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ARIZONA SUPERIOR COURT, PIMA COUNTY

BY: R. ST. GERMAINE, DEPUTY

HON. GUS ARAGÓN

CASE NO. C-20140690

DATE: November 20, 2014

KARL HIRSHMAN, et ux.,
Plaintiffs,

vs.

CITY OF TUCSON, et al.,
Defendants.

R U L I N G

UNDER ADVISEMENT RULING RE: CROSS MOTIONS FOR SUMMARY JUDGMENT

The parties have submitted cross motions for summary judgment. The Court has considered all of the motion papers and statements of fact, as well as the oral arguments of counsel and now issues this ruling.

Arizona Rules of Civil Procedure, Rule 56(c) provides that a motion for summary judgment should be granted where there is no genuine issue of material fact for a jury to resolve. All facts and inferences to be drawn from the facts are to be construed in favor of the non-moving party. *Orme School v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). If undisputed material facts give rise to factual inferences over which reasonable minds could differ, summary judgment is not proper. *Scottsdale Jaycees v. Superior Court of Maricopa County*, 17 Ariz. App. 571, 574, 499 P.2d 185, 188 (1972). Summary judgment should be granted if the facts in support of a claim have so little probative value, that "reasonable people could not agree with the conclusion advanced by the proponent of the claim." *Orme School v. Reeves*, 166 Ariz. at 309, 802 P.2d at 1008. The Court will not consider speculation or allegations without proper foundation.

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Judicial Administrative Assistant

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Plaintiffs have challenged the constitutionality of §28-39 of the Tucson Procurement Code, on its face. Plaintiffs, as taxpayers, have standing. As such, the Court will consider the language of §28-39 and its meaning. Sec. 28-39 is part of the City of Tucson's Procurement Code, Ordinance 10992. Sec. 28-39 by its language sets up certain bid preferences in Tucson's sealed bidding procurement process. By its language this section gives bidding preference to certain providers of goods and services purchased by the City. The stated intent of Ord. 10992 is to try to enhance the local economy. As to this challenge the Court finds that there are no genuine disputes as to any material fact, and further finds that Plaintiffs are entitled to judgment as a matter of law.

The Court has analyzed the constitutional challenges to §28-39 and finds that, as a matter of law, §28-39 on its face violates the Arizona Constitution and the United States Constitution. More specifically, §28-39 violates the Gift Clause of the Arizona Constitution (Article IX, Section 7), the Equal Privileges and Immunities clause of the Arizona Constitution (Article II, Section 13), the Federal Equal Protection Clause (Article XIV, Section 1), and the Privileges and Immunities Clause of the United States Constitution (Article IV, Section 2).

In addition, the Court finds §28-39 violates the principles set forth in Arizona case law. It is not reasonably related to furthering a legitimate state purpose, and it violates the Arizona Gift Clause as set forth in *Big D Constr. v. Court of Appeals*, 163 Ariz. 560 (1990) and *Turken v. Gordon*, 223 Ariz. 342 (2010).

Similar to the statute found unconstitutional in *Big D*, §28-39 by its language discriminates among bidders for government work/services and it violates the Gift Clause by granting a direct taxpayer subsidy to certain preferred bidders, and the City receives no direct consideration in return.

IT IS THEREFORE ORDERED that Plaintiffs' Motion for Summary Judgment is granted and Defendants' Motion for Summary Judgment is denied.

J. Herrera

Judicial Administrative Assistant

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IT IS FURTHER ORDERED that, within ten business days, Plaintiffs submit a proposed form of judgment consistent with this ruling.

cc: Jonathon Riches, Esq.
Michael McCrory, Esq.
Under Advisement Clerk

J. Herrera

Judicial Administrative Assistant