COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

NEPTUNE SWIMMING FOUNDATION, Plaintiff / Appellant, v. CITY OF SCOTTSDALE, a municipal corporation, Defendant / Appellee.	No. 1 CA-CV 21-0053 Maricopa County Superior Court No. CV 2019-007172

APPELLANT'S OPENING BRIEF

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INTRODUCTION

The City of Scottsdale ("City") violated the Arizona Constitution's Gift Clause by granting one private entity, the Scottsdale Aquatic Club ("SAC"), exclusive access to the City's four aquatic centers at a rate far below fair market value to the exclusion of other swim clubs that provide the same services to the public. It granted SAC the right to a continued exclusive license to use all four pools *after* SAC lost in the procurement process—a process that was supposed to determine the "most advantageous bidder."[1] That was actually Neptune Swimming Foundation ("Neptune"), not SAC.

Neptune offered to pay $12 per hour for use of both long- and short-course lap lanes, while SAC bid only $4 per hour for short-course lanes and $8 per hour for long-course lanes. Yet despite this drastic disparity, the City arbitrarily selected SAC after the bidding process was over—a choice that costs City taxpayers $284,000 per year, or approximately $1,420,000 over the course of SAC's exclusive renewable license. That disparity is so great, that it amounts to a gift of public resources to SAC, in violation of the Arizona Constitution's "Gift Clause."

[1] The "Most Advantageous" bidder is the "responsible offeror whose proposal is determined in writing to be the most advantageous to the city taking into consideration the evaluation factors set forth in the request for proposals. No other factors or criteria may be used in the evaluation." Scottsdale Procurement Code § 2-188(c)(5).

That Clause provides that "[n]either the state, nor any … city … shall ever … make any donation or grant, by subsidy *or otherwise*, to any individual, association, or corporation." Ariz. Const. art. IX, § 7.[2] Use of taxpayer resources for the benefit of a private party violates the Gift Clause if such use: (1) fails to serve a public purpose, or (2) the government does not receive adequate and direct value in return. *Turken v. Gordon*, 223 Ariz. 342, 348, ¶¶ 21–22 (2010). The Clause was intended to prevent the application of public resources to "giv[e] advantages to special interests." *Wistuber v. Paradise Valley Unified Sch. Dist.*, 141 Ariz. 346, 349 (1984). Under the circumstances presented here, the City's grant of the license to SAC violates the Gift Clause because it predominantly benefits one private party to the exclusion of others, and the City does not receive adequate consideration in exchange for the use of its public resources.

Neptune also challenges the City's decision to violate its own Procurement Code by failing to award the contract to Neptune after the City adopted and used that Code's provisions throughout the bidding process. The City established objective criteria and explicit procedures when it issued its Request for Proposals ("RFP"), but after the bids were calculated and it was clear that Neptune had won, it then disavowed those criteria and the Procurement Code's requirements, in order

[2] Unless otherwise noted, internal quotations and citations have been omitted and emphasis has been added for all citations in this brief.

to award the contract to the losing bidder instead. That was an abuse of discretion that amounted to a gift of public resources to SAC.

STATEMENT OF THE CASE

This case was filed in Maricopa County Superior Court on March 17, 2020. Neptune sought a writ of mandamus compelling the City to award the contract in question to Neptune. IR.26. Both parties moved for summary judgment. Following oral argument on June 5, 2020, the trial court granted the City's motion for summary judgment and denied Plaintiffs' motion, ruling that the City's grant of the license did not violate the Gift Clause and it did not violate the Procurement Code. APPV3.065; APPV3.067. The trial court issued final judgment on December 11, 2020. APPV3.069. Neptune timely appealed on January 7, 2021. APPV3.070.

The Court has jurisdiction pursuant to A.R.S. § 12-2101.

STATEMENT OF FACTS

Neptune challenges SAC's control of Scottsdale public pools

Neptune is an Arizona non-profit 501(c)(3) corporation, nationally recognized for its award-winning youth competitive swimming program. APPV1.006 ¶ 1.

The City's Community Services Division operates multiple public swimming pools, or "aquatic facilities," including the four at issue here: Cactus

Aquatic and Fitness Center, Chaparral Aquatic and Fitness Center, Eldorado Aquatic and Fitness Center, and McDowell Mountain Ranch Aquatic and Fitness Center. APPV3.049 ¶ 4. There are learn-to-swim and recreational swimming opportunities available at all four of these facilities. APPV1.007 ¶ 2.

SAC is a private membership organization that runs a youth competitive swimming team, and uses the four City pools referred to above, pursuant to a renewable license granted by the City. *Id.* ¶ 3. SAC requires its members to pay an annual admission fee of $135, plus monthly practice fees ranging between $107and $234.[3] To become a member of SAC, a person must "try out" for the team, which means SAC's coaching staff evaluates the individual's athletic ability and then decides whether or not to accept the person as a member of the team.

For over 50 years, SAC has held a contract which grants it the *exclusive* right to provide youth competitive swim team services in the four City pools. APPV3.061; APPV1.007 ¶ 4; APPV1.023.

Neptune is a nationally recognized, award-winning youth competitive swimming organization, operating in Scottsdale and elsewhere in the Valley. APPV1.006 ¶ 1. In 2007, Neptune's head coach approached the City and requested access to the pools in question. APPV1.026. The City rebuffed this

[3] Scottsdale Aquatic Club website, https://www.teamunify.com/team/assac/page/fees/dues.

request and stated that to allow Neptune access would create a conflict of interest with the City's long-time license-holder, SAC. *Id.* In 2010 Neptune also attempted to gain access by applying to be the City's sponsored team pursuant to City policy. APPV3.035 ¶ 5. These attempts were also unsuccessful. *Id.*

On July 5, 2016, the City Council passed Resolution No. 10522. APPV1.028–29. This resolution allowed the City to enter into an exclusive license with SAC, which gave SAC a three-year exclusive right to use the pools with two, one-year extensions totaling five years ("2016 license"). APPV1.031 § 3.0. Pursuant to this license, SAC agreed to pay the City $3 per hour for short-course lap lanes (25 yards) and $7 per hour for long-course lap lanes (50 yards), along with other various fees associated with SAC's use of the pools. APPV1.033 § 6.2. SAC later agreed as part of its exclusive license to provide volunteer coaching for the City's summer recreation team and support services during the City championship meet. APPV3.052–53 ¶ 13; APPV1.110 § 12.3; APPV1.053 § IV.

After the City granted the 2016 license to SAC and refused to permit Neptune any access to the City pools, Neptune retained counsel to investigate potential violations of the law. APPV3.036 ¶ 8.

On August 8, 2017, Neptune's attorneys sent the City a letter detailing that the grant of exclusive use rights to SAC amounted to an unconstitutional gift to SAC. APPV1.057–58; APPV3.036 ¶ 9. The City responded by agreeing to begin

an open procurement process that would allow Neptune to bid for the right to use the pools. In exchange, Neptune agreed that it would not pursue a Gift Clause claim against the City at that time. APPV3.036 ¶¶ 9–10; APPV1.010 ¶ 13.

The City then issued RFP Number 18RP017, seeking bids for the use of the pools and to "[Establish an] Aquatic Youth Competitive Swim Team." APPV1.068; APPV1.011 ¶ 15. The RFP Terms of Agreement established that the contract to be awarded would have a three-year duration with two, one-year extensions. APPV1.100 ¶ 9.

The City's RFP for the swim lanes

Scottsdale Procurement Code § 2-188(c)(5) provides that an "award shall be made to the responsible offeror whose proposal is determined in writing to be the most advantageous to the city taking into consideration the evaluation factors set forth in the request for proposals. No other factors or criteria may be used in the evaluation." RFP Number 18RP017 specifically identified the criteria that were to be addressed in each proposal and the weight that each criterion carried. APPV1.114. Only the evaluation factors expressly identified in the RFP could be used to evaluate the bids per city procurement code. The scored categories included:

a. Firm/Organization Qualifications – 20%

b. Key personnel Qualifications – 10%

c. Team and Facility Use/Tentative Project Schedule/Exceptions – 20%

d. Revenue/Lap Lane Hours – 30%

e. Membership/Residency Requirements Plan – 20%

Id.

The RFP stated that "[r]esponsive proposals will be evaluated based on the evaluation criteria established within the solicitation document." APPV1.079. The City prepared a scoring matrix which the Evaluation Committee was to use to judge each bidder's response to the criteria identified in the RFP. APPV1.139–44.

The matrix identified the following scoring rubric:

a. 5 – excellent; exceeds all specifications

b. 4 – above average; exceeds most specifications

c. 3 – average; meets all specifications

d. 2 – below average; meets most specifications

e. 1 – poor; does not meet specifications.

APPV1.140.

The City selected three City employees ("Evaluation Committee") to review and score the bids. APPV1.012–13 ¶ 23. On February 1, 2018, SAC submitted its bid. APPV2.078–214. On February 6, 2018, Neptune submitted its bid to compete for the swimming lane contract. APPV2.004–77.

The City miscalculates the RFP scores, then corrects them

The RFP stated that the proposal that was most "advantageous" would be determined by applying the identified criteria and its listed weight value. APPV1.114. But—as the City later admitted—the City miscalculated the scores of both bidders, which resulted in SAC being wrongly identified as the highest scoring proposal. APPV1.016–17 ¶ 38; APPV3.012–14. The City miscalculated the scores because its Purchasing Department incorrectly entered an element for price scoring. APPV3.054 ¶ 22.

	Neptune	SAC
Correct Score	211	210.25
Incorrect Score	161	192.75

As a result of this miscalculation, the City gave Neptune 161.00 points and SAC 192.75 points. APPV2.247–48; . Later, after the City corrected the errors, the results were reversed: Neptune had 211 points and SAC had 210.25. APPV3.019; APPV3.040 ¶ 27; APPV3.013–17. This meant that Neptune was, in fact, fully qualified and the highest and best bidder.

On March 26, 2018, Terry Erickson, the City's Parks and Recreation Manager, recommended that the City award SAC the lanes based on the miscalculated scores of the Evaluation Committee. APPV1.015 ¶ 29; APPV2.245.

The City's Bid and Contract Specialist then executed an approval to award the contract to SAC on March 26, 2018. APPV1.015 ¶ 30; APPV2.246.

On March 30, 2018, Neptune filed a formal protest of the City's award to SAC. APPV1.015 ¶ 33; APPV2.249–50. On April 3, 3018, Neptune requested a stay of the award. APPV2.252–53. The City responded to the protest on April 5, 2018, rejecting Neptune's protest pursuant to Procurement Code § 2-213—and contending that the City had followed all Procurement Code rules and procedures. APPV1.016 ¶ 35; APPV3.004–5. The City also denied Neptune the hearing it requested pursuant to Procurement Code § 2-213(c). APPV1.016 ¶ 36; APPV3.006–7. Only then did the City release the miscalculated scores and the sealed RFP bid proposals. APPV1.016 ¶ 37; APPV3.012.

Upon discovering the miscalculations in the bids, Neptune notified the City. APPV3.013–17. The City then admitted the error and acknowledged that Neptune did receive the most points under the RFP when properly calculated. APPV3.019. A memo drafted on behalf of City Manager also acknowledged that Neptune was "ahead" once the pricing was weighed appropriately. APPV3.031. Not only was Neptune "ahead" on scores, it was also ahead on two of the three evaluator's score totals. APPV3.013. This meant that not only was Neptune the most advantageous bidder, but that the committee did not "overwhelmingly favor" SAC over Neptune, as the City has since contended. APPV3.056 ¶ 29.

The City cancels the RFP and continues its award of the renewable license to SAC anyway

But, after admitting that the City had erred in its calculations and that Neptune outscored SAC, the City decided not to award the contract to Neptune. Instead, it reopened the RFP, reconvened the Evaluation Committee, and required both bidders to make supplemental presentations to the Committee. APPV1.017–18 ¶ 39; APPV3.018. On May 11, 2018, it issued a document claiming that the Procurement Code did not govern the award of a contract to the City's choice of sponsored swim teams. APPV3.030. Assistant City Manager Bruce Stockwell then stated that although Neptune was the most advantageous bidder, the Evaluation Committee had, through "overwhelming consensus," decided to award the RFP to SAC anyway. APPV3.056 ¶ 29. Stockwell also stated that the City was in "no way bound by the requirements set forth in the Procurement Code for this RFP." APPV3.030.

Then, the City decided to simply cancel the RFP instead of awarding the contract in accordance with the procurement process. *Id.*. On May 16, 2018, it formally cancelled the RFP without an award. APPV1.020 ¶ 46; APPV3.030. It then allowed SAC to continue to act as the City's sponsored team through the use of the 2016 license the City previously granted to SAC. APPV3.033. The City, several years later, raised the price of the short-course lanes that SAC was required

to pay from $3 to $4 per short-course lane and from $7 to $8 for long-course lanes. APPV3.052 ¶ 12b; APPV1.033–34 §§ 6.2.1 & 6.2.5.

On April 9, 2019, SAC exercised the first of its two, one-year extensions to allow it the exclusive right to contract for youth competitive swimming services in Scottsdale's public pools. APPV3.033; APPV3.043 ¶ 38.

How Neptune's and SAC's bids compare

In its RFP, the City said it would award the largest number of points based on the revenue that the respective bidder would generate. This counted for 30% of the score. This is the category that was identified by the City as being worth the most points. APPV1.114.

The differences between Neptune and SAC in the "revenue" category of the RFP arose from (1) the differences in how much each bidder proposed to charge "non-resident" swimmers and (2) how much each bidder offered to pay the City per short- and long-course lanes per hour. APPV1.108–9. In its proposal, Neptune promised to provide approximately $420,000 a year in revenue for just the cost of short- and long-course lap lanes, promising $12 per hour for both. APPV2.006, 11. By contrast, SAC's proposal offered to provide approximately $141,360 per year in revenue for the cost of the short- ($4) and long-course ($8) lap lanes. APPV2.083. Neptune also offered to provide an additional $18,000 to the City for non-resident fees, bringing the total annual revenue of Neptune's bid to

$438,000—far above SAC's projected revenue. APPV2.011. Indeed, SAC only offered to provide an additional $12,000 to the City for non-resident fees, bringing its total annual revenue to $153,360. APPV2.083. Thus, Neptune's total bid proposed revenue of more than $284,640 per year higher than SAC's proposal. Neptune's bid also proposed to reduce fees charged to Scottsdale residents by 10%. APPV2.006.

Comparing the exclusive license that was granted to SAC with the response to the City's RFP that was submitted by Neptune yields a total of $284,640 annually as reflected here or a total of $1,423,000 over the five-year contract period:

	Neptune	SAC	Difference
Short Course cost per lane hour times estimated hours to be used	$12 X 32,000 $384,000	$4 X 33,100 $132,400	$251,600
Long Course cost per lane hour times estimated hours to be used	$12 X 3,000 $36,000	$8 X 1,120 $8,960	$27,040

Non-Resident Fee	150 fees X $120 $18,000	200 fees X $60 $12,000	$6,000
Total	$438,000[4]	$153,360	$284,640

The $284,640 difference between the Neptune and SAC bids represents the benefit—i.e., the subsidy—that the City is giving SAC by awarding it exclusive use of the four pools instead of to the highest bidder, Neptune. And this subsidy is brought into stark relief when compared to City rates for what it describes as all other "commercial users" of short- and long-course swim lanes. "Commercial users" are other groups who use the pool that are not City "sponsored teams" for economic profit or private gain. APPV1.123. These users differ from the entity designated as the Sponsored Team, SAC. The Sponsored Team gets preferential access to City pools, and other facilities at a greatly discounted rate. APPV1.127. The City charges non-sponsored "commercial users" of the pools $10 per short-course lane and $23 per long-course lane with no cost differences for residents versus nonresidents. *Id*. Other cities in the Phoenix metropolitan area charge up to

[4] Plaintiff's Attorneys in earlier proceedings made some mathematical errors in their calculation of this number in correspondence with the City. This is the correct calculation according to the bids that SAC and Neptune provided for consideration of the RFP. See SAC's bid at APPV2.083 and Neptune's bid at APPV2.011.

$28 per long-course lap hour. APPV1.058. This means that the City is charging SAC $4 and $8 respectively for pool use that "commercial users" pay $10 and $23 for respectively.

Proceedings below

The trial court granted summary judgment in favor of the City on the procurement claim, holding that the "most advantageous bidder" was not necessarily determined by a higher numerical score. APPV3.065. It then held that Neptune failed to complete the RFP process because it protested against being required to make an "oral presentation" in additional to the RFP process after the notice of intent to award had been made. *Id.* It held that because Neptune "failed to continue with the process," the City's decision to cancel the RFP and award SAC the contract was rational. *Id.*

The trial court also granted summary judgment to the City on the Gift Clause claim, on the grounds that providing public recreational services is a public purpose, and that the award of the contract to SAC was "[not] so inequitable that it amounts to a subsidy." APPV3.066–67.

STATEMENT OF THE ISSUES

1. Did the City violate the Gift Clause when it gave SAC exclusive use of the swim lanes for an amount drastically below fair market value and after SAC submitted a losing bid for use of the facilities?

2. Did the City violate the Procurement Code when it cancelled the RFP, which was based on objective criteria, after Neptune submitted the highest and best bid, and then unilaterally awarded the contract to the losing bidder, SAC?

STANDARD OF REVIEW

The court "determine[s] *de novo* whether … the trial court properly applied the law" and "view[s] the facts and inferences drawn from those facts in the light most favorable to the party against whom judgment was entered." *Korwin v. Cotton*, 234 Ariz. 549, 554 ¶ 8 (App. 2014). The application and interpretation of constitutional and statutory provisions is reviewed *de novo*. *Morrissey v. Garner*, 248 Ariz. 408, 410 ¶ 7 (2020).

ARGUMENT

I. The City's grant of the exclusive use of public facilities to one private party at a cost to the public of $284,000 per year violates the Gift Clause.

A. The Gift Clause forbids government from subsidizing private entities by granting them public resources without receiving adequate return value.

Arizona's Constitution prohibits the City from "mak[ing] any donation or grant, *by subsidy or otherwise*, to any individual, association, or corporation." Ariz. Const. art. IX, § 7. This prohibition "was designed *primarily* to prevent the use of public funds…in aid of enterprises apparently devoted to *quasi* public purposes, but actually engaged in private business." *Turken*, 223 Ariz. at 346 ¶ 10.

The Gift Clause applies to *any* transfer of resources or grant of public benefits to private parties. *Indus. Dev. Auth. v. Nelson*, 109 Ariz. 368, 372 (1973) (The Gift Clause applies to government actions that "[give] money, credit *or other valuable advantages*" to private firms). Thus, regardless of whether a transfer of resources takes the form of an outright payment, or some other extension of a public benefit, an agreement still violates the Gift Clause if it fails to obtain adequate consideration in exchange for the grant of resources. Tax exemptions, for example, are the equivalent of outright payments. *See, e.g.*, *Op. of the Justices to the Senate*, 514 N.E.2d 353, 355 (Mass. 1987); *Columbus City Sch. Bd. of Educ. v. Franklin Cnty. Bd. of Revision*, 85 N.E.3d 694, 697 ¶ 15 (Ohio 2017) (same). Use of government facilities for free or for greatly reduced rates is also equivalent to a subsidy. *U.S. ex rel. Rodriguez v. Weekly Publ'ns, Inc.*, 68 F.Supp. 767, 770 (S.D.N.Y. 1946) (allowing businesses to send things through the mail for "extremely low postal rates" was "a huge subsidy."); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 835 (1995) (using government owned property is a form of subsidy). *City of Tempe v. Pilot Props., Inc.*, 22 Ariz.App. 356, 362 (1974) ("A donation of *public property* to a private corporation for a purpose that is deemed by the city fathers to be for the public good, in our opinion falls squarely within the prohibition of our constitution and the purpose of such a provision as determined by our Supreme Court.")

And "token rentals"—in which a private entity gets exclusive use of public property at a greatly reduced rate—is also a form of subsidy. *Ariz. Ctr. for Law in Public Interest v. Hassell*, 172 Ariz. 356, 367 (App. 1991).

The Supreme Court has crafted a two-prong test to determine whether a challenged use of government resources violates the Gift Clause. A transfer of public resources to a private entity must: (1) serve a public purpose, and (2) be in exchange for contractually-obligated, direct consideration that is proportionate to the expenditure. *Schires v. Carlat*, 480 P.3d 639, 642-43 ¶ 7 (Ariz. 2021). The Court must analyze the sufficiency of the consideration by identifying the *objective* fair market value of what is provided to the private entity by the government and comparing it to what is received in return. *Id.* at 644 ¶ 14. No deference is afforded to the government's assessment of this comparison. *Id.* at 646 ¶ 23. Instead, the Court looks at "what the public is giving and getting from [the] arrangement and … whether the 'give' so far exceeds the 'get' that the government is subsidizing a private venture." *Id.* at 644 ¶ 14.

An expenditure/subsidy violates the Gift Clause if it fails either the "public purpose" prong or the "adequacy of consideration" prong of the test. *Wistuber*, 141 Ariz. at 349. Here, the challenged use fee for swim lanes at a greatly discounted rate fails both prongs.

On the public purpose prong, the trial court made the first of its two legal errors. It declared that "[p]roviding recreational services" is a "public benefit" and therefore that the City's actions satisfied the public purpose requirement of the Gift Clause. APPV3.066. But that was not the question. Nobody disputes that recreational services are a public benefit—and both SAC and Neptune provide recreational services.[5] Rather, the question is whether a public purpose was served by the City's actions in cancelling the RFP and unilaterally awarding the contract to SAC despite the fact that Neptune was the highest bidder. Because those actions were an abuse of discretion, the City's award of the use of public facilities to SAC violated the public purpose prong. *Turken*, 223 Ariz. at 349 ¶ 28.

The second error came in addressing the adequacy of consideration. In making this analysis, the Court must "identify the fair market value of the benefit provided to the entity and then determine proportionality." *Schires*, 480 P.3d at 646 ¶ 23. In this case, the City granted exclusive use of a limited public resource to one private party for less than one third of its objective fair market value. As a

[5] SAC is not a public institution, but a private athletic organization that charges substantial fees and requires satisfaction of an athletic tryout before a person can join. It does not provide "public" recreational services, but instead uses pool facilities for its members' training. The Superior Court's conclusory assertion that the City's grant of the contract to SAC served a public purpose because it aids in public recreation was therefore legal error.

matter of law, that is inadequate consideration—and amounts to a subsidy to SAC of over $284,640.

Yet the trial court failed to apply an independent, non-deferential comparison of the market values. Instead, it deferred to the City's determination of adequacy of consideration. As *Schires* made clear, however,[6] a public entity is afforded no deference in determining whether the recipient of a government benefit is giving adequate consideration to the government in exchange for the public expenditure. *Id.* The court below held that "[j]ust because Neptune agreed to pay more does not mean that the license to SAC … amounts to a subsidy," APPV3.066–67, but the court engaged in no comparison of values. On the contrary, it concluded only that it "cannot say, on this record" that what the City gave was more than what the City got. APPV3.066. But that deference to the City's assessment of values is contrary to the requirements of *Shires*.

B. The City's abuse of discretion in unilaterally cancelling the RFP and granting an exclusive license to the least advantageous bidder violated the public purpose requirement.

It is "a core Gift Clause principle" that "[p]ublic funds are to be expended only for 'public purposes' and cannot be used to foster or promote the purely private or personal interests of any individual." *Turken*, 223 Ariz. at 347–48 ¶¶

[6] *Schires* was decided after the Superior Court issued its ruling regarding Neptune's Gift Clause challenge.

19–20. Further, "determining whether governmental expenditures serve a public purpose is ultimately the province of the judiciary." *Id.* at 346 ¶ 14.

Although government entities have broad discretion in determining what constitutes a "public purpose," when a government body's discretion has been unquestionably abused, the court will not find a public purpose. *Id.* at 349 ¶ 28. Where a government entity engages in a series of actions that ignores its own rules, processes, and procedures for the benefit of one private firm over another, there is an abuse of discretion—and consequently, a violation of the public purpose requirement.

Differential treatment of similarly situated parties involved in the same activity—where that disparity cannot be justified by some public rationale—is an abuse of discretion. *Brown v. City of Phoenix*, 77 Ariz. 368, 373–76 (1954). And it is plainly an abuse of discretion for the City to disregard its own processes and rules to adulterate an open and competitive procurement process. *Id.*; *Clay v. Ariz. Interscholastic Ass'n*, 161 Ariz. 474, 476 (1989).

The trial court concluded that providing public recreation is a public purpose and ended its public purpose analysis there. But that was never in dispute. SAC does not provide recreational opportunities to the general public. It is a private entity that uses City owned facilities for its own private purposes. Thus, the question before the Court is whether the City abused its discretion by throwing out the terms of the RFP when it became clear that SAC was not the most advantageous bidder, and simply extending the existing contract with SAC. *That*

was an abuse of discretion—one that benefitted a private party. Thus, the City's actions did not serve a public purpose.

Obviously, the City can rent City facilities to private parties such as SAC or Neptune for private use. But when it does so, it must ensure that the public's interest is protected by getting adequate consideration from the private entity in exchange for the use of those facilities. The open RFP process is supposed to ensure that this is accomplished. *See* *Turken*, 223 Ariz. at 350, ¶ 32 ("The potential for a subsidy is heightened when, as occurred here, a public entity enters into the contract without the benefit of competitive proposals."). And the City initially admitted the necessity of following that process. But when the bid resulted in a highest bidder that the City did not wish to award the contract to, it then unilaterally cancelled the RFP, and awarded the use of the swim lanes to the losing bidder instead. That was an abuse of discretion. *See* *Planning & Design Solutions v. City of Santa Fe*, 885 P.2d 628, 634–35 (N.M. 1994) (city abused its discretion by failing to follow its own RFP); *Forest City Land Grp. v. Ohio Dep't of Mental Health*, Nos. 19079, 19080, 1999 WL 194515, at *3 (Ohio App. Mar. 31, 1999) (same); *City of Dayton ex rel. Scandrick v. McGee*, 423 N.E.2d 1095, 1097 (Ohio 1981) (government abused discretion when it "modified [RFP] requirements without notice" "after the bids were opened.").

In *Brown*—a case remarkably like this one—two companies bid to lease space in the Phoenix airport. The Phoenix City Council, however, selected the losing bidder. 77 Ariz. at 371. The Supreme Court found this improper. It recognized that public contracting is necessarily an exercise of discretion, but concluded that the city had abused that discretion by awarding the lease to the low bidder where the city's ordinances, like the Procurement Code in this case, required the award to go to the highest responsible—i.e., most advantageous—bidder. *Id.* at 373. As in this case, the city argued that it was free to reject all bids, and therefore that its actions were not arbitrary—but the court found that these "magic words" could not justify the city's arbitrary decision to "reject the lower bid" "between two bidders equally responsible." *Id.* The city appeared to be granting the lower bidder the award out of "a sense of loyalty … for past services rendered," and that was improper. *Id.* at 375. Yet the court emphasized that there was no evidence that the city acted in bad faith—and that such a charge would make no difference. *Id.* at 377. The evidence showed that the city had "a fixed intention" to award the lease to the incumbent lessee, and that was unlawful because "[t]he letting of contracts for public business should be above suspicion of favoritism." *Id.*

Here, too, the City acted arbitrarily and capriciously by rejecting Neptune's bid after it became clear that Neptune was the winning bidder, then adding

additional requirements onto the RFP *post hoc*, and then cancelling the entire RFP process after the winner was determined. APPV3.030. The facts suggest a fixed intention by the City to award the contract to SAC, which has enjoyed exclusive use of the pools for over 55 years now. But even absent any bad faith on the part of the City, its arbitrary decision to disregard the terms of the RFP and its own Procurement Code, and to award the use of the lanes to SAC after Neptune won the bidding contest was an abuse of discretion—which means it violates the public purpose requirement.

In *Osborn v. Mitten*, 39 Ariz. 372 (1932), the court found that Maricopa County unlawfully contracted with a printer that was not the lowest responsible bidder based on inadequate investigation of the other bidder's qualifications. *Id.* at 381. The County awarded the contract to the incumbent printer and failed to investigate the qualifications of other bidders, simply because the incumbent printer had provided "wonderful" service in the past, which the court said was unlawful. *Id.* at 380.

As in this case, the County argued that it retained the authority to reject all bids, and therefore it had discretion to award the contract as it chose, but the court rejected that argument: "[The County] could, of course, reject all bids…if they concluded that none of the bidders was responsible or that all of the bids were exorbitant or excessive; but, if the board is satisfied that bids are reasonable and

fair and proceed to award the contract, they must let it to the lowest responsible bidder." *Id.* at 384. Here, the City set out criteria in the RFP as to what would determine the status of responsible or "most advantageous" bidder—and then proceeded to disregard those criteria once it became clear that Neptune offered the best bid. APPV1.064–137. The City never indicated that Neptune was an irresponsible bidder, and once it was satisfied that a bidder was responsible and chose to award the contract, the City was bound to follow the procurement process. *Cf.* *Osborn*, 39 Ariz. at 377. Neptune won that process. It was thus an abuse of discretion, and consequently, a violation of the public purpose requirement, for the City to subsequently cancel the RFP and award the contract to SAC. *Accord*, *City of Phoenix v. Wittman Contracting Co.*, 20 Ariz. App. 1, 5 (1973).

The City offers two arguments below as to why its actions—in canceling the RFP after Neptune won, and awarding the contract to SAC instead—was not an abuse of discretion. Neither are persuasive.

First, it argues the RFP included the language "the City expressly reserves the right to … reject any or all Proposals." APPV1.079 ¶ 29. But as *Osborn*, 39 Ariz. at 384 makes clear—and as *Brown*, 77 Ariz. at 373, *City of Santa Fe*, 885 P.2d at 630, and *Wittman Contracting*, 20 Ariz.App. at 5, reiterate—this language cannot justify the City's arbitrary decision to cancel the process *after* the bids were

disclosed and *after* Neptune won—and to then award the contract to the losing party.

In *Wittman Contracting*, the Court of Appeals made clear that while the government can reject all bids in a contracting process, it cannot do so after it has already determined the results of the process: "[O]nce the City determines to award a contract to someone, such as 'the lowest bidder,' the City has completed the exercise of its discretion and it must then award the contract to the 'lowest bidder.'" *Id.* Here, the City did determine to award the contract to someone—to SAC, based upon the City's mathematical error—and therefore it had no discretion to cancel the RFP. Instead, it was required to award the contract to the best bidder—i.e., Neptune.

As the Florida appellate court has observed, the government's reserved power to cancel an RFP, is "subject to the requirement that its exercise be not arbitrary, unreasonable or capricious. Without these limitations the purpose of competitive bidding is circumvented. Rejection of all bidders then becomes a means of allowing a favored bidder another chance." *Wood-Hopkins Contracting Co. v. Roger J. Au & Son, Inc.*, 354 So.2d 446, 450 (Fla. Dist. Ct. App. 1978).

Second, the City argues that the "most advantageous bidder" was not determined mathematically, meaning that it could consider other factors in awarding the contract. But in the RFP application itself, the City said that the

ranking of the proposals would be determined mathematically, by stating that, "[e]ach proposal will be reviewed in entirety and assigned a score with respect to each of the criteria. The proposals will be ranked by the evaluation committee according to their total weighted ranking." APPV1.114. The City itself identified the ranking, scores, and values given each category, and if some other factor was more or less important, this was where that valuation should have happened.[7] Instead, what the City did was to "introduced new criteria in evaluating the bids" "[a]fter the bids had been opened," which is an abuse of discretion. *City of Santa Fe*, 885 P.2d at 630.

The City also argues that it could request supplemental presentations pursuant to the Procurement Code and the RFP application. This is true *until* there is a "conclusion of … the evaluations." APPV1.079 ¶ 29. The City specified in the RFP application when the conclusion of the evaluations would happen—namely, when "a recommendation is made to award." *Id.* That occurred on March 26, 2018. APPV2.245. By that date, the evaluation committee had evaluated the proposals and provided scoring based on the proposals' responsiveness to solicitation requirements. This means that based on the scoring criteria, the evaluation committee believed it had enough information about both proposals to

[7] In fact, the criteria were given differential values for ranking, for instance the City identified that Key Personnel was worth only 10% of the final score, while Revenue per lap lane hour was worth 30% of the score. *Id.*

fairly score them. In fact, they were scored. APPV2.215–44. And the City accepted the scoring of the evaluation committee. APPV2.245. It only wanted more information *after* it realized that SAC lost. APPV3.018. To reopen the process for further examination would not be to clarify information for the evaluation committee, but to add a new consideration to the process not listed in the RFP application. APPV1.114. Such an effort to move the Goalposts is an abuse of discretion. *Wittman Contracting*, 20 Ariz.App. at 5.

C. The City's actions violate the public purpose requirement.

As explained above, the City's arbitrary and capricious cancellation of the RFP violated the public purpose requirement of the Gift Clause. *Turken*, 223 Ariz. at 349 ¶ 28 (where "governmental body's discretion has been 'unquestionably abused,'" "a public purpose [is] absent."). The Superior Court disregarded this point because it concluded that public recreation serves a public purpose. But that was reversible error because SAC does not provide *public* recreational activities. It is a wholly private organization that determines its own membership based on both annual and monthly payments and the satisfactory completion of an athletic test.

In all previous cases upholding government expenditures on public purpose grounds, the private entity involved was in some way serving the *general* public—for example, "diversifying [a] City's economic base and work force" or "revitalizing an underused area in the City." *Schires*, 480 P.3d at 643 ¶ 10. Here,

by contrast, SAC does not provide swimming opportunities to the general public—it uses the swim lanes for its own members. And membership in SAC is not open to all—only those skilled enough to meet its athletic standards, and able to pay the hefty membership and training fees, are able to swim in SAC's lanes.

Even if SAC's activities could be said to serve a public purpose, the City has failed to properly supervise or monitor SAC's use of public facilities to ensure that this purpose is, in fact, accomplished through SAC's use of the pools. In *Kromko v. Ariz. Bd. Of Regents*, 149 Ariz. 319, 321 (1986), the court made clear that when the government pays a private entity to provide a public service (in that case, hospital services), the government must ensure that there is proper public oversight and control over the use of the public resources to ensure that the public goal is accomplished in objectively measurable ways. *Id.* at 319. In *Kromko*, the private entity's "internal organization" was subject to approval by the Arizona Board of Regents (ABOR); ABOR appointed the hospital's board of directors; ABOR retained the right of approval before the private entity engaged in any financial transactions that could adversely affect the interests of the state or before its bylaws or articles could be amended; the entity was required to provide annual progress reports and audited financial statements; and all of its assets upon dissolution would revert to ABOR. *Id.* at 321. In essence, the nonprofit hospital was an alter ego of ABOR.

The City's grant of the pool contract to SAC here is 180 degrees opposite from the contract approved in *Kromko*. SAC's internal organization is not subject to approval by the City, SAC appoints its own Board of Directors, SAC retains the right of first approval before it engages in any transactions that could adversely affect the interests of the state or before its bylaws can be amended, and should SAC be dissolved its assets are not required to pass to the City. There is, in short, no meaningful public oversight of SAC's activities to ensure that it provides the general public with swimming recreation opportunities. That, of course, is because SAC does not use the pools for public recreation purposes—it uses these public pools for private purposes.

II. The lower court erred in failing to evaluate the objective fair market value of what the City provided to SAC and what the City received in return.

To survive Gift Clause scrutiny, a use of government resources by private parties must not only serve a public purpose but must also be supported by adequate consideration. "[B]ecause paying far too much for something effectively creates a subsidy from the public to the seller," courts compare what the government gives with what it gets in return to ensure that the government is not subsidizing a private entity in the guise of an exchange. *Turken*, 223 Ariz. at 350 ¶ 32. This analysis "focuses … on the objective fair market value of what the private party has promised to provide in return for the public entity's payment."

Id. ¶ 33. And because the assessment of objective fair market value is an objective one, no deference is afforded to the City's own comparison of values. *Schires*, 480 P.3d at 646 ¶ 23.

Here, the consideration analysis is simple. The City is providing a $284,000 subsidy to SAC each year because that is the difference between the market rate for the lanes and the amount that SAC is paying for them. Because the City chose to reject Neptune's bid and allow SAC to remain in place as the exclusive user of the lanes—despite the fact that the City will obtain $284,000 less in revenue by doing so—the selection of SAC over Neptune is the functional equivalent of a direct subsidy of that amount to SAC.

Other than a below-market payment to the City, SAC doesn't promise to give the City anything that Neptune didn't already promise to give them in the RFP process. APPV1.064–137; APPV1.030–56. SAC is not contracting with the government to provide a public service, as in *Kromko*—it is simply a private entity using government-owned property for its private purposes. It does not promise or provide free swim days for the general public. Membership in SAC is not open to the public, only to those children who can pass SAC's subjective tryout process. In fact, SAC has one of the highest membership fees in Arizona, higher than Neptune's fees, while SAC pays the lowest per lane fees in the state. All that SAC agrees to in its arrangement with the City are the basic requirements of paying for

use of swim lanes, paying for office and rental space (at a greatly discounted price), and providing those services that were demanded in the RFP. APPV1.053, APPV1.034.

Courts use the objective fair market value for the consideration analysis. *Turken*, 223 Ariz. at 348 ¶ 22. Fair market value is the "price a desirous but unobligated purchaser would pay a desirous but unobligated seller after consideration of all uses to which the property is adapted and for which it is capable of being used." *Mid First Bank v. Chase*, 230 Ariz. 366, 368 ¶ 7 (App. 2012). Market value is "what the property would sell for between a willing buyer and a willing seller in an arms-length transaction." *Id.* Where there is a ready market, proof of objective fair market value is simple to quantify.

The most objective and reliable way to assess the fair market value of the exclusive use of swim lanes the City granted to SAC is to assess what each party was willing and able to pay for that use in an open and competitive bid.[8] *See TCC Enters. v. Estate of Erny*, 149 Ariz. 257, 258 (App. 1986) (fair market value is the price a willing buyer would pay a willing purchaser for capable use of the

[8] In fact, the record establishes that the City applied only an "educated guess" when it calculated the value of the swim lanes. APPV2.249. Rather than relying on a guess, the Court should instead identify the objective fair market value of what the government has provided and what the government has received in order to determine proportionality. Shires, 480 P.3d at 646 ¶ 23. Under that test, the City's grant of an exclusive license to SAC fails.

property); *see also* *Honeywell Info. Sys., Inc. v. Maricopa Cnty.*, 118 Ariz. 171, 174 (App. 1977) (fair market value is "what the property would sell for between a willing buyer and a willing seller in an arms-length transaction.")

Here, the facts are undisputed: Neptune willingly offered to pay the City $12 per short-course lane per hour and $12 per long-course lane per hour. APPV2.011. SAC offered to pay the City $4 per short-course lane per hour and $8 per long-course lane per hour. APPV2.083. The record is further plain that Neptune is a ready, willing, and able buyer for the use of these public resources. Neptune is an established organization that has used pools across the Phoenix Metro area and has long sought to utilize Scottsdale public facilities. APPV1.007 ¶ 5. Thus, as evidenced by Neptune's willingness and ability to pay $12 per short-course lane and $12 per long-course lane, Neptune's bid *is* the fair market value of the swim lanes.

As for what the City is receiving in return—i.e., adequacy of consideration—we know precisely what the City is receiving from SAC in exchange for its grant to SAC of exclusive use of the swim lanes. Despite Neptune's far higher bid, the City is currently renting the lanes to SAC for only $8 per long-course lane per hour and $4 per short-course lane per hour. In other words, the City is receiving *three times less* than the fair market value for the short-lanes and *one-third* less than the fair market value of the long-course lanes.

When the non-resident fees are added, this equates to a subsidy to SAC of at least $284,600 from the City *per year*. Under the objective fair market analysis required by *Schires* and *Turken*, this is grossly disproportionate and a violation of the Gift Clause.

If we look at the reasonable use of the property for *other* commercial users, *cf. TCC Enters.*, 149 Ariz. at 258, the City's subsidy to SAC is even greater. The City charges other "commercial users" $23 per hour for long-course lanes and $10 per hour for short-course lanes. APPV1.127. This means the City is providing SAC exclusive access to public property at a rate that is three times less for long lanes and over two times less for short lanes. Again, under an objective fair market analysis, this is grossly disproportionate and a violation of the Gift Clause.

Nor can the City's dealings with SAC be described as "an arms-length transaction." *Honeywell*, 118 Ariz. at 174. An arm's length transaction is a "dealing[] between two parties who are not related or not on close terms and who are presumed to have roughly equal bargaining power; not involving a confidential relationship." Black's Law Dictionary (11th edition, 2019). Arm's length transactions, such as that proposed by Neptune, ensure that "uncontrolled transactions are subject to the full play of market forces," so that they can be used as a valuation benchmark. John Neighbour & Jeffrey Owens, *Transfer Pricing in*

the New Millennium: Will the Arm's Length Principle Survive?, 10 Geo. Mason L. Rev. 951, 952 (2002).

There was no preexisting relationship between Neptune and the City, by contrast, and Neptune submitted a bid in response to an open public procurement process. Consequently, the bid provided by Neptune has all of the earmarks of an arm's length transaction. Although Neptune was the highest bidder, once the City properly added the scores from its evaluation of both bids and determined that Neptune actually won, the City unilaterally declared that it was not bound by the RFP terms or the Procurement Code, and awarded the license to SAC, the losing bidder, anyway. And it did so at an amount far below the objective, fair market value of the swim lanes. The City's actions therefore amount to a subsidy to SAC because they fail to advance a public purpose and fail to obtain adequate consideration in return for the investment or use of public resources.

III. The City's refusal to grant the contract to the most advantageous bidder, and to disregard its own RFP was arbitrary and capricious.

In addition to violating the Gift Clause by granting government benefits to SAC for which SAC pays inadequate consideration, and in an arbitrary manner that fails the public purpose requirement, the City also violated its own Procurement Code in making the award.

As noted above, the City began the RFP process by making a promise: it would award the contract for use of the swim lanes to the most advantageous

bidder as determined according to certain objective criteria specified in the RFP. APPV1.114. Neptune relied on that promise and submitted a proposal. When the City's math error initially rated SAC as the winner, Neptune ran its own calculations and discovered that the City's basic addition was wrong. APPV3.013. Correcting for the scoring error, Neptune found, and the City confirmed, that Neptune had won, 211 to 210.5. APPV3.019. When it thought SAC had won, the City declared the process complete. Once it realized it made a simple math error, the City changed the rules and the scoring criteria by adding a new, highly subjective category: an in-person interview process. APPV3.018.

Then, before interviews were conducted, the City canceled the RFP and renewed SAC's current contract. APPV3.030; APPV3.033. It justified that decision by stating the RFP was not strictly governed by the Procurement Code, but that the Procurement Code was only a "guide in determining which offer [was] most advantageous to the City." APPV3.030. This was incorrect—and a violation of the Code.

A. The City improperly ignored its Procurement Code and the criteria specified in the RFP and improperly asserted discretion to "re-score" the bids.

Section 2-188(c)(5) of the Procurement Code provides that an "award shall be made to the responsible offeror whose proposal is determined in writing to be the most advantageous to the city taking into consideration the evaluation factors

set forth in the request for proposals. *No other factors or criteria may be used in the evaluation.*" In other words, the City, after scoring proposals, must make an award to the winning bidder.

The RFP itself stated an explicit method of determining "most advantageous," and, after evaluation, Swim Neptune was that bidder. APPV1.114. The term "most advantageous" is used to distinguish a scoring process from the "lowest bidder based on price." *See, e.g.*, A.R.S. § 41-2534(G); *see also* AAC R2-7-C317(A) (requiring agency procurement officers to award contract to "the responsible offeror whose offer is determined to be most advantageous to the state based on the evaluation factors set forth in the solicitation").

The Superior Court made an erroneous distinction about the term "most advantageous." It stated that "[n]othing in the RFP, or in the Procurement Code or rules indicate that a numerical calculation of points would determine the 'most advantageous bidder.'" APPV3.065. But while it is true that non-*monetary* factors were part of the overall scoring process, the numerical calculation—the score—*is* a requirement that the RFP applications be judged mathematically. Under the terms of the RFP, the Evaluation Committee should apply the criteria that were spelled out in the application to determine the "most advantageous" bidder. The RFP provided a system for weighting all of the factors to determine "most advantageous," and that system did allow the evaluation committee to grade non-

price factors—but it did so through an objective, mathematical process that weighted those factors along with price. The City had no discretion to change the scoring once that was accomplished.

The Procurement Code states that "evaluation of proposals shall be based on the evaluation factors set forth in the Request for Proposals," and that "the contract *shall be awarded* to the offeror whose proposal is determined in writing to be the most advantageous to the City *based on the factors set forth in the Request for Proposals.*" *See* Procurement Code §§ 2-188.18 and 2-188.23. The Superior Court declared that because the RFP used the phrase "most advantageous" bidder, the City was not required to award the contract based on "a numerical calculation of points." APPV3.065. But as the *Brown* court said, 77 Ariz. at 373, such "magic words" cannot evade the requirements of the RFP and the Procurement Code, which did promise that the contract would be awarded to the most advantageous bidder, as determined by the method specified in the RFP—and which provides that an "award *shall* be made" to the party whose proposal is determined to be the most advantageous based on "the evaluation factors set forth in the [RFP]. *No other factor or criteria may be used in the evaluation.*" APPV1.114; Procurement Code § 2-188(c)(5).

In short, Appellants do not deny that non-money factors are part of the overall evaluation. Rather, they contend that these non-money factors were

already included in the process as part of the scoring process. The City incorporated those factors when it followed the RFP process—and then jettisoned the result of that process and added *new* criteria *post hoc*, in order to reach a desired result—which is a violation of the Procurement Code.

B. The City also violated the Procurement Code by changing the evaluation process and the criteria for most advantageous after the award was determined.

Although the City has discretion in awarding public contracts, its determination as to the most advantageous bidder was *complete* when the City completed its assessment and reached the decision to award the contract. *City of Santa Fe*, 885 P.2d at 630; *Osborn*, 39 Ariz. at 384. At that point, the City had "completed the exercise of its discretion and it must then award the contract to the 'lowest bidder.'" *Wittman Contracting*, 20 Ariz.App. at 5.

In *Wittman Contracting*, the city awarded a contract to the low bidder, but a disappointed bidder then argued that *his* bid was actually the lowest once a statutory preference was included in the calculation. *Id.* at 3-4. Because the contract had already been awarded, the city argued that the court could not compel it to change the award to the disappointed bidder. But the court rejected that argument. Once the city finds a bid responsive and *determines* to award a contract, it said, the city's exercise of discretion comes to an end, and the "powers and duties of the City thereupon [become] … merely 'ministerial.'" *Id.* at 5. In other

words, because the law at issue in that case—like the Procurement Code and the RFP here—specified *how* the best bid would be calculated, and the city followed that process, found a responsive bidder, and decided to award the contract, the next step was one of "pure mathematics." *Id.*

The same principles apply here. Neptune was the most advantageous bid based on the formulae specified in the RFP and were made mandatory and exclusive to the Procurement Code. Contrary to the Superior Court's assertion, APPV3.065, the RFP application itself, in fact, did require a mathematical calculation, APPV1.114—and so does *Wittman Contracting*. The evaluation process came to an end when the City decided that there was a most advantageous bidder, issued a Recommendation for Award form, APPV2.245, sent out a signed approval routing sheet, APPV2.246, and stated that it had "concluded that the recommended award [go] to…(SAC) as the most advantageous contractor." APPV3.009. Then, once the City's mathematical error was corrected, and it was revealed that Neptune was the most advantageous bidder, the City's ministerial duty was to respect the process set forth in the RFP and the Procurement Code, and grant the purely mathematical winner the contract. *Wittman Contracting*, 20 Ariz. App. at 5. When it instead reopened the RFP process, added a *post hoc* presentation requirement, then cancelled the RFP and gave the contract to SAC, the City abused a discretion that had already been "completed." *Id.*

The Superior Court therefore erred in holding that because non-monetary factors are part of the determination of "most advantageous," the City could—even after the process of determining "most advantageous" had been completed—disregard everything that had gone before and award the contract as it pleased. That erroneous ruling would allow a city to continue the evaluation process after scoring was completed, and the most advantageous bidder was determined, by creating new criteria for evaluation after the fact, and then award contracts arbitrarily "to one who bid one percent of his gross income because he had six children to support, [or] was hale-fellow-well-met, or voted the straight 'vegetarian ticket,'" or other "[s]uch nonsense." *Brown*, 77 Ariz. at 376. That is not proper.

In *McGee*, 423 N.E.2d at 1096-97, the city solicited bids for a construction project, and, instead of selecting the least expensive bidder among the equally qualified candidates, it added an unannounced *post hoc* requirement to the scoring criteria—a residency requirement—which shifted the ultimate outcome. The court held that City officials had abused their discretion by adding *post hoc* criteria to determine the bid that was "most advantageous." *Id.* at 1097. Even without proof or even an allegation of favoritism, the court said the practice of adding *post hoc* requirements was still arbitrary and unlawful. *Id.* at 1098. To allow this, the court said, would turn the bidding process into "an uncharted desert, without landmarks or guideposts, and subject to a city official's shifting definition[s]." *Id.*

Here, the City was bound by both the Procurement Code and the RFP to select the bidder that it determined—after scoring the respective bids according to the objective standards in the RFP—was the most advantageous. *Wittman Contracting*, 20 Ariz.App. at 5; *Wood-Hopkins Contracting Co.*, 354 So.2d at 450. While the City could have cancelled the RFP for legitimate reasons, it had no authority to do so after it made the determination to award the contract—simply as a means of circumventing the RFP and the Procurement Code. *City of Santa Fe*, 885 P.2d at 634–35.

The fundamental rule in *Brown* is that where there are multiple bidders for a right to use taxpayer funded property, the officers charged with awarding that property must "secure as great a return … as is reasonably possible" for the use of that property. 77 Ariz. at 373. While non-monetary factors can play a role, they are not an excuse for subjective or arbitrary decision-making. That is why the Procurement Code and the RFP carefully lay out the factors to be considered in the process. That process was followed and reached a conclusion when the City decided to award the contract. That decision included a mathematical error, which, upon correction, revealed Neptune to be the most advantageous bidder pursuant to the RFP and the Procurement Code. The City was then obliged to award Neptune the contract. *Wittman Contracting*, 20 Ariz.App. at 5. Instead, and in violation of the RFP's objective standards, the City chose to "change[] the rules in the middle

of the game," *City of Santa Fe*, 885 P.2d at 633—or rather, *after* the game was over—by requiring additional *post hoc* criteria. It then canceled the RFP and issued the contract to SAC anyway. Such arbitrary decision-making fails to fulfill the "high trust" vested in the City, and requires reversal. *Brown*, 77 Ariz. at 375.

IV. Neptune did not abandon the procurement process.

The Superior Court held that because Neptune protested the City's *post hoc* demand that it participate in an in-person presentation—after the RFP process was completed and the decision to make an award had been made—that Neptune had "failed to continue with the [procurement] process." APPV3.065. But this misconstrues Neptune's protest, which was not a refusal to continue with the process, but rather an objection to the City's decision to add additional requirements to the RFP after the bids were opened and a winner determined. *Cf. City of Santa Fe*, 885 P.2d at 634–35 (city may not add additional criteria *post hoc*); *McGee*, 423 N.E.2d at 1097 (same). Because the RFP did not require this step, it was improper for the City to add it after the fact—and Neptune's protest was therefore not any kind of waiver. APPV3.021; APPV3.023–26. In fact, SAC also objected to reopening the bidding process. APPV3.028–29. And the City itself recognized that Neptune's response was a protest, not a waiver, and dismissed the protest. APPV3.006.

In other words, although the City engaged in an open procurement process to establish fair market value in an arm's length transaction, and then made a decision to award the contract—albeit based on its mathematical error—it then abandoned that process once the error was discovered, and added an additional requirement to the process in order to award the contract to its favored bidder. *See Turken*, 223 Ariz. at 350 ¶ 32 ("the potential for a subsidy is heightened when … a public entity enters into the contract without the benefit of competitive proposals."). That was improper.

In *City of Santa Fe*, the government solicited bids for professional services in developing a mixed-use community. As in this case, the RFP listed the factors to be considered in weighing proposals. 885 P.2d at 630. The city received 11 proposals, which were evaluated by a committee, and the committee found that a company called PDS made the "most advantageous" bid. *Id.* But the city council then decided to award the contract to the fourth-ranked bidder, Mazria, instead, because Mazria was headquartered in New Mexico. *Id.* The court found that this was improper, because the city could not lawfully add new criteria to the RFP requirements after having weighed the RFPs and made the decision to award the contract to PDS—to do so was "chang[ing] the rules in the middle of the game." *Id.* at 633. The city argued in that case, as the City argues here, that the RFP allowed it to reject all bids, so it could select the contractor it pleased, but the court

rejected that argument because the city had "introduce[ed] a locality requirement after the bids were opened" and "reject[ed] the proposals after making a contract award." *Id.* at 634. That meant the City was "evad[ing] the [Procurement] Code … 'under the color of a rejection.'" *Id.*

The same is true here. The city weighed the two RFPs, made a decision to award the contract, and did so. Only after it was revealed that Neptune was the best bidder did the City change the rules, invoke the *post hoc* in-person presentation requirement, and demand that Neptune and SAC offer presentations. APPV3.018. Neptune protested against this requirement on the grounds that it was improper, APPV3.023, as did SAC. APPV3.028. The City thereupon cancelled the RFP and gave SAC the award.

The City contends that the RFP itself stated that an in-person presentation might be required before the awarding of the contract. That is true—but no such presentation was required prior to the City's decision on the RFPs. *Cf.* *City of Santa Fe*, 885 P.2d at 634. Once the City reviewed the bids and made a determination and decided to award the contract—and then discovered its mathematical error—it was required to award the contract to Neptune, not to change the rules of the game and add an additional requirement to the process. As the *Santa Fe* court put it, the government in a procurement process certainly "may adopt new criteria," but "it must do so properly." *Id.* at 633. It was *not* proper for

the City to abruptly add additional requirements *after* a determination had been made in an open and competitive bidding process—and then to cancel the RFP and award the contract to SAC.

Neptune's (and SAC's) protests against the *post hoc* in-person presentation requirement were therefore proper, and the Superior Court erred in holding that Neptune was properly denied the contract for failure to participate in the process.

CONCLUSION

Based on the foregoing, Neptune respectfully requests that the judgment should be *reversed* on all claims and the Court issue a writ of mandamus compelling the City to award the contract in question to Neptune.

NOTICE UNDER RULE 21(A)

Appellants request costs and attorney fees pursuant to A.R.S. § 12-341 and 12-348 and the private attorney general doctrine.

Respectfully submitted April 6, 2021 by:

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