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# MEMORANDUM

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Date: April 15, 2019

To: The Honorable Chairman and Members  
Pima County Board of Supervisors

From: C.H. Huckelberry  
County Administrator

A handwritten signature in black ink, appearing to be "CHH", is written over the printed name "C.H. Huckelberry".

Re: **County Response to the Goldwater Institute's Appeal of Arizona Superior Court Regarding the Procurement of Architectural and Construction Services Related to World View**

The attached response was filed April 1, 2019 with the Arizona Court of Appeals. The response is self-explanatory; however, the response also clearly documents fundamental misreading of long established procurement law enacted by the Arizona Legislature, specifically related to the acquisition of Construction Manager at Risk services.

Based on this response, I am confident the County will again prevail in this matter as we have in the past.

CHH/anc

Attachment

c: Andrew Flagg, Chief Civil Deputy County Attorney  
Regina Nassen, Deputy County Attorney

**ARIZONA COURT OF APPEALS**

**DIVISION TWO**

RICHARD RODGERS, et al.,

Plaintiffs – Appellants/Cross-  
Appellees,

v.

CHARLES H. HUCKELBERRY, et al,

Defendants – Appellees/Cross-  
Appellants.

No. 2 CA-CV 2018-0161

Pima County Superior Court  
No. C20161761

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**CROSS-APPELLANTS’  
REPLY BRIEF**

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**1. The standard of review is de novo; there are no factual findings to defer to.**

The trial court granted the County summary judgment and denied Taxpayers' cross-motion. (See [ROA 116](#) 6.) This Court "determine[s] de novo whether any genuine dispute of material fact exists and whether the trial court correctly applied the law." *Wolfinger v. Cheche*, 206 Ariz. 504, 506, ¶ 4 (App. 2003).

Taxpayers make the surprising assertion that the trial court made "factual findings . . . to which this Court must defer." (AB/RB,<sup>1</sup> at 4.) In support of this proposition, they cite a case that doesn't apply because it was an appeal from a bench trial, not a summary judgment: *John C. Lincoln Hosp. & Health Corp. v. Maricopa County*, 208 Ariz. 532, 536, ¶ 5 (App. 2004). Moreover, the trial court here made clear that its ruling was based on "*undisputed*" facts. ([ROA 116](#) 2 (emphasis added).) There is no deference required here; the standard of review is de novo.

**2. This case is moot.**

The County has urged this Court to dismiss Taxpayers' appeal as moot. The World View facility was completed over two years ago, and all sums due under the Architect and CMAR Contracts have been paid. Even if Taxpayers could convince this Court that the Board of Supervisors abused its discretion when it awarded the Contracts without following the normal [Chapter 6](#) competitive process, no

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<sup>1</sup>"AB/RB" refers to Appellants' Combined Cross-Answering Brief and Reply Brief," filed March 11, 2019. "AB/OB" refers to Appellees' Combined Answering Brief and Opening Cross-Opening Brief.

meaningful relief is available. The building cannot be unbuilt and contracts procured anew. Nor does Taxpayers' [Title 34](#) challenge provide this Court with the opportunity to address an important recurring question (other than the standing issue raised by the County) in a manner that transcends the facts in this particular case and provides meaningful guidance for future conduct.

Taxpayers assert, in response, that their claim is not moot because there are still two meaningful forms of relief available to them: the Court could order the County to pay Swaim and Barker for the work those firms did during the fall of 2015, before they were under contract with the County (AB/RB, at 24-25); and the court could invalidate the Contracts, which would relieve Swaim and Barker of any continuing warranty and indemnity obligations to the County (AB/RB, at 25). To be sure, extraordinary forms of "relief" for three County taxpayers to seek; ones that the hundreds of thousands of other County taxpayers likely wouldn't thank them for.

Taxpayers also argue that, even if their claim is moot, the Court should address its merits because, they claim, the County has exhibited a pattern of frequently invoking [§ 34-606](#) and [Pima County Code § 11.12.060](#) to justify questionable limited-competition procurements. In fact, according to Taxpayers, *every single instance* in which the County conducted such a procurement during Fiscal Years 2013 through 2017—79 in all—was questionable. Apparently they

want this Court to issue an opinion so broad that it reads those provisions entirely out of existence.

**A. There is no meaningful relief available for Taxpayers at this point; it would be highly improper for the County to pay Swaim and Barker for work that they donated to the World-View-retention effort when they were not under contract with the County, or to deprive taxpayers of the surviving warranty and indemnity protections under the Architect and CMAR Contracts.**

The Board of Supervisors' award of the actual Architect and CMAR Contracts in January 2016 was based on the circumstances that existed at that time, and the Court must judge its propriety on that basis. The only procurement that Taxpayers are really complaining about at this point is the "procurement"—apparently by Mr. Huckelberry, according to Taxpayers—of the work done by Swaim and Barker on the conceptual drawings and cost estimates in the fall of 2015. But that work was not "procured."

Taxpayers (AB/RB, at 3-4) cite the definition of "procurement" found in [A.R.S. § 34-101\(24\)\(a\)](#)—"buying, purchasing, renting, leasing or otherwise *acquiring* any materials, services, construction or construction services" (emphasis added)—when arguing that Mr. Huckelberry somehow procured Swaim's and Barker's services for the County. But, even using the broadest term in that definition, what did the County "acquire?" Until there was a deal with World View, the services provided had no continuing value for the County. Nor did the County have any claim to the work product; that belonged to the Firms. (See [ROA 102](#) 100:21-101:4 and

126:24-127:10.) And one cannot read much of [Title 34](#) without understanding that it concerns *contracting*—legally obligating the agent in some manner. Consider, for example, the second part of the definition of “procurement,” found in [§ 34-101\(24\)\(b\)](#): “Includes all functions that pertain to obtaining any materials, 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.*” (Emphasis added.) In this case, no contract for the feasibility work done by the Firms was ever awarded. Mr. Huckelberry, even if he had *tried* to contract for that work, didn’t have the authority to do so.

As usual, Taxpayers have it exactly backwards. If Mr. Huckelberry *had* illegally procured (in other words, purported to contract for) the services of Swaim and Barker, the “remedy” would be to *not* pay them for the work. Yet Taxpayers—fond as they are of the Gift Clause, and even though their standing arguments are based on an ostensible concern for the public fisc—are asking this Court to order the County to gratuitously pay out sums of money to firms that have no, *and have never asserted any*, right to payment. That is the first form of “meaningful relief” that they argue keeps this case from being moot.

The other form of relief consists of voiding the Architect and CMAR Contracts, the only effect of which—Taxpayers freely acknowledge—would be to invalidate surviving obligations of Swaim and Barker that protect the County and its

taxpayers. That is absurd. Moreover, if that were enough to avoid mootness, the same rationale would surely have applied in the prior cases in which procurement challenges were found to be moot. See [ASH, Inc. v. Mesa Unified Sch. Dist. No. 4](#), 138 Ariz. 190, 191 (App. 1983) (appeal dismissed as moot about 6 months after school buses delivered and paid for under challenged contract).

**B. If this Court were to find that Pima County violated [Title 34](#) or the County’s own procurement code, its ruling, in order to have any application beyond the specific facts in this case, would have to be so broad that it would read [§ 34-606](#) and [Pima County Code § 11.12.060](#) entirely out of existence.**

Taxpayers urge this Court to address their procurement challenge, even if moot, because it is “plainly a case of major public importance, raising issues that are almost certain to recur.” (AB/RB, at 25.) In support of the likelihood of recurrence, Taxpayers point out that, during the fiscal-year-2013-through-2017 time period, the County “invoked the ‘emergency’ exceptions to the procurement statutes *seventy nine times*, for the same reasons it invoked in this case (allegedly compressed timelines, a contractor’s convenient familiarity with a project, or speculation the competitive bidding would not be useful).” (AB/RB, at 26 (emphasis in original).) The comma after the emphasized language is important; there were only 79 limited-competition procurements *total* during that 5-year time frame—16 under [§ 34-606](#), and 63 under [Pima County Code § 11.12.060](#). All of which Taxpayers apparently find suspect, due to the justifications given. That includes, for example, procuring

body armor for sheriffs' deputies from a new supplier under a "compressed timeframe" because the then-current (and competitively selected) supplier repeatedly failed to deliver the ordered safety items. ([ROA 90](#) 38.) Also, procuring emergency repairs to Silverbell Road under a "compressed timeframe" necessitated by a storm event. ([ROA 90](#) 25.<sup>2</sup>)

Taxpayers also assert that Brian Barker "testified that 'more than 50%' of his company's County projects are done ... with a 'loss leader' given to the County in hopes of getting the contract in return, and that this pays off about half the time. Therefore it is likely that the County will engage in precisely the same unlawful procurement practices in the future." (AB/RB, at 26.) Factually, that is a mischaracterization of the record. In fact, Barker testified that about half the projects they work on involve providing preliminary estimates before they are under contract. ([ROA 106](#) 20.) This was not specific to County projects. Barker testified that his company had worked on around 10 County projects, none of which involved construction of an office building, a balloon launching pad, or a balloon construction facility. ([ROA 106](#) 13.) There is no reason to assume that any of those prior County projects were in the 50% of Barker's work that involved free pre-contract cost

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<sup>2</sup> Contract 13\*181 is one of the contracts listed in the interrogatory response attached as an exhibit to Taxpayers' statement of facts. The contract can be accessed through the County's onbase database, and it recites the need for an accelerated procurement:

<https://onbase.pima.gov/publicaccess/PO/datasourcetemplate.aspx>

estimates. In addition, for all the reasons cited in the County's earlier brief, the reference to "loss leaders" is a red herring. The Board of Supervisors awarded the CMAR Contract to Barker because of that firm's familiarity with the project, which would have been decisive regardless of how Barker was selected to provide the initial cost estimates, and regardless of whether Barker was paid for that service.

A holding in this case that "compressed timelines" and a contractor's "familiarity with the project" are never legally sufficient justifications under [§ 34-606](#), regardless of the circumstances, would certainly provide clear guidance for Pima County and other agents in the future. It would also interpret that statute right out of existence. That, this Court cannot do. Therefore, if this Court were to hold that the Board of Supervisors' award of the Architect and CMAR Contracts in this case was improper, it would have to do so based on all the specific facts in this case. Because *that* would be a fairly useless precedent for future situations, it cannot justify overlooking the fact that this case has long been moot. This entire exercise has been a waste of public resources from the very beginning, and that waste should come to an end.

**3. Taxpayers lack standing both because the Legislature has enacted a "complete and valid" remedy for [Title 34, Chapter 6](#) procurement violations and because Taxpayers cannot show a plausible tie between the relief they seek and their equitable interest in public money.**

Taxpayers argue that they have standing to challenge the County's procurement because the remedy in [A.R.S. § 34-613](#) doesn't apply to situations "in

which the procurement statutes are violated by a *non-agent*” (AB/RB, at 17) and because, they contend, the County has basically made up the distinction between qualifications-based procurement and price-based procurements (AB/RB, at 7-10). For good measure, they also argue they have standing to bring an independent challenge under the Pima County Code. (AB/RB, at 21-24.)

The principal problem with these arguments is that they can only succeed if this Court misreads the procurement statutes as badly as Taxpayers do. The statutes in [Title 34, Chapter 6](#) are, admittedly, not an easy read. But a proper understanding of their requirements is essential to deciding whether taxpayers can sue to challenge a [Chapter 6](#) procurement. Taxpayers, frankly, do not understand [Chapter 6](#). Their arguments demonstrate that.

**A. The Legislature’s provision of a complete and valid remedy at the same time it created [Chapter 6](#) precludes taxpayer suits.**

The County’s argument that [Chapter 6](#) does not allow for taxpayer suits is straightforward. Because competitive procurement is not required unless a statute says so, it is entirely the Legislature’s prerogative to decide what those statutes require. It necessarily follows that the Legislature can decide what the remedy is for violating those statutes. *See, e.g., [Valley Drive-In Theatre Corp. v. Superior Court](#), 79 Ariz. 396, 400 (1955).*

In 2000, the Legislature created [Chapter 6](#), which did not previously exist. *See [2000 Ariz. Sess. Laws, ch. 35](#).* In doing so, it also included a remedy for any violation

of that [Chapter](#) by an agent. By creating the statutory scheme and including this complete and valid remedy, the Legislature made that remedy exclusive, precluding taxpayer suits.

Much of Taxpayers' response is directed to an argument the County is not making. As the County noted, one *could* argue that the Legislature's 1985<sup>3</sup> passage of a remedial statute applicable to [Chapter 2](#) procurements, [A.R.S. § 34-203](#), effectively repealed [Secrist v. Diedrich](#), 6 Ariz. App. 102 (1967), and [Smith v. Graham Community College District](#), 123 Ariz. 431 (App. 1979). But because the procurements here were not [Chapter 2](#) procurements, the County expressly noted that the Court need not address that issue. (AB/OB, at 29-30.)

The argument the County *is* making is that [§ 34-613](#) precludes taxpayer challenges to [Chapter 6](#) procurements. Taxpayers' response—that [§ 34-613](#) can't be read to impliedly extinguish an existing cause of action recognized by [Secrist](#) and [Smith](#) (AB/RB, at 15)—doesn't make sense. Neither [Secrist](#) nor [Smith](#) recognized an "existing" [Chapter 6](#) taxpayer cause of action because they were decided years before [Chapter 6](#) existed. Accordingly, the authorities and argument regarding how to decide whether the Legislature has repealed an existing cause of action are simply not relevant.

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<sup>3</sup>1985 Ariz. Sess. Laws, Ch. 80, § 3. (Available at [ROA 23](#).)

With that pushed aside, we are left with Taxpayers’ argument that the remedy is incomplete, and therefore does not preclude taxpayer suits. In this argument, Taxpayers concede—as they must—that a statutory remedy is complete when it is available against any person who violates the statute. (AB/RB, at 17.) They argue that the [§ 34-613](#) remedy is incomplete because it only applies to violations by “agents.” But “agents” are who [Chapter 6](#) applies to. Because the rules only apply to “agents,” the [§ 34-613](#) remedy for violations by “agents” is complete.

A simple analogy highlights the flaw in Taxpayers’ argument. The NBA has detailed rules governing fouls by “players” and the penalties for those fouls. *See* National Basketball Association, [2018-19 Official Rulebook, Rule No. 12\(A\)](#), § I. There is, of course, no penalty for a foul by a “non-player” because only players are subject to the rules. Nobody would argue that the NBA’s rules are inadequate because they don’t account for fouls by non-players. Here, similarly, the rules in [Chapter 6](#) apply to “agents,” and that is why the remedy applies to violations by agents.<sup>4</sup>

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<sup>4</sup>It is true that an agent can’t circumvent [Title 34](#) by agreeing with a private developer to have the developer construct improvements subject to [Title 34](#), *see Achen-Gardner Inc. v. Super. Ct.*, 173 Ariz. 48, 53 (1992), but it is equally true that in that context it is the agent—not the private developer—who violates [Title 34](#) by attempting to do so.

Taxpayers’ attempts to mine [Chapter 6](#) for unsolved problems fare even worse. They argue that the [§ 34-613](#) remedy is incomplete because only taxpayers or “bondholders”<sup>5</sup> can sue for declaratory relief to challenge the adequacy of a bid security submitted under [A.R.S. § 34-608](#). But the Legislature thought of this scenario, and provided solutions that don’t require litigation. If the bond is void or otherwise substantially noncompliant, the agent simply rejects the bid, and everyone moves on. *See* [§ 34-608\(E\)](#) (“If the request for proposals requires security, noncompliance *requires* that the agent reject the proposal for noncompliance with the security requirements, unless the agent determines that the bid fails to comply in a nonsubstantial manner with the security requirements.” (Emphasis added.)). If the bond suffers from an insubstantial deficiency, it is “deemed by law to be in the form required and set forth in this section,” [§ 34-608\(G\)](#), and, again, everyone moves on. In the unlikely event that the agent accepts a substantially deficient bid security—unlikely, because the bid security is designed to *protect the agent*—the Attorney

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<sup>5</sup>“Bondholders”? Taxpayers don’t seem to understand the difference between debt obligations issued by a government entity, and surety bonds. There are no “bondholders” involved in the latter. A surety bond has three parties—the principal obligor (for a bid bond, the bidder), the obligee (here, the agent), and the surety (also called a “secondary obligor”). *See* [Restatement \(Third\) of Suretyship & Guaranty, § 1\(1\)](#) (1996). The surety is liable to the obligee in the event of a material breach by the principal, *see id.*—for a bid bond, that means a refusal by the winning bidder to honor their bid, provide payment and performance bonds, and enter into the awarded contract.

General could presumably step in and enforce under [§ 34-613](#). Taxpayer suits are not a necessary part of this process.

Similarly, Taxpayers misunderstand the nature of a “suit on [a] bond” provided under [A.R.S. § 34-610](#). [Section 34-610](#) generally requires contractors subject to that section to provide payment and performance bonds before the contract is executed.<sup>6</sup> A payment bond’s purpose is to ensure payment of labor and materials suppliers, [§ 34-610\(A\)\(2\)](#), while a performance bond’s purpose is to ensure performance of the contract, [§ 34-610\(A\)\(1\)](#). Lawsuits on payment and performance bonds can and do occur, but when they do, they are contract actions between *parties to the bond*. And they occur well after the procurement process is complete, when something on the job has gone wrong—*e.g.*, the contractor isn’t getting the job done or isn’t paying subcontractors. A “suit on [a] bond” provided under [§ 34-610](#) is not a vehicle to allege a [Title 34](#) violation; it is a vehicle for a party to the bond to vindicate that party’s rights under the bond. The possibility of such a suit in no way undermines the argument that [§ 34-613](#) provides a complete and valid remedy for [Chapter 6](#) procurement violations.

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<sup>6</sup>A winning bidder could, of course, refuse to submit the required bonds or submit bonds that are below the amount required. In that instance, the contract would not be executed. *See* [§ 34-610\(A\)](#) (bonds must be provided “before an agent executes [the] contract”). Again, everyone would move on—except that here the agent would be able to recover on the bid bond.

**B. Even were § 34-613's remedy incomplete, Taxpayers would still lack standing because they cannot plausibly show that the relief they request would vindicate their equitable interest in taxpayer funds.**

Taxpayers contend that they have standing based on the mere expenditure of taxpayer funds on the World View project. (AB/RB, at 5-6.) But they simply ignore two Arizona Supreme Court cases that show they are wrong.

First is *Bennett v. Napolitano*, which tells us that a challenge to a process leading up to a lawful expenditure is not enough to invalidate the expenditure—the expenditure itself must be illegal. 206 Ariz. 520, 527, ¶ 30 (2003). The other case Taxpayers ignore is *Henderson v. McCormick*, which held that taxpayers lacked standing to challenge a sale of government property because they sought nothing more than “a determination that the sale was within the prohibition of” a conflict-of-interest statute. 70 Ariz. 19, 23 (1950). *Bennett* and *Henderson* foreclose Taxpayers’ argument that taxpayers have freestanding authority to “challenge expenditures . . . that are undertaken in violation of legally required procedures.”<sup>7</sup> (AB/RB, at 6.)

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<sup>7</sup>*Bennett* and *Henderson* also show that the Arizona taxpayer-standing analysis is more restrictive than that elsewhere, such as in California, where *Connerly v. State Personnel Board* was decided. Compare *Henderson*, 70 Ariz. at 22-23 (taxpayer could not challenge legality of sale when town sold truck to high bidder), with *Connerly*, 112 Cal. Rptr. 2d 5, 17 (2001) (“[T]axpayer suits provide a general citizen remedy for controlling illegal governmental activity.”) The cases from other jurisdictions that Taxpayers cite, including *Connerly*, are therefore unhelpful.

Taxpayers try to sidestep this by arguing that they *do* in fact challenge the legality of the County’s design and construction of the Facility and Launch Pad—not just the procurement process followed—because they are challenging “the *entire* World View project.” (AB/RB, at 11.) But that is not the way they pleaded their case. Their filings below—along with the discrete procedural paths the various claims have taken—clearly demonstrate that their procurement challenges are independent claims based on alleged violations of [Title 34](#) and the Pima County Code.<sup>8</sup> And Taxpayers did not dispute below and do not dispute now the County’s clear statutory authority to “[c]ause to be erected and furnished . . . such other buildings as necessary.” [A.R.S. § 11-251\(8\)](#). Their procurement challenges are challenges to the *process followed*, not the legality of the expenditure.

Nor can taxpayers show that the process followed implicates any legitimate taxpayer concerns about waste of taxpayer money, in light of the qualifications-based procurement process in [Chapter 6](#). Taxpayers insist that the County has crafted a quality/quantity distinction out of whole cloth. (AB/RB, at 7-10.) But it is the statutes themselves that create that distinction. Taxpayers protest to the contrary, but

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<sup>8</sup>Indeed, if Taxpayers’ procurement challenges were actually part and parcel of their other challenges to the World View transaction, it would mean that the procurement challenges must succeed or fail based on the outcome of those other challenges. Yet they lost one of those challenges, [Rodgers v. Huckelberry](#), 243 Ariz. 427 (App. 2017), and they haven’t asked this Court to stay this appeal until their Gift Clause challenge is resolved. Accordingly, it is clear that their procurement challenges are independent claims.

they simply misread the statutes.

The theme of Taxpayers' procurement challenges is that competition is critical to avoiding favoritism, and that the County should have followed a competitive process. (*See, e.g., ROA 2* ¶ 83.) But, as the County has repeatedly explained, though the normal procurement process for the type of services procured here (Architect and CMAR services) is competitive, that competition is based on qualifications, not price.<sup>9</sup> Indeed, at the competition stage, price *cannot* be considered. A.R.S. [§ 34-603\(C\)\(1\)\(a\)](#). Because competition for those services is qualifications-based, and because Taxpayers never produced evidence that the County ended up with an unqualified Architect or CMAR,<sup>10</sup> Taxpayers have not shown the necessary tie between their challenge and their equitable interest in taxpayer funds.

Taxpayers now counter that the applicable statutes “blend both ‘qualitative’ and ‘quantitative’ considerations”—so that price is always a component of the analysis. But *not* at the competition stage. Under the statute they cite, [§ 34-603\(E\)\(2\)](#), an agent may only negotiate compensation *after* it has selected a winner

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<sup>9</sup> It is also worth noting that an agent may employ an architect by “direct selection”—with no competition—if the contract is for \$500,000 or less. [A.R.S. § 34-103\(D\)](#). That dollar amount was recently increased from \$250,000. [2018 Ariz. Sess. Laws, ch. 155, § 1.](#)

<sup>10</sup> The County does not concede that Taxpayers would have standing even if they had shown some lack of qualifications, given the existence of the [§ 34-613](#) remedy. But at least there would be some logic to their argument.

based on qualifications. [§ 34-603\(E\)\(3\)](#) (“The agent *shall* enter into negotiations with the *highest qualified person or firm* on the final list.” (Emphasis added.)) If compensation negotiations are unsuccessful, the agent either must move to “the next most qualified person or firm on the final list in sequence until an agreement is reached” or must terminate the entire procurement. [§ 34-603\(E\)\(4\)](#). *At no time* can an agent procuring Architect or CMAR services actually pit firms against each other based on price—it must be based on qualifications only.

Taxpayers apparently now contend that “the County should have followed” [§ 34-603\(F\)](#), and that that subsection requires budget and price considerations. (AB/RB, at 8.) They were wise not to make that argument below, and should have omitted it here. Subsection (F) is an alternative applicable only to “design-build construction services or job-order-contracting construction services.” (Even then, it is an option available at the discretion of the agent. *See id.* (“As an alternative to subsection E of this section, an agent *may* award a single contract for design-build construction services or job-order-contracting construction services as follows: . . .” (Emphasis added).) An agent cannot use the subsection (F) procedure to acquire the type of services acquired here—Architect and CMAR services.

Taxpayers also insist that [§ 34-606](#)’s mandate that an agent use “such competition as is practicable under the circumstances” necessarily requires consideration of price. But Taxpayers’ reading of the statute negates the very

distinction the Legislature carefully set up in [Chapter 6](#)—that competition based on qualifications is the only appropriate competition for certain types of services. It would make no sense for the Legislature to absolutely *prohibit* price-based competition for Architect and CMAR services, but then *mandate* it when those services are procured under [§ 34-606](#). [Section 34-606](#) cannot be read to require price-based competition.

**C. Taxpayers cannot separately sue under the Pima County Code.**

Taxpayers maintain they have a separate cause of action under the Pima County Code. (AB/RB, at 21-24.) This must necessarily mean they think the Pima County Code includes requirements *more stringent* than those in [Title 34](#), else their Pima County Code claim would be entirely subsumed within their [Title 34](#) challenge. Indeed, Taxpayers have contended there is such a requirement—the provision in [Pima County Code § 11.12.060](#) that requires a “limited competitive process” for when a “situation exists which makes compliance with normal purchasing procedures impracticable or contrary to the public interest.”

The County has previously explained why this provision does not apply to [Title 34](#) contracts, and that for those contracts the Pima County Code mirrors [Title 34](#). See [Pima County Code § 11.16.010\(A\)](#). But, even assuming that the Pima County Code imposes more stringent requirements, that would be because the County made the decision to impose those requirements even though it didn’t have to. And it is

clear that, when the County does that, it also gets to decide what remedy, *if any*, there is for violating those requirements. See [\*Valley Drive-In Theatre Corp.\*](#), 79 Ariz. at 400.

Taxpayers' response to this—like so much of their reasoning in this case—is circular. They contend that taxpayers must have standing under the Pima County Code because the bid-protest remedy in the code is incomplete . . . and it is incomplete because it doesn't allow for taxpayer standing. (AB/RB, at 22-23.) What they fail to establish is why, in order to be considered a “complete” remedy, the remedy must include taxpayer standing. There is no reason that an extra requirement a county voluntarily includes in its code must be enforceable by taxpayers. Pima County—the body with authority to enact the code in the first place—created both the limited-competition provision Taxpayers rely on and the remedial provision.

### **Conclusion**

This appeal—which challenges only the selection of the Architect and CMAR firms to design and build a Facility and Launch Pad that have been designed, built, and occupied for over two years—is moot. It should be dismissed on that basis alone. The only legal questions raised in this appeal, for which a ruling from this Court could provide meaningful future guidance, despite the appeal's overall mootness, is the standing issue raised the County, which provides an alternative basis to affirm

the trial court's judgment. The County therefore respectfully requests that this Court either dismiss this appeal or affirm the judgment below.

RESPECTFULLY SUBMITTED April 1, 2019.

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