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 REPLY BRIEF

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I. Neptune timely filed this matter within the applicable statute of limitations and its claims are not moot.

A. Neptune diligently pursued this litigation and has requested appropriate relief.

The City claims that Neptune was "dilatory [in the] pursuit of this litigation," which has rendered its claim for "relief moot." Ans. Br. at 16. This is both factually and legally incorrect.

The City cites no legal authority to support its position that "Neptune has waived any relief it seeks," Ans. Br. at 15, but appears to be asserting the defense of laches and waiver. But laches and waiver apply when delay in filing a lawsuit "is unreasonable and results in prejudice to the opposing party." *Sotomayor v. Burns*, 199 Ariz. 81, 83 ¶ 6 (2000). That is not the case here.

Neptune has diligently pursued a prompt and efficient resolution to this matter, despite the City's multiple attempts to move the goal posts and avoid resolution. In August 2017, Neptune first notified the City that the exclusive license it provided to SAC was unlawful under the City's Charter and the Gift Clause. APPV3.061. Responding to this letter, on January 8, 2018, the City issued a Request for Proposal ("RFP") soliciting bids for use of the City's pools by youth competitive swim teams. *Id.* After Neptune and SAC submitted bids, the City erroneously awarded the contract to SAC on March 26, 2018. APPV3.062. Neptune filed a formal protest against the RFP award *four days* later, on March 30,

2018. *Id.* The City then released the full RFP packages to Neptune. After reviewing the RFP, on April 6, 2018, Neptune notified the City that a mathematical error had occurred in calculating the scores for the RFP, and that when the error was corrected, Neptune was, in fact, the most advantageous bidder. APPV3.062. The City agreed that Neptune's analysis was correct. *Id.* Yet, rather than award the contract to Neptune, the City added additional RFP criteria *after the fact*. APPV3.062–63. Neptune again protested, and the City unilaterally cancelled the RFP on May 11, 2018, and elected to continue the license it had previously issued to SAC. APPV3.063.

Neptune then retained legal counsel, and less than six months later, filed a formal protest against the City's award of the RFP to SAC on August 8, 2017. APPV1.057–62. Despite multiple opportunities to resolve this matter at this stage, the City elected to continue its contract with SAC, and on April 9, 2019, the City exercised the first of two one-year extensions to its exclusive license with SAC. APPV1.021; APPV3.033. Neptune then filed suit in the trial court on May 3, 2019—less than one month after the City extended a license extension to SAC. IR.1. Contrary to the City's suggestion, that is not "dilatory," but diligent.

Establishing a laches defense also requires the City to show (by clear and compelling evidence) that it was prejudiced by any alleged delay on Neptune's part. *In re Paternity of Gloria*, 194 Ariz. 201, 205 ¶ 20 (App. 1998). The City has

not even attempted to show that there was *any* delay in filing this case, let alone a delay that was unreasonable, nor has it offered any reason to believe the City suffered prejudice.

The City's next contention, that subsequent events have "render[ed] … [Neptune's] requested or available relief moot," Ans. Br. at 16, is likewise incorrect. Although "Arizona's constitution does not feature a 'case-or-controversy' requirement" for mootness, *Kondaur Capital Corp. v. Pinal County*, 235 Ariz. 189, 193 ¶ 7 (App. 2014), there is still very much a live controversy here between the City and Neptune. Specifically, every day that SAC enjoys exclusive use of publicly owned resources, in violation of the City's own public procurement processes, below market rates, and to the exclusion Neptune, Neptune is injured.

What's more, Neptune has requested both mandamus and declaratory relief *in the alternative*. IR.1 at 19 ¶¶ A–B. In other words, it asked that the court, in the first instance, to order the City to award a license to Neptune under the terms it was entitled to when the City unlawfully awarded the license to SAC, or, in the alternative, enjoin and declare unlawful the RFP because it does not comply with the City's own procurement code and the Gift Clause. Thus, the Court can grant Neptune relief for the complained-of injury.

Finally, even if the passage of time had rendered the award of *this* license impractical, the Court could and should resolve it anyway because it raises "an

issue of great public importance" and one that is "capable of repetition yet evading review." *Phoenix Newspapers, Inc. v. Molera*, 200 Ariz. 457, 460 ¶ 12 (App. 2001). An issue is of great public importance when it "will have broad public impact beyond resolution of the specific case." *Cardoso v. Soldo*, 230 Ariz. 614, 617 ¶ 6 (App. 2012). This case involves the allocation of limited public resources to private entities that affects a large number of residents and citizens seeking access to those facilities. Additionally, to the extent the City is permitted to award limited public resources to one favored, special interest, nothing would prevent the City from doing the same things with other public resources: from libraries to parks to nature preserves. Thus, the Court can always issue a declaration on the legal questions presented in this appeal that would prevent unlawful action by the City in this case and others like it.

We also know that this case is capable of repetition, because the City just released a "new" procurement proposal for its youth competitive swim team that incorporates many of the same exact legal errors as the process challenged in this case. *See* Council's Action on Allocation Policy [1] The City's constantly shifting legal positions and justifications to rationalize the contract award to its preferred

[1] Pursuant to Ariz. R. Evid. 201, Neptune requests that this Court take judicial notice that on April 21, 2021, the City approved the Youth Aquatic Facility Allocation Policy.

vendor shows that if this case is not resolved by this Court, the City will continue to behave unlawfully with respect to these public facilities.

B. A.R.S. § 12-821 does not bar this claim.

The City's argument that the statute of limitations bars Neptune's Gift Clause claim under A.R.S. § 12-821 also fails. That statue provides that "[a]ll actions against any public entity or public employee shall be brought within one year after the cause of action accrues and not afterward." Assuming that statute applies, Neptune brought this case within the applicable time period. The City unilaterally cancelled the RFP that is the subject of this case on May 11, 2018. APPV3.063. Neptune then filed this case (after additional communications aimed at resolution with the City failed) on May 3, 2019, within one year of that date (which was the date on which the cause of action accrued under A.R.S. § 12-821); IR.1.

The City nonetheless asserts that A.R.S. § 12-821 bars this action because Neptune was aware before May 11, 2018 of the City's grant to SAC of the exclusive license. Ans. Br. at 17. And it is true that Neptune has, over the years, repeatedly brought the City's unlawful allocation of its facilities to the City's attention. Those communications ultimately resulted in the procurement process Neptune diligently pursued, and which is the subject of this litigation. To the extent the City is claiming that Neptune should have sued the City *while that*

procurement process was ongoing, Ans. Br. at 17-18, the City is estopped from asserting that defense. Under the doctrine of equitable estoppel, a defendant is "estopped from asserting the statute of limitations defense based on inducement to forbear filing suit … [if] (1) … the defendant engaged in affirmative conduct intended to cause the plaintiff's forbearance; (2) … the defendant's conduct actually caused the plaintiff's failure to file a timely action; (3) … the defendant's conduct reasonably could be expected to induce forbearance; and (4) …the plaintiff brought the action within a reasonable time after termination of the objectionable conduct." *Nolde v. Frankie*, 192 Ariz. 276, 281 ¶ 20 (1998). All of these factors are present here.

Neptune first contacted the City about the illegal contracting process with respect to the swim lanes in August 2017. APPV3.061. In response to that communication, the City agreed to put out the RFP that is the subject of this case. That was in January 2018 (*id.*), and thus constituted "affirmative conduct intended to cause [Neptune's] forbearance." *Nolde*, 192 Ariz. at 281 ¶ 20. Neptune did, indeed, forbear from suing in order to diligently pursue that RFP process—until the City unilaterally cancelled it on May 11, 2018. APPV3.063. Neptune then timely filed an action in trial court on May 3, 2019, less than one year after that illegal cancellation, and within the statute of limitations contemplated by A.R.S. § 12-821. IR.1.

The *only* reason this case was not filed earlier is because Neptune worked in good faith with the City to pursue an RFP that could have resolved all the legal issues Neptune brought to the City's attention. It was reasonable and appropriate for Neptune to pursue what it thought was a lawful procurement process, and Neptune filed this case in a reasonable period after Neptune realized that process was not lawful. The City is estopped from asserting a statute of limitations defense after the City's own conduct resulted in the procurement process that is the subject of this case, and that Neptune pursued in good faith as an alternative to first bringing a lawsuit.

II. The City's grant of exclusive use of public facilities to SAC in violation of its own procurement process and at far below market rate violates the Gift Clause.

A. The Gift Clause applies to the use of public facilities by private entities.

The City contends that the Gift Clause "should [not] even be considered applicable to the City permitting its citizens to use public facilities on a non-exclusive basis." Ans. Br. at 21. That argument suffers from two errors: first, that the Gift Clause does not apply to "use of public facilities," and second, that SAC's use is on a "non-exclusive basis."

First, case law squarely forecloses the argument that the Gift Clause does not apply to use of public resources. In *Arizona Center for Law in Public Interest v. Hassell*, 172 Ariz. 356, 367 (App. 1991), the court of appeals held that "[t]he

framers did not restrict their prohibition to the grant of public money," and expressly applied the Clause to the disposition of public resources (in that case, the sale of state-owned riverbed lands). *See also* *Indus. Dev. Auth. v. Nelson*, 109 Ariz. 368, 372 (1973) (the Gift Clause "provisions were designed to prevent the economic losses of the 19th century suffered by municipal corporations which gave money, credit *or other valuable advantages* to railroads, canal companies, etc." (emphasis added; citation omitted)).

The Gift Clause applies to "token rental[s]" in which a private entity gets exclusive use of public property at a greatly reduced rate. *Cf.* *Hassell,* 172 Ariz. at 367. That is precisely what happened in *City of Tempe v. Pilot Props., Inc.*, 22 Ariz.App. 356, 362 (1974). There, the court held that when Tempe provided public land for use by a private major league baseball team for spring training for a token fee, the transaction fell "squarely within the prohibition" of the Gift Clause. *Id.* *Hassell* and *Pilot Properties* simply foreclose the City's argument that the Gift Clause does not apply to the allocation of public property to private interests.

Second, the use of the swim lanes by SAC is plainly exclusive. The entire purpose of the license is to provide SAC, and only SAC, with exclusive use of Scottsdale's public swimming pools for youth competitive swimming. Since 1966, the City has entered into annual agreements with SAC to conduct youth competitive swim in Scottsdale pools to the exclusion of all other teams.

APPV1.007. No other teams have been afforded that privilege. What's more, under the RFP at issue, "the preferred procedure is to make a *single* award as a result of this solicitation process." APPV1.012 (emphasis added). That *single* award was made to SAC so SAC alone could use Scottsdale's public pools for its swim program. Additionally, SAC requested and was awarded 34,220 hours of swim lane hours per year, essentially the entirety of the hours available for use for youth competitive swimming. APPV2.083. That means that, as a practical matter, no other team could use the City's pools for any meaningful period of time. SAC, and only SAC, is using these public facilities on an exclusive basis during the times that are most coveted for youth competitive swim for long periods of time.

The City also contends that the Gift Clause does not apply here because it was intended to prevent the "depletion of the public treasury," and in this case, "there is no 'depletion' of the City treasury that would implicate the concerns held by the framers of the Gift Clause." Ans. Br. at 22. Again, this is wrong. The Gift Clause is not only designed to prevent the depletion of the public treasury, but also to prevent "giving advantages to special interests," *Wistuber v. Paradise Valley Unified Sch. Dist.*, 141 Ariz. 346, 349 (1984), or applying public resources to "the purely private or personal interests of any individual." *Kromko v. Ariz. Bd. of Regents*, 149 Ariz. 319, 320–21 (1986). Here, the City is plainly giving a unique advantage to SAC that no other party enjoys for SAC's private use.

Moreover, allocating public property to private use for nominal fees *does* deplete the public treasury, by depriving the public of a fair return for the use of publicly owned resources. In this case, the uncontroverted evidence shows that the City's decision to arbitrarily award the contract to SAC costs City taxpayers $284,640 per year, or approximately $1.4 million over the course of SAC's exclusive, renewable license. APPV2.011; APPV2.083. This arrangement, by turning over public resources to private use for a value far below what those resources are worth on the market, depletes the public treasury just the same as a direct expenditure of public funds. *Cf.* *Hassell*, 172 Ariz. at 368 ("when a court reviews a dispensation of public trust property, as when a court reviews the dispensation of any other property, the two *Wistuber* elements—public purpose and fair consideration—must be shown.").

Finally, the City misrepresents Neptune's argument by saying that it would require the government to dispose of its resources by "sale to the highest bidder." Ans. Br. at 22. That is a straw man. This case is not about "City parks," or "City streets," *id.*—which all involve the *non-exclusive, public* use of *public* property. Obviously the City is not required to charge the public an entry fee for City-owned parks or roads because the City is not giving any private entity the exclusive use or ownership of those properties. But this case, by contrast, involves a contract that

gives one *private* party *exclusive* use of public resources.[2] When *that* happens, the Gift Clause requires that the public receive adequate and direct consideration, to avoid conferring an unconstitutional gift to that private entity. *How* exactly the City chooses to obtain that adequate consideration is a matter for the City's discretion. But what is *not* open to the City's discretion is that it must do so. In disposing of public resources to either the ownership by, or the exclusive use of, private parties, it must comply with the twin requirements of the Gift Clause: public purpose and adequate consideration. *Hassell*, 172 Ariz. at 368. *See also Schires v. Carlat*, 480 P.3d 639, 646 ¶ 23 (Ariz. Feb. 8, 2021) ("In deciding the sufficiency of consideration…courts should not give deference to the public entity's assessment of value but should instead identify the fair market value of the benefit provided to the entity and then determine proportionality."). That did not occur here. The City has given SAC exclusive use of the swim lanes without serving a public purpose and without obtaining their fair market value in return, and has therefore conferred an unconstitutional gift on SAC.

[2] The City's citation to *Kotterman v. Killian* is likewise unhelpful here. *Kotterman* involved a taxpayer's use of the taxpayer's own money, not private use of public resources. 193 Ariz. 273, 285 ¶ 36 (1999).

B. The City receives constitutionally inadequate consideration for the use of the swim lanes because it provides them to SAC at far below objective fair market value.

The consideration analysis here is straightforward. "[T]he most objective and reliable way to determine whether the private party has received a forbidden subsidy is to compare the public expenditure to what the government receives under the contract." *Turken v. Gordon*, 223 Ariz. 342, 348 ¶ 22 (2010). The Court simply "focuses on what the public is giving and getting from an arrangement and then ask[] whether the 'give' so far exceeds the 'get' that the government is subsidizing a private venture." *Schires*, 480 P.3d at 644 ¶ 14. "[A]nticipated indirect benefit[s]" are "valueless under [the consideration] prong," and therefore cannot be included on the "get" side of the comparison. *Id.* at 645 ¶ 16. Instead, the Court compares "the objective fair market value of what the private party has *promised to provide* in return" for an outlay of public resources. *Id.* at 644 ¶ 14 (emphasis added; citation omitted).

In this case, the objective fair market value of the swim lanes was established through an open and competitive procurement process. *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 seller for capable use of the property); *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."). Neptune offered to pay $420,000 per year for the lanes (plus an $18,000 fee for non-residents), while SAC offered to pay $141,360 per year for the lanes (plus a $12,000 fee for non-residents). APPV2.011; APPV2.083. The difference between what Neptune offered and what SAC offered—$284,640 per year—is the subsidy.

As the *Turken* court noted, "[t]he potential for a subsidy is heightened when … a public entity enters into the contract without the benefit of competitive proposals." 223 Ariz. at 350 ¶ 32. This case is actually more extreme than in *Turken*, where there was no bid involved—because here, the City did begin a procurement process, and received competitive bids that established fair market value, then 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, 375–77 (1954). The City's contract with SAC does not include any enforceable, direct, obligatory promises on the part of SAC toward the City in return for this subsidy—and as a result, the consideration from SAC in exchange for the City's grant of the lease is not proportionate and violates the Gift Clause. *Turken*, 223 Ariz. at 350 ¶ 32.

The City mistakenly contends that "even if a promise is difficult to value, it is consideration nonetheless." Ans. Br. at 24. No, it is not. *Schires* made it abundantly clear that "objective fair market value" is the *only* standard by which to

evaluate adequacy of consideration. 480 P.3d at 644 ¶ 14. Indeed, the court went on to hold that contract terms that are "too indefinite to enforce, much less value" do not count as consideration. *Id.* at 646 ¶ 21. Any other purported benefits the City claims it receives from SAC that cannot be measured and are not obligatory are simply "valueless" under the Gift Clause. *Id.* at 645 ¶ 16.

The City's argument that "the only promise that the City makes is to provide [SAC] office and storage space at an agreed upon rental rate," Ans. Br. at 25, is ludicrous, and finds no support in the record. The entire purpose of the license is to provide the exclusive use of Scottsdale's public swimming pools for youth competitive swimming. When SAC is exercising its rights under the license to use the lanes, SAC, and only SAC, can use them to the exclusion of all others. APPV1.008 ¶ 10. That use is not *de minimis*, as the City insinuates. Rather, SAC can use the lanes for 34,220 hours, nearly all of the hours that the City has made the lanes available for youth competitive swimming. The Supreme Court emphasized in *Wistuber* that courts evaluating gift clause challenges should focus on "the *reality of the transaction*," 141 Ariz. at 349 (emphasis added), and here, the reality of the transaction is that SAC and only SAC is permitted use of the City's limited swimming facilities to the exclusion of all other youth competitive swim teams. To direct public resources to this private user for an exchange that was far

below objective fair market value, fails the adequacy-of-consideration requirement and violates the Gift Clause.

C. The City's license to SAC also does not serve a public purpose because it was awarded in a manner that is arbitrary and capricious.

The City repeats the same error the court below committed regarding the public purpose prong of the Gift Clause test; namely, the City argues that the provision of recreational swim opportunities is itself a public purpose and therefore the license at issue complies with the Gift Clause. APPV3.066; Ans. Br. at 19. But the question here is not whether recreational swimming at public facilities serves a public purpose—it is whether the City's abuse of discretion in awarding the contract to SAC (by ignoring its own processes and procedures to favor one special interest at the exclusion of all others) violates the public purpose requirement. The City's sophistical claim that "[i]f the SAC License is invalid for lack of a public purpose, any license issued to Neptune would necessarily lack a public purpose as well," Ans. Br. at 19, must be rejected.

Turken made clear that a transaction fails the public purpose requirement when "the governmental body's discretion has been 'unquestionably abused.'" 223 Ariz. at 349 ¶ 28. Because the City engaged in a series of actions that ignored its own rules, processes, and procedures for the benefit of one private firm over another, and without legitimate reason, there was an abuse of discretion. *Brown*,

77 Ariz. at 376-77. Consequently, there was also a violation of the public purpose requirement.

From the beginning of this affair, the City structured the RFP to ensure that one party, and one party alone, SAC, was awarded this contract, apparently out of "a sense of loyalty … for past services rendered." *Id.* at 375. When SAC was the highest bidder, the City announced an intent to award the contract to SAC. APPV1.015 ¶ 31. Then, when the City realized it had miscalculated the bids, it changed the procurement criteria. APPV1.017-18 ¶ 39. And when Neptune protested the change, the City unilaterally cancelled the procurement and extended SAC's previous license from 2016. APPV3.030. The manner in which this was done was an abuse of discretion that violates the central purpose of the Gift Clause, which is to prevent the giving, lending, or selling of public resources for "the purely private or personal interests of any individual." *Kromko*, 149 Ariz. at 320–21.

III. The City acted outside its discretion and arbitrarily with inappropriate favoritism in failing to award Neptune the contract.

The City erroneously asserts that a municipality has unfettered discretion to accept, reject, or change the findings of the panel to which it has assigned the task of choosing the most advantageous offeror in a request for proposals (RFP). That is not true, however, because the City abandoned any such discretion when it adopted its Procurement Code—which 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,*" Scottsdale Procurement Code § 2-188(c)(5) (emphasis added)—and then assigned the choice of who is the most advantageous bidder to an independent panel.

Even if it had discretion in choosing the most advantageous offeror, it could not exercise that discretion unfairly with undue favoritism to the existing swim club. *Brown*, 77 Ariz. at 377. Here, the City attempts to hide behind a pretext of "cancelling" its RFP—but it only cancelled the RFP after its pre-determined winner finished second, and only after multiple attempts to name its chosen club the winner: first by miscalculation, second by rejecting its own process, and third by cancelling the award and unilaterally renewing SAC as the existing provider. The City's actions are therefore an abuse of whatever discretion the City might otherwise have.

A. The City incorporated the Procurement Code into the RFP and then wrongfully and prejudicially attempted to reject the Code *post hoc*.

The City's Procurement Code leaves the City with no discretion, once a participant in an RFP is mathematically deemed to be the "most advantageous" bidder. Section 2-188(c)(5) of that Code says the award "*shall* be made" to the

most advantageous offeror, and that the most advantageous offeror "shall" be determined by "the evaluation factors set forth in the request for proposals," and that "[n]o other factors or criteria may be used in the evaluation." The use of the word "shall" indicates a lack of discretion. *Collins v. Krucker,* 56 Ariz. 6, 13 (1940). Thus the City has no power to change the decision of the panel to which it has designated, pursuant to its own regulations, the authority to make a procurement decision, and which has determined which is the most advantageous offeror.

In this case, the RFP stated that it was being conducted pursuant to the Procurement Code, APPV1.011 ¶ 16; APPV1.071, and it included the factors that would be considered in determining the most advantageous offeror, as specified in Section 2-188(c)(5) of that Code. In compliance with these rules, the panel made its determination—which it later acknowledged was based on a mathematical error. Had that error not occurred, Neptune would have been deemed the most advantageous. When the City corrected that error, therefore, the City was bound by Section 2-188(c)(5) to award the contract to Neptune. Instead, it changed its position to claim that the Procurement Code did not apply, canceled the RFP, and extended SAC's previous license.

The City assigned an independent panel the task of grading an explicit and detailed RFP and deciding which applicant would be awarded the contract for

providing youth competitive swim teams at the City pools. The City created this process to find the most advantageous bidder to operate competitive youth swimming in its pools, as it had done in similar contracts, such as in awarding a masters swimming program contract. It appointed three independent graders to determine, based on stated factors, which club was the best provider. And the City pre-weighted the factors to be considered. It then, and, without good reason, rejected the findings of its own independent panel in order to award the contract to SAC instead. This is impermissible. *Brown*, 77 Ariz. at 377 ("[T]he action of the city council conclusively indicates a fixed intention to award the lease in question [to the favored applicant]. … The letting of contracts for public business should be above suspicion of favoritism.").

In its brief, the City acknowledges that it "did use its Procurement Code as a guide," but argues that it did not have to comply with its Procurement Code because it was not spending "public monies." Ans. Br. at 31–32. That is irrelevant. The City chose to specify in its RFP that the RFP would be governed by the Procurement Code. APPV1.071. The RFP, in fact, characterized itself as being for the obtaining of "competitive swimming and training services," APPV1.101, as well as coaching services, APPV1.104, safety services, APPV1.106, etc. And the Procurement Code applies not only to purchases with "public monies," but also to "any awards for services when the city is selecting

services that are then provided to … and directly paid for by citizens in the course of city interactions." Procurement Code § 2-181(c).

Even if the Code did not apply, however, Neptune (and SAC) relied on the City's statement in the RFP that it would abide by the Procurement Code, and it (and SAC) participated in a lengthy and expensive procurement process based on that representation. The City should therefore be estopped from denying the applicability of the Code at this stage. *See* *Barron G. Collier, Inc. v. Paddock*, 37 Ariz. 194, 197 (1930) (City was stopped from denying the binding effect of its own contract); *Cf.* *Pointe Resorts, Inc. v. Culbertson*, 158 Ariz. 137, 142–43 (1988) (good faith reliance on city's representations binds the city). Estoppel applies where the government makes an "absolute, unequivocal, and formal" promise "in writing," upon which the private party relies, and then takes "an affirmative act, inconsistent with" that promise. *Open Primary Elections Now v. Bayless*, 193 Ariz. 43, 47 ¶ 14 (1998) (citation omitted)). That is the case here.

The Procurement Code mandates that the contract "shall issue" to the most advantageous bidder, once the most advantageous bidder is determined in accordance with the specified procedure. *City of Phoenix v. Wittman Contracting Co.*, 20 Ariz. App. 1, 5 (1973) ("[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.'"). That was Neptune, and the City was therefore bound to make the award to Neptune.

The City argues that "proposals may be rejected," Ans. Br. at 34 (quoting Procurement Code § 2-193), but it ignores the fact that Sections 2-193.3 and 2-193.4 of the Code allow for cancellation of the RFP only *after* opening of proposals, or *after* opening and evaluation "but *before* award." S.R.C. § 2-193.3(A) (emphasis added). As *Wittman Contracting* observed, once the City determined to accept a bid, its powers and duty "became characterized as merely 'ministerial,'" and its "failure to perform essentially 'ministerial' functions" was "'arbitrary and capricious'" 20 Ariz. App. at 5.

Here, the evaluations were complete, a notice of intent to award the contract issued, and the contract was awarded. Once it was determined that the award was infected with a mathematical error, the City was likewise mandated to correct that error and award the contract to Neptune. What it had no discretion at that point to do was to cancel the RFP, and arbitrarily and capriciously continue its prior license with SAC.

The City's proposed process of unfettered discretion *after* an RFP has issued and an award made is also bad policy. The City initially promised fairness and encouraged competitive applications to find the most advantageous bidder, but, after making that promise to be fair and impartial, the City reneged without

justification. The City now says it rejected its own "metrics" for evaluating offeror's proposals because *after the process was complete* the City did not find them appropriate. The reasonable inference, of course, is that the City changed the process because it did not like the result. *Cf.* Brown, 77 Ariz. at 377 (city's actions raised inference of an improper "fixed intention to award the lease" to its preferred recipient).

B. The City's attempt to employ discretion was arbitrary and inappropriate favoritism.

The City has a duty to avoid favoritism or the appearance of favoritism. *Id.* It violated that duty by adding requirements to the RFP *post hoc,* and then cancelling the entire RFP process after a 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. *Id.*

After Neptune alerted the City to potential violations of the law in 2016, APPV3.036 ¶ 8, the City agreed to use an open procurement process, allowing Neptune to apply for use of the pools and Neptune agreed not to pursue a Gift Clause claim.[3] APPV3.036 ¶¶ 9–10; APPV1.010 ¶ 13. The City issued an RFP,

[3] Scottsdale City Attorney Bruce Washburn stated that "in order to give other groups, such as your client, an opportunity to demonstrate to the City that they should be the ones with whom the City is contracting, the City is *initiating a procurement process that will result in the award of a contract at the time the current contract expires on June 30, 2019*." APPV1.063 (emphasis added).

seeking bids for the use of the pools and to "[Establish an] Aquatic Youth Competitive Swim Team" with a contract for a three-year duration with two, one-year extensions. APPV1.068; APPV1.011 ¶ 15; Ans. Br. at 10 ¶ 18; APPV1.100 ¶ 9.

Contrary to the City's assertions, *at no point during the RFP was SAC the prevailing bidder*. The City in fact admits that the Purchasing Department "added an element for the pricing scoring which ultimately turned out to have an error." Ans. Br. at 10 ¶ 22. And it admits that, based on that error, "the City published a notice of intent to award a contract to SAC." *Id.* The correction of the scoring resulted in Neptune, not SAC, prevailing. *Id*. at 11 ¶ 25. This resulted in a series of contortions by Assistant City Manager Brent Stockwell, who decided that despite Neptune prevailing, the "consensus of the committee" was to make an award to SAC. *Id*. at 12 ¶ 29. What the City means by "consensus" is unclear, however, given that Neptune was not only ahead on scores, but was also ahead on two of the three evaluators' score totals when pricing was added correctly. APPV3.013. Thus, not only was Neptune the most advantageous bidder, but the committee did not "overwhelmingly favor" SAC over Neptune, nor did a "consensus of the committee" favor SAC, as the City now contends. APPV3.056 ¶ 29. Instead, the City reneged on the RFP only after it learned that Neptune was the winner. These actions are arbitrary, exhibit favoritism, and undermine public

confidence in the procurement process, which should be characterized by openness and transparency, rather than a masquerade for a predetermined outcome.

C. Mandamus is proper and appropriate.

Mandamus is appropriate when it is required to compel a public official to perform "an act the law requires." *Sears v. Hull*, 192 Ariz. 65, 69 ¶ 11 (1998). In this case, mandamus is an appropriate remedy, although not the only remedy, to compel the City to award the contact to Neptune, the lawful winner of the City's RFP.

The City cites to *Sears*, 192 Ariz. at 68, to support its argument that mandamus is not available in this case. But *Sears* is plainly distinguishable. That case stands for the unremarkable proposition that mandamus is not available to "prevent [an official] from acting." *Id.* at 69 ¶ 12. In this case, Neptune is seeking not to prevent the City from acting, but to compel the City to honor its RFP and award a contract to Neptune as the Procurement Code and state law require. That is an appropriate use of mandamus. *Wittman Contracting*, 20 Ariz. App. at 5. And although the City claims there is no "non-discretionary act which the City or any of its officials failed to perform," Ans. Br. at 29, the opposite is true: once Neptune was determined to be the most advantageous offeror, the City's function was merely ministerial—to award the contract to the winning bidder—and mandamus can compel a ministerial act. *Wittman Contracting*, 20 Ariz. App. at 5.

D. The City now attempts to "rescore" the evaluation and falsely claim that Neptune abandoned the application process.

The City seeks to introduce newly asserted factual claims regarding the evaluation done by an independent evaluation panel appointed to evaluate the RFP. Ans. Br. at 36-39. That is improper, and for that reason alone, this portion of the City's argument should be rejected. *In re Estate of Feir*, 145 Ariz. 295, 298 (App. 1985) (party may not "raise a new factual issue for the first time on appeal."); *Lemons v. Showcase Motors, Inc.*, 207 Ariz. 537, 541 ¶ 17 n.1 (App. 2004) ("We cannot consider new factual theories raised for the first time on appeal from summary judgment.").

The trial court correctly found that "[w]hen the City evaluated [Neptune's] protest further … it likewise concluded that Neptune's analysis was correct—the purchasing department had incorrectly scored the pricing criteria, and when the scoring was corrected, Neptune had the highest score." APPV3.062. The City now offers an entirely new theory—not raised below—that the Director "reserved" 25% of the points to award in the evaluation process. Ans. Br. at 38. Thus, on the one hand, the City asserted that the highest score does not matter because the City has discretion to award the contract to whomever it pleases—and now it contends on the other hand that the scores *do* matter, they were just calculated incorrectly for a *second* time. That is a new factual assertion that cannot be raised for the first time on appeal.

But even if the Court were to consider it, this argument fails. The initial miscalculation error was quite simple. The total points for the RFP were 300, not 250. Each of the three evaluators had a maximum of 75 points to award (or 225 total for the "Technical Average Rating"). The evaluation of pricing ("Revenue to the City") was left for the Purchasing Department, which had 75 total points to award for pricing. Neptune was superior to SAC on pricing and should have been awarded the full 75 points (with SAC receiving 26.25), but the Purchasing Department mistakenly added only 1/3 of this amount, apparently forgetting to add 25 to each evaluator's score for Neptune and 8.75 to each evaluator's score for SAC. APPV3.016–17.

On April 5, 2018, the City provided SAC's full RFP bid proposal to Neptune that included a chart that plainly shows the City's mistake. APPV3.008–11. The City failed to add 50 more points to Neptune's initial score of 161 and 17.5 points to SAC's initial score of 192.75. Once corrected, Neptune's score was 211 and SAC's score was 210.25. Neptune was therefore the highest scorer and the most advantageous bidder.

The City's new argument is that the Purchasing Department was wrong for a *second* time when it made this correction. The City now rationalizes, without evidence or testimony, that is why Mr. Stockwell started a new process outside the

RFP even after it was determined Neptune was the most advantageous bidder. There is no factual support for the City's new position.

The City also continues to assert that Neptune refused to participate in the RFP. Ans. Br. at 34. But that is not what happened. As explained in the Opening Brief at 42-45, Neptune protested the RFP after the new criterion for personal interviews was added *after the fact*. This new criterion was improper, *cf.* *Planning & Design Solutions v. City of Santa Fe*, 885 P.2d 628, 634–35 (N.M. 1994), and Neptune's protest was proper. SAC also protested to this new criterion, APPV3.028–29, and the City recognized at the time that Neptune was protesting, not waiving its rights. APPV3.006. In other words, there was no step in the procurement process that Neptune did not participate in. They participated in the entire process and protested that process *after it was completed* and after they were the lawful winner.

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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

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 14(a) of the Ariz. R. Civ. App. P., I certify that the body of the attached Appellants' Reply Brief appears in proportionately spaced type of 14 points, is double spaced using a Roman font, and contains 6,636 words, excluding table of contents and table of authorities.

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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 **CERTIFICATE OF SERVICE**

The undersigned certifies that on June 7, 2021, she caused the attached Appellant's Reply Brief to be filed via the Court's Electronic Filing System and electronically served a copy to:

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