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**IN THE SUPERIOR COURT OF ARIZONA
IN AND FOR THE COUNTY OF PIMA**

KARL HIRSHMAN; RICHARD RODGERS; and
BRUCE ASH,

Plaintiffs,

vs.

JONATHAN ROTHSCILD, in his official capacity
as Mayor of the City of Tucson; REGINA ROMERO,
in her official capacity as member of the Tucson City
Council; PAUL CUNNINGHAM, in his official
capacity as member of the Tucson City Council;
KARIN UHLICH, in her official capacity as member
of the Tucson City Council; SHIRLEY SCOTT, in her
official capacity as member of the Tucson City
Council; RICHARD FIMBRES, in his official
capacity as member of the Tucson City Council;
STEVE KOZACHIK; RICHARD MIRANDA, in his
official capacity as City Manager of the City of
Tucson; and CITY OF TUCSON,

Defendants.

Case No.

C2014-0690

**COMPLAINT for Declaratory
and Injunctive Relief**

Gub. Ariz. 2014

Introduction

1. Public procurement – the process by which public entities purchase goods and services – is predicated on open and fair competition to ensure the government receives the goods and services necessary for its operation and taxpayers receive the best

value for their dollars. The federal and state constitutions, and state and local law, provide safeguards to protect the integrity of the public procurement process.

Unfortunately, and especially during difficult economic times, public officials are tempted to use procurement as a policy tool, always at the expense of taxpayers and often at the expense of the very businesses they are attempting to assist. On June 12, 2012, the Tucson City Council gave way to this temptation, and enacted an ordinance that permits subsidies to arbitrarily defined “local” companies at the expense of the general taxpaying public and in violation of state law and the United States and Arizona constitutions.

TUCSON, ARIZ., PROCUREMENT CODE art. III, § 28-39 (“§ 28-39”).

2. Awards of contracts for public works projects are governed by laws requiring that the contracts be open to bid and let to the lowest reliable bidder. In Arizona, there is a statutory requirement that public contracts, including contracts entered into by cities, towns, and other local governments, be awarded only to the “lowest responsible bidder.” ARIZ. REV. STAT. §§ 34-211(A), 34-101(1)(a). The purpose of Arizona’s law is to ensure that local taxpayers pay the lowest possible price for public goods and services. Prohibitions against local preference laws also prevent favored special-interests from receiving government largess, prevent barriers to interstate commerce, and prevent retaliation among other local governments who may be tempted to send patronage to their favored interests. Despite these important reasons underlying Arizona’s law, Tucson’s bid preference ordinance, § 28-39, ensures that contracts where the preference is exercised will be let to someone other than the lowest, responsible bidder.

3. Not only does § 28-39 violate state law, it is unconstitutional. § 28-39 violates the Arizona Constitution's Equal Privileges and Immunities Clause, is an unconstitutional special law, and constitutes an unlawful gift to favored businesses. Additionally, the ordinance violates the U.S. Constitution's Equal Protection Clause and the Privileges and Immunities Clause.

4. Plaintiffs Karl Hirshman, Richard Rodgers, and Bruce Ash ("Taxpayers") are Tucson taxpayers whose tax dollars are used to finance public works projects in the city. Taxpayers seek to enforce the statutory and constitutional guarantees that prohibit the discriminatory bid preferences of § 28-39 in order to prevent their tax dollars from being unlawfully spent. Because § 28-39 violates state law and the federal and state constitutions, § 28-39 cannot stand, and any future expenditure of taxpayer funds made pursuant to § 28-39 must be enjoined.

Parties, Jurisdiction, and Venue

5. Plaintiff Karl Hirshman is a resident of the City of Tucson in the state of Arizona. Plaintiff Hirshman pays property tax and sales tax in Tucson.

6. Plaintiff Richard Rodgers is a resident of the City of Tucson in the state of Arizona. Plaintiff Rodgers pays property tax and sales tax in Tucson.

7. Bruce Ash is a Tucson taxpayer and owner of Campbell Fair, a commercial shopping center located in Tucson. Campbell Fair remits transaction privilege tax to the City of Tucson.

8. Defendant Jonathan Rothschild is the Mayor of the City of Tucson and its chief executive officer. He is sued in his official capacity only.

9. Defendant Regina Romero is a member of the Tucson City Council, which is the legislative body for the City of Tucson. She is sued in her official capacity only.

10. Defendant Paul Cunningham is a member of the Tucson City Council, and is sued in his official capacity only.

11. Defendant Karin Uhlich is a member of the Tucson City Council, and is sued in her official capacity only.

12. Defendant Shirley Scott is the Vice Mayor of the City of Tucson and member of the Tucson City Council, and is sued in her official capacity only.

13. Defendant Richard Fimbres is a member of the Tucson City Council, and is sued in his official capacity only.

14. Defendant Steve Kozachik is a member of the Tucson City Council, and is sued in his official capacity only.

15. Defendant Richard Miranda is City Manager for the City of Tucson, and is authorized to remit payments under certain contracts on behalf of the City of Tucson. He is sued in his official capacity only.

16. Defendant City of Tucson is a municipal corporation organized under the laws of the State of Arizona.

17. Jurisdiction over this action and its claims, and parties is provided by A.R.S. §§ 12-123, 12-1801, and 12-1831.

18. Venue is proper pursuant to A.R.S. § 12-401.

Facts Common to All Claims

19. On June 12, 2012, the Tucson City Council adopted Ordinance Number

10992, a local bid preference law that applies to city contracts for goods and services with a projected contract value between \$50,000 and \$1,000,000. TUCSON, ARIZ., PROCUREMENT CODE art. III, § 28-39 (“§ 28-39”).

20. Section 28-39 gives Tucson businesses and Arizona firms a percentage preference on bids submitted for city contracts vis-a-vis their “non-local” competitors. Specifically, the local preference mandates of § 28-39 require a percentage price preference, or subsidy, to bidders, offerors, or respondents: (1) “whose principal place of business of their enterprise is physically located within the Tucson Metropolitan Statistical Area (TMSA)” (2) “whose principal place of business of their enterprise is physically located outside of the TMSA but within the State of Arizona,” or (3) a “locally owned franchise” whose principal place of business is located within the TMSA. *Id.* The favored businesses that fall within these definitions receive a five percent (5%), three percent (3%), and one and half percent (1.5%) price preference respectively when bidding on City of Tucson public contracts. *Id.*

21. “Principal place of business” means the enterprise’s address on record with the Arizona Corporation Commission (ACC).

22. “TMSA” means Pima County.

23. “Locally owned franchise” means that a business is owned by a resident of Pima County and has the right to operate a business that is identified or associated with a franchisor’s trademark, or to offer, sell, or distribute goods, services, or commodities that are identified or associated with a franchisor’s trademark.

24. When a bid preference under § 28-39 is exercised, the percentage of the

preference is applied to the total dollar amount of the bid, and the bid is “reduced” by that percentage only for the purpose of determining the “lowest” bid.

25. However, the amount paid for the contract is the full dollar amount of the actual bid, not the “reduced” bid as calculated after the preference is applied.

26. When a bid preference is applied under § 28-39, the City is, therefore, awarding contracts to bidders other than the lowest actual bidder.

27. On information and belief, the City has entered into contracts in which § 28-39 was exercised and has awarded contracts to higher bidders, despite receiving proposals from other lower bidders.

28. The City of Tucson finances payments made on municipal contracts, *inter alia*, through the collection of sales and property tax.

29. When Tucson officials issue payment under a procurement contract, the City engages in a direct expenditure of taxpayer funds.

30. When a preference is exercised under § 28-39, there is an unlawful, direct expenditure of taxpayer funds generated through taxation in the amount of the preference.

31. Plaintiffs Hirshman, Rodgers, and Campbell Fair pay property tax and sales tax in the City of Tucson, and share the burden of replenishing the coffers of the City of Tucson when the City provides unlawful subsidies to private contractors under § 28-39. Plaintiffs have a legal right to have their tax dollars lawfully spent. Because Plaintiffs’ taxes finance the City’s local price preference policies, they are directly harmed by the City’s grant of illegal subsidies to favored businesses under § 28-39.

Count One—State Law Preemption

32. Plaintiffs reallege, adopt and incorporate by reference paragraphs 1 through 31 above as though fully set forth herein.

33. The State of Arizona provides a comprehensive statutory scheme for the employment of contractors on public works projects throughout the state. *See* ARIZ. REV. STAT. § 34-201, *et seq.* Those laws are a matter of statewide concern.

34. In the context of public contracts, Arizona law defines “agent” as “any county, city or town, of officer, board or commission of any county, city or town.” ARIZ. REV. STAT. § 34-101(1)(a).

35. Arizona law mandates that “[t]he agent *shall* enter into a contract with the lowest responsible bidder whose proposal is satisfactory,” except in specifically enumerated circumstances. *Id.* at § 34-221(A) (emphasis added).

36. “Lowest responsible bidder” means the bidder who submits the lowest bid and is competently able to perform the contract.

37. The location of a bidder’s “principal place of business” is not a factor in determining whether the bidder is “responsible.”

38. Bid preferences for “local” contractors is not one of the specific statutory exceptions to the requirement to let public contracts to the lowest responsible bidder.

39. The City of Tucson does not have legal authority to award a contract to someone other than the lowest responsible bidder.

40. On information and belief, the City has entered into contracts in which § 28-39 was exercised and has awarded contracts to higher bidders, despite receiving

proposals from other lower bidders in violation of § 34-221(A).

41. When a preference is exercised and a contract is awarded pursuant to § 28-39, City contracts are awarded to someone other than the lowest responsible bidder in violation of § 34-221(A).

Count Two—Equal Privileges and Immunities Clause

42. Plaintiffs reallege, adopt and incorporate by reference paragraphs 1 through 41 above as though fully set forth herein.

43. Art. II, § 13 of the Arizona Constitution provides “[n]o law shall be enacted granting to any citizen, class of citizens, or corporation other than municipal, privileges and immunities which, upon the same terms, shall not equally belong to all citizens or corporations.”

44. A Municipal ordinance that makes discriminatory classifications violates the Equal Privileges and Immunities Clause, unless the ordinance is “rationally and reasonably related to furthering some legitimate governmental interest.” *See Big D Construction Corp v. Court of Appeals for State of Ariz., Div. One*, 163 Ariz. 560, 566, 789 P.2d 1061, 1067 (1990).

45. Section 28-39 discriminates among two classes of contractors seeking to do business with the City of Tucson – those who qualify for the preference and those who do not.

46. A contractor who has received a preference and has been awarded a contract pursuant § 28-39 has been granted a privilege to receive public funds that is not available to other contractors within the City of Tucson, even if those contractors

generate substantive tax revenues or employment opportunities.

47. Section 28-39's arbitrary classification of and discrimination against businesses within and outside the City of Tucson, raising the costs of public contracts and depriving Plaintiffs of their right to have their tax dollars lawfully spent, is not rationally related to a legitimate government interest.

48. Accordingly, § 28-39 violates the Equal Privileges and Immunities Clause of Art. II, § 13 of the Arizona Constitution.

Count Three—Special Law

49. Plaintiffs reallege, adopt and incorporate by reference paragraphs 1 through 48 above as though fully set forth herein.

50. Art. IV, Part 2, § 19 of the Arizona Constitution provides, "No local or special laws shall be enacted . . . [g]ranting to any corporation, association, or individual, any special or exclusive privileges, immunities, or franchises."

51. An ordinance is not an impermissible special law if (1) the classification is rationally related to a legitimate governmental purpose, (2) the classification is legitimate, encompassing all members of the relevant class, and (3) the class is elastic, allowing members to move in and out of it. *See, e.g., Gilbert v. Maricopa County*, 213 Ariz. 241, 246, 141 P.3d 416, 421 (App. 2006).

52. By its express terms, § 28-39 terms creates an exclusive class of contractors that receive a direct taxpayer subsidy that other contractors do not receive.

53. For the reasons set forth above, § 28-39 creates an arbitrary classification that is not rationally related to a legitimate government interest.

54. Moreover, the ordinance applies only to municipal contracts, yet the class of contractors eligible for the preference includes all businesses who have an address registered with the ACC in Pima County. As a result, the classifications of § 28-39 are neither legitimate nor rationally related to a proper government purpose.

55. Any purported public benefits of § 28-39 can be secured through the application of a general law.

56. For the foregoing reasons, § 28-39 constitutes a special law in violation of Art. IV, Part 2, § 19 of the Arizona Constitution.

Count Four—Gift Clause

57. Plaintiffs reallege, adopt and incorporate by reference paragraphs 1 through 56 above as though fully set forth herein.

58. Art. IX, § 7 of the Arizona Constitution provides that neither the State nor any city “shall ever give or loan its credit in the aid of, or make any donation or grant, by subsidy or otherwise, to any individual, association or corporation. . . .”

59. A “subsidy” is “a grant of funds or property from a government, to a private person or company to assist in the establishment or support of an enterprise deemed advantageous to the public.” *State Tax Comm’n v. Miami Copper Co.*, 74 Ariz. 234, 241, 246 P.2d 871, 876 (1952).

60. When the City enters into a contract in which the preference under § 28-39 is exercised, it is providing a direct subsidy to the favored contractor in the amount of the preference.

61. A government expenditure does not violate the Gift Clause if there is a

public purpose and in return for the expenditure the government entity receives consideration that is not “grossly disproportionate.” *See Turken v. Gordon*, 223 Ariz. 342, 347-348, 224 P.3d 158, 163-164 (2010).

62. Contractors who are awarded contracts pursuant to § 28-39 are entirely privately owned and use revenue and profit from public contracts for purely private purposes.

63. Direct subsidies to private contractors who qualify for bid preferences under § 28-39 do not serve a public purpose.

64. Additionally, “indirect benefits...when not bargained for as part of the contracting party's promised performance...are not consideration under contract law” or the Gift Clause. *Id.* at 350, 224 P.3d at 166. Moreover, “consideration is what one party to a contract *obligates* itself to do (or to forbear from doing) in return for the promise of the other contracting party.” *Id.* at 349, 224 P.3d at 165 (emphasis added).

65. The City receives no direct benefits from the subsidy provided to contractors who receive a preference under § 28-39.

66. Any indirect benefits purportedly received by the City for subsidies provided under § 28-39 are not consideration under the Gift Clause.

67. Moreover, private contractors receiving a subsidy under § 28-39 are not *obligated* to provide any purported indirect benefits, such as an increased tax base or employment opportunities, under the express terms of § 28-39.

68. As a result, the City does not receive adequate consideration in return for the expenditure of public funds when financing subsidies to contractors who qualify for

the preference under § 28-39.

69. For the foregoing reasons, § 28-39 constitutes a gift in violation of Art. IX, § 7 of the Arizona Constitution.

Count Five—U.S. Equal Protection Clause

70. Plaintiffs reallege, adopt and incorporate by reference paragraphs 1 through 69 above as though fully set forth herein.

71. The Fourteenth Amendment of the United States Constitution states that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”

72. Promotion of domestic business by discriminating against non-residents is not a legitimate state purpose under the U.S. Equal Protection Clause. *See, e.g., Metro. Life Ins. Co. v. Ward*, 470 U.S. 869 (1985).

73. Section 28-39(c) promotes franchises located within Pima County and owned by Pima County residents by discriminating against non-resident franchise owners.

74. As a result, the discriminatory franchise preference of § 28-39(c) does not constitute a legitimate state interest under the Equal Protection Clause.

75. For the reasons set forth above, § 28-39 creates an arbitrary classification that is not rationally related to a legitimate government interest.

76. Accordingly, § 28-39 violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

Count Six—U.S. Privileges and Immunities Clause

77. Plaintiffs reallege, adopt and incorporate by reference paragraphs 1 through 76 above as though fully set forth herein.

78. Art. IV, § 2, cl. 1 of the United States Constitution states that “[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”

79. Residency alone is not a sufficient justification for discriminatory treatment between residents and non-residents under the Privileges and Immunities Clause. *See, e.g., United Building and Construction Trades of Camden v. Camden*, 465 U.S. 208 (1984).

80. Section 28-39(c) discriminates between resident franchise owners and non-resident franchise owners solely as a result of their residency within Pima County.

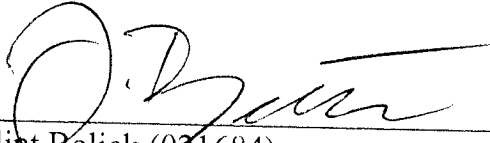
81. As a result, § 28-39 burdens the privileges and immunities of the non-Tucson residents, and the ordinance violates art. IV, § 2, cl. 1 of the United States Constitution.

Request for Relief

For their relief, Plaintiffs request that this Court take the following actions:

- A. Declare that City of Tucson Ordinance Number 10992 (codified at TUCSON, ARIZ., PROCUREMENT CODE art. III, § 28-39) is unlawful and unconstitutional, and enjoin its further effect.
- B. Preliminarily and permanently enjoin Defendants from making any payments or otherwise expending taxpayer funds pursuant to the provisions of TUCSON, ARIZ., PROCUREMENT CODE art. III, § 28-39.
- C. Award costs and attorney fees pursuant to A.R.S. §§ 12-341, 12-348, and the private attorney general doctrine; and
- D. Award such other and further relief as may be just and equitable.

RESPECTFULLY SUBMITTED this 6th day of February, 2014 by:

A handwritten signature in black ink, appearing to read 'Jonathan Riches', written over a horizontal line.

Clint Bolick (021684)

Jonathan Riches (025712)

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