OAH 03-3000-18088-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF TRANSPORTATION

In the Matter of the Petition of the Treated Wood Council for a Declaration that a Department of Transportation Memorandum Regarding a Hazard Evaluation Process of Products and Waste Materials Is an Unadopted Rule	**ORDER**

By Petition filed May 23, 2007, the Treated Wood Council (Petitioner) seeks an order directing the Department of Transportation (Department) to cease enforcement of an unadopted rule. The Department filed a written response on June 12, 2007. Oral argument was held on the Petition on July 19, 2007, at the Office of Administrative Hearings. The record closed on August 2, 2007, following submission by the parties of post-argument memoranda.

Stephen A. Melcher, Fabyanske, Westra, Hart & Thomson, PA, 920 Second Avenue South, Suite 1100, Minneapolis, Minnesota 55402 appeared on behalf of the Treated Wood Council. Patrick Whiting, Assistant Attorney General, 445 Minnesota Street, Suite 1800, St. Paul, Minnesota 55101 appeared on behalf of the Department of Transportation (Department or Mn/DOT).

Based upon all of the filings by the parties, the oral argument, and for the reasons set out in the Memorandum which follows,

IT IS HEREBY ORDERED THAT:

1. The Department of Transportation's February 1, 2006, Technical Memorandum No, 06-05-ENV-01 regarding its Hazard Evaluation Process of Products and Waste Materials is not an unadopted amendment to a rule or an unadopted rule.

2. Treated Wood Council's Petition is DISMISSED.

Dated: September 6, 2007

s/Kathleen D. Sheehy

KATHLEEN D. SHEEHY
Administrative Law Judge

Reported: Digitally recorded (no transcript prepared)

NOTICE

This decision is the final administrative decision under Minn. Stat. § 14.381. It may be appealed to the Minnesota Court of Appeals under Minn. Stat. §§ 14.44 and 14.45.

MEMORANDUM

Petitioner is an international trade association of organizations involved in the treated wood industry, at least eight of which have offices and/or facilities, and conduct business, in Minnesota.[1] Petitioner's members produce pressured-treated wood products.[2] The Petitioner seeks an order determining that the Department is improperly implementing a policy requiring vendors of treated wood products to submit their products to a "hazard evaluation process" as though there were a duly adopted rule requiring such a process. Petitioner brings this challenge pursuant to Minn. Stat. § 14.381, which permits a person to "petition the Office of Administrative Hearings seeking an order of an administrative law judge determining that an agency is enforcing or attempting to enforce a policy, guideline, bulletin, criterion, manual standard, or similar pronouncement as though it were a duly adopted rule."

Background Facts

The Minnesota Department of Transportation has used treated wood products in highway construction projects since at least 1976.[3] Traditionally, treated wood has been used in retaining walls, noise walls, vehicle bridge structures, guardrail posts, pilings, and buildings (such as salt sheds). The most common current uses for treated wood are as non-structural parts of noise walls.[4]

Over time, the Department has decreased its use of wood products treated with chromated copper arsenate (CCA) because of its propensity to leach contaminants, particularly arsenic, into the ground.[5] In October 2002 the Commissioner of the Minnesota Pollution Control Agency strongly recommended that the Department examine the possibility of purchasing alternative materials, because of issues concerning the disposal of CCA-treated wood in solid waste landfills.[6] Studies conducted by the Department confirmed that there is soil contamination adjacent to noise barriers in the Twin Cities and recommended further investigation of the scope

[1] Petition at 2; Affidavit of Jeffrey T. Miller ¶¶ 2-3.
[2] Miller Aff. ¶¶ 4-5.
[3] Affidavit of John Sampson ¶ 8.
[4] *Id*. ¶ 11.
[5] *Id*. ¶ 13.
[6] Dept. Ex. 11. This recommendation was repeated in February 2006. *See* Dept. Ex. 12.

and extent of metals migration and identification of high-risk areas near residential dwellings.[7] In January 2004, the U.S. Environmental Protection Agency (EPA) prohibited the use of CCA to preserve wood intended for most residential uses.[8]

Because of these concerns, in late 2003 the Department began permitting or requiring the use of borate-treated wood (one such product is Envirosafe Plus) for noise walls on its projects.[9] Borate-treated wood does not contain arsenic, heavy metals, or chromium.[10] In late 2004, the Department issued a draft Policy Guideline providing that it would no longer use chemically treated wood products on its projects unless and until the products were reviewed and approved by the Department's Office of Environmental Services (OES).[11] This draft policy was not implemented.[12]

In February 2006 the review procedures contained in the draft Policy Guideline were, however, substantially incorporated into the Department's policies concerning review of products used in construction and recycling of waste materials. The document at issue is a Technical Memorandum issued by the Department's Engineering Services Division, entitled "Hazard Evaluation Process of Products and Waste Materials," Technical Memorandum No. 06-05-ENV-01 (Memorandum).[13] The Memorandum provides that it replaces an earlier technical memorandum and will continue in force until February 1, 2011, unless superseded prior to that date. The Memorandum's introduction provides that it is the policy of the Department to comply with state and federal regulatory requirements and to provide evidence of due diligence in preventing, detecting, and correcting violations of environmental requirements, as required by Minn. Stat. § 114C.21, subd. 2a. It further provides that in determining whether the Department will procure particular types of new products or reuse/recycle waste materials, "Mn/DOT must balance public health and safety, environmental risks and potential liabilities with the possible benefits received by using the product or waste material."[14]

The "Guidelines" section of the Memorandum provides:

> Vendors that would like Mn/DOT to consider using their products or waste materials should be directed to contact the Mn/DOT Product Evaluation Committee (PEC). The vendor must follow the application process established by the PEC. The PEC will distribute the product information to the appropriate Mn/DOT functional groups for review and possible inclusion in the Mn/DOT Qualified Products List. The Office of

[7] Dept. Ex. 9. *See also* Dept. Exs. 19 & 20.
[8] Dept. Ex. 19 at CRS-2.
[9] Petitioner's Exs. 19-24; Miller Aff. ¶¶ 7a-7f.
[10] Petitioner's Ex. 24; Dept. Exs. 13-14.
[11] Petitioner's Ex. 28; Miller Aff. ¶ 10.
[12] Sampson Aff. ¶ 31.
[13] Petitioner's Ex. 29; Dept. Ex. 1.
[14] *Id*.

> Environmental Services will inform the PEC which product types must be sent to OES for review using the Hazard Evaluation Process.[15]

The Memorandum further outlines the procedural steps OES will use to evaluate the product and specifies the information a vendor must submit for completion of the Hazard Evaluation Process (HEP).[16] It describes the general principles that OES will use in making product procurement decisions, including consideration of short- and long-term environmental liabilities associated with using the product, as well as current and future legal and financial liability issues associated with the intended use of the product. Upon completion of the review, it provides that OES will make a recommendation to the Engineering Services Division Director as to whether the product should be included in the Department's Qualified Product List or rejected based on the product's expected environmental performance.[17] To date, the OES has completed reviews of approximately 20 new products.[18]

As indicated above, the Department maintains a Qualified Product List identifying products of various kinds that are acceptable for use in road projects.[19] The list includes hundreds if not thousands of products ranging from joint and crack sealer, cement, epoxies, concrete curing compounds, grouts, paints, pavement markers, soil stabilizers, and erosion control blankets. The list also includes treated wood products.[20] The current Approved Treated Wood Products page lists the product name or the type of protective treatment in the wood as well as restrictions on the use of each type of wood or treatment listed. For example, Envirosafe Plus has been approved for structural members that are not in contact with soil; another product is approved for use except within 100 feet of surface water bodies; and treated wood products currently in Mn/DOT stock are approved for their intended purpose until Mn/DOT's supply is exhausted. A note at the bottom of this list states that "[m]anufacturers or distributors of treated wood products can submit a request to Mn/DOT for product evaluation by the Product Evaluation Committee."[21]

In addition, approximately every five years the Department publishes a book of standard contract specifications for highway construction contracts.[22] The last such book was published in 2005. The Department's book of Standard Specifications (2005) includes, among many other things, requirements for various types and uses of wood

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[15] Dept. Ex. 1 at 2.
[16] *Id.*at 3-5.
[17] *Id*. at 5.
[18] Dept. Exs. 23-42; Affidavit of Dr. Robert Edstrom.
[19] The list is titled "Approved Products and Certified Products and Sources for Acceptance on Mn/DOT and Federal-Aid Projects." *See* http://www.mrr.dot.state.mn.us/materials/apprprod.asp.
[20] Dept. Ex. 5; http://www.mrr.dot.state.mn.us/materials/apprprod.asp.
[21] Petitioner's Ex. 10; http://ww.mrr.dot.state.mn.us/materials/ApprovedProducts/approvedwood.pdf. Two other treated wood products have been submitted for review under the HEP. TimberSil was reviewed and given a low risk hazard rating and a recommendation that it could be safely used on Mn/DOT projects, but it was not yet on the approved product list when the record closed. Another product, Merichem CuNap-8, was submitted for review in September 2006 and is still under review. *See* Miller Aff. ¶¶ 15 & 16; Petitioner's Exs. 37 and 41.
[22] Dept.'s Letter Brief at 1 (Aug. 2, 2007); http://www.dot.state.mn.us/tecsup/spec.

products, such as timber bridges, guardrail and fence posts, structural timber, bridge wearing course planks, timber piling, traffic signal poles, and light poles. The book of Standard Specifications describes the type and quality of wood products required for each intended use, and generally requires the use of timber treated with a preservative in accordance with Section 3491 of the Standard Specifications.[23] Section 3491 of the Standard Specifications is captioned "Preservatives and Preservative Treatment of Timber Products," and it requires the use of products treated in accordance with standards developed by the American Wood Preservers Association (AWPA).[24] The AWPA does not approve the use of borate-treated wood for exterior applications; it only lists applications for borate-treated wood that are above ground and continuously protected from liquid water.[25]

Legal Issues

The Petitioner asserts that, because the Department's book of Standard Specifications requires compliance with AWPA standards, it cannot, by issuing a Technical Memorandum, cease to rely on those standards in determining whether a particular treated wood product or preservative is approved by the Department for use in its construction projects. Petitioner argues that the Department must accept products and product uses consistent with AWPA approvals, regardless of the outcome of the HEP outlined in the Memorandum. The foundation for this argument is that the Memorandum constitutes either an improperly adopted amendment to the Standard Specifications or that the Memorandum is itself an improperly adopted rule that should have been adopted, if at all, through formal rule-making procedures, during which the Department would be required to demonstrate the need for and reasonableness of its policy. The Petitioners seek an order requiring the Department to "cease its implementation of the Policy and return to its historic practice of specifying wood treated with EPA-registered pesticides and in accordance with AWPA standards."

The Department maintains the February 2006 Memorandum is not a rule; and in the alternative, if it is considered a rule, then it falls within several exceptions to rule-making requirements contained in the Minnesota Administrative Procedure Act.

Discussion

The Minnesota Administrative Procedure Act (MAPA) defines a rule as:

> every agency statement of general applicability and future effect, including amendments, suspensions, and repeals of rules, adopted to implement or make specific the law enforced or administered by that agency or to govern its organization or procedure.[26]

[23] Department of Transportation Standard Specifications §§ 2403, 3412, 3413, 3426, 3457, 3471, and 3840 (2005) (Petitioner's Exs. 11-16, 18).
[24] Petitioner's Ex. 17.
[25] Affidavit of Scott W. Conklin ¶¶ 10-11.
[26] Minn. Stat. § 14.02, subd. 4.

Certain agency statements are expressly excluded from the statutory definition of a rule, including rules concerning only the internal management of the agency or other agencies that do not directly affect the rights of or procedures available to the public.[27] Unless an agency statement is excluded from the definition of a rule, it is subject to the rulemaking requirements set forth in Chapter 14 of Minnesota statutes. However, an agency may adopt rules "only pursuant to authority delegated by law."[28]

In general, an agency is not deemed to have engaged in rulemaking if its interpretation of a statute or rule coincides with the plain meaning of that statute or rule.[29] In other words, if an interpretation is consistent with the plain meaning of the statute or rule that is being interpreted, the agency action is authorized by the statute or rule itself, and the fact that no rule was adopted does not render the interpretation invalid.[30] However, if an agency's announced policy is inconsistent with the statute or rule, the courts have often invalidated that policy. And, if the policy makes new law without the public input required by the APA, the policy will be invalidated.

The Memorandum As an Unadopted Amendment to a Rule

Petitioner's claim that the Memorandum is an unadopted amendment to a rule rests on two main ideas: that the Standard Specifications are a rule; and, that the Memorandum, by eliminating reference to the AWPA standards, is an unadopted amendment to those parts of the Standard Specifications that refer to the AWPA standards. To prevail on this argument, the Petitioner would have to demonstrate that the book of Standard Specifications is itself a product of statute or rule and that the Memorandum is inconsistent with such statute or rule.

In general, the Department is required to comply with a variety of statutory mandates concerning the environment. It is charged with providing "a balanced transportation system" for the State of Minnesota.[31] In planning and implementing all modes of transportation, the Commissioner of Transportation is required to ensure that they are consistent with the State's environmental and energy goals.[32] The Commissioner must:

> consider the social, economic, and environmental effects resulting from existing and proposed transportation facilities and . . . make continuing efforts to mitigate any adverse effects. The commissioner shall utilize a systematic, interdisciplinary approach which shall insure the integrated

[27] Minn. Stat. § 14.03, subd. 3 (1).
[28] *Id.* § 14.05, subd. 1.
[29] *Cable Communications Board v. Nor-west Cable Communications Partnership*, 356 N.W.2d 658, 667 (Minn. 1984); *In the Matter of the Petition for Review of the Minnesota Department of Commerce Policy Pronouncement and Guidance Document Regarding Insurance/Credit Scoring Filings*, OAH Docket No. 1-1004-15233-2 (2003) at 3.
[30] *Sellner Manufacturing Co. v. Commissioner of Taxation*, 202 N.W.2d 886, 888-89 (Minn. 1972).
[31] Minn. Stat. § 174.01, subd. 1.
[32] *Id*. § 174.01, subd. 2 (10).

> use of the natural, social, and physical sciences and the environmental design arts in plans and decisions which may affect the environment.[33]

In addition, the state's Environmental Policy Act requires all state agencies to "identify and develop methods and procedures that will ensure that environmental amenities and values, whether quantified or not, will be given *at least equal consideration* in decision making along with economic and technical considerations."[34] Other state laws and executive orders make state agencies responsible for "a release or threatened release of a hazardous substance" from a state facility and require state agencies to "encourage pollution prevention through their purchasing policies and specifications."[35]

With regard to the Department's own purchasing policies and specifications, the Commissioner has authority to "construct and maintain transportation facilities as authorized by law."[36] In order to accomplish these tasks, "[t]he commissioner may conduct the work or any part of the work incidental to the construction and maintenance of the trunk highways . . . by contract."[37] The legislature has explicitly warned that "the opportunity to be awarded [transportation] department contracts or to supply goods or services to the department is a privilege, not a right . . . ."[38] Department contracts "must be based on specifications prescribed by the commissioner."[39]

In accordance with the requirement to prescribe specifications, the Department publishes its book of Standard Specifications. The book recognizes that, despite the apparent purpose of making specifications uniform and predictable, specifications will change over time and with individual projects:

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[33] Minn. Stat. § 174.03, subd. 6.
[34] *Id*. § 116D.03, subd. 2 (emphasis added).
[35] *Id*. § 115B.03, subd. 1; Dept. Exs. 6-7 (Minnesota Executive Orders No. 99-4 and 03-04).
[36] *Id*. § 174.03, subd. 4(1).
[37] *Id*. § 161.32, subd. 1. The Commissioner of Administration is required to approve any contract entered into by the Department of Transportation, and make all decisions regarding acquisition activities, unless that approval authority has been delegated to the Department of Transportation pursuant to the Commissioner of Administration's power to make such a delegation. *See* Minn. Stat. § 16C.03, subds. 3, 4a, & 5. *See also* Minn. Stat. § 16C.03, subd. 16. The Commissioner of Administration has specific rulemaking authority relating to:

> (1) solicitations and responses to solicitations, bid security, vendor errors, opening of responses, award of contracts, tied bids, and award protest process;
> (2) contract performance and failure to perform;
> (3) authority to debar or suspend vendors, and reinstatement of vendors;
> (4) contract cancellation;
> (5) procurement from rehabilitation facilities; and
> (6) organizational conflicts of interest.

Minn. Stat. § 16C.03, subd. 2. The rules promulgated pursuant to this rulemaking authority are at Minn. R. 1230 *et. seq*. These rules are essentially procedural and do not pertain to the development of contract specifications or product procurement.
[38] Minn. Stat. § 161.315, subd. 1(2).
[39] *Id*. § 161.32, subd. 1a.

> These Standard Specifications, the Plans, Special Provisions, supplemental Specifications, and all supplementary documents are essential parts of the Contract, and a requirement occurring in one is as binding as though occurring in all. They are intended to be complementary and to describe and provide for a complete work.
>
> *In case of discrepancy*, calculated dimensions will govern over scaled dimensions; *Special Provisions will govern over Standard and supplemental Specifications* and Plans; Plans will govern over Standard and supplemental Specifications; *supplemental Specifications will govern over Standard Specifications*.[40]

"Special Provisions" are defined in the book as "[a]dditions and revisions to the standard and supplemental Specifications covering conditions peculiar to an individual Project."[41] "Supplemental Specifications" are defined as "[a]dditions and revisions to the standard Specifications that are approved subsequent to issuance of the printed book of standard Specifications."[42]

Importantly, the Petitioner does not contend that the Department's book of Standard Specifications is itself an improperly adopted rule. The Petitioner argues that it both "assumes" and "hopes" that the Standard Specifications were adopted pursuant to the rulemaking process set forth in the MAPA, but the Petitioner has pointed to no legal or factual basis to support such assumptions or hopes. The Petitioner has identified no statutory requirement that the book of Standard Specifications be subject to rulemaking, nor is there any evidence that the Department, despite the lack of express authority to do so, chose to use the rulemaking process in publishing it. On the contrary, the Department maintains it was not required to adopt the Standard Specifications through MAPA rulemaking procedures and that it did not in fact do so.

The HEP outlined in the Memorandum is consistent with the statutory mandate that the Department must weigh environmental considerations heavily as it fulfills its road-building responsibilities. It is also consistent with executive orders requiring it to prevent pollution in developing its purchasing policies and specifications. And the Commissioner of Transportation has statutory authority to "prescribe" standard contract specifications pursuant to Minn. Stat. § 161.32, subd. 1a (2006). When the legislature wishes to authorize or require rulemaking, the legislature uses the language of rulemaking.[43] In requiring the Commissioner of Transportation to "prescribe" contract specifications, the legislature chose to permit the Commissioner to dictate the terms of those specifications, not to require them to be adopted through the rulemaking process. The Administrative Law Judge has found no authority that would either authorize or

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[40] Minnesota Department of Transportation, Standard Specifications § 1504 (2005) (emphasis added).
[41] *Id*. § 1103.
[42] Minnesota Department of Transportation, Standard Specifications § 1103 (2005).
[43] *See, e.g.,* Minn. Stat. § 161.321, subd. 6 (permitting the Commissioner to promulgate rules regarding small business contracting); Minn. Stat. § 16C.03, subd. 2 (permitting the Commissioner of Administration to adopt rules relating to specific contracting topics).

require the Department to "adopt" standard contract specifications as rules. Because the Standard Specifications are not required to be adopted through rulemaking, there is no basis for concluding that the February 2006 Memorandum's departure from those specifications is an unadopted amendment to a rule.

In the alternative, the Petitioner argues that the Standard Specifications can be considered "rules" based on long-held, unchanging agency policy. Petitioner's argument cannot succeed because the book of Standard Specifications, by its own terms, contains clear language indicating that the specifications are subject to change in any given contract.[44] Because the Standard Specifications are not rules, a document reflecting a process that departs from them cannot be said to be an amendment of a rule.

The Memorandum Itself As an Unadopted Rule

In order to be considered a rule, an agency statement must be "of general applicability." Although it is true that, according to the procedures spelled out in the Memorandum, all products submitted to the Department for approval must be submitted to the PEC for review and possible evaluation under the HEP, it does not necessarily follow that the Memorandum is a statement of general applicability. The process applies only to those vendors who wish to have their products reviewed and recommended for possible inclusion in the specifications for road construction contracts. The HEP provides a process and guidelines to make the review consistent and orderly, but does not impose blanket rules applicable to all products, or even to all wood-treated products. The Administrative Law Judge accordingly concludes the Memorandum is not a statement of general applicability and that it falls outside the definition of a rule.[45]

In addition, Minnesota courts have found that an agency's development of policy on a case-by-case basis falls outside of the definition of a rule. For example, in *Reserve Life Insurance Co. v. Commissioner of Commerce*, the Minnesota Court of Appeals found that the Commerce Department's evaluation of an insurance company's policy forms did not amount to rulemaking. There, the Commerce Department reviewed the forms on a case-by-case basis to determine whether the forms contained terms that were unfair, inequitable, misleading, or deceptive.[46] In this case, as in *Reserve Life*, the Department is conducting a case-by-case review of products submitted by vendors to determine, in part, whether any environmental hazards posed by the product are sufficiently acceptable to justify their use in public road construction projects. The Administrative Law Judge accordingly concludes the rulemaking requirements are not applicable.

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[44] Minnesota Department of Transportation, Standard Specifications § 1103 (2005).
[45] *Cf*. *MacNeil Environmental, Inc. v. Allmon*, 2002 WL 767754 (Minn. App.) (unpublished) (contract provision was not a statement of general applicability and future effect).
[46] *Reserve Life Insurance Co. v. Commissioner of Commerce,* 402 N.W. 2d 631, 634 (Minn. App. 1987), *pet. for review denied* (Minn. May 20, 1987); *In the Matter of Hibbing Taconite,* 431 N.W. 2d 885, 894 (Minn. App. 1988).

Even if the Memorandum were within the general definition of a rule, however, the Department maintains the Memorandum is not subject to rulemaking because it falls within a statutory exception to the definition of a rule, which exempts rules concerning only the internal management of the agency that do not directly affect the rights of or procedures available to the public.[47]

The Memorandum describes the process by which the Department will review and specify products to be used in highway construction contracts. This concerns the internal management of the agency's road-building responsibilities and does not directly affect the rights of or procedures available to the public. It does not preclude the Petitioner's members from selling their products in Minnesota or anywhere else; it simply describes the process by which the Department will review products that it may potentially purchase for use in transportation-related construction projects. The implication of the argument that the Department should be required to adopt this policy through rulemaking is that all state agencies should have to open rulemaking dockets and conceivably hold public hearings to establish contract specifications for purchases ranging from computer hardware and software to paper clips. This would impose an extraordinary burden and expense on state agencies. There is simply no precedent for the notion that, when a state agency is in the role of consumer, it must engage in rulemaking before it can determine which particular product to purchase.[48]

Neither Petitioner's member producers nor anyone else has a right to sell goods to the Department.[49] Nor do Petitioners have a right to dictate the process by which the Department evaluates the various products it may or may not purchase. The agency has the discretion to determine what products will suit its needs and to balance the sometimes-competing interests such as environmental hazard, cost, and long-term efficacy. The HEP process, if it does fall within the general definition of a rule, is statutorily excluded from rulemaking requirements because it concerns the internal management of the agency.

Finally, much of Petition is devoted to addressing the efficacy of borate-treated products, as opposed to products treated in accordance with AWPA standards. The Department agrees that the HEP was never intended to address efficacy considerations; by its terms it is intended to address other issues, including environmental impacts and potential liability.[50] These arguments are irrelevant to this proceeding, which, under Minn. Stat. §14.381, can only consider whether the Memorandum, and specifically the HEP, is an unadopted rule. The ALJ concludes that the Memorandum is not an unadopted rule.

K. D.S.

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[47] Minn. Stat. § 14.03, subd. 3(a)(1); s*ee also In re the Matter of Assessment Issued to Leisure Hills Health Care Center,* 518 N.W.2d 71, 74 (Minn. App. 1994), *pet. for rev. denied*, (Minn. Sept. 16, 1994) (agency procedure for performing inspections not subject to rulemaking).

[48] *Cf. Perkins v. Lukens Steel Co.*, 310 U.S. 113, 127 (1940) ("Like private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases.").

[49] *See* Minn. Stat. § 161.315, subd. 1(2).

[50] Sampson Aff. ¶ 28.