

Case No. A-25-607

IN THE COURT OF APPEALS OF THE STATE OF NEBRASKA

K2 REAL ESTATE DEVELOPMENT, LLC,
Appellant and Cross-Appellee,

v.

NEMAHA COUNTY, NEBRASKA,
Appellee and Cross-Appellant.

Appeal from District Court of Nemaha County, Nebraska
The Honorable Julie D. Smith

BRIEF OF NEMAHA COUNTY, NEBRASKA,
Appellee and Cross-Appellant

Prepared and Submitted by:

Louie M. Ligouri, #16708
Ligouri Law Office
1118 15th Street
P.O. Box 99
Auburn, Nebraska 68305
Telephone: 402-274-5484
Email: ligourilaw@hotmail.com

Attorneys for Appellee and Cross-Appellant

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STATEMENT OF JURISDICTION

Appellee, Nemaha County, Nebraska (hereinafter County) accepts Appellant K2 Real Estate Development, LLC (hereinafter K2) Statement of Jurisdiction.

STATEMENT OF THE CASE

A. Nature of the Case

This is an appeal from an Order entered by the District Court involving a written proposal (proposal) for repairing a County bridge between K2 and the County.

B. Issues Actually Tried in the Court Below

This action arises out of a proposal to repair a bridge for the sum of \$85,580 subject to an additional \$50,000 should K2 have a start date later than March 22, 2022, “at the fault other than the Contractor.” (E12, p.12) K2 filed its Complaint on September 23, 2022. (T1-3) The County filed its Answer on October 28, 2022. (T10-15) K2 proceeded to file a Motion for Summary Judgment on March 7, 2024. (T17-19)

C. How the Issues Were Decided and What Judgment Was Entered by the Trial Court

The District Court entered an Order on June 28, 2024, granting partial summary judgment for K2 finding that “Nemaha’s contract with K2 is not illegal and Nemaha breached its contract with K2.” (T116) The Court further found that there were “genuine issues of material fact regarding whether K2 was damaged by Nemaha’s breach and the amount of those damages.” (T116)

The District Court determined that Neb. Rev. Stat. § 39-810(1)(c) is limited to contracts only for the purchase of materials. (T113) The Court further expressed that in construing § 39-810 as a whole the provisions of § 39-810(1)(b) prevailed over § 39-810(1)(c). (T113) Otherwise, the District Court stated “any contract that had a component involving materials, even though the contract was also for labor, would be subject to § 39-810 (1)(c) and the county would be unable to enter any contract exceeding twenty thousand dollars.” (T114)

On December 13, 2024, the County in accordance with the Trial Court's Order of September 25, 2024, filed its Disclosure and Designation of Expert Witnesses. (T138-134) The Disclosure included facts and opinions, the witnesses may be expected to testify in at trial. (T128-134).

On February 11, 2025, K2 filed a Motion In Limine directed toward the County's Disclosure and Designation of Expert Witnesses. (T135-138) On February 18, 2025, the County filed a Reply with Supporting Memorandum of Law to Plaintiff's Motion in Limine. (T162-185).

On February 20, 2025, hearing was had on K2's Motion in Limine. The Trial Court in ruling on the Motion held: "In this case, the court made no finding of substantial performance in the summary judgment order. Furthermore, whether there was substantial performance is relevant on the remaining issue of damages." (T188)

On the evening of February 20, 2025, K2 filed a Motion to Reconsider or Clarify Journal Entry Order. (T191-198) The Trial Court, without hearing, modified its earlier Order, reiterating that "the determination of substantial performance is relevant to the issue of damages." (T190)

Whether K2 substantially performed its obligation for the bridge repairs under its proposal was a question of fact for the Trial Court. (T188, 190) The parties each filed post-trial closing arguments with brief or memorandum and proposed orders. (T203-245)

D. Scope of Appellate Court's Review

A breach of contract action presents an action at law. *Bloedorn Lumber Co. v. Nielson*, 300 Neb. 722, 726, 915 N.W.2d 786 (2018). In a bench trial of a law action, a trial court's factual findings have the effect of a jury verdict and will not be set aside on appeal unless clearly erroneous. The Appellate Court does not reweigh the evidence but considers the judgment in a light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence. *Bloedorn Lumber Co. supra*.

“The construction of a contract is a matter of law, in connection with which an Appellate Court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below.” *Valley Boys, Inc. v American Family Insurance Company*, 306 Neb. 928, 937, 947 N.W.2d 856, 864 (2020).

PROPOSITIONS OF LAW

I. The appellate court has an obligation to reach an independent conclusion in connection to the construction of a contract.

Valley Boys, Inc. v American Family Insurance Company, 306 Neb. 928, 947 N.W.2d 856, 864 (2020).

II. When there is a question about the meaning of a contract’s language, the contract will be construed against the party preparing it.

LaPuzza v. Prom Town House Motor Inn, Inc. 191 Neb. 687, 217 N.W.2d 472 (1974)

Spring Creek Homes, LLC v. Shurigar, 28 Neb.App. 785, 948 N.W.2d 297 (2020)

III. A court is not free to rewrite a contract or to speculate as to terms of the contract which the parties have not seen fit to include.

Benjamin v. Bierman, 305 Neb. 23, 942 N.W.2d 283 (2020)

Gibbons Ranches, L.L.C. v. Bailey, 289 Neb. 949, 857 N.W.2d 808 (2015)

IV. The interpretation given to a contract by the parties themselves while engaged in the performance of it is one of the best indications of true intent and should be given great, if not controlling, influence.

Keller v. Bones, 260 Neb. 202, 616 N.W.2d 883 (2000)

Strayer v. City of Omaha, 209 Neb. 734, 311 N.W.2d 520 (1981)

- V. “In order to recover in an action for breach of contract, the plaintiff must plead and prove the existence of a promise, its breach, damage, and compliance with any conditions precedent that activate the defendant’s duty.”**

Henriksen v. Gleason, 263 Neb. 840, 847, 643 N.W.2d 652 (2002).

Stern v. On Time Freight Systems, Inc., 1 Neb. App. 302, 493 N.W.2d 348 (1992)

- VI. To successfully bring an action on a contract, a plaintiff must first establish that the plaintiff substantially performed the plaintiff’s obligations under the contract.**

VRT, Inc. v. Dutton-Lainson Co., 247 Neb. 845, 530 N.W.2d 619 (1995)

ADC-I, Ltd. v. Pan American Fuels, 247 Neb. 71, 525 N.W.2d 190 (1994)

RM Cambell Industrial, Inc. v. Midwest Renewable Energy, LLC., 294 Neb. 326, 886 N.W.2d 240 (2016)

- VII. The determination whether substantial performance has occurred or not is determined based upon the facts and circumstances of any individual case.**

VRT, Inc. v. Dutton-Lainson Co., 247 Neb. 845, 530 N.W.2d 619 (1995)

First Data Resources, Inc. v. Omaha Steaks International, Inc., 209 Neb. 327, 307 N.W.2d 790 (1981)

Bloedorn Lumber Co. v. Nielson, 300 Neb. 722, 915 N.W.2d 786 (2018).

Sorenson v. Dager, 8 Neb.App. 729, 601 N.W.2d 564 (1999)

- VIII. Constructive amendment of pleadings on appeal is permitted when the effect will be to acknowledge that certain issue upon which the lower court’s decision has been based or issues consistent with the Trial Court’s judgment have been litigated.**

Blinn v. Beatrice Community Hospital and Health Center, Inc., 270 Neb. 809, 708 N.W.2d 235 (2006)

Hess v. Heger, 9 Neb. App. 748, 619 N.W.2d 237 (2000)

IX. In building and construction contracts, in the absence of an express agreement to the contrary, the law implies that the structure will be erected in a reasonably good and workmanlike manner and will be reasonably fit for the intended purpose.

McGill Restoration, Inc. v. Lion Place Condo. Ass'n, 309 Neb. 202, 959 N.W.2d 251 (2021)

Lindsay Mfg. Co. v. Universal Surety, Co. 246 Neb. 495, 519 N.W.2d 530 (1994)

Lange Industries, Inc. v. Hallam Grain Co., 244 Neb. 465, 507 N.W.2d 465 (1993)

Langel Chevrolet-Cadillac, Inc. V. Midwest Bridge & Const. Co., 213 Neb. 283, 320 N.W.2d 97 (1983)

Tibbs v. Fisher, 208 Neb. 306, 307, 303 N.W.2d 293 (1981)

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Groeteke v. Stubbs, 196 Neb. 114, 241 N.W.2d 538 (1976)

Henggeler v. Jindra, 191 Neb. 317, 214 N.W.2d 925 (1974)

X. Mutual assent by the parties is required to modify a contract that substantially changes liabilities of the parties.

Solar Motors, Inc. v. First Nat. Bank of Chadron, 249 Neb. 758, 545 N.W.2d 714 (1996).

XI. Damages are not recoverable for loss that the injured party could have avoided without undue risk, burden, or humiliation.

Meyer Nat. Foods LLC v. Greater Omaha Packing Co., 302 Neb. 509, 925 N.W.2d 39 (2019)

STATEMENT OF FACTS

By 2019, the County bridge had become unsafe for vehicles or public travel. (479:9-18; 481:3-11) The bridge was closed in 2019 and was never reopened. (479:9-18; 584:4-7) Ultimately the bridge was replaced with a box culvert. (387:18-25; 388:1-3; 584:4-19)

K2's proposal for the "Nemaha County Bridge Repair" obligated it as follows: "K2 Construction will remove and salvage existing timber decking. We then will, install (4) HP10x42 piling at 60'-0" lengths at the North Abutment of the Nemaha County Bridge, per engineer's request. After installation of the H-Piling, we will weld existing substructure steel to the new substructure steel and piling." (E12, p.1)

At the time of the proposal, the County was represented by three commissioners. Michael Hall of District 1, Bryan Mellage of District 2, and Larry Holtzman of District 3. The bridge was located within District 3.

K2 did not do any repair work to the bridge. (484:20-25; 485:1-25; 486:1-25; 487:1-8) K2 neither removed any timber decking nor salvaged any existing timber decking. (487:13-25; 488:1-3) K2 did not install any HP 10x42 piling, at 60'-0" lengths, or install any piling at the County bridge. (488:4-25; 489:1-8) K2 did not weld any existing substruction steel to any new substructure steel or piling. (490:17-25) K2 did not make any improvement to the County bridge. (391:12-16; 392:18-22)

Commissioner Hall is a high school graduate and was a diesel mechanic for thirty-five years. (461:4-23) Mr. Hall did not have any contact with anyone from K2. (463:1-17) Mr. Hall had no understanding from K2's proposal that K2 would be making a claim for stamped plans and approvals of an engineer to be provided by the County. (464:5-11)

Mr. Mellage is a high school graduate and was a truck and tractor mechanic for 45 years. (394:24-25; 395:1-14) He had no personal experience with repairing bridges or building bridges. (395:15-19)

Mr. Mellage did not have any discussion with K2 personnel regarding engineering plans and specifications or approvals. (390:17-25) Before K2's email of March 15, 2022, at 12:24 p.m., Mr. Mellage was unaware that K2 would be claiming under its proposal that the County was to provide K2 with stamped plans and approvals of an engineer. (E37, p.1; 391:1-11; 393:6-25; 394:1-11) Mr. Mellage understood from K2's email of March 15, 2022, at 12:24 p.m. that K2 was adding \$50,000.00 to the project. (E37, p.1; 394:12-23)

Commissioner Larry Holtzman is a high school graduate with one year of trade school and thirty years of being a handyman. (413:25; 414:1-4) Mr. Holtzman had no expertise in bridge construction or bridge repairs. (414:5-9)

On February 15, 2022, Mr. Holtzman met at the bridge site with Thomas Schwab of K2. (414:17-25; 415:1-6) Also present was Dan Alexander of Midwest Engineering. (415:7-8) Mr. Holtzman testified that the purpose of the meeting was to “get an idea of what” needed to be done to make the bridge useable and to obtain “an estimate of cost”. (415:21-25; 416:1-5, 20-23) Mr. Holtzman had no conversation about the County supplying any engineering. (417:5-16) Mr. Holtzman had no knowledge of any plans or specifications and approvals of an engineer being imposed upon the County by K2 until March 15, 2022. (418:19-25; 419:1-25; 420:1-24) Mr. Holtzman testified that he did not direct K2 to mobilize to the bridge site, start work at the bridge site, or take materials to the bridge site. (421:7-13)

While at the bridge site on February 15, 2022, Mr. Holtzman understood from Mr. Schwab of K2 that the total cost of repairs to the existing bridge structure would be between \$30,000 and \$40,000 resulting in a useable, functionable, and safe bridge. (422:25; 423:1-25) The only difference Mr. Holtzman observed about the bridge, from before February 15, 2022 and after K2 left the site in March, 2022, were timber planks had been removed from the bridge. (424:17-25; 425:1-12) The timber planks were removed by the County road crew. (425:3-4)

Dan Alexander, a civil engineer with Midwest Engineering testified that he was at the meeting at the bridge site on February 15, 2022, that included Mr. Holtzman and Thomas Schwab of K2. (441:24-25; 442:1-6) Mr. Alexander did not give any directions for K2 to perform any services or to do any bridge repair work. (443:3-13) Mr. Alexander did not have any discussion to provide engineering services or any engineering for the bridge repair. (443:14-22) While at the bridge site on February 15, 2022, Mr. Schwab estimated the total cost of the bridge repair project at \$30,000 to \$40,000. (444:1-25; 445:1-21)

Mr. Alexander did not direct K2 to mobilize at or about the bridge site. (446:15-19) Mr. Alexander did not request K2 to install any pilings at the bridge. (447:4-7) Mr. Alexander did not direct K2 to begin any work at the bridge site or

to the bridge, or to purchase and deliver any materials to the bridge site. (447: 8-17) Mr. Alexander did not request K2 to remove or salvage any existing timber decking from the bridge. (450:25; 451:1-5) Mr. Alexander did not request K2 to weld any existing substruction steel or new substructure steel or piling. (451:11-16) At no time did Mr. Alexander make any request of K2 to do what is shown within K2's proposal. (E12, p.1; 456:16-25; 457:1-2)

Following the February 15 meeting and after reviewing K2's proposal, Mr. Alexander did recommend to the commissioners not to move forward with K2's proposal. (449:24-25; 450:1-24) Other than the discussion on February 15, 2022, Mr. Alexander had no other communication with K2 regarding the bridge project. (447:18-23) At no time did Mr. Alexander inform K2 that he would provide K2 with stamped plans and approvals to repair the bridge or that he would provide K2 with specific drawings. (448:7-14)

Diane Johnson was the Nemaha County Clerk. (467:9-14) On the afternoon of March 15, 2022, Ms. Johnson received an email that came from K2 showing a time of March 15, 2022, at 12:24 p.m. (E37, p.1, 468:24-25; 469:1-18) Upon receiving the March 15, 2022, 12:24 p.m. email of K2, Ms. Johnson called Mark Mainelli, the County Highway Superintendent, and informed him of the content of that email because it requested stamped plans and approvals by an engineer. (E37, p.1, 469:19-25; 470:1-15; 471:4-15) Other than the March 15, 2022, 12:24 p.m. email Ms. Johnson had not seen any other correspondence or emails from K2 requesting or asking for engineering plans or approvals. (470:16-25; 471:1-3; 472:3-9)

James Holthus is the county road foreman of District 3. (476:7-14; 477:10-17) Mr. Holthus' duties with Nemaha County include maintenance and repair of county roads and bridges. (476:18-25; 477:1-9) Beginning in 2015, Mr. Holthus made visual inspections of the bridge one or two times a month. (478:4-25; 479:1-8) Mr. Holthus testified the bridge was not useable after July, 2019. (481:3-11)

On March 8, 2022, Mr. Holthus, together with two other county workers, in an hour's time, removed approximately 160 square feet of plank from the deck of the bridge. (481:12-25; 482:1-17; 483:10-19; 484:8-15; 524:9-17) Mr. Holthus did not observe any work or repair done to the bridge by K2. (484:20-25; 485:1-

25; 486:1-25; 487:1-8) K2 did not remove any timber decking or salvage any existing timber decking. (487:13-25; 488:1-3) K2 did not install any H-piling. (488:4-25; 489:1-8) Mr. Holthus testified that he did not see any substructure steel at the bridge site. (490:17-19) All of the timber decking needed replaced to use the bridge. (499:11-25; 500:1) Mr. Holthus further testified that there was not any designated portion of the bridge that could have been used as a bridge after March of 2022. (506:2-8)

Mark Mainelli has been a licensed civil engineer in Nebraska since 1989. (E64; 526:20-25; 527:1-6) Mr. Mainelli has extensive experience working on the rehabilitation and replacement of all types of bridge structures. (E64; 529:4-25; 530:1-25; 531:1-25; 532:1-25; 533:1-18) Mr. Mainelli holds a Class A Highway Superintendent's License. (535:17-25; 537:8-25; 538:1-25; 539:1-18)

Mr. Mainelli had made inspections of the subject bridge multiple times before February, 2022. (540:2-23) In 2019 the bridge was closed. (541:6-16) There was a Bridge Scour Plan of Action prepared for the bridge in 2008. (541:9-16; 542:1-25; 543:1-25; 544:1-7) In 2008, the plan was to replace the structure as the "channel was in an active mode of moving and failure. The truss [were] beyond its service life, and the piers and the abutments were also in such disrepair that repair wasn't deemed feasible at the time." (544:10-17) The condition of the bridge continued to deteriorate after 2008. (544:18-25; 545:1-7)

There was also a Nebraska Department of Transportation Fracture Critical and Routine Inspections Report on the subject bridge from October, 2019. (552:19-24) Mr. Mainelli was familiar with that report and testified that in forming opinions concerning the preparation of stamped plans and approvals he would need to take into account the report of October, 2019. (552:25; 553:1-22)

The bridge was an early 1900s-type truss. (553:23-25; 554:1-8) The channel condition of the bridge was rated, within the Nebraska Department of Transportation Fracture Critical and Routine Inspections Report of October, 2019, at a two; a critical rate. (554:9-17) That rate had been lowered from five to two because of "the active channel bank failing, sliding into the river...taking the fill away from the abutments and the piers and causing the piers to bow and exposing the north abutment piling." (554:18-23) As the bank eroded it was in an active state and "imminently going to fail." (554:24-25; 555:1)

When Mr. Mainelli was informed of the content of the email from K2, dated March 15, 2022, 12:24 p.m., he went to the bridge site within a few hours to see for himself what was happening at the bridge site as he had seen no plans. (E37, p.1; 567:4-16) Opening the bridge was a public safety issue. (567:17-25; 568:1-5) Whoever, as the engineer, subsequently prepared stamped plans and approvals would then be responsible for the work done under those plans and for the safety of the public using the bridge. (567:18-25; 568:1-25; 569:1-25; 570:1-25; 571:1-25; 572:1-5) From a safety perspective, Mr. Mainelli testified that the bank was not stable and they “were driving pile into an unstable bank. And that there was absolutely no way that this project was going to be able to move forward.” (578:3-17)

Mr. Mainelli did not observe any repairs made to the bridge resulting from K2’s proposal and did not observe any improvement to the bridge after January, 2022. (594:10-25; 595:1-15) Mr. Mainelli observed no benefit or value to the County as a result of K2’s mobilization to the bridge site as well as no benefit or value to the County from anything K2 did at the bridge site. (595:17-25; 596:1-3)

SUMMARY OF ARGUMENT

K2 is attempting to read its proposal to mean that the County was required to provide K2 with stamped plans or specifications and approvals, but K2 cannot point to any part of the proposal that states as much. K2’s proposal contained no language of promise or obligation by the County to provide stamped plans and approvals of an engineer. (E12, p.1)

The County neither received nor retained any benefits from K2’s proposal. The acts and services of K2 did not confer upon the County a benefit. Nothing K2 did improved the County's bridge, its function, or use; not a single repair was made to the bridge by K2. (391:12-16; 392:18-22; 484:20-25; 485:1-25; 486:1-25; 487:1-25; 488:1-25; 489:1-8; 490:17-25)

ARGUMENT

I. Contract Interpretation

The question of breach of contract is one of contract interpretation. Contract interpretation begins with the language of the contract. *Gibbons*

Ranches, L.L.C. v. Bailey, 289 Neb. 949, 857 N.W.2d 808 (2015). The starting point for any contract interpretation is the plain language of the agreement. The plain and unambiguous meaning of a written agreement controls. If a court determines that a contract is ambiguous, the court will generally apply the rule of *contra preferentem* resolving the ambiguity against the drafter. It being reasoned that the party who drew up the contract holds the power of the pen and recognizing the legal maxim that a contract should be construed most strongly against the party who prepared the document. *LaPuzza v. Prom Town House Motor Inn, Inc.* 191 Neb. 687, 217 N.W.2d 472 (1974); *Spring Creek Homes, LLC v. Shurigar*, 28 Neb.App. 785, 948 N.W.2d 297 (2020).

K2 was commercially artful. Thus, its proposal's cursory silence on stamped plans and approvals. As can be readily ascertained, K2's choice of terms within its proposal provide much more carefully for the protection of K2's own interests than for those of the County. K2 as the party who entirely drafted the proposal, had the opportunity to make the provisions clear as K2 did, in fact, with its provision that "K2 Construction anticipates a start date no later than March 22, 2022. A start date after to this date at the fault other than the Contractor will result in an additional (1.0) Lump Sum cost of "\$50,000.00 added to the project." (E12, p.1)

The written proposal of K2 expresses the agreement between the parties. (E12, p.1) More important, that proposal clearly does not contain a requirement upon the County to provide K2 with stamped plans and approvals. The County was not required to provide stamped plans and approvals when it had not agreed to do so. *Benjamin v. Bierman*, 305 Neb. 23, 942 N.W.2d 283 (2020).

The proposal in the instant case was prepared entirely by K2, and it must bear the responsibility for any indefiniteness of the terms. (291:5-25; 292:1-24) That to the extent the proposal is susceptible to two constructions as to the meaning of vague or ambiguous language, it is to be construed most strongly against the party who prepared the document, and most strongly in favor of the party who is not the author. *LaPuzza v. Prom Town House Motor Inn, Inc.* 191 Neb. 687, 217 N.W.2d 472 (1974); *Spring Creek Homes, LLC v. Shurigar*, 28 Neb.App. 785, 948 N.W.2d 297 (2020).

The proposal of K2 did not include any provision, clause, or term that required the County to provide stamped plans and approvals for the scope of the work set forth in K2's proposal. (E12, p.1) The proposal made by K2 that was accepted by the County was devoid of any directive by K2, or of any agreement by the County to provide K2 with stamped plans and approvals. *Lange Industries, Inc. v. Hallam Grain Co.*, 244 Neb. 465, 507 N.W.2d 465 (1993); *Henggeler v. Jindra*, 191 Neb. 317, 214 N.W.2d 925 (1974).

K2 in its proposal stated what K2 would do and how K2 would do it. The County had no hand in preparing the proposal submitted by K2. (291:5-25; 292:1-24) The plans and specifications within K2's proposal were plans and specifications of K2 for its scope of work. (E12, p.1) That K2 failed to provide any contractual obligation upon the County to provide K2 with plans and specifications does not, at K2's unilateral volition, impose additional responsibilities upon the County. *Solar Motors, Inc. v. First Nat. Bank of Chadron*, 249 Neb. 758, 545 N.W.2d 714 (1996).

In reading K2's proposal as a whole, specifications for the bridge repair are directly expressed in the proposal. More particularly, the proposal of K2 sets forth the repair work within the proposal, noting specifically that "We Propose hereby to furnish material and labor-complete in accordance with above specifications...." (E12, p.1) The proposal clearly does not state in accordance with plans and specifications to be provided by the County. Further, under the acceptance of proposal it again adds "[t]he above prices, specifications and conditions are satisfactory and are hereby accepted. You are authorized to do the work as specified. Payment will be made as outlined above." (E12, p.1) There was nothing in K2's proposal that expressed that the County warranted the sufficiency of K2's specifications.

The County's authorization is circumscribed accordingly by the specifications expressed by K2 within its proposal. K2 does list twenty-one exclusions in its proposal. The broad category of exclusions simply do not address stamped plans or specifications and approvals. (E12, p.1)

All of the exclusions, read together however, do not amount to expressing that the County was required to provide stamped plans or specifications and approvals for the bridge repair work described in K2's proposal. The words

“stamped”, “plans”, and “approvals” do not appear anywhere within K2’s proposal. (E12, p.1) In this respect, the Trial Court stated “[t]he contract speaks for itself.” (137:7-8) The Trial Court further reiterated “[e]xhibit 12 really speaks for itself.” (143:17-18)

In hindsight, it would have been much different had the commissioners relied upon Mr. Mainelli rather than K2. Nevertheless, the County commissioners who accepted K2’s proposal for repairing the County bridge were entitled to rely on K2’s knowledge and experience in the construction and repair of bridges. *Groeteke v. Stubbs*, 196 Neb. 114, 241 N.W.2d 538 (1976). The County was entitled to rely upon the plan and “specifications” of K2 within its proposal, calling for K2 to “install (4) HP10x42 piling at 60’-0” lengths at the North Abutment” and “[a]fter installation of the H-Piling,” welding “existing substructure steel to the new substructure steel and piling.” (E12, p.1) K2 was in the construction business, not the commissioners. The commissioners had no reason to read into K2’s proposal a requirement for stamped plans or specifications and approvals which was not expressed. To the extent K2’s own specifications within its own proposal are unsound that is the proposal K2 made in its entirety. (291:5-25; 292:1-24)

The words of K2’s email of March 15, 2022, 12:24 p.m. positively evince K2’s refusal to perform repairs to the County bridge until it has stamped plans and approvals of an engineer. (E37, p.1) At that time K2 had not made a single repair to the County bridge. So far as the terms of K2’s proposal were concerned, the County had made no agreement or promise to provide K2 with stamped plans and approvals of an engineer. (E12, p.1)

II. Substantial Performance

What constitutes “substantial performance” is a question of fact. What the County contracted for and what the County actually received were two entirely different things. Substantial performance is characterized by completion of the fundamental purpose and intended benefit to be realized from the contract. Repairing the bridge was the very essence for the proposal. (E12, p.1)

To successfully bring a cause of action for breach of contract, a plaintiff first is required to establish that it substantially performed the plaintiff’s

obligations under the contract. *VRT, Inc. v. Dutton Lainson Co.*, 247 Neb. 845, 530 N.W.2d 619 (1995); *ADC-I, Ltd. v. Pan American Fuels*, 247 Neb. 71, 525 N.W.2d 190 (1994). To establish substantial performance under a contract, any deviations from the contract must be relatively minor and unimportant. *Lange Indus. v. Hallam Grain Co.*, 244 Neb. 465, 507 N.W.2d 465 (1993).

Substantial performance is a relative term, and whether it exists is a question to be determined based upon the existing facts and circumstances of any individual case. *First Data Resources, Inc. v. Omaha Steaks Int., Inc.*, 209 Neb. 327, 307 N.W.2d 790 (1981); *Sorenson v. Dager*, 8 Neb.App. 729, 601 N.W.2d 564 (1999). Substantial performance is established when the claimant proves the following: (1) it made an honest endeavor in good faith to perform its part of the contract, (2) the results of its endeavor are beneficial to other party, and (3) the other party retained those benefits. *ADC-I, Ltd. v. Pan American Fuels, Limited-Gulf Coast*, 247 Neb. 71, 525 N.W.2d 190 (1994). If any one of the elements for proving substantial performance is not established by the claimant, “the performance is not substantial, and the party has no right to recovery.” *VRT, Inc. v. Dutton Lainson Co.*, 247 Neb. 845, 530 N.W.2d 619 (1995); *ADC-I, Ltd. v. Pan American Fuels*, 247 Neb. 71, 525 N.W.2d 190 (1994); *Bloedorn Lumber Co. v. Nielson*, 300 Neb. 722, 915 N.W.2d 786 (2018).

When does K2 ever satisfy its burden of first establishing substantial performance? Here, the evidence clearly established that K2 performed no work that improved the bridge or constituted a repair to the bridge. (391:12-16; 392:18-22; 484:20-25; 485:1-25; 486:1-25; 487:1-25; 488:1-25; 489:1-8; 490:17-25) The Trial Court determined upon the facts and circumstances of the instant case that K2 did not, in fact, substantially perform its obligations under the proposal. (T249-251) Where a Court makes factual findings in a bench trial of an action at law, those findings have the same “affect of a jury verdict and will not be set aside unless clearly erroneous.” *McGill Restoration, Inc. v. Lion Place Condo. Ass’n*, 309 Neb. 202, 238, 959 N.W.2d 251 (2021)

Repairing the bridge was the essential purpose of K2’s proposal. Consequently, K2’s refusal to perform any repair work to the bridge goes against the essential purpose of the proposal. All of the repairs that were to have been made by K2 under its proposal were left unperformed by K2. (391:12-16; 392:18-22; 484:20-25; 485:1-25; 486:1-25; 487:1-25; 488:1-25; 489:1-8; 490:17-25) It

follows that substantial performance had not been rendered by K2. It cannot be seriously argued that K2 substantially performed its obligations under the proposal when K2, in real time, on March 15, 2022, made abundantly clear that it had not started. (E12, p.1; E37, p.1)

Thus, K2 stating in no uncertain terms that “[p]er our signed proposal, if we cannot proceed by March 22, we will be billing an additional \$50,000.00 to the contract amount.” (E12, p.1; E37, p.1) The interpretation given to a contract by the parties themselves while engaged in the performance of it is one of the best indications of true intent and should be given great, if not controlling, influence. *Keller v. Bones*, 260 Neb. 202, 616 N.W.2d 883 (2000); *Strayer v. City of Omaha*, 209 Neb. 734, 311 N.W.2d 520 (1981).

The uncontroverted evidence shows that the County did not seek any benefit from K2’s proposal after K2 refused to make any bridge repairs. (566:17-25; 567:1-22; 569:1-25; 570:1-3; 578:3-21; 584:4-19) Moreover, before K2 refused to make any repairs there had not been any repair to the bridge made by K2 or any benefit provided by K2 to the County. (391:12-16; 392:18-22; 484:20-25; 485:1-25; 486:1-25; 487:1-25; 488:1-25; 489:1-8; 490:17-25) In the instant case, K2’s refusal to perform any bridge repair went to the sole purpose for its proposal. It follows that substantial performance had not been rendered.

The case of *Omaha Public Power Dist. v. Darin & Armstrong, Inc.*, 205 Neb. 288 N.W.2d 467 (1980) cited by K2 in its Brief did not involve, address or otherwise pertain to the issue of substantial performance. The underlying factual scenario of *Omaha Public* is considerably different from the instant case. There were advertisements for bids, there were bids, and there were completed plans and specifications in *Omaha Public*. There appeared to be ongoing changes in the plans, change orders, and at least one new agreement in *Omaha Public*. Unlike the instant case, it appears that the contractor in *Omaha Public* performed significant beneficial work for the owner; such that the issue of substantial performance never arose.

K2 also cites construction lien cases between private parties in actions to foreclose upon the construction liens. Neb. Rev. Stat. § 52-132 provides: “[n]otwithstanding the provisions on existence of a construction lien of section 52-131, no lien attaches under sections 52-125 to 52-159 to real estate owned by

the state, a county, a municipality, or other governmental agency or political subdivision.”

In *Lange Industries, Inc. v. Hallam Grain Co.*, 244 Neb. 465, 507 N.W.2d 465 (1993) the parties acknowledged that *Lange*, as the contractor, had the burden of establishing that it substantially performed the contract. *Id.* at 473. It was likewise noted in *Lange* that the Trial Court properly allocated to *Lange* the burden of proving substantial performance. *Id.* at 474. Substantial performance is shown when all the essential elements necessary for the full accomplishment of the purposes of the contract have been performed with such an approximation to complete performance that the owner obtains substantially what is called for by the contract. *RM Cambell Industrial, Inc. v. Midwest Renewable Energy, LLC.*, 294 Neb. 326, 886 N.W.2d 240 (2016).

In the instant case, the facts evince not only a lack of substantial performance, but facts evincing outright nonperformance of any bridge repairs whatsoever made or performed by K2. (391:12-16; 392:18-22; 484:20-25; 485:1-25; 486:1-25; 487:1-25; 488:1-25; 489:1-8; 490:17-25) In this light, the Supreme Court held that “[n]onperformance can be proved under a general denial.” *First Data Resources, Inc. v. Omaha Steaks International, Inc.*, 209 Neb. 327, 334, 307 N.W.2d 790 (1981). Paraphrasing from *First Data*, “an examination of the record reveals something substantially less than an unequivocal admission on the part of (the County) that (K2) had fully performed its obligations.” *Id.* at 333.

The burden of proving the existence of a valid, legally enforceable contract and all facts essential to the cause of action for breach is upon the party who asserts the contract. *Stern v. On Time Freight Systems, Inc.*, 1 Neb. App. 302, 493 N.W.2d 348 (1992). “In order to recover in an action for breach of contract, the plaintiff must plead and prove the existence of a promise, its breach, damage, and compliance with any conditions precedent that activate the defendant’s duty.” *Henriksen v. Gleason*, 263 Neb. 840, 847, 643 N.W.2d 652 (2002).

The Complaint does not allege that K2 substantially performed its contractual obligations in repairing the bridge. (T1-3) Moreover, K2 has not met its evidentiary burden of proof to first establish substantial performance. (391:12-16; 392:18-22; 484:20-25; 485:1-25; 486:1-25; 487:1-25; 488:1-25; 489:1-8; 490:17-25) K2, not the County, bears the burden to plead substantial performance

and to first establish that it substantially performed its contract obligations. The County does not have the burden of proof to establish that K2 failed to meet its own burden of proof that attaches to an affirmative defense. *Lange Industries, Inc. v. Hallam Grain Co.*, 244 Neb. 465, 507 N.W.2d 465 (1993); *First Data Resources, Inc. v. Omaha Steaks International, Inc.*, 209 Neb. 327, 307 N.W.2d 790 (1981).

Substantial performance was not pled, proved, or at any time first established by K2. At no point did K2 first establish that it substantially performed the essential and indispensable purpose for its proposal. The nonperformance of K2 totally defeated the object of the proposal which was to repair the bridge. There were no repairs made to the bridge by K2. (391:12-16; 392:18-22; 484:20-25; 485:1-25; 486:1-25; 487:1-25; 488:1-25; 489:1-8; 490:17-25) Likewise, K2 neither alleged specifically nor generally “that all conditions precedent have occurred or been performed.” (Neb. Ct. R. § 6-1109(2)(c)).

The County’s pleadings repetitively dispute K2’s performance under its proposal. The County specifically denied each of the following paragraphs of K2’s Complaint, paragraphs: 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, and 13, and provided enhanced reasons, therefore. (T10-15) Answering to the actual allegations of the Complaint, in paragraph 10 of the Answer, the County specifically denied “accepting any alleged work, denies retaining any alleged work, denies the use of any alleged work, and denies receiving a benefit from the plaintiff.” (T11-12) The County stated in paragraph 19 of the Answer “that the plaintiff was and is of sufficient sophistication and acumen within the construction business to have known of the impracticability of carrying out the purported contractual agreement without engineering plans and approvals.” (T13)

The County stated in paragraph 20 of the Answer that “[t]he contractual agreement alleged by plaintiff in its Complaint was improvident from the outset, did not comply with statutory requirements, was outside the authority of the County, was void in its inception, remained void, and was not validated by any purported or claimed performance by the plaintiff.” (T13) Facts pled are sufficient if they put the plaintiff on notice of the issues. *Hess v. Heger*, 9 Neb. App. 748, 619 N.W.2d 237 (2000). Further, among other affirmative defenses, the County stated that “[t]he Complaint, and each allegation therein, fails to state a claim upon which relief can be granted.” (T14) Courts are not bound to accept as true,

legal conclusions of a Complaint couched as factual allegations. All the same, K2 on March 15, 2022, negated its own substantial performance by making it clear to the County that it would be “billing an additional \$50,000 to the contract amount” for a start date later than March 22, 2022. (E12, p.1; E37, p.1)

The County’s position in this respect was further expounded within the Summary Judgment proceedings. The County’s Annotated Statement of Disputed Facts, filed on April 22, 2024, included, in part, that:

“Nemaha County did not accept, retain, use or benefit from any claimed work and materials alleged by K2 Construction; and K2 Construction did not perform any work or repair to the bridge, creek banks, or creek channel referenced or associated with its proposal to Nemaha County, dated February 8, 2022 (the purported agreement). See Exhibit 1- Affidavit of Mark W. Mainelli, ¶¶ 1, 2, 3, 4, 5, 6, 7, 9, 10, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 29, 30, 31, 32, and 33; Exhibit 2- Affidavit of James Holthus, ¶¶ 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 18, 19, and 20; Exhibit 6- Affidavit of Bryan Mellage, ¶¶ 3, 13, 14, 15, 16, 17, 18, 19, and 20; Exhibit 7- Affidavit of Larry Holtzman, ¶¶ 5, 6, 9, 10, 11, 16, 17, 18, 19, and 20; Exhibit 8- Affidavit of Michael Hall, ¶¶ 3, 9, 10, 13, 14, 15, 16, 17, 18, and 19; and Exhibit 9- Answer ¶¶ 6, 8, 10, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, and 27.” (T41-42)

The substance of the facts evincing K2’s failure to substantially perform under its proposal were reiterated in paragraphs 20, 22, and 23 of the County’s Annotated Statement of Disputed Facts. (T42-44)

When the plaintiff (claimant) is required to first establish that it substantially performed and fails to do so, it is nonsensical that the defendant would have the burden of proving a lack of substantial performance that attaches to pleading an affirmative defense. For the sake of argument, an inadequacy in this respect, is considered cured under Neb. Ct. R. Pldg. § 6-115(b) by the trial on the merits; held herein on February 21, 2025, and April 11, 2025. *Blinn v. Beatrice Community Hospital and Health Center, Inc.*, 270 Neb. 809, 708 N.W.2d 235 (2006). Before any testimony or evidence was adduced at the trial, the Court stated “the defendant did not need to list as an affirmative defense their allegation that there was no substantial performance.” (87:2-5; T188, 190)

Considerable evidence was presented during the trial, without objection, establishing a lack of substantial performance by K2. The County in its Closing Argument and Post Trial Memorandum of Law argued a lack of substantial performance by K2. (T223-227) In K2's Closing Argument Brief and Proposed Order, it argued that K2 did substantially perform. (T206-208) The Trial Court ruled and decided that K2 failed to establish substantial performance under the contract. (T249-251)

III. Reasonably Fit/Intended Purpose

In *Davco Realty Co. v. Picnic Foods, Inc.*, 198 Neb. 193, 198, 252 N.W.2d 142 (1977) the Court quoting *Henggeler v. Jindra*, 191 Neb. 317, 319, 214 N.W.2d 925 (1974) stated: "In building and construction contracts, in the absence of an express agreement to the contrary, it is implied that the building will be erected in a reasonably good and workmanlike manner and will be *reasonably fit for the intended purpose*." (Emphasis in original.) The record is devoid of an express agreement to the contrary. See also, *Lange Industries, Inc. v. Hallam Grain Co.*, 244 Neb. 465, 507 N.W.2d 465 (1993); *Tibbs v. Fisher*, 208 Neb. 306, 307, 303 N.W.2d 293 (1981).

There being no express agreement in the proposal otherwise, K2 carried the implied duty for the bridge being repaired in a reasonably good and workmanlike manner and reasonably fit for its intended purpose. (E12, p.1) Apparently, K2 was not willing to perform the terms imposed upon it by its own proposal. (E12, p.1; E37, p.1) Nothing in K2's proposal states or indicates that the bridge will not be repaired in a good and workmanlike manner and fit for the purpose of a bridge. *Davco Realty Co. v. Picnic Foods, Inc.*, 198 Neb. 193, 252 N.W.2d 142 (1977)

The testimony of Mr. Mainelli, an expert in the field of civil engineering, including bridge construction and rehabilitation, made clear that the proposal project was a debacle and "there was absolutely no way that this project was going to be able to move forward." (E64, p.1; 578: 5-11) Further observing that on the "[b]asis of public safety" and when all the items of the project are addressed, "including the overall condition of the bridge...from a public standpoint of public funds, this was a complete disaster." (578:5-17) Mr. Mainelli's testimony presented a reasonable explanation for why the County did

not succumb to K2's demands for stamped plans and approvals. (554:24-25; 555:1; 578:5-17) The County was not relieving K2 from liability for the fitness of the bridge repairs for its intended purpose or from deficiencies and safety concerns related to its proposal.

Here, K2's proposal was not made upon the basis of or in accordance with stamped or prescribed plans and specifications of the County. No such plans and specifications existed. (578:5-7) K2 needed the County to provide it with stamped plans or specifications and approvals to bestow upon K2 a safe harbor for any repair work under its proposal. *Lindsay Mfg. Co. v. Universal Surety, Co.* 246 Neb. 495, 519 N.W.2d 530 (1994); *Langel Chevrolet-Cadillac, Inc. V. Midwest Bridge & Const. Co.*, 213 Neb. 283, 320 N.W.2d 97 (1983).

Mr. Mainelli as a Class A Highway Superintendent and licensed civil engineer was bound by industry standards, legal regulations, and legal precepts in the conduct of his professional duties. (E64, p. 1; 529:20-25; 530:1-3; 538:4-25; 539:1-9; 542:2-25; 543:1-25; 544:1-5; 552:19-25; 553:1-22; 571:15-25; 572:1-5) An engineer providing stamped plans or specifications and approvals assumes and takes responsibility for the sufficiency of the plans and specifications. (567:4-25; 568:1-10; 569:5-25; 570:1-25; 571:1-14; 578:3-21) It follows that a competent engineer should not and will not prepare plans and specifications for a bridge repair project that has absolutely no way of moving forward and is rife with serious safety concerns. *Lindsay Mfg. Co. v. Universal Surety, Co.* 246 Neb. 495, 519 N.W.2d 530 (1994); *Langel Chevrolet-Cadillac, Inc. V. Midwest Bridge & Const. Co.*, 213 Neb. 283, 320 N.W.2d 97 (1983).

If K2's proposal was a valid contract, K2 stood to gain \$50,000 on a \$85,000 contract for a start date later than March 22, 2022. Further, the proposal unsigned by K2 included "[t]his proposal may be withdrawn if work does not commence within 30 days of date of acceptance." (E12, p.1; 246:6-25; 247:1-9) *Valley Boys, Inc. v American Family Insurance Company*, 306 Neb. 928, 947 N.W.2d 856, 864 (2020). The date of acceptance on the Proposal was March 2, 2022. (E12, p.1)

K2 mobilized to the bridge site knowing that it had no plans or specifications, knowing that the proposal it submitted to the County contained no express requirement that the County provide plans or specifications and

approvals, and claiming it would not do any repairs without stamped plans and approvals supplied by the County. (E12, p.1; E37:p.1) On March 15, 2022, K2 gave the County the choice, provide K2 with stamped plans and approvals or pay K2 \$50,000 for a start date later than March 22, 2022. (E37:p.1)

So long as K2 can fall back upon stamped plans or specifications furnished to it by the County, then K2 can effectively and substantially change the respective responsibilities and liabilities between the parties. *Solar Motors, Inc. v. First Nat. Bank of Chadron*, 249 Neb. 758, 545 N.W.2d 714 (1996). Of paramount importance is the safety of the traveling public using the County bridge and responsibility for the bridge repairs that attaches to stamped plans and approvals. The County although improvident in dealing with K2 as to its proposal, was prudent and fitting in not providing stamped plans and approvals to K2. Moreover, the proposal itself contains no expressed agreement waiving K2's implied obligation for the repairs being made in a reasonably good and workmanlike manner and reasonably fit for the intended purpose. (E12, p.1)

K2 surely observed the same channel, channel banks and deteriorating condition of the bridge that Mr. Mainelli had observed. K2 had to have been cognizant of the same unsound conditions that were observable at, about and with the bridge. This is not a case that if not K2 some other contractor would be making the repairs. The bridge was obsolete, time-worn beyond its years, deteriorated, and channeled with active erosion and scour. (479:1-25; 480:1-7, 17-25; 481:1-11; 540:9-25; 541:1-16; 542:2-25; 543:1-25; 544:1-25; 552:19-25; 553:1-25; 554:1-25; 555:1; 569:2-18; 585:4-19) The bridge was never repaired; it was replaced with a box culvert because the bridge needed to be replaced not repaired. (387:18-25; 388:1-3; 584:4-19) Suffice it to say, that there was never going to be any benefit to the County as a result of K2's proposal. In this light, counsel for K2 expressed "[w]e'll stipulate to his assertion that it wasn't going to provide any benefit at the end of the day had they fully performed the contract." (97:13-15) Unjust enrichment is not present in this case.

III. DAMAGES

K2 is responsible for its own losses. K2 chose to mobilize without any plans and approvals from the County. (E37:p.1) In fact, no plans or specifications and approvals from the County ever existed. (390:17-25; 391:1-11; 393:6-25;

394:1-11; 417:5-16; 418:19-25; 419:1-25; 420:1-24; 443:14-22; 448:7-14; 464:5-11; 567:4-25; 568:1-10) K2's proposal prepared entirely by K2 does not include a provision that requires the County to supply K2 with stamped plans or specifications and approvals of an engineer. (E12, p.1; 291:2-25; 292:1-3) K2 could have avoided all of its claimed losses without undue risk, burden, or humiliation. *Meyer Nat. Foods LLC v. Greater Omaha Packing Co.*, 302 Neb. 509, 925 N.W.2d 39 (2019).

K2's proposal included the provision that "a start date later than March 22, 2022...at the fault other than the Contractor will result in an additional...cost of \$50,000.00 added to the project." (E12, p.1) K2's proposal was unsigned by any representative of K2. (E12, p.1, 246:6-19) And, K2's proposal provided that "[t]his proposal may be withdrawn if work does not commence within 30 days of date of acceptance." (E12, p.1; 246:20-25; 247:1-9)

K2 would not have had any undue risk, burden, or humiliation in deferring mobilization on the basis of its proposal. K2 had positioned itself for an additional \$50,000 on an \$85,580 project for starting after March 22, 2022. (E12, p.1) K2 also could have simply withdrawn. Instead, K2 unilaterally mobilized to the bridge site.

At the end of the day, K2 should not be able to recover damages that emanate from its failure to perform any bridge repairs because of its unequivocal refusal to make any bridge repairs without stamped plans and approvals of an engineer. Here, K2 did nothing that repaired or added value to the County's bridge. Repairing the County bridge was the very essence of K2's proposal. The value to the County of nothing is nothing.

K2's nonperformance of any bridge repair was absolute and rendered the entire bridge structure unsuited for its intended purpose. K2 did not perform any repair work in accordance with the provisions of its proposal. More particularly, there was no stage in the bridge repair project when the bridge, or a designated portion thereof, was substantially complete in accordance with the proposal so that the County could occupy or utilize the bridge for its intended use. (391:12-16; 392:18-22; 484:20-25; 485:1-25; 486:1-25; 487:1-25; 488:1-25; 489:1-8; 490:17-25) The County obtained no benefit from K2's proposal. Accordingly, K2

has no legitimate claim under the Nebraska Construction Prompt Pay Act. Neb. Rev. Stat. § 45-1201 et seq.

CONCLUSION

The channel bank of the bridge was in an active state of erosion and imminently going to fail. (554:24-25; 555:1) “[T]here was absolutely no way that this project was going to be able to move forward.” (578: 5-11) The proposal project “was a complete disaster.” (578:14-17)

There is insufficient evidence before the Court to find that the Trial Court was clearly erroneous. The findings of the Trial Court in dismissing the case were substantially supported by the evidence. The decision and order of the Trial Court dismissing this case should respectfully be affirmed. (T246-252)

Respectfully Submitted:

Dated: January 7, 2026

By: /s/ Louie M. Ligouri

Louie M. Ligouri (16708)
Ligouri Law Office

Attorneys for Appellee and
Cross-Appellant

Case No. A-25-607

IN THE COURT OF APPEALS OF THE STATE OF NEBRASKA

K2 REAL ESTATE DEVELOPMENT, LLC,
Appellant and Cross-Appellee,

v.

NEMAHA COUNTY, NEBRASKA,
Appellee and Cross-Appellant.

Appeal from District Court of Nemaha County, Nebraska
The Honorable Julie D. Smith

BRIEF ON CROSS-APPEAL
OF NEMAHA COUNTY, NEBRASKA,
Appellee and Cross-Appellant

Prepared and Submitted by:

Louie M. Ligouri, #16708
Ligouri Law Office
1118 15th Street
P.O. Box 99
Auburn, Nebraska 68305
Telephone: 402-274-5484
Email: ligourilaw@hotmail.com

Attorneys for Appellee and Cross-Appellant.

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STATEMENT OF JURISDICTION

This Court has jurisdiction over this cross-appeal under the provision of Neb. Rev. Stat. § 25-1902 and Neb. Ct. R. § 2-109(D)(4).

STATEMENT OF THE CASE

A. Nature of the Case

This is a cross-appeal from an Order entered by the District Court on June 28, 2024, granting K2's Motion for Summary Judgment in part and denying it in part. (T104-116)

B. Issues Actually Tried in the Court Below

In support of the County's opposition to K2's Motion for Summary Judgment, the County offered Affidavits of Mark W. Mainelli, P.E. (E3), James Holthus (E4), Michael Weiss (E5), Dan Alexander (E6), Bryan Mellage (E7), Larry Holtzman (E8) and Michael Hall (E9).

C. How the Issues Were Decided and What Judgment Was Entered

The District Court in its Order of June 28, 2024, found that "Nemaha's contract with K2 is not illegal and Nemaha breached its contract with K2." (T116) The Court further found that there were "genuine issues of material fact regarding whether K2 was damaged by Nemaha's breach and the amount of those damages." (T116)

The District Court determined that Neb. Rev. Stat. § 39-810(1)(c) is limited to contracts only for the purchase of materials. (T113) The Court further expressed that in construing § 39-810 as a whole the provisions of § 39-810(1)(b) prevailed over § 39-810(1)(c). (T113) Otherwise, the District Court stated "any contract that had a component involving materials, even though the contract was also for labor, would be subject to § 39-810 (1)(c) and the county would be unable to enter any contract exceeding twenty thousand dollars." (T114)

D. Scope of Appellate Court's Review

The Appellate Court reviews the District Court's grant of summary judgment *de novo*. When reviewing an order granting a motion for summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence; question on such review is not how a factual issue is to be decided, but whether any real issue of genuine fact exists. *McDonald v. Fischer*, 8 Neb.App. 160, 589 N.W.2d 172 (1999).

A question of law raised in the course of consideration of a motion for summary judgment, as with any question of law, must be decided by the Appellate Court without reference to the decision of the trial court. *Maycock v. Hoody*, 281 Neb. 767, 799 N.W.2d 322 (2011).

ASSIGNMENTS OF ERROR

1. The District Court erred in its application of Neb. Rev. Stat. § 39-810 by its determination that a conflict existed between § 39-810(1)(b) and § 39-810(1)(c) and in resolving the conflict by determining that § 39-810(1)(b) prevailed over § 39-810(1)(c).
2. The District Court erred in determining that § 39-810(1)(c) did not apply to a contract by the County for materials for repairing a bridge, the cost and expense of which exceed twenty thousand dollars.
3. The District Court erred in determining that § 39-810(1)(b) did not apply to a contract by the County for the repair of a bridge, the cost and expense of which exceed one hundred thousand dollars, when the subject contract for repairing the County bridge included a provision for fifty thousand dollars to be added to a contract in the amount of eighty-five thousand five hundred dollars.
4. The District Court erred in determining that § 39-810(1)(b) did not apply to a contract by the County for the repair of a bridge, the cost and expense of which would exceed one hundred thousand dollars for the bridge to be, in fact repaired, as opposed to being partially repaired in segmented or fractional parts, necessitating the splitting contracts, when the actual repair of the bridge

to allow the bridge to be used as a bridge in fact would exceed one hundred thousand dollars.

5. The District Court erred in failing to view the evidence in a light most favorable to the County and failing to give the County the benefit of all reasonable inferences deducible from the evidence.
6. The District Court erred in ruling that paragraphs 18 and 19 of the Affidavit of Mark W. Mainelli P.E. were inadmissible as evidence on behalf of the County. (E3, p.4-5)

PROPOSITIONS OF LAW

- I. A court must place on a statute a reasonable construction which best achieves the statute's purpose, rather than a construction which would defeat that purpose.**

Salts v. Lancaster County, 269 Neb. 948, 697 N.W.2d 289 (2005)

State v. Bryant, 311 Neb. 206, 971 N.W.2d 146 (2022)

Gage County Bd. of Equalization v. Nebraska Tax Equalization & Review Comm'n, 260 Neb. 750, 619 N.W.2d 451 (2000)

King v. State, 260 Neb. 14, 614 N.W.2d 341 (2000)

Estate of Alberts, 293 Neb. 1, 875 N.W.2d 427 (2016)

- II. Courts are required to strictly construe statutory provisions which are designed by the Legislature to protect taxpayers and safeguard public funds.**

Anderson v. Peterson, 221 Neb. 149, 375 N.W.2d 901 (1985)

Bierman v. Campbell, 175 Neb. 877, 124 N.W.2d 918 (1963)

Arthur v. Trindel, 168 Neb. 429, 96 N.W.2d 208 (1959)

Chicago, S. P., M. & O. R. Co. v. Randolph, 163 Neb. 687, 81 N.W.2d 159 (1957)

Neumann v. Knox, 115 Neb. 679, 214 N.W. 290 (1927)

- III. Counties and county boards can only exercise such powers as are expressly granted by statute, and such grant of power must be strictly construed.**

Shanahan v. Johnson, 170 Neb. 399, 102 N.W.2d 858 (1960)

Neumann v. Knox, 115 Neb. 679, 214 N.W. 290 (1927)
Hustead v. Richardson County, 104 Neb. 27, 175 N.W. 648 (1919)
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State ex rel. v. Whedon v. York County, 13 Neb. 57, 12 N.W. 816 (1882)
Miller v. Marshall County, 641 N.W.2d 742 (Iowa 2002)
Kunkle Water & Electric, Inc. v. Prescott, 347 N.W.2d 648 (Iowa 1984)
Everds Brothers v. Gillespie, 126 N.W.2d 274 (Iowa 1964)
Madrid Lumber Co. v. Boone County, 121 N.W.2d 523 (Iowa 1963)

IV. If a contract is invalid when made, because in violation of some mandatory requirement of statute, it will be deemed *ultra vires*, and can be ratified only upon the conditions essential to a valid agreement in the first instance.

Gutta Percha & Rubber Mfg. Co. v. Village of Ogalalla, 40 Neb. 775, 59 N.W. 513 (1894)
Plattsmouth v. Murphy, 74 Neb. 749, 105 N.W. 293 (1905)
Tullock v. Webster County, 46 Neb. 211, 64 N.W. 705 (1895)

V. In accordance with the principle that the last expression of the legislative will is the law, in case of conflicting provisions, in the same statute, or in different statutes, the last in point of time or order of arrangement prevails.

Hoiengs v. County of Adams, 254 Neb. 64, 574 N.W.2d 498 (1998)
Alegent Health Bergan Mercy Med. Ctr. V. Haworth, 260 Neb. 63, 615 N.W.2d 460 (2000)
Stoller v. State, 171 Neb. 93, 105 N.W.2d 852 (1960)
Chilen v. Commercial Casualty Ins. Co., 135 Neb. 619, 382 N.W. 366 (1939)
Van Horn v. State, 46 Neb. 62, 64 N.W. 365 (1895)

VI. One who contracts with a County is bound at its peril to take cognizance of statutory limitations upon the authority of the government agency.

Witzenburg v. State, 140 Neb. 171, 299 N.W. 533 (1941)
Gutta Percha & Rubber Mfg. Co. v. Village of Ogalalla, 40 Neb. 775, 59 N.W. 513 (1894)
Plattsmouth v. Murphy, 74 Neb. 749, 105 N.W. 293 (1905)

VII. The test for the competitive bidding threshold is not the costs of an individual fragmented contract but the estimated costs of the total project.

Kunkle Water & Electric, Inc. v. Prescott, 347 N.W.2d 648 (Iowa 1984)
Everds Brothers v. Gillespie, 126 N.W.2d 274 (Iowa 1964)
City of Akron v. Akron-Westfield Cmty. Sch. Dist., 659 N.W.2d 223 (Iowa 2003)
Master Builders of Iowa v. Polk County, 653 N.W.2d 382 (Iowa 2002)

VIII. On a summary judgment motion the moving party bears the burden of demonstrating the absence of any genuine issue of material fact.

Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

STATEMENT OF FACTS

Jim Holthus was employed by Nemaha County since September, 2015, and as the Foreman of the Road and Bridge Crew since September, 2021. (E4, p.1) His duties included maintenance and repair of country roads and bridges. (E4, p.1) Mr. Holthus was familiar with the condition of the subject bridge from inspections and maintenance beginning in September, 2015. (E4, p.1) The bridge was closed in July of 2019 and remained closed until it was taken down and removed in 2023. (E4, p.2; E5, p.1) The bridge was not useable or safe for traffic, was in a deteriorating condition and the banks at each side appeared unstable with notable erosion and heavy scour. (E4, p.1; E5, p.1-2; E7, p.1; E8, p.2; E9, p.1)

K2 did not perform any repair work to the bridge. (E3, p.5; E4, p.2-3; E5, p.2; E7, p.3; E9, p.3) The condition of the bridge did not change or improve after February 15, 2022, except for planks removed from the bridge deck by Nemaha County personnel. (E3, p.5; E4, p. 2-3; E5, p.2) There was no work performed by K2 that had any benefit or value to the County. (E3, p.5-6; E4, p.3; E5, p.2; E7, p.3; E8, p.3-4; E9, p.3)

K2 left steel pilings off the road in the County right-of-way which needed to be removed because where the steel pilings were left presented a potential road

hazard and farming obstacle. (E3, p.6; E4, p.4 ; E5, p.3) The County has no use or need for the pilings and has not used the pilings. (E4, p.4; E5, p.3)

Michael Weiss became a County commissioner for District 3 on January 5, 2023. (E5, p.1) Mr. Weiss has been a self-employed builder and in construction for 25 years. (E5, p.1)

Dan Alexander has been a licensed engineer since 2018. (E6, p.1) The proposal of K2, of February 8, 2022, did not involve any competitive bidding or letting to the lowest responsible bidder. (E3, p.3-4; E6, p.1; E7, p.2; E8, p.2; E9, p.2) The proposal of K2, of February 8, 2022, did not involve any public advertising or public notice. (E6, p.1; E7, p.2; E8, p.2; E9, p.2) Stamped plans and specifications would be required to properly collect competitive bids. (E6, p.2)

Bryan Mellage was a County commissioner for District 2 and was personally familiar with the condition of the subject bridge from personal observations. (E7, p.1) There was no emergency for the work referenced within K2's proposal of February 8, 2022. (E3, p.6; E7, p.2; E8, p.3; E9, p.2)

Larry Holtzman was a County commissioner from January 3, 2019 to January 5, 2023. (E8, p.2) The proposal, dated February 8, 2022, was for \$85,580, showing \$43,500 as materials, and an additional \$50,000 for a start date after March 22, 2022 "at the fault other than the Contractor." (E8, p.1-2)

Michael Hall was a County commissioner for District 1 beginning January 3, 2019. (E9, p.1)

Mark Mainelli has been a licensed civil engineer for 38 years with specialized knowledge in assessing and inspecting bridges and preparing engineering plans, specifications and reports on bridges. (E3, p.1-2) He has been familiar with the condition of the subject bridge from personal inspections and observations prior to February, 2022 and subsequent to March, 2022. (E3, p.2) Mr. Mainelli stated that the subject bridge "was functionally obsolete, structurally deficient and aged well beyond its service life." (E3, p.3) The Affidavit of Mr. Mainelli evinces the substantial deteriorating condition of the bridge and creek banks. (E3, p.3) In order to stabilize the creek banks to properly protect the structure as part of an overall repair plan it would potentially add costs in excess

of \$100,000 to the project. (E3, p.3) The added costs for replacement piling at the south abutment would almost double the original projected cost. (E3, p.3) The material costs alone under K2's proposal of February 8, 2022, exceed \$20,000. (E3, p.3)

Mr. Mainelli stated within a reasonable degree of professional certainty that the work and materials described in K2's proposal would not have resulted in a functional bridge, or a bridge within accepted standards in the industry, and would have been a waste of public funds. (E3, p.6)

SUMMARY OF ARGUMENT

Competitive bidding is intended to shield the taxpayer from the costs and consequences of improvident actions of their government officials. Competitive bidding statutes are intended to be applied in a manner which best comports with their purpose of benefitting taxpayers, not enriching bidders. *Salts v. Lancaster County*, 269 Neb. 948, 697 N.W.2d 289 (2005); *Shanahan v. Johnson*, 170 Neb. 399, 102 N.W.2d 858 (1960); *Neumann v. Knox*, 115 Neb. 679, 214 N.W. 290 (1927).

The County and K2 exceeded the statutory thresholds for a County to enter into a contract for the repair of a county bridge. The threshold under Neb. Rev. Stat. § 39-810(1)(b) is based on the entire project cost. The threshold under Neb. Rev. Stat. § 39-810(1)(c) is based on the cost of materials for repairing the bridge regardless of the total project cost. The language of § 39-810(1)(c) is unambiguous and explicitly requires competitive bidding for materials for repairing a bridge exceeding \$20,000. The competitive bidding requirement under § 39-810(1)(c) is triggered when the cost of materials for repairing a bridge exceed \$20,000. The contract for materials must be advertised and awarded to the lowest responsible bidder subject to § 39-810(1)(d) upon the County rejecting any bid or bids. Labor costs and other project expenses are irrelevant to the \$20,000 threshold, under § 39-810(1)(c).

ARGUMENT

BRIEF ON CROSS-APPEAL

I. Competitive Bidding Statutes

If the manner in which the Legislature empowers a county to contract is expressly prescribed, that prescribed manner is both mandatory and exclusive. *State ex rel. v. Whedon v. York County*, 13 Neb. 57, 12 N.W. 816 (1882). “The requirements of competitive bidding in the letting of municipal contracts is uniformly construed as mandatory and jurisdictional, and nonobservance will render the contract void and unenforceable.” 10 McQuillin, *Municipal Corporations* (3rd rev. ed 2025) § 29:32 p. 598

Competitive bidding statutes delineate specific contract types and monetary thresholds. Under the competitive bidding statutes there are expressed prohibitions and specific statutory limitations imposed upon a County’s authority to enter into a contract for county bridges, material, and labor. “The statutory mandate of competitive bidding is grounded in sound public policy; it is the taxpaying citizen who provides the necessary funds and whose interest must be protected.” 10 McQuillin, *Municipal Corporations* (3rd rev. ed 2025) § 29:32 p. 602

“[C]ompetitive bidding, after public advertising, is a fundamental, time-honored procedure that assures the prudent expenditure of public money. *H. Cohen, Public Construction Contracts and the Law 1.1* (1961). Competitive bid statutes exist to invite competition, to guard against favoritism improvidence, extravagance, fraud, and corruption, and to secure the best work of supplies at the lowest possible price. Such statutes are enacted for the benefit of taxpayers.” *Anderson v. Peterson*, 221 Neb. 149, 153, 375 N.W.2d 901 (1985).

A County in this State is a creature of statute with no inherent authority. A grant of power to a County is strictly construed and any fair and reasonable doubt of the existence thereof is resolved against the County in favor of the taxpayer. *Shanahan v. Johnson*, 170 Neb. 399, 102 N.W.2d 858 (1960); *Chicago, S. P., M. & O. R. Co. v. Randolph*, 163 Neb. 687, 81 N.W.2d 159 (1957). The authority the

County may have must be exercised within the provisions of the applicable statute. *Bierman v. Campbell*, 175 Neb. 877, 124 N.W.2d 918 (1963).

The County undertook to have bridge repairs made by contract. K2's proposal of February 8, 2022, specifically provided for materials for repairing the County bridge described as HP 10x42 and Substruction Steel, showing a combined total cost and expense of \$43,500. (E2, p.13) In this respect, Mark Mainelli, a civil engineer, with approximately 38 years of experience preparing engineering plans, specifications and reports on bridges, including bridges much like the subject bridge, expressed that the contract amount for materials alone within K2's proposal, "exceeded twenty thousand dollars." (E3, p.1, 3)

Thus, to have the repairs made by contract, the County was required to let the contract on competitive bidding in accordance with Neb. Rev. Stat. § 39-810(1)(c) and (1)(d). Certainly, "[a]ll contracts for materials for repairing...bridges...the cost and expense of which exceed twenty thousand dollars, shall be let to the lowest responsible bidder..." places K2's proposal within the definite scope of the plain statutory language of (1)(c).

This is a mandatory provision. The purpose of the provision in § 39-810(1)(c) is to protect the taxpayer and safeguard public funds. The provision should be interpreted accordingly. *Plattsmouth v. Murphy*, 74 Neb. 749, 105 N.W.293 (1905); *State ex rel. Grady v. Commissioners Lincoln Co.*, 18 Neb. 283, 25 N.W.91 (1885). Because the cardinal purpose of competitive bidding statutes is to protect the public as taxpayers, that purpose should not be hindered in interpreting the statutes.

Because the proposal included the cost and expense of materials exceeding \$20,000, the parties were required to comply with the competitive bidding requirements for the purchase of the materials in accordance with Neb. Rev. Stat. § 39-810(1)(c) & (1)(d). (E2, p.13) That is, the materials portion of the subject proposal was subject to the competitive bidding requirement under § 39-810(1)(c) because the cost of those materials exceeded \$20,000. This interpretation of Neb. Rev. Stat. § 39-810(1)(c) not only matches the language of the statute, but serves its purposes and objectives, and is consistent with the obligation to construe the competitive bidding statutes in favor of the taxpayer.

The cost of labor is not the focus of Neb. Rev. Stat. § 39-810(1)(c) or (1)(d); it is the cost and expense of materials. The threshold of \$20,000 is directed upon materials and not upon labor. Neb. Rev. Stat. § 39-810(1)(c) mandates competitive bidding for the materials portion of the proposal when the costs and expense for those materials exceed \$20,000, regardless of the total project cost. “The words of a governing text are of paramount concern, and what they convey, in their context, is what the text means.” *Antonin Scalia & Bryan A. Garner, Reading Law* (2012), at 56.

Under Neb. Rev. Stat. § 39-810(1)(c), the County may reject any and all bids submitted for materials and under (1)(d) then purchase materials without bidding; but only after previously rejecting the submitted bids. That did not occur here nor is there any evidence of any such occurrence. There was no competitive bidding in the instant case relative to K2’s proposal. (E2, p.13; E3, p.3-4; E6, p.1-2; E7, p.2; E8, p.2; E9, p.2)

K2 argued and the District Court accepted that Neb. Rev. Stat. § 39-810 (1)(a) and (1)(b) prevailed over (1)(c) to the exclusion of (1)(c) and that (1)(c) applied to contracts only for materials. (T70-72; T110-114) The District Court found reading the statute as presented by the County did “not make practical sense.” (T114; T80-85) The County sees no inherent contradiction between sections (1)(b) and (1)(c); which can be read harmoniously. To the extent (1)(b) and (1)(c) cannot be construed as harmonious, (1)(c) prevails as the last in order of arrangement. To the extent that there is a conflict or inconsistency between (1)(b) and (1)(c) then (1)(c) prevails over (1)(b). In no event, does (1)(b) or (1)(a) prevail in application to the exclusion of (1)(c).

In accordance with the principle that the last expression of the legislative will is the law, in case of conflicting provisions, in the same statute, or in different statutes, the last in point of time or order of arrangement prevails. *Hoiengs v. County of Adams*, 254 Neb. 64, 574 N.W.2d 498 (1998); *Alegent Health Bergan Mercy Med. Ctr. V. Haworth*, 260 Neb. 63, 615 N.W.2d 460 (2000); *Stoller v. State*, 171 Neb. 93, 105 N.W.2d 852 (1960); *Chilen v. Commercial Casualty Ins. Co.*, 135 Neb. 619, 382 N.W. 366 (1939); *Van Horn v. State*, 46 Neb. 62, 64 N.W. 365 (1895)

Here, the District Court added the word “only” in place of the word “all” in § 39-810(1)(c). No reasonable meaning of “all” translates to “only.” The express words of Neb. Rev. Stat. § 39-810(1)(c) require competitive bidding whenever the costs and expense of materials for repairing a bridge exceed \$20,000. *Townsend v. Holt County*, 40 Neb. 852, 59 N.W. 381 (1894). Such is the plain meaning of the statute. The word “all” enlarges the field or scope of Neb. Rev. Stat. § 39-810(1)(c). “All” connotes that a plurality of various contracts are within the ambit of competitive bidding under (1)(c). There would be no reason for the legislature to use “all” at the beginning of § 39-810(1)(c) when it meant “only.”

It is not within the province of a Court to read a meaning into a statute that is not warranted by the language; neither is it within the province of a Court to read anything plain, direct, or unambiguous out of a statute. A Court may not add language to the plain terms of a statute to restrict its meaning. *State v. Bryant*, 311 Neb. 206, 971 N.W.2d 146 (2022); *Estate of Alberts*, 293 Neb. 1, 875 N.W.2d 427 (2016). When the language of a statute is clear the words of the statute are the end of any judicial inquiry regarding its meaning. *King v. State*, 260 Neb. 14, 614 N.W.2d 341 (2000). Neb. Rev. Stat. § 39-810(1)(c) fits the proposal in this case exactly as (1)(c) is written. The language of § 39-810(1)(c) needs nothing in its wording changed, added or deleted for application to the proposal. (E2, p.13)

Construing the statute as was done here, the mandate of Neb. Rev. Stat. § 39-810(1)(c) requiring competitive bidding on all contracts for materials for repairing bridges the cost and expense of which exceed \$20,000 can be wholly defeated by simply adding \$50 of labor to a contract for materials for repairing a bridge having material costs of \$99,580. *Gage County Bd. of Equalization v. Nebraska Tax Equalization & Review Comm’n*, 260 Neb. 750, 619 N.W.2d 451 (2000). It would be absurd that a contract for materials of \$20,010 for repairing a bridge would require competitive bidding; but a contract for materials of \$99,580 and \$50 of labor would not require any competitive bidding.

The record fails to show that any bids were advertised for, that K2 was ever determined to be the lowest bidder, and that the proposal was in conformity with any bid specifications or requirements. (E3, p.3-4; E6, p.1-2; E7, p.2; E8,

p.2; E9, p.2) The problem in this case is not simply an irregularity, but the complete absence of any attempt to comply with any of the requirements of competitive bidding. “If a contract is invalid when made, because in violation of some mandatory requirement of statute, it will be deemed *ultra vires*, and can be ratified only upon the conditions essential to a valid agreement in the first instance.” *Gutta Percha & Rubber Mfg. Co. v. Village of Ogalalla*, 40 Neb. 775, 59 N.W. 513 (1894); *Plattsmouth v. Murphy*, 74 Neb. 749, 105 N.W. 293 (1905).

II. Bid Splitting

Here, if the bridge repairs were completed for the bridge to become safe and usable, and therefore reopened, at least two statutory thresholds would be violated. The \$20,000 plus in materials for the bridge repair project contemplated by the proposal fails to comply with Neb. Rev. Stat. § 39-810(1)(c). Further, fragmenting a repair project into parts so that the amount of each contract falls below even the highest threshold under the law of \$100,000 is directly contrary to the purpose for competitive bidding. Neb. Rev. Stat. § 39-810(1)(b).

Active scour and erosion which directly threaten the stability of the bridge’s foundations and abutments cannot be disregarded in meeting the basic functional and safety needs for reopening the bridge for public use. From an engineering and safety standpoint an unsafe bridge that may be only partially repaired is a dangerous bridge.

Mr. Mainelli’s affidavit states that “[i]n order to stabilize the channel and the channel banks, at this site to properly protect the structure as part of an overall repair plan would potentially add costs in excess of \$100,000.00 to the project.” (E3, p.3) The affidavit further evinces that “[t]he additional cost associated with driving replacement piling at the south abutment would almost double the original project cost.” (E3, p.3) In this respect, in Mr. Mainelli’s “opinion within a reasonable degree of professional certainty...pile repairs to the existing north bridge abutment structure would not bring the bridge to within acceptable and existing engineering standards. The proposal did not address the south abutment piling that was in similar condition and would require replacement.” (E3, p.3)

It would be a waste of taxpayer funds to do approximately \$85,000 of repairs, leave that repair unprotected from an unstable channel and unstable banks

and leave the south half of the bridge in an unsafe and dangerous condition. (E3, p.3) *Hustead v. Richardson County*, 104 Neb. 27, 175 N.W. 648 (1919); *In State ex rel. Whedon v. York County*, 13 Neb. 57, 12 N.W.2d 816 (1882). As a tree is known by its fruit, a bridge is known by its function. The issue is not whether K2 could have made repairs for less than \$100,000, but whether repairing the bridge for safe and actual use by the public as a bridge, in fact, could have been done for less than \$100,000. There is no functionality in such a structure as half a bridge.

As expressed in *Neumann v. Knox*, 115 Neb. 679, 214 N.W. 290 (1927) in determining whether the statute applies the object of the legislation is proper to consider. In this respect, the Court in *Neumann* stated:

“It is evident that the legislature was intending to protect the citizens of cities and villages in the expenditure of their moneys by their officials, and also to protect the taxpayer from possible venality of the officials, and prevent them from entering into improvident contracts for work or improvements, of the cost of which they might not be well advised.” *Id* at 684

The foregoing admonishment in *Neumann* is fitting for the instant case.

“The subject bridge...was functionally obsolete, structurally deficient and aged well beyond its service life.” (E3, p.3) The bridge was closed in 2019 and was not opened thereafter. (E3, p.2) The purpose of competitive bidding is to protect the taxpayer and guard the public purse. It is not to spend taxpayer money foolishly and lay waste to public funds. “A political entity has no authority to take any action that is inconsistent with the public bid law.” 10 McQuillin, *Municipal Corporations* (3rd rev. ed 2025) § 29:32 p. 603.

Here, there was no authority for the County to make Nemaha County taxpayers pay for essentially worthless repairs to a bridge that was obsolete, timeworn, beyond repair, and a waste of taxpayer money. *Tullock v. Webster County*, 46 Neb. 211, 64 N.W.705 (1895). It was Mr. Mainelli’s “opinion within a reasonable degree of professional certainty that the work and materials described in the proposal submitted by K2 Construction, dated February 8, 2022, would not have resulted in a functional bridge, or a bridge within accepted standards in the industry, and would have been a waste of public funds.” (E3, p.6)

To the extent K2 claims that it was not contracting to repair the bridge but only to install pilings and weld substructure steel, it emasculates the competitive bidding statutes by splitting needed repairs into separate contracts. That is, contracts that individually and separately do not exceed \$100,000 and thus are under the highest statutory competitive bidding threshold. Neither the County nor the bidder can do indirectly what cannot be done directly. *Madrid Lumber Co. v. Boone County*, 121 N.W.2d 523 (Iowa 1963).

In this light, if K2 claims its work was not for the purpose of repairing the bridge so that the bridge could, in fact, be utilized as a bridge then the County Purchasing Act should apply. As the County Purchasing Act establishes a uniform procedure for counties to purchase equipment, supplies, services, materials, and other personal property. See Neb. Rev. Stat. §§ 23-3101 to 23-3115.

Neither the County nor K2 has any prerogative to avoid the application of competitive bidding through contractually agreeing to some form of piecemeal repairs so that each component, sequential, or separate contract is less than \$100,000. Avoiding bidding by dividing the work and materials into smaller contracts, when the combined costs will significantly exceed \$100,000 clearly undermines the statutory purpose behind competitive bidding intended to insure transparency, accountability, and cost efficiency in the expenditure of the public purse. *Anderson v. Peterson*, 221 Neb. 149, 375 N.W.2d 901 (1985) Competitive bidding is required when the aggregate project costs exceed all statutory bid thresholds, regardless of how an individual contract is structured. *City of Akron v. Akron-Westfield Cmty. Sch. Dist.*, 659 N.W.2d 223 (Iowa 2003); *Master Builders of Iowa v. Polk County*, 653 N.W.2d 382 (Iowa 2002).

The test for the competitive bidding threshold is not the costs of an individual fragmented contract but the estimated costs of the total project. *Kunkle Water & Electric, Inc. v. Prescott*, 347 N.W.2d 648 (Iowa 1984); *Everds Brothers v. Gillespie*, 126 N.W.2d 274 (Iowa 1964). Given the avowed purposes of competitive bidding, it is the total character of the project which should control. *Arthur v. Trindel*, 168 Neb. 429, 96 N.W.2d 208 (1959); *Miller v. Marshall County*, 641 N.W.2d 742 (Iowa 2002).

K2's proposal calls for the expenditure of public funds of upwards to \$135,580.00. K2's proposal provides that "K2 Construction anticipates a start date no later than March 22, 2022. A start date after to this date at the fault other than the Contractor will result in an additional (1.0) Lump Sum cost of \$50,000.00 added to the project." (E2, p.13). At summary judgment, K2 sought to have that provision severed from the proposal arguing that the provision was made ineffectual on March 8, 2022. (T72). However, from the evidence offered by K2 at the hearing on April 24, 2024, it clearly shows that on March 15, 2022, Thomas Schwab of K2 stated that it was "billing an additional \$50,000.00 to the contract" unless it received stamped plans and approvals of an engineer from the County. (E2, p.19) The effect of K2's email of March 15, 2022, at 12:24 p.m. cannot be sterilized by later arguing that it does not apply. The County did not provide any plans and approvals of an engineer. There is no evidence that K2 made any repairs to the bridge after sending the email of March 15, 2022, at 12:24 p.m. (E2, p.19; E3, p.5-6; E4, p.1-5; E6, p.2; E7, p.2-3; E8, p.1-3; E9, p.2-3)

In the instant case, K2 argued that the competitive bidding statutes applied against the County but not K2. (34:13-23) "The person or company making a bid or entering into a contract with a municipality acts at his or her peril. He or she is presumed to know the law and is personal non grata with the courts, which must look to the protection of the public." 10 McQuillin, Municipal Corporations (3rd rev. ed 2025) § 29:30.50 p. 578-579. Contractors are charged with the duty to be familiar with the statutory requirements and adhere to them. *Witzenburg v. State*, 140 Neb. 171, 299 N.W. 533 (1941); *Gutta Percha & Rubber Mfg. Co. v. Village of Ogalalla*, 40 Neb. 775, 59 N.W. 513 (1894); *Plattsmouth v. Murphy*, 74 Neb. 749, 105 N.W. 293 (1905).

A non-moving party need not "produce evidence in a form that would be admissible at trial in order to avoid summary judgement," but it may oppose a motion using "any of the kinds of evidentiary materials listed in [the rule], except the mere pleadings themselves....." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). There was no basis for the District Court to sustain K2's objections to paragraphs 18 and 19 of Mark Mainelli's affidavit and exclude that evidence. (E3, p.4)

CONCLUSION

The District Court's ultimate dismissal of this case should be affirmed. To the extent that dismissal may not be affirmed, it is respectfully submitted that the District Court erred in granting, in part, K2's motion for summary judgment, and the Order of June 28, 2024, should then be reversed.

Respectfully Submitted:

Dated: January 7, 2026

By: /s/ Louie M. Ligouri

Louie M. Ligouri (16708)
Ligouri Law Office
1118 15th Street
P.O. Box 99
Auburn, Nebraska 68305
Telephone: (402) 274-5484
Email: ligourilaw@hotmail.com

Attorneys for Appellee and
Cross-Appellant

CERTIFICATE OF COMPLIANCE

Nemaha County, Nebraska, Appellee and Cross-Appellant, through counsel of record, hereby certifies that on the 7th day of January, 2026, that this Brief complies with the requirements of Ct. R. App. P. 2-103 for a word count of 14,601 not including this certificate of compliance.

The undersigned certifies that this Brief was prepared using Microsoft Word, 2016 and complies with the typeface requirements of Ct. R. App. P. 2-103 by using Times New Roman font, 12.0 point.

/s/ Louie M. Ligouri

Louie M. Ligouri (16708)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 7th day of January, 2025, he caused the above and foregoing Brief of Appellee and Cross-Appellant to be served upon the Appellant and Cross-Appellee by and through its attorneys of record, Austin L. McKillip of Cline Williams Wright Johnson & Oldfather, L.L.P., by using the Court's electronic filing and service system.

/s/ Louie M. Ligouri
Louie M. Ligouri (16708)

Certificate of Service

I hereby certify that on Wednesday, January 07, 2026 I provided a true and correct copy of this *Brief of Appeal W/ Cross Appeal Nehama Co* to the following:

K2 Real Estate Development LLC represented by Austin Lamoine McKillip (23212) service method:
Electronic Service to **amckillip@clinewilliams.com**

Signature: /s/ Louie Ligouri (16708)