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Contracts: MnDot's Ironically Nonspecific Specifications Should Not Concern Subcontractors—Storms, Inc. v. Mathy Construction Company

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**CONTRACTS: MNDOT’S IRONICALLY NONSPECIFIC
SPECIFICATIONS SHOULD NOT CONCERN
SUBCONTRACTORS—*STORMS, INC. V. MATHY
CONSTRUCTION COMPANY***

By David Ribnick[†]

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I. INTRODUCTION

In *Storms, Inc. v. Mathy Construction Company*, the Minnesota Supreme Court held that a general contractor could force a subcontractor to accept a contractor's reduced change orders on miscalculated estimated quantities—without breaching the subcontract. The Minnesota Supreme Court's holding also yielded an equitable outcome because the general contractor was not required to unjustly compensate the subcontractor.¹

The Minnesota Supreme Court's unanimous decision in *Storms* likely leaves Minnesota Department of Transportation subcontractors concerned. The precedent set by this decision allows general contractors to pass contract price reductions to their subcontractors.² However, there is minimal reason for concern because the Minnesota Supreme Court's holding in *Storms* is narrow. Further, subcontractors can easily avoid hardship because the holding informs subcontractors of this worrisome possibility.

This Note begins with a historical introduction to relevant contract interpretation principles and related construction contract terminology.³ The Note then presents a chronological overview of the dispute and subsequent litigation.⁴ Last, the Note argues that the Minnesota Supreme Court's holding was just,⁵ the potential future impact of the holding is minimal,⁶ and the Minnesota Department of Transportation's Standard Specifications for Construction needs further revision.⁷

II. HISTORY OF RELEVANT LAW

A. *American Contract Interpretation – Two Approaches*

Literal definitions and formal interpretations initially constrained contract law jurisprudence.⁸ Early interpretation of contractual language centered around the literal meaning of the

1. *Storms, Inc. v. Mathy Constr. Co.*, 883 N.W.2d 772, 778 (Minn. 2016).

2. *See id.* at 777–78.

3. *See infra* Part II.

4. *See infra* Part III.

5. *See infra* Part IV.A.

6. *See infra* Part IV.B.

7. *See infra* Part IV.C.

8. *See* KEVIN M. TEEVEN, A HISTORY OF THE ANGLO-AMERICAN COMMON LAW OF CONTRACT 221 (1990).

words and did not consider the parties' intentions; hence the interpretation known as "literalism."⁹ Literalists frequently consulted dictionaries in order to determine whether or not a certain word or phrase was ambiguous.¹⁰ As a result, literalism only found definitional ambiguity when a word or phrase had "more than one meaning or grammatical function."¹¹ Essentially, literalism employs a "plain meaning" approach to contract interpretation.¹²

Unsurprisingly, the literalist approach to contract interpretation had—and continues to have—many objectors and objections.¹³ One of literalism's biggest limitations is its failure to account for the intended definitions assigned by the contract's parties.¹⁴ Literalist-leaning courts only look for definitional ambiguity, "despite a party's contention that he understood the contract to mean something else."¹⁵ This constrained approach to contract interpretation, along with a global shift in commerce¹⁶ and shifts in judicial attitudes,¹⁷ fostered significant change in contract law jurisprudence.¹⁸

Late 19th century American legal scholars sought to codify the emerging area of interpretation within contract law.¹⁹ Consequently, two primary schools of thought emerged in the United States:

9. See STEVEN J. BURTON, *ELEMENTS OF CONTRACT INTERPRETATION* 17–18 (2009).

10. See *id.* at 18.

11. See *id.*

12. See *id.*

13. See *id.* at 18–19.

14. See *id.* at 19.

15. *Id.* (citing *Sofran Peachtree City v. Peachtree Holdings*, 550 S.E.2d 429, 432 (Ga. Ct. App. 2001)).

16. See P.S. ATIYAH, *AN INTRODUCTION TO THE LAW OF CONTRACT* 15 (5th ed. 1995) (discussing the gradual decline of the belief in "freedom of contract" as an example of changing social and economic conditions); TEEVEN *supra* note 8, at 219–20 (discussing the legal implications of the shift of buyers and sellers as "a close knit clique of London traders" to "strangers, who were now manufacturers, suppliers, middlemen and purchasers").

17. See, e.g., *id.* (explaining that society became less apprehensive over the concept of government intervention in contract law).

18. See Morton J. Horowitz, *The Historical Foundations of Modern Contract Law*, 87 HARV. L. REV. 917, 953 (1974) ("[T]he changes in contract law which were necessary to meet the needs of the newly emerging market economies . . . [and] also involved a pervasive shift in the sympathies of the courts.").

19. See TEEVEN, *supra* note 8, at 217–18.

objectivism and subjectivism.²⁰ These two competing perspectives were famously propagated by Samuel Williston, an objectivist, and Arthur Corbin, a subjectivist.²¹ This dichotomy between objectivism and subjectivism is illustrated in the First Restatement of Contracts because while Williston was the author, Corbin served as a special advisor.²²

Under Williston's approach, "the test for determining the meaning of contract language is not what the parties intended it to mean but what a reasonable person in the position of the parties when the contract was entered, aware of all relevant circumstances, would have thought it meant."²³ Additionally, Williston's approach rejects the notion that opposing parties can introduce demonstrative evidence on ambiguity if the contract's "ordinary meaning is clear."²⁴ Williston is perhaps most famous for his emphasis on interpreting contracts within their "four corners."²⁵ Williston's treatise emphasizes that the interpretation of unambiguous contracts occurs on "the face of the agreement."²⁶

Although Williston's objective approach bears some criticism by scholars,²⁷ it provides two key advantages: simplicity and predictability. First, Williston's approach simplifies the process of contract interpretation because it prioritizes a reasonable person's "ordinary meaning . . . over [the parties'] unwritten expressions."²⁸ Therefore, a court examining a contract primarily focuses on the document itself and disregards outside interactions. Second,

20. See *id.* at 89, 221; see also BURTON, *supra* note 9, at xiii.

21. See BURTON, *supra* note 9, at 23, 28.

22. See TEEVEN, *supra* note 8, at 221; see also Mark L. Movsesian, *Rediscovering Williston*, 62 WASH. & LEE L. REV. 207, 220 (2005).

23. 11 WILLISTON ON CONTRACTS § 30:6 (4th ed.).

24. *Id.* § 30:4.

25. See generally *id.* § 32:5. The "four corners" refer to each corner of the document in question, and thus the four corners approach focuses only on what is said in the contract itself. *Id.*

26. *Id.* § 30:6.

27. See Movsesian, *supra* note 22, at 222–29. Movsesian lists generally four criticisms held by academics and legal scholars. *Id.* First, Williston takes an essentialist view of contract law. *Id.* Second, Williston shares the classicist's view of the inevitability of legal rules. *Id.* Third, Williston's essentialism sets him apart from the theories of new formalists. *Id.* Fourth, Williston's work was undertheorized. *Id.*

28. Ronald J. Gilson, Charles F. Sabel & Robert E. Scott, *Text and Context: Contract Interpretation as Contract Design*, 100 CORNELL L. REV. 23, 50 (2014); see WILLISTON ON CONTRACTS, *supra* note 23, § 30:6.

Williston's writings advocate for improved predictability, especially within a commercial context.²⁹ Because Williston advocated for a pragmatic logical approach to interpretation³⁰ and handled contractual ambiguity from the perspective of a reasonable person,³¹ Williston's objective approach to contract interpretation is viewed as a predictable system for interpreting contractual ambiguity.³²

Conversely, Corbin endorsed a subjective method for contract interpretation.³³ Corbin had a large impact on the Second Restatement of Contracts,³⁴ as it is largely based on the writings in his famous treatise.³⁵ Corbin's namesake treatise rejects the "plain meaning" approach taken by Williston and other formalists; instead, favoring a more liberal approach.³⁶ The touchstone behind Corbin's position on contract interpretation held that "the just result was to determine the actual intention of the contracting parties."³⁷ Because "[t]here is in fact no 'one correct' meaning of a word or expression[.]" as the current Corbin treatise points out, allowing the introduction of extrinsic evidence to ascertain the parties' intent is preferred.³⁸ Corbin, as furthered in the current treatise bearing his name, justified his position by arguing that a court using a "plain

29. See Movsesian, *supra* note 22, at 231.

30. See *id.* at 213.

31. See WILLISTON ON CONTRACTS, *supra* note 23, § 30:6. See generally Gilson, Sabel & Scott, *supra* note 28, at 50 (discussing Williston's rationalizations of common law interpretation and exceptions as "purportedly coherent" and able to be predictably-applied).

32. See Movsesian, *supra* note 22, at 274.

33. See BURTON, *supra* note 9, at 29; see also 3 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 537 (1960) ("[T]he purpose of the law is to give effect to the meaning and intention of these two parties.").

34. RESTATEMENT (SECOND) OF CONTRACTS (AM. LAW INST. 1981).

35. See TEEVEN, *supra* note 8, at 221.

36. Compare CORBIN, *supra* note 33, § 537 ("There is no single rule of interpretation of language, and there are no rules of interpretation taken all together, that will infallibly lead to the one correct understanding and meaning [of a contract]."), with 3 SAMUEL WILLISTON ET AL., A TREATISE ON THE LAW OF CONTRACTS § 607 (3d ed. 1936) (arguing that where the parties have committed their agreement to a writing, "the standard of interpretation is . . . the ordinary meaning of the writing to the parties of the kind who contracted at the time and place where the contract was made, and with such circumstances as surrounded its making").

37. Gilson, Sabel & Scott, *supra* note 28, at 51.

38. *Id.*; 1 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 24:7 (Joseph M. Perrillo et al. eds. 2017).

meaning” approach to interpretation is “substituting its own linguistic education and experience for that of the contracting parties.”³⁹

Corbin’s approach—known as the fault approach—is considered subjective because of its heavy focus on the intentions of the contract’s parties.⁴⁰ Unlike the objective approach championed by Williston, the subjective approach attempts to enter the minds of the parties to the contract, and then seeks to ascertain what meaning the parties attached to a particular word or phrase.⁴¹ In other words, the subjective approach attempts to “interpret a contract according to the shared meaning the parties attached to the contract’s language,” rather than attaching externally determined meanings.⁴² Therefore, because Corbin’s interpretative approach fixates on the parties’ meanings and disregards the plain meaning, it is considered subjective.⁴³

Compared to more objective approaches, Corbin’s approach can be more advantageous because subjectivism seeks to uphold the “freedom of contract.”⁴⁴ Because a subjectivist interpretation is not constrained by plain meaning, contracts consequently get interpreted—at least ideally—how the parties intended. This allows the parties to enforce the contract they both believed they were entering into, without regard to the clarity or word choice of the document, promoting the notion of “freedom of contract.”⁴⁵ Likewise, because subjectivist contract interpretation considers the possibility that the parties may have attached unconventional meanings to particular contractual language,⁴⁶ the parties are not held to a potentially harsh, alternative but objective meaning.

39. CORBIN, *supra* note 38, § 24:7.

40. See BURTON, *supra* note 9, at 29; see also RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 34, § 201(2) (enshrining and expanding on Corbin’s fault approach).

41. See BURTON, *supra* note 9, at 28–29; Gilson, Sabel & Scott, *supra* note 28, at 50–51.

42. See BURTON, *supra* note 9, at 28. Burton continues: “[s]ubjectivism calls on an interpreter to draw inferences as to a party’s mental state from its manifestation of intention on the basis of all relevant evidence.” *Id.*

43. See *id.*

44. See *generally id.* at 23–24 (explaining objectivism “allows the [legal effect of a] contract to come apart from the parties’ subjective intentions,” which fails to uphold the parties’ perceived agreement).

45. See *id.*

46. See *id.* at 28. Burton highlights the Second Restatement of Contract’s

B. Minnesota's Approach to Contract Interpretation

Although Corbin's approach to interpretation was adopted by the Second Restatement of Contracts,⁴⁷ Minnesota courts did not adopt it. Rather, Minnesota courts are reluctant to look beyond the face of the document and thus interpret contracts in line with Williston's objective approach.⁴⁸

Minnesota courts typically employ a mechanical approach when interpreting contracts.⁴⁹ The court first determines whether a contract is ambiguous or unambiguous.⁵⁰ Minnesota courts have stated, "[t]he language of a contract is ambiguous if it is susceptible to two or more reasonable interpretations."⁵¹ Minnesota courts have also established that a contract's language is unambiguous if "it has only one reasonable interpretation."⁵² If the contract is unambiguous, the court decides the case without departing from the contract's language.⁵³ In 1965, the Minnesota Supreme Court wrote, "where the written language of an instrument applied to the subject is clear . . . it is neither necessary nor proper in construing it to go beyond the wording of the instrument itself."⁵⁴ The Minnesota

example: where two parties orally agree to invert the meaning of the terms "buy" and "sell," the results are quite different under an objective standard (where the words carry their ordinary meaning) and a subjective standard (where the parties' stated goals are achieved). *Id.* (citing RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 34, at § 212, cmt. b, illus.).

47. *See id.*

48. *See* Perry M. Wilson, III & Stephen I. Winer, *Chapter 12—Interpretation and Construction of Contracts*, in *CONTRACT LAW IN MINNESOTA 12-1* (Faye Knowles & John Satorius eds., 1993).

49. *See id.*

50. *See* Seagate Tech., LLC v. W. Dig. Corp., 854 N.W.2d 750, 761 (Minn. 2014) ("Interpreting a contract requires courts to determine if the language is clear and unambiguous."); *see also* Chergosky v. Crosstown Bell, Inc., 463 N.W.2d 522, 525 (Minn. 1990) (citing *Hunt v. IBM Mid Am. Emp.'s Fed. Credit Union*, 384 N.W.2d 853, 856 (Minn. 1986)); Wilson, III & Winer, *supra* note 48, at 12-4.

51. *Dykes v. Sukup Mfg. Co.*, 781 N.W.2d 578, 582 (Minn. 2010) (citing *Carlson v. Allstate Ins. Co.*, 749 N.W.2d 41, 45 (Minn. 2008)).

52. *Halla Nursery v. City of Chanhassen*, 781 N.W.2d 880, 884 (Minn. 2010).

53. *See* Wilson, III & Winer, *supra* note 48, at 12-4; *see, e.g., Dykes*, 781 N.W.2d at 582 (citing *Valspar Refinish, Inc. v. Gaylord's Inc.*, 764 N.W.2d 359, 364–65 (Minn. 2009)); *Travertine Corp. v. Lexington-Silverwood, Ltd. P'ship*, 683 N.W.2d 267, 271 (Minn. 2004) (citing *Motorsports Racing Plus, Inc. v. Arctic Cat Sales, Inc.*, 666 N.W.2d 320, 323 (Minn. 2003)).

54. *Telex Corp. v. Data Prod. Corp.*, 271 Minn. 288, 294–95, 135 N.W.2d 681, 686–87 (Minn. 1965) (citing *Minneapolis-St. Paul Sanitary Dist. v. City of St. Paul*,

Supreme Court has consistently upheld this established precedent.⁵⁵ However, if a court finds that a contract is ambiguous, it seeks to investigate the parties' intent before issuing a decision.⁵⁶

C. *Relevant Construction Law Terminology*

1. *Change Orders*

Seemingly every construction law commentator emphasizes the notion that changes to initial plans are an inevitable externality in construction projects.⁵⁷ As a result, many construction law practice guides, both commercial and residential, suggest that drafters of construction contracts include language to address this near certainty by allowing modification via a process called a "change order."⁵⁸ Black's Law Dictionary defines a "change order" as either "[a] modification of a previously ordered item or service . . . [or a] directive issued by the federal government to a contractor to alter the specifications of an item the contractor is producing for the government."⁵⁹ Perhaps a better definition of a change order is, "[a]ny modification to a construction contract after [the] contract [has been] award[ed]."⁶⁰ Within the context of MnDOT construction projects, a change order is defined as "[a] written order

240 Minn. 434, 439, 61 N.W.2d 533, 537 (Minn. 1953)).

55. See *Halla Nursery*, 781 N.W.2d at 884 (citing *Brookfield Trade Ctr., Inc. v. Cty. of Ramsey*, 584 N.W.2d 390, 394 (Minn. 1998)); *Travertine*, 683 N.W.2d at 271 (citing *Metro. Sports Facilities Comm'n v. General Mills*, 470 N.W.2d 118, 123 (Minn. 1991)); *Carl Bolander & Sons, Inc. v. United Stockyards Corp.*, 298 Minn. 428, 433, 215 N.W.2d 473, 476 (Minn. 1974); *Finke v. State*, 521 N.W.2d 371, 374 (Minn. Ct. App. 1994) (citing *Fena v. Wickstrom*, 348 N.W.2d 389, 390 (Minn. Ct. App. 1984)).

56. See *Wilson, III & Winer*, *supra* note 48, at 12-5.

57. See, e.g., 1A PHILIP L. BRUNER & PATRICK J. O'CONNOR, JR., *BRUNER & O'CONNOR ON CONSTRUCTION LAW* § 4:01 (2017) ("Certainty of change is a constant in the construction process.").

58. See, e.g., DAVID K. DEWOLF & MATTHEW C. ALBRECHT, 33 WASHINGTON PRACTICE CONSTRUCTION LAW MANUAL § 10:9 (2017-2018 ed. 2017); Minnesota Attorney General's Office, *Home Building and Remodeling*, OFF. OF MINN. ATT'Y GEN. LORI SWANSON, <https://www.ag.state.mn.us/brochures/pubHomeBuilding.pdf> (last visited Jan. 25, 2017).

59. *Change Order*, BLACK'S LAW DICTIONARY (10th ed. 2014).

60. Henry J. Rowland, *The Causes and Effects of Change Orders on the Construction Process* (Nov. 1981) (unpublished M.S. dissertation, Georgia Institute of Technology) (on file with Calhoun Institutional Archive of the Naval Postgraduate School), <https://calhoun.nps.edu/handle/10945/20447>.

. . . covering permissible adjustments, minor changes or corrections to the Plans, and rulings with respect to defects, omissions, discrepancies, and intent of the Contract.”⁶¹

One significant subset of change orders is called a “deductive change order.” Deductive change orders allow for parties within a construction contract to remove elements of the proscribed work, thereby decreasing the overall contract price.⁶² Deductive change orders are often caused by something called an “underrun,” which occurs when the cost of an item turns out to be less than what was originally anticipated.⁶³ Deductive change orders can be used when a contract owner or general contractor needs to reduce and/or remove some element of construction.⁶⁴ Sometimes a quantity of materials is overestimated or inadvertently miscalculated, as is what occurred in the dispute between Storms Inc. and Mathy Construction, discussed later in this Note.⁶⁵ Although it may appear that contractors get shortchanged by a deductive change order, the process allows for efficient contract modification because these contracts do not need to be completely renegotiated.⁶⁶

61. MINN. DEP’T OF TRANSP., STANDARD SPECIFICATIONS FOR CONSTRUCTION 695 (2016), <http://www.dot.state.mn.us/pre-letting/spec/2016/2016specbook.pdf> [hereinafter MINN. DEP’T OF TRANSP. 2016].

62. JAY M. BERGER ET AL., MICHIGAN CONSTRUCTION LAW MANUAL § 5:10 (2016–2017 ed. 2016).

63. See Brian K. Carroll, *The Road Goes on Forever and the Claims Process Never Ends: An Approach for Success in Handling Texas Department of Transportation Construction Claim*, 13 TEX. TECH. ADMIN. L.J. 233, 251 (2012) (discussing how the Texas Department of Transportation handles underruns).

64. BERGER ET AL., *supra* note 62. See generally WILLIAM SCHWARTZKOPF, CALCULATING CONSTRUCTION DAMAGES § 8.12 (3rd ed. 2017) (stating that deductive change orders are an often litigated industry term used in the contractor and subcontractor context).

65. See, e.g., *Storms, Inc. v. Mathy Constr. Co.*, 883 N.W.2d 772, 774–75 (Minn. 2016).

66. See PAUL E. DAVIS, NORTH CAROLINA CONSTRUCTION LAW, § 7:6 (6th ed. 2017) (“Changes clauses are a convenient way for the parties to change the contract’s scope of work.”); see also BRUNER & O’CONNOR, JR., *supra* note 57, § 4:1 (“Without the flexibility of clauses that permitted unilateral changes to the work during contract performance, and payment for work beyond the contractual undertaking, changes could be made only through bilateral negotiation and agreement under common-law principles of ‘offer and acceptance.’ That process was ill-suited to the exigencies of modern construction because of its potential to disrupt the construction process by sanctioning delay in implementation of changes until agreement is reached.”). But see BERGER ET AL., *supra* note 62 (“However, if the work is reduced by change order, there will be a subtraction of the estimated

2. “Changes” versus “Extras” and the Scope of a Contract

As previously established, changes within the context of large scale construction projects are essentially unavoidable.⁶⁷ Categorizing and facilitating changes are a commonly litigated issue within the construction context.⁶⁸ However, there is an important distinction between types of change orders: the difference between the notion of “change” and “extra.” An important and related concept that will help clarify this difference is “scope.”

The notion of scope is admittedly confusing because it is not particularly concrete or fact specific.⁶⁹ Legal writers and practitioners generally use terminology such as “inside of” and “outside of” when considering issues related to the scope of a contract.⁷⁰ One useful articulation of this concept is that “[c]hanges ‘within the scope’ of the undertaking are presumed to be covered by the contract.”⁷¹ Conversely, “[c]hanges outside the scope of the contract are comparable to nonmaterial or partial breaches.”⁷²

In most modern public works contracts, the scope of the contract is usually defined either by the municipality’s spec book or by statute.⁷³ Municipalities and various government entities frequently utilize standard specifications documents (“spec books”) to define numerous procedures and potential sources of dispute that may materialize during the course of a public works construction project.⁷⁴ In fact, this practice is so widespread that many cities and

cost and profit of the work from the total contract price. A work deletion and contract price reduction can have the effect of taking from the contractor the opportunity to retain the profit it would have realized by completing work more cost effectively than estimated.”).

67. See Marvin T. Fabyanske, *Extras and Changes*, in MARVIN T. FABYANSKE & ROBERT SMITH, *ADVANCED CONSTRUCTION LAW IN MINNESOTA* 47 (2005); Bruner & O’Connor, Jr., *supra* note 57, § 4:1.

68. SCHWARTZKOPF, *supra* note 64 § 8.12; see Fabyanske, *supra* note 67; BRUNER & O’CONNOR, JR., *supra* note 57, § 4:1.

69. See Fabyanske, *supra* note 67, at 48–49.

70. See generally BRUNER & O’CONNOR, JR., *supra* note 57, at § 4:10 (discussing the implications of the terms “within the scope,” “outside the scope,” “general scope,” and other terms relating to scope).

71. *Id.*

72. Fabyanske, *supra* note 67, at 48.

73. See, e.g., Public Works Contract Change Order Act, 50 ILL. COMP. STAT. § 525/5 (2004); MINN. DEP’T OF TRANSP. 2016, *supra* note 61, § 1402.3.

74. See, e.g., U.S. DEP’T OF TRANSP., STANDARD SPECIFICATIONS FOR CONSTRUCTION OF ROADS AND BRIDGES ON FEDERAL HIGHWAY PROJECTS (2014),

counties,⁷⁵ as well as the federal government⁷⁶ and all 50 states,⁷⁷ employ spec books. Due to technological distribution methods (i.e. internet publication), most of these documents are easily and readily available to the public.

In many of these projects' controlling spec books and statutes, the conceptual scope is not explicitly or obviously defined.⁷⁸ The scope of the contract is therefore implied by other contractual clauses such as change order clauses.⁷⁹ Consequently, scope has become a commonly disputed aspect in construction litigation.

In MnDOT's 2016 spec book, scope is defined by section 1402.3 labeled "Significant Changes to the Character of Work."⁸⁰ This section seeks to define two circumstances where changes to a contract would be considered outside of the scope of the contract.⁸¹ The first situation occurs "[w]hen the character of the work as altered differs materially in kind or nature from that involved or

<https://flh.fhwa.dot.gov/resources/specs/fp-14/fp14.pdf>.

75. See, e.g., HENNEPIN CTY. TRANSP. DEP'T, GUIDE TO BIDDING COUNTY ROAD AND BRIDGE PROJECTS 14 (2017), <http://www.hennepin.us/-/media/hennepinus/business/work-with-hennepin-county/contracting-with-hennepin/henn-co-biddingguideegram.docx?la=en> (stating MnDOT Standard Specifications for Construction controls); ST. LOUIS CTY. TRANSP., STANDARD SPECIFICATIONS FOR ROAD AND BRIDGE CONSTRUCTION (2017), http://www.stlouisco.com/Portals/8/docs/document%20library/highways/standard_specs/StLC_Standard_Specifications_Manual.pdf; CITY OF MINNEAPOLIS DEP'T OF PUB. WORKS, STANDARD SUPPLEMENTAL SPECIFICATIONS FOR THE CONSTRUCTION OF PUBLIC INFRASTRUCTURE IN THE CITY OF MINNEAPOLIS (2017), <http://www.ci.minneapolis.mn.us/www/groups/public/@publicworks/documents/webcontent/wcmsp-191951.pdf>; CITY OF MAPLE GROVE, MINNESOTA, GENERAL SPECIFICATIONS (2017), http://www.maplegovmn.gov/files/4214/9089/2492/4_-_General_Specifications.pdf; CITY OF PLYMOUTH, STANDARD SPECIFICATIONS FOR STREET CONSTRUCTION (2014), <http://www.plymouthmn.gov/Home/ShowDocument?id=9229>.

76. See U.S. DEP'T OF TRANSP., *supra* note 74.

77. See *infra* Table 1.

78. See, e.g., *supra* note 61, § 1402.3; 50 ILL. COMP. STAT. § 525/5; MINN. DEP'T OF TRANSP. 2016,

79. See, e.g., MINN. DEP'T OF TRANSP. 2016, *supra* note 61, § 1402.

80. *Id.* § 1402.3.

81. *Id.*

included in the original proposed construction.”⁸² A modification is also considered to be outside the scope by MnDOT “[w]hen a major contract item of work is increased in excess of 125 percent or decreased below 75 percent of the original Contract quantity.”⁸³ Other spec books seem to closely mirror the MnDOT provisions.⁸⁴ With the concept of scope in mind, it is easier to understand the difference between a change and an extra.

A change, within the context of a construction contract, relates to contract modifications that are likely, or at least on their face, within the scope of the contract.⁸⁵ Bruner and O’Connor on Construction Law defines a change as, “an alteration to an existing contract requirement concerning work that is already required to be done.”⁸⁶ Because a change only modifies preconceived elements of a construction project, under the Minnesota and Washington spec books, it is likely that a change is within the scope because it is not “materially [different] in kind or nature from that involved or included in the original proposed construction.”⁸⁷ However, if the change has a significant monetary difference (i.e. increases or decreases a contracted item by over 25 percent), the change would be considered outside the scope.⁸⁸

Whereas a change modifies an existing contractual element, an extra is a modification that adds an item to the contract.⁸⁹ Using the aforementioned spec book’s definitions of scope, it is likely that extras would be considered outside the scope since the increase in cost would exceed 25 percent.⁹⁰ Because of the potentially

82. *Id.*

83. *Id.*

84. *Compare id.*, TEX. DEP’T OF TRANSP., STANDARD SPECIFICATIONS FOR CONSTRUCTION AND MAINTENANCE OF HIGHWAYS, STREETS, AND BRIDGES 26 (2016), <ftp://ftp.dot.state.tx.us/pub/txdot-info/des/spec-book-1114.pdf>, *with* WASH. DEP’T OF TRANSP., STANDARD SPECIFICATIONS FOR ROAD, BRIDGE, AND MUNICIPAL CONSTRUCTION 1–20 (2016), <https://www.wsdot.wa.gov/publications/manuals/fulltext/M41-10/SS2016.pdf>.

85. BRUNER & O’CONNOR, JR., *supra* note 57, § 4:10.

86. *Id.* § 4:01; *see also Change Order*, BLACK’S LAW DICTIONARY (10th ed. 2014).

87. MINN. DEP’T OF TRANSP. 2016, *supra* note 61, § 1420.3; *see also* WASH. DEP’T OF TRANSP., *supra* note 84, at item 1-04.4.

88. *See* WASH. DEP’T OF TRANSP., *supra* note 84, at item 1-04.4.

89. Bruner and O’Connor on Construction Law defines “[a]n ‘extra,’ [as] an addition to the contract involving work that had not been included in the original agreement.” BRUNER & O’CONNOR, JR., *supra* note 57, § 4:01.

90. *Compare id.*, *with* MINN. DEP’T OF TRANSP. 2016, *supra* note 61, at 20

substantial implications of adding non-contracted for work and/or materials, extras are usually governed by separate spec book specifications, such as Specification 1402.5 in Minnesota.⁹¹

3. *Cardinal Change Doctrine*

Also related to questions regarding substantial changes to construction contracts is the common law doctrine of cardinal change, which addresses situations where modifications exceed the scope of the contract.⁹² Stephen Hess defines “[a] ‘cardinal change’ [as] a change or series of changes that so fundamentally alters the nature of the contractor’s obligations that its imposition against the will of the contractor constitutes a material breach.”⁹³ Put another way, “[a] cardinal change is a substantial deviation from the original scope of work that changes the nature of the bargain between the parties.”⁹⁴

Although use of the cardinal change doctrine is fairly common in the federal context,⁹⁵ Minnesota case law has only made reference to the term “cardinal change” in one case: *Starry Construction Co., Inc. v. Hubbard County*.⁹⁶ However, the *Starry Constr. Co., Inc.* court never addressed the meaning of the term “cardinal change” because the dispute was resolved without needing to interpret the term.⁹⁷

Instead of addressing cardinal change through case law, Minnesota has essentially codified cardinal changes in government construction contracts in Minnesota Statutes section 429.041

(affirming that the responsibility falls on the contractor), *and* WASH. DEP’T OF TRANSP., *supra* note 84, at 1-20 (affirming that the responsibility falls on the engineer).

91. See MINN. DEP’T OF TRANSP. 2016, *supra* note 61, at 20.

92. Stephen A. Hess, Annotation, “*Cardinal Change*” Doctrine in Federal Contracts Law, 9 A.L.R. FED. 2d 565 (2006).

93. *Id.* (“A ‘cardinal change’ occurs when an owner contracts for construction services and then imposes alterations in the work that are so drastic that the contractor is effectively required to perform duties materially different from those originally bargained for.”).

94. *ThermoCor, Inc. v. United States*, 35 Fed. Cl. 480, 490 (1996) (citing *Edward R. Marden Corp. v. United States*, 194 Ct. Cl. 799, 808 (1971)).

95. See generally Hess, *supra* note 92, at 565 (describing how various federal cases have dealt with the cardinal change doctrine).

96. See *Starry Constr. Co. v. Hubbard Cty.*, No. C9-01-867, 2001 WL 1647344, at *7 (Minn. Ct. App. Dec. 26, 2001).

97. See *id.*

subdivision 7, despite not using that precise terminology.⁹⁸ Under this statute, changes valued under “25 percent of the original contract price” are not required to be rebid.⁹⁹ Provisions in the MnDOT spec book align with this statute.¹⁰⁰

4. *Incorporation by Reference*

Another important aspect of construction law jurisprudence is the concept of “incorporation by reference.” When utilizing an incorporation by reference clause, subcontract drafters seek to absorb the provisions of the general contract into the subcontract.¹⁰¹ Perhaps one of the strongest motivations behind using an incorporation by reference clause is the protection it affords to general contractors as opposed to subcontractors.¹⁰² Despite these clauses being relatively common in construction contracts, they can be harmful to subcontractors.¹⁰³ Subcontractors likely will not see the general contract, so they are likely agreeing to contractual terms that they did not negotiate or have a chance to review.¹⁰⁴ However, subcontractors entering into contracts with incorporation by reference clauses could proactively request to review the general contract so they can understand where they may be subject to liability.¹⁰⁵

Although incorporation by reference clauses, especially within the construction context, are infrequently settled by Minnesota courts, this issue has presented itself in other jurisdictions. An early example of this occurred in the 1916 United States Supreme Court case, *Guerini Stone Co. v. P.J. Carlin Construction Co.*¹⁰⁶ In *Guerini*, a dispute arose between a general contractor and subcontractor originating from a construction delay caused by the contractee (i.e. the U.S. government).¹⁰⁷ The subcontract between the parties

98. See MINN. STAT. § 429.041 subdiv. 7 (2017).

99. *Id.*

100. *Storms, Inc. v. Mathy Constr. Co.*, 883 N.W.2d 772, 776 (Minn. 2016).

101. Stanley P. Sklar, *A Subcontractor's View of Construction Contracts*, 8 CONSTR. LAW. 1, 18 (1988).

102. *Id.*

103. *Id.* at 18–19.

104. *Id.*

105. *Id.*

106. 240 U.S. 264, 264 (1916).

107. See *id.* at 265; T. Bart Gary, *Incorporation by Reference and Flow-Down Clauses*, 10 CONSTR. LAW. 3, 44, 45 (1990) (summarizing *Guerini Stone Co.* and stating that it

referred to construction specifications from the general contract; however the general contractor was attempting to incorporate the entire contract.¹⁰⁸ Ultimately, the Supreme Court rejected the general contractor's position.¹⁰⁹ Although the general contract allowed the contractee to delay construction without liability because the subcontract only referred to the construction specifications, the court held that the only admissible elements of the general contract were the "drawings and specifications . . . referred to in the sub-contract."¹¹⁰

Despite modern contract drafters' attempts to improve incorporation clauses, the U.S. circuit courts are decidedly split when examining the issue.¹¹¹ Some circuit courts have followed the *Guerini* holding by limiting incorporated clauses from general contracts.¹¹² Alternatively, the Eleventh Circuit and the Sixth Circuit have both applied incorporated clauses more broadly.¹¹³

D. Documents and Statutes Governing Public Works Contracts

Sources for potential construction disputes are seemingly infinite,¹¹⁴ and because municipalities utilizing spec books are

is the leading decision in regard to incorporation by reference).

108. *Id.*

109. *Guerini Stone*, 240 U.S. at 283.

110. *Id.* at 278.

111. *See generally* Gary, *supra* note 107, at 44, 45–46 (describing various holdings related to this issue).

112. *See* S. Leo Harmonay, Inc. v. Binks Mfg. Co., 597 F. Supp. 1014, 1024 (S.D.N.Y. 1984) ("Under New York law, incorporation clauses in a construction subcontract, which incorporate by reference clauses in the prime contract into the subcontract, bind a subcontractor *only* to the prime contract provisions relating to the scope, quality, character and manner of the work to be performed by the subcontractor."); *see also* United States v. Fryd Constr. Corp., 423 F.2d 980, 983 (5th Cir. 1970); Caldwell v. United States, 407 F.2d 21 (5th Cir. 1969); United States v. Cleveland Elec. Co., 373 F.2d 585, 588 (4th Cir. 1967); U.S. Steel Corp. v. Turner Constr. Co., 560 F. Supp. 871, 874 (S.D.N.Y. 1983) (citing Wash. Metro. Area Transit Auth. v. Norair Eng'g Corp., 553 F.2d 233, 235 (D.C. Cir. 1977)); John W. Johnson, Inc. v. Basic Constr. Co., 429 F.2d 764, 775 (D.C. Cir. 1970).

113. *See, e.g.*, U.S. Fid. & Guar. Co. v. West Point Constr. Co., 837 F.2d 1507, 1508 (11th Cir. 1988) (citing Exch. Mut. Ins. Co. v. Haskell Co., 742 F.2d 274 (6th Cir. 1984)).

114. *See* Andrew Fuga, *The Structure of the Construction Industry and the Law: The Balance between the Owner, the Architect, the Construction Manager, and the Subcontractors: A Look at the Procedure of Large Scale Construction Projects and the Many Legal Issues That Result*, 7 DUQ. BUS. L.J. 47, 47 (2005).

seeking to avoid ambiguity and confusion during the bid process, many of these standard spec books can be hundreds of pages long.¹¹⁵ In most cases, standard spec books outline measurement techniques, define necessary materials, and address procedures for inevitable changing conditions, among numerous other potential sources for confusion.¹¹⁶ These standard spec books attempt to proactively address foreseeable sources for construction related disputes between the municipality and bid-winning general contractors. As this Note will later address, standard spec books do not usually govern relationships between general contractors and subcontractors.

Despite intending to address similar situations and serve similar purposes, the specific procedures in all of these documents tend to vary.¹¹⁷ Consider the standard spec books of Texas, Minnesota, and Washington as they address the required period in which the respective Departments of Transportation may issue change orders.¹¹⁸

Similar to the Minnesota Department of Transportation's (MnDOT) Standard Specifications for Construction (spec book), the seemingly analogous Texas and Washington documents explicitly address issues pertaining to change orders, but these specifications in each of the three documents differ significantly.¹¹⁹ For example, while Texas's Department of Transportation (TxDOT) Standard Specifications for Construction and Maintenance of Highways, Streets, and Bridges explains change order procedures, it lacks language stating when change orders can and should be issued.¹²⁰

In contrast, in the most recent 2016 iteration of MnDOT's spec book, Specification 1402 informs contractors that "[t]he [MnDOT] Engineer reserves the right to make, in writing, at any time during the progress of the work, such changes in quantities and such alterations in the work as are necessary to satisfactorily complete the

115. See, e.g., U.S. DEP'T OF TRANSP., *supra* note 74, at 746; MINN. DEP'T OF TRANSP. 2016, *supra* note 61.

116. See generally U.S. DEP'T OF TRANSP., *supra* note 74, at 746 (demonstrating that Standard Specifications include topics such as measurement techniques, necessary materials and procedures); MINN. DEP'T OF TRANSP. 2016, *supra* note 61, at 695.

117. See *supra* note 84 and accompanying text.

118. See *id.*

119. See *id.*

120. See TEX. DEP'T OF TRANSP., *supra* note 84.

project or for reasons of the Department's interest."¹²¹ Similarly, Washington State's Department of Transportation's (WSDOT) Standard Specifications for Road, Bridge, and Municipal Construction provides a timetable for the issuance of change orders.¹²² Specifically, WSDOT's spec book states that "[t]he Engineer reserves the right to make [changes], *at any time during the Work.*"¹²³ Despite both Specifications initially appearing identical, the MnDOT Specification provides its engineers more flexibility.¹²⁴ Unlike WSDOT, where change orders can be issued only during construction, MnDOT inserted the additional word "progress,"¹²⁵ making it possible for MnDOT to considerably expand the time period for issuing change orders by introducing greater ambiguity.

In an attempt to remove ambiguity from contract specifications, some states specifically legislate change orders on public works projects, but many of these laws differ in scope and intended purpose.¹²⁶ Illinois' Public Works Contract Change Order Act mandates that change orders exceeding 50% of the initial contract price be rebid.¹²⁷ One commentator, Christopher D. Montez, suggests in his 2005 Construction Lawyer article criticizing the Illinois law, that the purpose of this law was to prevent fraudulent bidding practices.¹²⁸ Montez describes a practice where contractors intentionally and severely underbid in order to secure the initial bid.¹²⁹ Subsequently, these contractors use "change orders to increase the contract price so that the contract amount will more accurately reflect the actual costs for the project."¹³⁰

Florida State has also issued legislation related to change orders in some public works contracts.¹³¹ Florida law permits the practice of

121. MINN. DEP'T OF TRANSP. 2016, *supra* note 61, at 19.

122. *See* WASH. DEP'T OF TRANSP., *supra* note 84.

123. *Id.* (emphasis added).

124. *Compare* MINN. DEP'T OF TRANSP. 2016, *supra* note 61, at 19, *with* WASH. DEP'T OF TRANSP., *supra* note 84, at 1–20.

125. *Compare* MINN. DEP'T OF TRANSP. 2016, *supra* note 61, at 19, *with* WASH. DEP'T OF TRANSP., *supra* note 84, at 1–20.

126. *See* Christopher D. Montez, *Illinois' Public Works Contract Change Order Act and Similar Statutes from Other Jurisdictions*, 25 CONSTR. L. 1, 40, 41 (2005).

127. Public Works Contract Change Order Act, 50 ILL. COMP. STAT. § 525/5 (2004).

128. *See* Montez, *supra* note 126, at 40.

129. *See id.*

130. *Id.*

131. *See* FLA. STAT. § 337.11(9) (2017).

using change orders to modify public works construction contracts, requires that change orders be in writing, and institutes a monetary cap on them.¹³²

Although Minnesota does not have as comprehensive of statutes as Florida and Illinois, some legislation exists relating to the bid process for public works construction contracts and construction contracts in general.¹³³ Similar to Florida law, where change orders are capped, Minnesota municipalities are allowed to accept change orders that do not exceed 25% of the original contract price.¹³⁴ Minnesota municipal law mandates that municipalities award the contract to the lowest bidder¹³⁵ or alternatively utilize the “best value alternative.”¹³⁶ Minnesota municipalities are also required to advertise for bids when projects are estimated to exceed \$100,000.¹³⁷ Minnesota has legislation regarding the construction of public subsidized housing, which also mandates that bids concerning projects estimated to exceed \$100,000 be properly published and that municipalities use the “best value alternative” as a substitute for the procurement method.¹³⁸ Although Minnesota has legislation requiring that construction contracts and subsequent change orders be written, these particular statutes apply only to residential contractors.¹³⁹

132. *See id.*

133. *See* MINN. STAT. § 429.041, subdiv. 7 (2017) (stating that, in certain cases, changes to contracts can be made without advertising for bids); *see also* MINN. STAT. § 429.041, subdiv. 2(a) (2017); MINN. STAT. § 429.041, subdiv. 1 (2017) (stating that contracts may be awarded to the contractor offering the best value and discussing advertisement of bids).

134. *Compare* FLA. STAT. § 337.11(9) (2017), *with* MINN. STAT. § 429.041, subdiv. 7 (2017).

135. MINN. STAT. § 429.041, subdiv. 2 (2017) (“The council shall award the contract to the lowest responsible bidder.”)

136. MINN. STAT. § 429.041, subdiv. 2a (2017) (indicating that the municipality must explain the weight of each of the criteria used in reaching their decision not selecting the lowest bid).

137. *See id.* (stating that bids must be advertised if the estimated costs are expected to exceed the amount in section 471.345, subdiv. 3); *see also* MINN. STAT. § 471.345, subdiv. 3 (2017) (indicating the dollar amount referenced in section 429.014, subdiv. 1 is \$100,000).

138. MINN. STAT. § 469.015, subdiv. 1, 1a (2017).

139. *See* MINN. STAT. § 326B.809(a) (2017).

III. CASE HISTORY

A. *The Initial Dispute*

On January 28, 2011, MnDOT opened the bidding process to general contractors on a project to recondition sections of Highways 44 and 76 in Houston County.¹⁴⁰ In their effort to secure the MnDOT bid, general contractor Mathy Construction Company (“Mathy”) gathered bids from prospective subcontractors.¹⁴¹ In Mathy’s subcontractor bid process, Mathy provided prospective subcontractors with MnDOT’s “Statement of Estimated Quantities” from the general contract bid, a document quantifying the required materials for MnDOT’s project.¹⁴² Relying on the quantities Mathy provided as reported in MnDOT’s Statement of Estimated Quantities, Storms, Inc. (“Storms”) submitted their subcontract bid to Mathy.¹⁴³ Because Mathy’s \$5,415,097.72 bid beat the MnDOT’s estimate by \$180,216.61 and also beat the competition’s bid by \$1,664,530.29, MnDOT awarded Mathy the general construction contract.¹⁴⁴ Additionally, Storms won the subcontract bid with Mathy and the parties signed the subcontract on March 22, 2011.¹⁴⁵ The subcontract stipulated that in exchange for a \$1,007,890.79 payment from Mathy, Storms would complete the “excavator and fill work” on Highways 44 and 76 by May 2011 and August 2011, respectively.¹⁴⁶

On May 16, 2011, Storms commenced its work on the MnDOT project.¹⁴⁷ Shortly thereafter, “it quickly became apparent to Storms, Mathy, and MnDOT that much smaller quantities of material were required than the amounts listed in the Statement of Estimated Quantities.”¹⁴⁸ Although Storms completed the necessary work on May 26, 2011, MnDOT’s engineer notified Mathy that some

140. *Storms, Inc. v. Mathy Constr. Co.*, 883 N.W.2d 772, 774 (Minn. 2016).

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* at 774; MINN. DEP’T OF TRANSP., TABULATION OF BIDS 1 (Mar. 1, 2011), <http://www.dot.state.mn.us/bidlet/abstract/110015ab.pdf>.

145. *See Storms*, 883 N.W.2d at 774; *Storms, Inc. v. Mathy Constr. Co.*, No. A15-0484, 2015 WL 7693550, at *2 (Minn. Ct. App. Nov. 30, 2015).

146. *See Storms*, 883 N.W.2d at 774.

147. *See id.*

148. *Id.*

estimated quantities were miscalculated and in June 2011 corrected the figures in MnDOT's Statement of Estimated Quantities.¹⁴⁹

Five months later, in a November 2011 meeting with Mathy and Storms, MnDOT notified the contractors that due to the miscalculations in the Statement of Estimated Quantities, MnDOT would decrease the general contract price.¹⁵⁰ MnDOT advised Mathy and Storms that it was possible to recover fixed costs contingent on requisite proof; however, Storms never supplied MnDOT with evidence of its fixed costs.¹⁵¹

On two separate occasions in early January 2012, Mathy contacted MnDOT to request full payment based on the initially agreed upon general contract price.¹⁵² Subsequently, MnDOT, Mathy, and Storms reconvened to address the decreased contract price, but the parties were unsuccessful in resolving their dispute.¹⁵³ On May 11, 2012, "MnDOT issued a deductive change order . . . reduc[ing] [Mathy's] general contract price by \$327,064.42."¹⁵⁴ Thus, MnDOT issued the change order nearly a year after Storms commenced construction and approximately nine months after Storms completed construction.¹⁵⁵ The Minnesota Supreme Court noted that "[c]hange orders . . . result[ing] in a reduction in the contract price are known in the industry as 'deductive' change orders."¹⁵⁶

B. Trial Proceedings

Because Mathy transferred MnDOT's deductive change order to Storms, via Mathy's own change order,¹⁵⁷ Storms commenced a breach of contract suit against Mathy in March 2013.¹⁵⁸ Storms

149. *See id.* at 774–75.

150. *Id.* at 775.

151. *Id.*

152. *Storms, Inc. v. Mathy Constr. Co.*, No. A15–0484, 2015 WL 7693550, at *1 (Minn. Ct. App. Nov. 30, 2015); *see also* Partial Summary Judgment Order at 6, *Storms, Inc. v. Mathy Constr. Co.*, No. 28-CV-13-235, 2014 WL 12631493, at *3 (Minn. Dist. Ct. Jan. 8, 2014) (finding Mathy contacted MnDOT on January 6, 2012, and on January 10, 2012).

153. *See Storms*, 883 N.W.2d at 775.

154. *Id.*

155. *See Storms*, 2015 WL 7693550, at *2.

156. *Storms*, 883 N.W.2d at 778 n.1.

157. *Id.* at 775.

158. *Storms*, 2015 WL 7693550, at *1.

sought \$327,064.42, the amount by which Mathy reduced the subcontract with Storms (i.e. the amount of MnDOT's deductive change order) plus related costs and attorney fees.¹⁵⁹

In January 2014, the district court granted Storms partial summary judgment, finding that Mathy breached the subcontract by failing to fully pay Storms, while setting aside the determination of damages.¹⁶⁰ In its analysis, the district court examined several provisions from the subcontract itself and from the MnDOT-issued spec book.¹⁶¹

Specifically, the district court examined Section 10.A of the subcontract and MnDOT Specification 1402.2(C).¹⁶² Section 10.A presented the possibility of MnDOT issued changes and required Mathy to notify Storms of those changes should "any modification affecting. . . [Storms'] work" occur.¹⁶³ Additionally, 10.A barred Storms from acting "inconsistent[ly] with the modifications to the General Contract."¹⁶⁴ Specification 1402.2(C) required modifications to the work be issued during the "progress of work."¹⁶⁵ Consequently, when the court read sections 10.A and 1402.2(C) in accord, it found that changes "must be made during the progress of the work or the remaining sentences of the section would not have been necessary."¹⁶⁶ Therefore, when Mathy modified the contract after the work was completed and then subsequently refused to pay the agreed upon price, Mathy breached the subcontract.¹⁶⁷

The issue of damages from the breach was determined at a bench trial.¹⁶⁸ However, the court determined the controlling MnDOT Specification was 1901, and not 1402, primarily relying on MnDOT engineer Mark Anderson's affidavit.¹⁶⁹ In Anderson's affidavit, he noted that, unlike what occurred in this situation, "1402

159. *Storms*, 883 N.W.2d at 774; *Storms*, 2015 WL 7693550, at *1.

160. Partial Summary Judgment Order at 6, *Storms, Inc. v. Mathy Constr. Co.*, No. 28-CV-13-235, 2014 WL 12631493, at *3 (Minn. Dist. Ct. Jan. 8, 2014).

161. *See id.* at *2.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.* at *3.

167. *See id.*

168. *See Findings of Fact, Conclusions of Law, Order for Judgment, and Judgment at 1*, *Storms, Inc. v. Mathy Constr. Co.*, No. 28-CV-13-235, 2014 WL 12631492, at *1 (Minn. Dist. Ct. Oct. 8, 2014).

169. *Id.* at 4–5, 2014 WL 12631492, at *2–3.

only applies to situations of unforeseen or significant changes.”¹⁷⁰ Anderson further stated that “1901.1 allowed him to modify the planned quantities after it was determined that the planned quantity was less than anticipated,” but “under Specification 1903.2(A), [Storms] is entitled to damages for his fixed costs relating to the change in the planned quantities.”¹⁷¹ Because Storms failed to supply evidence of its fixed costs, the court dismissed Storms’ damages claim.¹⁷² A subcontract provision stated that the prevailing party was entitled to attorney’s fees; thus, the court held that Mathy (the prevailing party) was entitled to attorney’s fees.¹⁷³

C. Court of Appeals Decision

In its 2015 decision, the Minnesota Court of Appeals affirmed the trial court’s holding that Mathy breached the subcontract, but reversed the trial court’s determination of damages.¹⁷⁴ First, the court of appeals affirmed the district court’s grant of summary judgment in favor of Storms holding that Mathy breached the subcontract by failing to pay Storms the agreed upon contract price.¹⁷⁵ Similar to the trial court’s analysis, the court of appeals examined provisions from both the subcontract and the spec book.¹⁷⁶ In its disposition, the court emphasized that while “Section 2 of the subcontract agreement incorporates the general contract into the subcontract,” when the general contract conflicts with the subcontract, the subcontract controls under Section 12.¹⁷⁷

Paramount to the court of appeals’ holding was the determination that Section 10.A stipulated “that any changes made to the project must be made during the progress of the work,” citing the trial court’s reasoning.¹⁷⁸ Because the court interpreted that

170. *Id.* at 4, 2014 WL 12631492, at *2.

171. *Id.* at 5, 2014 WL 12631492, at *3.

172. *Id.* at 11, 2014 WL 12631492, at *6.

173. *Id.*

174. *Storms, Inc. v. Mathy Constr. Co.*, No. A15-0484, 2015 WL 7693550 at *1 (Minn. Ct. App. Nov. 30, 2015).

175. *Id.* at *5.

176. *Compare id.* at *3–5, with Partial Summary Judgment Order at 5, *Storms, Inc. v. Mathy Constr. Co.*, No. 28-CV-13-235, 2014 WL 12631493, at *2 (Minn. Dist. Ct. Jan. 8, 2014).

177. *Storms*, 2015 WL 7693550, at *3.

178. *Id.* at *4 (“[A]s the district court found, ‘the remaining sentences of the section would not have been necessary’ unless it was mandatory that the changes

modifications under Section 10.A “be made during the ‘progress of work’ rather than after the work was completed,” the court reasoned that the subcontract’s “plain language” contradicted Specification 1901, thereby rejecting Mathy’s argument that Specification 1901 controlled.¹⁷⁹ Therefore, the court held that Mathy breached the subcontract with Storms because Mathy failed to pay Storms the stipulated contract price and because of Mathy’s tardy change order.¹⁸⁰

Second, the court of appeals reversed the trial court’s dismissal of damages after reasoning that Mathy breached the valid subcontract with Storms.¹⁸¹ The court further determined that Storms was entitled to expectancy damages because of Mathy’s breach,¹⁸² but the court declined to explicitly state the amount Mathy owed to Storms, citing the possibility that Storms “may have already received some of the amount outstanding.”¹⁸³ The court remanded the case for further determination.¹⁸⁴ Mathy then appealed the decision to the Minnesota Supreme Court.¹⁸⁵

D. Supreme Court Decision

In the 2016 appeal, the Minnesota Supreme Court held that Mathy had not breached the subcontract with Storms because the court found that Specification 1901 applied to the change in the required quantities, thereby reversing the trial and appellate level decisions.¹⁸⁶ The supreme court employed a sequential method to interpret the subcontract, unlike the lower courts.¹⁸⁷ Under the

were made during the progress of work.”).

179. *Id.* at *5.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *See Storms, Inc. v. Mathy Constr. Co.*, 883 N.W.2d 772, 776 (Minn. 2016).

186. *See id.* at 778.

187. *See id.* at 776. *Compare id.*, with *Storms, Inc. v. Mathy Constr. Co.*, No. A15-0484, 2015 WL 7693550 at *5 (Minn. Ct. App. Nov. 30, 2015) (“plain language”), and *Partial Summary Judgment Order* at 5–6, *Storms, Inc. v. Mathy Constr. Co.*, No. 28-CV-13-235, 2014 WL 12631493, at *2–3 (Minn. Dist. Ct. Jan. 8, 2014) (using plain language), and *Findings of Fact, Conclusions of Law, Order for Judgment, and Judgment* at 5, *Storms, Inc. v. Mathy Constr. Co.*, No. 28-CV-13-235, 2014 WL 12631492, at *3 (Minn. Dist. Ct. Oct. 8, 2014) (relying heavily on an MnDOT engineer affidavit).

sequential approach, the supreme court initially determined which MnDOT specification was applicable, and then proceeded to find a contradiction between the applicable specification and the subcontract's provisions.¹⁸⁸

First, the supreme court determined that the applicable specification was 1901, and not 1402.¹⁸⁹ The court determined that Specification 1901 controlled in situations where MnDOT miscalculated an estimated quantity necessitating a correction, which is precisely what occurred in this case.¹⁹⁰ The court reasoned that Specification 1402 was not applicable because "Specification 1402.1 is triggered only when the 'details of construction' – the scope of the work – are altered" and MnDOT only changed a quantity.¹⁹¹ The court determined the Specification 1901 was controlling, and so it proceeded to examine whether any of the subcontract's sections conflicted with Specification 1901.¹⁹²

Although Storms asserted that Section 10.A contradicted Specification 1901, the court rejected this argument and ultimately held that there was no conflict between 1901 and the subcontract.¹⁹³ As previously discussed, the court concluded Specification 1901 applied to circumstances where MnDOT miscalculated estimated quantities.¹⁹⁴ The court also reasoned that Section 10.A only pertained to situations where MnDOT sought to modify the extent of Storms' work.¹⁹⁵ Thus, Mathy had proper justification to alter the subcontract's estimated quantities.¹⁹⁶ Because Specification 1901 controlled and because there was no conflict between 1901 and the subcontract, the court held that Mathy did not breach the contract.¹⁹⁷

188. *See Storms*, 883 N.W.2d at 776.

189. *Id.* at 777.

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.* ("We do not read section 10.A and Specification 1901 to be in conflict because they address different situations. Section 10.A describes how to make changes to the scope of the work, whereas Specification 1901 governs the procedure for correcting errors in estimated quantities. The provisions can be read in harmony with one another." (citing *Chergosky v. Crosstown Bell, Inc.*, 463 N.W.2d 522, 525 (Minn. 1990))).

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.* at 777–78.

IV. ANALYSIS

A. *The Minnesota Supreme Court's Decision Properly Served Justice by Preventing a Windfall Victory*

The dispute between Storms and Mathy facially appears quite simple: on one side is a general contractor that was compensated only for work that was performed, and on the opposing side is a subcontractor that sought payment for goods and services that were not delivered.¹⁹⁸ Surely the ideal of “freedom of contract” is central to contract law and society should seek to uphold it.¹⁹⁹ However, the notion of fairness ultimately was the more persuasive contract law tenet supported by the court in its decision of this dispute. Although the court commendably rooted its discourse in the relevant contractual language, it also successfully prevented a windfall victory for the subcontractor seeking an unjust result.

The notion that parties to a contract should be free to negotiate the contract's terms, and those negotiated terms should be upheld, is a longstanding tradition in American contract jurisprudence.²⁰⁰ Both Williston's (objectivist) and Corbin's (subjectivist) approaches to contract interpretation further advance these premises, despite conflicting with respect to how the two approaches actually interpret contracts.²⁰¹

When Williston and Corbin formulated their respective approaches to interpretation, both intended to promote a key tenet of contract law: a contract's terms negotiated by the parties should be upheld.²⁰² Recall that Williston's formal approach to contract interpretation is considered “objective” because it utilizes a “reasonable person” standard when seeking to understand the

198. *Id.* at 774.

199. ATYAH, *supra* note 16, at 8 (“[T]he shibboleths ‘freedom of contract’ and ‘sanctity of contract’ became the foundations on which the whole law of contract was built.”).

200. *Id.* (discussing that while paternalistic notions surrounding contract law were characteristic of the eighteenth century, *laissez-faire* ideals of freedom of contract started to flourish during the nineteenth century).

201. Compare WILLISTON ON CONTRACTS, *supra* note 23, § 30:6, with CORBIN, *supra* note 38, §24:7; see also BURTON, *supra* note 9, at 23, 28.

202. Cf. BURTON, *supra* note 9, at 23, 28 (explaining that courts look to the prior negotiation of included terms to aid contract interpretation). Compare WILLISTON ON CONTRACTS, *supra* note 23, § 30:6, with CORBIN, *supra* note 33, § 24:7.

words in a contract.²⁰³ Conversely, Corbin’s subjective approach seeks to enter the minds of the contracting parties in order to ascertain their intentions.²⁰⁴ Although the “how” behind Williston’s and Corbin’s approaches to contract interpretation differ, the “why” remains the same: both Williston and Corbin seek to understand the true meanings assigned by the parties so that the contract can be properly enforced according to the parties’ ultimate intent.²⁰⁵

When issuing its opinion in *Storms*, the Minnesota Supreme Court upheld the contractual intentions of Storms and Mathy.²⁰⁶ Although the subcontract included language in Section 12 stating that “[w]here a provision of the General Contract is inconsistent with the provision of this Subcontract, this Subcontract shall govern,” the court essentially found that the subcontract’s incorporation of the provisions from the MnDOT spec book was a central aspect of the contract.²⁰⁷ The court determined that the disputed issue, change orders of estimated quantities, was addressed by Specification 1901.²⁰⁸ As a result, the court did not find inconsistency between the general contract and the subcontract.²⁰⁹ Because the court found that the spec book incorporation was central to the subcontract, and because Specification 1901 controlled in situations pertaining to estimated quantity change orders,²¹⁰ the court properly honored Storms’ and Mathy’s contractual intentions.

Furthermore, the Minnesota Supreme Court’s holding in *Storms* advanced notions of justice and fairness by preventing the

203. See WILLISTON ON CONTRACTS, *supra* note 23, § 30:6; see also BURTON, *supra* note 9, at 23.

204. See generally CORBIN, *supra* note 33, §24:7; BURTON, *supra* note 9, at 28.

205. See BURTON, *supra* note 9, at 23, 28, 35 (explaining that Williston believed that the parties’ true meanings were best understood through the plain meaning of their contract; however, Corbin’s approach advocates for the premise that the true meaning assigned by the contract’s parties originates from their own interpretation).

206. See *Storms, Inc. v. Mathy Constr. Co.*, 883 N.W.2d 772, 776 (Minn. 2016).

207. See *id.* at 774, 776.

208. See *id.* at 777 (“Specification 1901 fits the circumstances of this case. It gives the MnDOT engineer the express power to adjust material quantities when MnDOT’s estimate is incorrect.”).

209. See *id.* (“We do not read section 10.A and Specification 1901 to be in conflict The provisions can be read in harmony with one another.” (citing *Chergosky v. Crosstown Bell, Inc.*, 463 N.W.2d 522, 525 (Minn. 1990))).

210. See *id.*

subcontractor's recovery of unearned, windfall profits. If the court had found in favor of the subcontractor, the faultless general contractor would have been left responsible for contract modifications caused by the external source, MnDOT.²¹¹ In other words, because of involuntary alterations made to the contract by a third party (MnDOT), the general contractor (Mathy) would have been unfairly liable to compensate its subcontractor (Storms) because the materials were not supplied and the services were not delivered.

Admittedly, the subcontractor did successfully make a fairness argument during the initial appeal to the Minnesota Court of Appeals.²¹² Storms sought to have the court fully enforce the negotiated bargain by asserting that it lost out because of involuntarily forced upon external changes.²¹³ The subcontractor's position appears to align with a longstanding touchstone of contract law: "[a] deal is a deal."²¹⁴ The subcontractor essentially based its argument on the notion that the agreement should be upheld,²¹⁵ even though the general contractor negotiated what turned out to be an unfavorable agreement. While this was a compelling argument, the Minnesota Supreme Court correctly held that the subcontractor was not entitled to the compensation it sought because MnDOT-issued change orders on estimated quantities are permissible under Specification 1901 in MnDOT's spec book.²¹⁶

The Minnesota Supreme Court avoided setting a potentially problematic precedent. Had the case been decided in favor of the subcontractor, the general contractor would have been liable to pay for unsupplied materials and undelivered services. The potential precedent set would have allowed subcontractors to recover for deductive change orders even though they do not deserve recovery. It is possible that such a holding by the court may have also

211. Appellant's Reply and Response Brief at 16, *Storms, Inc. v. Mathy Constr. Co.*, No. A15-0484, 2015 WL 5969554 (Minn. Ct. App. Nov. 30, 2015).

212. See *Storms*, 883 N.W.2d at 776 (citing *Storms, Inc. v. Mathy Constr. Co.*, No. A15-0484, 2015 WL 7693550 (Minn. Ct. App. Nov. 30, 2015)).

213. See *Storms*, 883 N.W.2d at 776. See generally *Storms*, 2015 WL 7693550, at *5.

214. Richard P. Bress, Michael J. Gergen & Stephanie S. Lim, *A Deal is Still a Deal*:

Morgan Stanley Capital Group v. Public Utility District No. 1, 2008 CATO SUP. CT. REV. 285, 285 (2008).

215. See *Storms*, 883 N.W.2d at 776.

216. See *id.* at 777.

incentivized litigious contractors to seek out construction contracts where quantities are grossly overestimated, since they could have potentially recovered large sums of money despite supplying nothing. This alternative holding could have led to a practice where construction bids would be routinely underestimated, thus creating additional inefficiency for both the public and private sectors.

When examining the court's actual holding in *Storms* purely from a morality and fairness perspective, justice was properly served. Storms did not deserve to recover because Storms did not ultimately provide all of the originally contracted for materials and services.²¹⁷ Regardless of whether or not the materials and services were delivered, requiring Mathy to pay Storms for unsupplied materials and services is unjust. It is difficult to conceive of a situation, hypothetical or legitimate, where a person or entity is fully compensated despite not providing the entire quantity of a good; this exercise becomes even more difficult as the amount or the value of the goods increases.

While not completely analogous, since the governing contracts likely differ, big-box retailers are notorious for returning unsold (i.e. unused) product, despite attempting to accurately estimate how much product they will actually sell.²¹⁸ Even though retail and construction contracts probably significantly differ in terms of content and language, perhaps the reasons why estimated order quantities are overstated originates from similar motivations. Similar to retailers, construction engineers cannot afford stock-out costs due to an underestimation.²¹⁹ In other words, there is a major incentive for engineers to overestimate required materials—they need to ensure they do not run out because halting construction is very expensive.²²⁰ This is likely why MnDOT overestimated the bid quantities. Even though Storms asserted that it was entitled to the bargain it negotiated, Storms should not be paid when it did not

217. *See id.* 774–75.

218. *See, e.g.*, Robert D. Buzzell, John Quelch & Walter J. Salmon, *The Costly Bargain of Trade Promotion*, HARV. BUS. REV. (Mar.–Apr. 1990), <https://hbr.org/1990/03/the-costly-bargain-of-trade-promotion>; Shan Li, *A Growing Holiday Pastime: Returning Those Unwanted Gifts*, L.A. TIMES (Dec. 26, 2015), <http://www.latimes.com/business/la-fi-holiday-returns-20151225-story.html>.

219. *Compare* Buzzell, Quelch & Salmon, *supra* note 218, with Fredric L. Plotnick, *Understanding and Proving Construction Delay Claims*, 2 PRAC. REAL EST. LAW. 67, 67 (1986).

220. *See, e.g.*, Plotnick, *supra* note 219, at 67.

perform services or deliver materials because doing so would have been unnecessary.

This particular change order provision within the MnDOT spec book seems to essentially serve as a quasi-cancellation clause. As previously established, alterations in large scale construction projects are inevitable,²²¹ and there are significant financial incentives for project designers to overestimate material and service quantities.²²² It is thus reasonable for these contracts to include language that allows for changes to occur, and to an extent, these change order provisions appear to serve that function.

B. *Future Impact*

The Minnesota Supreme Court set a precedent that a general contractor on a public works project can pass price reductions from governmental miscalculations to their subcontractors, regardless of the subcontractor's willingness to accept the adjustment or the initially contracted bid price in the subcontract.²²³ The Minnesota Supreme Court's 2016 decision in *Storms* encourages judicial efficiency despite potentially setting a controversial precedent.

Had the Minnesota Supreme Court found in favor of *Storms*, Mathy would have been in a distressing position. Since Mathy would have been unable to recover the price difference from MnDOT, due to the general contract's provisions,²²⁴ Mathy would be left with two unpleasant options. Either Mathy could attempt to recover the loss from *Storms* on an unjust enrichment claim for not performing the entire contract, or worse, Mathy would simply suffer a large monetary loss of \$327,064.24.²²⁵

This precedent seems contrary to a central principle of contract law, "a deal is a deal,"²²⁶ because contracts are typically upheld

221. See Fabyanske, *supra* note 67, at 47; BRUNER & O'CONNOR, JR., *supra* note 57, § 4:01.

222. See Plotnick, *supra* note 219, at 67.

223. See generally *Storms, Inc. v. Mathy Constr. Co.*, 883 N.W.2d 772, 778 (Minn. 2016) (holding that general contractor (Mathy) did not breach its subcontract with the subcontractor (*Storms*) when owner (MnDOT) miscalculated estimated quantities during the initial bid solicitation process).

224. See MINNESOTA DEPARTMENT OF TRANSPORTATION, STANDARD SPECIFICATIONS FOR CONSTRUCTION 103 (2005), <http://www.dot.state.mn.us/pre-letting/spec/arch ive.html> [hereinafter MINN. DEP'T OF TRANSP. 2005].

225. See *Storms*, 883 N.W.2d at 774.

226. See, e.g., Bress, Gergen & Lim, *supra* note 214, at 285.

despite one party agreeing to unfavorable terms.²²⁷ While doctrines exist in contract law for defending against improper contract formation (e.g., incapacity, duress, undue influence) and excusing nonperformance (e.g., mistake, unconscionability, illegality),²²⁸ it is unlikely Mathy could have utilized any of them. Presumably, a contract was properly formed between Mathy and Storms because neither party disputed this issue throughout litigation.²²⁹ Also, there was no justifiable reason for Mathy's nonperformance, other than not being paid by MnDOT.²³⁰ At trial, Mathy relied on Section 18.A of the subcontract, which established that payment from MnDOT was a "condition precedent" to Mathy paying Storms.²³¹ Nonetheless, the trial court rejected Mathy's argument because the court believed Mathy did not exert "good faith" in seeking payment from MnDOT.²³²

Contrary to the trial court's decision,²³³ Mathy could reasonably and persuasively argue on appeal that the delay was not solely Mathy's fault since MnDOT's sluggishness played a contributory role. MnDOT failed to swiftly issue a deductive change order when shortly after Storms commenced working, "it quickly became apparent to Storms, Mathy, and MnDOT that much smaller quantities of material were required."²³⁴ Additionally, despite the MnDOT engineer's affidavit supporting that he could "summarily change the miscalculated quantities," MnDOT failed to promptly

227. See, e.g., *Winthrop Res. Corp. v. Sabert Corp.*, 567 F. Supp.2d 1084, 1092 (D. Minn. 2008) (explaining that "the fact that the contract represents a bad deal for [the defendant] does not excuse" the defendant's nonperformance (citing *Denelsbeck v. Wells Fargo & Co.*, 666 N.W.2d 339, 346–47 (Minn. 2003))).

228. 8 DUNNELL MINN. DIGEST, Contracts §§ 6.00–03, 10.21 (6th ed. 2015).

229. See *Storms*, 883 N.W.2d at 774 (noting the issue of the case was breach of a valid contract); see also *Storms, Inc. v. Mathy Constr. Co.*, No. A15-0484, 2015 WL 7693550, at *1–2 (Minn. Ct. App. Nov. 30, 2015).

230. See Partial Summary Judgment Order at 5, *Storms, Inc. v. Mathy Constr. Co.*, No. 28-CV-13-235, 2014 WL 12631493, at *2 (Minn. Dist. Ct. Jan. 8, 2014).

231. *Id.* at 6, 2014 WL 12631493, at *3 ("According to Section 18.A (2) of the Subcontract Agreement: Receipt of payment by the Contractor from the Owner shall be a condition precedent to the right of the Subcontractor to receive payment unless the failure to have payment shall be *solely* caused by the fault of the Contractor." (emphasis added)).

232. *Id.* (citing a lengthy delay between Mathy's final payment request from MnDOT and MnDOT's eventual issuance of the change order (i.e. January 10, 2011–May 11, 2012)).

233. See *id.*

234. *Storms*, 883 N.W.2d at 774.

issue a deductive change.²³⁵ However, it is unreliable to depend on such a strategy because the trial court had already rejected this argument.²³⁶

Furthermore, if the Supreme Court found Mathy breached the contract, Mathy's best option is to bring an unjust enrichment action; however, this approach for recovery is risky. Minnesota case law establishes the elements of unjust enrichment as a benefit conferred by one party to another and retention of that benefit must be unjust.²³⁷ To recover under this rule, Mathy would need to fully pay Storms the original contract price and then attempt to bring an action showing that Storms' retention of the full payment was unjust.

An unjust enrichment action is risky for two reasons. First, suppose Mathy did bring an unjust enrichment action. Mathy's hypothetical argument would then depend on the premise that Storms was paid for services that it had not performed. But Storms could easily prevail, arguing that Mathy surely had contemplated an adjustment to quantities (and thus payment) that were labeled "[e]stimated."²³⁸ Second, if Mathy loses the suit, Mathy would have lost \$327,064.42 (the difference between the initial and changed payment amount) plus litigation costs.²³⁹ Because unjust enrichment actions are a gamble, the Minnesota Supreme Court's decision in *Storms* is proper. It set an effective and efficient precedent for similar situations in the future.

The *Storms* decision establishes that general contractors can efficiently pass along payment changes from MnDOT onto their subcontractors when estimated quantities are miscalculated.²⁴⁰ Contract drafters in the future should be advised to incorporate clear language contemplating a situation, analogous to *Storms*, where MnDOT issues a change order either increasing or decreasing payment.²⁴¹

235. *Storms, Inc. v. Mathy Constr. Co.*, No. A15-0484, 2015 WL 7693550 at *5-6 (Minn. Ct. App. Nov. 30, 2015).

236. Partial Summary Judgment Order at 6-7, *Storms, Inc. v. Mathy Constr. Co.*, No. 38-CV-13-235, 2014 WL 12631493, at *3 (Minn. Dist. Ct. Jan. 8, 2014).

237. See *Caldas v. Affordable Granite & Stone*, 820 N.W.2d 826, 838 (Minn. 2012) (quoting *ServiceMaster of St. Cloud v. GAB Bus. Servs., Inc.*, 544 N.W.2d 302, 306 (Minn. 1996)); see also *Acton Constr. Co. v. State*, 383 N.W.2d 416, 417 (Minn. Ct. App. 1986) (quoting 66 AM. JUR. 2D *Restitution and Implied Contracts* § 4 (1973)).

238. *Storms*, 883 N.W.2d at 774-75.

239. *Id.* at 774.

240. See *id.* at 774, 777-78.

241. See *id.* at 774.

While subcontractors may feel slighted by the precedent set in *Storms*, since they may not get what they bid for, subcontractors should not feel completely discouraged. Subcontractors may perceive this precedent as unfavorable since compensation could be reduced involuntarily. However, the precedent set by *Storms* is constrained to contracts incorporating MnDOT's spec book.²⁴² Additionally, because *Storms* establishes clear precedent for similar situations in the future, subcontractors will probably spend less time and money litigating these types of claims.

Most importantly, *Storms* demonstrates that unfavorable outcomes are easily avoidable. In *Storms*, the subcontract included the general contract's provisions and gave the subcontract supremacy when the general contract and subcontract conflicted.²⁴³ In the future, contract drafters should also include language in their subcontract addressing payment reductions caused by the contractee's miscalculation of estimated quantities. Suppose *Storms* had included language in the subcontract such as:

Mathy is not entitled to reduce payment to Storms if MnDOT reduces an estimated quantity for any reason. Mathy is obligated to increase payment proportionally, if MnDOT increases an estimated quantity for any reason.

Most likely, a court would have found Mathy breached the subcontract, thus entitling Storms to recovery. Another potential solution for subcontractors could be imposing a monetary penalty when estimated quantities are changed for any reason. Not only are subcontractors compensated for unexpected alterations, general contractors and contractees are incentivized to provide more accurate estimates. Because this issue is foreseeable, subcontractors on MnDOT projects should include in their subcontracts language addressing miscalculations of estimated quantities.

C. *MnDOT's Standard Specifications for Construction Still Needs Revision*

Evidenced by the lower courts' difficulty interpreting the applicable specifications and the Minnesota Supreme Court's subsequent 2016 decision in *Storms*,²⁴⁴ MnDOT's spec book is overly convoluted and therefore should be revised to increase clarity.

242. See *id.* at 774.

243. *Id.* at 776.

244. See *id.* at 774.

The spec book is long, which is understandable given the complexities of doing large scale construction; it could benefit, however, from more concise language. In *Storms*, the Minnesota Supreme Court rejected the Minnesota Court of Appeals' approach where the court of appeals "based its decision on what it called the 'plain language' of the subcontract."²⁴⁵ Instead, the Minnesota Supreme Court employed a slightly different two-step "plain language" approach when correctly deciding the case: first, determine which spec book specification applies, then see if the applicable specification conflicts with the subcontract.²⁴⁶ Although MnDOT engineer Mark Anderson's affidavit²⁴⁷ proved to be extraneous in the court's decision,²⁴⁸ the spec book should be written more clearly, thereby eliminating the need for MnDOT engineers to submit explanatory affidavits.

Although MnDOT reduced the 2016 spec book's page count considerably, while also improving on clarity,²⁴⁹ some of the alterations made to the spec book's specifications still need improvement. Consider the analogous text from the 2005 spec book and the 2016 spec book. The 2005 text, labeled "Measurement of Quantities" states:

The Engineer will adjust the quantities on (P) designated Contract items when the Engineer revises the dimensions of that work (in which case only the affected portion will be re-determined) or when the Engineer decides that the quantity designated as (P) is incorrect.²⁵⁰

Specification 1901.1, labeled "P" Quantities, in the 2016 spec book states:

245. *Id.* at 776.

246. *See id.*

247. *See Storms, Inc. v. Mathy Constr. Co.*, No. A15-0484, 2015 WL 7693550, at *5-6 (Minn. Ct. App. Nov. 30, 2015) ("[S]pecification 1901 [applies to] miscalculated quantities . . . [whereas 1402] applies to . . . unforeseen changes or abnormalities in the physical conditions at the job site.") (internal quotations omitted).

248. *See Storms*, 883 N.W.2d at 775 (referencing the affidavit only early in their opinion, while addressing the district court's disposition).

249. Compare MINN. DEP'T OF TRANSP. 2016, *supra* note 61, at 695, with MINN. DEP'T OF TRANSP. 2005, *supra* note 224, at 1074.

250. MINN. DEP'T OF TRANSP. 2005, *supra* note 224, at 97.

The Engineer will adjust a “P” designated quantity if the Engineer revises the dimensions of the Work or decides the “P” designated quantity is incorrect.²⁵¹

Undoubtedly, the 2016 version is shorter and thus easier to comprehend; however, reorganization and/or section relabeling would further improve clarity. Suppose Specification 1901 was reorganized as (1) “Methodology of Measurement,” (2) “Modification Procedures for Measurements of Quantities,” and (3) “Measurements of Quantities Definitions.” This suggested reorganization and relabeling improves Specification 1901 threefold. First, by simply reading each section’s title, a reader can quickly ascertain what is included in the section. Second, this proposed reorganization improves general readability and flow by listing the highly technical definitions last. Third, the proposed relabeling of sections condenses the overall document for improved conciseness. For example, the proposed section “Modification Procedures for Measurements of Quantities” could integrate Specification 1903 labeled “Compensation for Altered Quantities.”²⁵² Since the modification procedures are outlined before the four-page list of definitions and after the measurement methodology, the document flows more logically and orderly, thus improving readability.

Although the 2016 spec book’s text has improved compared to the 2005 edition, the vague language could still be improved, despite the spec book’s usage in complex construction projects.

V. CONCLUSION

The Minnesota Supreme Court correctly applied Minnesota contract law when it utilized an expected mechanical process for contract interpretation. Initially, the court looked at the incorporated MnDOT specifications, then decided whether a subcontract provision conflicted.²⁵³ First, the court held, unlike the lower courts, that MnDOT Specification 1901 controlled in a situation where MnDOT miscalculated estimated quantities.²⁵⁴ Subsequently, the court correctly determined that Specification

251. MINN. DEP’T OF TRANSP. 2016, *supra* note 61, at 66.

252. *Id.* at 69.

253. *See Storms*, 883 N.W.2d at 776.

254. *See generally id.* at 777 (“Specification 1901 fits the circumstances of this case.”).

1901 did not conflict with the subcontract's provisions.²⁵⁵ As a result, the Minnesota Supreme Court held Mathy had not breached the subcontract with Storms, by properly applying Specification 1901 and finding no contradictions in the subcontract.

The Minnesota Supreme Court's holding in *Storms* prevented a windfall victory for an undeserving party. Even though Storms did not provide the materials and services for which it sought to recover, Storms attempted to recover for Mathy's alleged breach of their subcontract. Therefore, the Minnesota Supreme Court's holding, precluding Storms' recovery, yielded a fair outcome because it would be unjust for Storms to recover for goods and services it did not supply.

Although subcontractors are probably and understandably concerned by the Minnesota Supreme Court's holding in *Storms*, the future implications are constrained, informative, and potentially beneficial. The impact of *Storms* is limited because the question decided in *Storms* arose from a dispute regarding MnDOT's spec book, and therefore, does not seem to broadly apply to all subcontracts. The *Storms* holding educates future subcontract drafters how to theoretically avoid similar compromising positions. Lastly, subcontractors seeking payment from general contractors due to a MnDOT error will likely avoid lengthy and thus costly litigation because *Storms* sets a clear precedent.

The *Storms* decision demonstrates the unnecessary complexity of MnDOT's spec book. Evidenced by the lower courts difficulty interpreting its provisions, the spec book is excessively complicated. Although the 2016 edition of the spec book clarified previously confusing writing to an extent, the changes did not completely resolve

the complexities, nor does the 2016 edition entirely prevent future disputes. While the supreme court correctly sorted out the complicated intricacies, *Storms* demonstrates that the drafting of MnDOT's 2005 spec book was inadequate and was unfortunately resolved at the expense of Storms and Mathy.

255. See *id.* at 777.

Table 1	
State	Specbook Link
Alabama	https://www.dot.state.al.us/conweb/pdf/Specifications/2012%20DRAFT%20Standard%20Specs.pdf [https://perma.cc/T5BW-7PU4].
Alaska	http://www.dot.state.ak.us/stwddes/dcspes/assets/pdf/aptspecs/airportspecs.pdf [https://perma.cc/6QJ3-FG9N].
Arizona	https://www.azdot.gov/docs/business/2008-standards-specifications-for-road-and-bridge-construction.pdf?sfvrsn=0 [https://perma.cc/2R6F-MGQJ].
Arkansas	https://www.arkansashighways.com/standard_spec/2014/2014SpecBook.pdf [https://perma.cc/QRK8-VXC5].
California	http://www.dot.ca.gov/hq/esc/oe/construct/contract_standards/std_specs/2015_StdSpecs/2015_StdSpecs.pdf [https://perma.cc/V7V5-B8HX].
Colorado	https://www.codot.gov/business/designsupport/cdot-construction-specifications/2011-Specs/2011-specs-book/2011-Specs-Book.pdf/view [https://perma.cc/95PU-EWQW].
Connecticut	http://www.ct.gov/dot/cwp/view.asp?a=2288&Q=498392 [https://perma.cc/D26M-BZ9C].
Delaware	http://deldot.gov/Publications/manuals/standard_specifications/pdfs/2016/2016_standard_specifications_08-2016.pdf [https://perma.cc/2TVA-J8G6].
Florida	http://www.fdot.gov/programmanagement/Implemented/SpecBooks/ [https://perma.cc/C6LG-9PBK].

Georgia	http://www.dot.ga.gov/PartnerSmart/Business/Source/specs/DOT2013.pdf [https://perma.cc/G7QV-CXMP].
Hawaii	http://hidot.hawaii.gov/highways/s2005-standard-specifications/ [https://perma.cc/2MVK-M83B].
Idaho	http://apps.itd.idaho.gov/apps/manuals/SpecBook/files/SpecBinder.pdf [https://perma.cc/6ZAR-MH2S].
Illinois	http://www.idot.illinois.gov/Assets/uploads/files/Doing-Business/Manuals-Guides-&-Handbooks/Highways/Construction/Standard-Specifications/Standard%20Specifications%20for%20Road%20and%20Bridge%20Construction%202016.pdf [https://perma.cc/2Y5M-CT39].
Indiana	http://www.in.gov/dot/div/contracts/standards/book/sep15/sep.htm [https://perma.cc/F2YS-BUWY].
Iowa	https://www.iowadot.gov/specifications/Specificationsseries2012.pdf [https://perma.cc/3GYR-KE5W].
Kansas	https://www.ksdot.org/burconsmain/specprov/specifications.asp [https://perma.cc/QHF8-9C9R].
Kentucky	http://transportation.ky.gov/construction/pages/kentucky-standard-specifications.aspx [https://perma.cc/SJ4E-UPQQ].
Louisiana	http://wwwsp.dotd.la.gov/Inside_LaDOTD/Divisions/Engineering/Standard_Specifications/Pages/Standard%20Specifications.aspx [https://perma.cc/56L8-2BG8].
Maine	http://maine.gov/mdot/contractors/publications/standardspec/ [https://perma.cc/PB4B-2N74].

Maryland	http://roads.maryland.gov/pages/sscm.aspx?PageId=853&lid=SSP [https://perma.cc/MSF5-LPFF].
Massachusetts	http://www.massdot.state.ma.us/highway/DoingBusinessWithUs/ManualsPublicationsForms.aspx [https://perma.cc/RDC3-3PN7].
Michigan	http://mdotcf.state.mi.us/public/specbook/2012/ [https://perma.cc/G26Y-L55M].
Minnesota	http://www.dot.state.mn.us/pre-letting/spec/2016/2016specbook.pdf [https://perma.cc/X4HF-K399].
Mississippi	http://sp.mdot.ms.gov/Construction/Pages/Standard%20Specifications.aspx [https://perma.cc/NK6M-GR2U].
Missouri	http://www.modot.org/business/standards_and_specs/highwayspecs.htm [https://perma.cc/7MWU-Q39J].
Montana	http://www.mdt.mt.gov/business/contracting/standard_specs.shtml [https://perma.cc/X6ZT-487Q].
Nebraska	http://dot.nebraska.gov/media/6897/specbook-2007.pdf [https://perma.cc/L6WA-7ZMW].
Nevada	https://www.nevadadot.com/doing-business/contractors-construction/contract-services/standard-specifications-and-plans [https://perma.cc/B29V-DT75].
New Hampshire	https://www.nh.gov/dot/org/projectdevelopment/highwaydesign/specifications/ [https://perma.cc/9Z9U-7DMU].
New Jersey	http://www.state.nj.us/transportation/eng/specs/2007/Division.shtml [https://perma.cc/523M-37NL].
New Mexico	http://dot.state.nm.us/content/dam/nmdot/Plans_Specs_Estimates/2014_Specs_For_Highway_And_Bridge_Construction.pdf [https://perma.cc/S87Z-6KYN].

New York	https://www.dot.ny.gov/main/business-center/engineering/specifications/business-standards-usc/usc-repository/2016_1_Specs_USC.pdf [https://perma.cc/542F-JSNR].
North Carolina	https://connect.ncdot.gov/municipalities/Bid%20Proposals%20for%20LGA%20Content/01%20NCDOT%20Specifications%20Book.pdf [https://perma.cc/9RP4-RNCJ].
North Dakota	https://www.dot.nd.gov/dotnet/supplspecs/StandardSpecs.aspx [https://perma.cc/AA4Z-9GQS].
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