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ARIZONA SUPERIOR COURT, PIMA COUNTY

HON. CATHERINE M WOODS

CASE NO. C20161761

DATE: August 13, 2018

RICHARD RODGERS,
SHELBY MANGUSON-HAWKINS, and
DAVID PRESTON
Plaintiffs

vs.

CHARLES H. HUCKLEBERRY,
SHARON BRONSON,
RAY CARROLL,
RICHARD ELIAS,
ALLYSON MILLER,
RAMON VALADEZ, and
PIMA COUNTY
Defendants

******AMENDED**** UNDER ADVISEMENT RULING**

IN CHAMBERS RE: DEFENDANTS' SECOND MOTION FOR PARTIAL SUMMARY JUDGMENT RE COUNTS THREE AND FOUR / PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT RE COUNTS THREE AND FOUR

The Court's Under Advisement Ruling, originally issued on August 10, 2018, is amended solely for purposes of adding a "Prefatory Note" at pg. 2.

Pending before the Court are Defendants' Motion for Partial Summary Judgment regarding Counts 3 and 4, and Plaintiffs' Cross-Motion for Summary Judgment regarding Counts 3 and 4. The Court has carefully reviewed and considered the Motions and the related Responses, Replies, Separate Statements of Facts, Controverting Statements of Fact, and the statements and arguments of counsel. The Court finds that for the following reasons, Defendants are entitled to judgment as a matter of law pursuant to Rule 56(a), ARCP, as to Counts 3 and 4 of Plaintiffs' Complaint.

Plaintiffs' Complaint at Count Three seeks declaratory and injunctive relief for an alleged violation of the Title 34 competitive bidding requirements, found at A.R.S. §§ 34-603, -604, and -606. These statutes require, with limited exception, that governmental entities such as Pima County engage in a process of competitive bidding, contracting, and procurement before spending public funds on public construction

Maria Mendoza
Judicial Administrative Assistant

projects. Exceptions to these requirements include the existence of "a threat to the public health, welfare or safety," and/or the existence of a situation that makes compliance "impracticable, unnecessary or contrary to the public interest." *See* § 34-606. Under these types of circumstances, the government entity must procure services "with such competition as is practicable under the circumstances." *Id*.

Plaintiffs' Complaint at Count Four seeks declaratory and injunctive relief for an alleged violation of Pima County Code's similar requirements for competitive bidding, found at §§ 11.12.060 and 11.16.010. The Code, § 11.16.010(A), makes clear that the County follows Title 34 for construction procurement ("[p]rocurement for construction shall be conducted in accordance with Arizona Revised Statues Title 34").

Prefatory Note: The following discussion concerning Defendants' use of discretion in determining the public interest and/or making public policy decisions address only the issues raised in Counts Three and Four. They do not address, or decide, the public policy and public purpose issues raised by Plaintiffs' Count One, concerning an alleged violation of Arizona Constitution Article IX, Section 7 (aka, The "Gift Clause").

The purposes of competitive bidding include "to promote competition, to guard against favoritism, fraud and corruption, and to secure the best work or supplies at the lowest price practicable." *Rollo v. City of Tempe*, 120 Ariz. 473, 474 (1978). Defendants concede that they did not engage in any competitive bidding, contracting or procurement process before Pima County spent public funds on the design and construction of the building and balloon pad at issue in this case. They contend that the competitive process was excused by § 34-606 and corresponding County Code provisions because compliance was impracticable under the circumstances and compliance was contrary to the public interest. Plaintiffs contend that no impracticability existed, and the public interest was not served by altogether bypassing competitive bidding and procurement procedures. Alternatively, Plaintiffs claim that if an impracticability existed, Defendants should not be excused from a situation that they themselves created.

Summary Judgment is appropriate when "the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Rule 56(a), ARCP. The parties agree that there exists no genuine dispute over the material facts. The Court finds that on the undisputed, specific, and unique facts before it, § 34-606 provided to Pima County the option, and the right to use its discretion, to forego the competitive bidding, construction, and procurement process contemplated by §§ 34-603 and -604 and the corresponding County Code sections when it procured the services of the architect and construction-manager-at-risk to design and construct the building and balloon pad at issue in this case.

Maria Mendoza
Judicial Administrative Assistant

The evidence supports Defendants' contention that Pima County procured these services in January 2016, following a January 19, 2016 Board of Supervisors' meeting in which the Board voted 4-1 to move forward on the World View project and to hire Swaim and Associates as architect, and Barker Morrisey as construction-manager-at-risk. As of January 19, 2016, the Pima County Board of Supervisors was within its discretion to conclude that the public interest justified moving forward with the World View agreement, including the promise to use reasonable efforts to deliver occupancy of the premises by November 2016. The Board also was within its discretion to conclude that for this specific project, it was impracticable to pursue *any* competitive bidding for the design and construction of the project on the belief that there simply was not enough time for any other architect and any other construction manager to deliver occupancy by November 2016. The evidence reveals that the typical timeframe to complete the competitive bidding process is 2-4 months, and the typical timeframe to complete the construction process is 18-24 months. Here, had Pima County engaged in the competitive process after its January 19, 2016 vote, it would have left a mere 6-8 months for the design and construction of the building and balloon pad—a time frame that appears unrealistic if not impossible. As of January 2016, to meet a November 2016 occupancy deadline, one could reasonably conclude that a competitive bidding process would have been futile.

The Court has carefully considered Plaintiffs' contention that Defendants actually procured the design and construction services between the time frame of August-November 2015, when County Administrator Charles H. Huckelberry hand-picked Swaim and Barker Morrisey to prepare preliminary designs and cost estimates for the project, and he received their preliminary design services and preliminary cost estimates. In fact, in Mr. Huckelberry's memorandum dated November 2, 2015 to Deputy County Administrator Tom Burke, Mr. Huckelberry stated, "[i]n our initial meetings with World View, it is clear they had no structure regarding design and cost parameters for a new manufacturing facility. I suggested they work with Swaim and Associates Architects and Barker Morrisey Contracting …. The purpose of this memorandum is … to inquire of you and the Procurement Director the most appropriate method to employ World View's project architect, Swaim and Associates, to complete the necessary design, planning, programming and construction drawings for a new facility if they choose Pima County to locate their headquarters." The record is clear that for his part, Mr. Huckelberry had no intention of pursuing a competitive bidding process, or encouraging the Pima County Board of Supervisors to do so.

Mr. Huckelberry selected Swaim and Barker Morrisey at a 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. In essence, by selecting Swaim and Barker Morrisey in August 2015, Mr. Huckelberry received their services and gave them a five month "head start" over any other potential bidders. By October, Mr. Huckelberry actively was looking for a way to ensure that only one architect, Swaim, would be considered for the job. In analyzing whether the "procurement" occurred as early as August 2015, Plaintiffs' argument at first glance makes practical and logical sense. However, it is not supported by the legislature's language in Title 34 concerning how procurement occurs and who is authorized to procure on behalf of the governmental entity.

Pursuant to Title 34, a governmental agency may procure services only through its "agent." According to § 34-101(a), "agent" is defined in pertinent part as "any county, city or town, or officer, board or commission of any county, city or town …." Mr. Huckelberry, the County Administrator, is not an officer of Pima County. *See* § 11-401 (defining county officers to include County Supervisors; County Administrator is not among those identified as an officer). For purposes of this case, Pima County's agent, by definition, is the Pima County Board of Supervisors. Though he was integrally involved in securing the preliminary services of the architect and construction-manager-at-risk, and in persuading the Board of Supervisors ultimately to hire these hand-picked providers, Mr. Huckelberry by statutory definition is not an agent authorized to procure on behalf of Pima County. The Court is bound to interpret and apply the legislature's statutes as written. In interpreting a statute, "[w]e look primarily to the language of the statute … and statutory language controls our interpretation when the language is clear and unequivocal." *Mercy Healthcare Arizona, Inc. v. Arizona Health Care Cost Containment System*, 181 Ariz. 95, 98 (App. 1994). The legislature could have, but did not, include a County Administrator as an "agent" for purposes of a government's procurement of construction services. The Court will not overstep its judicial role to "usurp the Legislature's prerogative … on matters within its exclusive domain. " *See State v. Bowsher*, 225 Ariz. 586, 588, ¶ 11 (2010). Therefore, the Court concludes that under Title 34, neither Pima County nor Mr. Huckelberry "procured" Swaim and Associates' and Barker Morrisey's services prior to the time the Board of Supervisors awarded the contracts in January 2016.

The Court is sensitive to Plaintiffs' concerns that procurement requirements "are of great importance to the taxpayers" and the requirements should not be "frittered away by exceptions, but … should receive a construction … which will avoid the likelihood of their being circumvented, evaded, or defeated." *See* Cross Motion at pp. 4-5, citing *Secrist v. Diedrich*, 6. Ariz. App. 102, 106 (1967). Reasonable people could argue that for all intents and purposes, the Pima County Administrator's actions during August-November 2015 provided a means for Pima County to evade or circumvent the typical procurement requirements. However, the clear

language of § 34-101(a) leaves this Court no legitimate basis to find that Mr. Huckelberry or Pima County "procured" Swaim's and Barker Morrisey's services at any time before January 2016. To the extent Pima County's taxpayers disagree with the notion that the County Administrator did not and cannot "procure" on behalf of Pima County, they are welcome to seek relief through the legislative and statutory amendment process.

The Court also has considered Plaintiffs' argument that the November 2016 deadline was negotiable and/or that it existed only to serve World View's private interests. The record before the Court establishes that Pima County determined that it was within the public interest to secure the World View contract as a means of economic development. The record also supports a reasonable inference that Pima County was concerned that it would lose the World View opportunity if it did not agree to World View's accelerated time frame. On or about October 23, 2015, Mr. Huckelberry made a written proposal to World View to secure its business in Pima County. On December 23, 2015, World View accepted Pima County's offer to design and construct the building and balloon pad for World View's lease and future purchase. World View conditioned its acceptance on Pima County providing the premises for occupancy by "approximately November 2016." This accelerated time frame was based upon World View's commitments to a third-party client and/or its anticipated receipt of tax credits and grant funds for 2016. *See* letter from World View CEO Jane Poynter to Chuck Huckelberry dated December 23, 2015 (describing need for occupancy in approximately November 2016 to qualify for various tax credits and grant funds for 2016 and beyond through Arizona Commerce Authority, Arizona Qualified Facility Refundable Tax Credit Program, and Arizona Competes Fund). Had Defendants refused this accelerated schedule, they risked losing the World View deal to other competitors in New Mexico and Florida. There exists no evidence before this Court that the 2016 deadline was negotiable. There is evidence before the Court that suggests the agreement could have been at risk if Pima County had not agreed to the 2016 deadline.

Concerning Plaintiffs' argument that the "impracticability" of competitive bidding was a problem of Pima County's own making, the Court is not persuaded. It is true that Mr. Huckelberry learned of World View's probable accelerated time frame during the Fall of 2015. However, during the Fall of 2015, Mr. Huckelberry also knew that World View was touring potential sites in New Mexico and Florida. It was far from clear during the Fall of 2015 that World View ultimately would choose Pima County. In late November 2015, World View intimated that it probably would accept Pima County's offer. World View formally accepted Pima County's proposal on December 23, 2015, and conditioned that acceptance on an accelerated occupancy deadline of "approximately November 2016." The Pima County Board of Supervisors, the County's "agent," received the

details of the proposed deal in mid-January 2016. Under these specific and unique circumstances, the Court is unable to find that the "impracticability" of competitive bidding was the product of Pima County's own making. The Court finds *Innovation Dev. Enter. Of Am., Inc v. United States*, 108 Fed. Cl. 711 (2013) to be procedurally and factually distinguishable on this issue.

Based upon the foregoing, and good cause appearing,

IT IS ORDERED granting Defendants' Motion for Partial Summary Judgment regarding Counts 3 and 4 of Plaintiff's Complaint.

IT IS FURTHER ORDERED denying Plaintiffs' Cross-Motion for Summary Judgment regarding Counts 3 and 4 of Plaintiffs' Complaint.

/s/
HON. CATHERINE WOODS
(ID: 304a5653-62bf-4edf-87e7-ad3a0fb1452f)

cc: Andrew Lawrence Flagg, Esq.
Regina L. Nassen, Esq.
Timothy Sandefur, Esq.
Veronica M Thorson, Esq.
Case Management Services - Civil
Clerk of Court - Civil Unit
Clerk of Court - Under Advisement Clerk

Maria Mendoza
Judicial Administrative Assistant