



**ARIZONA SUPREME COURT  
ORAL ARGUMENT CASE SUMMARY**



**NEPTUNE SWIMMING FOUNDATION v. CITY OF SCOTTSDALE  
CV-23-0076-PR**

**PARTIES:**

**Petitioner:** Neptune Swimming Foundation

**Respondent:** City of Scottsdale

**Amici Curiae:** Speaker of the Arizona House of Representatives and President of the Arizona Senate on behalf of the 56th Arizona Legislature

**FACTS:**

The City of Scottsdale's ("Scottsdale") Parks and Recreation Department maintains various recreational facilities, including four aquatic centers that are open to the public. Youth competitive swim teams can use the aquatic centers when the team's sponsor obtains a revocable license from Scottsdale. Scottsdale Aquatic Center ("SAC") and Neptune Swimming Foundation ("Neptune") operate youth competitive swimming programs. Scottsdale has allowed SAC to use its aquatic centers for more than fifty years.

In 2016, SAC received a revocable license ("2016 License"), which contained an initial three-year term, with two consecutive one-year options. Neptune sent a letter to the City objecting to the 2016 License contending that it violated the Scottsdale Charter and Arizona Constitution because the grant was made at significantly below market rates and without compliance with open bidding. Scottsdale disagreed with Neptune's assertions but developed a procurement process for the next available license.

In January 2018, Scottsdale published its Request for Proposal ("RFP"), which explained the procurement process and presented the license terms. The RFP included a provision stating "all procurement activities . . . are in conformance with the rules and regulations of the Scottsdale Procurement Code" ("Code"). The Code directs procurement awards be made to the most "advantageous bidder." Code § 2-188(c)(5). The RFP provided Scottsdale's five weighted evaluation criteria and other factors the scoring committee could consider, which included: revenue; the bidder's experience; the bidder's ability and willingness to meet the listed specifications and standards; and the quality of the bidder's proposal and other presentation materials. The RFP's bidding process description included notice that "[b]idders may be invited to make a presentation on their proposals." It also indicated that a recommendation would be made to make an award to the proposer "that best met the City's need and provided the best value to the City."

SAC and Neptune submitted bids, with the Neptune bid reflecting significantly more in revenue. Scottsdale selected three disinterested city employees to serve on a scoring committee who selected SAC as the most advantageous bidder, based on SAC receiving 31.75 more points than Neptune. Scottsdale provided its "Notice of Intent to Award" the license to SAC in March 2018.

Neptune formally protested the RFP results, but Scottsdale dismissed that protest because it believed “the recommended award to [SAC] as the most advantageous Contractor . . . met all Procurement Code rules and procedures.”

After reviewing the scores, Neptune notified Scottsdale that the point totals were miscalculated and that Neptune received .75 more points than SAC. Upon additional review, Scottsdale agreed that it miscalculated the points. The Acting Purchasing Director found that there were anomalies with the RFP process. Scottsdale determined that the suitable remedy was to reconvene the evaluation committee and invite both SAC and Neptune to participate in interviews. Neptune protested Scottsdale’s decision, declined to participate in the interview, and argued that the Code required Scottsdale to instead award Neptune the license because Scottsdale had determined there was no violation of the Procurement Code.

Scottsdale responded that the Code did not bind the RFP because it did not involve Scottsdale “purchasing materials, services, or construction and this is not a City-mandated or City-sponsored program.” Scottsdale then canceled the RFP and rescinded its Notice of Intent to Award the license to SAC. Scottsdale decided to exercise the first one-year extension option under SAC’s 2016 License. To set the fees for the license extension, the Scottsdale City Council reviewed data for swim lane access in other Arizona municipalities.

In May 2019, Neptune filed a complaint seeking a writ of mandamus compelling Scottsdale to award Neptune a license under the RFP. Neptune alternatively alleged a violation of the Gift Clause, claiming the 2016 License was not supported by adequate consideration given Neptune’s bid for a higher rate per lane hour. Neptune’s remaining claims asserted Scottsdale caused Neptune money damages by failing to follow the bidding process. Neptune and Scottsdale filed competing motions for summary judgment.

The superior court granted summary judgment in Scottsdale’s favor. The court found Scottsdale’s decision to cancel the RFP did not violate the Code. The court reasoned that the RFP sought the “most advantageous” bid, not the highest bidder, and once a bidder raised concerns about the scoring committee’s calculations, Scottsdale could request presentations and seek a consensus of committee members. The court found that Neptune failed to continue with the process by objecting to the presentation invitation, and Scottsdale acted within its discretion to cancel the RFP. The court specifically determined that Scottsdale’s decision to cancel the contract was not arbitrary and capricious, but rather was rationally based on the circumstances presented. The superior court also found no Gift Clause violation. The court ruled that the recreational services provided under the 2016 License serve a public benefit and that “[j]ust because Neptune agreed to pay more [per swim lane] does not mean that the [2016 License] is so inequitable that it amounts to a subsidy.”

Neptune appealed. The court of appeals determined that Scottsdale abided by the Code when it canceled the RFP and reverted to the 2016 License. It also determined that the superior court did not err in granting summary judgment on the Gift Clause Claim and thus rejected Neptune’s argument that its higher offer established the market value of the license. Neptune filed a petition for review before the Arizona Supreme Court, which was granted.

## **ISSUES:**

As re-phrased by the Arizona Supreme Court:

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 fail to follow its own rules in cancelling a public procurement process and thereby abuse its discretion?

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