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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

PLAINTIFFS' REPLY IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT REGARDING COUNTS 3 AND 4

(Assigned to the Honorable Catherine Woods)

To sum up: the County procured Swaim and Barker's services in August 2015, at a time when there was no emergency or impracticability to justify a departure from the requirements of A.R.S. §§ 34-602 and 34-603 and Pima County Code 11.12.060 and 11.16.010. Even the County does not claim there was an emergency or impracticability at that time, and it has offered no justification for procuring these pre-construction services then without following the legal requirements. For that reason alone, Plaintiffs are entitled to summary judgment. The County makes three arguments in opposition: (1) that it is entitled to deference on what constitutes "impracticability"; (2) that it did not procure the services until January 2016; (3) that the whole project has now proceeded to such a stage that this Court can do nothing about it. This Court should reject those arguments.

I. WHATEVER DEFERENCE THE COUNTY IS ENTITLED TO CANNOT WARRANT ITS WHOLESALE VIOLATION OF PROCUREMENT REQUIREMENTS

The law provides that the County "shall" procure preconstruction architecture and contractor services in accordance with the procedure specified in A.R.S. §§ 34-602 through 34-605 and Pima County Code 11.12.060 and 11.16.010. It is undisputed that the County did not do that. There's an exception in cases where "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 use "such competition as is practicable under the circumstances." *Id.* The County procurement code likewise allows "the procurement director [to]…[f]ormulate a limited competitive process if a situation exists which makes compliance with normal purchasing procedures impracticable or contrary to the public interest. The competition obtained shall be that appropriate under the particular circumstances." Pima County Code 11.12.060(A)(1)(b).[1]

The County insists that "a situation exists that makes compliance with [this title] impracticable" is different from an "emergency," and that the County has discretion to determine when impracticability exists—discretion so broad that only the most extreme impropriety, such as fraud or conflict of interest,

[1] The procurement director here did not formulate a limited competitive process at all, PSOF ¶ 25, and—as explained below—did not seek to obtain any competition.

will exceed it. Defs.' Reply/Resp. at 3–4. That's doubtful; for one thing, reading the statute as a whole—as the Attorney General has done, Ariz. Op. Atty. Gen. No. I96-007, 1996 WL 340788 (1996)—it is plain that "impracticability" or "contrary to the public interest" must rise to a level that is essentially equivalent to an emergency. After all, Section 34-606 goes on to refer to emergency procurements, impracticability procurements, and public interest procurements together as *"these emergency procurements," id.* (emphasis added), and the statute is entitled "[e]mergency [p]rocurements." Moreover, if "impracticability" meant mere inconvenience, then it would be easy for counties to evade the procurement statutes whenever it was convenient to do so—which is virtually always. For more on why the impracticability provision does not create a standalone exception to procurement laws, *see* Plfs.' Mot. at 3-5.

Impracticability does *not* mean "inconvenient" or "complicated." It means "extreme [or] unreasonable difficulty … and this difficulty … must have been unanticipated." BLACK'S LAW DICTIONARY 772 (8th ed. 1999). And the evidence here shows that the County only found it *inconvenient* to follow the procurement rules—not impossible. In fact, the County made no findings (and there is still no evidence) that it *could not* have obtained Barker and Swaim's services pursuant to the procurement statutes, either in August 2015 when it procured those services—or later, when it learned that World View wanted the building done by November 2016—or *even in January 2016*, when the Board approved the *fait accompli* Huckelberry presented them with. Instead, the Board simply adopted Huckelberry's assumption—one that he formed with no actual inquiry—that nobody else could have done the job in time. PSOF ¶ 38.

The County's only answer on this point is to engage in evidence-free speculation about what "[t]he Board could have reasonably concluded." Defs.' Reply/Resp. at 8. But this isn't a rational basis case, and what the government could have reasonably believed is irrelevant. This is a statutory procurement case, and the Board was obligated to follow the statutes when procuring preconstruction

services.[2] It did not. It spent six months, starting in August 2015, planning the World View project with Barker and Swaim—*i.e.*, procuring their services—without even considering obeying those laws. PSOF ¶¶ 12–19. Then in January 2016, after Barker and Swaim had become so thoroughly involved in the project that the County considered them irreplaceable—only *then* did the County claim impracticability, on the grounds that Barker and Swaim had done so much planning by that point. *Id.* ¶ 32. Thus the purported impracticability was an artifact of the County's violation of the law. And that is an unquestionable abuse of discretion. *Cf. Innovation Dev. Enter. of Am., Inc. v. U.S.*, 108 Fed. Cl. 711, 727 (2013).

What's more, even if the County's actions did comply with *statute*, they violated the *County Procurement Code*. That Code distinguishes between emergency procurements and "public interest" procurements more clearly than state law does. Section 11.12.060(A)(1) allows the Board ***either*** to (a) "[m]ake emergency procurement[s] … if there exists a threat to public health, welfare, [etc.]" ***or*** to (b) "*[f]ormulate a limited competitive process* if a situation exists which makes compliance with normal purchasing procedures impracticable," so long as it obtains "[t]he competition … appropriate under the particular circumstances." (emphasis added). But here, no "limited competitive process" was ever "formulate[d]." PSOF ¶ 25. Instead, the Board simply made the procurement. But it can only do that under (a), in cases of "emergency"—and the County admits no *emergency* existed. Defs.' Reply/Resp. at 56. It claims this was an "impracticable or contrary to the public interest" case. But if *that's* true, then the Board violated the Code by not formulating a limited competitive process, and just making the procurement instead—which is only allowed in *emergency* cases. (This entitles the Plaintiffs to Judgment on Count Four of the Complaint.)

[2] The abuse of discretion standard only bars courts from overriding *policy* decisions by a county, not from enforcing statutes when a county violates those statutes. *See City of Glendale v. White*, 67 Ariz. 231, 238 (1948) ("*Where there is no…law forbidding such action*, we do not believe the court may substitute its judgment for that of the common council unless the latter's exercise of judgment or discretion is shown to have been unquestionably abused." (emphasis added)). Because the County's actions here violated the procurement laws, those actions were an abuse of discretion.

All of this shows that this Court need not decide how much discretion the County has when determining impracticability. There *was* no finding of impracticability—and no *grounds* for a finding of impracticability—until months after the procurement happened. The County ran a working group with Barker and Swaim in August 2015, which met repeatedly,[3] without offering any other contractor or architect an opportunity to participate, PSOF ¶¶ 14, 19, Plfs' Reply to CSOF ¶ 14, and without following procurement statutes. Only in January 2016, after World View officially approved the project that the County had so thoroughly planned—only *then* did the County ratify the procurement of Swaim and Barker's services, which had occurred six months before.

The County urges this Court not to "second-guess" its actions. Defs.' Reply/Resp. at 4. But the procurement laws exist to cabin the County's discretion. *Secrist v. Diedrich*, 6 Ariz. App. 102, 106 (1967). When abuse occurs—when a county gives its specially chosen favorites an insider's opportunity to participate in planning a project, and then gives the contract to those favorites, on the grounds that they have insider knowledge—it's proper for courts to act. The procurement statutes exist to protect taxpayers against waste, abuse, and favoritism of the kind that occurred here. Swaim and Barker were chosen for this project, not through an open process—indeed, through no particular process at all. They were chosen just because Huckelberry and his staff decided to invite them, and only them, to provide preconstruction services. PSOF ¶¶ 14, 19. That's just how "old boys networks" work, and that's what the procurement statutes forbid.

II. THE COUNTY UNLAWFULLY PROCURED SWAIM'S AND BARKER'S PRECONSTRUCTION SERVICES BEGINNING IN AUGUST 2014

A. The County Procured Preconstruction Services from Swaim and Barker Beginning in August 2015

The County describes its procurement of Barker and Swaim's services as if they were just vague initial inquiries, throwing ideas around about whether some kind of project might be possible. To rule

[3] Swaim testified that there were between 5 and 10 such meetings. PSOF ¶ 14. Barker provided the County between 5 and 10 revised versions of construction estimates. PSOF ¶ 22.

for Plaintiffs, it says, would mean a county "can't ask one of its architects to take a preliminary look at whether a building ... would work on a particular parcel." Defs.' Reply/Resp. at 8. But that's a straw man—and a self-contradiction.

It's a straw man because the six months of meetings, planning, negotiation, and estimates that the County engaged in with Swaim and Barker between August 2015 and January 2016 were not a "preliminary look." They were sustained, detailed planning meetings, with experts providing the County with multiple drawings, revisions of drawings, estimates, revisions of estimates, discussions of construction materials, deadlines, and costs. PSOF ¶¶ 14-15, 22. And it's a self-contradiction because the planning was actually *so detailed* that the County argues in this case that it couldn't have hired anyone else in January 2016, because by then Barker and Swaim had done so much planning that it would have been impracticable to hire a different architect or contractor; that would have meant starting from scratch. PSOF ¶¶ 28, 29, 35-36. That can't be true if all Swaim and Barker did was "take a preliminary look."

Either Swaim and Barker's precontract work was so in-depth and detailed that the County could not have hired anyone else—***or*** Swaim and Barker just took "a preliminary look," which would mean there was no impracticability justifying a departure from the procurement laws in January 2016. It can't be both.

The evidence makes clear which one it is. Over the course of six months, Barker and Swaim provided the County with detailed planning and preparation for the project. Huckelberry's deputy, Moffatt, testified that this planning was so detailed, and gave Swaim and Barker such a head start, that the County could not have hired a different contractor or architect in January 2016. "You could not get anybody up to speed in time," he said. "[N]umber one, you [would have] had to start again with architects, and if—and even if you had a contractor that could build it that fast, you had to—you had to get an architect to design it." Pls.' Supplemental Statement of Facts ("PSSOF") ¶ 1. He believed Swaim's plans were "probably 30 percent" complete by January 2016, *id.* ¶ 2—nearly a *third*, even by the County's own estimation—and that this head start was the deciding factor:

> Q: Because Barker Morrissey and Swaim had been involved from an early date, they were up to speed already [by January 2016]?
>
> A: Clearly.

PSSOF Ex. 2 at 84:12–15 and PSSOF ¶ 3. Barker and Swaim agreed. When the County's attorney asked Barker in deposition, "So when you're doing a pre-engineered metal structure, is there lead time that's required to get the metal engineered and fabricated before it comes out to the site?" his answer was "Yes." When asked, "So is that one of the reasons to involve a contractor like Barker Morrissey in a project earlier on versus some more standard design/bid/build method?" His answer was, "Yes, absolutely." PSSOF Ex. 3 at 81:11–20 and PSSOF ¶ 4. Swaim testified that the planning he and Barker did before January 2016 was so detailed that they were able to proceed with the project at a record-setting pace, and the plans they prepared before that only time required some modifications afterwards:

> [Swaim]: …we put the bid package out for the steel three weeks after the contract started, which is … probably one of the fastest project schedules I've ever seen ... . [W]e worked with [Barker] to create—to provide the drawings for [the] bid packages ... . [The steel and the elevator] were long-lead items. That was the only way to really get the project done.
>
> Q: So it's accurate then to say that ... these post-January bids and things ... you were able to do that promptly because you had this information that you had been working with in these preliminary drawings and estimates; right?
>
> A: That certainly helped.
>
> Q: How much did the conceptual design change after January 2016?
>
> A: There were modifications. It was still basically a 200 by 600 building, so the basic organization didn't change.

PSOF Ex. 7 at 59:14-61:4. In other words, the six month head-start made all the difference.

Barker got to such a level of detail in planning the project before January 2016 that at one point he revised plans to scale down the super-flat floor in the construction facility to a merely flat floor and

modified the bay spacing to reduce the number of columns inside, PSOF Ex. 1 at 36:22–39:20, and at another point, estimated that the chip seal on AB would cost $277,115. PSOF Ex. 10.

This was not "a preliminary look." This was preconstruction services. It was "professional architect services … within the scope of architectural practice as provided in title 32, chapter 1," A.R.S. § 41-2503(1) and "[a] combination of construction and … design services and preconstruction services, as those services are authorized in the definitions of construction-manager-at-risk, design-build or job-order-contracting in this section." *Id.* § 41-2503(6)(b). *See also* A.R.S. § 34-605 (referring to "[c]onstruction-manager-at-risk construction services," "[d]esign-build construction services," "architect services" and "[e]ngineer services."). And that means it should have been procured through the proper procedures.

It was only because the County procured in-depth preconstruction services between August 2015 and January 2016, without following the procurement laws, and without justification for not following them, that the County found it impracticable to hire anyone else in January 2016.

The County's opposition suggests that it did not procure Swaim and Barker's services because it is "World View [that] began consulting with Swaim, and Swaim contacted Barker." Defs.' Reply/Resp. at 7. It's unclear what relevance that has. Arizona law defines procurement as "buying, purchasing … *or otherwise acquiring any* … services [including] construction or construction services," and the term includes "*all* functions that pertain to obtaining *any* … 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). There's no dispute that Swaim and Barker provided their services to the County. World View certainly didn't procure their services, because World View was not even sure it wanted to locate in Pima County until after the County presented it with the plans it had Swaim and Barker prepare. And World View does not own the facilities; the *County* owns the facilities that Swaim and Barker planned and built. The *County* paid to implement the plans they drafted. The planning meetings with Swaim and Barker were organized by the *County*. Swaim and Barker sent their plans and estimates to the *County*. The County denies none of

this. So the *County* procured Swaim and Barker's services. As for *when* the County procured these services, it did so when it obtained them. That began in August 2015 and proceeded until January, when the Board ratified the selection of Swaim and Barker—a selection Huckelberry admitted (then and later) had already really been made. PSOF ¶¶ 5, 32, 35, 36.[4]

Since the County procured the services, it was required to comply with the procurement statutes. Those statutes require that the County "enter into a written contract … under which the agent shall pay the contractor a fee for preconstruction services." A.R.S. § 34-605(B). The County did not enter into a contract with Swaim and Barker until February 2016, seven months after they began providing the services, and the County has never paid them at all for the services rendered from August 2015 to January 2016. PSOF ¶¶ 16–17. Not paying them for those preconstruction services is *itself* a violation of state procurement law, even if the County is correct on every other argument. *See* A.R.S. § 34-602(C) and (D). The County has not addressed this point.[5]

There is no genuine dispute that the County procured Swaim and Barker's services beginning in August 2015 without following state or county procurement laws and without any impracticability. And there's no dispute that the head-start that this gave Swaim and Barker was the reason why the County selected them in January 2016. This was unquestionably an abuse of whatever discretion the County may have.

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[4] The County also suggests it did not procure Swaim and Barker's services in August 2015 because "the County can only procure services through its authorized agents—in this case, that is the Board." Defs.' Reply/Resp. at 7. But that argument is fallacious. The undisputed evidence shows that Huckelberry and his staff "acquir[ed] … services [including] construction or construction services," and "obtain[ed] … 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). They therefore *procured* those services. If they were not legally authorized to do so, that just shows all the more that the procurement they engaged in was unlawful.

[5] Again, the reason it's unlawful for the County to accept free services is to prevent favoritism that would arise if a contractor became known as willing to offer the County "loss leaders" that would induce favoritism. It may seem like community spirit to volunteer services, but not when it comes with the expectation that the "volunteer" will be hired afterwards.

B. Emergency/Impracticability and Competition Under the Circumstances

Because the procurement occurred in August 2015, the emergency/impracticability exception to the procurement statutes cannot apply. Even the County does not claim there was any emergency or impracticability *in August 2015*. At that point, nobody even knew that World View had a November deadline in mind. PSOF ¶ 18, Plf.'s Reply to Defs.' CSOF ¶ 18. So for the County to procure Swaim and Barker's services in August without complying with state and county procurement laws was an abuse of discretion.

But the abuse of discretion was even greater than that, because even in cases of genuine impracticability, a county must make procurements "with such competition as is practicable under the circumstances," A.R.S. § 34-606, and the County did not do this, or even *try* to do this. It says it "concluded that *no* competition was practicable," Defs.' Reply/Resp. at 8, but it did not. It made no determination at all. Instead, it ratified Huckelberry's predetermined selection of Swaim and Barker—a selection he based on "their prior involvement and detailed understanding of World View requirements" and the "months of substantial services" they had "provided … without compensation." PSOF Ex 4 at 7. Huckelberry testified that he made no effort to evaluate how much competition would have been practicable under the circumstances, PSOF ¶ 39, Plf.'s Reply to Defs.' CSOF ¶ 39, and nobody else did, either.

Even if the abuse of discretion test is appropriate, therefore, the County abused its discretion, because it did not consider the question. The County has no discretion to *utterly disregard* the statute. Discretion is exercised by reasonable judgment based on facts according to a process of reasoning. *Bam, Inc. v. Bd. of Police Comm'rs*, 7 Cal. App. 4th 1343, 1349 n.4 (1992). The County cannot appeal to an "abuse of discretion" standard when it failed to exercise any discretion at all. *Health Cost Controls v. Sevilla*, 850 N.E.2d 851, 865 (Ill. App. 2006) (courts "owe no deference to discretion that [the government] failed to employ."). And it is an abuse of discretion to reach a conclusion first and come up with a rationalization later. *Bam, Inc.*, 7 Cal. App. 4th at 1346; *Redevelopment Agency v. Norm's Slauson*, 173 Cal. App. 3d 1121, 1127 (1985).

III. THIS COURT CAN GIVE PLAINTIFFS THE RELIEF THEY SEEK

Even if this Court cannot issue injunctive relief, it can still grant the Plaintiffs their requested declaratory relief; the County does not argue otherwise. The Court should do so, because the County's actions were unlawful, and the plaintiffs are entitled to a judgment that the World View contract was unlawful. Declaratory relief would also give Plaintiffs the opportunity for further relief in a future action under A.R.S. §§ 11-641 and 11-642. Plaintiffs' declaratory relief claims are not moot.

As to injunctive relief, however, the County is changing the subject. It originally argued injunctive relief was *moot*, because the construction has been completed. Plaintiffs have shown that this claim for relief is not moot, because the Court could still remedy the violations by tailoring an injunction to redress the unlawful favoritism and unequal access to information. Plfs.' Mot. at 14. Such a remedy would be within this Court's equitable discretion. *See Buffalo Cent. Terminal v. U.S.*, 886 F. Supp. 1031, 1042–43 (W.D.N.Y. 1995) (listing "equitable remedies [that] have been fashioned by the courts upon a finding that there were illegalities in the procurement process"); *cf. Beta Analytics Int'l, Inc. v. U.S.*, 69 Fed. Cl. 431, 434 (2005) (ordering re-procurement as remedy for illegal procurement). The County's answer is that this would raise due process concerns, but that's a different question; even if true, that doesn't show that injunctive relief is *moot*. It just shows that, at the remedy stage, Swaim and Barker should have an opportunity to be heard. But the question we began with was whether injunctive relief is *moot*, and it has been shown that it is not.[6]

The County claims that World View is responsible for maintaining the facilities. But that is only true under the County/World View agreement, which this Court should declare void, because "[a] public

[6] As to Swaim and Barker's due process rights, the County cites *Golden Day Schs., Inc. v. State Dep't of Educ.*, 99 Cal. Rptr. 2d 917 (App. 2000), but the due process hurdle for debarment is not particularly high, *So. Cal. Underground Contractors, Inc. v. City of San Diego*, 133 Cal. Rptr. 2d 527, 535 (App. 2003), and as Barker and Swaim have had "an effective opportunity to confront adverse witnesses at depositions" and otherwise "to effectively present [their] position[s]," *id*., there's no reason to believe their due process rights would be violated by enjoining them from further profiting from unfair access to information.

contract entered in violation of a statute is invalid and unenforceable." *W. Corr. Grp., Inc. v. Tierney*, 208 Ariz. 583, 586 ¶ 13 (App. 2004). The County owns the facilities and is ultimately responsible for them.

Also, the purported mootness results from the County's own wrongdoing. The County was aware of this lawsuit long before the project was completed, and it proceeded with the project anyway—even after it lost the first summary judgment motion—presumably on the assumption that rapid completion of the project would moot the case. *Cf. John W. Danforth Co. v. Veterans Admin*., 461 F. Supp. 1062 (W.D.N.Y. 1978). Such a factor must weigh heavily against the County in the balance of equities for injunctive relief. *Id.* at 1073.

Even if the Court were disinclined to award an injunction affecting Swaim and Barker's maintenance of the property, the Court can still issue an injunction to bar the County from procuring services in a similar manner in the future. Taxpayers have an interest in seeing that the procurement statutes are followed, *Secrist*, 6 Ariz. App. at 106, and the County has made clear that it believes its conduct in this case was lawful. An injunction against such conduct would therefore remedy the taxpayer Plaintiffs' injuries.

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Respectfully submitted,

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