COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

RICHARD RODGERS, et al., Plaintiffs-Appellants, v. CHARLES H. HUCKELBERRY, et al., Defendants-Appellees.	No. 2 CA-CV 2018-0161 Pima County Superior Court Case No. C20161761

APPELLANTS' OPENING BRIEF

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INTRODUCTION

This case challenges the legality of actions taken by Pima County as part of "Project Curvature," whereby the County provides facilities at taxpayer expense to a private company called World View—which is supposed to operate a luxury tourism business taking passengers on rides to the stratosphere in specially made high-altitude balloons, and also running high-altitude scientific experiments.[1] The County embraced the project on the theory that World View's private business will help boost the local economy.

As part of the project, the County financed construction of a 135,000 square foot facility on 12 acres of county-owned land, to be used by World View. The facility consists of a balloon launching pad, a building for manufacturing these balloons, and a headquarters building for World View's corporate operations. The County paid for the design and construction of these buildings, and retains title to them and the land. In this stage of the case, the focus is on the County's selection of the architect (Swaim) who designed, and the contractor (Barker) who built those facilities for the

[1] The case was trifurcated for purposes of trial. This Court has already decided the first part of this case, in *Rodgers v. Huckelberry*, 243 Ariz. 427 (App. 2017), *rev. denied* (Aug. 29, 2018). This is the second part. One remaining cause of action is still being litigated in the Superior Court.

County. Appellants are taxpayers who contend that the County violated state and county procurement laws in selecting Swaim and Barker for the project.

STATEMENT OF THE CASE AND FACTS

A. How the County procured Barker's and Swaim's services.

Beginning in the summer of 2015, Pima County officials sought to entice World View to locate its business operations in the County, as part of an economic development plan. Among other things, the County built facilities for World View—including a construction facility for the manufacturing of high-altitude balloons, a launch pad for these balloons, and a headquarters building for World View. ROA 101 ep 3 ¶ 10. The County owned and still owns these buildings, but they are used exclusively by World View. ROA 106 ep 9 ¶ 37.

As the Superior Court correctly concluded, County Administrator Chuck Huckelberry[2] "selected" (indeed, "hand-picked") Swaim and Barker to work on the project in August 2015. ROA 116 ep 3-4. He did so without going through the procurement process required by state or County

[2] Unless otherwise specified, "Huckelberry" refers to Defendant Huckelberry, as well as his subordinates, most significantly John Moffatt, Ph.D., the County's Director of Economic Development, who coordinated the procurement of services from Swaim and Barker beginning in August 2015.

procurement laws, and without sufficient justification to invoke the exceptions to those rules provided by A.R.S. § 34-606 or Pima Procurement Code § 11.12.060(A)(1).[3] The Superior Court rightly found that from the beginning, he "had no intention of pursuing a competitive bidding process, or encouraging the Pima County Board of Supervisors to do so." ROA 116 ep 3. Instead, he chose Barker and Swaim at the project's inception in August 2015, and began "receiv[ing]" their services at that time—"when, because there was no looming deadline to complete the project on an accelerated schedule, it was not 'impracticable' to allow others the opportunity to bid for consideration on the project." Id. ep 3–4.

To be more specific, some time before August 12, 2015, Huckelberry selected Swaim to design the World View facilities. ROA 106 ep 5 ¶1. Shortly thereafter, he selected Barker to construct those facilities. *Id*. ¶2. Neither Barker nor Swaim had any experience designing or building a balloon launch pad or a balloon manufacturing facility, and had no particular expertise in this area. *Id*. ¶¶ 6–8.

[3] The procurement rules of A.R.S. §§ 34-604 – 34-606 are basically the same as the procurement rules of the Pima County Procurement Code Title 11, with one significant difference addressed in Section IV below. Therefore, unless otherwise specified, all references to the state procurement statutes should be taken as including the parallel county procurement ordinance provisions, too.

A week later, on August 20, 2015, County officials met with Barker, Swaim, and World View, and this became the first of a series of meetings and exchanges by email and telephone, during which Barker, Swaim, World View, and the County planned the facilities and created and revised construction cost estimates. *Id.* ep 5–6 ¶¶ 10–15.

There were between five and ten in-person meetings (in addition to countless phone calls and email exchanges) between August 2015 and January 19, 2016. *Id.* ¶ 14. During that time, Barker provided between five and ten estimates, and Swaim revised its plans several times. *Id.* ep 7 ¶¶ 22–23. Swaim devoted the working hours of Mr. Swaim both himself and an employee to the project. *Id.* ¶ 23. The planning was quite extensive, and involved such specific details as the degree of flatness in the construction facility's floor, the number of columns inside the warehouse, and the exact cost of the chip seal. ROA 112 ep 8–9 ¶ 1–7.

In fact, the planning was so extensive that by January 19, 2016, the planning was already 30 percent complete. *Id.* ep 8 ¶ 2.

No other architect or contractor was ever invited to participate in any of these meetings, discussions, or plans, or given any opportunity to provide design or preconstruction services or to work on the project in any way. ROA 106 ep 6 ¶¶ 13, 19.

Sometime around October 2015, this team (the County, Barker, and Swaim) learned that World View wanted the project completed by November 2016. *Id.* ¶ 18, ep 7 ¶ 24. On October 23, 2015, Huckelberry submitted a formal project proposal to World View on the County's behalf. *Id*. ep 5 ¶ 5. In it, he recommended that Swaim be the project architect and Barker be the contractor. *Id.* On December 23, 2015, World View accepted that proposal—including officially agreeing to Swaim as the architect and Barker as the contractor—and stated its desire that the facilities be completed by November 2016. *Id*. ep 7 ¶ 24.

On January 19, 2016, Huckelberry submitted to the Board of Supervisors a memorandum he had prepared in the preceding weeks in which he laid out the proposal for the World View project. *Id*. ep 8–9 ¶¶ 31-33. (Prior to that time, he had not discussed the project or his meetings with members of the Board.) No written request for an emergency or limited-competition procurement was prepared prior to January 2016, nor was a limited procurement process for the World View project created prior to January 2016. *Id.* ep 7 ¶ 25.

In his January 19 memorandum, Huckelberry recommended that the County approve the project and award the contract to Swaim as architect and Barker as contractor. He gave two reasons: first, that "[t]hese two firms

[had] provided months of substantial services without compensation to provide the necessary architectural programming and design and cost models" on the project, and second, that "[g]iven the required facility delivery date of November 2016 and because of [Barker and Swaim's] prior involvement and detailed understanding of World View[']s requirements," it would be "impracticable" to "compl[y] with the full provisions of the [procurement] statute" by allowing other firms to bid on the architecture or construction contracts. *Id.* ep 102–03.

Barker and Swaim were not paid, and will not be paid, for their pre-January 2016 work on the project. *Id*. ep 6 ¶¶ 16-17. Messrs. Barker and Swaim testified that they provided their services for free during that period because they hoped they would be awarded the contract in the end. *Id*. ep 7 ¶ 26. Moffatt testified that it is "not unusual" for firms to do this as "part of their marketing." *Id*. ¶ 27. Their hopes proved fruitful: the County did indeed award them the contract, in part as a reward for those free services. *Id.* ep 9 ¶ 35.

It was only because Swaim and Barker had already been providing services to the County for five months before the January 19, 2016 Board

meeting that the Board concluded that Swaim and Barker could complete the project in time.[4] ROA 101 ep 8 ¶ 44; ROA 112 ep 8 ¶¶ 1–5.

Not only had Swaim and Barker already completed 30 percent of their planning for the project before January 19, 2016, but what the trial court called Swaim and Barker's "five month 'head-start,'" ROA 116 ep 4, was so extensive that these two firms were able to proceed with the project at a record-setting pace after it was officially approved. The plans they had prepared before that time required only minor modifications afterwards, ROA 112 ep 8 ¶¶ 1–5; ROA 106 ep 7–8 ¶¶ 28–29; ROA 111 ep 7–8. They were able to obtain steel and other materials on what Mr. Swaim called "one of the fastest project schedules I've ever seen." *Id*. ep 7.

Simply put, Huckelberry and his staff circumvented Title 34 and County procurement ordinances by procuring these services in August 2015 and working with these firms in private to such an extent that by the time the Board was asked to consider the matter, the preconstruction services were already a third of the way complete and it appeared impracticable to hire anyone else. In January 19, 2016, the County decided it would be hard to switch horses midstream. But it chose which horse to ride in August 2015,

[4] In the end, they did not complete the project on time, but was almost two months late. ROA 101 ep 9 at ¶ 50. World View did not leave the County, however.

when Huckelberry "select[ed]" them and the County began "receiv[ing] their services." ROA 116 ep 4.

The Superior Court agreed with this interpretation of the facts. But it held as a matter of law that this did not qualify as unlawful "procurement" because Huckelberry is not an "agent" under state procurement laws, and since only agents are legally permitted to procure, his actions were not actually procurement, and were therefore lawful. *Id.* ep 4. This holding was illogical and incorrect as a matter of law and should be reversed.

B. Summary of argument.

The procurement laws forbid the County from "receiv[ing]," *id.*, preconstruction architecture and contractor services except through the legally prescribed methods. *See* A.R.S. § 41-2503(32) (defining "[p]rocurement" as including "buying, purchasing … *or otherwise acquiring* any … services" and "*all* functions that pertain to obtaining any … services") (emphasis added); A.R.S. § 34-602(B) (procurement "shall" be done "as provided in this chapter").

Rather than follow those methods, the County received architecture and contracting services from Swaim and Barker over the course of half a year prior to the official awarding of the contract. Only after five months, during which the preconstruction and design services were a third of the way

completed, ROA 112 ep 8 ¶2, did the Board of Supervisors ratify Huckelberry's unlawful procurement by officially awarding the contract to the firms Huckelberry had long ago "selected" for the project. ROA 116 ep 4. The Board, in fact, awarded those contracts to Swaim and Barker *because of* the illegal five-month head start that they had enjoyed. ROA 112 ep 8 ¶¶ 1–5. Thus there can be no dispute that the County *procured* these services in August 2015, and or that it did so in a manner not contemplated by the procurement statutes. That means the County acted illegally.

The Superior Court held to the contrary on the grounds that because the procurement statutes only allow "agent[s]" to procure, and because Huckelberry is not an "agent," then he cannot have "procured" Barker and Swaim's services. This despite the fact that he did "receive[] their services," ROA 116 ep 4—that is, he "acquir[ed] [their]…services", A.R.S. § 41-2503(32), and engaged in "functions that pertain to obtaining any … services" for the County. *Id.* That holding is illogical and contradicts the statutory definition of procurement.

The correct conclusion is that if the officials who procured Barker's and Swaim's services aren't "agents," that only proves *all the more* that the procurement in which they engaged was unlawful. It is illegal for the County to "receive[] … services" *id.* ep 4, except through a procurement

process overseen by an agent. The County did receive services from Swaim and Barker for five months, via Huckelberry's actions. That was procurement, and therefore unlawful.

The Superior Court's holding is illogical and contrary to the plain language of the statutes. Also—as the court itself seemed to recognize, *id.* ep 4–5—it also creates a dangerous incentive for government officials to engage in the sort of back-room favoritism that happened here: to dispatch officials who don't technically qualify as "agents" to secretly recruit firms for projects and encourage them to become so deeply involved in those projects that when the Board of Supervisors meets to decide the matter, it will be "impracticable" to hire anyone else. That outcome is inconsistent with the purpose of the procurement laws, which was to ensure an equitable and transparent process that minimizes favoritism and protects both taxpayers and competing firms.

Not only did the County violate the law by procuring Barker's and Swaim's services in August 2015 without complying with the statutes, but it also abused its discretion in January 2016, when it awarded them the contract. That decision was unlawful favoritism because it was both a reward for Swaim's and Barker's loyalty, *cf.* *Brown v. City of Phoenix*, 77 Ariz. 368, 376 (1954), and was based on the unequal access to information

that Swaim and Barker had been given thanks to their five-month head start. *Cf.* *ARINC Eng'g Servs. v. United States*, 77 Fed. Cl. 196, 202–03 (2007). The procurement of Swaim's and Barker's services was therefore unlawful and the judgment below should be reversed.

The Superior Court also erred by failing to address the Appellants' contentions that (a) the County acted illegally by not paying Swaim and Barker for services they rendered between August 2015 and January 2016; (b) even if the acquisition of Swaim's and Barker's services did not violate state law, it still violated the County Procurement Code; (c) the County violated A.R.S. § 34-606 by failing to make any effort to determine what amount of competition would have been practicable under the circumstances; and (d) there was no "public interest" justification for the County to act outside the normal procurement rules.

Even if the decision below was correct regarding the definition of "procurement," therefore, Appellants are entitled to judgment on those contentions, and as explained below, this Court should reverse.

STATEMENT OF THE ISSUES

1. Was it lawful for Pima County officials to acquire, receive, and obtain services from Barker and Swaim without complying with State procurement laws?

A. Was the County's acquisition of Swaim's and Barker's services between August 2015 and January 2016 "procurement"?

B. Was the Board's award of the contract to Swaim and Barker in January 2016 unlawful?

2. Was it lawful for the County to procure services from Barker and Swaim between August 2015 and January 2016 without paying for them?

3. Assuming the procurement satisfied state law, did it nonetheless violate the County's Procurement Code?

4. Even assuming the County's actions were otherwise lawful, did the County violate A.R.S. § 34-606 by failing to make the procurements "with such competition as is practicable under the circumstances"?

5. Did the County correctly assert a "public interest" sufficient to depart from the normal procurement requirements?

STANDARD OF REVIEW

As there are no facts in dispute, this appeal involves only legal issues of statutory construction, and therefore the proper standard of review is *de novo*, *Hogue v. City of Phoenix*, 240 Ariz. 277, 279–80 ¶ 8 (App. 2016), but with deference to the trial court's factual conclusions. *Harrington v. Pulte Home Corp.*, 211 Ariz. 241, 246–47 ¶ 16 (App. 2005).

ARGUMENT

I. Even if the County officials who obtained Barker's and Swaim's services aren't "agents," they still illegally "procured" those services.

The Superior Court agreed with Appellants that Huckelberry "hand-picked" and "selected" Barker and Swaim for the World View project in August 2015, and began "receiv[ing] their services" at that time—"when, because there was no looming deadline to complete the project on an accelerated schedule, it was not 'impracticable' to allow others the opportunity to bid for consideration on the project." ROA 116 ep 3-4.

But it held that this did not constitute unlawful "procurement" because Huckelberry is not an "agent" under state procurement law, and since only agents can "procure," his actions cannot have qualified as procurement and were therefore lawful. *Id*. ep 4. This was illogical, reversible error.

A. "Procurement" means any acquisition, even if by a non-agent.

The definition of "procurement" is plain: "buying, purchasing … *or otherwise acquiring* any … 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."). Swaim's and Barker's services were design, construction, and preconstruction services, and the County obtained and acquired those services, beginning in August 2015. Therefore, it procured those services, and did so at that time.

Indeed, the Superior Court found that Huckelberry "received [Swaim's and Barker's] services" in August 2015, ROA 116 ep 4—and there can be no dispute that he did so on the County's behalf. The County was the recipient of Swaim's and Barker's services, because they designed and built a facility owned by the County, which the County paid for. ROA 106 ep 9 ¶ 37. The County therefore obtained, acquired, and received Swaim's "design services" and Barker's "construction services" beginning in August 2015. A.R.S. § 34-602. And it did so when it *got* those services, which means, beginning in August 2015. ROA 106 ep 6 ¶ 14. Since the County acquired, got, obtained, and received those services at that time, it logically follows that it *procured* those services at that time.[5]

[5] At one point, the County suggested that its obtaining of these services didn't count as procurement because the services were ultimately for the benefit of World View. ROA 110 ep 7. But the facilities Swaim designed and Barker built always

The court below said that the County's acquisition of Barker and Swaim's services wasn't procurement because "a governmental agency may procure services only through its 'agent,'" ROA 116 ep 4, and Huckelberry isn't an agent. But while it's true that the law says that only agents are *allowed* to procure services for counties, it does *not* say that the word "procurement" only refers to acquisitions that are done by an agent. On the contrary, the word procurement means *any* acquisition *at all*, without limitation. A.R.S. § 41-2503(32). Some statutes even expressly refer to cases in which non-agents may obtain services for counties, and these are referred to as "procurements." Section 34-606, for instance, says an agent "may … authorize *others* to make emergency *procurements*." (Emphasis added). Thus it is plain that non-agents *can* procure—and that procurements by non-agents still fall within the definition of "procurement."

The Superior Court's error was in confusing *may* with *can*. It thought that because only agents *may* procure, that only agents *can* procure. But in fact, government agencies *can* procure through non-agents—it's just that the

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were and still are owned by the County, and the County oversaw the design and construction of those facilities. ROA 106 ep 9 ¶ 37. The County paid Barker and Swaim for (some of) these services, too. And although it did not pay for services between August 2015 and January 2016 (*id.* ep 6 ¶ 17), "procurement" includes the obtaining of services *for free*, also. Thus the County is the entity that obtained, acquired, received, and therefore *procured* Swaim's and Barker's services.

law ordinarily forbids this. In other words, only agents may *lawfully* procure.

Arizona law uses mandatory "shall" language to make clear that only agents are *authorized* to procure services for counties. *See, e.g.*, A.R.S. §§ 34-602(B), (C), (D), (E), 34-603(A), (B), (C)(1)(a). For instance, a county that seeks the services of an architect and a contractor "*shall* procure … design services as provided in this chapter," "*shall* procure … [c]onstruction by competitive sealed bidding," or "*shall* 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). But that means that procurement—i.e., buying, purchasing, renting, leasing or otherwise acquiring—by a non-agent *can* happen. It's just that when it does, it's typically *illegal*. Here, Huckelberry *did* procure Barker's and Swaim's services—but because he's not an "agent," that procurement was illegal.

The Court below committed logical and legal error by holding that procurement by a non-agent *doesn't qualify as procurement*, and therefore that it is *lawful*. That holding contradicts the statutory definition of procurement—which means any acquiring or receiving or obtaining at all, regardless of whether it is by an agent (A.R.S. § 41-2503(32)) —and it is

logically fallacious.[6] It's tantamount to saying (a) only licensed attorneys may practice law; (b) Tom is not a licensed attorney; (c) therefore when Tom advised clients, filed briefs, and represented people in court, his actions don't qualify as the practice of law. Actually, the opposite is true: Tom *did* practice law—he just did so *unlawfully*. Here, the court erred in holding that because Huckelberry isn't an agent, his acquiring, obtaining, and "receiv[ing]," ROA 116 ep 4, of Barker's and Swaim's services was not procurement. Actually, it was—it was *unlawful* procurement.

B. The acquiring of Swaim's and Barker's services in August 2015 violated the procurement laws.

The fact that Huckelberry's unlawful procurement began in August 2015 is significant because at that time, and for months afterward, there was no November deadline. Therefore "it was, " in the Superior Court's words, "not 'impracticable' to allow others the opportunity to bid for consideration on the project" at that time, *id*. ep 3-4, and consequently no basis for asserting any exception to the procurement requirements (such as A.R.S. § 34-606 provides). That means the unlawful acquiring of Swaim and

[6] Technically, a fallacy of equivocation, caused by illegitimately importing the *normative rule about* X into the *definition of* X, so that "Smith *is forbidden from doing* X" becomes "Smith is *logically incapable* of doing X." In fact, Smith is logically capable of doing X but should not; that's probably why the law forbidding it was passed!

Barker's services at that time without complying with the requirements of A.R.S. §§ 34-604 or 34-605 cannot be excused by appeal to any such emergency exception.

There was no reason the County could not have put out a call for proposals in August 2015, or otherwise follow the procurement statutes, or to use a competitive process or limited-competitive process to obtain design and contracting services for the project. Nor was there any reason why the Board could not have approved that project, or adopted a competitive or limited competitive procurement process, in August. Instead, the County simply began acquiring services from Barker and Swaim at that time without going through the procurement requirements.

The conclusion is inescapable: beginning in August 2015, the County "acquir[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," which the law defines as "procurement." A.R.S. § 41-2503(32). It procured those services unlawfully because the procurement was done (a) through a person who is not an agent, and therefore is not legally authorized to procure, (b) in a manner outside of the method required by state and county procurement law, and (c) at a time when, as the Superior Court found, it was "not

'impracticable'" to follow the procurement rules, ROA 116 ep 3–4, and no basis for triggering the A.R.S. § 34-606 exception.

Not only is the decision below illogical, but it also has deleterious consequences—as the Superior Court itself recognized. ROA 116 ep 4. The decision essentially means that non-"agent" county employees are legally free to acquire and obtain services for counties without following the procurement laws. That's an irrational result. It would mean, for instance, that a single sheriff's deputy could negotiate with Ford to provide an entire fleet of vehicles for the sheriff's department, and could ride around in borrowed Fords for six months, to be paid for at some future date by the Board of Supervisors—but that the Sheriff himself could not do this, because he's an "agent" who must follow the procurement laws. It would mean a school administrator could arrange the painting of a school or the installation of expensive equipment, and spend six months using it—thereby forcing the County to decide whether to pay or refuse to pay for it and expose itself to *quantum meruit* liability—but that a school superintendent could not do that, because she qualifies as an "agent" and must obey the procurement rules.

In short, the decision below creates both an opportunity and an incentive for counties to evade the procurement laws by dispatching

administrators and Economic Development Department officials to negotiate contracts and engage in private meetings with hand-picked contractors; to initiate projects and shepherd them along for months—and then present the deal to the Board of Supervisors as a *fait accompli*, whereupon the Board approves the project because the head-start these favored contractors got makes it unwise to hire anyone else.

That cannot be what the legislature intended. The procurement laws require counties to obtain and receive services in the prescribed method—not through a biased manner such as occurred here. Those laws require that *whenever* a county "buy[s], purchas[es] … *or otherwise acquir[es]* any … services," A.R.S. § 41-2503(32), including "construction-manager-at-risk, design-build, and job-order-contracting" services, A.R.S. § 34-602(B) and (C), such acquisitions "shall" be done by an agent, and shall be done in accordance with the prescribed procurement methods. A.R.S. § 34-602(B). Here, the County did not do that. It acquired Barker and Swaim's design and construction services for five months through a non-agent, which gave those firms a "30 percent" head start, ROA 112 ep 8 ¶ 2—a head start so dramatic that the Board then concluded that it had no realistic alternative but to award them the contract. Public contracting must be "conducted with…fairness, certainty, publicity, and absolute impartiality." *McBirney &*

Assoc. v. State, 753 P.2d 1132, 1136 (Alaska 1988) (citation omitted). That didn't happen in this case.

The Superior Court's conclusion is illogical. If Huckelberry is not an agent, then he had no lawful authority to do what he did here, which was to "acquir[e]" (A.R.S. § 41-2503(32)) the "construction-manager-at-risk, design-build and job-order-contracting" services of Barker and Swaim (A.R.S. § 34-602(C)) for five months and then use that unlawful procurement to bootstrap the selection of Barker and Swaim for the project. That means the procurement was unlawful, and the decision below should be reversed.

II. Because the award of the contract in January 2016 was based on previous illegal procurement and favoritism, that award was an abuse of discretion.

On January 2016, the Board of Supervisors awarded Swaim and Barker the contract for the project—or, more accurately, ratified the five-month old *fait accompli* selection of them that Huckelberry had already made. It did so for two reasons: first, because (in Huckelberry's words) "[t]hese two firms provided months of substantial services without compensation," and second, because "[g]iven the required facility delivery date…and because of their prior involvement and detailed understanding of

World View requirements,"[7] it was believed that they alone could complete the project on time. That was an abuse of discretion.

An abuse of discretion exists where government awards a contract "arbitrarily or capriciously based on improper criteria." *The Yadin Co. v. City of Peoria*, No. CV-06-1317-PHX-PGR, 2007 WL 552221, *2 (D. Ariz. Feb. 21, 2007). Such impropriety occurs where, for example, the government prejudicially determines which contractors are eligible to participate on a project so as to "discriminat[e] … against a certain class of bidders." *Prescott Courier, Inc. v. Moore*, 35 Ariz. 26, 34 (1929); *accord*, *Guardians v. Wells*, 201 Ariz. 255, 262 ¶ 20 (2001). It also occurs when government awards contracts based on loyalty rather than merit. *Brown*, 77 Ariz. at 375–76. And it occurs in "unequal access to information" situations, where one contractor is given information that other contractors are denied, thereby prejudicing the procurement process. *ARINC Eng'g Servs.*, 77 Fed. Cl. at 202–03.

In *Brown*, the court ruled that Phoenix officials abused their discretion when they selected a contractor to lease government-owned land based on favoritism. The city council selected the incumbent lessor instead of a

[7] These quotes are drawn from the January 19, 2016 memo from Huckelberry to the Board, which appears as Exhibit 4 to Defendants' Statement of Facts. ROA 102 ep 38. *See also* ROA 106 ep 9 ¶ 35 & ep 102.

newcomer, even though the newcomer offered to pay more, 77 Ariz. at 371, and even though only ten days after getting the contract, the incumbent raised his prices. *Id.* at 376. The court found that the city council had made its selection based on "a sense of loyalty to [the incumbent] for past services rendered (without public bidding, we note)." *Id*. at 375–76. This, the court ruled, was "a mockery," and "nonsense" which "serve[d] only to illustrate that the word 'discretion' does not mean 'caprice.'" *Id*. at 376. It did not matter that "there [was] no evidence of fraud or corruption on the part of the city council, and that what they did was done openly and above board," because that did not "cure the evil complained of, i.e., favoritism." *Id.*

Here, the Board's decision to select Swaim and Barker was an abuse of discretion for the same reason. Its selection of Swaim and Barker on account of the months of substantial services that they provided without compensation, ROA 102 ep 38, was just the sort of "loyalty" that the *Brown* court found improper. By rewarding firms for "past services rendered" to the County (without public bidding or any opportunity for other firms to provide such services), was favoritism. *Id.* at 375-76.

The County's second reason for choosing Barker and Swaim—their months of accumulated knowledge of the World View project—was also a form of favoritism. As the court below correctly found, Swaim and Barker

enjoyed "a five month 'head start' over any other potential bidders" due to the fact that Huckelberry selected them in August 2015. ROA 116 ep 4. The Board then relied on that head start when it awarded Swaim and Barker the contract due to their familiarity with the project.

Procurement experts call this type of unfair favoritism "unequal access to information." Daniel I. Gordon, *Organizational Conflicts of Interest: A Growing Integrity Challenge*, 35 Pub. Cont. L.J. 25, 32 (2005). It occurs "when a government contractor has access to non-public information in connection with performance of a government contract that may afford a competitive advantage in subsequent competition for a government contract." *Axiom Res. Mgmt., Inc. v. United States*, 564 F.3d 1374, 1377 n. 1 (Fed. Cir. 2009) (citation omitted).

Although no Arizona court has addressed this specific issue, federal courts have set forth a four-part test to determine when "unequal access to information" rises to the level of an abuse of discretion. *See ARINC*, 77 Fed. Cl. at 202-03. They ask: 1) whether the firm that received the contract had access to nonpublic information that other firms did not get; 2) whether that information proved competitively useful to the firm that got the contract; 3) whether the access to that information gave the winning firm "an advantage that was unfair"; and 4) whether not having that information was prejudicial

to firms that did not get the contract. *Id.* at 202. All four factors are present here.

For five months, Barker and Swaim enjoyed access to information about World View's and the County's project needs that were not available to any other firm—because no other firms were invited to participate in the project in August 2015. That information not only proved competitively useful to them, but it was the express basis on which the Board chose to award them the contract in January 2016. ROA 101 ep 8 ¶ 46; ROA 106 ep 9 ¶ 35. This advantage was plainly unfair, because it allowed Swaim and Barker to have the plans 30 percent complete before January 19, 2016, ROA 112 ep 8 ¶ 2—which was the very factor on which the Board relied when awarding them the contract. An exclusive, invitation-only, five-month head start on a public contract is virtually the definition of unfair.

"Favoritism is generated in many ways—some benign and others pernicious." Robert C. Marshall, et al., *The Private Attorney General Meets Public Contract Law: Procurement Oversight by Protest*, 20 Hofstra L. Rev. 1, 14 (1991). A government official "who is satisfied with a particular [service] or vendor may find evaluation of alternatives to be costly in terms of effort" and may see "little, if any … gains from the inclusion of other firms in the procurement." *Id.* This results in a "lack of evaluation of new

[services]," which leads the government "to select an awardee from a strict subset (the favored firms) of all the bidders that could have feasibly participated." *Id*. That's just what happened here—and that form of favoritism is an abuse of discretion. *Brown*, 77 Ariz. at 377 ("The letting of contracts for public business should be above suspicion of favoritism.")

Because the contract award here was the product both of loyalty to Barker and Swaim and of the unequal access to information that Huckelberry gave them between August 2015 and January 2016, the County's selection of these firms for the World View project was "arbitrary and capricious," *ARINC*, 77 Fed. Cl. at 202, and therefore an "abuse of discretion." *Brown*, 77 Ariz. at 372.

To emphasize, it is not relevant whether or not the Board engaged in fraud or corruption, or "that what they did was done openly and above board," because that fact does not "cure the evil complained of, i.e., favoritism." *Id.* at 376. Even where there is no evidence of improper motive, any contracting arrangement that has the "effect of promoting favoritism" is an abuse of discretion. *Hanna v. Bd. of Educ. of Wiciomico Cnty.*, 87 A.2d 846, 849 (Md. App. 1952).

The County must avoid not just actual favoritism but even the "suspicion of favoritism." *Brown*, 77 Ariz. at 377. Here, that did not

happen. The Board decided that because Swaim and Barker had spent half a year providing the County with their services for free, and had been given an exclusive and special head start on the project, the advantage they thereby gained made them the proper choice for the contract. Thus, *regardless* of any purported urgency in the World View project, the Board's actions were favoritism and therefore a quintessential abuse of discretion.

III. The County's procurement of services between August 2015 and January 2016 was unlawful because those services were not paid for.

The court below failed to address an argument Appellants made that, even aside from the question of whether the procurement of Barker and Swaim's services was otherwise lawful, the County nevertheless acted illegally by not paying Barker and Swaim for the services they provided between August 2015 and January 2016. Arizona law requires the County to pay for such services.

A.R.S. § 34-605(B) provides that, in the case of a construction-manager-at-risk procurement like this one, a County must "enter into a written contract" under which it "*shall* pay the contractor *a fee* for preconstruction services." (Emphasis added.) The County did not enter into a contract with Barker and Swaim until February 2016, seven months after they began providing their services to the County, and that contract did not

provide for Barker or Swaim to receive any compensation for the services they rendered between August 2015 and January 2016. The County has still not paid for them, and has no plans to do so. For that reason alone, the procurement of those five months' worth of services was unlawful—regardless of whether Huckelberry qualifies as an "agent" or not.

The reason Arizona law forbids the government from obtaining free services is to prevent favoritism, specifically by firms that might provide the government with "loss leaders" in hopes of receiving future contract awards in return. A loss leader is a product or service sold at a loss in hopes of enticing customers to buy other goods or services later. *See* Adam Cate, *Chapter 490: Spreading the Word on "Loss Leaders,"* 41 McGeorge L. Rev. 741, 741–42 (2010); *see also* Black's Law Dictionary 965 (8th ed. 2004) (defining "loss leader" as an item "sold at a very low price, usu. below cost, to attract customers to buy other items. … See Bait and Switch.").

While providing free services to the government might seem beneficent, it is improper when a firm does this in anticipation of a future reward, or to establish a pattern whereby the firm becomes known in the community for a willingness to provide the government with free services—which then raises the risk of favoritism. Loss-leader negotiating tactics unfairly exclude firms that either cannot afford to give free services to the

government or—as in this case—are not invited to do so. They also breed an "insider" mentality or old-boys-network situation in which the government can pressure contractors to provide free services. The use of loss leaders "is especially egregious when companies use them to procure state contracts that waste taxpayer money." Cate, *supra* at 746.

Here, it is plain that Barker and Swaim provided half a year of free preconstruction services to the County in hopes of future reward. ROA 106 ep 7 ¶ 26. County Economic Development Director Moffatt even testified that he understood this at the time to be a form of "marketing" on the part of Swaim and Barker. *Id*. ¶ 27. This is not to suggest that he, Swaim, Barker, or the Board had improper motives. But even where there is "no evidence of fraud or collusion," any arrangement "which tends to prevent or restrict competition, or any scheme which has the effect of promoting favoritism" is unlawful in public contracting. *Hanna*, 87 A.2d at 847, 849. And the statute is clear: A.R.S. § 34-605(B) mandates that the County "*shall* pay … a fee" for the kinds of services it received from Barker and Swaim.[8]

[8] The "shall pay" requirement applies both to procurements under A.R.S. § 34-603 (ordinary procurements) or § 34-606 (emergency procurements). The latter was the statute on which the County purported to rely when approving the World View agreement.

So even laying aside the other questions presented, the County's acquisition of services from Swaim and Barker between August 2015 and January 2016 was unlawful because the County did not pay for those services pursuant to a written contract. At a minimum, this portion of the County's actions must be declared unlawful. The judgment of the Superior Court should be reversed.

IV. The County violated the procurement ordinance by directly selecting Swaim and Barker, and violated state law by failing to employ such competition as was practicable, and by asserting a "public interest" under A.R.S. § 34-606 where none existed.

Even aside from the issues above, the County acted unlawfully in three other ways. First, it directly violated the County's Procurement Ordinance by directly selecting Swaim and Barker, which the Ordinance prohibits. Second, it failed to comply with A.R.S. § 34-606's requirement that emergency procurements be made with such competition as is practicable under the circumstances. Third, it asserted that a "public interest" existed warranting divergence from the requirements of Sections 34-604 and 34-605, when no such interest existed.

A. Even if the County's actions satisfied state law, they violated the County Procurement Ordinance.

The Pima County Procurement Code distinguishes between emergency procurements and "public interest" procurements. 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 or contrary to the public interest," so long as the County obtains "[t]he competition … appropriate under the particular circumstances." (emphasis added).

The County admits that no "emergency" existed under subsection (a). ROA 110 ep 5-6. Instead, it asserts that this was a "public interest" procurement under subsection (b).[9] But if that is the case, then the County violated the Ordinance because no "limited competitive process" was ever formulated." ROA 106 ep 7 ¶ 25. Instead, the Board just directly selected Swaim and Barker. Yet the Code only allows the Board to do that in cases of *emergency*—which the County concedes did not exist.

Thus even if the County's actions complied with *state* law, they violated County ordinances. Appellants made this argument in the Superior

[9] Actually, although Appellants made this argument in their motion for summary judgment, ROA 105 ep 3-4; ROA 111 ep 3, the County never replied to it. But the County's argument that emergency procurements differ from public interest procurements, and its admission that this was not the former, means it must contend that this procurement fell within Section 11.12.060(A)(1)(b)'s public interest rule.

Court, but it failed to address it. Because there is no dispute that the County did not comply with section (b), and that there was no emergency warranting reliance on section (a), the Appellants were entitled to judgment on this issue, and this Court should enter judgment in their favor.

B. The Board's failure to inquire what competition was practicable under the circumstances was illegal.

Even when emergency procurements are proper under A.R.S. § 34-606, a county must make such procurements "with such competition as is practicable under the circumstances." But the County made no effort to comply with this. Indeed, not only did it disregard its statutory duty to determine whether—and what amount of—competition would have been practicable, but, as the court below determined, Huckelberry "had no intention of pursuing a competitive bidding process" in August 2015, "or encouraging the Pima County Board of Supervisors to do so" at any time. ROA 116 ep 3. As early as October 2015, he "actively was looking for a way to ensure that only one architect, Swaim, would be considered for the job." *Id.* ep 4.

Neither the Board nor Huckelberry ever tried to determine whether other contractors or architects could have completed the project before November 2016. They simply assumed it. ROA 106 ep 9 ¶¶ 38-39. And although the participants in the project were aware of that deadline by

September or October of 2015, they did not try to determine, then or later, whether another architect or contractor could design and build the facility before November 2016. Huckelberry never tried to determine what competition would have been practicable under the circumstances. *Id.* ¶ 39. Nor did the Board. *Id.* It simply approved Huckelberry's *fait accompli* selection of Swaim and Barker, without making any inquiry into whether any competition for architecture or contracting services would have been practicable. Although Huckelberry *thought* it would have been impossible for another architect or contractor to complete the project by November 2016, neither he nor the Board ever knew—because they never tried to find out. *Id.* ep 9–10 ¶¶ 39-41.

This was unlawful. The statute *mandates* that the County employ whatever competition is practicable under the circumstances, meaning that 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). In fact, it did not exercise *any* discretion; it just ratified Huckelberry's procurement of Swaim's and Barker's services as presented in his January 19, 2016 memo. This is not the kind of exercise of discretion to which courts defer. When officials "simply 'rubber stamp[]' a predetermined result," they are not entitled to deference. *Redev. Agency v.*

Norm's Slauson, 173 Cal. App. 3d 1121, 1127 (1985); *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."). Instead, even under the abuse of discretion standard, deference is only appropriate where a county exercises discretion—i.e., 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. Bd. of Police Comm'rs*, 7 Cal. App. 4th 1343, 1346 (1992).

The County's failure even to inquire whether or not any degree of competition would have been practicable under the circumstances was therefore a violation of the statute. Appellants were entitled to judgment as a matter of law, and this Court should enter such judgment.

C. There was no "public interest" justifying divergence from the procurement requirements.

Finally, the County asserted on January 19, 2016 that under A.R.S. § 34-606, it would have been "contrary to the public interest" to follow the ordinary procurement requirements because by that time, it was necessary that the World View project be completed by November 2016. But that is not what "contrary to the *public* interest" means, for two reasons.

First, A.R.S. § 34-606 contemplates procurements that are of urgent necessity for the public health and safety, akin to an emergency. 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 competitive bidding requirements. Ariz. Op. Atty. Gen. No. I96-007, 1996 WL 340788 *3 (1996).

"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 and 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)). Perhaps the best definition of impracticable is "commercially senseless." *Conner Bros. Const. Co. v. United States*, 65 Fed. Cl. 657, 687 (2005).

That interpretation is supported by the rule of *in pari materia*. *See* *Achen-Gardner, Inc. v. Superior Court*, 173 Ariz. 48, 51 (1992) (applying *in pari materia* when interpreting competitive bidding statutes). Section 34-606 is entitled "[e]mergency procurements," and it is a single sentence; 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). Thus "impracticable, unnecessary, or contrary to the public interest" mean something of the order of urgent necessity or near impossibility—all of which that statute refers to collectively as "emergency" procurements.

It is clear, at least, that Section 34-606 was *not* written to give counties broad discretion to disregard the procurement requirements when they believe it merely convenient to do so. The state legislature has already deemed that the public interest is served by compliance with the procurement statutes, which are "based upon public economy and are of great importance to the taxpayers," and therefore "ought not to be frittered away by exceptions, but … should receive a construction … which will avoid the likelihood of their being circumvented, evaded, or defeated."

Secrist v. Diedrich, 6 Ariz. App. 102, 106 (1967) (citation omitted). The County is not free to disregard that rule.

No Arizona case supports the claim that the County is entitled to deference on the question of whether competitive bidding would have been impracticable, and no such deference is warranted. Instead, the County's "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 the offers of another contractor, and upon terms disadvantageous to the public." *Id.*

The Arizona Supreme Court has not accorded deference in cases involving competitive bidding requirements, but has said that "[w]hether competitive bidding is required…depends on the 'proper construction of the applicable law.'" *Achen-Gardner*, 173 Ariz. at 51 (citation omitted). Since legal interpretation is a matter for courts, not the Board, it follows that no deference is proper. *See also Rollo v. City of Tempe*, 120 Ariz. 473, 474

(1978) (no deference); *W. Corr. Grp., Inc. v. Tierney*, 208 Ariz. 583, 587 ¶ 16 (App. 2004) (same).

Holding that the County has discretion to disregard the procurement laws whenever it thinks doing so would serve the public interest would render words in the statute surplusage. It would mean that "threat to public health, welfare or safety" is redundant of "situation exists that makes compliance impracticable," because the latter would swallow up the former. And it would transform all competitive bidding requirements in Title 34 into mere recommendations, which counties could disregard when they asserted that some situation made compliance inconvenient. That was not the legislature's intention.

Second, the County acted in this case wholly as World View's agent, serving World View's *private*, commercial interests. The November 2016 deadline was not an urgent public necessity, but was set entirely based on World View's own private commercial needs. The County not only made no effort to negotiate it, but made no effort to weigh compliance with that deadline against other potentially more fruitful applications of County resources. Once again, the County never exercised discretion, but simply accepted the November 2016 deadline, without determining whether not meeting that deadline would cause World View to leave—and, in fact, the

project was *not* completed by November 2016, and World View did not leave. The County's reliance on a purported "public interest" exception in A.R.S. § 34-606 was therefore an abuse of discretion, a misinterpretation of the statute, and a violation of the law.

NOTICE UNDER RULE 21(a)

Taxpayers respectfully request an award of costs pursuant to A.R.S. § 12-341 and attorney fees pursuant to A.R.S. § 12-348 and the private attorney general doctrine. *See Arizona Ctr. For Law in Pub. Interest v. Hassell*, 172 Ariz. 356, 371 (App. 1991).

CONCLUSION

The decision of the Superior Court should be *reversed*, and judgment entered for Appellants.

Respectfully submitted this 17th day of December, 2018 by:

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DIVISION TWO

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Pursuant to Rule 14(a) of the Ariz. R. of Civ. App. P., I certify that the body of the attached Answering Brief appears in proportionately spaced type of 14 points, is double spaced using a Roman font, and contains 8,582 words, excluding the table of contents and table of citations.

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The undersigned certifies that on December 17, 2018, she caused the attached Appellants' Opening Brief to be filed via the Court's Electronic Filing System, mailed via first class mail, and emailed a copy to:

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