

No. 44139-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

MASON COUNTY, a Washington municipal corporation, MASON
COUNTY BOARD OF COMMISSIONERS, the legislative body of
Mason County, and REGIONAL DISPOSAL COMPANY,

Appellants,

v.

ADVOCATES FOR RESPONSIBLE GOVERNMENT, a Washington
nonprofit corporation, and DOES 1-10,

Respondents.

**OPENING BRIEF OF APPELLANT
REGIONAL DISPOSAL COMPANY**

James L. Austin, Jr., WSBA #02786
Walter E. Barton, WSBA #26408
KARR TUTTLE CAMPBELL, P.S.C.
Suite 3300, Columbia Center
701 Fifth Avenue
Seattle, WA 98101
(206) 223-1313

Attorneys for Appellant
Regional Disposal Company

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I. Introduction

Regional Disposal Company (“RDC”) is a Washington general partnership. RDC’s principal business is the acceptance of solid waste for transport to and disposal at RDC’s Roosevelt Regional Landfill near Goldendale, in Klickitat County. Since 1993, RDC has contracted with Mason County for such disposal services. The original 1993 contract between RDC and the County, which had an initial five-year term, has been extended four times, most recently in 2012.

Under RDC’s contract with the County, RDC picks up containers (supplied by RDC) that the County has filled with solid waste at a County-operated transfer station in Mason County and loads them onto RDC’s truck-trailers. The contract makes the County solely responsible for the operation of its transfer station; RDC is not involved in the operation of that County facility.

Under Section 10.1 of the contract, title to the waste that the County has loaded into RDC-supplied containers passes to RDC when RDC accepts it at the County’s transfer station. Following RDC’s acceptance of the waste, RDC transports the waste by truck-trailer to an RDC intermodal facility, where RDC transfers its waste-filled containers onto rail cars. Its containerized waste is then transported by rail to Roosevelt Landfill, where RDC disposes of it.

At issue in this appeal is an amendment of the Mason County/RDC contract, which the parties approved and signed in 2012, by which the term of the contract has been extended. Respondents Advocates for Responsible Government and several of its members (collectively “Advocates”) contend — as set forth in their Petition — that the County was precluded by law from extending its contract with RDC, and instead was required to let a new contract using a request-for-proposal process set forth in RCW 36.58.090. However, the Judgment and Order Granting Writ of Mandamus and Declaratory Relief from which RDC, Mason County and the Mason County Board of Commissioners appeal invalidated the contract extension on the basis that it was the product of neither the RFP process set forth in RCW 36.58.090 *nor* the competitive bidding process set forth in RCW 36.32.250 — a statute upon which Advocates did not base their claim. As a result, the applicability of both statutes is at issue on appeal.

Appellants contend that neither of those statutes applies to the Mason County-RDC contract. Appellants rely upon a line of Washington appellate decisions that have held that letting contracts for collection and disposal of solid waste is an exercise of the inherent police powers conferred by our state’s Constitution, which municipalities are free to pursue by whatever means they consider best, and are not contracts for “public works” subject to RCW 36.32.250 or contracts with respect to the

design, construction or operation of municipal solid waste facilities or systems subject to RCW 36.58.090. Appellants further contend that the RFP process set forth in RCW 36.58.090 by the terms of that statute is permissive and does not supplant or preclude the use of any other available contracting process. In short, contrary to Advocates' position, counties in Washington are free to contract for disposal of waste by whatever reasonable method they consider best.

RDC and the County further contend on appeal, as they did below, that: (1) Advocates and its members lack standing to bring their Petition, given the lack of affected "taxpayer status" and a failure to abide by required pre-*mandamus* procedures, and (2) contrary to the trial court's *sua sponte* finding of a violation of Washington's Open Public Meetings Act, the amendment extending the Mason County/RDC contract was approved by the County's Board of Commissioners after a thorough review process conducted in open public meetings at which members of the public, including representatives of RDC's competitors, had an opportunity to (and in fact did) address their concerns. With respect to these latter issues, RDC adopts the Opening Brief of Appellants Mason County and Mason County Board of Commissioners as if fully set forth herein.

II. Assignments of Error

1. The trial court erred in declaring the 2012 Addendum to Contract Regarding Solid Waste Export Services for Mason County “null and void” and in issuing a writ of mandamus requiring Mason County to submit a new “contract for solid waste export and disposal” to a competitive bidding process under RCW 36.32.250 or the request-for-proposal process under RCW 36.58.090.

Issue Presented: As state law does not require that municipal contracts for the collection and disposal of solid waste be subject to either a competitive bidding or a request-for-proposal process, did the trial court err and abuse its discretion in declaring that the 2012 Addendum to Contract Regarding Solid Waste Export Services for Mason County was “null and void” because it was not let subject to a statutory competitive bidding or request-for-proposal process?

2. The trial court erred with respect to that part of its Order that would require the County in any respect to comply with the competitive bidding process under RCW 36.32.250.

Issue Presented: Where: (a) Advocates did not seek relief requiring the County to comply with RCW 36.32.250; (b) the trial court’s initial Order to Show Cause did not direct the County to “appear ... and show cause” with respect to the alleged failure to comply with the statute;

(c) no briefing or argument was submitted by the parties on this issue; (d) Advocates acknowledged that it was not seeking relief under RCW 36.32.250; and (e) the trial court itself in its oral ruling found that the County was not required to comply with the statute, did the trial court err in its Order in finding that the County “did not comply with the public works competitive bidding process in accordance with RCW 36.32.250 and in ordering that the “Board of Mason County Commissioners ... comply with RCW 36.32.250?”

3. The trial court erred and abused its discretion in finding that Advocates or its members had standing to bring the mandamus action.

Issue Presented: Where: (a) Advocates for Responsible Government is a nonprofit corporation that pays no taxes; (b) taxes are not used to fund Mason’s County solid waste collection and disposal program; and (c) Advocates failed to follow the required pre-mandamus process before filing its Petition for Writ of Mandamus, did the trial court err in finding that Advocates had standing to bring the petition?

4. The trial court erred in ruling that Mason County violated the Open Public Meetings Act based on its finding that the “Board of Mason County Commissioners did not discuss the contract ... in an open public meeting at any time in 2012 prior to the June 5, 2012 meeting at which the ... contract was approved.”

Issue Presented: Where: (a) the Mason County Board of Commissioners conducted three open public meetings at which the contract extension with RDC was discussed and various stakeholders, including competitors of RDC, attended and were heard; (b) the Board voted on and approved the contract extension at the third of those open public meetings; and (c) the Open Public Meetings Act does not require that more than one public meeting be held to endorse municipal action, did the trial court err in finding that Mason County violated the Open Public Meetings Act?

5. The trial court erred in finding that Mason County violated the Open Public Meetings Act because Advocates failed to raise or argue the issue after filing its petition.

Issue Presented: Where: (a) Advocates, beyond its initial Petition, did not seek relief requiring the County to comply with the Open Public Meetings Act; (b) the trial court's initial Order to Show Cause did not direct the County to "appear ... and show cause" with respect to the alleged failure to comply with the Open Public Meetings Act; (c) no subsequent order of the trial court required the County to make any such showing; and (d) no briefing or argument was submitted by the parties on this issue, did the trial court err in finding that the County violated the Act?

III. Statement of the Case

A. RDC's Contract with Mason County

RDC and Mason County are parties to a Contract Regarding Solid Waste Export Services For Mason County dated August 26, 1993 (the "Contract"), pursuant to which RDC is required to accept delivery from the County of contained solid waste at a transfer facility owned and operated by the County, and to export that waste for disposal at RDC's Roosevelt Regional Landfill in Klickitat County. CP 162, 167-267. The transfer facility is located on the site of the County's former landfill, which it closed in 1993, thus requiring the County to seek a contractor for export and disposal services. CP 162. RDC does not operate any part of the County's transfer station or any other part of the County's system of solid waste facilities. Rather, this is the County's responsibility. CP 162.

Under the Contract, the County loads municipal solid waste that the County receives at its Transfer Station into RDC-owned containers that RDC supplies to the County for that purpose. RDC, through an RDC subcontractor, picks up the filled containers, which are then loaded on rail cars and transported to the RDC landfill in Klickitat County, where RDC disposes of the waste in accordance with applicable laws pertaining to landfills. The County pays RDC a fee for these services on a per-ton basis. CP 162, 313-314. Title to waste accepted by RDC at the County's landfill

immediately passes to RDC, and thus all of the waste that RDC transports and landfills is waste that already has become the property of RDC. CP 208.

The Contract is not for the design, construction, operation, or other services with respect to the Transfer Station or any other solid waste handling systems, plants, sites or other facilities of the County; indeed, Section 7.1(d) of the Contract specifically places upon the County the responsibility for operation and maintenance of “all facilities necessary for operation of the Transfer Station.” CP 197–198.

The County’s payments to RDC under the Contract are not funded by taxes. Rather, the money to finance the County’s solid waste operation, including the payments it makes to RDC to export and dispose of waste, come from tipping fees and other sources of non-tax revenue derived by the County in the operation of its solid waste services and facilities. CP 371–372, 374.

As originally executed, the Contract provided for a five-year term, with three five-year renewal options in favor of the County. CP 162–163, 232. Prior to 2012, the County approved and executed with RDC three contract amendments, which in part extended the contract term to August 26, 2013, with the same effect as if the County had exercised all three of its original extension options. CP 162–163, 270–291.

In 1994, the County and RDC entered into an Addendum To Contract Regarding Solid Waste Export Services For Mason County, dated June 28, 1994, by which the County agreed to take certain actions necessary to accommodate RDC's use of rail lines for the transport of waste delivered to RDC pursuant to the Contract, and RDC agreed to a reduction in its per-ton fee to the County. CP 162-163, 270-274.

In 1997, the County and RDC entered into a 1997 Addendum To Contract Regarding Solid Waste Export Services For Mason County, Washington, dated November 25, 1997, under which, among other things, the term of the Contract was extended to August 26, 2013 (in lieu of separately exercising the three five-year options), and the amounts payable to RDC for its services were further reduced. CP 163, 277-279.

In the following year, the County and RDC entered into a 1998 Addendum To Contract Regarding Solid Waste Export Services For Mason County, effective December 1, 1998, by which: (1) the County consented to RDC's acquisition by Allied Waste Industries, Inc.; (2) the definition of "Contractor" was changed to "Allied operating through its subsidiary, RDC;" and (3) amounts payable to RDC for its services were even further reduced. CP 163, 282-291.

In June 2012, the Mason County Board of Commissioners approved and the County executed with RDC a further amendment to the Contract:

the 2012 Addendum To Contract Regarding Solid Waste Export Services For Mason County (the “Addendum”). The Addendum provided for a further, seven-year extension of the Contract to August 26, 2020, with the County having a further option to extend the Contract for an additional three years. As part of the Addendum, RDC agreed to pay the County an additional \$150,000 in the first quarter of 2013, and agreed to implement a price reduction once the County installed and began using new scales at its transfer facility. CP 163, 294–295, 416–417.

B. The Board’s Meetings Regarding the Contract

The Mason County Board of Commissioners considered an extension of the Contract on at least three occasions in open public meetings between January and June 2012. On January 30, 2012, in a regularly scheduled, open public meeting, Tom Moore, the deputy director of the Mason County Public Works Department, Utilities Division, briefed the Board regarding issues relating to the Contract. The discussions specifically involved the need to extend the Contract. CP 423.

On May 7, 2012, in a regularly scheduled, open public meeting, Moore again briefed the Board regarding the Contract. The discussion again concerned the need to extend the Contract, as well a proposal for reducing the minimum trailer weight charge. CP 424.

The Board's June 5, 2012 regular meeting was a public meeting to which members of the public were invited and offered input on the Contract proposal. CP 121-129, 424. As noted in the minutes, the following proceedings took place:

8. Approval of Action Agenda:

* * * *

8.13 Approval of the 2012 Addendum to the Contract for Solid Waste Export Services (long haul and disposal) between Mason County and Regional Disposal Company/Allied Waste extending said contract through August 26, 2020 and providing additional considerations to the parties to the Contract and authorizing execution of said 2012 Addendum by the Mason County Board of Commissioners.

* * * *

Item 8.13

Denny Hamilton wanted to know the amount of the contract.

Tom Moore, Utilities and Waste Management, explained that the amount was on a per ton basis at about \$56 per ton. When 26 tons per trailer is exceeded it goes down to \$35 per ton. There will also be funding to install a loading scale to load the trucks and do some repairs at the transfer station.

Mr. Hamilton asked if the Solid Waste Advisory Committee had looked at the contract.

Mr. Moore replied that the Solid Waste Advisory Committee hadn't met in the last year.

David Baker asked for the Item to be considered for a separate vote.

Eric Johnson wanted to know if there was an opportunity for a new contract instead of extending the current contract.

Mr. Moore replied that they considered that option. They needed more to time to evaluate what they were going to do with the solid waste transfer station in general. They realized that a two-year extension wouldn't be enough time so they went to a five year contract.

Mr. Johnson thought the County and the public would be better served if the contract went through a competitive process.

Mr. Moore stated that they had a good relationship with the landfill they use. The process they are currently using is working an[d] they have the opportunity to save the citizens money with the contract.

Cmmr. Sheldon noted that the long haul and disposal services that the County had been provided so far had been very satisfactory. The company also agreed to provide money to upgrade the transfer station's scales. The waste is going to a state of the art landfill. The open market gives a competitive look at things but negotiations can sometimes create a deal that you couldn't get through a bid process.

Mr. Moore was also concerned that the fuel costs would be considerably higher through the open bid process.

Mr. Johnson noted that *at previous meetings* a one or two-year extension was discussed and now it is considerably different.

Mr. Baker didn't feel there was enough notice to the public on the Issue. He thought there needed to be an opportunity for a competitive bid process.

The item was removed for a separate vote.

* * * *

Item 8.13

Tom Moore explained that in August 1993, Mason County entered into a contract with Regional Disposal Company for solid waste export services (long hauling and disposal) for solid waste from the County's Shelton transfer station. The term of the original contract was for five years, with the right to renew at the County's option for three additional five-year terms. He went over the different amendments to the contract since that time and the proposed amendments for 2012.

Cmmr. Sheldon noted that at the beginning of the contract the County could have chosen a 20 year contract and now it is only an extension of seven years.

Mr. Moore added that it gives some stability to the rates and consistency with the way the County has done business in the past.

Cmmr. Bloomfield thought it was a good deal and the other companies were present at the public meetings. He had no issue continuing the Item to allow the other companies to respond again if they felt the public process wasn't adequate.

Scott Wilson, Wilson Recycling, commented that they have been to all of the meetings and they haven't had an opportunity to respond. They wanted the chance to go to bid but the consultant never contacted them.

Cmmr. Sheldon explained that the contract wasn't about the operations of the transfer station it was only about the hauling and disposal of the solid waste. They were very different subjects.

Mr. Wilson thought extending the long haul contract wouldn't allow a change in the operations of the transfer station.

Cmmr. Sheldon didn't agree and thought they were very separate issues.

Eric Johnson, Waste Management, commented that he is in the business of long haul and disposal. He agreed that there was a comment period but there was no formal request for proposals or bids. The department was allowed to go into negotiations that were not part of the formal bid process. Companies were not allowed to come forward with their proposals.

Rik Fredrickson, Mason County Garbage, was also surprised that the negotiations extended the period of the contract. He thought Allied Waste did a great job but his company felt it was a pivot away from possible privatization. It was his understanding that the contract would be negotiated for only one or two years to further discuss privatization.

Cmmr. Sheldon didn't believe the contract would deter privatization.

Mr. Wilson asked why the Solid Waste Advisory Committee hadn't met for over a year. Cmmr. Ring Erickson stated that was a separate discussion.

Cmmr. Sheldon was comfortable with moving ahead with the contract. He thought a long-term contract was in the best interest of the citizens of the county with the increasing fuel costs. He still felt privatization was a separate issue that could be addressed at a later time.

Cmmr. Bloomfield agreed. He noted that it was an open process where the different companies had the opportunity to speak.

Cmmr. Sheldon moved to approve item 8.13 as presented. Cmmr. Bloomfield wanted to see it extended for two weeks.

Cmmr. Ring Erickson noted that she would recuse herself from the vote because she is in a campaign with supporters on both sides.

Brian Matthews suggested tabling the item for a couple of weeks because there were three

companies that would like to bid. They could accept bids or throw them out depending on what was better for the citizens.

Cmmr. Ring Erickson didn't think opening up the issue for bid would be acceptable when there was already a proposal on the table.

Mr. Moore suggested convening the SWAC to get their take on whether or not the contract should be accepted.

Cmmr. Sheldon noted that the difficulty seemed to be that the issue of privatization was overriding the issue of putting the waste in the truck and taking it to the landfill safely. Long-term contracts can be a great asset to the County. He thought the SWAC would be a good resource to look at the privatization issue but not the long haul issue.

Cmmr. Bloomfield didn't want to kick the can down the road. He thought it was a good solid contract. His only objection was that people didn't feel they had an opportunity to respond.

Cmmr. Sheldon/Bloomfield moved and seconded to approve Action Item 8.13 as presented. Motion carried. RE-abstain; S-aye; B-aye.

CP 121–125 (underlined/italic emphasis added).

C. The Trial Court Action

Advocates for Responsible Government is a nonprofit corporation headed by Robert Drexler, a Mason County resident. CP 155. On June 25, 2012, Advocates filed a Petition for Writ of Mandamus, Writ of Prohibition, Declaratory Relief and Injunctive Relief in Grays Harbor County Superior Court against Mason County and its Board of Commissioners seeking a writ of mandamus to declare the Addendum

invalid. CP 1–9. More specifically, Advocates sought a “Writ of Mandamus ... ordering the Board of Mason County Commissioners to comply with RCW 36.58.090 in awarding the Contract for Solid Waste Services” and a “Writ of Prohibition ... ordering the termination of the new contract between Mason County and Regional Disposal Company/ Allied Waste.” CP 9.

That same day, Advocates obtained an ex parte Order to Show Cause, signed by Judge Gordon Godfrey, who would thereafter preside over the case, requiring the County and the Board to appear before the court on July 16, 2012, and “show cause why they should not be ordered to comply with RCW 36.58.090 in awarding the contract for solid waste export services.” CP 137–138. The Order to Show Cause did not require the County to address either of the other contentions upon which Advocates’ Petition sought to have the Addendum invalidated, *i.e.*, alleged arbitrary and capricious action, and alleged violation of the Open Public Meetings Act. CP 6–8, 137–138. With the consent of both parties, RDC intervened in the action for the purpose of protecting its interests. CP 421–422. Considerable briefing followed.

At the hearing on July 16, 2012, Judge Godfrey indicated that he wished to know more about the manner in which the original contract was let and to consider further the question of Advocates’ standing (which the

County and RDC had raised), and asked that the parties return for further argument at a later date (August 10, 2012). RP July 16, 2012, August 10, 2012 (“RP I”) at 28–31. This was followed by more briefing, in which Advocates urged the following relief:

[W]e respectfully request that this Court grant our Petition and require the Board of Mason County Commissioners to vacate the 2012 contract with RDC and comply with the procedures outlined under RCW 36.58.090 in awarding the contract for solid waste export and disposal.

CP 328. At the August 10 hearing, argument centered on two issues: (1) whether the County was required to utilize the process set forth in RCW 36.58.090 when contracting for solid waste export and disposal; and (2) whether Advocates and its members had standing to challenge the Addendum. RP I at 34.

At the end of the argument, Judge Godfrey ruled that: (1) “There’s no question in my mind that 36.58.090 applies to this type of contract,” but that the commissioners could “do whatever they wish[,] making an intelligent decision;” (RP I at 47–48); (2) the County had not complied with the Open Public Meetings Act (*id.* at 47–49); and (3) Advocates’ members, being local taxpayers, had standing to bring the Petition. The court also granted Advocates’ oral motion, made at the hearing by

Advocates' counsel (*id.* at 35–36), for joinder of the organization's proffered members as co-Petitioners (*id.* at 48).

However, as noted, compliance with the Open Public Meetings Act was never briefed or argued by the parties. CP 413. Nevertheless, Judge Godfrey took it upon himself to issue a ruling in this respect, stating:

Let's get pragmatic here. I like to see things taken care of in a more intellectual approach to common steps. ... Was there compliance with the open public meeting act? No. ... In our day and age there is no question that open government is totally to be observed at all times. ... Because the main question, was this a type of matter that should have been discussed in an open public meeting. End of my discussion.

RP I at 47–48.

Advocates also never asked the Court to require the County to comply with RCW 36.32.250; thus, that issue also was never briefed or argued. As Advocates admitted in their last substantive pleading filed in the trial court, they did not seek relief under RCW 36.32.250:

Our pleadings have never asserted that the Commissioners must comply with the stricter competitive bidding requirements of RCW 36.32.250. Rather, we have only asked that, at a minimum, the alternative process under RCW 36.58.090 be used to ensure that the taxpayers of Mason County have their money spent in a fiscally responsible manner.

CP 328.¹ “[W]hat we do dispute is whether or not [the County is] required to comply with 36.58.090....” RP I at 46:22–24.

As a result, Judge Godfrey did not rule at the August 16 hearing that the County had to comply with RCW 36.32.250. Rather, he stated:

[T]he county commissioners are not required under the statute to comply with — with lowest competitive bidding. They can do whatever they wish making an intelligent decision. ... [T]his statute [RCW 36.58.090] ... does not require them to take the lowest competitive bid

... The county should be given an opportunity to conduct an open public meeting. They should then, if anyone wants to give them further information after public discussion, they can exercise 36.58.090 and award the contract according to the power that they have.

RP I at 48–49.

However, Judge Godfrey did “invent” a remedy.

So therefore are you [Advocates] entitled to relief? Yes. Remedy? I’m going to invent the remedy. The remedy is that the contract is basically void and they’re relieved, but there is a six month time frame. And the purpose is very simple in my opinion. A mistake has been made. The mistake needs to be given the opportunity to be clear itself. ...

Bottom line, maybe they’ll change their mind. The other side of the coin, maybe this is just an exercise in futility and the public will have a right to their [open] public meeting and the commissioners will have a right to make a decision according to that

¹ Advocates subsequently filed their Motion for Entry of Judgment and Order on September 28. CP 399–400.

statute to what they feel is appropriate under the contract. I'm giving a six month period of time to enable that to take place and the order shall read that none of this decision of this Court shall interfere with the county commissioners['] right to proceed and conduct an open public meeting pursuant to 36.58.090 and entertain appropriate bids and/or. It's up to them.

Now, if you people don't like it[,] it's [a] tough break. As far as I'm concerned, I have given you a pragmatic response. The public is going to get their alternative and the commissioners are going to be able to exercise their power.

And I'm done, have a nice day.

RP I at 48–49.

Advocates then moved for entry of their preferred form of an order and judgment. CP 399–409. The County, joined by RDC, opposed entry of that form. CP 410–415. Principal among the County/RDC objections was the fact that only one issue was presented to the trial court as set forth in the court's initial Order to Show Cause: whether the County should be "ordered to comply with RCW 36.58.090." CP 137–138, 413. Other than the standing issue raised by the County and RDC, no other issues, including the application of RCW 36.32.250 and the Open Public Meetings Act, were addressed to the trial court or argued by the parties. CP 328, 413.

At the subsequent hearing on October 15, the trial court, without addressing the County's and RDC's stated concerns, summarily signed

Advocates' proffered Judgment and Order Granting Writ of Mandamus and Declaratory Relief ("Order") [CP 416-419],² after a colloquy with counsel.

Gosh, I hate to do something stupid, like solve a problem with common sense.

You know, realistically, when you look at the statutes, they don't have to go through the competitive bids process, we already had that matter, they can go and pick whoever they want. They just didn't hold a public meeting so they can have the discussion so everybody could put their two bits in. ... [I]nstead, we are going to sit here and play this game.

So, the order that is submitted by the Advocates will be signed. ...

And you people can go appeal and waste more public money instead of doing what's common sense. I would appreciate it, when you get up to the Court of Appeals, that, maybe the Court of Appeals would do something like, say, it's too bad that you had a judge that used common sense, I would like that kind of a decision, it would make me feel better. So, in the mean time, have at it. Goodbye.

RP October 15, 2012 ("RP II") at 4-5.

The Findings of Fact in the Order provide, in part:

In awarding the 2012 contract for solid waste export and disposal, Mason County and the Board of Mason County Commissioners did not comply with the public works competitive bidding process in accordance with RCW 36.32.250, or the vendor selection process for contracts for the design, construction, operation, or service related to solid

² The Order has been stayed pending the outcome of this appeal. See March 1, 2013 letter from Clerk David C. Ponzoha regarding "notation ruling" by Commissioner Eric B. Schmidt.

waste handling systems, plants, sites, or other facilities in accordance with RCW 36.58.090.

The Board of Mason County Commissioners did not discuss the contract for solid waste export and disposal in an open public meeting *at any time prior to the June 5, 2012 meeting* at which the 2012 contract was approved.

CP 417 (emphasis added). The Order and Judgment portion provides, in part:

Pursuant to RCW 7.16 *et seq.*, a writ of mandamus is hereby issued requiring Mason County and the Board of Mason County Commissioners to comply with RCW 36.32.250, or the alternative vendor selection process under RCW 36.58.090 in awarding any contract for solid waste export and disposal for Mason County. ...

* * * *

The Board of Mason County Commissioners violated the Open Public Meetings Act by failing to transact the official business of Mason County in open and public meetings. The purpose of the Open Public Meetings Act is to ensure that public bodies conduct deliberations and make decisions in an open and transparent manner. The 2012 contract between Mason County and Regional Disposal Company was entered into on June 5, 2012, without prior opportunity for public input or proposals, thereby violating RCW 42.30, *et seq.*

CP 417–418.

D. Facts Related to Respondents' Standing

Advocates for Responsible Government filed its Petition for Writ of Mandamus on June 25, 2012. CP 1. On July 12, in its Response to

Order to Show Cause, the County argued that Advocates lacked standing to bring its Petition. CP 145–146. RDC made a similar argument in its response to the Order to Show Cause. CP 308–309. The trial court held its first hearing on the Petition and Order on July 16, 2012. RP I at 1.

On July 18, two days after the initial hearing, Respondent Jack Johnson, a member of Advocates, wrote a letter to the Attorney General's Office, which stated in its entirety:

I am a resident and taxpayer of Mason County and am writing this letter to request that the Attorney General's office take action in the following matter. On June 5, 2012, the Board of Commissioners for Mason County voted to approve the 2012 Addendum to Contract Regarding Solid Waste Export Services for Mason County. This contract between Mason County and Regional Disposal Company provided that Regional Disposal Company would transport and dispose of solid waste for the county. The original 1993 contract for solid waste export services was for a term of five years with three options to renew for additional five year periods. This contract was set to expire in 2012 with no additional options for renewal remaining.

Mason County violated RCW 36.58.090 by not publishing notice of its requirements for this contract or requesting submission of qualifications statements or proposals.

I request that the Attorney General's office take immediate action to prevent enforcement of this new contract and require Mason County to comply with the requirements of RCW 36.58.090 in awarding this contract.

If you have any questions regarding this matter, please feel free to contact me at [phone number] or [email address].

CP 396.

The reply from Solicitor General Maureen Hart, dated July 24, 2012, stated, in part:

Your letter requests that the “Attorney General’s office take immediate action to prevent enforcement of this new contract and require Mason County to comply with the requirements of RCW 36.58.090 in awarding this contract.” ... As I understand it your contention is that Mason County was required to but did not invoke a competitive process in this matter, RCW 36.58.090. You do not indicate whether your interest is as a potential bidder, or more generalized.

... We ... evaluate the interests of taxpayers in considering requests such as yours, and in light of the principal purposes of competitive bid laws, the criteria we consider in determining whether to bring litigation to challenge a public contract focus on the overall financial interests of taxpayers. As a general rule, we believe that taxpayers would be best served by initiation of action on their behalf in three types of cases: (1) where there is evidence that decisions concerning the bid award are fraudulent or collusive; (2) where there are clear violations of law that will result in significant additional costs to taxpayers; or (3) where there are clear violations of law of such a nature as to seriously compromise the public’s interest in a fair and competitive bidding system. In evaluating the interests of taxpayers, we also balance potential additional contract costs to taxpayers, if any are alleged, against additional costs to taxpayers that would accompany litigation. The information provided in your letter does not provide a basis to conclude that your request satisfies these criteria.

Because your concern relates to a financial transaction of the county, I am forwarding your letter to the State Auditor's Office for its consideration in periodically auditing the financial affairs of local governments for compliance with governing laws.

CP 397–398. Advocates brought these communications to the trial court's attention in Petitioner's Supplemental Memorandum of Law, filed on August 7, 2012, but did not include copies of the letters. CP 322. Rather, the County thereafter filed them with the trial court. CP 394–398.

IV. Argument

A. Standard of Review

Where the decision to grant or deny a writ of mandamus is based solely on statutory interpretation, the appellate standard of review is de novo. “This appeal presents the question of whether the superior court should have issued a writ of mandamus based upon its interpretation of RCW 65.04.090. This determination involves a question of law and the standard of review on appeal is de novo.” *Land Title of Walla Walla v. Martin*, 117 Wn. App. 286, 288–89, 70 P.3d 978 (2003) (citing *Hertog v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999)). *See also Northwest Line Constructors v. Snohomish County PUD No. 1*, 104 Wn. App. 842, 846, 17 P.3d 1251 (2001). Therefore, the Court should apply a de novo review standard to the trial court's ruling that the County was

required to issue a new contract under either RCW 36.32.250 or RCW 36.58.090.

Where the decision to grant or deny a writ of mandamus is based on a mixed question of law and fact, the appellate standard of review is abuse of discretion. “A statutory writ is an extraordinary remedy which a court should only issue when there is no plain, speedy, and adequate remedy available in the ordinary court of law. We will not disturb a trial court’s decision regarding a plain, speedy, and adequate remedy unless the trial court’s exercise of its discretion was manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” *Cost. Mgmt. Servs., Inc. v. City of Lakewood*, 170 Wn. App. 260, 276, 284 P.3d 785 (2012) (citing *City of Kirkland v. Ellis*, 82 Wn. App. 819, 827, 920 P.2d 206 (1996); *River Park Square, LLC v. Miggins*, 143 Wn.2d 68, 76, 17 P.3d 1178 (2001)). Therefore, the Court should review the trial court’s rulings regarding Advocates’ standing and the Open Public Meetings Act under an abuse of discretion standard.

B. The County Is Not Required To Let Contracts for Solid Waste Collection and Disposal under a Statutory Bidding Process.

This appeal involves an important issue pertaining to cities and counties across the state and a vital function of local government. Are county and city contracts for disposal of solid waste, particularly those for

disposal outside a municipality's local system of solid waste facilities, subject to statutory bidding requirements, or are they instead matters of constitutional, local authority over sanitation that counties and cities are free to address as they consider most appropriate for the protection of public health?

1. *Contracts for the Collection and Disposal of Solid Waste Are within a Municipality's Inherent Police Power.*

For more than 100 years, our state's appellate courts have recognized that the collection and disposal of solid waste are inherently governmental functions within the authority conferred by Article XI, Section 11 of the Washington Constitution upon each county and city "to make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws." *Citizens for Clean Air v. Spokane*, 114 Wn.2d 20, 39, 785 P.2d 447 (1990); *King County v. Algona*, 101 Wn.2d 789, 794, 681 P.2d 1281 (1984); *Spokane v. Carlson*, 73 Wn.2d 76, 79-81, 436 P.2d 454 (1968) (stating that letting contracts for collection and disposal of garbage is "a valid exercise of the police power" of a municipality); *Wallis v. Fidelity & Deposit Co. of Md.*, 155 Wash. 618, 620, 285 P. 656 (1930) (city contract for private waste handling is an exercise of police power); *State v. Lovelace*, 118 Wash. 50, 54, 203 P. 28 (1921) (ordinance authorizing exclusive garbage disposal contract was within the police

power conferred by Article XI, Section 11 of Washington’s constitution); *Smith v. Spokane*, 55 Wash. 219, 221, 104 P. 249 (1909) (ordinance conferring exclusive solid waste collection rights on a private party are an exercise of police power).

The exercise of a municipality’s police powers under Article XI, Section 11 does not depend upon any specific authorization by the Legislature; rather, it is a constitutional delegation of authority directly to cities and counties, as ample within its limits as that possessed by the Legislature. *Seattle v. Proctor*, 183 Wash. 293, 295, 48 P.2d 238 (1935). As Article XI, Section 11 indicates, its broad delegation of authority to municipalities over sanitation applies to actions that “are not in conflict with general laws,” *i.e.*, actions that do not conflict with state legislation. *State v. Kirwin*, 165 Wn.2d 818, 825–26, 203 P.3d 1044 (2009); *Adams v. Thurston County*, 70 Wn. App. 471, 479, 855 P.2d 284 (1993).

2. *Case Law Establishes that Municipal Solid Waste Contracts Are Not Subject to Statutory Bidding Requirements.*

Washington appellate cases consistently have held that municipal contracts for solid waste collection and disposal, being within the exercise of a municipality’s police power, are *not* subject to competitive bidding requirements. Rather, counties may arrange for such services by any reasonable manner — a proposition with which the trial court here twice

agreed: “[T]he county commissioners are not required under the statute to comply with ... lowest competitive bidding. They can do whatever they wish[,] making an intelligent decision.” RP I at 48. “[W]hen you look at the statutes, they don’t have to go through the competitive bids process, ... they can go and pick whoever they want.” RP II at 4.

In *Shaw Disposal, Inc. v. Auburn*, 15 Wn. App. 65, 546 P.2d 1236 (1976), Division One of this Court rejected a challenge to a city solid waste collection contract that had been let by negotiation rather than by competitive bid, holding that contracts for collection and disposal of solid waste are not subject to competitive bidding statutes. Quoting a California court opinion, the court stated that “there is good reason for not requiring” municipalities in the exercise of their constitutional police power to let garbage contracts to the “lowest responsible bidder:”

The accumulation of garbage and trash within a city is deleterious to public health and safety. The collection and disposal of garbage and trash by the city constitutes a valid exercise of police power and a governmental function which the city may exercise in all reasonable ways to guard the public health. *It may elect to collect and dispose of the garbage itself or it may grant exclusive collection and disposal privileges to one or more persons by contract, or it may permit private collectors to make private contracts with private citizens. The gathering of garbage and trash is considered to be a matter which public agencies are authorized to pursue by the best means in their possession to protect the public health.*

15 Wn. App. at 67–68 (quoting *Davis v. Santa Ana*, 108 Cal. App. 2d 669, 676, 239 P.2d 656 (1952) (emphasis added)).

The state Supreme Court repeatedly has voiced its approval of *Shaw Disposal*, quoting the language above in *Weyerhaeuser v. Pierce County*, 124 Wn.2d 26, 40, 873 P.2d 498 (1994), and again more recently in *Ventenbergs v. Seattle*, 163 Wn.2d 92, 101–02, 178 P.3d 960 (2008). In *Ventenbergs*, the Supreme Court held that RCW 35.21.156 — the statute essentially identical to RCW 36.58.090, applicable to cities, which was adopted as part of the same bill that included RCW 36.58.090 — does not apply to solid waste collection contracts, even where such contracts require waste to be delivered to a specific municipal transfer station.

Ventenbergs involved exclusive contracts that Seattle had made with Rabanco and Waste Management for the collection of construction, demolition and land-clearing waste (so-called “CDL” waste). Seattle had entered into those contracts through private negotiations without using any competitive bidding process. As the Supreme Court noted, the contracts “specified that Rabanco and Waste Management would take commercial waste to specific transfer stations in the City and that the City reserved the right to direct disposal of [the] CDL.” 163 Wn.2d at 98.

When Seattle threatened to enforce restrictions against unsanctioned collection of CDL by Ventenbergs, Ventenbergs challenged the Rabanco

and Waste Management contracts, contending that RCW 35.21.156(1) — the twin of RCW 36.58.090(1) — requires that cities submit solid waste contracts on the basis of solicitations for competitive proposals. Ventenbergs took the same position that Advocates take in this case, only with respect to an essentially identical statute pertaining to cities.

The Supreme Court squarely rejected Ventenbergs' contention and upheld Seattle's contracts with Rabanco and Waste Management, stating:

Ventenbergs next claims that the City violated the provisions of RCW 35.21.156 by failing to comply with the bidding process set forth in that statute. The City responds that that provision applies only to waste *facilities* and thus it was not required to follow the procedural mandates of that provision.

RCW 35.21.156(1) sets forth the procedures for a municipality to follow when contracting with vendors for services for “the design, construction, or operation of, or other service related to, the *systems, plants, sites, or other facilities* for solid waste handling.” Thus, we must determine whether this provision applies to the City's contracts with Rabanco and Waste Management.

To determine the meaning of RCW 35.21.156, we look to the surrounding provisions. RCW 35.21.120 states, in relevant part, that “[a] city or town ... may award contracts for *any service* related to solid waste handling *including* contracts entered into under RCW 35.21.152.” RCW 35.21.152 in turn states that

[a] city or town may enter into agreements with public or private parties to: (1) Construct, lease, purchase, acquire, manage, maintain, utilize, or operate publicly or privately owned or operated *solid waste handling systems, plants, sites, or*

other facilities; (2) establish rates and charges for those systems, plants, sites, or other facilities; (3) designate particular publicly or privately owned or operated systems, plants, sites, or other facilities as *disposal sites*; and (4) sell the *materials or products of* those systems, plants, or other facilities.

By referring specifically to “systems, plants, sites, or other facilities,” the statute expressly reaches a subset of services related to solid waste handling, not “any service” as referenced by RCW 35.21.120. The fact that it refers to these “systems, plants, sites, or other facilities” as “disposal sites” that can produce “materials or products” indicates that it is not referencing collection. Thus, when this same “systems, plants, sites, or other facilities” language is used in RCW 35.21.156, it becomes apparent that that provision does not mandate that a city follow the bidding procedures to contract for *all* services related to solid waste handling, but rather that it applies only to that particular subset. Because the City’s contracts with Rabanco and Waste Management are not for these services, the provisions of 35.21.156 do not apply to them.

163 Wn.2d at 106–07 (internal citations omitted; emphasis in original).

As noted above, the portion of RCW 35.21.156 upon which the plaintiff in *Ventenbergs* relied, and which applies to cities, is the virtual verbatim counterpart of RCW 36.58.090(1) upon which Advocates rely here. RCW 35.21.152 similarly has a near-verbatim counterpart in the statute applicable to counties — RCW 36.58.040.³ There is, in short, no

³ RCW 36.58.040 confers authority on counties to “provide for the establishment of a system or systems of solid waste handling for all unincorporated areas of the county or for portions thereof.”

reason to think that the Legislature, which adopted both the city- and county-related statutes as part of the same legislation, intended either cities or counties to be more or less restrained than the other when it comes to contracting for solid waste services.

The contracts in *Ventenbergs* were for collection and delivery of waste to a municipal solid waste transfer facility. Mason County's contract with RDC is for pickup of waste at a municipal solid waste transfer facility, and for transport to and disposal of that waste at RDC's own facility in a different county. If a city contract for collection and delivery of waste to a municipal transfer station is not subject to RCW 35.21.156, as held in *Ventenbergs*, then certainly a county contract for pickup, export and disposal of waste somewhere outside of the municipality cannot be subject to RCW 36.58.090, *i.e.*, the statutory counterpart. A contract to accept loads of waste from a municipality and haul away that waste for disposal at the contractor's own out-of-county landfill no more involves the "design, construction, or operation of, or other service related to, the systems, plants, sites, or other facilities for solid waste handling" than does a contract to collect waste and deliver it to the municipality.

The language of RCW 36.58.090 itself indicates that it is concerned with contracts that involve services provided *with respect to* a facility that is part of a municipal system. For example, RCW 36.58.090(2)

provides that a county may indicate in an RFP issued pursuant to the statute that the selection of a vendor will be based upon criteria that include a vendor's experience, "including design, construction, or operation of *other similar facilities*." RCW 36.58.090(2) (emphasis added). The Contract here does not call for RDC to provide any design, construction or operation services with respect to *any* County facilities.

Contrary to Advocates' efforts to do so, *Ventenbergs* cannot be distinguished based on Advocates' assertion that it "only involved garbage collection services" and not what RCW 36.58.090(1) refers to as a "service related to ... solid waste handling ... facilities." See Response to Appellants' Motion to Stay Enforcement of Judgment and for Accelerated Review at 6. A garbage collection vehicle must visit some "facility" to dispose of its load, whether it is a city collection site or transfer station or a regional landfill. In this respect, the *Ventenbergs* Court rejected any association between such "services" and the same language in RCW 35.21.152 that is found in RCW 36.58.090 — "solid waste handling systems, plants, sites, or other facilities."

Simply put, the RDC Contract is the back-end equivalent of the front-end contract that *Ventenbergs* squarely held to be exempt from competitive bidding requirements. In *Ventenbergs*, the contract was for collection and delivery of solid waste to a specific municipal transfer

station; in this case, the contract is for pickup of waste at a specific municipal transfer station and for disposal. There is no substantive distinction between the two for purposes of determining the applicability of competitive bidding statutes.

As the *Shaw Disposal* Court noted at the conclusion of its opinion, “[T]here is ... the question of whether a city should be required to contract for the collection and disposal of garbage solely on the basis of the lowest price. The legislature resolves questions of this kind, not the courts.” 15 Wn. App. at 69. In similar fashion, the Legislature has resolved the question before this Court and does not require counties “to contract for the collection and disposal of garbage solely on the basis of the lowest price.”

3. *The County Cannot Be Required To Comply with RCW 36.58.090 Because the Statute Is Permissive, Not Mandatory.*

Advocates’ Petition sought to compel, and the trial court’s Order required, the County to employ the process set forth in RCW 36.58.090. However, the County cannot be compelled to do so because the statute by its express terms is permissive, not mandatory.

The statute establishes a procedure that involves advertising a request for proposals (RFP) and then negotiating with one or more qualified vendors. The first sentence of RCW 36.58.090(1) makes it plain

that the procedure is permissive and does not supplant any other process authorized by law:

Notwithstanding the provisions of any county charter or any law to the contrary, and *in addition to any other authority provided by law*, the legislative authority of a county *may* contract with one or more vendors for one or more of the design, construction, or operation of, or other service related to, the solid waste handling systems, plants, sites or other facilities in accordance with the procedures set forth in this section.

(emphasis added).⁴ In this vein, subsections (2) and (3) of the statute begin with the phrase: “If the legislative authority of the county decides to proceed with the consideration of qualifications or proposals” For good measure, RCW 36.58.090(9) further provides:

The vendor selection process permitted by this section *shall be supplemental to and shall not be construed as a repeal of or limitation on any other authority granted by law.* (emphasis added)

Section 21 of the session law that included what is now codified as RCW 36.58.090 specifically stated that it and RCW 35.21.156 (the counterpart of RCW 36.48.090 applicable to cities) “shall be deemed to provide an alternative method for the performance of those subjects

⁴ A city or county undoubtedly is free, if it chooses to do so, to utilize the procedures set forth in RCW 35.21.156 or 36.58.090 when contracting for collection or disposal services. See *Washington Waste Systems, Inc. v. Clark County*, 115 Wn.2d 75, 794 P.2d 508 (1990). However, both *Ventenbergs* and the language of the statutes make it clear that Mason County is not compelled to do so in this case.

authorized by [it] and shall be regarded as supplemental and *additional to powers conferred by the Washington state Constitution*, other state laws, and the charter of any city or county” (emphasis added).

“Where a statute is plain, unambiguous, and clear on its face, there is no room for construction.” *Northwest Line Constructors*, 104 Wn. App. at 846 (quoting *National Elec. Contractors Ass’n v. City of Bellevue*, 1 Wn. App. 81, 83, 459 P.2d 420 (1969)). Had the Legislature intended RCW 36.58.090 to be mandatory, it certainly would not have included these provisions, since they make it clear that a county remains free to utilize any vendor selection process for solid waste collection and disposal that it might lawfully have utilized before RCW 36.58.090 was adopted.

As *Shaw Disposal* and the Supreme Court decisions citing the case with approval indicate, a city or county is free to let contracts for solid waste collection or disposal by whatever reasonable means it determines to be best, including the letting of such contracts without a competitive bidding process. See *Weyerhaeuser v. Pierce County*, 124 Wn.2d at 40; *Shaw Disposal*, 15 Wn. App. at 68. RCW 36.58.090 does not purport to eliminate such authority. To the contrary, the statute expressly *preserves* such authority.

The principal case upon which Advocates have relied for asserting that RCW 36.58.090 imposes a mandatory process, *Washington Waste*

Systems, Inc. v. Clark County, 115 Wn.2d 75, 794 P.2d 508 (1990), did not address the ultimate issue before the Court here: whether the County was **required** to submit the Contract extension to competitive bidding or an RFP process. *Washington Waste Systems* concerned only RCW 36.58.090 and dealt only with whether Clark County **could** use the RFP process, *i.e.*, “whether the Legislature *authorized* the use of the alternative procedure” under RCW 36.58.090. *See Washington Waste Systems*, 115 Wn.2d at 78 (emphasis added). Because the Supreme Court held that Clark County could and did follow the RCW 36.58.090 process, it did not have to address — and, more importantly, it did not address — whether competitive bidding statutes otherwise would have applied.

4. *RCW 36.32.250 Does Not Apply to the Claims in This Case.*

a. Advocates Did Not Seek Relief under RCW 36.32.250.

The matter before the trial court was a summary proceeding in which the court, in rendering its decision, could rely only upon the record, the briefing and arguments of counsel with respect to the applicable law, and the parties’ respective requests for relief. *Cf.* CR 56(c).

In this latter respect, Advocates’ Petition sought statutory relief solely under RCW 36.58.090. CP 5–6, 9. The trial court’s Show Cause Order directed the County and Board to appear before the court solely to

address “why they should not be ordered to comply with RCW 36.58.090 in awarding the contract for solid waste export services.” CP 137–138.

Advocates admitted that they sought relief under no other bidding statute:

Our pleadings have never asserted that the Commissioners must comply with the stricter competitive bidding requirements of RCW 36.32.250. Rather, we have only asked that, at a minimum, the alternative process under RCW 36.58.090 be used to ensure that the taxpayers of Mason County have their money spent in a fiscally responsible manner.

CP 328. “[W]hat we do dispute is whether or not [the County is] required to comply with 36.58.090....” RP I at 46:22–24.

Nevertheless, the Order, as submitted by Advocates, includes both Findings of Fact, and Order and Judgment sections pertaining to a claim that Advocates never asserted — violation of RCW 36.32.250 — and matters that were never briefed by the parties — the purported application of RCW 36.32.250 to the issues before the court and alleged violations of the Open Public Meetings Act. Judge Godfrey summarily signed the Order as presented, after apparently becoming upset with the arguments of RDC’s and the County’s counsel, who were pointing out that the Order included matters that had not been briefed or argued. RP II at 2–5; CP 412–415.

The Order states:

In awarding the 2012 contract for solid waste export and disposal, Mason County and the Board of

Mason County Commissioners did not comply with the public works competitive bidding process in accordance with RCW 36.32.250

* * * *

Pursuant to RCW 7.16 *et seq.*, a writ of mandamus is hereby issued requiring Mason County and the Board of Mason County Commissioners to comply with RCW 36.32.250, or the alternative vendor selection process under RCW 36.58.090 in awarding any contract for solid waste export and disposal for Mason County.

CP 417–418.

This language is directly in contrast with Judge Godfrey’s ruling on August 10, in which he stated:

[T]he county commissioners are not required under the statute to comply with — with lowest competitive bidding. They can do whatever they wish making an intelligent decision. ... [T]his statute [RCW 36.58.090] ... does not require them to take the lowest competitive bid

... The county should be given an opportunity to conduct an open public meeting. They should then, if anyone wants to give them further information after public discussion, they can exercise 36.58.090 and award the contract according to the power that they have.

RP I at 48–49. And it is contrary to Judge Godfrey’s comments at the October 15 hearing at which he signed the Order, where he stated:

You know, realistically, when you look at the statutes, they don’t have to go through the competitive bids process, we already had that matter, they can go and pick whoever they want.

RP II at 4.

Because Advocates did not seek relief under RCW 36.32.250 and did not substantively address the potential application of the statute before the trial court, RDC and the County had no opportunity to address the statute's asserted application in the trial court. Given the lack of any legal support in the record and the fact that the County and RDC did not have an adequate opportunity to be heard on the issue, the trial court erred and abused its discretion in granting relief that Advocates never asked for and that the parties never briefed or argued, particularly given the fact that Judge Godfrey ruled that the County was not required "to take the lowest competitive bid," which is the essence of RCW 36.32.250.

Northwest Line Constructors v. Snohomish County PUD No. 1 addressed a similar situation in a similar case, holding that the trial court had correctly granted the PUD's summary judgment motion because the plaintiff had "failed to state claims later raised at summary judgment." 104 Wn. App. at 848. In *Northwest Line Constructors*, the National Electrical Contractors Association ("NECA") filed a complaint for declaratory judgment and injunctive relief asserting that the PUD had violated RCW 54.04.070, a public utility competitive bidding statute, by failing to submit certain work for competitive bidding. NECA also alleged

that the PUD had violated the statute and other bidding statutes by “splitting” its contracts. 104 Wn. App. at 844.

However, “NECA failed to allege in its complaint that PUD’s conduct fell outside accepted industry practice under prudent utility management,” a required element under the statute, although it argued the issue at summary judgment. *Id.* at 845. The trial court granted NECA leave to amend its complaint, but it never did, so the court “dismissed the complaint because it failed to state a claim under the bidding statute.” *Id.*

After reviewing the pleading requirements under CR 8(a), the Court of Appeals affirmed the trial court, stating that NECA’s complaint “fails to allege a violation of the statute at all” *Id.* at 849. Division One’s following analysis applies directly to the circumstances here:

“[P]leadings are primarily intended to give notice to the court and the opponent of the general nature of the claim asserted.” *Lewis v. Bell*, 45 Wn. App. 192, 197, 724 P.2d 425 (1986) (citing *Lightner v. Balow*, 59 Wn.2d 856, 370 P.2d 982 (1962)). Although inexpert pleading is permitted, insufficient pleading is not. *Id.* “A pleading is insufficient when it does not give the opposing party fair notice of what the claim is and the ground upon which it rests.” *Id.* (citing *Williams v. W. Sur. Co.*, 6 Wn. App. 300, 492 P.2d 596 (1972)).

Even a liberal examination of NECA’s complaint cannot support NECA’s contention that it sufficiently pleaded the specific allegations raised at summary judgment. In *Dewey v. Tacoma Sch. Dist. No. 10*, 95 Wn. App. 18, 974 P.2d 847 (1999), the

court found the plaintiff's complaint failed to plead a First Amendment violation because it did not allege all elements necessary to establish a prima facie free speech claim. *Id.* at 24-25. The court noted that "[a] complaint must at least identify the legal theories upon which the plaintiff is seeking recovery." *Id.* at 25 (citing *Molloy v. City of Bellevue*, 71 Wn. App. 382, 389, 859 P.2d 613 (1993)). Similarly, while NECA's complaint implies that the PUD is generally in violation of RCW 54.04.070, nowhere does it identify or even fairly imply the specific legal theories NECA raised at summary judgment.

Id. at 848-49. The Court concluded: "Because NECA's complaint did not give notice of the factual allegations made at summary judgment, the trial court correctly concluded that NECA failed to plead these allegations." *Id.* at 849.

b. RCW 36.32.250 — Like RCW 36.58.090 — Does Not Apply to the Contract.

For the same reasons set forth primarily in *Shaw Disposal* and *Ventenbergs*, and as discussed above, the competitive bidding requirements in RCW 36.32.250 do not apply to municipal contracts for solid waste collection and disposal because such contracts are within the exercise of a municipality's inherent police power. *See Shaw Disposal*, 15 Wn. App. at 67-68; *Ventenbergs*, 163 Wn.2d at 108.

As a result, Advocates have been forced to look elsewhere for authority to support their assertion and now contend that the services

provided by RDC under the Contract constitute “public works” that bring the Contract under the purview of RCW 36.32.250⁵ and for which they cite *Washington Waste Systems* as supporting authority. See Response to Appellants’ Motion to Stay Enforcement of Judgment and for Accelerated Review at 3–4. However, the *Washington Waste Systems* Court did not construe RCW 36.32.250 as requiring counties to use a competitive bidding process when letting contracts for the collection and disposal of solid waste. It stated, “Counties must use a competitive bidding procedure for *most* municipal contracts,” citing RCW 36.32.250, and referred to RCW 36.58.090 as “a more flexible alternative procedure for certain solid waste contracts.” 115 Wn.2d at 78 (emphasis added). RCW 36.32.250 applies to *most*, but not *all* municipal contracts, and the Washington courts have made it clear that it would not apply to the Contract here.

Advocates’ argument also strains the well-understood meaning of “public work” under RCW 39.04.010(4): “‘Public work’ means all work, construction, alteration, repair, or improvement other than ordinary maintenance, executed at the cost of the state or of any municipality, or which is by law a lien or charge on any property therein.”

⁵ “No contract for public works may be entered into by the county legislative authority or by any elected or appointed officer of the county until after bids have been submitted to the county upon specifications therefor.”

The Court in *Shaw Disposal*, which — as noted above — construed statutes applicable to cities and analogous to those applicable to counties at issue here, expressly rejected the argument that the statutory definition of “public work” includes garbage collection and disposal.

Auburn’s position is that RCW 35.23.352⁶ does not apply to its garbage contracts because RCW 35A.40.200 relates to “public improvement” and “public work,” not to garbage collection and disposal service. We agree. The term “public work,” which *Shaw Disposal* believes covers garbage disposal, is defined in RCW 39.04.010 to include “all work, construction, alteration, repair or improvement other than ordinary maintenance, executed at the cost of the state or of any municipality, ...”

15 Wn. App. at 67.

V. CONCLUSION

Longstanding and well-accepted Washington law provides that municipal contracts for the collection and/or disposal of solid waste, being

⁶ **Public works — Contracts — Bids — Small works roster — Purchasing requirements, recycled or reused materials or products**

(1) Any second-class city or any town may construct any public works, as defined in RCW 39.04.010, by contract or day labor without calling for bids therefor whenever the estimated cost of the work or improvement, including cost of materials, supplies and equipment will not exceed the sum of sixty-five thousand dollars if more than one craft or trade is involved with the public works, or forty thousand dollars if a single craft or trade is involved with the public works or the public works project is street signalization or street lighting. A public works project means a complete project. The restrictions in this subsection do not permit the division of the project into units of work or classes of work to avoid the restriction on work that may be performed by day labor on a single project.

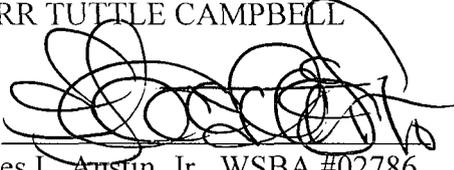
within the inherent, constitutional police powers of a municipality, are not subject to competitive bidding requirements under statutes governing “public works.” In this case, even though the County participated, along with other counties, in a competitive bidding process in 1993 in letting the original export contract to RDC, this does not mean that the statutes at issue required it to do so then or required it to put the extension of the RDC Contract out for competitive bid in 2012.

The statutes referenced in the trial court’s Order simply do not apply, either as a matter of law or because they were not properly addressed in Advocates’ complaint. RCW 36.58.090 is, by its express terms, a permissive statute. It does not *require* a county to do anything; it merely sets forth a process that a county *may* elect to follow. RCW 36.32.250 does not require the County to submit contracts for solid waste collection and disposal to competitive bidding because, as the case law clearly holds, such contracts fall within the County’s inherent police powers and do not involve “public works” to which the statute is limited. Furthermore, Advocates failed to assert any claims, seek any relief or make any argument regarding the potential application of RCW 36.32.250 and, therefore, effectively waived the ability to rely on the statute, an error compounded by the trial court’s summary acceptance of a proffered improper order.

On the basis of the foregoing, Regional Disposal Company, joined by Mason County and the Mason County Board of Commissioners, respectfully requests that the Court of Appeals reverse the trial court's Judgment and Order Granting Writ of Mandamus and Declaratory Relief and reinstate the 2012 Addendum to Contract Regarding Solid Waste Export Services for Mason County.

Respectfully submitted this 29th day of March, 2013.

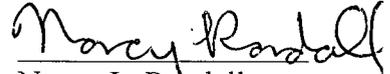
KARR TUTTLE CAMPBELL

By: 
James L. Austin, Jr., WSBA #02786
Walter E. Barton, WSBA #26408

Attorneys for Respondent
Regional Disposal Company

DECLARATION OF SERVICE

I declare under penalty of perjury of the laws of the state of Washington that I am over the age of 18 and not a party to the above-captioned action. That on March 29, 2013, I caused to be served upon counsel listed below in the manner indicated a true and correct copy of the foregoing Opening Brief of Appellant Regional Disposal Company.


Nancy L. Randall

Wayne Hagen
Zach Edwards
P.O. Box 2016
Aberdeen, WA 98520
Attorneys for Appellants
wayne@hagenlaw.net
zach@hagenlaw.net

- Via Hand Delivery
- Via Facsimile
- Via US Mail
- Via Overnight Mail
- Via e-mail

Attorneys For Respondents

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APPENDIX

RCW 36.58.090

Contracts with vendors for solid waste handling systems, plants, sites, or facilities — Requirements — Vendor selection procedures.

(1) Notwithstanding the provisions of any county charter or any law to the contrary, and in addition to any other authority provided by law, the legislative authority of a county may contract with one or more vendors for one or more of the design, construction, or operation of, or other service related to, the solid waste handling systems, plants, sites, or other facilities in accordance with the procedures set forth in this section. When a contract for design services is entered into separately from other services permitted under this section, procurement shall be in accord with chapter 39.80 RCW. For the purpose of this chapter, the term "legislative authority" shall mean the board of county commissioners or, in the case of a home rule charter county, the official, officials, or public body designated by the charter to perform the functions authorized therein.

(2) If the legislative authority of the county decides to proceed with the consideration of qualifications or proposals for services from vendors, the county shall publish notice of its requirements and request submission of qualifications statements or proposals. The notice shall be published in the official newspaper of the county at least once a week for two weeks not less than sixty days before the final date for the submission of qualifications statements or proposals. The notice shall state in summary form (a) the general scope and nature of the design, construction, operation, or other service, (b) the name and address of a representative of the county who can provide further details, (c) the final date for the submission of qualifications statements or proposals, (d) an estimated schedule for the consideration of qualifications, the selection of vendors, and the negotiation of a contract or contracts for services, (e) the location at which a copy of any request for qualifications or request for proposals will be made available, and (f) the criteria established by the legislative authority to select a vendor or vendors, which may include but shall not be limited to the vendor's prior experience, including design, construction, or operation of other similar facilities; respondent's management capability, schedule availability and financial resources; cost of the services, nature of facility design proposed by the vendor; system reliability; performance standards required for the facilities; compatibility with existing service facilities operated by the public body or other providers of service to the public; project performance guarantees; penalty and other enforcement provisions; environmental protection measures to be used; consistency with the applicable comprehensive solid waste management plan; and allocation of project risks.

(3) If the legislative authority of the county decides to proceed with the consideration of qualifications or proposals, it may designate a representative to evaluate the vendors who submitted qualifications statements or proposals and conduct discussions regarding qualifications or proposals with one or more vendors. The legislative authority or representative may request submission of qualifications statements and may later request more detailed proposals from one or more vendors who have submitted qualifications statements, or the representative may request detailed proposals without having first received and evaluated qualifications statements. The representative shall evaluate the qualifications or proposals, as applicable. If two or more vendors submit qualifications or proposals that meet the criteria established by the legislative authority of the county, discussions and interviews shall be held with at least two vendors. Any revisions to a request for qualifications or request for proposals shall be made available to all vendors then under consideration by the city or town and shall be made available to any other person who has requested receipt of that information.

(4) Based on criteria established by the legislative authority of the county, the representative shall recommend to the legislative authority a vendor or vendors that are initially determined to be the best qualified to provide one or more of the design, construction, or operation of, or other service related to, the proposed project or services. The legislative authority may select one or more qualified vendors for one or more of the design, construction, or operation of, or other service related to, the proposed project or services.

(5) The legislative authority or its representative may attempt to negotiate a contract with the vendor or vendors selected for one or more of the design, construction, or operation of, or other service related to, the proposed project or services on terms that the legislative authority determines to be fair and reasonable and in the best interest of the county. If the legislative authority or its representative is unable to negotiate such a contract with any one or more of the vendors first selected on terms that it determines to be fair and reasonable and in the best interest of the county, negotiations with any one or more of the vendors shall be terminated or suspended and another qualified vendor or vendors may be selected in accordance with the procedures set forth in this section. If the legislative authority decides to continue the process of selection, negotiations shall continue with a qualified vendor or vendors in accordance with this section at the sole discretion of the legislative authority until an agreement is reached with one or more qualified vendors, or the process is terminated by the legislative authority. The process may be repeated until an agreement is reached.

(6) Prior to entering into a contract with a vendor, the legislative authority of the county shall make written findings, after holding a public hearing on the proposal, that it is in the public interest to enter into the contract, that the contract is financially sound, and that it is advantageous for the county to use this method for awarding contracts compared to other methods.

(7) Each contract shall include a project performance bond or bonds or other security by the vendor that in the judgment of the legislative authority of the county is sufficient to secure adequate performance by the vendor.

(8) The provisions of chapters 39.12, 39.19, and *39.25 RCW shall apply to a contract entered into under this section to the same extent as if the systems and plants were owned by a public body.

(9) The vendor selection process permitted by this section shall be supplemental to and shall not be construed as a repeal

of or limitation on any other authority granted by law.

(10) The alternative selection process provided by this section may not be used in the selection of a person or entity to construct a publicly owned facility for the storage or transfer of solid waste or solid waste handling equipment unless the facility is either (a) privately operated pursuant to a contract greater than five years, or (b) an integral part of a solid waste processing facility located on the same site. Instead, the applicable provisions of RCW 36.32.250 and chapters 39.04 and 39.30 RCW shall be followed.

[1992 c 131 § 4; 1989 c 399 § 10; 1986 c 282 § 19.]

Notes:

***Reviser's note:** Chapter 39.25 RCW was repealed by 1994 c 138 § 2.

Construction of 1986 c 282 § 19 -- 1990 c 279: "Section 19, chapter 282, Laws of 1986, codified as RCW 36.58.090, established an alternate procedure by which a county was authorized to procure systems and plants for solid waste handling and to contract with private vendors for the design, construction, or operation thereof. Any county with a population of over one hundred thousand that, prior to the effective date of chapter 399, Laws of 1989 [July 23, 1989], complied with the requirements of either (1) section 10 (3), (4), and (5), chapter 399, Laws of 1989, or (2) section 19(3), chapter 282, Laws of 1986, shall be deemed to have complied with the requirements of section 19(3), chapter 282, Laws of 1986." [1990 c 279 § 1.]

Severability -- Legislative findings -- Construction -- Liberal construction -- Supplemental powers -- 1986 c 282: See notes following RCW 35.21.156.

RCW 36.32.250

Competitive bids — Contract procedure — Contracts under forty thousand dollars — Small works roster process.

No contract for public works may be entered into by the county legislative authority or by any elected or appointed officer of the county until after bids have been submitted to the county upon specifications therefor. Such specifications shall be in writing and shall be filed with the clerk of the county legislative authority for public inspection. An advertisement shall be published in the county official newspaper stating the time and place where bids will be opened, the time after which bids will not be received, the character of the work to be done, the materials and equipment to be furnished, and that specifications therefor may be seen at the office of the clerk of the county legislative authority. An advertisement shall also be published in a legal newspaper of general circulation in or as near as possible to that part of the county in which such work is to be done. If the county official newspaper is a newspaper of general circulation covering at least forty percent of the residences in that part of the county in which such public works are to be done, then the publication of an advertisement of the applicable specifications in the county official newspaper shall be sufficient. Such advertisements shall be published at least once at least thirteen days prior to the last date upon which bids will be received. The bids shall be in writing, shall be filed with the clerk, shall be opened and read in public at the time and place named therefor in the advertisements, and after being opened, shall be filed for public inspection. No bid may be considered for public work unless it is accompanied by a bid deposit in the form of a surety bond, postal money order, cash, cashier's check, or certified check in an amount equal to five percent of the amount of the bid proposed. The contract for the public work shall be awarded to the lowest responsible bidder. Any or all bids may be rejected for good cause. The county legislative authority shall require from the successful bidder for such public work a contractor's bond in the amount and with the conditions imposed by law. If the bidder to whom the contract is awarded fails to enter into the contract and furnish the contractor's bond as required within ten days after notice of the award, exclusive of the day of notice, the amount of the bid deposit shall be forfeited to the county and the contract awarded to the next lowest and best bidder. A low bidder who claims error and fails to enter into a contract is prohibited from bidding on the same project if a second or subsequent call for bids is made for the project. The bid deposit of all unsuccessful bidders shall be returned after the contract is awarded and the required contractor's bond given by the successful bidder is accepted by the county legislative authority. In the letting of any contract for public works involving less than forty thousand dollars, advertisement and competitive bidding may be dispensed with on order of the county legislative authority. Immediately after the award is made, the bid quotations obtained shall be recorded and open to public inspection and shall be available by telephone inquiry.

As an alternative to requirements under this section, a county may let contracts using the small works roster process under RCW 39.04.155.

This section does not apply to performance-based contracts, as defined in RCW 39.35A.020(4), that are negotiated under chapter 39.35A RCW.

[2009 c 229 § 8; 2000 c 138 § 207; 1996 c 18 § 3; 1993 c 198 § 8; 1991 c 363 § 58. Prior: 1989 c 431 § 57; 1989 c 244 § 6; prior: 1985 c 369 § 1; 1985 c 169 § 9; 1977 ex.s. c 267 § 1; 1975 1st ex.s. c 230 § 1; 1967 ex.s. c 144 § 16; 1967 c 97 § 1; 1965 c 113 § 1; 1963 c 4 § 36.32.250; prior: 1945 c 61 § 2; Rem. Supp. 1945 § 10322-16.]

Notes:

Purpose -- Part headings not law -- 2000 c 138: See notes following RCW 39.04.155.

Purpose -- Captions not law -- 1991 c 363: See notes following RCW 2.32.180.

Severability -- 1989 c 431: See RCW 70.95.901.

Severability -- 1967 ex.s. c 144: See note following RCW 36.900.030.

Subcontractors to be identified by bidder, when: RCW 39.30.060.