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April 5, 2016

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500 E. Coronado Rd.
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VIA U.S. MAIL & EMAIL jmanley@goldwaterinstitute.org

Re: March 28, 2016 letter to Hon. Sharon Bronson, Chair, Pima County Board of Supervisors, regarding the County's transaction with World View Enterprises, Inc.

Dear Mr. Manley:

At the request of the Pima County Board of Supervisors (the "Board"), we are responding to the Goldwater Institute's March 28th letter to Supervisor Bronson (the "Goldwater Letter").

In that letter, you assert, on behalf of the Goldwater Institute, that (1) Pima County's January 19, 2016 transaction with World View Enterprises, Inc. ("World View"), violates Ariz. Const. art. 9, § 7 (the "Gift Clause"),[1] and (2) the County's related January 19, 2016 selection of Swaim Associates and Barker-Morrissey Contracting for design and construction services violated Pima County's own procurement code as well as Title 34 bidding requirements. Neither allegation has legal merit, as more fully explained below.

1. Gift Clause

As the Goldwater Letter correctly notes, the Gift Clause requires that a public contract with a private entity (1) serve a public purpose, and (2) require the private entity to provide

[1] Although the letter alleges specifically that the County is "lending its credit in aid of a private corporation," that part of the Gift Clause refers to the local-government 19th-century practice of guaranteeing railroad bonds or exchanging government bonds for railroad bonds, which allowed railroads to essentially borrow on a local government's credit. *See* discussion in David E. Pinsky, *State Constitutional Limitations on Public Industrial Financing: An Historical and Economic Approach*, 111 U. Pa. L. Rev. 265, 277-278 (1963). Here, although the County is borrowing funds to build the County Facility, it is not loaning or giving World View any funds or allowing World View to raise funds using the County's credit. The prohibition on "any donation or grant, by subsidy or otherwise," is therefore arguably the more relevant portion of the Gift Clause.

reasonable consideration in exchange for what the private entity is receiving from the government under the contract. The County's transaction with World View satisfies both of these requirements, as explained below.

1.1 Public Purpose

The first full paragraph on page 2 of the Goldwater letter states that the World View transaction serves no public purpose because the space-tourism services that World View intends to provide, at the facility it is leasing from the County (the "County Facility"), are not affordable for the majority of Pima County residents. No reasonable person would argue that the stratosphere will, in the near future, replace Disneyland as a vacation destination for middle-class families. But providing affordable recreational opportunities for County residents, though a legitimate public purpose, is obviously not the public purpose the County is seeking to further in its transaction with World View.

The Board approved the transaction with World View as an economic development initiative. As noted in Section 1.8 of the World View Lease-Purchase Agreement (the "WV Lease"),[2] the County has "authority under A.R.S. § 11-254.04 to engage in 'any activity that the board of supervisors has found and determined will assist in the creation or retention of jobs or will otherwise improve or enhance the economic welfare of the inhabitants of the county,' including specifically the 'acquisition, improvement, leasing or conveyance of real or personal property.'" In this instance, the Board determined that entering into the WV Lease and related Space Port Operating Agreement, in order to retain World View's operations in Pima County, will "have a significant positive impact on the economic welfare of Pima County's inhabitants." The Goldwater Letter correctly points out that such "indirect" public benefits do not constitute consideration for purposes of the second part of the Gift Clause test. But the Arizona Supreme Court has stated, quite unequivocally, that indirect benefits *do* establish a *public purpose* sufficient to satisfy the first part of the test. *See Turken v. Gordon*, 223 Ariz. 342, 349-350, ¶¶ 25-28 (2010).

The Court has likewise repeatedly stated that it will defer to a political body's determination of public purpose. *Id*. at 349, ¶ 28 ("we have repeatedly emphasized that the primary determination of whether a specific purpose constitutes a 'public purpose' is assigned to the political branches of government, which are directly accountable to the public. We find a public purpose absent only in those rare cases in which the governmental body's discretion has been 'unquestionably abused.'" (Citations omitted)). The Board's determination in this instance that the World View transaction serves a public purpose was clearly not an abuse of its discretion; it was, quite rationally, "[b]ased on an economic impact study by Applied Economics, commissioned by Sun Corridor, Inc., which takes into account World View's anticipated employment and salary levels." (WV Lease, § 1.8)

[2] The WV Lease, as well as the Spaceport Operating Agreement, can be viewed online through the County's website, by accessing the January 19 Board of Supervisors Agenda on the Clerk of the Board's page. https://pima.legistar.com/Calendar.aspx

Under the circumstances, a court would certainly find that the World View transaction satisfies the first part of the Gift Clause test.

1.2 Consideration

The Arizona Supreme Court has indicated that it will not be as deferential to political judgments when it applies the second part of the test. Adequacy of consideration is to be determined based on the objective market value of the private party's contractual obligations, rather than a political judgment about a transaction's overall public desirability. *Turken* at 350, ¶ 33. But even here there is some flexibility. A transaction fails this part of the Gift Clause test only if the consideration provided by the private party is "'so inequitable and unreasonable that it amounts to an abuse of discretion.'" *Id.* at 349, ¶ 30. That occurs only when the public entity pays "*far more* than the fair market value" for what the private entity is doing or providing in exchange. *Id*. at 350, ¶ 35 (emphasis added).

A. Rent

Under the WV Lease, the County is obligated to spend no more than $14.5 million dollars building the County Facility. Over the 20-year term of the WV Lease, World View will pay the County rent at a per-square-foot rental rate, which begins at $5.00 per square foot and periodically increases until it reaches $12.00 per square foot during the last 5 years of the term. (WV Lease, § 6.1) During the term, the County continues to own the County Facility, which will not be conveyed to World View until World View has paid all amounts due under the WV Lease. At that point, the total amount paid by World View for the County Facility will exceed the County's investment (including borrowing costs) by several million dollars. This transaction is clearly not so inequitable or unreasonable that it constitutes an abuse of the Board's discretion.

The Goldwater Letter nevertheless asserts that the transaction fails to meet this second part of the constitutional test because (1) there is a risk that World View will default under the WV Lease and the County will not receive the benefit of its bargain; and (2) World View has the "exclusive right to control the balloon pad, including the ability to charge rent to other balloon companies."

B. Risk Factors

There is *always* a risk that a party to a contract will default and fail to meet its contractual obligations. A contract cannot secure the other party's *actual* performance; it simply makes the breaching party legally liable for the non-breaching party's contract damages. And even that may not be worth much, as a practical matter, depending on the financial viability of the breaching party at the time of the breach, which cannot be known with any certainty at the outset of a transaction. This risk of nonperformance does not negate the value of what is promised, however; if it did, no contract would be valid. And we are aware of no Arizona case in which a court has invalidated a transaction on Gift Clause grounds because of a judicial assessment that the deal is "too risky." Like determinations of public purpose, risk/benefit determinations are

best left to the political branches of government, and it is unlikely a court would wish to second-guess such policy choices.

When discussing consideration and risk factors, it is also important to note that World View has actually promised to employ specified numbers of people, during specified time periods, at specified minimum salary levels. (WV Lease, § 4 and Exhibit E) Although the economic impacts that the Board expects to flow generally from World View's operations are "indirect" benefits that do not constitute consideration for purposes of the Gift Clause, this specific contractual obligation regarding employment levels *does* constitute additional consideration. *See Turken* at 350, ¶ 33 (implying that indirect benefits may constitute consideration when the private party is obligated to deliver them). The "fair market value" of that additional promise may be difficult to conclusively establish, but, more importantly, it helps the County ensure that its public purpose—economic development and job growth in Pima County—is actually realized by the transaction.

If World View does not meet its employment requirements, fails to pay rent, or fails to fulfil another of its obligations under the WV Lease, the County has the ability to terminate that lease, retake possession of the County Facility, and redirect it to some other public use; its investment in the facility will not be lost.

C. Control of Space Port

With respect to the second factor—World View's control of the County's Space Port, being built adjacent to the County Facility—the Goldwater Institute has failed to take into account several important provisions of the Space Port Operating Agreement. World View is obligated to operate and maintain the Space Port during the term of the agreement at no cost to the County (Space Port Operating Agreement, § 4); it must make the Space Port publically available for use by others (§§ 3.2, 4.1); and although it can charge those other users a fee, the fee must be based on a reasonable apportionment of World View's actual cost of operating the Space Port (§ 4.2). The agreement thus forecloses any possibility that World View can use the Space Port as a private revenue-generating facility.

2. Procurement

The Goldwater Institute also alleges that the County violated Title 34 bidding requirements, and the County's own procurement code, when it awarded contracts for the design and construction of the County Facility on an emergency basis.

The justification for the emergency procurement is set forth in Mr. Huckelberry's January 19 Memorandum to the Board recommending approval of both the World View agreements and the contract awards.[3] In that Memorandum, Mr. Huckelberry explains that Pima County had, for some months, been competing with several other locations within the United States for the siting of World View's expanded operations. In order to develop an incentive proposal, it was

[3] The memo is available on the Clerk of the Board's webpage.

necessary for World View to convey to the County its facility requirements and the estimated cost of constructing such a facility. World View worked with Swaim Associates and Barker-Morrissey Contracting to develop those plans and estimates.

Ultimately, World View selected Pima County for its headquarters, but indicated to County representatives that the deal was contingent on the County being able to deliver a completed facility by November 2016. After World View committed to the deal, just a few days before Christmas 2015, its representatives worked diligently with County representatives and legal counsel on the WV Lease and the Space Port Operating Agreement, getting those agreements negotiated and drafted in just a few short weeks. Nevertheless, when the deal was submitted to the Board in January, County representatives concluded that the expedited construction schedule would not accommodate normal Title 34 procurement procedures.

Title 34, however, permits "emergency procurements" under a fairly broad spectrum of circumstances. A.R.S. § 34-606 provides:

> Notwithstanding any other provision of this title, an agent may make or authorize others to make emergency procurements of architect services, construction-manager-at-risk construction services, … if a situation exists that makes *compliance with this title impracticable, unnecessary or contrary to the public interest* …. A written determination of the basis for the emergency and for the selection of the particular contractor shall be included in the contract file.

(Emphasis added.) The Pima County Code contains a corresponding exception, in Section 11.12.060.

In compliance with both the statute and the Pima County Code, a written justification for the procurement was presented to and approved, first by the County Administrator, and then by the Board. There is no Arizona case law interpreting A.R.S. § 34-606 to mean anything other than what its plain language indicates. County representatives made a reasonable good faith determination that, under the circumstances, compliance with normal Title 34 bidding requirements for award of the County Facility design and construction contracts was "impracticable, unnecessary [and] contrary to the public interest." There is no basis for a court to second-guess that determination.

It should also be noted that no other contractors filed a complaint about the awards, which were made on January 19th, well over two months ago. The awards were made, contracts executed, and work has been proceeding. Even if a court were to decide that the use of an emergency process was questionable in this case, termination of the awards would not—particularly after the passage of this much time—be an appropriate or available remedy. *See Achen-Gardner, Inc. v. Superior Court In & For County of Maricopa*, 173 Ariz. 48, 55 (1992) (questioning whether an injunction was an available remedy for the Title 34 violation found in that case).

For all the above reasons, it is extremely unlikely that a court would find the Goldwater Institute's claims meritorious should a legal action be brought. We therefore urge you to reconsider your proposed course of action, which will simply waste taxpayer dollars by forcing the County to defend a lawsuit. Please let me know if you have any questions or would like to discuss our respective clients' positions. I can be contacted at 520-740-5411 or regina.nassen@pcao.pima.gov.

Sincerely,

Regina L. Nassen

cc: Hon. Members of the Pima County Board of Supervisors
C.H. Huckelberry, Pima County Administrator
Thomas Weaver, Chief Civil Deputy Pima County Attorney