SUPREME COURT OF FLORIDA

STATE OF FLORIDA, DEPARTMENT OF
THE LOTTERY, and AUTOMATED
WAGERING INTERNATIONAL, INC.,

Petitioners,

v.

SC Case Nos. SC01-1795
SC01-1796

GTECH CORPORATION,

Respondent.

DCA Case Nos. 1D00-451
1D00-578

GTECH CORPORATION'S ANSWER BRIEF DIRECTED TO THE INITIAL BRIEF OF AUTOMATED WAGERING INTERNATIONAL, INC.

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PRELIMINARY STATEMENT

Petitioners, the State of Florida, Department of the Lottery ("the Lottery"), and Automated Wagering International, Inc. ("AWI"), each filed separate initial briefs. The Lottery's brief is forty-five pages in length and AWI's is forty-four pages in length.

Rather than file two separate, fifty-page briefs, respondent, GTECH Corporation ("GTECH"), will attempt to address the arguments made by both petitioners, which are similar, in this brief. GTECH is contemporaneously filing a separate, much shorter brief limited to the issue that this Court should decline to exercise its discretion to decide the case in light of the very recent (2001) legislative amendments to Chapter 287 that address the precise issues raised by the certified questions.

In both briefs, respondent will use the pseudonyms "GTECH" for itself, "AWI" for Automated Wagering International, Inc., and "the Lottery" for the State of Florida, Department of the Lottery.

On October 22, 2001, the First District Court of Appeal provided a partial record to this Court. That record includes seventy-three (73) pages of materials, beginning with the First District's February 28, 2001 opinion and ending with its September 5, 2001 order staying the issuance of the mandate. GTECH will cite these portions of the record as "(R. ____)."

The record before the First District also included a six-volume, spiral bound appendix filed by GTECH. Petitioners both cite exclusively to the GTECH appendix in their initial briefs. However, the First District did not provide to this Court GTECH's

appendix, as well as various other pertinent parts of the record. GTECH has filed a motion to correct the record and require that the complete record be supplied. The same motion requests an extension of time to serve GTECH's answer briefs. However, in light of the Lottery's strident opposition to GTECH's motion, GTECH is filing both briefs now. GTECH will cite to its First District appendix, which it assumes will eventually be supplied to the Court, as "(GTECH _____)" and "(GTECH _____, sec. _____)" when a particular section on the referenced page is referred to. GTECH reserves the right to amend its briefs if it becomes necessary based upon the completed record.

STATEMENT OF THE FACTS & CASE

1. Introduction

This is a declaratory judgment action to invalidate a contract between AWI and the Lottery entered into on March 9, 1999. The Lottery awarded the contract to AWI following a competitive procurement initiated by a "Request for Proposals" ("RFP"). After awarding the contract to AWI, the Lottery and AWI commenced private negotiations that resulted in a contract that is materially different, and more favorable to AWI, than its proposal and the mandatory terms of the RFP.

The trial court entered summary judgment in favor of GTECH. The court held that the privately negotiated contract violated Chapter 287, Fla. Stat. The First District Court of Appeal affirmed in an opinion issued February 28, 2001. The First District subsequently denied petitioners' motions for rehearing and rehearing *en banc*. The case is in this Court because the First District certified two questions as being of great public importance. Though these questions were clearly important to the dissenting Judge, they were not passed upon by the majority. Further, very recent (June, 2001) amendments to Chapter 287 prospectively authorize the type of "competitive negotiation" that petitioners argue occurred in this case, and thus eliminate any contention that this case is one of "great public importance."

2. The Parties

In 1987, the Legislature established a statewide lottery and created the Department of the Lottery to operate it. Section 24.104, Fla. Stat. Like most state agencies, the Lottery is

authorized to purchase or lease goods and services necessary for its operations. Section 24.105(17), Fla. Stat. Further, ***because*** it is a state agency, the Lottery is required to award contracts pursuant to the competitive process prescribed in Chapter 287, Fla. Stat.

Since its inception, the Lottery has contracted with AWI (or AWI's predecessor) to provide its computerized gaming system and related services. (GTECH 164-65, 291). The on-line services contract requires the presence of substantial vendor personnel in Tallahassee. For several years, AWI's employees have worked alongside the Lottery's employees at the Lottery's headquarters. GTECH is one of the largest suppliers of on-line Lottery equipment and services in the world. It currently provides similar on-line systems to many other states and foreign countries, including Texas, New York and the United Kingdom.

3. The RFP

The original contract between AWI and the Lottery expired in June, 1996. In late 1995, in anticipation of that expiration, the Lottery issued the RFP. The RFP sought proposals for a new on-line system and general services contract. (GTECH 1379). The RFP is in two parts. Part I seeks information regarding the financial responsibility, security, and integrity of the applicants.
[1] Part II sets forth detailed specifications for the new gaming system and services sought by the Lottery. The system consists of two primary components. First, the contractor is required to provide a central computer system in Tallahassee and a secondary system in Orlando. (GTECH 548). The

[1] Both AWI and GTECH satisfied this threshold requirement. (GTECH 793).

computer system includes a mainframe, servers, workstations, and PCs. (GTECH 548). Second, the contractor is also required to provide 11,500 retailer terminals to be installed at gas stations, convenience stores and other locations throughout the state. (GTECH 551).

The RFP provided for the creation of an evaluation committee to evaluate and score the proposals. (GTECH 605, sec. 8.1). The committee was to evaluate several issues: (1) management; (2) technical requirements; (3) operations and security; (4) marketing; and (5) use of certified minority business enterprises. (GTECH 525-26, sec. 1.20). The RFP also required an overall price proposal. (GTECH 525-26, sec. 1.20). There were 100 available points. The evaluation committee could award up to eighty points per applicant based upon the management, technical, operations and marketing proposals. The remaining twenty points were based upon the price proposals. (GTECH 606, sec. 8.6).[2]

One of the most important technical requirements of the RFP is the deadline for implementing the central computer system. The RFP requires the prevailing applicant to implement the entire system (including a hot back-up site) within 180 days from the notice of award. (GTECH 708, sec. 1.47(E)). This is known as a "big bang" implementation. (GTECH 596). Failure to comply subjects the vendor to liquidated damages of up to $1 million per day. If the delay extends beyond twenty days, the Lottery is authorized to cancel the contract. (GTECH 708, sec. 1.47(E)).

The RFP also specifies the type and number of "retailer terminals" to be provided. The Lottery generally offers two types of tickets, "on-line" and "instant". (Lottery Brf., p. 14). The RFP requires the prevailing applicant to begin with at least 8,500 on-line terminals, with the anticipated expansion to 10,000 terminals during the initial term of the contract. (GTECH 551, sec. 3.4.1). The RFP also requires the prevailing applicant to begin with at least 3,000 instant terminals, with the anticipated expansion to 4,000 terminals during the initial term of the contract. (GTECH 551, sec. 3.4.1).

As part of the "big bang" implementation, the RFP establishes a deadline of 180 days from

[2] Five bonus points were available for the use of certified minority business enterprises. (GTECH 606).

the notice of award for the vendor to fully install and have operational all required terminals. (GTECH 708, sec. 1.47(F)). Failure to comply with this deadline subjects the vendor to liquidated damages of up to $600.00 per day. (GTECH 708, sec. 1.47(F)).

The technical requirements in the RFP are daunting. Approximately 43% (41 of 95 pages) of the RFP is dedicated to the technical requirements. In this context, it is impossible to overstate the centrality of the "big bang" schedule. The upshot of the "big bang" requirement is that the successful contractor must, within six months of the notice of award, design and install a massive central computer system, including a mainframe and related systems in Tallahassee, a backup system in Orlando, and a complex telecommunications package. (GTECH 1414-18). On top of all this, the contractor must also install 11,500 retailer terminals across the state. (GTECH 1418-26).

Compliance with the "big bang" schedule was not a mere academic or paper exercise. The RFP imposes severe penalties for failure to comply. In addition to the base penalty of $1 million per day, it is important to understand that the $600 per day terminal penalty is ***per terminal***. (GTECH 708, sec. 1.47(F)). The terminals cannot function unless the central computer system is operational. Thus, if the central system is not operational by the 180-day deadline, ***none*** of the 11,500 required terminals will be operational, and the contractor is liable for liquidated damages of ***$6.9 million per day***. In submitting their price and technical proposals, the applicants obviously had to take into consideration that failure to comply with the "big bang" schedule could bankrupt the company.

In addition to the technical specifications, the RFP mandates the inclusion of certain "commercial" provisions in the contract. (GTECH 531, sec. 1.39). The RFP specifically states that the final contract "shall" include "at least" these commercial provisions. (GTECH 531, sec. 1.39). The mandatory commercial provisions include a "termination for convenience" provision, whereby the Lottery is permitted to terminate the contract at any time without cause. (GTECH 535, sec. 1.39(n)). The RFP also requires a "termination for cause" provision. (GTECH 534, sec. 1.39(m)). Under this provision, the Lottery reserves the right to immediately terminate the contract upon the occurrence of certain specified events. (GTECH 534, sec. 1.39(m)).

Finally, as petitioners emphasize, Specification 8.7.2 of the RFP provides:

> If the Secretary determines that the proposals under this RFP are the best method of obtaining the desired gaming system and services, the Secretary shall negotiate a Contract with the most highly qualified Respondent. Should the Secretary be unable to negotiate with that Respondent the conditions and price that the Lottery deems to be fair, competitive, and reasonable, negotiations with that Respondent shall be terminated. The Secretary shall then undertake negotiations with the second most qualified Respondent. Should the Lottery be unable to negotiate a satisfactory Contract with that firm, additional firms may be selected to participate in this negotiation process or negotiations may be reinstated following the original order of priority. Negotiations shall continue until an agreement is reached or all proposals are rejected. The Lottery reserves the right to reject all proposals at any time during negotiations.

(GTECH 1475). AWI and the Lottery interpret this provision as permitting substantive negotiations following the RFP process. It is their position that, once the Lottery declared AWI the highest-ranked bidder, they were no longer constrained by the mandatory specifications of the RFP or AWI's proposal, including its price bid.

4. AWI's Proposal

AWI submitted its proposal in response to the RFP on December 15, 1995. (GTECH 607). AWI offered to provide the required on-line system and services for a price equivalent to 1.85% of on-line net sales. (GTECH 1481). AWI also proposed to comply with all of the mandatory terms of the RFP, including the "big bang" implementation. AWI stated in its proposal that "[a]ll the Lottery's requirements will be delivered at the start of the new contract." (GTECH 1476). AWI also stated that it would comply with the RFP's terminal requirements. AWI specifically stated that it would provide, at start-up, 8,500 "Ovation" on-line terminals and 3,000 "OmniPoint" instant terminals, as required by the RFP. (GTECH 1477, 1480).

5. The Interim Contracts

The Lottery completed the evaluation process and announced its intention to award the contract to AWI on October 31, 1996. (GTECH 793). GTECH thereafter initiated two bid protests. The Lottery issued its Final Order awarding the contract to AWI on March 23, 1998, thereby completing the RFP process. (GTECH 1026).

As previously noted, the original contract between AWI and the Lottery had expired almost two years earlier, on June 30, 1996. In order to avoid an interruption of service, the Lottery and AWI entered a series of supplemental agreements whereby AWI continued to provide the Lottery's on-line system and services. The Lottery and AWI entered into seven such supplemental agreements, which effectively extended the terms of the original contract through January 5, 1998. (GTECH 1490-1503).

By virtue of an eighth supplemental agreement, described as an "interim agreement," executed on January 5, 1998, AWI and the Lottery extended the expiration date of the original contract to January 1, 2000. (GTECH 1507).

On October 29, 1998, AWI and the Lottery executed two documents: a "second amendment" to the January 5, 1998 "interim agreement," and an "Agreement for Gaming System and Services" ("the October, 1998 contract"). (GTECH 1504, 1520). By virtue of the former, the Lottery agreed to implement a controversial "Powerball" game. (GTECH 1505, 1617). The latter was the contract that purportedly completed the RFP process begun in 1995. However, the October 1998 contract omitted or altered certain material provisions required by the RFP, and added other provisions never contemplated by the RFP. These material deviations included a nine-year term, a price made contingent upon implementation of the "Powerball" game, elimination of the "big bang" implementation schedule, and the deletion of the required "termination for convenience" provision. (GTECH 1524, 1613, 1539, 1611).

The Lottery and AWI entered the October, 1998 contract just five days before the general election held on November 3, 1998. At the election, the citizens of Florida elected a Republican, Jeb Bush, as governor. Shortly thereafter, Marcia Mann, a Democrat, announced her resignation as Lottery Secretary. (GTECH 11). It was apparent prior to the election that Governor Bush was likely to prevail and the timing and substance of the October, 1998 contract generated harsh criticism. (GTECH 1615-22).

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6. The March, 1999 Contract

GTECH filed the underlying lawsuit on February 5, 1999. GTECH sought a declaratory judgment regarding the validity of the October, 1998 contract and the preceding interim agreements. (GTECH 5). About that time, the new Lottery Secretary began negotiating revisions to the October, 1998 contract. In connection with these negotiations, AWI and the Lottery specifically discussed whether it was legally permissible to deviate from the mandatory terms of the RFP. (GTECH 1623-28). AWI assured the Lottery in writing that such deviations would be lawful. (GTECH 1623-24). The Lottery accepted this legal advice from its vendor and thus assumed the risk that a negotiated contract might someday be invalidated.

On March 9, 1999, the Lottery and AWI signed two new agreements. The two agreements are entitled "Amended Interim Agreement for the Operation of On-Line Lottery System" ("the amended interim agreement") and "Amended Agreement for Gaming System and Services" ("the new contract"). (GTECH 1629, 1635). The amended interim agreement changes the expiration date of the previous interim agreement from January 1, 2000 to September 29, 1999. (GTECH 1629). The term of the new contract is from September 30, 1999 to December 31, 2004. (GTECH 1639). This is the contract at issue in this case.

Like its predecessor, the new contract omits or alters several provisions required by the RFP, and adds other provisions never contemplated by the RFP, such that the terms of the new contract are materially different, and more beneficial to AWI, than the contract for which GTECH and AWI submitted proposals.

First, the new contract changes AWI's price proposal. In response to the RFP, AWI proposed to provide the entire computer system and all related services for 1.85% of online net sales. (GTECH 1481). The new contract provides that AWI will receive payment at this rate, but further

[3] The newspaper articles attached to GTECH's cross-motion were offered to show that the criticisms were in fact made, not that the matters stated in the articles are true. Thus, the articles are not hearsay and were admissible in support of GTECH's cross-motion. See Martin v. City of Indianapolis, 982 F. Supp. 625, 630 (S.D. Ind. 1997).

provides that AWI is eligible for "incentive compensation" if net sales exceed a certain amount. (GTECH 1729). Under this "incentive compensation" provision, AWI can receive total payments of up to 2.08% of on-line net sales. (GTECH 1729). Nowhere in its response to the RFP did AWI state that its price proposal was contingent upon any additional "incentive compensation."

The new contract also alters the RFP provisions regarding the term of the contract. The RFP states that the contract shall expire on June 30, 2001, with the Lottery having the option to renew the contract for two additional two-year periods. (GTECH 520, sec. 1.8). The new contract continues through December 31, 2004 — three and one-half years longer than the mandatory expiration date in the RFP. (GTECH 1639). Further, the renewal option may not be at the same price. The new contract requires the Lottery to notify AWI of its intent to renew by December 31, 2001 (three years prior to the expiration of the new contract) in order to retain the same terms and conditions. Otherwise, any renewal "shall be on mutually agreed terms and conditions." (GTECH 1639).

The new contract eliminates the "big bang" implementation schedule central to the RFP. The change is most profound in the area of terminal installation requirements. The RFP requires the prevailing applicant to install and have operational all 11,500 required terminals within 180 days of the notice of award. (GTECH 708, sec. 1.47(F)). Under the new contract, AWI is not required to provide ***any*** new terminals at start-up. Instead, the new contract provides for a phased-in installation that did not even ***begin*** until January 3, 2000. (GTECH 1728). This date is ***645*** days after the notice of award (March 23, 1998). AWI was not required to complete installation of all of the terminals until December 27, 2000. (GTECH 1728). This date is more than ***33 months*** (1004 days) after the notice of award. Recall that, under the "big bang" schedule in the RFP, installation of all terminals was to occur within ***6 months*** of the notice of award.

The same is true regarding implementation of the central computer system. The RFP required full implementation within 180 days (6 months) of the notice of award, with liquidated damages of up to $1 million per day for failure to comply. (GTECH 708, sec. 1.47(E)). The new contract gave AWI until October 31, 1999 to implement the new gaming system. (GTECH 1722).

Moreover, that deadline could be extended to March 1, 2000. (GTECH 1722). The October 31, 1999 deadline is more than 19 months after the notice of award.

The new contract also changes the number and type of terminals AWI is required to provide. AWI stated in its proposal that it would provide, at start-up, 8,500 Ovation terminals and 3,000 OmniPoint terminals. (GTECH 1477, 1480). Under the new contract AWI is to provide only 8,000 Ovation terminals and 2,000 OmniPoint terminals. (GTECH 1689). To make up for this deficiency, AWI has promised to provide 2,000 OmniLink terminals. (GTECH 1689). The OmniLink is never mentioned in AWI's response to the RFP.

The new contract also changes or deletes mandatory commercial provisions of the RFP. In particular, the new contract does ***not*** include a "termination for convenience" clause, as specifically required by the RFP. (GTECH 535, sec. 1.39(n)). This is a startling concession because such a provision is included in virtually every state contract. Also, the liquidated damages penalty for failing to comply with the already relaxed system implementation deadline is reduced from $1 million per day to $10,000 per day. (GTECH 1654). This is 1/100 of the amount in the RFP. These valuable concessions, individually and collectively, result in a significantly more favorable contract to AWI than the one it proposed.

Finally, it is important to note that, under the March, 1999 contract, AWI retained ownership of the terminals and shouldered the financial burden of installing them. (GTECH 1641). Thus, AWI assumed the financial risk that all of the terminals might be rendered useless if the March, 1999 contract is declared illegal and void. There is no risk that the Lottery will be "stuck with" 11,500 useless terminals if the contract is voided.

7. GTECH's Bid Protests

A theme of petitioners' briefs is that GTECH's litigation of the contract award resulted in "delay," and thus necessitated the negotiation of a contract with terms materially different than the RFP and AWI's proposal. This is untrue and a red herring designed to distract the Court from the real issues in the case.

First, it is important to note that GTECH ***prevailed*** in the first bid protest. The ALJ found,

and the Lottery agreed, that the committee's award of the contract to AWI was arbitrary and capricious. (GTECH 901-02, para. 296). This finding was based largely upon the fact that several evaluation committee members were biased in favor of AWI because it was the incumbent. (GTECH 861, 863, 868, 874).

The primary issue in the second bid protest was the propriety of assigning the ***same*** evaluation committee to re-evaluate and rescore the proposals after that finding. GTECH Corporation v. State of Florida, Department of the Lottery, 737 So.2d 615, 618 (Fla. 1st DCA 1999). A divided court affirmed the award to AWI. The point is that GTECH's bid protests raised serious issues, many of which it prevailed on, and it is inappropriate to suggest that it be somehow penalized for exercising its rights.[4]

8. Procedural History of this Case

GTECH initiated this action on February 5, 1999 to challenge the validity of the October, 1998 contract. GTECH filed an amended complaint on March 22, 1999. It did so after learning through a public records request that AWI and the Lottery had entered into the March 9, 1999 contract. The amended complaint sought a declaration that the March 9, 1999 contract is illegal and void.[5]

AWI moved for summary judgment on June 12, 1999. (GTECH 410). In its motion, AWI specifically asserted:

> Both Counts I and II of the Amended Complaint rest entirely upon the construction of written instruments, statutes and rules. Thus, there are no genuine issues of material fact to be resolved and both counts are appropriate for adjudication by summary judgment.

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[4] Also, as noted in footnote 6 (page 14) of GTECH's separate brief, the First District ***denied*** GTECH's motion for a stay during its appeal and thus that appeal caused no delay.

[5] The Amended Complaint includes three Counts. GTECH voluntarily dismissed Count I. Count II (declaratory judgment regarding validity of the March, 1999 contract) is at issue in this case. Count III (violation of the public records law) remains pending below.

(GTECH 414). GTECH agreed that the case presented purely legal issues and filed a cross-motion for summary judgment on January 5, 2000. (GTECH 1370). The Lottery subsequently moved for summary judgment as well. (GTECH 1773).

The trial court held a lengthy hearing on January 26, 2000. (GTECH 1835). Following the hearing, the trial court granted GTECH's motion for summary judgment as to Count II of the amended complaint. (GTECH 1833). The trial court identified the "basic legal question" as "whether the Lottery could eliminate all but the lowest bidder in an administrative RFP process and then later privately negotiate the mandatory and price terms of the contract which had been set out in the AWI proposal by which it gained the status of winning bidder." (GTECH 1833). The trial court answered that question in the negative, deeming such a process "contrary to Florida law and untenable under the concept of fair competition among bidders." (GTECH 1834).

Petitioners appealed. The First District Court of Appeal affirmed in an opinion dated February 28, 2001. The First District agreed with the trial court that the post-award negotiations between AWI and the Lottery violated "fundamental fairness." (R. 10). The court held that

> GTECH was entitled to rely on the RFP process in submitting a responsive proposal under Florida's system of competitive bidding and that the Lottery now cannot ignore those laws in reaching a new agreement which may in the final analysis bear little resemblance to the proposal that earned AWI preferred status in the first place.

(R. 9).

The court specifically rejected petitioners' arguments that Specification 8.7.2 of the RFP permitted the post-award negotiations under the particular facts of the case. The court recognized that, under this provision, "in order to get to the point of negotiating a final contract for goods and services, the [Lottery Secretary] first had to determine that 'the proposals under this RFP are the best method of obtaining the desired gaming system and services.'" (R. 6). The court concluded that the material deviations from AWI's winning proposal constituted an implicit determination that the proposals were ***not*** the "best method" of obtaining the desired system and services. Thus, Specification 8.7.2 was inapplicable. (R. 6).

AWI and the Lottery moved for rehearing, rehearing *en banc*, and for certification. The First

District denied the motions for rehearing and rehearing *en banc*. However, the First District certified two questions as being of "great public importance." They are:

> 1. Does the Department of the Lottery, pursuant to a specification included in a request for proposals, have the authority to negotiate substantive contract terms with the most highly qualified respondent, and pursuant to such negotiations, award a contract that must be upheld absent a finding of illegality, fraud, oppression, or misconduct?
>
> 2. Where the negotiation clause in a request for proposals indicates that the agency will negotiate a contract with the most highly qualified respondent, including conditions and price that the agency deems to be fair, competitive, and reasonable, may an unsuccessful proposer that has failed to administratively contest the negotiation clause later attack the contract in circuit court on the basis that the negotiations conducted pursuant to the terms of that clause were impermissible?

(R. 59).

Both AWI and the Lottery filed notices to invoke this Court's jurisdiction. On August 17, 2001, GTECH filed motions to "dismiss discretionary review of questions not passed upon by the District Court of Appeal." As the title indicates, GTECH contends that the First District did not pass upon either of the two certified questions, and thus this Court lacks subject matter jurisdiction. Art. V, Sec. 3(b)(4), Fla. Const. Neither AWI nor the Lottery filed a response to the motions. Instead, they moved to "strike" GTECH's motions as somehow in violation of Rule 9.210(a), Fla. R. App. P. The Court recently denied AWI's request to toll time and ordered it to respond to GTECH's motion.

SUMMARY OF ARGUMENT

This Court does not have subject matter jurisdiction over this case. The First District did not "pass upon" either of the certified questions. The certified questions were clearly generated by the dissent. This Court cannot base "passed upon" jurisdiction upon issues only discussed in a dissent. Further, even if the district court did pass upon the certified questions, very recent amendments to Chapter 287 eliminate any basis for "great public importance" jurisdiction (if such ever existed).

Specifically, in May, 2001, the Florida Legislature amended Chapter 287 to authorize the type of "competitive negotiation" purportedly used in this case. Section 287.057(3),(4), Fla. Stat. (2001). These amendments are not retroactive and do not affect the legality of the March, 1999

contract. However, they will almost certainly prevent a recurrence of the issues in this case and thus eliminate the need for Supreme Court discretionary review.

On the merits, both the law and the facts are quite simple. The Lottery is a state agency. It is subject to Chapter 287 and must award contracts pursuant to a competitive process. At the time this contract was let in 1995, there were only two vehicles for such procurements: invitations to bid and requests for proposals. An invitation to bid ("ITB") is used when an agency can award a contract based strictly on price. A request for proposals ("RFP") is used for more complicated contracts like the one in this case. Price is an important factor, but the agency can take into account other factors as well. The Lottery chose to use an RFP.

The RFP is very specific. It consists of over ninety single spaced pages and spells out in intricate detail the mandatory contract requirements. The "big bang" implementation schedule is the central premise of the procurement. The RFP provided for liquidated damages of up to $1 million ***per day*** for failure to adhere to the big bang schedule. Another mandatory requirement was that the final contract include a termination for convenience provision. This created substantial risk because the Lottery could terminate the contract before the vendor was able to recoup the capital expense required for the big bang implementation. All of these factors had to be taken into account in submitting a price bid.

After awarding AWI the contract based on its proposal, the Lottery jettisoned the proposal and the RFP and privately negotiated a significantly different contract. There is no dispute that the contract materially deviates from the bid specifications. The deviations modify the basic criteria upon which the competing proposals were evaluated and are favorable to AWI:

> **Price**: The price in the contract is potentially higher than the price proposed by AWI.
>
> **Term of Contract:** The RFP stated that the contract would expire on June 30, 2001. The new contract extends three and one-half years beyond that date, to December 31, 2004.
>
> **"Big Bang" Implementation**: The RFP requires a "big bang" implementation whereby the entire system, including all terminals, is installed within six months from the notice of award. The contract adopts a phased-in implementation not to be completed until ***thirty-three*** months after the notice of award.

> **Terminals**: The contract permits AWI to install different terminals than those described in its proposal.
>
> **Liquidated Damages**: The liquidated damages penalty for failing to comply with the already relaxed implementation schedule is reduced to 1/100 of the amount in the RFP.
>
> **Termination for Convenience**: This mandatory provision of the RFP, which appears in virtually every state contract, is deleted from the final contract.

This case presents pure issues of law. The initial issue is whether, by privately negotiating an entirely different contract, the Lottery implicitly decided that the RFP was not the "best method" of awarding the contract. The second issue is whether a contract awarded pursuant to a RFP under Chapter 287 must materially adhere to the RFP specifications and the prevailing bidder's proposal. Common sense dictates the answers. GTECH's proposal, including its price bid, was based upon the assumption that the contract would include the mandatory provisions of the RFP. Had GTECH known that these "mandatory" provisions were negotiable, as now argued by petitioners, it might have submitted a very different proposal. If a state agency can, following a competitive procurement, privately negotiate terms materially different, and more favorable to the prevailing bidder than the mandatory bid specifications, then Chapter 287 has no meaning at all. That is the basis for GTECH's lawsuit.

There is much discussion in petitioners' briefs about "competitive negotiation." This is a red herring that has nothing to do with this case. Competitive negotiation is an alternative method of contract procurement that was, until this year, authorized only for certain specified contracts (i.e., engineering, architectural). It was not an authorized method for procuring the contract in this case and indeed was not used in this case. It is argued in petitioners' briefs as part of a revisionist effort to justify a clearly illegal contract.

GTECH did not waive its right to challenge the March, 1999 contract. Appellants contend that GTECH should have challenged Specification 8.7.2 of the RFP within seventy-two hours of its issuance in 1995. Specification 8.7.2 is facially unobjectionable. As the District Court recognized, the "best method" language precludes negotiations that materially alter the mandatory specifications. GTECH had no reason in 1995 to anticipate that the Lottery would abandon the "big bang" schedule,

negotiate a more favorable price, and deviate from the other mandatory specifications. It certainly did not waive its right the challenge such a contract entered four years later.

ARGUMENT

I. This Court Lacks Subject Matter Jurisdiction and the Case Does Not Involve an Issue of "Great Public Importance" Justifying Supreme Court Discretionary Review

The fact that the First District certified two questions does not automatically require this Court to decide the case. Article V, Section 3(b)(4) of the Florida Constitution provides:

> The Supreme Court ***may*** review any decision of a district court of appeal that ***passes upon*** a question certified by it to be of great public importance . . .

Art. V, Sec. 3(b)(4), Fla. Const. (emphasis added).

There are two separate jurisdictional issues in this case. First, GTECH contends that the district court did not "pass upon" either of the certified questions, thereby depriving this Court of subject matter jurisdiction. Second, GTECH contends that, even if the certified questions were passed upon, this Court should exercise its discretion not to decide the case in light of the recent amendments to Chapter 287. The first issue is addressed in GTECH's August 17, 2001 motions to dismiss discretionary review. Those motions remain pending.

[6] The second issue is ***not*** addressed in the August 17 motions. It is discussed briefly below and more fully in GTECH's separate brief.

1. "Passed Upon" Jurisdiction

As discussed in GTECH's August 17 motions, a finding that the district court "passed upon" the certified questions is a prerequisite to subject matter jurisdiction. Revitz v. Baya, 355 So.2d 1170 (Fla. 1977). This Court routinely dismisses certified question cases when it determines that the district court did not actually pass upon the certified question. Gee v. Seidman & Seidman, 653 So.2d 384 (Fla. 1995); Salgat v. State, 652 So.2d 815 (Fla. 1995). GTECH will not repeat all of the

[6] The two motions are identical. One was filed in Case No. SC01-1795 (the Lottery's petition) and the other was filed in Case No. SC01-1796 (AWI's petition). The two cases have been consolidated.

arguments made in its August 17 motions. However, a brief restatement of the argument is appropriate.

Both certified questions are clearly based upon the dissent. In his dissent, Judge Kahn very clearly states his view that "this case turns on the question of whether Specification 8.7.2 of the Lottery's Request for Proposals (RFP) is valid." (R. 11). Judge Kahn clearly disagreed with GTECH's argument that a provision in a bid document reserving the right to negotiate material changes after the contract is let violates fundamental precepts of competitive bidding. See Wester v. Belote, 138 So. 721, 724 (Fla. 1931); Robert G. Lassiter & Co. v. Taylor, 128 So. 14 (Fla. 1930) (both discussed below). Judge Kahn also disagreed with GTECH's argument that, whatever the specification says, "competitive negotiation" is not permitted for the type of contract involved in this case. See Miami Marinas Assoc., Inc. v. City of Miami, 408 So.2d 615 (Fla. 3d DCA 1981) (also discussed below). Instead, Judge Kahn concluded that the specification is "valid" and that the resulting contract should be evaluated under the "illegality, fraud, oppression, or misconduct" standard of Department of Transportation v. Groves Watkins, 530 So.2d 912, 913 (Fla. 1988). (R. 12).

GTECH asserts that (to use Judge Kahn's word) the specification is "invalid" as applied in this case. Yet the district court simply did not reach that issue. None of the cases relied upon by GTECH (Wester, Lassiter, Miami Marinas) are cited anywhere in the majority opinion. The majority decided the case on different grounds than were argued by the parties and discussed in Judge Kahn's dissent. The majority held that the "negotiation" provisions of Specification 8.7.2 were never triggered because, by jettisoning AWI's proposal and the mandatory RFP terms, the Lottery implicitly determined that the RFP was not "the best method of obtaining the desired gaming system and services." (R. 6). Because the majority resolved the case based on this threshold issue, it was unnecessary for it to reach the issue raised by the dissent, and expressed in the first certified question, i.e., whether a "negotiated" contract is governed under the Groves Watkins standard. The majority simply did not "pass upon" that issue. Judge Kahn even criticized the majority for not deciding the validity of the "specification." (R. 14).

GTECH will not dwell long on the second certified question. This question was not even arguably passed upon by the majority. Petitioners do not seriously contend that it was. The Lottery devotes a single unpersuasive sentence to the argument. (Lottery Brf., p. 44). AWI is a bit more inventive. It argues that the majority addressed the second certified question "in the broad context of its discussion of the need to exhaust administrative remedies before a circuit court action can be brought." (AWI Brf., p. 20-21).

Petitioners are being purposefully obtuse. The only "exhaustion" issue addressed by the majority is its suggestion, in dicta, that GTECH should have requested an administrative hearing to challenge the 1999 contract, rather than filing a declaratory judgment action in circuit court. [7] (R. 4-5). The court held that petitioners waived this argument by failing to raise it. (R. 5). The court did not address the ***different*** "exhaustion" argument presented in the second certified question, which is whether GTECH should have initiated an administrative challenge to Specification 8.7.2 upon issuance of the RFP ***in 1995***. See Section 120.57(3)(b), Fla. Stat. This issue was simply not addressed by the majority. The dissent, however, found the argument persuasive. (R. 13).

At bottom, the "passed upon" issue comes down to whether the jurisdictional requirement can be satisfied by a discussion of the certified questions only in the dissent. In the context of "conflict" jurisdiction under Article V, Section 3(b)(3) of the Florida Constitution, this Court has consistently held that "[n]either a dissenting opinion nor the record itself can be used to establish jurisdiction." Reaves v. State, 485 So.2d 829, 830 (Fla. 1986); Jenkins v. State, 385 So.2d 1356 (Fla. 1980). Rather, the rule established in those cases is that jurisdiction is based only on "the four

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[7] GTECH respectfully disagrees with the court's conclusion on this issue. The fundamental problem with this argument is that there was never any "point of entry" into the administrative process. An agency must grant affected parties a clear point of entry to Section 120.57 proceedings. United States Service Industries-Florida v. State of Florida, Dept. of Health & Rehab. Services, 385 So.2d 1147, 1149 (Fla. 1st DCA 1980). Failure by an agency to provide the required notice precludes it from arguing that a party has waived administrative proceedings. Capital Copy, Inc. v. University of Florida, 526 So.2d 988 (Fla. 1st DCA 1988); Northrop & Northrop Building Partnership v. State Dept. of Corrections, 528 So.2d 1249 (Fla. 1st DCA 1988). Here, the Lottery did not provide GTECH (or anybody else) any notice that it was entering into the new contracts with AWI. The Lottery and AWI negotiated the contracts in secret. There was never any point of entry into the administrative process and Section 120.57 does not apply.

corners of the majority decision." Reaves, 485 So.2d at 830.

In Jenkins, the Court explained the reason for this rule:

> When facts and testimony are set forth in a majority opinion, they are assumed to be an accurate presentation upon which the judgment of the court is based. However, a dissent does not rise to a similar level of dignity and is not considered as precedent. . . .

Jenkins, 385 So.2d at 1358.

This rationale is equally applicable to jurisdiction under Article V, Section 3(b)(4). This is especially true in light of the desire to prevent the district courts from becoming nothing more than an intermediate level court of appeal. Jenkins, 385 So.2d at 1358. A holding that "passed upon" jurisdiction can be based solely on issues addressed in a dissent would increase this Court's caseload and directly conflict with the jurisdiction-reducing goal of Jenkins. Petitioners do not cite a single case for the proposition that a dissent can be considered in determining the existence of "passed upon" jurisdiction. Nor do they offer any rationale for applying a different rule in Section 3(b)(3) and 3(b)(4) cases. The Court should not do so here.

2. Elimination of Any Great Public Importance

This Court retains discretion not to decide the case even if it finds that the First District passed upon the two certified questions. This discretion is plain from the language of Article V, Section 3(b)(4). Zirin v. Charles Pfizer & Co., 128 So.2d 594, 596-97 (Fla. 1961).

The issue driving this case is whether, after awarding a contract pursuant to an RFP, an agency can privately negotiate a contract more favorable to the prevailing bidder than its winning proposal. AWI acknowledges that such negotiated contracts are "open to suspicion." (AWI Brf., p. 34). Nevertheless, AWI and the Lottery devote most of their briefs to arguing that such negotiations are permissible under administrative rules regarding "competitive negotiation." (AWI Brf., pp. 26-29).

For good or bad, the Florida Legislature, assuming constitutionality, has rendered this issue moot. Effective June, 2001, the Legislature amended Chapter 287 to authorize "competitive negotiation" for this type of contract. Specifically, the Legislature added the following provision

to Section 287.057:

> If any agency determines that the use of an invitation to bid or a request for proposal will not result in the best value to the state, based on factors, including, but not limited to, price, quality, design, and workmanship, ***the agency may procure commodities and contractual services by an invitation to negotiate***. An agency may procure commodities and contractual services by a request for a quote from vendors under contract with the department.

Section 287.057(3), Fla. Stat. (2001) (emphasis added).

The amendments define an "invitation to negotiate" ("ITN") as "a written solicitation that calls for responses to select one or more persons or business entities with which to commence negotiations for the procurement of commodities or contractual services." Section 287.012(20), Fla. Stat. (2001). The 2001 amendments specifically add this method to the list of approved procurement vehicles for goods and service contracts. Section 287.057(4), Fla. Stat. (2001).

The 2001 amendments also directly address the issue presented by the second certified question. In language that appears to have been taken directly from this case, the amendments modify Section 287.042 to make clear that a prospective applicant must challenge, within 72 hours of the issuance of the procurement document, any RFP or ITN provision "reserving rights of further negotiation" or "the modification of [sic] amendment of any contract". Section 287.042(2)(d), Fla. Stat. (2001).

As noted in GTECH's separate brief, the 2001 amendments to Chapter 287 do not affect the legality of the contract at issue in this case. However, they clearly eliminate any argument that this case is one of "great public importance." Assuming the 2001 amendments are constitutional, a state agency desiring to engage in "competitive negotiation" now has the means and authority to do so. [8] Moreover, a prospective applicant is now on notice that the mandatory terms of a bid specification are not necessarily mandatory, and language reserving negotiation rights must be challenged immediately.

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[8] The Legislature's specific authorization of "competitive negotiation" for future goods and services procurements is an implicit recognition that such authority did not exist when this contract was entered.

That being the case, a decision upholding the AWI-Lottery contract will not provide any needed "flexibility," or eliminate any "uncertainty" caused by the First District's decision. Any state agency desiring to award a contract through competitive negotiation can now presumably do so. In short, the outcome of this case will have little, if any, effect on future procurements in this State, and thus cannot be of "great public importance."

To the extent a decision authorizing state agencies to engage in private negotiations following the award of a competitively bid contract was ever a matter of "great public importance," it is not now. The 2001 amendments to Chapter 287 presumably give state agencies all the "flexibility" they need to award contracts though "competitive negotiation." A decision by this Court announcing authority that agencies already have would serve "no useful purpose" and thus the Court should decline jurisdiction. Zirin, 128 So.2d at 597.

II. The Negotiated Concessions to AWI Following the Award Process Deprived GTECH of the Opportunity to Compete for the Contract Ultimately Entered, in Violation of Chapter 287.

The Lottery is an agency of the State of Florida. Like any other state agency, it is required to procure commodities and contractual services pursuant to Chapter 287, Fla. Stat. Because the 2001 amendments to Chapter 287 operate prospectively only, this case is governed by the law as it existed in 1999, when the contract was entered. That means it is governed by the pre-2001 law applicable to RFPs under Section 287.057(2), Fla. Stat.

The very first provision in Chapter 287 contains the Legislature's finding that "fair and open competition is a basic tenet of public procurement; [and] that such competition reduces the appearance and opportunity for favoritism and inspires public confidence that contracts are awarded equitably and economically. . . ." Section 287.001, Fla. Stat. Chapter 287 further provides that "[i]t is essential to the effective and ethical procurement of commodities and contractual services that there be a system of uniform procedures to be utilized by state agencies in managing and procuring commodities and contractual services;. . .and that adherence by the agency and the contractor to specific ethical considerations be required." Section 287.001, Fla. Stat.

Public procurement codes similar to Chapter 287 have existed in Florida for many years.

In 1931, the Florida Supreme Court explained that such laws "are of a highly remedial character, and should receive a construction always which will fully effectuate and advance their true intent and purpose and which will avoid the likelihood of same being circumvented, evaded, or defeated." Wester v. Belote, 138 So. 721, 724 (Fla. 1931).

Petitioners pin their entire case on Specification 8.7.2 of the RFP, which they construe as authorizing post-award modifications to the contract required by the RFP. (AWI Brf., 28; Lottery Brf., pp. 28). However, the Wester Court specifically rejected the validity of such a procedure. The Court recognized that a fundamental precept of fair public procurement is to let contracts based upon definite plans or specifications. Id. Thus, the Court made crystal clear that public letting officers ***"are without power to reserve in the plans or specifications so prepared in advance of the letting the power to make exceptions, releases, and modifications in the contract after it is let."*** Id. (emphasis added).

In establishing this rule, the Court recognized the obvious: permitting post-award modifications would "afford opportunities for favoritism, whether any favoritism is actually practiced or not." Id. The decision in Wester negates petitioners' reliance on Specification 8.7.2 of the RFP as a justification for the privately negotiated modifications. Such a process creates an unacceptable risk of mischief and is fundamentally unfair to the second-place bidder, which is deprived of its right to compete for the contract ultimately entered.

The principles discussed in Wester are embodied in Chapter 287. At the time this contract was let, two basic vehicles existed for awarding state contracts: (1) competitive sealed bids; and (2) competitive sealed proposals. Section 287.057(1), (2), Fla. Stat. Regardless of which is used, Chapter 287 makes it clear that ***the contract must be awarded based upon the bid specifications and the proposals submitted***. In particular, the statute provides that a request for proposals "shall" include a statement of the commodities or contractual services sought, "and all contractual terms and conditions applicable to the procurement. . . ." Section 287.057(2), Fla. Stat. The law further provides that

> the award shall be made to the responsible offeror whose ***proposal*** is determined in writing to be the most advantageous to the state, taking into consideration the price and the other criteria set forth in the request for proposals.

Section 287.057(2), Fla. Stat. (emphasis added).

In a series of cases following Wester, Florida courts have specifically held that post-award modifications to mandatory bid specifications are illegal and void. In Robert G. Lassiter & Co. v. Taylor, 128 So. 14 (Fla. 1930), the Florida Supreme Court voided a contract under virtually identical facts. There, the City of Sebring issued an invitation for bids for certain street improvements. The invitation specified the use of concrete pavement. One of the bidders ("Lassiter") submitted two proposals – one for concrete pavement and another for the use of "Densite" pavement. The Densite proposal was more profitable to Lassiter. The city awarded the contract to Lassiter and entered a contract based upon the bid specifications. However, the city later modified the contract to change the type of pavement to Densite. The trial court entered a temporary injunction barring further payments to Lassiter. Lassiter appealed.

The Florida Supreme Court declared the contract void and affirmed the injunction. The Court noted that the city's charter required the city to let the contract to the lowest responsible bidder. Id. at 16. Based upon this provision, the court reasoned that

> [t]he quoted provision of the charter being mandatory in its nature, any contract entered into by the city for construction work, other than the kind authorized by the. . .plans and specifications. . .would have been in violation of the provision of the charter and therefore illegal and void."

Id. at 17. The Court concluded that the city council had no right to "thwart the object and purpose of the charter provision" by making, in effect, a new contract for the "Densite" pavement. Id. at 18.

More recently, the Third District relied on Wester to void a similar attempt to circumvent the specifications of a bid document. In Glatstein v. City of Miami, 399 So.2d 1005 (Fla. 3d DCA 1981), the City of Miami requested proposals for the development of an amusement park. The bid document indicated that a $35 million budget had been established, with a contingency for an

additional $10 million. Five developers submitted proposals. One of the developers ("Diplomat") submitted a proposal based on an incomplete design plan and with an estimated budget of $55 million. The City nevertheless accepted Diplomat's proposal.

On appeal, the Third District voided the contract because it "patently violated" the competitive bidding provisions of the city charter. Id. at 1007. Relying on Wester, the court concluded that "the material variance between the detailed plans upon which competitive bidding was proposed to be submitted and that which was submitted by Diplomat and ultimately adopted by the City renders the contract void." Id. at 1008. See also City of Miami Beach v. Klinger, 179 So.2d 864, 866 (Fla. 3d DCA 1965) (declaring contract void because it "differed materially and substantially from that invited by the City and submitted by the other bidder").

Wester, Lassiter, Glatstein and Klinger are on-point and compel the conclusion that the new contract between AWI and the Lottery is illegal and void. AWI and the Lottery do not cite a single case upholding post-award negotiations that deviate from mandatory bid specifications. The reason is obvious: such a procedure is repugnant to basic fairness and obviously illegal. The RFP established the parameters within which the competition was to occur. These parameters are mandatory, and include the price, the "big bang" implementation schedule, the terminal requirements, the liquidated damages provision, and the other mandatory commercial provisions. GTECH submitted its proposal in reliance on these "mandatory" specifications. Having established these specifications and used them to select AWI over GTECH, the Lottery cannot later enter into an entirely different contract more favorable to AWI. Legally, there is no difference between the change from concrete to "Densite" paving in Lassiter and the change from a "big bang" to a phased-in implementation (along with the other changes) in this case.

The First District correctly recognized that the Lottery's decision to jettison the mandatory bid specifications was neither fair to GTECH nor ***authorized by the bid document***. The central premise of the RFP was the "big bang" implementation schedule. The RFP initiated a competition between AWI and GTECH designed to determine which could implement the best system, at the lowest price, within 180 days. The Lottery chose that "method" of awarding the contract and

GTECH relied on it in submitting its proposal. After receiving and evaluating the proposals, the Lottery was required to affirmatively determine that its chosen "method", i.e., a "big bang" implementation, was still the "best method" of obtaining the desired gaming system and services. (GTECH 607, Specification 8.7.2).

It did not. Instead, the Lottery abandoned the "big bang" schedule in favor of a completely different, phased-in approach. The District Court correctly held that, in doing so, the Lottery implicitly determined that the RFP, at contract time, was not the "best method" for obtaining the goods and services. (R. 6). Specification 8.7.2 expressly conditions the Lottery's authority to conduct "negotiations" on a "best method" finding. (GTECH 607, Specification 8.7.2). The District Court was exactly right. The RFP itself simply does not permit the private negotiations that occurred in this case.

[9]

The First District also recognized the serious public policy implications of permitting post-award negotiations. The Court held:

> To countenance the Lottery's entry into a contract that was materially different than AWI's proposal would encourage responders to RFPs to submit non-competitive, unrealistic proposals solely for the purpose of receiving the highest ranking for subsequent negotiations. It seems to us that such a procedure is at odds with the proscriptions of Chapter 287 and is not likely to inspire public confidence in the fairness of the process or that the Lottery has entered into the most beneficial agreement.

(R. 7-8).

Again, the District Court is right on target. The process employed in this case obviously undermines the purpose of Chapter 287 and creates opportunities for favoritism and collusion. Had GTECH known that the Lottery would agree to discard the "big-bang" implementation schedule and alter the terminal requirements, not to mention negotiate a different price and a different term, it may

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[9] AWI's suggestion that the "best method" language refers to an "alternate" RFP simultaneously issued by the Lottery is misleading. (AWI Brf., p. 36). The Lottery abandoned this idea very early in the process and well before the submission of the proposals by GTECH and AWI. Pursuing the "alternate" RFP was not an option at the time of contracting because the Lottery had abandoned the idea years earlier.

well have submitted a very different proposal.

Petitioners ridicule the District Court's decision as "illogical" and "flawed." (AWI Brf., p. 35; Lottery Brf., p. 30). They dismiss the Court's public policy concerns by arguing that, following the competitive award, the Lottery could have insisted that the prevailing applicant enter a contract based upon the exact terms of its proposal. (AWI Brf., pp. 33-34; Lottery Brf., p. 32). This argument misses the point. Of course any agency would hold a bidder to a "lowball" proposal if its motives were pure. However, the problem with permitting unlimited and private negotiations with an in-house favorite is that it permits an agency to "end-run" the competitive procurement process. In other words, such a process creates a risk of collusion between an agency and a preferred bidder who can submit a "lowball" proposal confident that more favorable terms will ultimately be negotiated.

The purpose of the competitive bidding statutes is to eliminate precisely this sort of fraud and favoritism in awarding state contracts. Permitting open-ended negotiations resulting in contract terms unrelated to the bid specifications creates the risk of a loophole in Chapter 287 the size of a Mack truck. The Legislature's 2001 amendments to Chapter 287 may or may not have created that loophole, and may or may not be good public policy. Regardless, the pre-2001 case law (Wester, Lassiter, Miami Marinas) makes clear that, at the time this contract was entered, such private negotiations were not permitted.

III. The "Competitive Negotiation" Issue is a Red Herring Created as an After-The-Fact Rationalization for an Illegal Contract

In the face of Wester, Lassiter, Glatstein and Klinger, appellants attempt to recast the RFP into something that it never was, a vehicle for "competitive negotiation." The 2001 amendments to Chapter 287 did not exist when the contract was entered. Thus, petitioners are forced to be more imaginative. They attempt to find authority for the private negotiations based upon a complex rubric of statutes and rules that do not apply to this case. The "competitive negotiation" argument is a red herring created as an after-the-fact rationalization for a clearly illegal contract.

1. Petitioners' Argument

Petitioners' argument is very complicated and based upon statutes and administrative rules promulgated by the Lottery and the Department of Management Services ("DMS"). The argument appears to be as follows: (1) the Lottery's enabling statute (Section 24.105(14)) permits it to procure goods and services through any procedure available to DMS; (2) DMS' enabling statute (Section 287.042) authorizes it to prescribe methods for "negotiating and awarding" contracts other than invitations to bid or requests for proposals; (3) thus, the Lottery can procure contracts by any method prescribed by its own rules or rules issued by DMS; (4) the Lottery promulgated an administrative rule (Rule 53ER97-39) permitting the award of contracts through "competitive negotiation"; and (5) the process used in this case is similar to competitive negotiation, and thus permissible.

This argument fails for two reasons. First, prior to 2001, the "competitive negotiation" process was authorized only for certain types of contracts. Second, whether or not it ***could*** have used this process, the Lottery in fact ***did not*** use a competitive negotiation process in this case. It used an RFP.

2. Competitive Negotiation is Unavailable

A process similar to that described by petitioners does exist. The process generally involves the agency accepting proposals, ranking them, and then beginning negotiations with the highest ranked applicant.

[10] Prior to this year, Chapter 287 authorized this process only for specific types of contracts. These included contracts for architecture, professional engineering, landscape architecture, and registered surveying and mapping. Section 287.055(2)(a), (5)(b), Fla. Stat. There was no similar authorization for such a process under Section 287.057, which governs the purchase of commodities and contractual services.

Under the doctrine of *expressio unius est exclusio alterius*, if a statute enumerates the things

[10] Importantly, the initial ranking is performed ***without*** reference to the price proposals and negotiations occur with ***all*** responsive applicants. As discussed below, neither procedure was followed in this case.

on which it is to operate, it is ordinarily construed as excluding from its operation all those matters not expressly mentioned. Sun Coast Intern., Inc. v. Department of Business Regulation, 596 So.2d 1118, 1121 (Fla. 1st DCA 1992). A corollary of this principle is that a legislative direction as to ***how*** a thing shall be done is, in effect, a prohibition against its being done any other way. Id.

Here, the Legislature established competitive negotiation as the appropriate method for awarding the contracts listed in Section 287.055. It established competitive sealed bids or proposals as the appropriate method for awarding the contracts listed in Section 287.057. Under the *expressio unius est exclusio alterius* principle, this statutory distinction prohibits agencies from awarding contracts in any other manner. Prior to this year, Section 287.057 did not permit competitive negotiation as a means of awarding contracts for commodities and services (the type of contract in this case). In the face of this ***statutory*** prohibition, neither the Lottery nor DMS can, by rule, expand competitive negotiation to this contract.

The court so held in Miami Marinas Assoc., Inc. v. City of Miami, 408 So.2d 615 (Fla. 3d DCA 1981). In that case, the City of Miami awarded a waterfront management contract through competitive negotiation. The city's charter required it to award contracts relating to waterfront property pursuant to either "competitive bids or competitive negotiations." Id. at 616. Although the charter permitted competitive negotiations, the court held that this method was not available unless the contract involved the services listed in Section 287.055 (architecture, professional engineering, etc.). Because the contract did not involve any of those services, the court concluded that the city was required to award the contract pursuant to competitive bids. Id. at 616-17.

The same is true here. The contract at issue is one for contractual services under Section 287.057. It must therefore be awarded pursuant to competitive bids or proposals. It cannot be awarded pursuant to "competitive negotiation" because it is not a contract for architectural, engineering or the other type of services specified by that section. The fact that the Lottery has a rule permitting competitive negotiation is irrelevant. The city charter in Miami Marinas had a similar rule. However, as in that case, the agency's rule cannot trump the statutes. This is the holding of Miami Marinas and neither AWI nor the Lottery cite any contrary authority.----- (as it existed

prior to 2001). This it cannot do.

5. The Lottery's "Unique" Status

Using the "competitive negotiation" ruse as a springboard, AWI and the Lottery advance a series of other "red herring" arguments. None of these are persuasive or even applicable.

AWI argues that the Lottery is "unique" and therefore its "interpretation" of Specification 8.7.2 should be adopted, even though it is, at best, only within the "range" of possible interpretations. (AWI Brf., p. 31). The argument that this Court should give the Lottery "slack" because of its "unique" status is unpersuasive. The Lottery is certainly unique in one sense: hundreds of millions of public gambling dollars flow through its coffers each year. Rather than give it "slack," however, it is imperative that, in order to maintain the public trust, the Lottery conduct its operations in a manner that is above reproach and avoids even the appearance of graft, influence peddling or favoritism.

The Legislature recognized the importance of procedural fairness in prescribing rules for the Lottery's procurement decisions. The Lottery's enabling statute, upon which petitioners so heavily rely, specifically provides that "[i]n all procurement decisions, the department shall take into account the particularly sensitive nature of the state lottery. . . ." Section 24.111(1), Fla. Stat. The statute further directs the Lottery to take steps to "promote and ensure security, honesty, fairness, and integrity in the operation and administration of the lottery. . . ." Id.

It would not be good public policy to permit the Lottery to ignore state procurement laws and operate like a private business. Under state law, 50% of the Lottery's gross revenues are to be returned to the public in the form of prizes, 38% is to be used to the benefit of public education, and the remaining 12% is to be used to pay the administrative expenses of the Lottery. Section 24.121, Fla. Stat. Every dollar squandered through sweetheart contracts with preferred vendors is one less dollar available to educate the state's children. In short, to the extent the Lottery's "unique" status is relevant at all, it should result in greater (not less) scrutiny of its compliance with Chapter 287.

6. Proof of "Fraud, Collusion or Bad Faith"

Petitioners also argue that, whatever the flaws in the final contract, it must be upheld absent proof by GTECH of "illegality, fraud, collusion or bad faith." Petitioners cite Department of Transp. v. Groves-Watkins Constructors, 530 So.2d 912 (Fla. 1988), in support of this proposition. This case is unhelpful to petitioners.

Groves-Watkins is distinguishable because it applies to the review of contract ***awards***. That case governs the process during which the agency reviews the competing bids or proposals and awards the contract. Such evaluations necessarily involve agency expertise as to which proposal will best suit its needs. The award phase of this case is over. This case involves a pure legal issue regarding the legality of the new contract entered following the award process, and thus the deferential "bid protest" standard is not appropriate.

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[11] Further, the salient point is that the contract at issue is ***illegal*** under Wester, Lassiter, Glatstein and Klinger. Thus, the March, 1999 contract is void even under Groves-Watkins standard proposed by

IV. GTECH Did Not Waive Its Right to Challenge the March, 1999 Contract By Not Challenging the RFP in 1995.

Assuming the negotiated contract violates Chapter 287, petitioners nevertheless assert that GTECH failed to exhaust its administrative remedies. Specifically, petitioners argue that GTECH was required to file an administrative protest challenging Specification 8.7.2 of the RFP within 72 hours of its issuance in 1995. (AWI Brf., p. 39, citing Section 120.57(3)(b), Fla. Stat.; Lottery Brf., p. 34 (same)). This argument fails because, at the time the Lottery issued the RFP, GTECH could not reasonably foresee that the Lottery would negotiate a contract materially different than the bid specifications. In short, GTECH was not required to anticipate future illegal conduct by an agency.

The provision upon which petitioners rely provides that "[a]ny person who is ***adversely affected*** by the agency decision or intended decision shall file with the agency a notice of protest in writing within 72 hours. . . ." Section 120.57(3)(b), Fla. Stat. The fatal flaw in petitioners' argument is that, when the Lottery issued the RFP in 1995, the "provisions relating to negotiation" did not "adversely affect" GTECH. Specification 8.7.2 of the RFP is facially unobjectionable when read in the context of the entire RFP, which specifically identifies mandatory provisions that ***must***, at a minimum, appear in the final contract. (GTECH 1398-1403). The only reasonable interpretation of Specification 8.7.2 is that any post-award "negotiation" must not result in a contract that materially deviates from these required provisions.

Petitioners and the dissent argue that the references to "negotiations" in Specification 8.7.2 make it "inconceivable" that GTECH would not conclude that such negotiations might occur. This argument of course ignores the "best method" language relied upon by the majority. In light of this language, it would ***not*** have been reasonable to assume that the Lottery could abandon the big bang implementation and the other mandatory specifications and instead negotiate an entirely different contract. Like the District Court, GTECH obviously concluded that such negotiations would constitute a determination that the proposals were not the "best method" of awarding the contract.

A similar situation occurred in Aurora Pump, Division of General Signal Corp. v. Goulds

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petitioners.

Pumps, Inc., 424 So.2d 70 (Fla. 1st DCA 1982). There, the Jacksonville Electric Authority ("JEA") issued an invitation for bids for the manufacture of general centrifugal pumps. The bid document provided that the applicants would first submit technical and price proposals. Negotiations would then occur with each bidder regarding exceptions to the technical or commercial terms of the proposed contract. Based upon those negotiations, each bidder was permitted to adjust its price proposal.

Although not mentioned in the bid documents, JEA had in prior procurements circulated a preliminary evaluation of the bids. Several of the bidders knew of this informal practice and knew that price adjustments had to be submitted prior to the date of the preliminary evaluation. However, one of the bidders ("Goulds") did not know of this practice. It submitted price adjustments after the release of the preliminary evaluation. JEA rejected Goulds' final price adjustment which, had it been accepted, would have resulted in Goulds being awarded the contract. Goulds filed suit and the circuit court permanently enjoined JEA from proceeding unless it re-submitted a revised invitation for bids.

The First District affirmed. The court rejected the prevailing applicant's argument that Goulds waived its right to complain about the deadline by failing to submit a written request for interpretation of the instructions. The court stated:

> Aurora's argument misses the point. Because of its lack of knowledge of the "unwritten rules," and due to its reasonable interpretation of the instructions, Goulds did not know it was "confused."

Id. at 75. See also B&L Service, Inc. v. Department of Health & Rehab. Services, 624 So.2d 805 (Fla. 1st DCA 1993) (failure to challenge bid specifications within 72-hours of issuance did ***not*** preclude bid protest challenging agency's authority to enter contract).

[12]

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[12] Petitioners cite Optiplan, Inc. v. School Board of Broward County, 710 So.2d 569 (Fla. 4th DCA 1998), and Capeletti Brothers, Inc. v. Department of Transp., 499 So.2d 855 (Fla. 1st DCA 1986). (AWI Brf., p. 41; Lottery Brf. pp. 38-39). Both of these cases involved bid protests in which the disappointed bidder challenged the constitutionality of awarding points based upon the participation of minority-owned enterprises, and are thus distinguishable. GTECH is not aware of a single decision outside the context of constitutional challenges to minority enterprise provisions in which the failure to challenge the bid specifications has been held to constitute a waiver.

The same is true here. GTECH did not know it was "adversely affected" by Specification 8.7.2 because it did not interpret it as permitting the Lottery to enter a contract materially different than the RFP. The RFP states that all mandatory terms are designated by "shall" or "must." (GTECH 524). No vendor was on notice that "shall" or "must" did not mean shall or must. GTECH could not have reasonably anticipated when the RFP was issued that the Lottery would ignore Chapter 287 and enter a wholly different contract. GTECH simply did not know there was anything to challenge in 1995. It would be unfair to penalize GTECH for failing to foresee that, four years later, the Lottery would privately negotiate a contract completely different than the mandatory RFP specifications and the proposals.[13]

This is not a situation where GTECH slept on its rights. The RFP consists of 95 single-spaced pages. As acknowledged by petitioners, GTECH filed timely challenges to certain provisions that it regarded as vague or otherwise inappropriate. Clearly, the 72-hour challenge provision of Section 120.57(3)(b) does not apply and GTECH did not fail to exhaust its administrative remedies.

CONCLUSION

The Court should decline jurisdiction or affirm the decision of the district court in all respects.

[13] Petitioners place much emphasis on the reference in Specification 8.7.2 to negotiating the "price." This argument ignores the obvious: the agency can always negotiate for a ***lower*** price. That is perfectly legal, and exactly what happened in Brasfield & Gorrie General Contractor, Inc. v. Ajax Construction Co., 627 So.2d 1200 (Fla. 1st DCA 1993). A disappointed bidder is not prejudiced under these circumstances.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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