IN THE SUPREME COURT

STATE OF ARIZONA

RICHARD RODGERS, et al. Plaintiffs/Appellants/Cross-Appellees, v. CHARLES H. HUCKELBERRY, et al., Defendants/Appellees/Cross-Appellants.	Supreme Court No. CV-19-0285-PR Court of Appeals, Division Two Case No. 2 CA-CV 2018-0161 Pima County Superior Court Case No. C20161761

PETITION FOR REVIEW OF OPINION OF COURT OF APPEALS

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Issues Presented for Review

1. Does A.R.S. § 34-606 let counties disregard Arizona's statutory procurement requirements as "impracticable" when the alleged "impracticability" is not an urgent necessity, but the Supervisor's belief that following procurement requirements would be commercially impractical?

2. Did the County violate A.R.S. § 34-605(B) by not entering into a written contract to pay for preconstruction services that it obtained for free for five months?

3. Did the County violate state and county procurement laws by giving the architect and the contractor a five-month head start on the project, then using that head-start as the reason for granting them the contract?

Introduction

Pima County used government-owned property as collateral to obtain a $15 million loan to design and build a facility for World View ("WV"), a private company. The constitutionality of that expenditure is still being litigated below, but this part of the case concerns the County's procurement of architecture and contracting services to build the facilities.

Plaintiffs are Taxpayers who argue that the County illegally procured these services from the architect (Swaim) and the contractor (Barker) (collectively "B&S") for five months without paying for them in violation of A.R.S. § 34-

605(B). The County later used that "five month 'head start'," as the Superior Court called it, ROA 116 ep 4, to justify giving B&S the contract for the project, which taxpayers contend was also unlawful. The County argues that it was not required to follow the procurement process because doing so would be "impracticable" under A.R.S. § 34-606. Taxpayers reply that the County's interpretation of the "impracticability" exception is legally incorrect.

Facts and Procedural History

WV is a private company that hopes to send tourists and scientific equipment to the stratosphere in high-altitude balloons. In August 2015, County Administrator Huckelberry, hoping to entice WV to locate in Tucson for economic reasons, invited B&S to participate in a series of meetings to design a headquarters and manufacturing facility, and a balloon launch pad, tailor-made to WV's specifications. About ten meetings occurred between August 2015 and January 2016.

In October 2015, WV told the County it wanted the facilities finished by November 2016.

In January 2016, Huckelberry informed the Board of Supervisors about the project, and recommended it give B&S the contracts to design and build the facility. By that time, their plans were already 30 percent complete. ROA 112 ep 8 ¶ 2. In other words, the County gave B&S a "five month 'head start'," ROA 116

ep 4, with the result that by January 2016, they were in a unique position to complete the project by WV's deadline.

Therefore, at the January 2016 meeting, Huckelberry recommended that the Board invoke the A.R.S. § 34-606 emergency exception to the procurement statutes, and award them the contracts, because: (a) they had done five months of work for free, and (b) that head start meant they alone could finish the project in time.[1] The Board adopted that recommendation.

Taxpayers sued, arguing that the County's procurement of services from B&S violates state procurement laws, which require counties to follow a competitive process for obtaining pre-construction services. The County argued that it was relying on its authority under Section 34-606 to dispense with that competitive process in emergency cases. Taxpayers replied that there was no emergency or impracticability in August 2015, when the procurement began. The impracticability—if any—began when the County learned of WV's deadline, in October 2015.

Taxpayers also argued that the County violated Section 34-605(B) by not paying B&S for services rendered before January 2016, because that statute requires counties to pay for all preconstruction services, pursuant to written

[1] The project was not completed by November 2016, but was about a month late. WV located there anyway.

contracts. Yet the County has not paid, and has no plans to pay, for those preconstruction services.

The Superior Court ruled against Taxpayers on the theory that Arizona procurement laws only apply to County "agents," and since Huckelberry is not an "agent," the procurement laws do not apply to him. ROA 116 ep 4. The court then entered judgment for the County—without addressing Taxpayers' other arguments.

Taxpayers appealed, arguing that if Huckelberry is not an "agent," his procurement was still unlawful, because Arizona law only allows "agents" to procure, *see, e.g.*, A.R.S. §§ 34-602(B)-(E), 34-603(A)-(C), and Huckelberry certainly did "procure" B&S's services. *See* A.R.S. § 41-2503(32) (defining "procurement"). Taxpayers also argued that remand was required, because the Superior Court never addressed their remaining claims.

The Court of Appeals, however, dismissed on mootness grounds. It found that it could not grant relief because the WV facilities have been built. Taxpayers argued that the case is not moot because the County has still not paid for the preconstruction services, and this could be remedied by a court order requiring payment or by declaratory relief. The court rejected that argument on the grounds that it would be "against the taxpayers' interest in preventing depletion of public funds" to require the County to pay. *Rodgers v. Huckelberry*, 450 P.3d 1279, 1283 ¶ 18 (Ariz. App. Oct. 21, 2019).

Taxpayers also argued that the case qualifies for an exception to mootness because it involves questions of great importance and is virtually certain to recur. The County's violations of procurement laws is a matter of statewide importance because its position is that this is the normal way of doing business—and the record substantiates that—making it almost certain that the County will continue procuring in this fashion. The Court of Appeals *agreed* with that, stating "[w]e acknowledge similar circumstances here: a substantial expenditure, a process that may recur, and the possibility of future litigation that could delay completion of a project," *id.* at 1284 ¶ 19, but still refused to decide the case because Taxpayers had not sought an injunction to bar construction.

Reasons the Petition Should be Granted

Arizona procurement laws require counties to obtain services through a specific procedure. They must advertise and request submission of qualifications from prospective contractors, then make a list of respondents, interview them, and choose based on qualifications, cost, etc. A.R.S. § 34-603(C)(2), (E). The law forbids counties from obtaining preconstruction architecture and contractor services except through the legally prescribed methods. A.R.S. § 34-602(B).

Section 34-606 provides an exception by which counties may make "emergency procurements" 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, except that these emergency procurements shall be made with such competition as is practicable under the circumstances." In January 2016—after procuring services from B&S for five months without following the rules—the County invoked that exception and awarded the contracts to B&S for two reasons: as a reward for having provided free services, and because that five-month head start made it "impracticable" to hire anyone else. This was unlawful for at least three reasons—all of which warrant this Court's review.

I. The "impracticability" exception does not apply where the only "impracticability" is the feasibility of an economic development project.

A. The law does not allow the County to exempt itself from procurement laws due to economic impracticality.

The County asserted in January 2016 that it was "impracticable" to comply with the procurement requirements because doing so would delay the project past WV's deadline. *Rodgers*, 450 P.3d at ¶ 5. But this application of the emergency exception was unlawful.

The County's position is that Section 34-606 creates *two* exceptions to the procurement requirements: an emergency exception and an impracticability exception. And although it concedes that there was no emergency, County's Combined Answering & Cross-Opening Br. ("Cnty's App. Br."), ep 57, it contends that *commercial impracticality* satisfies the impracticability factor. It also argues

that courts must defer to the County's determination of impracticality. *Id.* ep 43–48.

This is both wrong and dangerous. It's wrong because Section 34-606 must be read as a whole, and doing so reveals that an "impracticability" must rise to the same level of urgent necessity as an emergency. This is proven by the fact that the section refers to both "threat[s] to the public health" and "situation[s] … that make[] compliance with this title impracticable" as "*these* emergency procurements" (emphasis added)—which grammatically must mean that both circumstances are "emergency" procurements (emphasis added). The section's first and last sentences do the same thing: the first authorizes counties to make "*emergency* procurements" and the last requires counties to provide a "written determination of the basis for *the emergency*" (emphasis added). Thus, Section 34-606 contemplates only one exception—that is, an "impracticability" so extreme as to be the equivalent of an emergency.

That is also the Attorney General' opinion. *See* Ariz. Op. Atty. Gen. No. I96-007, 1996 WL 340788 (1996). In rejecting the argument that impracticability is a standalone exception to the procurement statutes, he stated that the law allows the government to dispense with the procurement requirements "only under emergency conditions that involve a sudden, unexpected, and unforeseen event that jeopardizes the public's health, welfare, or safety and under circumstances that

make the formal procurement process impracticable, unnecessary, or contrary to the public interest." *Id.* at *5.

The County argues that "impracticability," *as determined by the County itself*, is an exception to the procurement rules, and that commercial impracticality qualifies. That is not only an ungrammatical reading of the statute; it would also create a loophole whereby counties can simply disregard the procurement laws at their discretion. The record shows that Pima County already does so routinely; invoking Section 34-606 *seventy-nine times* in recent years. ROA 90 ep 3 ¶¶ 4–5. And under the County's deference theory, courts must uphold a county's decision to exempt itself from the statutory requirements in all but the most extreme circumstances.

Simply put, the County's position is that the procurement laws are optional.

The purpose of the emergency exception is plain: to allow counties obtain services rapidly when public safety is threatened. If, say, a flood washes out a bridge, this section lets county officials hire a repair crew without delay. But Pima County interprets this provision as allowing it to "make emergency procurements" even where there is *no* urgent necessity or threat to the public, but where circumstances merely render it expensive or difficult to follow the law. Interpreting the exception that broadly renders the statute toothless.

Even if the County's interpretation were right, however, it cannot apply here, because the procurement began *not* in January 2016, but *in August 2015*, when the planning sessions with B&S began—long before the County learned of WV's deadline, and when, as the Superior Court found, there *was* no impracticability. ROA 116 ep 3–4.

There are no precedents interpreting the Section 34-606 exception, and given the evidence that the County employs it so often, this Court's review is necessary to ensure that state procurement statutes are obeyed.

B. Awarding the contracts due to the "five-month head start" was unlawful favoritism.

In August 2015, Administrator Huckelberry invited B&S—and only them—to participate in a series of meetings during which they planned the WV project before it was approved, or even considered, by the Board of Supervisors. ROA 106 ep 5 ¶ 1. Then, in January 2016—after B&S completed *one third* of the planning, ROA 112 ep 8 ¶ 2—he informed the Board of the project and recommended it award the contracts to B&S, *because of* the illegal "five-month head start" they had enjoyed. ROA 112 ep 8 ¶¶ 1–5.

Huckelberry gave two reasons for giving B&S the contracts: to reward them for providing free services ROA 106 ep 8–9 ¶¶ 32, 35, and because the head start meant they alone could finish it in time. The Board agreed. The first reason (a reward for free services) is discussed below. The second reason—the fact that

B&S were already a third of the way finished—was an unlawful form of favoritism even aside from any other issue presented here.

Procurement experts call this kind of unlawful favoritism "unequal access to information." *Axiom Res. Mgmt., Inc. v. United States*, 564 F.3d 1374, 1377 (Fed. Cir. 2009); *ARINC Eng'g Servs., LLC v. United States*, 77 Fed. Cl. 196, 202–03 (2007). It happens "when a government contractor has access to non-public information … that may afford a competitive advantage in subsequent competition for a government contract." *Axiom Res. Mgmt., Inc.*, 564 F.3d at 1377 n. 1 (citation omitted). By inviting B&S to begin designing the project in August 2015, the County loaded the dice, giving B&S an advantage no other firms could have, so that when the project was considered in January 2016, they alone could be awarded the contract.

No Arizona court has yet addressed this issue. But federal courts have set forth a four-part test. *See ARINC*, 77 Fed. Cl. at 202-03. They ask: 1) whether the firm that received the contract had access to nonpublic information other firms did not get; 2) whether that information proved competitively useful; 3) whether that information gave the winning firm "an advantage that was unfair"; and 4) whether not having that information prejudiced firms that did not get the contract. *Id.* at 202. All four factors are present here.

For five months, B&S enjoyed access to information about WV's needs that was not available to any other firm—because no other firms were invited to participate in the planning sessions. The information proved competitively useful to them—indeed, it was the very reason the Board awarded them the contracts. ROA 101 ep 8 ¶ 46; ROA 106 ep 9 ¶ 35. This advantage was commercially advantageous to them because the "head start" was why they got the contracts. An exclusive, invitation-only, five-month head start on a public contract is the definition of unfair.

This was contrary to law and public policy. Yet no Arizona case directly addresses the question, and it is important. If counties can give such "head starts" to their chosen favorites, the entire process of government contracting will be undermined, and officials will engage in precisely the favoritism this Court has condemned. *See* *Brown v. City of Phoenix*, 77 Ariz. 368, 377 (1954) ("The letting of contracts for public business should be above suspicion of favoritism.")

The the County considers its actions to be lawful—indeed, ordinary. Not only does the state's second-largest county regard it as unremarkable to spend months secretly procuring services from what the Superior Court called "hand-picked" favorites, ROA 116 ep 4, but it invokes the emergency exception to the procurement statutes more than once per month on average. Review is therefore important to ensure that Arizona's procurement laws are followed.

II. Pima County's procurement of services without payment was unlawful.

Section 34-605(B) requires counties to enter into written contracts whereby they pay for preconstruction services. The County did not do that. Between August 2015 and January 2016, it obtained services from B&S without a written contract and for free.[2]

It is illegal to procure services without paying because that encourages favoritism and hinders competition. It leads to a situation where government contracts are awarded, not to the most competitive or qualified firms, but to those with political connections, or who are wealthy enough to provide free services in hopes of later being rewarded with the contract. Such favoritism ultimately harms taxpayers by creating an end-run around the statutory procurement process.

That is what happened here. B&S were lucky enough to be invited by the County to begin designing the project in August 2015—an opportunity no other contractor or architect got. They gave the County five months of free services as "part of their marketing strategy" (in the words of a County official, ROA 106 ep 7 ¶ 27)—i.e., in hopes of getting the contracts in return. And they were, indeed,

[2] Bizarrely, the court below characterized it as a "conce[ssion]" by Taxpayers "that the county has no contractual obligation to pay … for pre-award services." *Rodgers*, 450 P.3d at 1284 n.4. Far from being a concession, this fact is essential to Taxpayers' case. The County is, indeed, under no such obligation—and that's unlawful, because Section 34-605(B) *requires* the County to "enter into a written contract … under which the agent shall pay the contractor a fee for preconstruction services."

awarded the contracts, partly as a reward for these free services. ROA 106 ep 8–9 ¶¶ 32, 35.

It is an abuse of discretion to award government contracts based on loyalty or favoritism instead of merit. In *Brown*, this Court ruled that Phoenix officials acted illegally when they selected a contractor to lease government-owned land based on "a sense of loyalty … for past services rendered." 77 Ariz. at 375–76. The City selected the incumbent lessor instead of a newcomer, even though the newcomer offered to pay more, and without competitive bidding. *Id.* at 371. 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.* at 376. Likewise, the Board's selection of B&S on account of five months of free services was just the sort of "loyalty" *Brown* found unlawful.

The County's position is that acquiring preconstruction services for free and without a written contract was legal, and indeed, unremarkable. This demonstrates that absent action by this Court, the procurement practices at issue in this case will continue.

III. This case is not moot.

The Court of Appeals dismissed on the grounds that the case is moot because the project has been built. That was wrong. This case remains a live

dispute, and, even if it were moot, it presents questions of major importance that are virtually certain to recur—as the Court of Appeals admitted. *Rodgers*, 450 P.3d at 1284 ¶ 19.

A. The Plaintiffs' injury for past wrongs could still be remedied by a favorable decision.

This case is not moot because the County, contrary to state procurement law, never made a contract to pay for B&S's pre-construction services, and has no plans to. Taxpayers contend this is unlawful—meaning a live legal dispute remains that could be resolved by a judicial determination.

The court below rejected this argument because "it would be against the taxpayers' interest in preventing depletion of public funds" to order payment. *Id.* at 1283 ¶ 18. Yet this is both false and irrelevant.

First, Taxpayers sought both injunctive *and* declaratory relief, so even if it *were* against their interest to order the County to pay, the court can still grant *declaratory* relief that the County acted unlawfully—which would redress Taxpayers' injury. *Cf. Sandblom v. Corbin*, 125 Ariz. 178, 182 (App. 1980) ("declaratory relief can still issue independently of a request or grant of other special relief."). The Court can award *prospective* relief holding that the County's actions were unlawful, so as to prevent future recurrences. *Turken v. Gordon*, 223 Ariz. 342, 351–52 ¶¶ 44, 50 (2010). The court below gave no reason for refusing this, even assuming its conclusion regarding payment was correct.

Second, however, Taxpayers' interest is *not* merely in preventing depletion of public funds, but in ensuring that funds are *lawfully spent*—even if spending money in an *un*lawful way might be cheaper. For example, in *Smith v. Graham Cnty. Cmty. Coll. Dist.*, 123 Ariz. 431, 432 (App. 1979), the plaintiff sued when a community college district used its own staff to repair facilities, even though the reason it did so was because that was cheaper than following the procurement laws. Yet the court allowed the case to proceed because taxpayers have an equitable interest, not just in saving money, but in seeing that funds are lawfully spent.

Likewise, in *Secrist v. Diedrich*, 6 Ariz. App. 102 (1967), the taxpayer sued when a school board used its own staff to perform landscaping at schools, instead of going through the procurement process. Having the work done by staff instead of outside contractors was doubtless cheaper, but the court found that taxpayers had standing to challenge "illegal expenditures," not merely illegal expenditures that *also* cost more money. *Id.* at 104.

Third, compliance with the procurement laws—including Section 34-604(B)—*does* save taxpayers money, *in the long run*. Arizona's procurement statutes are designed to prevent favoritism because favoritism harms taxpayers by reducing competition; cronies and favorites are rewarded, and newcomers who cannot afford to provide free services, or lack the political connections to be

invited to participate in secret, back-room meetings, cannot obtain contracts. True, any *particular* instance of favoritism might be cheaper than following the procurement laws. But in the long run, favoritism harms taxpayers and costs more. Taxpayers here have a legally enforceable interest in preventing that.

And because the controversy regarding the non-payment for preconstruction services remains live, the case as a whole remains live. *Cf.* *Fisher v. Maricopa Cnty. Stadium Dist.*, 185 Ariz. 116, 119 (App. 1995) (where dispute over fees remained live, the rest of the moot case remained live).

B. This case involves questions of great public importance that are almost certain to recur.

Even if this case were moot, the questions presented "have broad public impact beyond resolution of [this] specific case," *Cardoso v. Soldo*, 230 Ariz. 614, 617 ¶ 6 (App. 2012), and *will*—not just may—recur. The Court of Appeals even said so. *See* *Rodgers*, 450 P.3d at 1284 ¶ 19. Yet it declined to decide the case because Plaintiffs did not seek an injunction at an earlier stage. That, however, is not a proper consideration with regard to the importance/recurrence exception to mootness.

The reason for the importance/recurrence exception is that deciding such cases "avoid[s] a multiplicity of appeals," *Bd. of Exam'rs of Plumbers of Phoenix v. Marchese*, 49 Ariz. 350, 353 (1937), and ensures the uniform application of the

law by providing rulings "for the future guidance of the bench and bar." *State v. Super. Ct.*, 86 Ariz. 231, 234 (1959).

The importance/recurrence analysis does not include *any* consideration of whether a plaintiff sought temporary relief earlier in the case. On the contrary, Arizona courts *frequently* resolve important, recurring questions in cases that have become moot even though the parties failed to seek an injunction at an earlier point. *See, e.g.*, *Marchese*, *supra*; *Ciulla v. Miller ex rel. Ariz. Highway Dep't*, 169 Ariz. 540, 541 (App. 1991); *Big D Const. Corp. v. Ct. of App.*, 163 Ariz. 560, 562–63 (1990); *Fisher*, 185 Ariz. at 119.

Fisher, *supra*, involved a dispute over the legality of meetings preparatory to adoption of a tax to finance a baseball stadium. The tax was later adopted, and the government argued that the case was thereby rendered moot. The court found it was not moot because the case was not about the tax, but about the meetings. *Id.* The government also argued "that the issues … will not recur because 'construction of more than one major league baseball stadium … is very unlikely,'" but the court found that this "mischaracterize[d] the issue … . The issue likely to recur is not the building of a second stadium but the future use of the 'legal advice' exemption to justify [illegal meetings]." *Id.* at 120. The same applies here: this case challenges the legality of the County's procurement of preconstruction services and its invocation of the emergency exception; the

completion of building does not moot *that* question. Just as *Fisher* qualified for the importance/recurrence exception, so does this case.

To paraphrase *Fisher*, the legality of the County's procurement is "fundamentally significant because [it] will define just how [counties can procure services]. If ['loss leaders' and secret pre-project meetings] are left unexamined by the judiciary, they could handily be expanded until the purpose of the [state's procurement] law is frustrated." *Id.*

As for the likelihood of recurrence, the record shows that Pima County and B&S regard their actions as an ordinary method of procurement. ROA 106 ep 7 ¶¶ 26–27. Pima County invokes the Section 34-606 more than once per month, for the same reasons as here (timelines; a contractor's convenient familiarity with a project; speculation that competitive bidding would not be useful). ROA 90 ep 3 ¶¶ 4–5. This will *certainly* happen again.

B&S gave the County free services because they hoped it would give them the contracts in return, ROA 106 ep 7 ¶ 26, which it did. County officials regard this as a typical method of "marketing" for these firms. *Id.* ¶ 27. Barker testified that "more than 50 percent" of his company's County projects are done this way, *id.* ep 20 at 52:22, and that it pays off half the time. *Id.* at 53:23–24. Therefore it is certain that this will all happen again.

This Court can, of course, decide this case regardless of the Court of Appeals' choice not to do so. Given the importance of the issues involved, and the likelihood of recurrence, this Court should grant the petition.

Conclusion

The petition should be *granted*.

Respectfully submitted this 19th day of December, 2019 by:

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