Contractor is responsible for the project during times of suspension...[and] for maintenance of traffic.” Regrettably, MnDOT does not promise the Contractors payment for these ongoing services. Obviously, Contractors will rightly object and refuse to work with no promise of payment. Clearly, maintaining traffic control on public roadways under construction is a critical activity so that car accidents are avoided. That work item must remain funded during the shutdown. In addition, protection of exposed buildings and infrastructure must be funded so that expensive, incomplete construction is not damaged by the elements while the shutdown delays their completion. All state construction projects must be reviewed and funds appropriately authorized so that the public remains safe and that incomplete construction is not damaged during the shutdown.

According to the Attorney General's formulation of the issue, these types of construction projects and the work required to protect and keep them safe are "core functions" of the government and should be funded during any shutdown. They should also fall into the Governor's proposed Priority 1 Critical Services that need to be funded to avoid immediate threats to public health and safety. The MnAGC disagrees with the position in the pleading of four State Senators that such projects should not receive continued state funding because an appropriation for them has not yet been passed. The MnAGC's position is consistent with the decision of Chief Judge Cohen when ruling on the Petition before him during the threatened 2001 shutdown, when he found, "by way of example, core functions include, but are not limited to... the application and maintenance of federal and/or State contracted or mandated programs and projects; ...safety in modes of transportation and state highways (such as the inspection of products and services provided pursuant to construction contracts),...protection and maintenance of lands, buildings, waterways, transport property, equipment and other property owned or leased by the state government... and prompt payment of amounts owed to employees, vendors, and contractors." *See Exhibit 1 to Petition of Attorney General, p. 8-9.*

IV. MAINTAINING STATE FUNDING FOR ALL STATE DESIGN AND CONSTRUCTION CONTRACTS IS A CORE GOVERNMENT FUNCTION

The state of the construction industry in Minnesota is in extreme distress and according to virtually every economic measure, design and construction businesses and their employees have been disproportionately affected by the economic downturn. While the nation and Minnesota continue to suffer through a recession, the design and building industry is experiencing depression-like conditions. When looking back at an economic slowdown that has compounded over several years, the unemployment rate for Minnesota's design and building industry is 40 percent in some areas as projects around the state continue to be stalled due to the national

recession. This unemployment rate is devastating not just for the industry but also for the entire state, since construction spending traditionally accounts for approximately 10 percent of Minnesota's economy.

In the 12 months that ended 2011, Minnesota lost 6,300 construction jobs. See Associated General Contractors of America, www.agc.org, from Bureau of Labor Statistics (BLS), U.S. Department of Labor, www.bls.gov/sae,3/10/11. Based on MNDEED employment numbers, U.S. construction employment is down 37 percent from its historic capacity experience in August 2006. Minnesota construction employment is down 53 percent, from its historic capacity experience in August 2007. Construction jobs traditionally account for five percent of the state's total workforce, but currently are only around two and a half percent.

Since 2006, Minnesota has experienced a 33 percent decrease in the number of construction firms, as a net loss of over 6,000 closed their doors. Currently, there are 12,000 construction service companies in this state; however, over 1,000 companies will no longer exist by the end of this year. These challenging conditions continue to plague the industry, and Minnesota risks the permanent loss of these workers. The long-term health of Minnesota's design and building industry, which has long had a strategic advantage, is at risk as the industry faces the prospect of losing even more educated and skilled workers due to a stagnant economy. Of those construction service companies, 95 percent are small businesses with fewer than 19 employees. Many of these sole proprietors will not be eligible for unemployment support and will be among the thousands of invisible unemployed. Even if workers are eligible for unemployment, if they don't log enough weeks of employment, they won't qualify for benefits if their jobs are suspended due to the shutdown. With the state's private design and building economy in such distress, the industry has been depending on public construction for its very

survival. A state government shutdown will send the industry into a further tailspin, deepening and extending an already long depression in this economic sector.

The MnAGC recognizes that the impending government shutdown will affect all sorts of contracts, not just those involving design and construction. Other non-construction industry companies will have their business and payments suspended, too. This is not, however, merely a case of special pleading on behalf of the building community; the economic effect on the construction industry will be of a different kind and quality. Unlike other sectors of the economy, the construction industry is already in such straits that it cannot afford a shutdown in the only part of its market that was functioning – i.e. the public sector. Without continued public funding of state construction contracts, there will be little gas remaining to fuel this important part of the state’s economic engine. Because the construction industry is already on life support, it is critical and essential that the state government maintain its funding during the shutdown. What is at stake is not just ongoing short term revenues but the long term survival of the industry in the state. It is a core function of government to preserve this significant sector of the state’s economy from the unique peril that threatens it.

Indeed, shutdown of seemingly minor, non-core activities will have huge ramifications on core functions. There are many important projects on which the state is only a relatively small, partial funding source, but with a shutdown, there will not be any state staff able to perform the administrative task of reviewing and signing pay application requests. If the state can’t even approve, much less fund its portion of the pay request, other public and private lenders won’t do so either. More troubling is that any failure to obtain funding puts the borrowers in multiple defaults of their loan covenants to keep the loans “in balance” and the project on schedule. Thus, the collateral damage to construction from the shutdown will be

extreme. The Court must protect the legitimate expectation that the government will not be allowed to inflict harm on its own citizens.

REQUEST FOR RELIEF

Justice Holmes wisely observed that, “It is true that, when people make contracts, they usually contemplate the performance not the breach.” O. W. Holmes, Jr., *THE COMMON LAW*, 302 (Little Brown 1881). The same is true with the State’s Constitution, the social contract formed by Minnesota’s citizens. It was drafted with performance, not its failure in mind. The Constitution, frankly, does not provide express terms as to what is to be done if the Legislature and the Governor do not agree on a budget to fund the State’s government. Under the common law, the courts have the power to determine the missing interstitial terms in any contract intended to be binding. The Constitution’s defining principle is not Article XI, Section 1 requiring an appropriation before money is spent from the treasury. Rather, the core intent of the document is expressed in Article 1, Section 1: “Government is instituted for the security, benefit and protection of the people...” When the Legislature and the Governor cannot work to achieve those core functions, then the Court should intervene to ensure that those functions are funded and continued. The Attorney General and the Governor have each proposed a mechanism by which that can occur, but the fundamental principle upon which each plan should be judged is whether the all core functions of government are preserved. It is appropriate and necessary for the courts, in the exercise of their broad and flexible equitable powers, to ensure that outcome.

The MnAGC respectfully requests that the Court authorize and empower either the Governor or Government Entities (as defined by the Attorney General) to review all state construction contracts for the purpose of determining whether they involve “core functions” of


government and fund such core functions from the state treasury during any state government shutdown.

Respectfully submitted,

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