

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

IOWA EYE ENTERTAINMENT, LLC,)	CASE NO. CVCV007943
)	
Petitioner,)	
)	
v.)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW
IOWA DEPARTMENT OF ECONOMIC)	AND ORDER
DEVELOPMENT,)	
)	
Respondent.)	

Petitioner, Iowa Eye Entertainment, LLC (“Iowa Eye”) brought this action under Iowa Code § 17A.19 seeking judicial review of the failure of the Iowa Department of Economic Development (“IDED”) to prepare, execute, and provide to Iowa Eye a written contract under the Iowa Film, Television, and Video Project Promotion Program for its film project “Clean Out.” This matter comes before the Court on Iowa Eye’s request for expedited temporary relief under § 17A.19(5). Iowa Eye requests that the Court order IDED to promptly prepare, execute and provide to Iowa Eye a written contract that requires that upon completion of “Clean Out” and submittal and approval by IDED of Iowa Eye’s qualified expenditures, IDED will issue tax credit certificates for the qualified expenditure and qualified investment tax credits, up to \$6,500,000. A hearing was held on Iowa Eye’s request on November 9, 2009. The Petitioner appeared with its counsel, Stan Thompson, Scott Brennan, and Sam Langholz, and Respondent was represented by its counsel, Jeff Peterzalek, Julie Pottorff, Scott Idleman, Adam Humes, and Jennifer York. The Court, after hearing the testimony of Kevin DeWalt and receiving exhibits from Iowa Eye and IDED, enters the following Finds of Fact and Conclusions of Law:

I. FINDINGS OF FACT

Having reviewed the record and file herein, having examined the exhibits and heard the testimony and arguments of counsel, the Court finds that the underpinning facts surrounding Plaintiff's request are relatively undisputed. It is the interpretation and application of those facts that create the issues before this Court. Having read the proposals of both of the parties hereto, the Court generally agrees with the proposed findings of fact as submitted by the Plaintiff. The Court sets out those findings of fact below with, of course, the Court's own deletions, additions, and changes.

1. Iowa Eye is an Iowa limited liability company based in West Des Moines that is in the business of film production. (Exhibit C, Tr. 114-15.) Iowa Eye began the process of organizing in early July (Tr. 92), and formally filed its Certificate of Organization with the Secretary of State on July 30, 2009. (Exhibit C.) Iowa Eye presently maintains offices at 5550 Wild Rose Avenue in West Des Moines, Iowa (Tr. 114-15), and Kevin DeWalt is Iowa Eye's "CEO/Producer." (Exhibits 8, 8A.)

2. The Iowa Department of Economic Development ("IDED") is an agency of the State of Iowa that administers the Iowa Film, Television, and Video Project Promotion Program ("Program"), authorized under Iowa Code § 15.393 and implemented by Iowa Administrative Code §§ 261-36.1 to -36.9. Throughout the Program, IDED made various representations to the public about the benefits of the Program, including touting the Program as "50% off! 1/2 Price Filmmaking!" (Exhibits 2, 22; Tr. 39-40.)

3. Iowa Eye sought to produce a film in Iowa titled "Clean Out," which had a cast that included, among others, Timothy Dalton, Elliott Gould, and Harvey Keitel. (Exhibit 1.) On or about July 29, 2009, Iowa Eye submitted its application to IDED requesting that "Clean Out"

be registered under the Program by IDED so as to entitle it to receive certain film tax credits, including the qualified expenditure tax credit and the qualified investment tax credit. (Exhibits 8, B.) IDED admits Iowa Eye submitted this application. (Respondent's Answer ¶ 5.) Iowa Eye's application reflected, among other things, that: the total film production budget was \$18,724,413 and \$13,423,583 would be spent in Iowa (Exhibit 8, at 13); "Clean Out" had funding commitments for 50% of the film as required (Id. at 10); and Iowa activity on the film project would start August 3, 2009 (Id. at 12).

4. IDED sought to have Iowa Eye produce "Clean Out" because it was interested in attracting international investors, and "Clean Out" is a co-production with investors from Canada, Switzerland, and France (Tr. 45; Exhibit B (containing "Clean Out" Financing Commitments)). Iowa Eye also offered to organize workshops benefiting the Iowa Motion Picture Association and to provide information about setting up a mentoring program for the film industry in Iowa. (Exhibit 8A; Tr. 40-42.)

5. From August 3 to August 5, 2009, Iowa Eye and IDED engaged in negotiations over the amount of the approximate tax credits to be awarded. IDED initially offered a preliminary award amount of \$5,500,000. (Exhibit 19.) Iowa Eye responded that it had been anticipating an award of \$6,700,000 but that it could make it work with an award of \$6,500,000, and IDED replied that the decision would be reconsidered by "superiors" in the office. (Exhibit 21.)

6. The funding commitments for "Clean Out" required that a film bonding company issue a film completion guarantee, to provide security that once the film project was undertaken, the film would be completed. The company retained to provide the completion guarantee is named Film Finances Canada Ltd ("Film Finances"). IDED knew, based on an August 3, 2009,

e-mail from Iowa Eye to IDEED that “Film Finances, who is providing a completion bond on the movie, won’t allow us to set up the production office and start pre-production until we get our award in writing from you,” that failing to secure the tax credits would “inhibit us the [sic] ability to close a completion bond which we must have on the movie to go forward” and that “[n]o parties are prepared to move forward to long form agreements until we can show full financing.” (Exhibit 21.)

7. On August 19, 2009, Iowa Eye informed IDEED that it needed to provide a funding commitment with an official notification from IDEED regarding the award. (Exhibit 26.) Iowa Eye understood from IDEED that its application would be formally put before the Iowa Economic Development Board on August 20, 2009. (Tr. 59.) In fact, on August 20, 2009, the 22-member Iowa Economic Development Board did meet and was presented with information about Iowa Eye’s application and its tax credit award. (Exhibit 27A, at 8.) That same day, Vincent C. Lintz, Deputy Director of IDEED, formally approved Iowa Eye’s application. (Exhibit 27B.) Iowa Eye was thus a Registered Project under the Program. (See also Exhibit J, Affidavit of Amy Johnson ¶ 7 (“Iowa Eye’s application for ‘Clean Out’ was registered after July 1, 2009.”)).

8. On August 21, 2009, IDEED sent Iowa Eye a letter regarding a “[c]onfirmed tax benefit” and approval of the application for “Clean Out” and eligibility to contract with IDEED for tax credits. (See Exhibit 29.) IDEED described this letter as “a letter confirming your credit award amount.” (Exhibit 28.) In the letter, IDEED indicated that “Clean Out” was assigned Project Number “10-FILM-009,” further signifying it had become a Registered Project, and was awarded an approximate tax credit of \$6,500,000. (Exhibit 29.) The letter, signed by Tom Wheeler on behalf of IDEED, asked Iowa Eye, through Kevin DeWalt, to signify its agreement “to

the contents and statements contained in this letter” by signing the same. It appears to the Court that said document sets out the material and necessary terms to this contract.

9. On August 24, 2009, Iowa Eye signed and agreed to the conditions and terms of the confirmation letter (“Confirmation Agreement”) as instructed, which included: The approximate amount of the tax credit award; Review of spending by a third party such as a CPA; An expiration date on the contract; and Qualified spending caps for certain labor and personnel. (Exhibit 31.)

10. Iowa Administrative Code § 261-36.5(2) addresses a required contract (“Required Contract”), which IDED shall prepare and send to successful applicants after notice of approval. The Required Contract, which Iowa Eye was eligible to execute, is a “standard” form contract which even IDED refers to as a “shell” or “template” form because the contract has boilerplate, non-negotiable terms. (See Exhibit 35 (“shell”); Exhibit 35A (“template”); Exhibit 36 (“standard contract”); Exhibit J, Affidavit of Amy Johnson ¶¶ 3-6 (describing the “shell contract”).)

11. Although Amy Johnson, the Business Division Coordinator of IDED, testified in her affidavit that “[s]ome final contracts contained a lot of negotiated variables, while others contained smaller changes,” IDED has failed to provide any specific evidence of such negotiation taking place. IDED’s communication to Iowa Eye and other projects that were awaiting the Required Contract contained no discussion of further negotiation occurring over contract terms (Exhibits 35, 35A, 36), nor did IDED mention any further negotiation in any of its verbal conversations with Iowa Eye. (Tr. 70.)

12. On September 1, 2009, Iowa Eye obtained a letter of intent from Film Finances for a completion guarantee for “Clean Out.” The letter of intent made the completion guarantee subject to “successful closing of all necessary financing” for “Clean Out.” (See Exhibit H

attached to Petitioner's Petition for Judicial Review of Agency Action.) The Required Contract was the final document Iowa Eye needed to obtain all necessary financing which would, in turn, result in Film Finances issuing the completion guarantee.

13. Based on the Confirmation Agreement and in reliance on the communication Iowa Eye had with IDED that it had been awarded the tax credit and the Required Contract would be forthcoming, Iowa Eye and other production companies began pre-production of "Clean Out" and spent in excess of \$3,000,000 on salaries, set construction, set decorations, props, casting, location fees, wardrobe, equipment rentals, used vehicle purchase (for crash scene in the film), insurance, financing costs, legal fees, travel and living expenses, and other rentals. (Affidavit of Kevin DeWalt ¶ 19; Tr. 73-74.)

14. On September 18, 2009, Iowa Governor Chester J. Culver unexpectedly, and without warning to Iowa Eye, wrote to the Chair of the IDED Board, asking "that no further schedules of qualified expenditures be approved nor any further tax credit certificates be issued" under the Program. (Exhibit 38.) That statement did not address film production for projects that had executed a Confirmation Agreement and did not prevent IDED from issuing a Required Contract to Iowa Eye. (Id.)

15. On September 19, 2009, Iowa Eye contacted IDED to inquire about the status of the Program and its Registered Project. (Exhibit 39.) Iowa Eye never received a response to this e-mail from IDED. Since then, IDED has failed to prepare, execute, and provide to Iowa Eye a Required Contract for "Clean Out." The failure by IDED to prepare and execute a Required Contract for "Clean Out" and provide the same to Iowa Eye was significant because Iowa Eye's funding commitments were conditioned upon the issuance of a completion guarantee by Film Finances. (Affidavit of Kevin DeWalt ¶ 23.) Based on Governor Culver's September 18, 2009,

letter, and without execution of a Required Contract providing that tax credit certificates would be issued upon completion of “Clean Out” by Iowa Eye subject to submittal and review of qualified expenditures by IDED, Film Finances could not verify the successful closing of all necessary financing and refused to issue the completion guarantee, and Iowa Eye has been unable to obtain access to the funding necessary to continue production. (Id. ¶ 24; Tr. 73-74.)

16. At this time, Iowa Eye has postponed production of “Clean Out.” (Tr. 73-74.) Iowa Eye’s production operations in Iowa were shut down and crew that had been hired were sent home. This interruption has caused and will continue to cause significant costs and expenses that were not budgeted by Iowa Eye. Without the Required Contract being prepared, executed and provided to Iowa Eye by IDED, “Clean Out” cannot be completed. (Affidavit of Kevin DeWalt ¶ 29.)

17. The Court is satisfied from the evidence that if production is not restarted before November 27, 2009, Iowa Eye will lose one of the cast members of “Clean Out” for at least twelve months and the production will likely fall apart. (Tr. 73-74.) Iowa Eye will likely go out of business, and will suffer damage to its relationships with business partners, such as actors, investors, and the bond company. (Tr. 75-76.) The Court also finds that the failure will harm Iowa Eye’s ability to recover by producing further film because it will be difficult to ever be bonded again and it is nearly impossible to make a film independently without a completion bond. (Id.)

18. The failure to provide the Required Contract to Iowa Eye also causes harm to all tax credit programs. According to Dr. James M. Kurtenbach, an Associate Professor of Accounting at Iowa State University, the perception that the government’s failure to honor its

commitments could adversely affect opportunities for investment in Iowa projects that are dependent on government commitments. (Exhibit 40, at 2.)

19. Had IDED prepared, executed and provided to Iowa Eye a Required Contract, Iowa Eye would have executed the same and attempted to obtain the funding necessary to complete production of “Clean Out.” (Tr. 78; Affidavit of Kevin DeWalt ¶ 30.)

II. CONCLUSIONS OF LAW

Under Iowa Code § 17A.19(5), the Court is authorized to grant temporary remedies during the pendency of judicial review of agency action when “the agency refuses to grant an application for stay or other temporary remedies, or application to the agency for a stay or other temporary remedies is an inadequate remedy.” Iowa Code § 17A.19(5)(c). In determining whether to grant a request for temporary remedies, the Court shall consider and balance:

- (1) The extent to which the applicant is likely to prevail when the court finally disposes of the matter.
- (2) The extent to which the applicant will suffer irreparable injury if relief is not granted.
- (3) The extent to which the grant of relief to the applicant will substantially harm other parties to the proceedings.
- (4) The extent to which the public interest relied on by the agency is sufficient to justify the agency's action in the circumstances.

Id. The factors are to be assessed collectively, and thus a stronger showing on one factor may excuse a weaker showing on another. See Grinnell Coll. v. Osborn, 751 N.W.2d 396, 402 (Iowa 2008) (“In other words, more of one factor excuses less of another factor”).

Here, Iowa Eye has requested that the Court grant the temporary remedy of ordering IDED to promptly prepare, execute and provide to Iowa Eye a written contract that requires that upon completion of the Registered Project and submittal and approval by IDED of Iowa Eye’s qualified expenditures, IDED will issue tax credit certificates for the qualified expenditure and

qualified investment tax credits, up to \$6,500,000. The Court concludes that it is authorized to grant such a request because IDEED has no process by which Iowa Eye can seek the temporary relief from the agency's inaction. Moreover, Iowa Eye requested assurance on the status of its project, and IDEED has not responded to that request and has wrongfully continued to fail to provide the Required Contract to Iowa Eye. Therefore, any further application to IDEED for temporary relief is an inadequate remedy and the court may order the requested relief after considering and balancing the four factors set forth in Iowa Code § 17A.19(5)(c).

A. Iowa Eye Is Likely To Prevail On The Merits

Iowa Eye seeks judicial review of IDEED's failure to prepare, execute and provide to Iowa Eye a Required Contract after registering "Clean Out" under the Program and executing the Confirmation Agreement with Iowa Eye. In analyzing the first element under 17A.19(5)(c), the Supreme Court has explained that it "does not describe the degree of likelihood of prevailing, but only requires the court to consider and balance the extent or range of the likelihood of success" with the other factors to be considered, based on the evidence submitted to the court at this time. Grinnell Coll., 751 N.W.2d at 402, 403.

Iowa Eye is likely to prevail when the Court enters its final ruling in this matter because Iowa Eye is entitled to judicial review of IDEED's inaction under the Iowa Administrative Procedure Act, and IDEED's inaction prejudiced Iowa Eye's substantial rights. Under the Program's statutory and regulatory scheme, once IDEED approved Iowa Eye's application, registered "Clean Out" as a Registered Project under the Program, and confirmed in writing with the Petitioner their agreement to the material terms of the contract, Iowa Eye became entitled to the tax credit benefits under the Program and the Required Contract that IDEED must prepare, execute, and provide to the Petitioner. By failing to comply with its duties under the Iowa Code

and IDEED rules, and their written agreement to the material terms of the contract, IDEED has substantially prejudiced Iowa Eye's rights and judicial relief is appropriate.

IDEED has not disputed that Iowa Eye is entitled to judicial review of its failure to provide the Required Contract, and the Court agrees that review is appropriate under § 17A.19. Under Iowa Code § 17A.19(1), a person "who has exhausted all adequate administrative remedies and who is aggrieved or adversely affected by any final agency action is entitled to judicial review thereof." Likewise, a person may seek immediate review of "preliminary, procedural or intermediate agency action . . . if all adequate administrative remedies have been exhausted and review of the final agency action would not provide an adequate remedy."

The Court need not resolve whether IDEED's failure to prepare, execute, and provide to Iowa Eye the Required Contract is final or intermediate agency action because in either case, IDEED's inaction is reviewable. Agency inaction is reviewable under § 17A.19. See Iowa Code § 17A.2(9) (defining "agency action" to include "a failure to act," the failure to exercise agency discretion, or the failure to perform any agency duty); City of Waukee v. City Dev. Bd., 514 N.W.2d 83, 89 (Iowa 1994) (reviewing agency's failure act on a voluntary annexation application); McManus v. State, 499 N.W.2d 726, 727-28 (Iowa 1993) (noting that petitioner could have sought judicial review of agency's failure to act on his tax refund request). The agency has failed to take further action with respect to "Clean Out" for more than eleven weeks and has given no indication when, or if, it will take any further action. Requiring Iowa Eye to wait indefinitely until further action is taken, when such action may never occur, defeats the purpose of judicial review. Interests of finality will be advanced by considering IDEED's failure to act final action and allowing review to occur now.

Even if IDED's failure to prepare, execute, and provide to Iowa Eye the Required Contract is not final agency action, immediate review is appropriate because waiting for IDED to finally act will not provide an adequate remedy. Iowa Eye will soon be forced to permanently cease production because of the unlawful delay in providing the Required Contract. Once this occurs, it will be too late for any agency action to remedy the harm caused by IDED's inaction because, even if IDED eventually provides the Required Contract, Iowa Eye will not be in a position to produce "Clean Out" and secure the tax credits awarded to Iowa Eye. Iowa Eye's petition for judicial review is likely the only opportunity for Iowa Eye to seek review of IDED's unlawful failure to provide the Required Contract and save the film.

Regardless of whether IDED's inaction constitutes final agency action or immediately appealable intermediate agency action, Iowa Eye has adequately exhausted all adequate administrative remedies. IDED has not pointed to any administrative process, formal or otherwise, by which Iowa Eye can seek further review on IDED's inaction, and IDED has failed to provide any assurance on the status of its project for more than seven weeks, and has failed to provide the Required Contract for more than eleven weeks. See Lundy v. Iowa Dep't of Human Servs., 376 N.W.2d 893, 895 ("Before an exhaustion requirement can be imposed, two conditions must be met: An administrative remedy must exist for the claimed wrong, and the statutes must expressly or impliedly require the remedy to be exhausted before resort to the courts" (internal quotation omitted).) Any further attempts to seek administrative action on the part of Iowa Eye would be futile and would continue to cause Iowa Eye irreparable harm. Therefore, Iowa Eye is entitled to judicial review of IDED's failure to prepare, execute, and provide to Iowa Eye the Required Contract under § 17A.19.

Section 17A.19(10) authorizes the Court to grant relief from agency action if it determines that substantial rights of the person seeking judicial relief have been prejudiced because the agency action meets one of several enumerated criteria. Here, Iowa Eye argues that IDED's failure to prepare, execute, and provide to Iowa Eye a Required Contract has prejudiced the substantial rights of Iowa Eye because IDED's inaction is:

- (1) Beyond the authority delegated to the agency in Iowa Code § 15.393 and in violation of that section, see Iowa Code § 17A.19(10)(b);
- (2) Inconsistent with a rule of the agency, namely Iowa Administrative Code §261-36.5(2), see id. § 17A.19(10)(g);
- (3) Not required by law and its negative impact on Iowa Eye's rights affected is so grossly disproportionate to the benefits accruing to the public interest that IDED's action must necessarily be deemed to lack any foundation in rational agency policy, see id. § 17A.19(10)(k); and
- (4) Unreasonable, arbitrary, and capricious. See id. § 17A.19(10)(n).

Iowa Eye need only prove that IDED's inaction satisfies one of these criteria, and the Court concludes that it has satisfied, in part, each of them.

1. Beyond IDED's Authority. IDED's failure to prepare, execute, and provide to Iowa Eye a Required Contract is beyond the authority delegated in § 15.393 and in violation of that section. Section 15.393 authorizes IDED to "establish and administer a film, television, and video project promotion program that provides for the registration of projects to be shot on location in the state," and sets forth criteria that IDED must consider before registering a project. The statute also provides IDED authority to "negotiate the amount of the tax credit." Once IDED has registered a project, however, the project is eligible to receive benefits under subsection 2 of the statute. See Iowa Code § 15.393(1) ("A project that is registered under the program is entitled to the assistance [the film tax credit benefits] provided in subsection 2")

(emphasis added).) Section 15.393 does not provide IDEED the authority to suspend the Program or to otherwise deny a Registered Project the opportunity to receive its tax credit benefit.

Here, as IDEED itself concedes (Respondent's Answer ¶ 5), IDEED engaged in negotiations with Iowa Eye about the amount of the tax credit in early August, initially offering an award of \$5.5 million and eventually providing notice to Iowa Eye on August 5, 2009, that "the award amount for Clean Out has been approved at \$6.5M." (See Exhibits 19, 21, 23.) On August 21, 2009, IDEED provided formal notification of the "[c]onfirmed tax benefit in Iowa Film, Television and Video Project Promotion Program Project #10-FILM-009, 'Clean Out,'" and stated that IDEED had approved Iowa Eye's application to register "Clean Out" and that the Required Contract "will provide an approximate tax credit of \$6,500,000." (Exhibit 29.) Amy Johnson also testified in her affidavit that Iowa Eye's application for "Clean Out" was registered. (Exhibit J ¶ 7.) Therefore, under Iowa Code § 15.393, Iowa Eye is entitled to the tax credit benefits, and IDEED's inaction and attempt to suspend Iowa Eye's benefits under the Program is in violation of that section and beyond the authority granted to IDEED.

2. Inconsistent Action by IDEED. Although § 15.393 does not mention the need for any contract, IDEED provided by agency rule, Iowa Admin. Code § 261-36.5(2), that after registering a project, "The department shall prepare a contract," that must include particular terms, including a description of the project, the amount of the tax credit, and any terms and conditions for receipt of the benefits. Similar to the statute, however, IDEED's rules provide that "[p]rojects included on IDEED's list of registered film, television, or video projects will be eligible for the tax credits authorized by the Act, determined by the department and stipulated in the project contract." Iowa Admin. Code § 261-36.4(2). And IDEED's rules state that "[s]uccessful applicants will be

notified in writing of approval of a request for registration, including any conditions and terms of the approval.” Id. § 261-36.5(1).

The Court agrees with Iowa Eye that under this statutory and regulatory scheme, the legally significant event is IDED’s approval/registration of the project for a tax credit award. The Required Contract is merely a ministerial formality that memorializes the agreement between IDED and the production company. Cf. Horsfield Constr., Inc. v. Dubuque County, Iowa, 653 N.W.2d 563, 571-72 (Iowa 2002) (holding that Board’s approval of bid by contractor constituted a concluded contract and “the ‘contract’ document that was to follow was a mere formality and redundant to” the bid and approval by the Board). Accordingly, IDED has no legal basis to delay the preparation and execution of the Required Contract. Its failure to do so is inconsistent with its own rule, Iowa Admin. Code § 261-36.5(2), and thus warrants relief.

iii. Grossly Disproportionate Impact. As the above discussion of the statute and agency rules shows, IDED’s failure to prepare, execute, and provide to Iowa Eye the Required Contract is not required by law. In addition, its negative impact on Iowa Eye’s rights is so grossly disproportionate to the benefits accruing to the public interest that IDED’s action must necessarily be deemed to lack any foundation in rational agency policy. See Iowa Code § 17A.19(k); Zieckler v. Ampride, 743 N.W.2d 530, 532-33 (Iowa 2007) (discussing and applying § 17A.19(k)). As discussed in greater detail in Part II.B., Iowa Eye will suffer irreparable injury because of IDED’s inaction and is already suffering significant injury every day that passes without any action. This is grossly disproportionate to the minimal benefits accruing to the public interest by the inaction because the Required Contract is merely a formality that IDED is obligated to prepare, see Iowa Admin. Code § 261-36.5(2) (“The department shall prepare a contract” (emphasis added)), and thus ordering IDED to prepare,

execute, and provide the Required Contract does not significantly alter IDEED's legal obligation or benefit the public interest.

iv. Unreasonable Action. IDEED's inaction is also generally unreasonable. "Agency action is unreasonable when it is clearly against reason and evidence." Soo Line R.R. Co. v. Iowa Dep't of Transp., 521 N.W.2d 685, 689 (Iowa 1994) (internal quotations omitted); see also Churchill Truck Lines v. Transp. Regulation Bd., 274 N.W.2d 295, 300 (Iowa 1979) ("Unreasonable' has been said to mean action in the face of evidence as to which there is no room for difference of opinion among reasonable minds.").

IDEED's failure to prepare, execute, and provide to Iowa Eye the Required Contract is unreasonable in view of what it has agreed to with the Petitioner in writing. IDEED failed even to provide information to Iowa Eye about IDEED's view of Iowa Eye's current status under the Program or about when the Required Contract may be forthcoming. Moreover, IDEED failed to give Iowa Eye a reasoned explanation for its inaction under the circumstances. The continued indefinite inaction is thus unreasonable, providing only uncertainty and unpredictability to Iowa Eye and others interested in the future of the Program.

IDEED contends generally that the Court is ultimately unlikely to rule in Iowa Eye's favor and order the Required Contract because the registration of the project was only an "agreement to agree," further negotiation is necessary between Iowa Eye and IDEED, and IDEED does not yet have a new "shell contract" reflecting the statutory changes to the program effective July 1, 2009. (Respondent's Brief at 7-8.) IDEED's argument ignores, however, that it is the statute and IDEED rules that impose the legal obligation on IDEED to provide the tax benefits, not just the Confirmation Agreement between IDEED and Iowa Eye. In any event, the Confirmation Agreement is more than just an agreement to agree because it does include all the material terms

of the Required Contract – the amount of the tax credits and the program changes and specifications (See Exhibit 31) – and it is IDED’s authorization of the tax credit benefits that was the legally significant event. See Scott v. Grinnell Mut. Reinsurance Co., 653 N.W.2d 556, 562 (Iowa 2002) (implying that if “all the terms and conditions of the contract are agreed on and nothing is left to future negotiations,” that an “agreement to agree” is effective (internal quotations omitted)); Horsfield Constr., Inc., 653 N.W.2d at 571-72 (holding that Board’s approval of bid by contractor constituted a concluded contract and “the ‘contract’ document that was to follow was a mere formality and redundant to” the bid and approval by the Board).

Likewise, the evidence does not support IDED’s contention that further negotiation was to take place between IDED and Iowa Eye. All negotiation had already taken place before IDED authorized the tax credit benefits in the amount of \$6,500,000. (See Respondent’s Answer ¶ 5; Exhibits 19, 21, 23.) Neither IDED’s September 16, 2009, e-mail to Iowa Eye discussing the Required Contract (Exhibit 36), nor its e-mails to other Registered Projects at that time included any discussion of further negotiation taking place when the “shell” or “template” contracts were presented for signature. (Exhibits 35, 35A.) In addition, Kevin DeWalt testified that he would sign the Required Contract if it were presented to him. (Tr. 78.)

Finally, IDED’s assertion that it has not yet finalized the new shell contract does not provide a basis to find that Iowa Eye is not entitled to the Required Contract. If an agency could avoid its legal duties under the Iowa Code merely by refusing to prepare itself to act as it is required to do, agencies would have license to ignore their legal obligations. IDED has had nearly six months since the legislature passed revisions of the Program to update its required contract and apparently has failed to complete the task. See Act of May 18, 2009, ch. 109 (S.F. 483), 2009 Iowa Legis. Serv. 109 (West); Act of May 22, 2009, ch. 135 (S.F. 483), 2009 Iowa

Legis. Serv. 135 (West). IDEED has already begun the process of updating the shell contract, (Exhibit J, Affidavit of Amy Johnson ¶ 5), and Iowa Eye presented a draft revised shell contract that was prepared by IDEED around September 14, 2009 (Exhibit 41). Iowa Eye also correctly notes that the necessary revisions to the Required Contract are outlined in the Confirmation Agreement. (Exhibit 31.) IDEED thus appears capable of rapidly concluding its preparation of the revised Required Contract to be able to comply with its statutory obligations and this Court's order.

Therefore, the Court will likely find that Iowa Eye is entitled to relief from IDEED's inaction by granting Iowa Eye's request that IDEED promptly prepare, execute, and provide to Iowa Eye a written contract that requires that upon completion of the Registered Project and submittal and approval by IDEED of Iowa Eye's qualified expenditures, IDEED will issue tax credit certificates for the qualified expenditure and qualified investment tax credits, up to \$6,500,000. Accordingly, the Court concludes that Iowa Eye is likely to prevail on the merits when the Court finally disposes of the matter.

B. Iowa Eye Will Suffer Irreparable Injury

Iowa Eye presented evidence showing that it will suffer irreparable injury if temporary relief is not granted. Kevin DeWalt testified that without the Required Contract, Iowa Eye was unable to close all its necessary financing and Film Finances was unable to issue a completion bond for the film, preventing production from taking place. (Tr. 73; Exhibit 23 (making the completion guarantee subject to "successful closing of all necessary financing"); Affidavit of Kevin DeWalt ¶ 24.) He also testified that "Clean Out" would lose the availability of one of its cast members for at least twelve months if it could not begin production by November 27, 2009, and that it would be very unlikely for Iowa Eye to hold the film together after this occurred. (Tr.

74.) The production schedule of “Clean Out” has already been delayed by the eleven weeks of inaction by IDEED, and every day that passes with uncertainty as to the Program makes it more likely that additional necessary actors, crew, or funding, will no longer be available and the film will fall apart. Each day also increases the unplanned expenses and costs incurred because of the interruption of the production caused by IDEED’s inaction.

If Iowa Eye is forced to permanently cease production before receiving the Required Contract, the harm will be irreparably done. Receiving the Required Contract after that time would no longer repair the injury because Iowa Eye would no longer be able to produce “Clean Out,” and as such could not receive the tax benefits to which it is now eligible under Iowa Code § 15.393.

IDEED correctly argues that mere financial loss generally does not amount to irreparable harm, but nevertheless “extreme circumstances of financial loss” can amount to irreparable injury, particularly when ultimate corrective relief would not be available upon conclusion of successful judicial review. Grinnell Coll, 751 N.W.2d at 402. For example, the Iowa Court of Appeals held that evidence that denying the requested relief “would act to close [a] business forever” was sufficient for a court to find irreparable harm. R & V, Ltd. v. Iowa Dep’t of Commerce, 470 N.W.2d 59, 62-63 (Iowa App. 1991). Similarly, the United States Supreme Court found no abuse of discretion in a district court’s determination of irreparable harm when evidence was presented that absent such relief the respondents “would suffer a substantial loss of business and perhaps even bankruptcy.” Doran v. Salem Inn, Inc., 422 U.S. 922, 932 (1975). The Court explained, “Certainly the latter type of injury sufficiently meets the standards for granting interim relief, for otherwise a favorable final judgment might well be useless.” See also Siggins v. Vilsack, Polk County Case No. EQCE 53324, at 6-7 (Iowa Dist. May 2, 2006) (Pille,

J.) (holding that the impending bankruptcy of plaintiffs “if the TouchPlay ban goes into effect” demonstrated that plaintiffs “will suffer irreparable harm”). Here, Iowa Eye has shown that if temporary relief is not granted, Iowa Eye will almost certainly be forced to permanently cease production of “Clean Out” and will close its business. This is sufficiently extreme financial loss to constitute irreparable harm.

The irreparable harm is further strengthened by the evidence presented by Iowa Eye of its nonfinancial losses. DeWalt testified that his reputation and business relationships have suffered from the halting of the film caused by IDED’s failure to provide the Required Contract, and that his reputation would be permanently damaged if he fails to receive the Required Contract and “Clean Out” falls apart and is never made. (Tr. 74-76.) DeWalt shared the familiar saying in the movie production business that “you’re only as good as your last film,” and explained that his relationships with his business partners – investors, actors, and crew – would be seriously damaged if “Clean Out” is not completed. (*Id.*) Moreover, the failure of the film would make it more difficult for DeWalt to be bonded by a film bonding company such as Film Finances in the future, and without having a completion bond, an independent film cannot be made. (*Id.*)

While mere reputational harm “is not ordinarily severe enough to be considered irreparable,” Salsbury Labs. v. Iowa Dep’t of Env’tl. Quality, 276 N.W.2d 830, 837 (Iowa 1979) (internal quotation omitted), courts have recognized that damages to business relationships, such as the loss of the goodwill of clients, “constitute the sort of intangible injuries which may be found to be irreparable harm.” Moore Business Forms, Inc. v. Wilson, 953 F. Supp. 1056, 1062 (N.D. Iowa 1996); *see also* Tom Doherty Assocs. v. Saban Entertainment, Inc., 60 F.3d 27, 37-38 (2d Cir. 1995). Reputational harm is particularly acute in the area of creative expression, such as filmmaking. *Cf.* Concrete Machinery Co., Inc. v. Classic Lawn Ornaments, Inc., 843

F.2d 600, 611 (1st Cir. 1988) (noting, in the copyright context, that monetary recovery is typically inadequate to redress the harm to an artist's reputation because "[t]he ultimate commercial success of an 'artist' often depends on name recognition and reputation with the value and popularity of each succeeding work depending upon the 'name' established through commercial exploitation of preceding works"). The Court agrees and finds that the damages to Iowa Eye's relationships with its business partners strengthen the severity of Iowa Eye's harm.

In light of the combined effect of the extreme financial loss and the reputational harm that will result absent the grant of temporary relief, the Court finds that Iowa Eye clearly will suffer irreparable harm.

C. Granting Relief Will Not Substantially Harm IDED

The Court agrees with Iowa Eye that granting the requested relief to Iowa Eye will not substantially harm IDED. By approving Iowa Eye's application for registration of "Clean Out" under the Program, IDED has already obligated itself to issue the tax credit certificates for the project, subject to completion of the project and submittal and approval by IDED of Iowa Eye's qualified expenditures. See Iowa Code § 15.393(1) ("A project that is registered under the program is entitled to the assistance [the film tax credit benefits] provided in subsection 2" (emphasis added)). Because the Required Contract is merely a formality, and IDED is obligated to prepare it, ordering IDED to prepare, execute, and provide the Required Contract does not significantly alter IDED's legal obligation. See Iowa Admin. Code § 261-36.5(2) ("The department shall prepare a contract" (emphasis added)). Rather, the Required Contract recognizes the obligations already agreed to by IDED by awarding Iowa Eye the tax credits. Therefore, the requested relief does not substantially harm IDED.

IDED argues that granting the requested relief will harm other film projects that were registered after July 1, 2009, that are subject to a \$50 million-per-fiscal-year cap on film tax credits because less of the \$50 million will be available for the other projects. (Respondent’s Brief at 10); See Iowa Code § 15.119 (providing that IDEED “shall not authorize an amount of tax credits” for various tax credit programs in excess of \$185 million per fiscal year); Act of May 22, 2009, ch. 135 (S.F. 483), § 3(2), 2009 Iowa Legis. Serv. 135 (West) (providing that the cap “applies to tax credits awarded on or after July 1, 2009”). Because these other projects are not parties to this review proceeding, however, any impact is not a relevant consideration under Iowa Code § 17A.19(5)(c)(3) (“The extent to which the grant of relief to the applicant will substantially harm other parties to the proceedings”). In any event, the issuance of the Required Contract to Iowa Eye does not affect the rights of the other projects because the cap applies to tax credits authorized by IDEED, and IDEED has already authorized Iowa Eye’s tax credits in the amount of \$6,500,000. (See Exhibits 27B, 29.) Therefore, issuing the Required Contract would not obligate further funds subject to the cap, and the requested action does not affect the substantial rights of the other projects.

D. The Public Interest Is Insufficient To Justify IDEED’s Inaction

IDED argues that its failure to provide Iowa Eye the Required Contract is justified by the “public interest in resolving questions about the Program and serious problems with Iowa Eye’s application before any additional taxpayer money is committed.” (Respondent’s Brief at 10.) Iowa Eye responds that while there is certainly a public interest in ensuring that the Program is managed properly and in preventing and discovering fraud, such an interest does not justify IDEED ignoring its duties under the law and its legal obligations, particularly when the action Iowa Eye requests was not suspended by Governor Culver’s request. Iowa Eye also contends

that the issues raised by IDED regarding its application under the Program are irrelevant to the question at issue here.

As an initial matter, the Court agrees with Iowa Eye that Governor Culver's request of September 18, 2009, does not provide authority to suspend the action requested here. Assuming for the sake of argument that the Governor has authority to order an indefinite suspension of certain IDED operations, despite the statutory directive that IDED engage in such operations, see Iowa Code § 15.393(1), (2)(a)(3), (2)(b)(2), the preparation, execution, and provision of Required Contracts to Registered Projects has not been suspended by the Governor. On September 18, 2009, Governor Chester J. Culver requested in a letter to the chair of the Iowa Economic Development Board "that no further schedules of qualified expenditures be approved nor any further tax credit certificates be issued." Governor Culver's statement did not suspend other phases of the Program. In particular, Governor Culver did not direct that IDED refuse to prepare, execute, and provide the Required Contract to Registered Projects.

The public interest also favors IDED honoring the commitments it made under the rules that existed at the time of such action. As the Iowa Supreme Court stated, when explaining why the State is bound to its legal contractual obligations:

It would be no favor to the State to exonerate it from contractual liability. To do so would seriously impair its ability to function. A government must finance its affairs, must contract for buildings, highways, and a myriad of other public improvements and services. It would lead to untenable results if a government, after having contracted for needed things, did not have to pay for them. The rules of economics seem to exact a terrible price from those of uncertain responsibility. The few persons or institutions willing to deal with an exempt state would necessarily factor in the cost of such a tentative chance to collect. This cost to the State would ultimately be borne by the public.

AFSCME/Iowa Council 61 v. State, 484 N.W.2d 390, 394 (Iowa 1992). The public interest does not dictate IDED's suspension of the issuance of a Required Contract to "Clean

Out” – presently for more than eleven weeks – without regard to IDED’s ongoing duties under the Program, its obligations to projects already registered under the Program, or even its need to act in conformance with the Governor’s statement.

In addition, IDED’s continuing inaction has cast doubt not only on the status of the tax credits awarded under the Program for “Clean Out” and other film projects, but also on the State’s willingness to honor its obligations with respect to all tax credit programs. In order for an economic development tax credit program that relies on transferrable tax credits -- like the Film, Television, and Video Project Promotion Program -- to function, a market must exist to enable the transfer of tax credits. The continued uncertainty surrounding the Program threatens to damage the market, and thus to seriously undermine economic development initiatives around the state. (See Exhibit 40, Affidavit of James M. Kurtenbach, Ph.D.) As Dr. James M. Kurtenbach stated in his affidavit, “We should expect that other industries will be similarly adversely affected if the State fails to comply with the perceived investment tax credit commitments for the film industry.” (Id. at 2.) Thus, the public interest supports recognizing IDED’s obligations to Iowa Eye under the Program by granting the requested relief, rather than affirming IDED’s prolonged inaction.

The public interest further supports granting the requested relief because allowing the production on “Clean Out” to move forward in Iowa would support the local economy directly and indirectly as the production spends millions in the state, provides jobs, and helps to build the Iowa film industry.

IDED raises a number of issues that it argues demonstrate further public interest in continuing to deny Iowa Eye the Required Contract, but the Court agrees with Iowa Eye that these issues are irrelevant to the question before the Court because they do not affect the

obligation of IDED to provide the Required Contract. First, IDED contends that it should have never registered “Clean Out” as a Registered Project in the Program or authorized the tax credit benefits. In effect, IDED asks the Court to remedy alleged mistakes that IDED itself made. (Respondent’s Brief at 15-16.) The action of IDED in registering “Clean Out” is not before the Court for review in these proceedings. Iowa Eye appealed IDED’s inaction in providing the Required Contract, and no party has appealed IDED’s registration action. Even if the question were properly before the Court, there appears to be no evidence by the Respondent to show IDED’s action, in granting the registration, was contrary to law or not supported by substantial evidence. The provisions of Iowa Code § 15.393 that IDED now argues it violated only require that IDED determine that the project will “have an economic impact on the economy of the state or locality sufficient to justify assistance under the program” and that the project “will further tourism, economic development, and population retention or growth in the state or locality.” The statute leaves the determination of what economic impact is sufficient in the discretion of IDED, an agency with expertise in economic development. Accordingly, the Court will not second-guess the agency’s determination, particularly where, as here, IDED could reasonably find that “Clean Out” would have a positive impact by the size of its budget--indisputably spending millions of dollars for Iowa labor and with Iowa vendors; by attracting further big-budget films and films with European financing; and by Iowa Eye’s offer to provide workshop and mentoring materials to assist in the development of the film industry in Iowa. (Tr. 40-42, 45-47; Exhibit 8A.)

At the hearing, IDED also presented evidence that Iowa Eye filed its application with IDED on July 29, 2009, one day before its Certificate of Organization was filed with the Iowa Secretary of State on July 30, 2009. (See Exhibits B, C.) This minor technicality – of which

Kevin DeWalt, who signed the application, made clear he was not aware (Tr. 118) – is of no legal significance. Cf. *Nepstad Custom Homes Co. v. Krull*, 527 N.W.2d 402, 406 (Iowa App. 1994) (requiring only substantial compliance with contract provisions, allowing “omissions or deviations from the contract that are inadvertent or unintentional, not the result of bad faith, do not impair the structure as a whole, are remedial without doing material damage to the other portions of the building, and may be compensated for through deductions in the contract price”). IDED still registered Iowa Eye, and Iowa Eye was organized at the time that its application was approved and it became registered. Moreover, IDED admitted in its answer Iowa Eye submitted the application (Respondent’s Answer ¶ 5) and that “Clean Out” became a registered project. Id. ¶ 12 (stating that Iowa Eye received a “letter registering the project”); see also Exhibit J, Affidavit of Amy Johnson ¶ 7 (“Iowa Eye’s application for ‘Clean Out’ was registered after July 1, 2009”).

IDED also argues that concerns about past abuses in the programs, such as those discussed in the Clifton-Gunderson report, with respect to improperly qualified expenditures, inadequate documentation, and deficient review by IDED before issuing tax credits justify its failure to provide the Required Contract. (Respondent’s Brief 13-14.) Yet, none of these allegations involved Iowa Eye, nor does any involve the process of providing the Required Contract. Likewise, IDED’s speculative concerns that Iowa Eye may be planning to spend money in a way that may not qualify under the current or future definitions of qualified expenditures are irrelevant. Iowa Eye’s qualified expenditures will be reviewed when it completes production of “Clean Out” and submits its schedule of qualified expenditures to IDED. See Iowa Code § 15.393(2)(a)(3), (2)(B)(2) (providing for review by IDED of qualified expenditures before issuing tax credit certificate). At that time, when actual expenditures have

been made, IDED can appropriately determine whether Iowa Eye's expenditures are qualified. The Court notes, however, IDED has previously stated that it allows many of the expenditures it now challenges, such as a "pass-through." (See Exhibit 22 at 4.)

For the same reason, the Court need not address IDED's allegation that IDED miscalculated the amount of the Investment Tax Credit when awarding tax credits for "Clean Out" in the approximate amount of \$6,500,000. The exact amount of the tax credit certificate to be issued by IDED is not determined until after the review of Iowa Eye's submitted qualified expenditures upon completion of the project, and it is unnecessary to determine that amount prematurely before the investments and qualified expenditures have been made. This issue is not relevant to the determination of whether Iowa Eye is entitled to the Required Contract.

E. Requirement of a Bond

The Court is in agreement with the Petitioner's request that the Petitioner is entitled to injunctive relief. The Court feels obligated to raise the issue, and allow the parties to present argument, regarding the necessity for the posting of a bond by the Petitioner prior to the Court's imposition of the injunctive relief requested.

Iowa Rule of Civil Procedure 1.1508 provides as follows:

Rule 1.1508. Bond. The order directing a temporary injunction must require that before the writ issues, a bond be filed, with a penalty to be specified in the order, which shall be 125 percent of the probable liability to be incurred

In that neither party in its argument or proposals to the Court has addressed the issuance of a bond, the Court finds the parties should be given further opportunity to express their position and request regarding the applicability of the rule and the amount of the bond, if any, that must be posted. Accordingly, the Court sets further hearing before the undersigned to address said issues.

ORDER

IT IS THEREFORE THE ORDER OF THIS COURT that further hearing be held before the undersigned Judge in Courtroom 307 at the Polk County Courthouse on the 20th day of November, 2009, at 9:30 a.m. for the limited purposes of the Court determining the need for and amount of any bond that may be required to be posted by the Petitioner herein before the issuance of a writ herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that upon the Court's determination of the bond requirement, if any, the Court will issue further order providing that, upon the Petitioner meeting the bond requirements, the Respondent, the Iowa Department of Economic Development, shall promptly prepare, execute, and provide to the Petitioner, Iowa Eye Entertainment, Inc., a written requirement that requires that upon completion of the Registered Project and submittal and approval by IDED of Iowa Eye's qualified expenditures, IDED will issue tax credit certificates for the qualified expenditures and qualified investment tax credits, up to \$6,500,000.00.

DATED this 17th day of November, 2009.

GLENN E. PILLE, District Judge
Fifth Judicial District of Iowa

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