

**ARIZONA SUPREME COURT**

NEPTUNE SWIMMING FOUNDATION,

Plaintiff/Appellant,

v.

CITY OF SCOTTSDALE,

Defendant/Appellee,

No. CV-23-0076-PR

Court of Appeals No.  
1 CA-CV 21-0053

Maricopa County Superior Court  
No. CV2019-007172

**BRIEF OF OFAMICI CURIAE SPEAKER OF THE ARIZONA HOUSE OF REPRESENTATIVES BEN TOMA AND PRESIDENT OF THE ARIZONA STATE SENATE WARREN PETERSEN ON BEHALF OF THE 56<sup>TH</sup> ARIZONA LEGISLATURE**

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## INTRODUCTION

The Arizona Legislature enacted the State Procurement Code nearly four decades ago. [Laws 1984, Ch. 251, § 1, at 985](#) (enacting A.R.S. § 41-2501, *et seq.*). The Legislature’s stated purposes for enacting the Code were, among other things, to “[p]rovide for increased public confidence in the procedures followed in public procurement,” “[e]nsure the fair and equitable treatment of all persons who deal with the procurement system of this state,” “[f]oster effective broad-based competition within the free enterprise system,” and “[p]rovide safeguards for the maintenance of a procurement system of quality and integrity.” [Laws 1984, Ch. 251, § 1, at 985](#).

The Legislature also granted cities and political subdivisions authority to “adopt all or any part of” the State Procurement Code. [A.R.S. § 41-2501\(C\)](#). One year later, the Legislature made clear that “the principles of law and equity ... supplement the provisions of” the State Procurement Code. [A.R.S. § 41-2504](#).

Here, the City of Scottsdale initiated a procurement process to award a license to a youth competitive swimming program to use Scottsdale’s aquatic centers, and two bidders participated: Neptune Swimming Foundation (“Neptune”) and Scottsdale Aquatic Center (“SAC”). [Neptune Swimming Foundation v. City of Scottsdale, No. 1 CA-CV 21-0053, 2023 WL 2418546, ¶¶ 1-8 \(Ariz. App. Mar. 9, 2023\) \(“Decision”\)](#). Five months later—after Neptune notified Scottsdale that its scoring committee made a calculation error during the selection process—

Scottsdale’s procurement director determined that cancelation was in Scottsdale’s best interest and canceled the entire procurement process. *Id.* at ¶¶ 7-8, 21-22. Scottsdale then reverted to its 2016 license with SAC—which happens to be “the only competitive swim team Scottsdale has allowed to use its aquatic centers for over 50 years.” *Id.* at ¶¶ 3, 8.

In its Petition for Review, Neptune alleges that Scottsdale violated its own procurement code and article 9, section 7 of the Arizona Constitution and that the court of appeals made factual and legal errors in its Decision rejecting Neptune’s claims. Petition for Review (“PFR”) at 6-15. This case provides the Court with an opportunity to reconcile Arizona case law with the state’s procurement statutes, thereby clarifying the legal principles that bind cities and other political subdivisions in the procurement process. Given the important public policies and legislative intent underlying the State Procurement Code, this case presents a matter of statewide importance and warrants the Court’s review. As Neptune convincingly argues, the procurement process exists—both on statewide and local levels—“to prevent favoritism, waste, and taxpayer harm.” PFR at 10.

For these reasons, Speaker of the Arizona House of Representatives Ben Toma and President of the Arizona State Senate Warren Petersen respectfully submit this brief as *amici curiae*. Speaker Toma and President Petersen take no position on

the question of which party should prevail on the merits of this appeal, but simply urge this Court to grant Neptune’s Petition for Review.

### **INTEREST OF THE AMICI**

Ben Toma is the Speaker of the Arizona House of Representatives and Warren Petersen is the President of the Arizona State Senate. The *amici* proffer this brief as presiding officers of their respective chambers to articulate the perspective of the legislative branch on important issues bearing on the application—and underlying aspirations—of procurement statutes the Legislature has enacted. *See State ex rel. Napolitano v. Brown*, 194 Ariz. 340, 342, ¶ 5 (1999) (“In Arizona, the legislature is endowed with the legislative power of the State, and has plenary power to consider any subject within the scope of government unless the provisions of the Constitution restrain it.”); *Canon School Dist. No. 50 v. W.E.S. Const. Co., Inc.*, 177 Ariz. 526, 527-31 (1994) (reconciling a conflict between state law and procurement rules adopted by the Board of Education to effectuate legislative intent).

### **ARGUMENT**

#### **I. This Court Should Grant Review to Determine Threshold Questions Concerning the Legal Authority for Local Procurement Code Provisions Under Arizona Law**

In the second issue presented in Neptune’s Petition for Review, Neptune argues that Scottsdale violated its own procurement code “by unilaterally cancelling” the procurement process and giving the aquatic facilities contract to

SAC. PFR at 10-14. In response, Scottsdale relies on the court of appeals' determination that Scottsdale "acted within its authority by cancelling the RFP [request for proposal] and reverting to the 2016 License." Response to PFR at 5 (citing [Decision](#), ¶ 26). This issue presents important and interesting threshold questions, which Arizona appellate courts have not fully addressed, about the scope of a city's authority to enact a local procurement code and the extent to which a local code may permissibly deviate from the State Procurement Code.

In *Falcone Brothers & Associates, Inc. v. City of Tucson*, 240 Ariz. 482, 488, ¶ 15 (App. 2016), the court of appeals recognized that A.R.S. § 41-2501(C) authorizes cities to "adopt all or any part" of the State Procurement Code. *Falcone* ultimately held that the City of Tucson's procurement code "was neither an adoption of nor a permissible extension of the state procurement code" because Tucson's code "shared the same essential defect" that this Court identified in *R.L. Augustine Construction Co. v. Peoria Unified School District No. 11*, 188 Ariz. 368, 370 (1997), by establishing a single-tier procurement process that deviated from the State Procurement Code's two-tier process. *Falcone*, 240 Ariz. at 488-89, ¶¶ 16-19. The court of appeals reasoned that, "as *Augustine* established, the City's scheme was inconsistent with Arizona's procurement code" and therefore, Tucson "failed to 'adopt' the state procurement code within the meaning of § 41-2501(C)." *Id.* at 489,

¶ 19. *Falcone* therefore suggests (appropriately) that [A.R.S. § 41-2501\(C\)](#) implicitly imposes reasonable limits on a city’s authority to enact a local procurement code.

Moreover, the Arizona Attorney General has repeatedly opined that even when an entity is not subject to the State Procurement Code, the entity nonetheless “has a fiduciary duty to obtain maximum return for each dollar of public funds spent.” [Ariz. Att’y Gen. Op. No. I89-063 \(July 6, 1989\)](#); *see also* [Ariz. Att’y Gen. Op. No. I84-035 \(Mar. 12, 1984\)](#) (citing *Hertz Drive-Ur-Self System, Inc. v. Tucson Airport Authority*, 81 Ariz. 80, 85 (1956), for the proposition that “even in the absence of a statutory bidding requirement, a public entity has a fiduciary obligation to obtain maximum return for each dollar spent which may, in some instances, require competitive bidding”); [Ariz. Att’y Gen. Op. No. I80-015 \(Feb. 4, 1980\)](#) (“The lack of competitive bidding in our experience generates abuse and in most instances results in higher costs ... all public officials with authority to expend public funds have a fiduciary obligation to do so in the most economical and feasible manner.”). Yet in another opinion, the Attorney General interpreted [A.R.S. § 41-2501\(C\)](#) as authorizing political subdivisions to “adopt any part of the Procurement Code, or none at all”—without referencing any fiduciary duty. [Ariz. Att’y Gen. Op. No. I89-098 \(Nov. 28, 1989\)](#).

Scottsdale cites *Hertz* for “the well-established principle” that in the absence of a controlling constitutional or statutory provision, municipal ordinance, or other



legislative requirement, “competitive bidding is not an essential prerequisite to the validity of contracts for public works[.]” Response to PFR at 3. Notably, *Hertz* predates the State Procurement Code and presented a factual scenario where the two competitors in the case “were *not* in fact bidders in the sense that they were responding to a call for bids, for there had been no such call—no formal advertisement, no specifications for the bidders to follow, no standard of comparison to be applied to all bids.” *Hertz*, 81 Ariz. at 84 (emphasis added). This Court reasoned that because “there were no bids, there could be no legal duty ... to accept any bid.” *Id.* In this case, however, the court of appeals observed that “Scottsdale explicitly held out” the RFP “as subject to [its Procurement] Code”—and Scottsdale does not dispute this fact in its response to Neptune’s Petition for Review. *See Decision*, ¶ 18; *see also id.*, ¶ 5 (describing the RFP). Thus, as the Arizona Attorney General has explained, to the extent this Court’s 67-year-old opinion in *Hertz* established any legal proposition, it is that cities owe a fiduciary duty to obtain maximum return for every dollar spent.

As relevant here, Arizona’s administrative procurement rules allow cancellation based on the “best interest of the state” under the following conditions:

**R2-7-B308. Cancellation of Solicitation After Receipt of Offers and Before Award**

- A. Based on the best interest of the state, an agency chief procurement officer may cancel a solicitation after offer due date and time. The

agency chief procurement officer shall prepare a written justification for cancellation and place it in the procurement file.

- B. The agency chief procurement officer shall notify offerors of the cancellation in writing.
- C. The agency chief procurement officer shall retain offers received under the canceled solicitation in the procurement file. If the purchasing agency intends to issue another solicitation within six months after cancellation of the procurement, the agency chief procurement officer shall withhold the offers from public inspection. After award of a contract under the subsequent solicitation, the agency chief procurement officer shall make offers submitted in response to the cancelled solicitation available for public inspection except for information determined to be confidential pursuant to R2-7-103.
- D. In the event of cancellation, the agency chief procurement officer shall promptly return any bid security provided by an offeror.

[Ariz. Admin. Code § 2-7-B308.](#)

In contrast, Scottsdale's corresponding procurement rules governing cancellation are more relaxed:

**R2-193.3 Cancellation of Solicitation After Bids or Proposals Are Due**

- A. After opening of bids or proposals, but before award, a solicitation may be canceled if the Director determines that cancellation is advantageous to the City.
- B. A notice of cancellation and rejection shall be given to all bidders or offerors submitting bids or proposals.
- C. Bids or proposals received shall be placed in a sealed file pending a decision of a rebid of the solicitation. In the event of a rebid of the solicitation, the file, whether hard copy or electronic, shall remain sealed until an award is made.

[Scottsdale Procurement Code, R2-193.3.](#)

The court of appeals relied on this provision of Scottsdale’s code when it decided that Scottsdale did not exceed its authority by canceling the RFP. *See Decision*, ¶ 26. However, Neptune correctly argues that Scottsdale’s procurement code does *not* grant Scottsdale discretion to invoke the cancellation provision after releasing the sealed bids, which occurred here. PFR at 13. Scottsdale brushes this argument aside, asserting that “even if the fact that the City decided to release the proposals led to the conclusion that a contract was awarded, that award would have been to SAC not Neptune.” Response to PFR at 5. Scottsdale’s response is puzzling and circular, because if the contract had been awarded to SAC, Scottsdale’s procurement code would *not* have authorized cancellation. *See* PFR at 13.

In light of the parties’ dispute regarding Scottsdale’s authority to cancel the RFP, and the obvious distinctions between state procurement rules and Scottsdale’s procurement rules, this Court should grant review to resolve a threshold legal determination, as the *Falcone* court did. Specifically, the Court should request that the parties address whether Scottsdale permissibly adopted the state’s procurement rules governing cancellation under [A.R.S. § 41-2501\(C\)](#). The record here might indicate that Scottsdale’s less-restrictive procurement rules enabled Scottsdale to induce Neptune into an illusory five-month procurement process, only to exercise another option with SAC outside of the procurement process altogether. *Cf.*

*Arizona's Towing Professionals, Inc. v. State*, 196 Ariz. 73, 77-78, ¶¶ 23-24 (App. 1999) (observing that “[e]very contract imposes upon each party a duty of good faith and fair dealing” and cancellation of a contract for convenience “creates the impression that the contract was illusory”). Granting review would also enable the Court to endorse the Arizona Attorney General’s non-binding opinions that even in the absence of a statutory requirement, political subdivisions owe a fiduciary duty to maximize every dollar spent.

**II. This Court Should Grant Review to Clarify the Circumstances that Justify a “Best Interest” Analysis in a Procurement Decision**

This case also provides the Court with an opportunity to apply the holding of *Brown v. City of Phoenix*, 77 Ariz. 368 (1954)—a 69-year-old opinion that predates the State Procurement Code and appears to be central to this dispute.

As the court of appeals explained, *Brown* involved the City of Phoenix’s consideration of “competing bids for car rental businesses to lease space at the airport.” *Decision*, ¶ 24 (citing 77 Ariz. at 371). “The city awarded the lease to the ‘less favorable bidder,’” even though the city charter directed the city to make the award to the “highest responsible bidder.” *Decision*, ¶ 24 (citing *Brown*, 77 Ariz. at 377). This Court decided that the city officials abused their discretion under a “best interests of the city” analysis and directed the issuance of a writ of mandamus awarding the lease to the other bidder. *Brown*, 77 Ariz. at 375, 377. Here, the court of appeals determined that it was “[c]ritical” to this Court’s conclusion in *Brown* that

the city had “conducted a one-sided evaluation” by failing to investigate the competing bidder. [Decision](#), ¶ 24 (citing [Brown](#), 77 Ariz. at 375.) The court of appeals distinguished *Brown*, reasoning that “Scottsdale did not reject Neptune’s higher bid and accept SAC’s lower one as the city did in *Brown*.” [Decision](#), ¶ 25.

Neptune extensively argues that the court of appeals misapplied *Brown* and misconstrued the record. *See* PFR at 10-15. As Neptune puts it, “[t]he facts here are remarkably similar to those in *Brown*, 77 Ariz. at 371.” PFR at 14. Scottsdale does not acknowledge *Brown* at all. *See generally* Response to PFR.

Several of this Court’s statements in *Brown* appear to support Neptune’s arguments. For example, this Court cited a well-recognized principle on which the State Procurement Code was enacted, i.e., that “[t]he undoubted purpose of the law is to benefit the taxpayers and citizens of the city by regulating the manner in which disposition may be made of city property, to the end that the city shall secure as great a return for its property as is reasonably possible.” *Compare Brown*, 77 Ariz. at 373, with [Laws 1984, Ch. 251, § 1, at 985](#) (stating that one purpose of the State Procurement Code is to “maximize to the fullest extent practicable the purchasing value of public monies of this state”). This Court further elaborated that “[t]he purpose of requiring competitive bidding is to prevent the plundering of the taxpayers and as between two bidders equally responsible the municipality cannot reject the lower bid.” [Brown](#), 77 Ariz. at 373 (cleaned up). This Court also added

that “the power to reject any or all bids”—which appears to have occurred here when Scottsdale canceled the entire procurement process—“is a further grant of discretionary power.” *Id.*

Given the apparent similarities between this case and *Brown*, this Court should grant review to determine whether the court of appeals correctly interpreted *Brown* and to provide all political subdivisions with needed guidance in procurement processes. In *Brown*, this Court struck down a contract upon concluding that the evidence did not support a “best interest of the city” finding where the “bid was unquestionably inferior in so far as dollars and cents are concerned.” [77 Ariz. at 377](#). Nearly seven decades after *Brown*, it is imperative that this Court grant review to determine how courts should conduct a “best interest” analysis in evaluating any procurement award—including in this case, when a city decides to unilaterally cancel a procurement process by invoking a “best interest” provision of a local procurement code that deviates from the State Procurement Code.

## CONCLUSION

For the reasons above, this Court should grant Neptune's Petition for Review.

RESPECTFULLY SUBMITTED this 29th day of June, 2023.

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