IN THE SUPREME COURT

STATE OF ARIZONA

NEPTUNE SWIMMING FOUNDATION, Plaintiff/Appellant, v. CITY OF SCOTTSDALE, Defendant/Appellee.	Supreme Court No. CV-23-0076-PR Court of Appeals, Division One Case No. 1 CA-CV 21-0053 Maricopa County Superior Court Case No. CV2019-007172

PLAINTIFF/APPELLANT'S PETITION FOR REVIEW

Timothy Sandefur (033670)
Jonathan Riches (025712)
Scharf-Norton Center for Constitutional Litigation at the GOLDWATER INSTITUTE
500 E. Coronado Rd.
Phoenix, Arizona 85004
(602) 462-5000
Litigation@goldwaterinstitute.org

Dennis L. Hall (013547)
DENNIS L. HALL, ATTORNEY PLLC
23623 N. Scottsdale Rd., Ste. D3 #265
Scottsdale, AZ 85255-3471
(602) 740-5045
dennis@dlhall.net

Attorneys for Plaintiff/Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

INTRODUCTION

This case concerns the constitutionality of a city's choice to give public resources to a private business's use for rates far below the objective fair market value of those resources. Relying on well-established precedents such as *City of Tempe v. Pilot Properties, Inc.*, 22 Ariz. App. 356, 362 (1974) and *Arizona Center For Law In the Public Interest v. Hassell*, 172 Ariz. 356 (App. 1991),[1] which say that the Constitution's Gift Clause forbids not only the state overpaying when buying things, but also under-charging when selling or leasing things, the Petitioner contends that the city's below-market rates are an unconstitutional subsidy to that private firm.

For over 50 years, the City of Scottsdale ("City") has given Scottsdale Aquatics Club ("SAC") the *exclusive* right to use four coveted public swimming pools for its youth swimming programs, either for free, or at rates substantially below the objective fair market value. APP.V3.034; APP.V1.005 ¶ 4; APP.V1.021. Another club, Neptune Swim Foundation ("Neptune"), which is the Petitioner here, sought to use these valuable public resources, APP.V1.024; APP.V3.008 ¶ 5, whereupon the City opened a public competitive bidding process

[1] *See also Schires v. Carlat*, 250 Ariz. 371, 376 (2021) (the government "may not give away *public property* or funds; it must receive a *quid pro quo*…") (emphasis added).

for use of the pools for youth swimming. APPV1.057; APPV1.009 ¶ 15. But when the public procurement process ended, it turned out—after the City admitted to mathematical errors in calculating the bids—that Neptune was the highest financial bidder, exceeding SAC's bid by a substantial margin. APP.V3.093; APP.V3.013 ¶ 27; APP.V2.148–52. In fact, Neptune's bid eclipsed SAC's bid by a factor of three, promising nearly $300,000 more per year to the City, or $1.5 million over the course of the contract.

Nevertheless, the City cancelled the procurement process and unilaterally awarded the use of the pools to SAC anyway—again, at below-market rates. APP.V3.005; APP.V3.006.

Neptune challenged this arrangement as an unconstitutional subsidy as well as an abuse of discretion by the City, because the City failed to honor its own procurement rules.

The court of appeals rejected Neptune's Gift Clause challenge because it found that "unsuccessful bids on government contracts" do not establish fair market value for purposes of evaluating consideration under the Gift Clause. Op. ¶ 35. It also concluded that the City did not abuse its discretion because the City's procurement director could cancel the procurement process even after it was determined Neptune was the highest and most advantageous bidder based on objective criteria. *Id.* at ¶ 22.

Both of these findings were in error and contravene longstanding jurisprudence of this Court—in the process setting dangerous precedent that, if left undisturbed, will eviscerate key constitutional taxpayer protections when government entities engage in procurement. The decision below will also encourage favoritism, fraud, and waste when officials ignore procurement rules to award contracts to predetermined, special, favored interests, rather than to the highest and best bidder.

ISSUES PRESENTED

1. Did the court of appeals err in holding that qualified bids from higher bidders should not be considered when evaluating objective fair market value under the consideration prong of the Gift Clause?

2. Did the City abuse its discretion when it failed to follow its own procurement rules and cancelled a public procurement to unilaterally award exclusive use of public facilities to its predetermined choice, instead of the highest qualified bidder?

FACTS

Neptune and SAC operate youth competitive swimming clubs, often using public swimming pools to provide their programs. APP.V1.004–5 ¶ 1; APP.V3.018 ¶ 3. For over 55 years, the City has given SAC exclusive use of its

publicly-owned pools for SAC to operate its programs. APP.V3.034; APP.V1.005 ¶ 4; APP.V1.021.

After Neptune protested this favoritism toward SAC,[2] the City issued RFP Number 18RP017 ("RFP"), which established objective criteria for the use of these scarce public resources. APP.V1.057; APP.V1.009 ¶ 15. The RFP sought proposals for a contract with a three-year duration and two one-year extensions. APP.V1.089 ¶ 9. Only the evaluation factors expressly identified in the RFP could be used to evaluate the bids under both the City Code and the RFP itself. [3] Scottsdale Procurement Code § 2-188(c)(5); APP.V1.068.

The difference between the amount that SAC and Neptune offered for use of the pools was very large. Neptune bid approximately $438,000 a year in revenue[4], and SAC bid approximately $153,360 per year in revenue.[5] APP.V1.134; APP.V2.008. **Thus, Neptune's total bid proposed revenue to the City of more**

[2] The City had most recently awarded SAC an exclusive three-year right to use the pools with two one-year extensions for a total of five years ("2016 license"). APP.V1.027 § 3.0.
[3] These criteria and the corresponding weight for each criterion were: (1) Firm/Organization Qualifications (20%); (2) Key personnel Qualifications (10%); Team and Facility Use/Tentative Project Schedule/Exceptions (20%); Revenue/Lap Lane Hours (30%) and Membership/Residency Requirements Plan (20%). APPV1.103.
[4] Neptune bid $12 per hour for both short- and long-course lanes and other fees. APP.V1.134.
[5] SAC bid $4 for short-course and $8 for long-course ($8) lap lanes and other fees. APP.V2.008.

than $284,640 per year higher than SAC's proposal, or $1,423,200 over the course of the five-year contract. *Id.*

SAC and Neptune both submitted bids. APP.V2.003–139; APP.V1.127–200. The City selected three employees ("Evaluation Committee") to review and score the bids based on the RFP's evaluation criteria. APP.V1.010–11 ¶ 23. The Evaluation Committee evaluated the bids using the criteria in the RFP and initially (but erroneously) determined that SAC won the bid. APP.V2.141–42.

On March 26, 2018, the City posted a Notice of Intent to Award the contract for the pools to SAC. APP.V2.140. Four days later, Neptune filed a protest, which the City denied. APP.V1.013 ¶ 33; APP.V2.143–45; APP.V2.146–47. The City then released the sealed bids to SAC, an action that can only occur under City Code after a contract has been awarded. Scottsdale Procurement Code § 2-188(c)(2).

After reviewing SAC's bid, Neptune discovered that the Evaluation Committee had made a mathematical error. APP.V2.148–52. The **City admitted the error and acknowledged that Neptune did receive the most points under the RFP criteria** when properly calculated. APP.V3.003; APP.V3.040 ¶ 28; APP.V2.148–52. This meant Neptune was, in fact, not only fully qualified, but the highest and best bidder.

But rather than award the contract to Neptune, the City cancelled the RFP, claiming it had "initiated the RFP under advisement of a Purchasing Director who has since retired," APP.V3.005, and then renewed SAC's 2016 license for exclusive use of the public pools for SAC's swimming program. APP.V3.006.

ARGUMENT

I. The lower court erred by holding that competitive bids from reliable bidders should not be considered in determining "objective fair market" value under the consideration prong of the Gift Clause.

To survive Gift Clause scrutiny, a government expenditure must both serve a public purpose and be supported by adequate consideration. *Schires v. Carlat*, 250 Ariz. 371, 374–75 ¶ 7 (2021). In assessing adequacy of consideration, a court "focuses on what the public is giving and getting from an arrangement and then asks whether the 'give' so far exceeds the 'get' that the government is subsidizing a private venture." *Id.* at 376 ¶ 14. Importantly, the comparison "'focuses … on the objective fair market value[s]'" of both sides of the transaction. *Id.* (citation omitted). Courts "should *not* give deference" to the government's assessment of value. *Id.* at 378 ¶ 23.

Here, the question is: What is the objective fair market value of the City's swimming pools? In a single sentence, the lower court dispensed with the most appropriate and reliable measure of the objective fair market value, which is the public procurement process. It held that "unsuccessful bids on government

contracts *[do not]* establish[ ] the standard by which we judge reasonable consideration [under the Gift Clause]." Op. ¶ 35. Instead, it said the value should be determined by the fee structure established "by the city council." Op. ¶ 33.

This is plain error, and if allowed to stand, would eviscerate the protections the Gift Clause provides to taxpayers in the context of competitive bidding for public resources or services.

The most objective and reliable way to assess the fair market value of any exchange is to determine what a would-be buyer is willing to pay. As this Court has repeatedly held fair market value is the "'amount at which property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of the relevant facts.'" *Bus. Realty of Ariz., Inc. v. Maricopa Cnty.*, 181 Ariz. 551, 553 (1995) (citation omitted); *see also S'holders & Spouses of Carioca Co. v. Superior Ct.*, 141 Ariz. 506, 508 (1984). Indeed, this is just basic economics. Michael Sanders, *Market Value: What Does it Really Mean?* Appraisal Journal (Summer 2018) at 207. *See* Thomas Sowell, *Basic Economics* 20–21 (4th ed. 2011).

The procurement process seeks to determine the value of public resources, including the City's pools, by evaluating what responsible parties are willing and able to pay in an open and competitive bid. *See Rodgers v. Huckelberry*, 243 Ariz. 427, 430 ¶ 8 (App. 2017) (the "competitive bidding process [is] designed to

produce full-market value without respect to the identity of the tenant."); *see also* *State ex rel. Robbins v. Bonner*, 270 P.2d 400, 403 (Mont. 1954) ("It is competitive bidding that produces the fair market value of the [public] property disposed of."); *Ford Motor Credit Co. v. Price*, 163 Cal. App.3d 745, 751 (1985) ("Competitive bidding helps to assure that the purchase price approximates the fair market value of the property.")

In *Turken v. Gordon*, 223 Ariz. 342 (2010), this Court specifically contemplated using competitive bidding in the procurement process to establish adequacy of consideration under the Gift Clause. It held that "[t]he potential for a subsidy is heightened when, as occurred here, a public entity enters into the contract without the benefit of competitive proposals." *Id.* at 350.

This case is actually more extreme than in *Turken*, where there was no bid involved—because here, the City *did* begin a procurement process based on objective criteria, and received competitive bids that *did* establish fair market value. But rather than accepting the best and most qualified bidder, it rejected the winning bid in favor of the party to which the City felt "a sense of loyalty … for past services rendered." *Brown v. City of Phoenix*, 77 Ariz. 368, 375–76 (1954). That contravenes the express purpose of the Gift Clause, which is to prevent "giving advantages to special interests." *Wistuber v. Paradise Valley Unified Sch. Dist.*, 141 Ariz. 346, 349 (1984).

The lower court stated that "Neptune fails to properly identify the 'give' and the 'get' for purposes of our consideration analysis." Op. ¶ 32. But that isn't true: the "give" is use of the City's pools, and the "get" is what users are willing to pay. It is undisputed that Neptune was willing and able to pay $**284,640 more per year than SAC, or $1,423,000 over the course of the five-year contract.** APP.V1.129, 134; APP.V2.008. Yet, the City gave the pools to SAC instead, thus providing a significant subsidy to SAC, and harming City taxpayers in the process.

By failing to "review the failed RFP process,"[6] the court below failed to properly apply the *Turken* and *Schires* consideration rule for evaluating objective fair market value. *See also Nat'l Soc'y of Pro. Eng'rs v. United States*, 435 U.S. 679, 692 (1978) (a ban on competitive bidding "'impedes the ordinary give and take of the market place.'" (citation omitted)).

The lower court also disregarded the essential purposes of public procurement laws: to prevent favoritism and protect the taxpaying public. *Achen-Gardner, Inc. v. Superior Court*, 173 Ariz. 48, 52 (1992) ("the purposes of competitive bidding are 'to promote competition, to guard against favoritism, fraud and corruption, and to secure the best work or supplies at the lowest price practicable.'"(citation omitted)). Contrary to the decision below, Neptune's

[6] By basing its consideration analysis on the 2016 license, the amount of the subsidy to SAC *increases* to $318,860 each year or $1,594,300 over the five-year contract. APP.V1.029–30 § 6.2.

willingness and ability to pay far more than Neptune in an open and competitive bidding process for use of public facilities must be considered in determining the objective fair market value of those facilities, and in evaluating consideration for use of public resources under the Gift Clause.

The government "'may not give away *public property* or funds,'" *Schires*, 250 Ariz. at 376 ¶ 14 (citation omitted) (emphasis added). *See also Hassell*, 172 Ariz. at 367–69 (selling or leasing public property at below-market rates is a subsidy). By disregarding the highest qualified bid for use of scarce and valuable public property, the lower court discarded this Court's Gift Clause jurisprudence in a manner that, if allowed to stand, will eviscerate key taxpayer protections when government agents engage in procurement. Additionally, under the lower court's decision, cities can now disregard the best bidders in evaluating consideration for use of public resources, and government entities throughout the state can circumvent the Gift Clause even when using the procurement process.

II. The City abused its discretion by violating its own Procurement Code and unilaterally awarding use of City resources to its preferred bidder.

This Court should also grant review to prevent favoritism, waste, and taxpayer harm when municipalities abuse their discretion to award contracts to preferred bidders in the procurement process. In this case, the City abused its discretion by unilaterally cancelling an RFP and instead awarding the contract to its preferred bidder, which was not the highest and best bidder. The court below

mis-applied this Court's precedent in *Brown*, 77 Ariz. at 373–76, and misconstrued the record.

Differential treatment of similarly situated parties involved in the public procurement process—where that disparity cannot be justified by some public rationale—is an abuse of discretion. *Id.* Certainly the City cannot ignore its own rules to adulterate an open and competitive procurement bid and award a contract to its preselected favorite. *Id.*; *Clay v. Ariz. Interscholastic Ass'n*, 161 Ariz. 474, 476 (1989). That is what the City did here.

The undisputed facts are these: The City published an RFP with objective criteria to award use of the swim lanes to the most advantageous bidder. APP.V1.053–126. Based on those objective criteria, the City initially (but erroneously) calculated that SAC was the winning bidder and announced its intent to award the contract to SAC. APP.V2.140–42. Neptune filed a protest, APP.V1.013 ¶ 33; APP.V2.143–45, which the City denied. APP.V2.146–47. But then the City released SAC's sealed bid to Neptune, a process that can *only* occur under City Procurement Code "after contract award." § 2-188(c)(2). And when Neptune discovered that there was a mathematical error in calculating the bids—which the City later admitted, and conceded that Neptune did, in fact, receive the most points and thus had the most advantageous bid, APP.V3.003; APP.V3.013 ¶

27—the City chose *not* to award the contract to Neptune, but to unliterally cancel the RFP, and just renewed SAC's license. APP.V3.006.

The court below said this was not an abuse of discretion because "[t]he Code provides the [procurement] director with discretion to cancel a solicitation if it is advantageous to Scottsdale, *until it issues an award*." Op. ¶ 22 (emphasis added). But that was plain error because the City already had (or should have already) issued the award when it cancelled the RFP, and the Code grants the City no discretion to do so unmoored from the RFP's objective criteria and *after* an award has been made.

The City's 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.*" § 2-188(c)(5) (emphasis added). The RFP in this case stated an explicit method of determining "most advantageous" when applying the RFP's specific criteria. APP.V1.103. The mathematical winner based on the RFP's objective criteria was Neptune. APP.V3.003; APP.V3.013 ¶ 27.

The procurement process exists to prevent *just* what the City did here: select a winner based on non-objective criteria and change the rules of the game to ensure

its preferred candidate won. That is just what happened in *Brown*, 77 Ariz. at 377, which this Court said was unacceptable.

The lower court's finding that the City's procurement director had discretion to cancel the award is *only* true if the City follows the procurement rules and if the award had not *already* been made. Here, the lower court disregarded the fact that the award had been made (or should have been) when the City cancelled the RFP. First, the City released the *sealed* bids to Neptune. That can *only* happen under City Code "*after* contract award."[7] Second, the City did not correct the scores based on Neptune's protest, as the court below said. Op. ¶ 21. Instead, the City *denied* Neptune's protest, at which point the City had a ministerial duty to issue the award.[8]

The court of appeals appears to have confused Neptune's protest, which was not based on the City's mathematical error, with the City's subsequent discovery of its mathematical error. But by the time the City discovered that error, the notice timeframe had elapsed, and the contract was or should have been administratively awarded. As a result, once the City's mathematical error was corrected, and it was revealed that Neptune was the most advantageous bidder, the City's ministerial

[7] § 2-188(c)(2) ("The proposals shall *not* be open for public inspection until *after* contract award…") (emphasis added).
[8] Scottsdale Procurement Code § 2-188.8(G)(1) ("At the expiration of the Notice period, Purchasing *shall* issue a Purchase Order or Notice of Award to the Successful bidder." (emphasis added)).

duty was to follow the process set forth in the RFP and the Procurement Code, and grant the award to the highest bidder, Neptune. *Mohave Cnty. v. Mohave-Kingman Ests., Inc.*, 120 Ariz. 417, 420 (1978) ("In general, public authorities cannot contract with the lowest bidder for terms which were not included in the bidding specifications."). When the City instead unilaterally cancelled the RFP and gave the contract to SAC, the City abused its discretion in a process that had already been "completed." *City of Phoenix v. Wittman Contracting Co.*, 20 Ariz. App. 1, 5 (1973).

The facts here are remarkably similar to those in *Brown*, 77 Ariz. at 371. There, two companies bid to lease space at Sky Harbor. The City Council, however, selected the losing bidder. This Court found that to be an abuse of discretion where the city's ordinances, like the Procurement Code here, required the award to go to the highest responsible—i.e., most advantageous—bidder. *Id.* at 373. As in this case, the city in *Brown* claimed it was free to reject all bids, and therefore 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 in *Brown*, as in this case, appeared to be granting the lower bidder the award out of "a sense of loyalty … for past services rendered." *Id.* at 375. There, as here, the record 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.* at 377. Even absent bad faith on the City's part, its arbitrary decision to disregard the terms of the RFP and its own Procurement Code and award the use of the lanes to SAC after Neptune won the bidding contest, was an abuse of discretion.

By failing to apply *Brown*, and by confusing two different parts of the factual record, the lower court erred. In doing so, it gave procurement officials throughout this state carte blanche to ignore their own procurement codes, ignore their own RFPs, and award contracts instead to their preferred bidders. *Id.* at 375.

This Court should therefore accept review and find that such actions are an abuse of discretion that undermine the purpose of competitive bidding to "prevent the plundering of taxpayers," *id.* at 373, and "'to promote competition, to guard against favoritism, fraud and corruption.'" *Achen-Gardner*, 173 Ariz. at 52 (citation omitted).

RULE 21(a) NOTICE

Appellants request costs and attorney fees pursuant to A.R.S. §§ 12-341 and 12-2030 and the private attorney general doctrine.

CONCLUSION

The Court should grant the petition and reverse the decision of the Court of Appeals.

Respectfully submitted May 10, 2023 by:

/s/ *Jonathan Riches*
Timothy Sandefur (033670)
Jonathan Riches (025712)
Scharf-Norton Center for Constitutional Litigation at the GOLDWATER INSTITUTE

/s/ Dennis L. Hall
Dennis L. Hall (013547)
DENNIS L. HALL, ATTORNEY, PLLC