

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2011-017119

10/27/2011

HONORABLE ARTHUR T. ANDERSON

CLERK OF THE COURT

L. Nixon
Deputy

AMERICAN FRIENDS SERVICE
COMMITTEE, et al.

STACY SCHEFF

v.

JANICE K BREWER, et al.

REX C NOWLAN

RULING

Defendants' Motion to Dismiss was taken under advisement following oral argument on October 14, 2011. Having read and considered the briefing and having heard oral argument, the Court issues the following rulings.

I.

In 2009, the legislature authorized the Arizona Department of Corrections ("DOC") to issue a request for proposal for 5000 private prison beds. *See Laws 2009, Ch. 6, § 37.* On January 24, 2011, DOC issued Request for Proposal, Solicitation No. 110054DC. DOC apparently has received proposals from four vendors, two of which currently hold prison contracts with the State.

On September 12, 2011, Plaintiffs American Friends Service Committee ("AFSC"), Joyce Clayton, and Oralee Clayton, Sr. filed a declaratory judgment action and motion for temporary injunction, essentially seeking to enjoin DOC from accepting a proposal pursuant to Solicitation No. 110054DC until it conducts the biennial comparison of services required by A.R.S. § 41-1609.01(K) and provides it to the joint legislative budget committee for review.

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A.R.S. § 41-1609.01(M).¹ Defendants Janice K. Brewer, Governor of the State of Arizona, and Charles Ryan, Director of DOC, move to dismiss pursuant to Ariz. R. Civ. P. 12(b)(1) and 12(b)(6).

II.

Defendants argue Plaintiffs lack standing to seek a declaratory judgment because their Complaint does not state a justiciable controversy. *See A.R.S. § 12-1831 et seq.; e.g., Yes on Prop 200 v. Napolitano*, 215 Ariz. 458, 468, 160 P.3d 1216, 1226 (App. 2007). A justiciable controversy exists if there is “an assertion of a right, status, or legal relation in which the plaintiff has a definite interest and a denial of it by the opposing party.” *Keggi v. Northbrook Prop. & Cas. Ins. Co.*, 199 Ariz. 43, 45, 13 P.3d 785, 787 (App. 2000) (citations omitted). In this regard, Defendants contend that Plaintiffs have no “definite interest” because they have no private right of action to establish that interest.

A.R.S. § 41-1609.01 does not expressly provide a private right of action. However, a private right of action may be implied when consistent with “the context of the statutes, the language used, the subject matter, the effects and consequences, and the spirit and purpose of the law.” *Chavez v. Brewer*, 222 Ariz. 309, 318, 214 P.3d 397, 406 (App. 2009), quoting *Transamerica Fin. Corp. v. Super. Ct.*, 158 Ariz. 115, 116, 761 P.2d 1019, 1020 (1988); see generally *Van Zanen v. Qwest Wireless, L.L.C.*, 550 F. Supp. 2d 1261, 1264 (D. Colo. 2007), aff’d, 522 F.3d 1127 (10th Cir. 2008) (noting that Arizona courts “invariably find the purpose of the statute...to be dispositive of the question whether the statute creates a private right of action.”) The focus is whether the statute at issue protects the rights of individuals and whether the plaintiff is a member of “the class for whose especial benefit” the statute was adopted. *Chavez, id.* (electronic voting machine statute provided for implied private right of action); *Transamerica, id.* at 116-17, 761 P.2d at 1020-21 (Consumer Loan Act provided for implied private right of action).

¹ A.R.S. § 41-1609.01 provides, in relevant part:

...

K. The performance of the contractor shall be compared to the performance of this state in operating similar facilities, as provided in this section. The department shall conduct a biennial comparison of the services provided by the vendor for the purpose of comparing private versus public provision of services. The comparison of services shall be based on professional correctional standards specified by the director and incorporated into the contract and shall be used for the purpose of determining if the contractor is providing at least the same quality of services as this state at a lower cost or if the contractor is providing services superior in quality to those provided by this state at essentially the same cost....

...

M. The director of the state department of corrections shall provide the most recent service comparison and cost comparison for contractors who exclusively contract with the department to the joint legislative budget committee for its review.

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Defendants argue this case is analogous to *Lancaster v. Ariz. Bd. of Regents*, 143 Ariz. 451, 457, 694 P.2d 281, 287 (App. 1984), which held that a legislative enactment requiring the Board of Regents to prepare a report for the legislature on the development of a system of wage and salary equivalency did not provide an implied private right of action. In that case, University of Arizona employees brought a declaratory judgment action against the Board of Regents setting forth their right to lost wages. *Id.* at 453, 694 P.2d at 283. The court found that the plaintiffs were not members of the class for whose special benefit the enactment was intended, and thus they could not pursue a private right under it. *Id.* at 457, 694 P.2d at 287.

The sole and exclusive purpose of [the enactment], as reflected in its title and section heading, was to require the preparation of a report for submission to the legislature by the Board of Regents. The plain terms of the section itself confine the duty imposed by the board to prepare a report by a certain date. By restricting the duty imposed by the enactment to making a report to the legislature, and devising a plan for legislative implementation, the legislature precluded a private right of action for damages and other relief in the courts brought by third persons....

[T]he enactment's specification that the report was to be made to the legislature for legislative implementation necessarily precludes private judicial enforcement by third persons who are incidental beneficiaries of the contemplated report. The duty imposed upon the Board of Regents to prepare a report contained the correlative right by the legislature alone to receive the report and act upon it....

Because [the enactment] creates only a right, vested in the legislature alone, to receive a report on a particular subject by a specified date, it "does not in terms create or alter any civil liability". The statute "limits a thing to be done in a particular mode" and thus negates any other mode or remedy by private parties. Plainly negated through the specification of a strictly legislative right is a private right of action by employees of the state colleges and universities in the courts of Arizona predicated upon the act.

Id. (citations omitted).

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Plaintiffs distinguish *Lancaster*, contending that the biennial comparison of services required under § 41-1609.01(K) is specifically intended to benefit them by ensuring public safety and protecting against wasteful spending of tax dollars.²

The Court agrees with Defendants that *Lancaster* is applicable here. As Defendants' counsel noted during oral argument, ensuring the goals of public safety and judicious use of tax dollars in particular, and compliance with Title 41 in general, is not a function of subsection (K). Inherent in the solicitation process is the legislative admonition that DOC not accept a proposal unless it "offers a level and quality of services that are at least functionally equal to those that would be provided by this state." A.R.S. § 41-1609.01(H). In this regard, the solicitation defines the scope of work, which is evaluated by DOC to determine the vendor's qualifications to:

Maintain effective custody and control over inmates in an environment that is safe, secure and humane. This includes safeguarding the public, staff and inmates through the efficient, safe and secure operation of the prison facility, ensuring that all security and operational requirements are fulfilled, and eliminating unfavorable occurrences. Offerors must comply with the requirements in accordance with A.R.S. §§ 41-1609, 41-1609.01, 41-1609.02, 41-1609.03, and 41-1609.04 and where specifically not stated within this document all requirements of these Statutes apply.

Solicitation No. 110054DC at 2.1.2.1.³ Further, the legislature has admonished DOC that it shall not accept a proposal unless it "offers cost savings to this state...based upon the standard cost comparison model for privatization established by the director." A.R.S. § 41-1609.01(G). Subsection (K) "creates only an executive duty to prepare and a legislative right to receive a report." *Lancaster*, 143 Ariz. at 457, 694 P.2d at 287. It does not protect the rights of individuals, cf. *Chavez*, 222 Ariz. at 318, 214 P.3d at 406, an incidental benefit thereto notwithstanding. See *Lancaster, id.* The Court finds that Plaintiffs are not members of the class for whose special benefit A.R.S. § 41-1609.01(K) was adopted. Thus, they have no private right of action predicated upon that statute.

² Plaintiffs Clayton allege standing as taxpayers who are injured by the expenditure of state funds in violation of state law and as parents of a prisoner at a private prison in Kingman. Plaintiff AFSC alleges associational standing based on its 2800+ members, volunteers, constituents, and donors in Arizona, who are either incarcerated or formerly incarcerated persons or their families and friends, or persons living in close proximity to private prisons. Based on its finding that Plaintiffs lack standing because A.R.S. § 41-1609.01(K) does not imply a private right of action, the Court need not reach these issues.

³ See generally A.R.S. §§ 41-1609 (agreements with federal or private agencies and institutions; contract review; emergency contracts), 41-1609.01 (adult incarceration contracts; criteria), 41-1609.02 (establishment of private prison facilities; notice; hearing), 41-1609.03 (adult incarceration private contractors; liability for services), 41-1609.04 (reimbursing county for expense of prosecution; private prison).

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Plaintiffs do not have standing to obtain the declaratory judgment they seek. Given this, to the extent that Plaintiffs request this Court enjoin Defendants from awarding a contract pursuant to Solicitation No. 110054DC until DOC complies with § 41-1609.01(K), the Court agrees with Defendants that such an injunction would violate Arizona's anti-injunction statute. *See A.R.S. § 12-1802(4), (6).*⁴

Plaintiffs also request this Court order Defendants to disclose current private prison contracts so Plaintiffs can determine if Defendants are in breach of their duty with regard to A.R.S. § 41-1609.01 reporting requirements. Defendants argue that Plaintiffs' request for disclosure of DOC's current contracts with Management & Training Corporation ("MTC") and Geo Group is not ripe because Plaintiffs have not filed a request under Arizona's public records law. *See A.R.S. § 39-121.02;*⁵ *Stapert v. Ariz. Bd. of Psychologist Examiners*, 210 Ariz. 177, 179, 108 P.3d 956, 958 (App. 2005). Plaintiffs contend this Court has broad discretion to consider their request for expedited disclosure of the contracts that would be relevant to resolving this matter. Considerations of an expeditious resolution are moot, however, the Court having found that Plaintiffs lack standing to proceed with their underlying claim. Plaintiffs are free to proceed with this request under A.R.S. § 39-121 *et seq.*

Based on the foregoing, the Court need not reach the other issues raised in Defendants' Motion to Dismiss. Accordingly,

IT IS ORDERED granting Defendants' Motion to Dismiss.

⁴ A.R.S. § 12-1802 provides, in relevant part:

An injunction shall not be granted: ...

4. To prevent enforcement of a public statute by officers of the law for the public benefit.

...

6. To prevent the exercise of a public or private office in a lawful manner by the person in possession....

⁵ A.R.S. § 39-121.02 provides, in relevant part:

A. Any person who has requested to examine or copy public records pursuant to this article, and who has been denied access to or the right to copy such records, may appeal the denial through a special action in the superior court, pursuant to the rules of procedure for special actions against the officer or public body....