

WHY THE SUPREME COURT DETERMINED THAT THE KING COUNTY PUBLIC DEFENSE AGENCIES WERE NOT INDEPENDENT CONTRACTORS, BUT INSTEAD WERE ARMS AND AGENCIES OF KING COUNTY

The Supreme Court found that “under common law principles,” the public defense agencies were not genuine independent contractors, but “are in fact agencies of the county.” *Dolan v. King County*, 172 Wn.2d 294, 30 (2011); Opinion, ¶34. The Supreme Court based its decision on compelling and unusual facts about these agencies (172 Wn.2d at 308-22):

- Unlike independent contractors, “the county treated the defender organizations exactly like any other agencies of the county. For example, the defender groups participate in the county budgeting process exactly like any other agency.” Opinion, ¶15. “Through this [budget] process the County had effective right of control and approval over all leases and other defender organization expenditures,” just as it does for other county agencies. Opinion, ¶6. And like other County agencies, and unlike independent contractors “the defender organizations may not retain for their own purposes any profits or any funds that may be left over from the budget. Nor are they held liable for any budget shortages.” Opinion, ¶15 (citations omitted).
- “Independent contractors can usually bid for or negotiate contracts.” Opinion, ¶34. In contrast, for the King County public defense agencies “it is the budget process that determines the amount the defender group receives.” Opinion, ¶6. “The contracts of the defender organizations are merely pass-throughs of the County’s budgeting process. The contract price is not a negotiated term but is determined the previous year by the County’s budget process.” Opinion, ¶23, n. 12. And “the contracts appear to be considered mere details; the constitutionally mandated services of the defender organizations are often performed without any contract for the corresponding period being signed,” which is not normal for independent contractors. *Id.*
- “All employees of the public defender organizations must comply with the County’s Employee Code of Ethics,” which would not be true for a contractor. Opinion, ¶17.
- Like other County agencies, but in contrast to independent contractors, “[i]n the event of a budget crisis where there is a county-wide reduction in budget the defender groups must reduce their budgets in the same percentage as other agencies.” Opinion, ¶15.
- “Generally independent contractors may have many clients, but defender organizations are true captives of the county in the sense they cannot have other clients without the county’s consent and the county provides virtually all of the organizations’ funding.” Opinion, ¶34. Because the county provides virtually all their funding and restricts their purpose, “the contract is presented in a ‘take it or leave it form’ where ‘leaving’ means the organizations cease to exist.” *Id.*
- The “county code” requires that indigent defense may only be provided by “nonprofit corporations.” Opinion, ¶34, n.16. And “the county has interpreted this [code provision] to mean the organizations, unlike true independent contractors may never engage in providing any other form of legal representation – whether for profit or pro bono.” *Id.* (internal quotes omitted).

- Unlike normal independent contractors “the defender organizations were created specifically to carry out a constitutionally mandated function of the county.” Opinion, ¶34.
- “Generally, independent contractors determine their own formal structure, such as composition of boards, articles, and bylaws; but the county has imposed stringent control over the defenders’ formal structure.” Opinion, ¶34. Indeed, “in the process of reorganizing NDA, the County required changes in the composition of the board of directors, bylaws, corporate articles, employee policies, financial practices and contracts with the county for all its public defender organizations.” Opinion, ¶9.
- “Independent contractors generally do not have customers establish a pay scale for their employees or require independent contractors to give their employees the same cost of living increases that the customer employees receive.” Opinion, ¶35.
- Unlike the public defense agencies, “independent contractors would generally realize profits or losses and nonprofit entities would be able to set aside money for future growth and expansion.” Opinion, ¶35.
- “Independent contractors may generally lease space or acquire property without approval; the defender organizations may not lease or acquire property without the county’s approval and the county has asserted that property owned by the organizations belongs to the county.” Opinion, ¶34.
- “The defense organizations are thoroughly integrated into the county budget process and administrative procedures to the extent that the only difference between King county nonprofit entities and the Pierce County Department of Assigned Counsel, an official county department, is formal not functional.” Opinion, ¶23.
- “Unlike a true independent contractor,” who are not at will, “the county asserted a termination at will clause in 2003 which effectively gave the county the power to terminate the existence of any or all the organizations at its slightest displeasure.” Opinion, ¶35, n. 19.

Thus, the Supreme Court determined, because of these compelling and unusual facts, “King County has such a right of control over the defender organizations that they are arms and agencies of the county.” Opinion ¶38; *Dolan*, 172 Wn.2d at 320-22.