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IN THE SUPERIOR COURT OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

RICHARD RODGERS; SHELBY MAGNUSON-HAWKINS; and DAVID PRESTON, Plaintiffs, vs. CHARLES H. HUCKELBERRY, in his official capacity as County Administrator of Pima County; SHARON BRONSON, RAY CARROLL, RICHARD ELIAS, ALLYSON MILLER, and RAMÓN VALADEZ, in their official capacities as members of the Pima County Board of Supervisors; PIMA COUNTY, a political subdivision of the State of Arizona, Defendants.	**Case No.:** C20161761 (Assigned to the Honorable Catherine Woods) **PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND CROSS-MOTION FOR SUMMARY JUDGMENT REGARDING COUNTS 3 AND 4.**

Pursuant to Ariz. R. Civ. P. 56, Plaintiffs move for summary judgment in their favor—and denial of Defendants' summary judgment motion—regarding Counts Three and Four. These counts allege that Defendants ("the County") violated A.R.S. §34-603, 34-604, and A.R.S. §34-606, and Pima County Code 11.12.060 and 11.16.010, when it hired Swaim and Associates ("Swaim") and Barker-Morrissey ("Barker") as the project architect and contractor, respectively, for the World View project. Summary judgment is appropriate because there is no genuine issue of material fact and Plaintiffs are entitled to judgment as a matter of law. *Orme Sch. v. Reeves*, 166 Ariz. 301, 309 (1990). This Motion is supported by the accompanying Separate Statement of Facts ("PSOF") and this Memorandum of Points and Authorities.

Memorandum of Points and Authorities

I. INTRODUCTION

There is no dispute of material fact. But the undisputed facts show that Plaintiffs, not the County, are entitled to judgment as a matter of law, because the County procured the services of Barker and Swaim in August 2015. PSOF ¶¶ 1—19, 25, 35, 36. It did so without ever considering following state or county procurement rules.[1] It never invited any other firms to participate in the six months of planning that ensued. PSOF ¶ 19. Then, at a late stage, it used World View's commercially motivated urgency to rationalize its preselected choice of Swaim and Barker because—as a consequence of the County's own wrongdoing—those firms were by then so thoroughly involved in the project that hiring anyone else would have been "arguably" impracticable. Defendants' Motion for Summary Judgment on Counts 3 & 4 ("Def. MSJ") at 9. Even in January 2016, however, the County acted without considering what competition would have been practicable under the circumstances, as A.R.S. § 34-606 requires. PSOF ¶ 38—39. Granting summary judgment for the County would convert the mandatory procurement requirements of Title 34 into a mere suggestion, allowing governments to avoid transparency requirements when it suits their (or favored companies') purposes.

[1] Plaintiffs agree with Defendants that, as relevant here, the Pima County Procurement Code mirrors state law. Citations herein are to the state statute but should be understood to refer to both unless otherwise specified.

II. ANALYSIS

A. Applicable Procurement Laws and Degree of Deference Owed to the County

Title 34's procurement requirements exist "to promote competition, to guard against favoritism, fraud and corruption, and to secure the best work or supplies at the lowest price practicable." *Rollo v. City of Tempe*, 120 Ariz. 473, 474 (1978). These statutes are written in mandatory "shall" language. A county that intends to hire an architect and a contractor "s*hall* procure design services as provided in this chapter," "s*hall* procure: [c]onstruction by competitive sealed bidding," or "s*hall* procure construction services under the construction-manager-at-risk, design-build and job-order-contracting project delivery methods *pursuant to this chapter*." A.R.S. § 34-602(B), (C) (emphasis added). Because the contracts at issue here were for architectural design services and construction services, Title 34 applies. Under A.R.S. § 34-603(B), the County "shall" procure construction-manager-at-risk services by "provid[ing] notice of each procurement of professional services … and shall award the single contract on the basis of demonstrated competence and qualifications for the type of professional services or construction services pursuant to the procedures prescribed in this section."

It is undisputed that the County did not do so. Instead, it procured the services of Swaim and Barker in early August 2015, when it began a six-month process of working exclusively with both companies to design, plan, and prepare for construction of the World View project. PSOF ¶¶ 1–5, 10, 19–21. In August 2015, there was no emergency or other circumstance warranting departure from A.R.S. § 34-603. Half a year later, in January 2016, the Board of Supervisors ratified the selection of Barker and Swaim that had been made long before—on the grounds that they had already spent six months working on the project.

There is one exception to the Title 34 procurement procedures relevant here: the County may make "emergency procurements" without complying with those procedures "if a threat to the public health, welfare or safety exists or if a situation exists that makes compliance with this title impracticable, unnecessary or contrary to the public interest." A.R.S. § 34-606. But even then, the County must procure services "with such competition as is practicable under the circumstances." *Id.*

The Swaim and Barker contracts were not emergency procurements under Title 34. The County does not contend otherwise. Instead, it argues that the phrase "impracticable, unnecessary or contrary to the public interest" creates a *standalone* exception to Title 34 even in *non*emergency situations. Def. MSJ at 5. In other words, it says the Court should *not* read Section 34-606 "as a whole" with "a comprehensive and harmonious meaning." *State v. City Court of City of Tucson (Gillette),* 138 Ariz. 244, 246 (App. 1983). The County also argues that it has broad authority to basically decide for itself when "the public interest" justifies disregarding Title 34 procurement rules. It says the Board of Supervisors, "the same entity that decides what is practicable, necessary, or in the public's interest in the first place—has the authority … to decide whether particular circumstances excuse Title 34 compliance." Def. MSJ at 6–7. This is incorrect.

First, that interpretation fails to give meaning to every word in Section 34-606. *Cf. Gillette*, 138 Ariz. at 246. That section is a single sentence, and it allows counties to "make emergency procurements" if "a *threat to the public health, welfare or safety* exists or if a situation exists that makes compliance with this title impracticable, unnecessary or contrary to the public interest, except that *these emergency procurements* shall be made with *such competition as is practicable under the circumstances*" (emphasis added). Following the rule of *in pari materia* requires that "impracticable, unnecessary, or contrary to the public interest" mean something of the same order of urgent necessity or near impossibility—and that these be considered "emergency" procurements—rather than as giving the Board *carte blanche* to disregard procurement requirements whenever the Board considers it expedient to do so. *Achen-Gardner, Inc. v. Superior Ct. in & for Cnty. of Maricopa*, 173 Ariz. 48, 51 (1992) (applying *in pari materia* when interpreting procurement statutes).

That is why the Attorney General, interpreting the virtually identical state procurement statute, has said that the "contrary to the public interest" exception only applies to "true emergency conditions" and is *not* a standalone exception to statutory procurement requirements. Ariz. Op. Atty. Gen. No. I96-007, 1996 WL 340788, **2–4 (1996).[2]

[2] Here, the County Procurement Code differs from state law. County Ordinance Section 11.12.060 purports to authorize "limited competition procurement[s]" in nonemergency situations and provides

The County's interpretation would render words in the statute surplusage because it would make "threat to public health, welfare or safety" redundant of "situation exists that makes compliance impracticable"; the latter would swallow up the former. *Cf. Herman v. City of Tucson*, 197 Ariz. 430, 434 ¶ 14 (App. 1999) (courts should "avoid interpreting a statute so as to render any of its language mere 'surplusage,'" or make any words "'void, inert, redundant, or trivial.'") (citation omitted). And it would transform Title 34's procurement requirements into mere recommendations, which counties could disregard whenever they assert that a situation makes compliance inconvenient. That was not the legislature's intention.

"Impracticability" means more than mere inexpediency. The statute does not use the word "impractical" but "impracticable," which means a substantial, unavoidable, and unanticipated impediment to performance. It means "extreme [or] unreasonable difficulty … and this difficulty … must have been unanticipated." BLACK'S LAW DICTIONARY 772 (8th ed. 1999). *Cf. 7200 Scottsdale Rd. Gen. Partners v. Kuhn Farm Mach., Inc*., 184 Ariz. 341, 345 (App. 1995) (defining impracticability in contracts as "death or incapacity of a person necessary for performance, destruction of a specific thing necessary for performance, [or] prohibition or prevention by law."); *Blair v. Burgener*, 226 Ariz. 213, 218–19 ¶ 17 (App. 2010) (defining impracticability in service of process rule as "*extremely* difficult or inconvenient" or as "futility" (emphasis added)). *See also* Ariz. Op. Atty. Gen. No. I96-007, 1996 WL 340788, *3 (1996) (impracticable means unforeseen impossibility).

Second, the County is not the entity "that decides what is practicable, necessary, or in the public's interest in the first place." Def. MSJ at 6–7. The *state* is. And it has determined that a certain procurement process is in the public's interest, and enacted Title 34 for that reason. *Secrist v. Diedrich*, 6 Ariz. App. 102, 106 (1967) (procurement requirements "are of great importance to the taxpayers," so

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that the County's procurement director "may … [f]ormulate a limited competitive process if a situation exists which makes compliance with normal purchasing procedures impracticable or contrary to the public interest." But the County Procurement Director did not formulate any process for the procurement of Swaim and Barker's services in August 2015. Also, the Code still requires that the County "obtain[]" such "competition" as is "appropriate under the particular circumstances." As described in Section C below, the County made no effort to comply with this requirement.

they should not "be frittered away by exceptions, but … should receive a construction … which will avoid the likelihood of their being circumvented, evaded, or defeated.") (citation omitted).

The County claims it is entitled to deference as to whether compliance with Title 34 would have been impracticable. Def. MSJ at 7. It cites no cases that support this claim, and no such deference is proper. It does cite *Sulphur Springs Valley Elec. Coop. v. City of Tombstone,* 1 Ariz. App. 268 (1965). But the question there was whether the city—which *did* comply with procurement requirements—acted correctly when it sold property as a single package rather than as separate items. *That* was a question of policy rather than legal duty, so the city was owed deference on *that* question. *Id.* But here, where the question is not a policy question but a question of the County's lawful authority, its "right is measured by its duty, which is to act in the public interest, to be fair, honest, prudent and to exercise a wise discretion in the awarding of its contracts." *Hertz Drive-Ur-Self Sys., Inc. v. Tucson Airport Auth.*, 81 Ariz. 80, 85 (1956). Local governments "ha[ve] no such absolute rights in executing [their] public powers" and may not "at [their] uncontrolled pleasure arbitrarily fix upon terms with one contractor to the utter exclusion of … another contractor, and upon terms disadvantageous to the public." *Id.*

The Arizona Supreme Court has not accorded deference in cases involving procurement requirements but has said that whether those requirements are applicable "depends on the 'proper construction of the applicable law.'" *Achen-Gardner, Inc.*, 173 Ariz. at 51 (citation omitted). Since legal interpretation is a matter for courts, not the County, it follows that no deference is proper. *See also Rollo*, 120 Ariz. at 474 (no deference); *Western Corr. Grp., Inc. v. Tierney*, 208 Ariz. 583, 587 (App. 2004) (same). On the contrary, the Court must independently apply "[a] most careful analysis of the evidence." *Brown v. City of Phoenix*, 77 Ariz. 368, 377 (1954) (same).

But it is unnecessary to determine how much deference is due, because—as explained below, Sections B and C—the County did not exercise *any* discretion in hiring Swaim and Barker. "Where it is evident that the [government] exercised no discretion … [courts] owe no deference to discretion that it failed to employ." *Health Cost Controls v. Sevilla*, 850 N.E.2d 851, 865 (Ill. App. 2006).

B. The County Unlawfully Procured Swaim and Barker Morrissey's Services in August 2015.

The County's argument hinges on one basic, false assumption: that the procurement of Barker's and Swaim's services occurred in January 2016, when the Board approved Huckelberry's recommendation that the County officially select them for the project. But the reality is that their services were procured in *August 2015*, six months earlier. PSOF ¶¶ 1–4, 10–15. That was when these firms began providing services to the County, and they did so for half a year—designing and planning the building and becoming thoroughly acquainted with the project. PSOF ¶¶ 10–11, 19, 22–23. And in August 2015, when the County procured those services, it made no effort to comply with Title 34 *or* to use the emergency procurement statute, *or* to instruct the County Procurement Director to formulate a "limited competitive process" (as required by Pima County Ordinances Section 11.12.060), because no circumstances then existed to justify an emergency procurement. PSOF ¶ 18. Then, in January 2016, the Board ratified the procurement that had already taken place—although even then, it still did not follow the statutory requirements, as explained in Section C below.

It is irrelevant that the County "did not commit in writing" to the arrangement until January 2016 (Defs MSJ at 8), or that it did not pay Swaim and Barker for services performed between August 2015 and January 2016. PSOF ¶ 26.[3] "Procurement" means "buying, purchasing … *or otherwise acquiring* any … services, construction or construction services," and the term includes "*all* functions that pertain to obtaining any … services, construction or construction services, *including description of requirements, selection and solicitation of sources, preparation and award of contract, and all phases of contract administration*." A.R.S. § 41-2503(32) (emphasis added). *See also* BLACK'S LAW DICTIONARY 1244 (8th ed. 2004) (defining procurement as "getting or obtaining something."); BLACK'S LAW DICTIONARY 1373 (4th ed. 1968) (defining "procure" as "[t]o obtain" or "[t]o bring the seller and the buyer together so that the seller has an opportunity to sell."). The County *procured* the services when it *sought them and got them*.

[3] The provision of free services to the government may seem beneficent. But when done in anticipation of future reward, or in a manner that may generate unfair favoritism in either this or a future contract, it raises the kind of concerns that led to the enactment of procurement laws in the first place.

The statute forbids the County's effort to "buy now, pay later." A.R.S. § 34-605(B) requires, in the case of a construction-manager-at-risk procurement, that the County "enter into a written contract … under which the agent shall pay the contractor a fee for preconstruction services." The County did not enter into written contracts with Swaim or Barker-Morrissey for preconstruction services until February 2016, seven months after the firms began providing those services, and the County did not pay them for the preconstruction services rendered from August 2015 to January 2016. PSOF ¶¶ 16–17. These failures were *themselves* violations of state procurement law. *See* A.R.S. §34-602(C) and (D).

The County might claim that Swaim and Barker provided their services to World View and not to the County, but this is incorrect. The two firms were designing and building a facility that is and always has been owned by the *County* (PSOF ¶ 37), and *the County* ended up paying Swaim and Barker to build the project, when it approved the plans in January 2016. It was *the County* that needed to know the cost and parameters of the project so it could finish the facility in time to lease it to World View. The County was involved throughout the process and led the team to furnish World View with the facilities, which were built at the County's expense and in accordance with a contract that Swaim and Barker (later) signed with the County. So it was *the County* that procured these firms' services.

It did so in August 2015, when Huckelberry (in his own words) "selected Swaim … as the Lead Architect … [and] Barker" as the contractor. PSOF ¶ 3. There was no urgency at that time, because World View's November 2016 deadline was not mentioned until September or perhaps October. PSOF ¶ 18. In December 2015, World View made it official that November 2016 was their deadline. PSOF ¶ 24. But in August 2015, when the County asked Swaim and Barker to design plans and prepare estimates for construction of the World View project, no such deadline was in mind. PSOF ¶ 18.

Representatives of the County met with Barker and Swaim for the first time on August 20, 2015 (PSOF ¶ 10) but even before then Swaim provided the County with "[a]rchitect services," A.R.S. § 34-603(A)(1), and "construction services, including description of requirements, selection and solicitation of sources, preparation and award of contract," etc. *Id*. § 41-2503(32). PSOF ¶ 1. Together Swaim and Baker provided the County with valuable "[a]rchitect services," and/or "[c]onstruction-manager-at-risk

construction services," and/or "[d]esign-build construction services," and/or "[e]ngineer services," *id.* § 34-603(A)—ignoring Title 34.

This went on until January 19, 2016—153 days—before the Board officially approved the project. During that time, no other architect or contractor was given the opportunity to participate; Barker and Swaim were, in all but name, the exclusive contractor and architect. PSOF ¶¶ 12–14, 22–23. And during that time, Huckelberry never even considered suggesting that the County procure services from any other contractor or architect.[4] He testified that he would not have done so, even if he *had* considered it, because the project was being tailor-made for World View and he was satisfied with the services Barker and Swaim were providing. PSOF ¶ 21. He consulted no other architects or contractors; Moffatt did, but only to casually ask whether the plans Swaim and Barker put together were realistic. PSOF ¶¶ 19, 20.

Swaim and Barker prepared and revised plans and estimates multiple times during these months. PSOF ¶¶ 22, 23. Barker provided between five and ten construction estimates, which would have cost at least $2,000 each. PSOF ¶ 22. Swaim dedicated an employee's working hours to the project. PSOF ¶ 23. They did this for free, however, because they hoped that by becoming so deeply involved at the front end, they would be hired once the project was approved. PSOF ¶ 26. Moffatt testified that it was "not unusual" for firms to do this as "part of their marketing." PSOF ¶ 27.

Their hopes were reasonable; after spending half a year designing the project in such detail, it probably would have been hard to switch horses midstream. PSOF ¶ 28. But the County chose which horse to ride across that stream six months previously. So the argument that the County was "arguably justified in concluding [in January 2016] that the compressed time frame for design and construction necessitated a departure from normal Title 34 requirements," Defs. MSJ at 9, is irrelevant. In reality, Huckelberry and his staff circumvented Title 34 by procuring Swaim's and Barker's services in August

[4] Neither firm had any particular expertise or experience relevant to this project. Neither had ever built a balloon launch pad before, PSOF ¶ 6, and there are plenty of other architects and contractors in the county. PSOF ¶ 9.

2015 and working with them so extensively that, by the time the Board considered the matter in January 2016, it was "arguably" impracticable to switch.

Public contracting experts call this kind of illegal procurement "unequal access to information." Daniel I. Gordon, *Organizational Conflicts of Interest: A Growing Integrity Challenge*, 35 PUB. CONT. L.J. 25, 32 (2005).[5] It occurs when one contractor "ha[s] almost unfettered access to procurement sensitive information while the other bidders ha[ve] none." *U.S. ex rel. Harrison v. Westinghouse Savannah River Co.*, 352 F.3d 908, 917 (4th Cir. 2003). That was the case here—except that the County *also* used the unequal access as a justification for not even seeking other bidders *at all*.

On November 2, 2015, after receiving preconstruction and design services from Barker and Swaim for half a year, Huckelberry stated, "[i]n our initial meetings with World View … I suggested they work with Swaim and Associates Architects and Barker Morrissey Contracting." PSOF ¶ 4. He instructed his deputy to ask County staff to "make recommendations regarding a possible contract with Swaim." PSOF ¶ 30. After that, on December 23, 2015, World View's president wrote to Huckelberry to say "World View accepts the Pima County proposal," and "[w]e agree that Swaim Associates will be the architect and Barker Morrissey the builder." PSOF ¶ 24.

At that point, Huckelberry began drafting a report to the Board of Supervisors in which he recommended that Swaim and Barker be selected based on the fact that the County had been receiving their construction services since August 2015. In fact, in the first draft of the report, he made no mention of any particular urgency; he wrote:

> During the recruitment process to offer World View facilities in Pima County, it was necessary to quantify their exact architectural program and space needs, as well as provide them with a reliable cost estimate for building construction. *The County initially selected Swaim* Associates Ltd Architects AIA, with Mr. Phil Swaim as the Lead Architect, *and Barker Morrissey* Contracting with Mr. Riley Rasmussen as the Project Manager. *These two firms provided services* without compensation to provide the necessary architectural programming and design and cost models to determine the reliable size configuration and cost of constructing World View's headquarters in Pima County. *Because of their prior involvement and detailed understanding of World View requirements,* the County will now

5 https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?referer=https://www.bing.com/&httpsredir=1&article=1688&context=faculty_publications

> select Swaim Associatesas [*sic*] the Project Architect and Barker Morrissey Contracting as the Contractor using *discuss selection/contracting method (to be completed by the Procurement Director with the appropriate justification for doing so).*

PSOF ¶ 32; emphasis added. The underlined words were highlighted in the original to emphasize that Huckelberry needed a *post-hoc* rationalization for giving the contracts to Swaim and Barker. The draft report contained *no reference* to World View's November 2016 deadline. Only after consulting with the Procurement Director did Huckelberry revise the draft to refer to the deadline and say that complying with Title 34 would be contrary to the public interest. PSOF ¶ 33.

These facts are similar to *Innovation Dev. Enter. of Am., Inc. v. United States*, 108 Fed. Cl. 711 (2013), in which the Air Force circumvented procurement requirements by delaying the offering of a project until it became urgent—and then used that urgency as a justification for invoking an emergency exception to the procurement rules. *Id*. at 718. As in this case, the Air Force made no effort to determine whether a competitive process would have been practicable under the circumstances. *Id.* at 719. Instead, it claimed that its decision was justified by "the short time line and the fact that … the services [the contractor would] render[] are highly specialized and unique to the incumbent contractor." *Id.* at 726 (citation omitted). The court found this an unexcused violation of the law, because the compressed time frame was "entirely the result of a lack of advance planning on the part of the Air Force," and there was "no evidence … of any efforts by the Air Force to conduct adequate market research, or to plan and prepare for a competitive procurement." *Id* at 727. There was also "no indication … that the Air Force engaged in a meaningful consideration of the capabilities of other potential sources." *Id.* at 728. Thus the procurement was arbitrary, capricious, and unreasonable. *Id.* Likewise, the County's procurement of Swaim and Barker's services between August 2015 and January 2016—with no effort to determine whether proper procurement was practicable—and its delay, which led to a compressed time frame in January 2016—all of this was arbitrary, capricious, and unreasonable.

Even after the contract was awarded, Huckelberry stated that his staff would have chosen Barker and Swaim regardless of Title 34, *not* because of the compressed timeframe, but based on the firms' "prior uncompensated work helping to define the size, scope and extent of the facility required by World View." PSOF ¶¶ 35, 36. But, of course, no other architect or contractor was ever given the chance to

perform such prior work, so no other firm had any chance of benefiting from the urgency that County officials themselves created. Instead, the reason Swaim and Barker alone provided such work was because County officials exclusively procured *their* services six months before—in an informal, back-door manner that violates Arizona law.

Whether or not they had good intentions, the arrangement circumvented the procurement statutes. *See Hanna v. Board of Educ. of Wicomico Cnty.*, 87 A.2d 846, 847–49 (Md. App. 1952) (even where there is "no evidence of fraud or collusion," any "private agreement which tends to prevent or restrict competition, or any scheme which has the effect of promoting favoritism" is unlawful). As the Alaska Supreme Court has said, public contracting must be "conducted with … fairness, certainty, publicity, and absolute impartiality," *McBirney & Assocs. v. State*, 753 P.2d 1132, 1136 (Alaska 1988) (citation omitted). The government "cannot be allowed to use the sole-source process to circumvent [procurement] requirements." *Id.* at 1136 n.5. Transparency is essential because "the potential for abuse increases as the amount of publicity surrounding a particular public works project decreases." *Id.*

There was no publicity or transparency here. The County met in August 2015 with a select group of chosen contractors and collaborated with them in such a way that by January 2016, the project deadline made it impracticable, in the County's opinion, to comply with Title 34. That was circumvention—and the sort of favoritism Title 34 forbids. *See also PENPAC, Inc. v. Morris Cnty. Mun. Util. Auth.*, 690 A.2d 1094, 1098 (N.J. Super. App. Div. 1997) ("The opportunity to privately negotiate an agreement violated the recited goals of the competitive bidding requirements of the statute."). The process was prejudiced by Defendants' decision to procure services from the contracting and architecture firms that it hand-selected.

C. The County Failed to Comply with A.R.S. § 34-606, Which Requires it to Make Emergency Procurements with Such Competition as is Practicable.

Even if one assumes that procurement of Swaim and Barker's services occurred in January 2016 instead of August 2015, the County's actions were still unlawful, for two reasons. First, even when emergency procurements are proper, state law and County ordinances require the County to make those procurements "with such competition as is practicable under the circumstances." A.R.S. § 34-606; *see*

also Pima County Code 11.12.060(b). The County did not do this. Second, World View's timeframe for completion of the project was not a matter of "public interest" but of its own *private* interest, and therefore cannot satisfy the emergency procurement rules.

1. The County Made No Assessment of The Practicability of Competition.

County officials made no effort at *any* time to determine whether another contractor or architect could have completed the project before November 2016. They simply assumed it. PSOF ¶ 38. Although they knew of World View's completion deadline by September or October of 2015, PSOF ¶ 18, they did not try to learn, then or later, whether another architect or contractor could design and/or build the structure before November 2016. They made no effort to determine what competition would have been practicable under the circumstances. PSOF ¶ 39. Instead, they worked closely and exclusively with World View, Swaim, and Barker for months to plan the project, PSOF ¶¶ 14, 22—23, then presented the package to the Board and asked it to ratify the preselected contractor and architect.

Thus, even if the County were entitled to deference, it plainly abused its discretion by (1) selecting Barker and Swaim as the project contractor and architect in August 2015 and then later ratifying that arrangement with the excuse of the new deadline and by (2) failing to consider what amount of competition would be proper under the circumstances. The fact that A.R.S. § 34-606 *mandates* that the County employ whatever competition is practicable under the circumstances means the County *has* no discretion to disregard that requirement. *See Advanced Transp. & Logistics Inc. v. Botetourt Cnty.*, 77 Va. Cir. 164, 2008 WL 8201355 at *8 (2008).

Even if it were otherwise, the County plainly abused its discretion by simply ratifying the predetermined selection decision in January 2016. Even under the abuse of discretion standard, deference is only appropriate where the County evaluates facts and reasons from them to draw relevant conclusions. "Findings are not supposed to be a *post hoc* rationalization for a decision already made." *Bam, Inc. v. Board of Police Comm'rs*, 7 Cal. App. 4th 1343, 1346 (1992). When officials "simply 'rubber stamp[]' a predetermined result," they are not entitled to deference. *Redevelopment Agency v. Norm's Slauson*, 173 Cal. App. 3d 1121, 1127 (1985).

Here, the Board never considered whether compliance with Title 34 would have been impracticable. Although Huckelberry and other witnesses *thought* it would have been, they did not really know—and could not, because they never tried to find out. PSOF ¶¶ 38, 41.

2. World View's Commercial Needs Don't Qualify as The "Public Interest".

Finally, the County contends that letting the contract to public bidding would have been "contrary to the public interest" because when the Board approved the World View deal in January 2016, it was necessary that the project be completed by November 2016, and it would have caused delay and disruption to obtain the services of a different architect or contractor. But that is not what "contrary to the *public* interest" means. The *public* interest means the interest of the *public*—not the private interest of World View.

The County consistently acted at World View's behest. It made no effort to question, challenge, or negotiate over World View's deadline. PSOF ¶ 40. Huckelberry viewed his efforts as a matter of "meeting [World View's] deadline as a condition of economic expansion." *Id.* The County made no assessment of the consequences of not meeting that deadline; it just assumed World View would find it in its financial interest to locate elsewhere. PSOF ¶ 41. The County adopted World View's November 2016 deadline without any consideration of the *public* interest of meeting that deadline (as opposed to devoting taxpayer resources to some other project). But that deadline was set based on World View's *private* interests. The County took no steps to ensure that it also served a sufficient *public* interest to justify deviation from Title 34.

Even assuming World View's private interests were the same as the public interest, the County made no effort to confirm that letting the contract by public bidding would have been contrary to World View's interests. There is no evidence that the County ever discussed the requirements of Title 34 with World View, most likely because they never had any intention of complying with them. Nor is there evidence that following the procurement rules would have been incompatible with World View's plans—there's just the County's assumption that World View's November 2016 deadline was immovable. *Yet it was not*. The facilities were not finished until December 23, 2016. Defs' Statement

of Facts ¶ 51. So the only possible "public interest" justifying deviation from the law was an unreviewed assumption by Huckelberry and Moffatt that turned out to be untrue.

D. The County's Standing and Mootness Arguments are Meritless.

The County's standing argument is easily disposed of. The Plaintiff taxpayers have standing to challenge violations of procurement requirements—including county procurement ordinances. *Secrist*, 6 Ariz. App. at 104; *Smith v. Graham Cnty. Cmty. Coll. Dist*., 123 Ariz. 431, 432 (App. 1979).

The County also contends that because all payments under the contract have been made, Plaintiffs' request for injunctive relief is moot. That is not so. First, Plaintiffs seek other forms of relief, such as declaratory relief that the contracts here were void *ab initio* and unenforceable. *Tierney*, 208 Ariz. at 586 ¶ 13. Second, the Court can still grant an injunction, as pleaded in the Complaint, to permanently bar the County from expending public funds pursuant to the terms of the challenged agreements or any *other* contract adopted pursuant to those agreements. That would include, *inter alia*, barring the County from contracting with Barker and/or Swaim for maintenance, repair, etc., of the facilities at issue.[6] Courts have held that a proper remedy in a case of "unequal access to information" is to require that the contract be let via procurement statutes and to disqualify the contractors with the unfair advantage. *See, e,g., NKF Eng'g, Inc. v. United States*, 805 F.2d 372, 377 (Fed. Cir. 1986); *McBirney & Assocs.*, 753 P.2d at 1137–38. As it would be unjust to allow Barker and Swaim to continue profiting from the unlawful procurement practices engaged in here, the Court can and should order the County to obtain any further repair and maintenance services through Title 34 and disqualify Barker and Swaim from participating. Third, as addressed in Plaintiffs' prior pleadings,[7] declaratory and injunctive relief on these causes of action will have the beneficial effect of setting the law going forward on all future County procurements.

[6] On December 19, 2017, a balloon exploded at the World View facility, causing $200,000 in damage, which Swaim and Barker repaired. That was paid for by the County's insurance. *See* Memorandum of C.H. Huckelberry to Pima County Board of Supervisors, Feb. 8, 2018, https://goo.gl/FpSvUx.
[7] *See* Plaintiffs' Opposition to Defendants' Initial Motion for Summary Judgment at 5-7.

CONCLUSION

The County procured Barker's and Swaim's services in August 2015, without complying with state and county procurement requirements. There was no justification for failing to comply, because no emergency or impracticability existed to justify deviating from Title 34. Even in January 2016, when the County claims an impracticability *did* exist, it *still* failed to comply with the procurement requirements because it made no effort to make the procurements "with such competition as [was] practicable." A.R.S. § 34-606. Nor was the January 2016 deadline a matter of public interest; it was a matter of *private* interest which the County rubber-stamped. No deference is due to the County, therefore. But even if it were, its actions were unreasonable, arbitrary, and an abuse of discretion.

Defendants' motion for summary judgment should be *denied* and summary judgment should be granted for *Plaintiffs*.

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Respectfully submitted,

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