**IN THE SUPREME COURT OF FLORIDA**

**STATE OF FLORIDA,**
**DEPARTMENT OF LOTTERY,**

**Petitioner,**

**v.**

**CASE NO. SC01-1795**
**DIST. CT. NO. 1D00-451/1D00-578**

**GTECH CORPORATION,**

**Respondent.**
_____/

# AMENDED INITIAL BRIEF OF THE DEPARTMENT OF LOTTERY

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## STATEMENT OF THE CASE AND THE FACTS[1]

**1. Overview**.

The Department of Lottery ("DOL") is responsible for administering lottery games, including instant and on-line games. § 24.105(2), Fla. Stat. Since its inception, DOL has opted to contract with a third party vendor to implement and operate the on-line gaming system. DOL entered into its first on-line gaming contract with Automated Wagering International, Inc. ("AWI") in 1988. V.I, 349 ¶ 1. The term of the 1988 contract was set to expire June 30, 1996. V.I,165¶ 9.

In 1995, before the 1988 contract expired, DOL initiated a procurement process to secure a new on-line contract by issuing a request for proposals (the "RFP"). V.I,165 ¶¶ 9-10. The specifications of the RFP placed all interested parties on notice that DOL, in accordance with its rules, could elect to negotiate the final terms of any contract awarded under the RFP. V.II,516 § 1.1; V.II,607 § 8.7.2.

AWI and Gtech Corporation ("Gtech Corp.") submitted the only proposals in response to the RFP. V.I,165 ¶ 11. After conducting an evaluation, DOL ranked AWI ahead of Gtech (V.III,717) and issued a Notice of Award, stating DOL's intention to negotiate a contract with AWI pursuant to the specifications of the RFP (V.III,716). On November 5, 1995, Gtech filed an administrative action to protest DOL's decision to rank AWI first. V.III,720-71. On March 23, 1998, following two evidentiary hearings before the Division of Administrative Hearings ("DOAH"), DOL issued a

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[1]The record in this case, per order of the district court, was provided to the district court through appendices of the parties. See Fla. Dept. of Lottery v. Gtech Corp., Case No. 1D00-451/1D00-578 (Orders) (Fla. 1st DCA Mar. 13 and Apr. 25, 2000). Unless otherwise stated, all references to the record shall be to the appendices filed by Gtech, which shall be referenced by volume, page, and, where appropriate, paragraph (e.g., record reference IV, 635, ¶ 1.2, would reference Volume IV, page 635, paragraph 1.2).

final order adopting the administrative law judge's recommendation to reject Gtech's bid protest. V.III,1026-36. Gtech appealed that decision to the First District Court of Appeal, but on July 22, 1999, the First District affirmed DOL's order. Gtech Corp. v. Fla. Dept. of Lottery, 737 So. 2d 615 (Fla. 1st DCA 1999). Gtech's petition for review of that decision in this Court was denied on December 3, 1999, more than four years after the RFP was first issued. Gtech Corp. v. Fla. Dept. of Lottery, 749 So. 2d 502 (Fla. 1999).

During the pendency of the appeal, and pursuant to its March 23, 1998 final order, DOL entered into contract negotiations with AWI, which led to the execution of a contract on October 29, 1998. V.I,26-56. Three months later, on February 5, 1999, Gtech filed an action in circuit court, seeking a declaration that the October 29 contract was void. V.I,5. DOL and AWI subsequently amended their contract on March 9, 1999 (V.I,54-86), whereupon Gtech amended its complaint to challenge the validity of the amended agreement (hereafter the "Negotiated Contract") (V.I,163).

Gtech's amended complaint alleges that the Negotiated Contract was void because DOL and AWI negotiated material contract terms that deviated from the RFP and AWI's proposal. V.I,176 ¶ 42. After all parties filed summary judgment motions, the trial judge, N. Sanders Sauls, denied the motions filed by DOL and AWI, but granted Gtech's motion and declared the Negotiated Contract void. V.VI,1833-1834. DOL and AWI appealed that decision to the First District Court of Appeal. V.VI,1833-1834. With Judge Charles J. Kahn, Jr., dissenting, the district court majority (Charles E. Miner, Jr., and Anne C. Booth) affirmed Judge Sauls' decision, but on rehearing unanimously certified two questions addressing the following issues: (1) whether DOL had the authority to negotiate substantive terms of the Negotiated Contract; and (2) whether Gtech's collateral attack on the Negotiated Contract was

properly brought in circuit court. Fla. Dept. of Lottery v. Gtech Corp., 26 Fla. L. Weekly D621, 2001 WL 193770 (Fla. 1st DCA Feb. 28, 2001).

**2. Facts Relating to the First Certified Question: DOL's Contract Negotiating Authority**

In issuing the RFP, DOL relied on its procurement authority under Chapter 24, Florida Statutes. See, e.g., V.II,516 § 1.1. Supplementing the procurement authority given to every other state agency under Chapter 287, Chapter 24 authorizes DOL to step into the shoes of the state's procurement agent, the Department of Management Services ("DMS"), by allowing DOL to procure goods and services using DMS's procurement authority under any statute or DMS rule. § 24.104(14). Section 24.104(14) states in relevant part:

> [DOL] shall . . . [h]ave the authority to perform any of the functions of the Department of Management Services under chapter 255, chapter 273, chapter 281, chapter 283, or chapter 287, **or any rules adopted under any such chapter**, and may grant approvals provided for under any such chapter or rules.

(Emphasis added).

Notably, when the RFP was issued, DMS had in place a rule which expressly stated that DMS could procure goods and services through a contract negotiation process.[2] Rule 60A-1.018(2), F.A.C.[3] That rule set forth certain procedures to be followed in conducting such negotiations. Id. It also authorized alternative

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[2]See DMS Rule 60A-1.018(2): "Negotiation of Contracts without First Seeking Competitive Sealed Bids/Proposals Exceeding the Threshold for Category Two – When determined to be in the best interests of the State, the Division may contract by negotiation or may delegate to any agency the authority to contract by negotiation."

[3]For this Court's convenience, all administrative rules referenced in this Brief are attached.

negotiation procedures when such alternative negotiation procedures were deemed to be in the best interest of the State, stating:

> When it deems it to be in the best interest of the State, [DMS] may authorize or require the use of alternative negotiation procedures. Such alternative negotiation procedures shall be specified in writing and made available to prospective contractors prior to commencing negotiations with any vendor.

Rule 60A-1.018(2)(g), F.A.C. (emphasis added).

Consistent with Rule 60A-1.018(2)(g), DOL had in place an emergency rule[4] that established a competitive negotiation process as a means for conducting major procurements of goods and services. See Rule 53ER87-13, F.A.C.[5] In conducting procurements under this rule, DOL was required to first issue an RFP. DOL would

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[4]As compared to other agencies, the Florida Legislature gave DOL extraordinary emergency rulemaking authority in section 24.109(1):

> The department may **at any time** adopt emergency rules pursuant to s. 120.54. The Legislature finds that such emergency rulemaking power is necessary for the preservation of the rights and welfare of the people in order to provide additional funds to benefit the public. **The Legislature further finds that the unique nature of state lottery operations requires, from time to time, that the department respond as quickly as is practicable to changes in the marketplace**. Therefore, in adopting such emergency rules, the department need not make the findings required by s. 120.54(4)(a). Emergency rules adopted under this section are exempt from s. 120.54(4)(c) and **shall remain in effect until replaced** by other emergency rules or by rules adopted under the nonemergency rulemaking procedures of the Administrative Procedure Act.

[5]In 1997, DOL reenacted and recodified the provisions of Rule 53ER87-13 in Rule 53ER97-39. Thus, from 1987 to the execution of the Negotiated Contract, DOL had its own rule providing for procuring goods and services through a competitive negotiation process.

then rank respondents and commence negotiations with the highest ranked respondent. DOL's competitive negotiation rule stated in relevant part as follows:

> When it is considered in the best interest of the State, [DOL] can acquire goods and services, including major procurements through a competitive negotiation process.
>
> 1. **A Formal Request for Proposal will be let** stating general requirements to be met and that award of the contract will be through a competitive negotiation process.
>
> . . . .
>
> 5. The Secretary . . . **shall negotiate** a contract with the most highly qualified firm. Should the Secretary . . . be unable **to negotiate** a satisfactory contract with the firm considered to be the most qualified at a price the Department determines to be fair, competitive, and reasonable, negotiations with that firm shall be terminated. The Secretary . . . shall then **undertake negotiations** with the second-most qualified firm. Failing accord with the second most qualified firm, the Secretary . . . shall terminate **negotiations** with that firm and shall then undertake **negotiations** with the third-most qualified firm. Should the Secretary . . . be unable to **negotiate** a satisfactory contract with any of the selected firms, additional firms may be selected in accordance with this rule, or **negotiations** may be reinstated following the original order of priority. **Negotiations** shall continue in accordance with this rule until an agreement is reached or all proposals are rejected.

Rule 53ER87-13(5)(i), F.A.C. (emphasis added).

The procedures DOL established for the procurement of the new on-line gaming system and services contract at issue tracked Rule 53ER87-13. Compare Rule 53ER87-13 with Spec. 8.7.2. V.II,607. In accordance with its rule, DOL issued an RFP that solicited proposals from qualified vendors and established a mechanism for ranking proposals. V.II,512-712. In order to facilitate this ranking, so that all respondents could be measured using a common standard or yardstick, the RFP

mandated that each proposal address certain minimum requirements.[6] Proposals that met the minimum requirements would be deemed responsive and sent to an evaluation committee for scoring.[7] V.II,699-700 § 1.7(E-J). After that ranking was complete, DOL then had the option to commence negotiations with the highest ranked proposer. V.II,700 § 1.7(J); V.II,607 § 8.7.2.

In addition to the option of negotiation, RFP Specification 1.21 provided that DOL could choose to contract without any negotiations, in which case the terms of the final contract would be derived entirely from the RFP and the highest ranked proposal.[8] But, consistent with DOL's negotiation authority, the RFP also made clear that the parties could agree to terms in the final contract that deviated from the RFP, the vendor's proposal, or both. See, e.g., RFP Spec. 1.36 ("the Contract shall incorporate this RFP, addenda to this RFP, and the Contractor's proposal . . . **except**

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[6]See RFP Spec. 1.18 (DOL "has established certain mandatory requirements which must be included as part of **any proposal**. The use of the terms 'shall', 'must' or 'will' . . . in this RFP indicate a mandatory requirement or condition.") (emphasis added). V.II, 524 § 1.18.

[7]Conversely, a proposal that failed to comply with the mandatory proposal requirements would be deemed non-responsive and rejected, since a deviation from a mandatory requirement would make it uncomparable to another proposal. See RFP Spec. 1.19 ("A non-responsive proposal is one that does not meet all material requirements of the RFP. Material requirements of the RFP are those set forth as mandatory or without which an adequate analysis **and comparison** of proposals is impossible . . . ."). V.II, 524-525 § 1.19.

[8]See RFP Spec. 1.21 (DOL "reserves the right to make an award with or without further negotiations with the apparent successful Respondent. Therefore, proposals should be submitted with the most favorable terms Respondents can offer."). V.II, 628.

**to the extent that the Contract explicitly provides to the contrary.**") (emphasis added).[9] V.II,700.

The terms of the RFP were extremely specific as to DOL's negotiation options. In the very first section of the RFP, DOL provided an overview of the procurement process in which it clearly indicated that the final contract would be formulated through negotiations. RFP Specification 1.1 stated as follows:

> Respondents who are determined to be responsive and responsible pursuant to RFP Part I, and whose technical proposals under RFP Part II are determined to be responsive to the requirements of RFP Part II, will have their technical proposals submitted to an Evaluation Committee for evaluation. Thereafter, price proposals will be opened, responsiveness determined, tabulated and points awarded as provided herein. **Contract negotiations may then be commenced with the Respondent with the highest overall score**.

V.II,516 (emphasis added).

The entire RFP process – from the ranking of proposals to the negotiation of the final contract terms – was also described with particularity in the RFP timetable and specifically noticed interested proposers that DOL anticipated substantive negotiation of the final terms of any contract awarded under the RFP. See Spec. 1.7(J) ("**Upon completion of negotiations**, a Contract, **if any**, between the Lottery and the successful Respondent is expected to be awarded and executed as soon as lawfully possible") (emphasis added). V.II,700.

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[9] See also RFP Spec. 1.3 (which states that the term "contract" means the "agreement entered into by the Lottery and the successful Respondent to this RFP, which shall incorporate among other provisions, the contents of this RFP and the successful Respondent's proposal, **except as specifically provided to the contrary in the Contract**"). V.II, 517.

As to how the negotiations would be conducted, the RFP provided very detailed specifications that mirrored Rule 53ER87-13(5)(i)5. The negotiation procedures were codified in RFP specification 8.7.2, which stated:

> 8.7.2 Negotiation
> 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.

V.II,607 (emphasis added).

The plain language of both Rule 53ER87-13(5)(i)5 and the RFP stated that DOL intended to engage in substantive contract negotiations following the ranking of proposals. Indeed, Specification 8.7.2 of the RFP specifically stated that the negotiations could include not only contract conditions, but also terms regarding price.[10] V.II,607. Such negotiations, however, were not without limitation. Under both the rule and the RFP, **any negotiated term had to be "fair, competitive, and reasonable."** Rule 53ER87-13(5)(i)5.; V.II,607 § 8.7.2 (emphasis added).

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[10] See also RFP Spec. 3.1: "The Contractor's sole payments for meeting all requirements specified herein, and those that arise during the term of this Contract, **will be the amount** determined in accordance with the Contract **negotiated** between the Contractor and the Lottery." V.II,710 (emphasis added).

### 3. Facts Relating to the Second Certified Question: Waiver of Gtech's Right to Collaterally Attack the Negotiated Contract in Circuit Court.

DOL issued its RFP subject to the rights of vendors under Chapter 120. V.II,521 § 1.9. That chapter includes section 120.57(3)(b), which both establishes and limits vendors' rights to challenge the validity or propriety of any specification incorporated into an RFP.[11] When DOL initiated this procurement, DOL put all vendors on notice of their section 120.57(3)(b) rights by including the following provision in the RFP:

> Any prospective Respondent who disputes the reasonableness or appropriateness of the terms, conditions, and specifications of this RFP shall file a formal written protest in appropriate form within seventy-two (72) hours . . . of the receipt of the RFP or of a written addendum **and/or written answers to questions.** . . . Failure to both file a formal written protest as provided in Chapter 24.209(2) and post a bond . . . shall constitute a waiver of proceedings under Chapter 120, Florida Statutes.

V.II,521 § 1.9 (emphasis added).

DOL's section 120.57(3) notice clearly stated that DOL's responses to vendor questions could trigger a right to initiate a protest directed to the RFP. V.II,521 § 1.9. In this regard, the RFP provided prospective vendors multiple opportunities to question DOL about the meaning of the RFP terms and conditions. For instance, the RFP scheduled a pre-bid conference that was intended to give respondents an

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[11]Section 120.57(3)(b) states: "With respect to a protest of the specifications contained in an invitation to bid or in a request for proposals, the notice of protest shall be filed in writing within 72 hours after the receipt of the notice of the project plans and specifications in an invitation to bid or request for proposals, and the formal written protest shall be filed within 10 days after the date the notice of protest is filed. **Failure to file a notice of protest or failure to file a formal written protest shall constitute a waiver of proceedings under this chapter.**" (Emphasis added). Section 24.109 states that section 120.57(3)(b) applies to DOL, but moves the formal written protest deadline up from 10 days to 72 hours.

opportunity to orally ask questions. V.II,699-700 § 1.7. Vendors could also submit written questions about the RFP specifications, which DOL was required to answer "in the form of a written Addendum to the RFP." Id.[12] In other words, any clarifying answer that DOL provided to a vendor question would have become part of the RFP itself, which a vendor could then challenge via section 120.57(3).

Prior to submitting its proposal, Gtech asked at least 114 questions about the RFP. V.II,664-685. Gtech even timely filed an administrative protest under section 120.57(3). V.III,799. However, at no point during the procurement process did Gtech either inquire about or challenge any of the RFP terms relating to the negotiation of the final contract. Neither did Gtech vocalize any inquiry or opposition to a negotiated contract after DOL issued its notice of intent to initiate negotiations with AWI as the highest ranked bidder, which noticed Gtech as follows:

> The Florida Lottery has completed ranking of Respondents for the above referenced procurement and **intends to initiate negotiations** with the highest ranked Respondent:
>
> Automated Wagering International, Inc.
>
> **Award is contingent upon successful completion of negotiations**.

V.III,914 (emphasis added).

In fact, Gtech did initiate a bid protest in response to DOL's notice, but it limited its protest to AWI's ranking as the superior respondent. See Gtech Corp., 2001 WL 193770 at 1; Gtech Corp. v. Fla. Dept. of Lottery, 1997 WL 1052816, No. 96-

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[12] See also RFP Spec. 1.9 ("[q]uestions concerning conditions and specifications of this RFP Part II, and/or requests for changes to conditions and specifications, must be in writing, addressed to the Issuing Officer, and received in accordance with Section 1.7. Copies of questions and final answers will be mailed to all prospective Respondents who were furnished a copy of this RFP by the Lottery, in the form of a written addenda, as specified in Section 1.7"). V.II, 521.

5461-BID (DOAH Rec. Order Jun. 4, 1997). At no time during the protest did Gtech dispute DOL's claimed authority to conclude the contract through negotiations. As a result, the administrative law judge (the "ALJ") issued an order confirming that, consistent with the notice of award, the final contract would be negotiated. Id. In his order, the judge made the following findings recognizing DOL's intent to negotiate:

> **[DOL] determined to commence negotiations** for the award of a contract to provide the gaming system and services called for in the RFP. AWI was the proposed awardee based upon higher scores it received in competition with Gtech under Part II. Gtech opposes the decision to award a contract to AWI.
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> . . . .
>
> By its proposed action announced on that date, **the Lottery intended to enter into negotiations** leading to a contract between the Lottery and AWI to have AWI provide the gaming system and related services called for in the RFP for the benefit of the Lottery.
>
> . . . .
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> On October 31, 1996, the Lottery issued its notice of award, responsiveness and responsibility declaring AWI to be the highest ranked vendor. Based upon this notice **the Lottery intended to award a contract to AWI contingent upon the ability to successfully negotiate** a contract with AWI to deliver the goods and services called for in the RFP.
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> . . . .
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> Gtech had proposed operating systems in the mainframe environment that depicted one operating system for which the Lottery employees would be responsible. However, at hearing William Hunter explained that the data base machine depicted as an operating system that was prospectively run by Gtech would be moved to allow the Lottery employees to operate the equipment, making the Lottery ultimately responsible for two operating systems in the mainframe environment. **William Hunter offered this comment on the basis that the Lottery and Gtech would negotiate to move the data base machine from Gtech to the Lottery if Gtech was selected**.
>
> . . . .

> During the Maryland site visits to allow AWI to demonstrate its proposal, questions were posed concerning the intention by AWI to use radio telecommunications. In particular, questions of what type radio, the number of licenses need to operate the radios, and number of licenses obtained to that point in time were raised. **The response given was that those details had not been determined to that point and would be provided in the event that AWI was successful in the competition and entered into contract negotiations with the Lottery.**
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> . . . .
>
> [T]o the extent that any change in circumstances that may have occurred related to the business experience of the vendors would affect the financial responsibility, integrity or security of the respective vendors, the Lottery is called upon to continue to examine those issues throughout the competitive bidding process, **negotiations for a contract** and during the operative period of a contract.

Id. (Emphasis added).

Despite the clear language of DOL's rule, the RFP, the Notice of Intent, and the ALJ's order, that all provided explicit notice of DOL's intent to negotiate, Gtech never filed any inquiry or protest regarding such negotiations.

**4. Gtech's Collateral Challenge to the Negotiated Contract**

Gtech initiated its circuit court action on February 5, 1999, seeking a declaration that the Negotiated Contract was void because it included negotiated terms. V.I,5-162. This action was filed more than three years after DOL published the RFP advising vendors of its intention to engage in a competitive negotiation process. Despite having by-passed prior opportunities to raise the issue, Gtech alleged, for the first time, that DOL lacked the authority to engage in substantive negotiations as a means of reaching an agreement on the final contract terms. V.I, 174-181. According to Gtech's theory, any material terms in the Negotiated Contract that deviated from either the RFP or AWI's proposal rendered the entire contract void as a matter of law. V.I,180 ¶¶ 45-46.

In its complaint, Gtech alleged that the following contract terms had been negotiated: the price; a contract renewal notice requirement; the number, type and mix of the computer terminals to be installed at retailers; the implementation period for installing the hardware and software; the cap on liquidated damages for system implementation delays; and the contract termination clause. V.I, 174-181. Notably, Gtech's sole evidence as to the materiality of these so-called "deviations" consisted only of the Negotiated Contract itself, the RFP, and a short excerpt from AWI's proposal. V.I, 186-289.

Gtech made no allegation or attempt to prove that the negotiated terms fell outside the scope of RFP Specification 8.7.2. Even though Specification 8.7.2 specifically stated that contract "conditions and price" were subject to negotiation, Gtech made no allegation that the negotiated terms were unrelated to a contract condition or the contract price. Gtech also made no allegation that the negotiated terms failed to meet the "fair, competitive, and reasonable" standard set forth in the RFP. Finally, Gtech made no allegation that the terms set forth in its proposal were better than the terms of the Negotiated Contract.

To place the negotiated terms in context, a brief discussion of each "deviation" posed by Gtech is set forth below:

**(a) Price.** As to the price term, the Negotiated Contract added an incentive clause under which AWI would receive a bonus for meeting a sales target. V.I,286 ¶ 1(B). Assuming AWI met the sales target, AWI could receive compensation above its proposed base rate. Id. The Negotiated Contract, however, capped AWI's total compensation (base compensation + unguaranteed bonus) at an amount below what Gtech had proposed. Compare V.I,286 ¶1(B) with V.III,856. Thus, even though the price term deviated from that in AWI's proposal, Gtech's bid was still more costly.

**(b) Terminals.** In its 1996 response to the RFP, AWI proposed two terminal models – one capable of on-line gaming functions (Ovation); the other capable of instant ticket gaming functions (Omnipoint). V.I, 178 ¶42(D). During the contract negotiations in 1999, AWI agreed to provide a terminal (Omnilink) that was not available under its 1996 proposal. Id. This terminal had both on-line and instant game functions. V.I, 246-251. DOL negotiated for this new terminal with dual functionality in the Negotiated Contract. Id. The availability of the dual-functioning terminal logically meant that fewer of the terminals with only one function were needed. Nevertheless, Gtech alleged that the "deviation" of installing more of some kinds of terminals, and less of others, than AWI proposed invalidates the Negotiated Contract. V.I,180 ¶¶45-46. Gtech offered, however, absolutely no evidence to show that this different mix of terminals (which included the new dual functionality terminals) was less favorable to DOL than the terminal mix in AWI's proposal. Given the passage of time, updating the terminal mix was consistent with the RFP, which created the "expectation . . . that current technology be made available." Gtech Corp., 1997 WL 1052816, No. 96-5461-BID, ¶ 139. See also RFP Spec. 3.1 ("[DOL] is interested in realizing the benefits of new mainstream technology"). V.II,710.

**(c) Implementation Period.** The RFP anticipated that the installation of the new terminals and the transition from the existing to the new gaming system would occur no later than "180 days from notice of award." V.II,708 § 1.47. The RFP also tied the cap on liquidated damages to a failure to meet this specific deadline. Id. However, because of Gtech's lengthy pre-contract protests, several years passed between issuance of the RFP, the notice of award, and execution of the Negotiated Contract. This obviously made it impossible to meet that 180-day deadline. Accordingly, a new implementation schedule was negotiated (V.I,282-285) as

permitted by Specification 1.30, under which DOL specifically reserved the right to alter any implementation schedule. See RFP Spec. 1.30 (DOL "reserves the right, in its own best interest, to modify, reject, cancel or stop any and all plans, schedules or work in progress")(emphasis added). V.II,529.

It is certainly conceivable that DOL would want to revise the project schedule given changed circumstances occurring since the RFP was issued in 1995. For instance, at the time DOL executed the Negotiated Contract in March 1999, Gtech's appeal was still pending, and, in fact, was not resolved until December 1999. See Gtech Corp. v. Fla. Dept. of Lottery, 749 So. 2d 502 (Fla. 1999) (denying review). Had DOL opted for the 180-day implementation schedule, the installation of all the hardware and software would have been completed before December 1999. Thus, had the district court not ruled in DOL's favor, DOL could have been faced with the prospect of having to disassemble the new system with no backup in place.

**(d) Liquidated Damages.** Because the project schedule had to be revised, it was likewise conceivable that the parties had to renegotiate liquidated damages. Liquidated damages in the RFP were tied to and only authorized in connection with the original RFP schedule, which envisioned a "big bang" conversion plan under which the existing system would be abandoned immediately. V.II,708 § 1.47. In negotiations, DOL necessarily had to amend those provisions given the different risk associated with a gradual conversion process under which the existing system would remain for a period of time as a backup. V.I,210¶3 ("Liquidated damages assessments herein represent a good faith effort to quantify the range of harm that could reasonably be anticipated at the time of the execution of the agreement"). Gtech offered no evidence that, under these changed circumstances, the negotiated liquidated damages provision was unfair, uncompetitive, or unreasonable.

**Importantly, even under the revised schedule in the Negotiated Contract, the new on-line gaming system has been completely installed and implemented**. V.I,282-285. Whether the system should have been implemented faster is now an academic question.

**(e) Contract Renewal Notice & Contract Termination Clause.** In the Negotiated Contract, DOL and AWI added a contract renewal notice clause and amended the contract termination provisions. V.I,196¶3(B); V.I, 206-208. Regarding DOL's ability to renew the Negotiated Contract under its existing terms, the Negotiated Contract added the requirement that any renewal notice be given at least three years before the end of the initial contract term. V.I,196¶3(B). Additionally, the termination provisions in the Negotiated Contract allowed DOL to terminate the Contract for cause but eliminated the provision allowing DOL to terminate the Contract for no reason at all. V.I,206-208. Gtech neither alleged nor presented any evidence that adding a condition of advance notice as to renewal or eliminating a condition of termination without justification is inconsistent with notions of fairness, competitiveness or reasonableness in a negotiation process.

**5. The Circuit and District Court Decisions.**

Gtech, AWI, and DOL all filed motions for summary judgment. V.II,410; V.V,1370; V.VI,1773. After a brief hearing on the motions, Judge Sauls ruled from the bench, granting Gtech's motion and declaring the Negotiated Contract to be null and void. V.VI, 1897-96. Two days later, he issued a brief Final Summary Judgment nullifying, voiding, and enjoining performance of the Negotiated Contract based on his finding that DOL could not negotiate the "mandatory and price terms of the contract which have been set out in the AWI proposal . . ." V.VI,1833-34.

On appeal, a divided district court panel affirmed the Final Summary Judgment. Fla. Dept. of Lottery v. Gtech Corp., 26 Fla. L. Weekly D621, 2001 WL 193770 (Fla. 1st DCA Feb. 28, 2001). The district court addressed two issues: (1) whether DOL had the authority to negotiate substantive terms of the Negotiated Contract; and (2) whether Gtech's collateral attack on the Negotiated Contract was properly brought in circuit court. Gtech Corp., 2001 WL 193770 at 2, 3-5.

As to issue one, Judges Miner and Booth, constituting the majority, concluded that DOL did not have authority to negotiate substantive terms of the Negotiated Contract. In reaching its conclusion, the majority evaluated Specification 8.7.2 of the RFP. That Specification, as noted above, states that, if DOL determines that the proposals under the RFP are the best method for obtaining the desired gaming system and services: (1) DOL "shall negotiate a contract with the most highly qualified respondent" and (2) such negotiation is to encompass "conditions and price that DOL deems fair, competitive, and reasonable." The majority concluded that the plain language of Specification 8.7.2 required DOL to turn the winning proposal into a contract with no substantive negotiations and that Chapter 287 does not convey to DOL the authority to negotiate terms materially different from those in AWI's response. Id. at 3-5. The majority opinion makes no reference to the contracting authority of DOL vested through DMS.

In a dissenting opinion, Judge Kahn concluded that Specification 8.7.2 was valid and that the Negotiated Contract must thus be upheld. Id. at 5 (Kahn, J., dissenting). He noted that Specification 8.7.2 closely tracks DOL's procurement rule (Rule 53ER87-13(5)(i)5., F.A.C.) and that both the Specification and that Rule direct DOL to negotiate a contract with the most highly qualified respondent. He further emphasized that both the Rule and the Specification envision the prospect of failed

negotiations because they both direct that, if DOL is unable to negotiate successfully with the most highly ranked respondent, the negotiations shall be terminated and DOL must then undertake negotiations with the second-most qualified respondent. Id. In other words, it would be illogical to anticipate failed negotiations if only immaterial terms could be negotiated. Indeed, Judge Kahn found it "inconceivable that anyone reading Specification 8.7.2 would not conclude that DOL might reserve the right to negotiate scope of work, and thereby, unavoidably, negotiate price." Id. Citing to this Court's decision in Department of Transportation v. Groves-Watkins Constructors, 530 So. 2d 912, 913 (Fla. 1988), Judge Kahn concluded that the Negotiated Contract must be upheld absent a finding of illegality, fraud, oppression, or misconduct and that no such finding had been made in this case. Gtech Corp., 2001 WL 193770 at 6.

As to issue two, the majority held that Gtech's collateral attack on the Negotiated Contract was permissible as a declaratory judgment action in circuit court. Id. at 2. The majority stated that attacks to state contracts should be brought in an administrative forum but, because no exhaustion of administrative remedies argument was presented to the trial court in this regard, Gtech's collateral attack in circuit court was appropriate. Id.

Judge Kahn, in his dissent, again disagreed. Judge Kahn concluded that Gtech had waived the right to bring this action. Id. at 6. Consistent with arguments made by DOL in both the trial and district courts, Judge Kahn concluded that Gtech failed to follow the law governing procurement procedure protests set forth in Chapter 120. Because Chapter 120 requires that any protest regarding an RFP specification must be brought during the pre-contract, proposal process, and because Specification 8.7.2 clearly placed Gtech on notice that DOL would negotiate substantive terms of the contract, Judge Kahn determined that Gtech waived its right to challenge that

Specification in this collateral proceeding. Id. In short, Judge Kahn equated Gtech's circuit court action to a belated challenge to the RFP specifications permitting a negotiated contract.

After the district court issued its split decision, both DOL and AWI moved for rehearing and certification of these issues to this Court. In response, the district court denied rehearing but unanimously certified the following questions considered by the court as being of great public importance:

> 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?

Gtech Corp., 2001 WL 193770 at 7.

On August 15, 2001, both AWI and DOL filed notices to invoke the discretionary jurisdiction of this Court to consider the certified questions, thus initiating this review.

## STANDARD OF REVIEW

The trial court's order under review by the district court (and now this Court) is an order granting final summary judgment. Circuit Judge Sauls granted summary judgment after finding that DOL was not authorized to negotiate substantive terms of its contract with AWI. In determining whether the trial court correctly granted summary judgment as a matter of law, this Court applies a de novo standard of review. See, e.g., Major League Baseball v. Morsani, 790 So. 2d 1071 (Fla. 2001) (summary judgments are classic examples of the type of decisions that present questions of law subject to the de novo standard of review); Holl v. Talcott, 191 So. 2d 40 (Fla. 1966); Dr. Phillips, Inc. v. L & W Supply Corp., 790 So. 2d 539 (Fla. 5th DCA 2001); Joya Industries, Inc. v. City of Hollywood, 789 So. 2d 539 (Fla. 3d DCA 2001). See also Philip J. Padovano, Florida Appellate Practice 148 (2nd ed. 1997).

The rule governing DOL's authority to negotiate contract terms provides that DOL may negotiate terms that are "fair, competitive, and reasonable." Rule 53ER87-13(5)(i)5., F.A.C. This Court, in evaluating the summary judgment, is to give great weight to DOL's construction of that rule. Pan American World Airways, Inc. v. Florida Pub. Serv. Comm'n., 427 So. 2d 716, 719 (Fla. 1983) (administrative construction of statute or rule by agency responsible for administration of such statute or rule is entitled to great weight and should not be overturned unless clearly erroneous). In fact, DOL's discretionary judgment as to what constitutes fair, competitive, and reasonable terms in the negotiation process of procuring goods and services cannot be overturned absent a finding of illegality, fraud, oppression, or misconduct. Groves-Watkins, 530 So. 2d at 913 (honest exercise of agency's discretion in exercising its broad discretion cannot be overturned absent a finding of

illegality, fraud, oppression, or misconduct); Liberty County v. Baxter's Asphalt & Concrete, Inc., 421 So. 2d 505 (Fla. 1982).

## SUMMARY OF THE ARGUMENT

As Judge Charles J. Kahn, Jr., noted in his well-reasoned dissent, the majority decision, which voids DOL's Negotiated Contract for the implementation and operation of the Florida Lottery:

- is contrary to law authorizing DOL to procure goods and services through an alternative negotiation process;
- is contrary to decisions of this Court;
- will create uncertainty in its application; and
- "inconceivably" finds that the RFP specification governing the negotiation process used by DOL did not give notice that DOL intended to negotiate substantive contract terms, including price.

In this case, the district court addressed and certified two issues: (1) whether DOL has the authority to negotiate substantive terms of the Negotiated Contract; and (2) whether Gtech's contest to the Negotiated Contract could be brought in circuit court. Without question, DOL has the authority to negotiate substantive contract terms. Without question, Gtech's contest is procedurally barred.

DOL is authorized by law to negotiate substantive terms of contracts for goods and services that are fair, competitive, and reasonable. Unlike other state agencies, DOL is charged to act as an entrepreneurial enterprise to maximize revenues for the purpose of funding education. Also unlike other state agencies, DOL is specifically authorized by statute to act under any statute or rule under which the Department of Management Services may procure goods and services ("DMS").

DMS's procurement rule, adopted pursuant to Chapter 287, permits DMS to engage in an alternative negotiation process when purchasing goods and services.

Consistent with that rule, DOL has adopted its own procurement rules implementing such an alternative negotiation process. DOL used that alternative negotiation process in securing the Negotiated Contract with AWI. It also specifically set forth its intention to implement such a process in the RFP used to obtain that Contract. The RFP, in Specification 8.7.2, specifically stated that DOL could negotiate substantive terms of "condition and price" that are "fair, competitive, and reasonable" with the highest ranked proposer, and, if such negotiations failed, DOL would then negotiate such terms with the second ranked proposer. Gtech has never disputed that the negotiated terms were fair, competitive, and reasonable; Gtech has only asserted that DOL had no authority whatsoever to negotiate substantive terms of the Contract.

The majority opinion, in finding that DOL had no authority to negotiate substantive terms of the Negotiated Contract under either the law or Specification 8.7.2, ignores the statutes and rules governing DOL and the plain language of Specification 8.7.2. The majority bases its decision only on "public policy" concerns regarding "public confidence in the fairness of the process," yet ignores the many factors implemented to ensure that the process was in fact fair. All parties were aware and had an opportunity to challenge DOL's rule authorizing negotiations but none did so. All parties had notice from the plain language of the RFP that DOL could negotiate substantive terms of conditions and price. All parties had ample opportunity to ask questions regarding the RFP. And all parties had notice that the negotiated terms had to be fair, competitive, and reasonable.

No party has asserted that the negotiated terms were not fair, competitive, and reasonable. Moreover, under decisions of this Court, DOL's broad discretion in evaluating what constitutes fair, competitive, and reasonable terms, must be upheld

absent a finding of illegality, fraud, oppression or misconduct. As Judge Kahn stated, there has been no such finding in this case.

Even if some argument could be framed to contest DOL's clear authority to negotiate terms of the Negotiated Contract, any such claim is now procedurally barred. The plain language of the RFP distinctly and fairly placed all interested proposers on notice that, after ranking the proposers, DOL could implement its authority to negotiate substantive terms that were fair, competitive, and reasonable. As noted by Judge Kahn, it is "inconceivable that anyone reading Specification 8.7.2 would not conclude that DOL might reserve the right to negotiate scope of work, and thereby, unavoidably, negotiate price," especially given DOL's sophisticated technology demands and the "incredible" changes in technology that took place during the procurement process at issue. Gtech Corp., 2001 WL 193770 at 6.

Long-standing law governing procurement contracts mandates that any protest regarding a RFP specification must be brought during the pre-contract procurement process. Gtech raised numerous other claims in that process. It failed, however, to bring any protest as to DOL's authority to negotiate or to the plain language in the RFP providing for negotiations of conditions and price. Accordingly, Gtech has waived the right to bring such a protest now.

The district court majority apparently misconstrued DOL's consistent and preserved assertions in this regard in finding that DOL waived an "exhaustion of administrative remedies" in this proceeding. As recognized by Judge Kahn, DOL's argument is not that Gtech should have raised this post-contract dispute in the administrative arena; DOL's argument is that Gtech had to raise in the pre-contract procurement process any issue regarding DOL's authority to negotiate, and, because it did not do so, it waived the ability to bring this proceeding.

The Negotiated Contract is an excellent example of why collateral attacks such as Gtech's are inappropriate and against public policy. The pre-contract procurement process for the Negotiated Contract began in 1995. Six years later, the Negotiated Contract is still in dispute. What should have been rectified years ago in the pre-contract procurement process still remains unresolved. Indeed, the implementation schedules under the Negotiated Contract have long-passed, thus making any nullity of the Contract in that regard moot. As illustrated by this case, if the district court's decision is left to stand, it surely will facilitate (and indeed encourage) never-ending litigation in state procurement processes. Such a result is unwarranted and inconsistent with the law and decisions of this Court.

This Court should quash the majority opinion and remand this case with directions that summary judgment be issued in favor of DOL and AWI. If the majority opinion is left to stand, DOL's authority to negotiate meaningful contract terms in the quickly changing technology arena will be significantly impaired, if not eliminated. Correspondingly, DOL's ability to enhance public education will be abridged. Additionally, the majority opinion will subject every procurement contract in this State to the risk of collateral attack, long after the time claims such as Gtech's could and should have been raised. This Court should exercise its discretionary jurisdiction to address the two certified questions of great public importance passed upon by the divided district court panel and should quash the majority opinion.

## ARGUMENT

### I. DOL HAS THE AUTHORITY TO NEGOTIATE SUBSTANTIVE CONTRACT TERMS WITH THE MOST HIGHLY QUALIFIED RESPONDENT SO LONG AS DOL PROPERLY EXERCISES ITS DISCRETION IN DETERMINING THAT THOSE TERMS ARE FAIR, COMPETITIVE, AND REASONABLE.

According to the majority opinion, the trial court "rejected the contention by [DOL] and AWI that they were no longer bound by Florida's statutorily required method of contracting for goods and services as set out in Chapter 287, but rather were free to negotiate without limitation after Gtech was eliminated from the process." Gtech Corp., 2001 WL 193770 at 3. In agreeing with the trial court, the majority framed the "pivotal issue" to be "whether [DOL] can treat the RFP process as little more than a ranking tool to determine a preferred provider and then negotiate a contract with that provider with little or no concern for the original proposal of that preferred provider." Id. In answering this issue, the majority then concluded that such a procedure, under which the parties were "free to negotiate a contract without limitation," was "at odds with the proscriptions of Chapter 287." Id. The majority cited no specific statutory provision under that chapter, but instead relied on general public policy considerations, speculating that "[t]o countenance [DOL]'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." Id.

The majority's opinion is inconsistent with the law and misconstrues DOL's position. As Judge Kahn correctly understood in drafting his well-reasoned dissent, DOL has never contended that it had unfettered authority to negotiate whatever contract terms it wanted. In fact, as repeatedly noted by DOL, the plain language of

the RFP (as well as DOL's rule governing its procurement authority) limits negotiations to contract "conditions and price" that are "fair, competitive, and reasonable." Moreover, because Gtech has made no allegation that any of the negotiated terms exceeded this limitation, it is unnecessary to reach any conclusion as to whether DOL exceeded the "fair, competitive, and reasonable" standard governing DOL's negotiation authority. As discussed below, because the majority misconstrued DOL's arguments, it overlooked DOL's clear legal authority to negotiate substantive contract terms that were fair, competitive, and reasonable.

DOL was created to generate as much revenue as possible to enhance public education funding. § 24.104. To facilitate that goal, the statutes governing DOL require that it be able to "respond as quickly as is practicable to changes in the marketplace." § 24.109(1). To that end, the Legislature has empowered DOL to perform any of the functions authorized by the statutes and rules governing the state's purchasing agent, the Department of Management Services ("DMS"). § 24.105(14). Section 24.105 provides:

> The [Lottery] shall:
>
> (14) Have the authority to perform any of the functions of the Department of Management Services under chapter 255, chapter 273, chapter 281, chapter 283, or chapter 287, or any rules adopted under any such chapter . . . .

(Emphasis added).

Rule 60A-1.018(2)(g), Fla. Admin. Code, which is adopted under chapter 287, provides that DMS may "require the use of alternative negotiation procedures" in securing goods and services whenever "it deems it to be in the best interest of the State . . . ." (Emphasis added). Because the use of alternative negotiation procedures is specifically authorized by this DMS Rule, and because DOL is specifically

empowered to perform any of the functions authorized under a DMS rule, DOL clearly has the authority to secure goods and services through alternative negotiation procedures.[13]

Consistent with Rule 60A-1.018(2)(g), DOL enacted Rule 53ER87-13 implementing its ability to secure goods and services through negotiation. Rule 53ER87-13 provides in pertinent part as follows:

> (1) The secretary . . . is authorized to execute contracts for commodities and services which are to be used in the normal operation of the Department provided that such contracts are made in accordance with the provisions of these rules.
>
> . . . .
>
> (5) Source Selection and Contract Formation
>
> . . . .
>
> (i) When it is considered in the best interest of the State, the Department can acquire goods and services, **including major procurements** through a competitive negotiation process.

(Emphasis added.) Subsection (5)(i)5. then delineates in detail how DOL is to implement that competitive negotiation process. It further provides that DOL can agree to terms that are "fair, competitive, and reasonable."

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[13]Because the DMS rule was in effect during the course of numerous legislative amendments to and reenactment of section 24.105, the Legislature had to know it was vesting authority in DOL to act pursuant to the DMS rule governing alternative negotiation procedures. State ex rel Szabo Food Serv's, Inc. of N.C. v. Dickinson, 286 So. 2d 529 (Fla. 1973) (when legislature reenacts statute, it is presumed to know and adopt construction placed thereon by agency); Preston v. Health Care and Retirement Corp. of Am., 785 So. 2d 570 (Fla. 4th DCA 2001) (Legislature presumed to know state of law in passing statutes); Cole Vision Corp. v. Dept. of Bus. & Prof. Reg., 688 So. 2d 404 (Fla. 1st DCA 1997) (when Legislature reenacts statute, it is presumed to know and adopt construction of statute by agency responsible for its administration); Wood v. Fraser, 677 So. 2d 15, 18 (Fla. 2d DCA 1996) (well-settled rule of statutory construction that legislature presumed to know existing law when statute is enacted).

DOL incorporated into the RFP at issue plans and specifications consistent with its rule. The RFP specifications advised all potentially interested parties of the procedures DOL would follow in conducting its procurement of a new on-line gaming system. This included the ranking of proposers, followed by one of three options. First, DOL could cancel the procurement if it deemed that "to be in its best interest." V. II, 628 § 1.21. Second, DOL could enter into contract negotiations with the highest ranked proposer as to "conditions and price" that were "fair, competitive, and reasonable." V.II, 607 § 8.7.2. Under the second option, if contract negotiations with the highest ranked proposer failed, then DOL was required to undertake negotiations with the second most qualified respondent. Id. Third, DOL could award the contract without further negotiations with the apparent successful respondent. V.II, 628 § 1.21.

Specification 8.7.2, in which the second option (negotiation) was delineated, largely restated the negotiation provisions of Rule 53ER87-13. This constituted unambiguous and irrefutable notice of the possibility that DOL would negotiate the substantive terms of "conditions and price" of any eventual contract pursuant to its rule authority. In this case, after evaluating its three options, DOL notified Gtech and AWI of its intent to negotiate a contract with AWI through its Notice of Award. That Notice specifically provided that DOL "intends to initiate negotiations" with AWI and that such award "is contingent upon successful completion of negotiations." V.III,914.

Because Rule 53ER87-13 was presumptively valid, DOL was entitled and obligated to follow that rule in securing the Negotiated Contract. See Graham v. Swift, 480 So. 2d 124 (Fla. 1985). See also Vantage Healthcare Corp. v. Agency for Health Care Admin., 687 So. 2d 306 (Fla. 1st DCA 1997) ("[t]he agency is obligated

to follow its own rules"). Any vendor that wanted to question DOL's procurement rule had an available administrative remedy to do so before the negotiation process began. See § 120.56(3) (giving any "substantially affected person" the right to "seek an administrative determination of the invalidity of an existing rule . . . ." ). Despite this clear remedy, Gtech failed to contest Rule 53ER87-13, either before or after publication of the RFP. It failed to do so even though the RFP was obviously issued pursuant to that rule. Given that DOL followed Rule 53ER87-13 in securing the Negotiated Contract, and given that Gtech never contested that rule's validity, Gtech cannot now assert that rule's invalidity as a basis for undoing the result. Central Fla. Reg. Hosp., Inc. v. Dept. of H.R.S., 582 So. 2d 1193 (Fla. 5th DCA 1991) (agency required to approve application pursuant to rule methodology in place when application submitted despite subsequent determination of its invalidity); Cleveland Clinic Fla. Hosp. v. Agency for Health Care Admin., 679 So. 2d 1237 (Fla. 1st DCA 1996) (citing Central Florida for principle that "agency cannot apply one set of rules during the application process and then apply a different set of rules after the applicants have already relied upon agency's announced policies and requirements").[14]

DOL's procurement authority (including the rules inherited from DMS) clearly authorized the inclusion of Specification 8.7.2 in the RFP. Neither the trial court nor the majority expressly declared either DOL's procurement rule or Specification 8.7.2 to be invalid. However, because the majority did not find Specification 8.7.2 to be

[14]Alternatively, Gtech cannot now convert its circuit court complaint into a rule challenge petition since, under the exhaustion doctrine, "judicial challenges to administrative rules must await exhaustion of available administrative remedies." Florida Marine Fisheries Comm. v. Pringle, 736 So. 2d 17 (Fla. 1st DCA 1999).

invalid, it had to reconcile the plain language of Specification 8.7.2 with its inconsistent view that DOL could not negotiate material or substantive contract terms.

To accomplish this, the majority re-characterized the specification's purpose, stating that it contemplates nothing more than "finalizing an agreement by turning the winning proposal into a contract," presumably with no changes. Gtech Corp., 2001 WL 193770 at 3. According to the majority, a condition precedent to negotiations under Specification 8.7.2 was a determination that "the proposals under this RFP are the best method of obtaining the desired gaming system and services." The majority then concluded that, if such a finding were made, a proposal could not be substantively changed, since any change would be an indication that the proposal was not the "best method." Id. Stated differently, the majority concluded that DOL could engage in contract negotiations only by making a "best method" finding and, once such a finding was made, DOL could not negotiate substantive terms because Specification 8.7.2 only authorizes a contract that tracks the proposal "as is" with no changes.

The majority's interpretation is both illogical and inconsistent with what Specification 8.7.2 plainly states. For instance, Specification 8.7.2 states that DOL will negotiate terms, including "price." Clearly, "price" is a substantive term. Thus, the inclusion of "price" as a negotiable term unquestionably refutes the majority's claim that the Specification does not contemplate the negotiation of substantive terms. Further, as noted by Judge Kahn,

> [b]oth the rule and the RFP envision the prospect of failed negotiations, because they both direct that if the Secretary is unable to negotiate successfully with the most highly ranked firm, those negotiations shall be terminated and the Secretary "shall then undertake negotiations with the second-most qualified firm."

Gtech Corp., 2001 WL 193770 at 5. Surely if the parties' "negotiations" were limited to immaterial matters, they could not fail. Hence, as recognized by Judge Kahn, by establishing a process that anticipates failed negotiations, the RFP envisioned meaningful negotiations over substantive contract terms.

The majority's interpretation is not only illogical, it makes Specification 8.7.2 a meaningless alternative under the RFP. As previously discussed, the RFP gives DOL the option of either entering into a contract with no prior negotiations per Specification 1.21 or negotiating a contract pursuant to Specification 8.7.2. If no material terms could be negotiated under Specification 8.7.2, then a negotiated contract would look materially the same as an un-negotiated contract. The inclusion of Specification 8.7.2 would therefore be an unnecessary redundancy as opposed to an alterative procurement procedure. Courts cannot construe statutes, rules, and documents in such a way that is contrary to their plain meaning; courts must give reasonable meaning to all of their provisions. See, e.g., Deni Associates of Fla., Inc. v. State Farm Fire & Cas. Ins. Co., 711 So. 2d 1135 (Fla. 1998) (court cannot place limitations on plain language of contract term simply because court may think it should have been written that way).

The majority's apparent motivation for re-writing Specification 8.7.2 (and hence DOL's rule on which it was based) was that the procedure set forth therein was "not likely to inspire public confidence in the fairness of the process or that the Lottery has entered into the most beneficial agreement." Gtech Corp., 2001 WL 193770 at 3. Specifically, the majority expressed concern that Specification 8.7.2 would "encourage responders to RFPs to submit non-competitive, unrealistic proposals solely for the purpose of receiving the highest ranking for subsequent negotiations." Id. This concern appears to be premised on Gtech's allegation that

"AWI purposely 'low balled' its proposal in order to attain superior ranking over Gtech and then negotiated a contract on much more favorable terms than it initially proposed . . . ." Id. The majority's concern is unwarranted because there is no record basis for questioning the fairness of the process. Gtech produced absolutely no evidence to support its contention that AWI "low balled" its proposal. To the contrary, the record supports a finding that the process was fair to all proposers. Both Gtech and AWI were on notice as to DOL's rule, which specifically provided for the negotiation process used. Before submission of their proposals, both Gtech and AWI were simultaneously given the same specifications (including 8.7.2). Before submission of their proposals, both Gtech and AWI were allowed to make inquiries regarding the RFP. And both Gtech and AWI had an equal opportunity to compete for the contract.

Both Gtech and AWI were also on notice as to Specification 1.21, under which DOL reserved the right to "make an award . . . without further negotiations." This Specification (of which the majority made no mention), by itself, would have dissuaded Gtech and AWI from submitting unrealistic proposals because neither could have known in 1995 (when the RFP was issued) whether DOL would elect to negotiate the final contract.

Even assuming that the majority's interpretation of Specification 8.7.2 is reasonable, or even preferable, there are other reasonable interpretations, including DOL's view that Specification 8.7.2 – and its underlying rule – authorized substantive negotiations. Courts have consistently concluded that an agency's interpretation as to its own statutes and rules must be accorded great weight and that any question in this regard must be construed in favor of the agency. D.A.B. Constructors, Inc. v. Dept. of Trans., 656 So. 2d 940, 944 (Fla. 1st DCA 1995) ("[a]n agency's construction

of a statute which it administers is entitled to great weight and will not be overturned unless the agency's interpretation is clearly erroneous. . . . The agency's interpretation need not be the sole possible interpretation or even the most desirable one; it need only be within the range of permissible interpretations"); Koger v. Dept. of Prof. Reg., 647 So. 2d 312, 313 (Fla. 5th DCA 1994). Not only did the majority opinion fail to give deference to DOL's reasonable interpretation of its own rule, the majority appeared to give that interpretation any weight at all.

From a public policy perspective, the majority also failed to give due consideration to the leverage disappointed bidders will now have over DOL and other agencies that depend on advanced and rapidly evolving technologies. In DOL's case, the RFP expressed DOL's need to implement a complex computer system based on current technology. Judge Kahn noted the "incredible changes" in information technology that occurred during the course of Gtech's bid protest. Yet, despite the substantial delay caused by the Gtech protest, the majority's holding effectively precludes DOL from making any changes to the final contract. Thus, in future procurements, disappointed bidders can use bid protests to delay execution of the final contract as long as possible hoping that the RFP will become outdated, thereby requiring the agency to start the process anew. Such a result certainly would prevent DOL from adhering to its Legislative mandates to function as an "entrepreneurial business enterprise," respond quickly to marketplace changes, and maximize revenues for education.

In short, DOL had the clear legal authority to negotiate substantive terms of the Negotiated Contract that were fair, competitive, and reasonable. Absent any showing of illegality, fraud, oppression, or misconduct in DOL's exercise of discretion regarding the fairness, competitiveness, and reasonableness of the negotiated terms,

the Negotiated Contract must be upheld. Groves-Watkins, 530 So. 2d at 913 ("[A] public body has wide discretion in soliciting and accepting bids for public improvements and its decision, when based on an honest exercise of this discretion, will not be overturned by a court even if it may appear erroneous and even if reasonable persons may disagree.") (emphasis added) (quoting Liberty County v. Baxter's Asphalt & Concrete, Inc., 421 So. 2d 505 (Fla. 1982)). As noted by Judge Kahn, there has been no such showing here. Gtech Corp., 2001 WL 193770 at 6. Accordingly, this Court should quash the majority opinion and remand with directions that summary judgment be entered in favor of DOL and AWI.

## II. A DISGRUNTLED PROPOSER SUCH AS GTECH, THAT FAILS TO TIMELY CONTEST A NEGOTIATION CLAUSE IN AN RFP, CANNOT LATER COLLATERALLY ATTACK THE CONTRACT IN CIRCUIT COURT (OR ELSEWHERE) ON THE BASIS THAT THE NEGOTIATIONS CONDUCTED PURSUANT TO THAT CLAUSE WERE IMPERMISSIBLE.

Summary Judgment for Gtech is not only improper because DOL had full authority under the law and terms of the RFP to negotiate substantive terms of the Contract with AWI, it is also improper because Gtech's collateral attack on the Negotiated Contract is impermissible. Well-established principles of law and sound public policy prohibit collateral attacks on the terms of an RFP such as Specification 8.7.2. Only if Gtech were able to establish that Specification 8.7.2 is invalid could a judicial body prohibit DOL from negotiating terms of the Negotiated Contract. Gtech is procedurally barred from bringing any such protest, however, because terms of an RFP must be contested during the pre-contract procurement process. By failing to timely contest Specification 8.7.2, Gtech has waived the right to bring its protest here. Any contrary finding is inconsistent with the law and will place every state procurement contract in jeopardy of collateral attack.

Florida law requires vendors to protest specifications in an RFP before any bids or proposals are submitted to the agency in reliance on the RFP. See §§ 120.57(3)(b); 24.109(2). The failure to file such a protest prior to the submission and evaluation of proposals constitutes a waiver of the right to contest the validity of the specifications. This law is codified in section 120.57(3)(b), which governs bid protests. Section 120.57(3)(b) states in relevant part:

> With respect to a protest of the specifications contained in an invitation to bid or in a request for proposals, the notice of protest shall be filed in writing within 72 hours after the receipt of notice of the project plans and specifications or intended project plans and specifications in an invitation to bid or request for proposals, and the formal written protest shall be filed within 10 days after the date the notice of protest is filed. **Failure to file a notice of protest or failure to file a formal written protest shall constitute a waiver of proceedings under this chapter.**

(Emphasis added). See also § 24.109(2) (applying 120.57(3) to DOL's contracting process, but shortening the limitations period for filing the formal written protest from 10 days to 72 hours). This statutory mandate is consistent with long-standing judicial principles prohibiting piecemeal litigation and requiring that claims not timely raised are procedurally barred. See, e.g., Atwater v. State, 788 So. 2d 223 (Fla. 2001) (claims that could and should have been raised on direct appeal are procedurally barred); State ex rel. Outrigger Club, Inc. v. Barkdull, 277 So. 2d 15 (Fla. 1973) (needless, piecemeal litigation is to be avoided if at all possible; where parties are noticed and could and should have raised claims in prior proceeding regarding possible zoning irregularities but failed to do so, any claims in that regard are waived); Boynton Landscape v. Dickinson, 752 So. 2d 1236 (Fla. 1st DCA 2000) (piecemeal litigation of mature claims are no more permissible in workers' compensation cases than in civil litigation; claims not raised are waived)

Consistent with section 120.57(3)(b) and well-established law, the RFP itself required that any prospective respondent disputing "the reasonableness or appropriateness of the terms, conditions, and specifications of the RFP" had to file a formal written protest within seventy-two hours after receipt of the RFP. See V.II,521 § 1.9.

Even though Gtech timely filed numerous other administrative protests, it filed no protest within the time constraints of the law or the RFP as to the validity of Specification 8.7.2 and its clear provisions regarding subsequent negotiations. As discussed above, Specification 8.7.2 plainly authorized DOL to negotiate with the most highly qualified respondent **conditions and price** that are fair, competitive, and reasonable. That provision further stated that, if such negotiations failed, DOL would then undertake negotiations with the next ranked proposer. In his dissenting opinion, Judge Kahn characterized the clear notice in the Specification regarding substantive negotiations by stating: **"I find it inconceivable that anyone reading Specification 8.7.2 would not conclude that the Lottery might reserve the right to negotiate scope of work, and thereby, unavoidably, negotiate price."** Gtech Corp., 2001 WL 193770 at 6.

Not only did Gtech fail to contest Specification 8.7.2's negotiation option during the required protest period, it also failed to contest DOL's clear intent to negotiate a contract set forth in DOL's "notice of award." After AWI was determined to be the most highly qualified respondent, DOL issued a notice of award, which stated that the "**[a]ward [to AWI] is contingent upon successful completion of negotiations**." V.III,914. (emphasis added). The face of the notice specifically confirmed that DOL intended to negotiate terms of the contract with AWI.

It is simply undeniable that Gtech had ample opportunity to timely contest the negotiation specifications during the numerous administrative protests it filed both before and after it submitted its proposal, but chose not to do so. Neither did Gtech ever question DOL's rule authorizing the alterative negotiation process. Instead, Gtech waited until its own attempt to win the right to negotiate with DOL failed before it brought this action to abrogate the contract negotiated with its competitor. By failing to timely protest the specifications of the procurement document, Gtech has waived any objection it might have had to the subsequent negotiation of the contract. Stated differently, Gtech cannot ambush DOL and AWI at the end of the procurement process by seeking to void their contract based on the alleged invalidity of a specification that Gtech was obligated to contest at the beginning of the procurement process.

Importantly, this argument has been made consistently by DOL throughout this proceeding before both the trial court and the district court. The district court's majority apparently misconstrued DOL's assertions in this regard in finding that DOL waived an "exhaustion of administrative remedies" in this proceeding. As recognized by Judge Kahn, DOL's argument is not that Gtech should have raised this post contract dispute in the administrative arena; rather, DOL's argument is that Gtech should have raised any issue regarding DOL's authority to negotiate in the pre-contract procurement process, and, because it did not do so, it waived the ability to bring this proceeding.

To allow Gtech's protest at this late stage of the procurement process would establish precedent that would forever subject all state procurement contracts to risk of attack long after the time for filing protests has passed. Recognizing the need for

ensuring the viability of state contract awards, courts have repeatedly rejected collateral attacks similar to Gtech's.

For instance, in Capeletti Brothers, Inc. v. Department of Transportation, 499 So. 2d 855 (Fla. 1st DCA 1986), the First District Court of Appeal rejected a post-procurement protest to a rule authorizing the Department of Transportation ("DOT") to set a goal for participation by women-owned businesses ("WBE goal") in its procurement specifications. In that case, Capeletti submitted the low bid for the project, but DOT deemed its bid non-responsive because Capeletti failed to meet the WBE goal. Capeletti protested the contract award decision and simultaneously challenged the rule which authorized DOT to set the WBE goal in the first place. The hearing officer found the rule invalid and held that DOT could not rely on the invalid rule as the basis for rejecting Capeletti's bid. DOT rejected the hearing officer's conclusion and awarded the contract to another party. In affirming DOT's decision, the district court found that the proper procedure for contesting the WBE goal was to file a bid solicitation protest within seventy-two hours of receipt as required by law and that the failure to do so constituted a waiver to bring the subsequent protest. Id. at 857. In so holding, the court emphasized that the purpose of the bid solicitation protest provision is to allow an agency, in order to save expense to the bidders and to assure fair competition among them, to correct or clarify plans and specifications before accepting bids. Id.

Likewise, the Fourth District Court of Appeal refused to consider a late-filed challenge to contract specifications in Optiplan, Inc. v. School Board of Broward County, 710 So. 2d 569 (Fla. 4th DCA 1998) – even where such a challenge involved the constitutionality of the RFP specifications. The school board in Optiplan was soliciting proposals for the provision of group vision care. Optiplan filed a formal

written protest when its proposal was rejected, arguing, among other things, that "the RFP was unconstitutional because it used race-based classifications in scoring points under the minority and women business enterprise participation category." Id. at 570. The court, however, agreed with the decision below that it was just too late for Optiplan to raise this issue, stating:

> Finally, with respect to the constitutional challenge to the RFP's specifications because it awarded points tied to race-based classifications, we agree with the hearing officer that Optiplan waived its right to contest the School Board's use of the criteria by failing to formally challenge the criteria within 72 hours of the publication of the specifications in a bid solicitation protest. The purpose of such a protest is to allow an agency to correct or clarify plans and specifications prior to accepting bids in order to save expense to the bidders and to assure fair competition among them. . . . Having failed to file a bid specification protest, and having submitted a proposal based on the published criteria, Optiplan has waived its right to challenge the criteria.

Id. at 572-73. Like the disgruntled bidders in Capeletti and Optiplan, Gtech is trying to collaterally attack a contract award based on an allegedly invalid specification that was not timely challenged.

Notably, despite the clear language of Specification 8.7.2, Gtech has argued in the courts below that no waiver occurred in this case because it did not interpret Specification 8.7.2 as allowing substantive, material negotiations. As stated by Judge Kahn, such an argument is not only unavailing, it is "inconceivable" given the plain language of the Specification, DOL's need to implement a highly sophisticated and expansive on-line lottery system, and the "incredible changes" in the area of information technology "in almost unimaginably short time intervals." Gtech Corp., 2001 WL 193770 at 6.

Moreover, given the plain language of the Specification, Gtech was required to file appropriate pre-proposal inquiries if it had any doubt whatsoever as to its meaning. Even where an agency's notice provides no policy regarding how an agency will implement its decision-making authority, any question in that regard must be raised during the pre-contract procurement process. See, e.g., Gulf Coast Home Health Services of Florida, Inc. v. Department of Health and Rehabilitative Services, 515 So. 2d 1009 (Fla. 1st DCA 1987) (rejecting argument that agency's notice of litigation was insufficient to alert litigant to the policy the agency would use in making subsequent decision, and holding that claim was waived where clarification of the policy to be used was not timely initiated). Gtech asked at least 114 questions in the pre-contract procurement process, but failed to asked any question whatsoever regarding the negotiation provisions of the RFP. By failing to seek clarification regarding the negotiation provisions, Gtech assumed the risk that DOL would act according to its own interpretation. Cf. D.A.B. Constructors, Inc., 656 So. 2d at 944 ("[a]n agency's construction of a statute which it administers is entitled to great weight and will not be overturned unless the agency's interpretation is clearly erroneous. . . . The agency's interpretation need not be the sole possible interpretation or even the most desirable one; it need only be within the range of permissible interpretations"); Koger, 647 So. 2d at 313.

The Negotiated Contract is an excellent example of why collateral attacks such as Gtech's are inappropriate and against public policy. The pre-contract procurement process for the Negotiated Contract began in 1995. Six years later the Negotiated Contract is still in dispute. What should have been rectified years ago in the pre-contract procurement process still remains unresolved. **Indeed, the implementation schedules under the Negotiated Contract have long-passed, thus making any**

**nullity of the Contract in that regard moot.** As illustrated by this case, if the district court's decision is left to stand, it surely will facilitate (and indeed encourage) never-ending litigation in state procurement processes. Such a result is unwarranted and unnecessary. No one can dispute that such a result also will detrimentally impact the State's budget because of the increased litigation expenses for all state contracts that are certain to occur. At some point, there must be finality to allow the state to function economically and securely.

Because Gtech failed to timely challenge Specification 8.7.2, this Court should quash the majority opinion and remand this cause with directions that summary judgment be entered in favor of DOL and AWI.

## III. THIS COURT SHOULD EXERCISE ITS DISCRETIONARY JURISDICTION TO REVIEW THE CERTIFIED QUESTIONS PASSED UPON BY THE DISTRICT COURT BECAUSE THE ISSUES PRESENTED HAVE SIGNIFICANT IMPACT ON THE LOTTERY'S ABILITY TO FUND PUBLIC EDUCATION AND ALL STATE PROCUREMENT CONTRACTS.

**(a) The Certified Questions are of Great Public Importance.** The certified questions passed upon by the district court are of great public importance. The answers to these questions will significantly impact DOL's ability to fund public education and will imperil every State procurement contract.

If the district court's decision is allowed to stand, DOL's ability to maximize revenues and fund public education will be jeopardized. Like any entrepreneurial enterprise, DOL must be able to make predictable and timely purchases of the supplies and services it needs to deliver its "product" to the marketplace. This is especially true given DOL's dependence on technology and the rapidly advancing innovations in that arena. To that end, as discussed above in Issue I, DOL is allowed to operate

under DMS's rules, which specifically authorize the negotiation of procurement contracts.

If the district court's decision is left to stand, DOL's authority to negotiate meaningful contracts terms will be eliminated. Without that authority, DOL simply cannot comply with the Legislative mandate of "respond[ing] as quickly as is practicable to changes in the marketplace." Correspondingly, DOL's ability to maximize revenues to enhance public education will be abridged. As the lengthy pre-contract protests in this case illustrate, it is sometimes years between issuance of an RFP and execution of contemplated contract.

Allowing the district court's decision to stand will also subject every procurement contract in this State to collateral attack, even where proposers were given full opportunity to question proposal specifications before their proposals were submitted but failed to do so as required by law. The district court's decision will also allow courts to second-guess the meaning of those specifications after contracts have been procured and to void contracts already being performed simply because a court disagrees with an agency's interpretation of its own rules and procedures. One of the primary purposes of the statutorily mandated pre-contract, bid protest procedures is to insure that such disputes are resolved before any contract is awarded. See, e.g., Advocacy Center for Persons with Disabilities, Inc. v. Department of Children and Family Servs., 721 So. 2d 753 (Fla. 1st DCA 1998) (purpose of bid solicitation protest provision is to allow agency to correct or clarify plans and specifications before accepting bids); Capeletti Bros., Inc. v. Department of Transp., 499 So. 2d 855 (Fla. 1st DCA 1986) (same).

As this Court held in Groves-Watkins and Liberty County, an agency's discretion regarding a contract such as the one at issue should be upheld absent a

finding of illegality, fraud, oppression, or misconduct. This standard has been effectively overruled by the district court's decision and will place every State-procured contract in jeopardy. Accordingly, it is clear that the questions certified are of great public importance to the citizens of Florida.

**The Certified Questions Were "Passed Upon" by the District Court.** The certified questions were also "passed upon" by the district court. After DOL filed its notice invoking jurisdiction, Gtech filed a motion to dismiss this case, asserting that the district court did not "pass upon" the questions certified. At the time this brief was filed, that motion was still pending before this Court along with DOL's motion to strike same as an unauthorized jurisdictional brief. Although the face of the district court's decision clearly reflects that the court "passed upon" the certified questions, DOL briefly provides additional explanation in this regard given Gtech's assertions to the contrary.

As noted in the Statement of the Case and the Facts, the district court addressed two issues in its split decision: (1) whether DOL had the authority to negotiate substantive terms of the Negotiated Contract; and (2) whether Gtech's collateral attack on the Negotiated Contract was properly brought in circuit court. The majority concluded that DOL did not have the authority to negotiate substantive contract terms and that Gtech's collateral attack was properly brought in circuit court. Judge Kahn, in a dissent, disagreed with both holdings based, in part, on this Court's decision in Groves-Watkins.

The certified questions track the issues addressed by both the majority and the dissent. The first question addresses whether DOL has the authority to negotiate substantive terms of a contract following a competitive procurement process (the majority concluded that it did not; the dissent concluded that it did). The second

addresses whether Gtech's collateral attack to the contract was appropriate in circuit court (the majority concluded that it was appropriate; the dissent concluded that it was not). Thus, from the face of the district court's decision, it is clear that the district court "passed upon" both of the certified questions; both the reasoning and the issues ruled on are set forth in the court's decision.

Notably, however, even if the district court had not explicitly set forth its reasoning for ruling on the questions certified or failed to state the issues adequately in certifying the questions, jurisdiction in this Court would still be proper. First, whether a district court expressly provides any reasoning for rejecting or affirming an issue is irrelevant to a determination of jurisdiction. So long as it is clear that the district court ruled on the issue certified, even if the court does not explain its reasons for such a ruling, jurisdiction in this Court is properly invoked. See, for example, Weiand v. State, 732 So. 2d 1044, 1047 (Fla. 1999), in which this Court accepted jurisdiction of a certified question even though the district court's ruling consisted of nothing more than a statement that it "examined each [issued raised] together with the entire trial transcript and conclude[d] that none of the errors asserted require reversal." As this Court emphasized, "While a discussion in the [district court's] opinion of the issues raised by the certified question would have been helpful to this Court, it was not a necessary predicate to our exercise of jurisdiction." Id.

Likewise, the fact that a district court fails to formulate an issue adequately in certifying a question does not impair this Court's jurisdiction to review the issue. See Finkelstein v. Dept. of Transp., 656 So. 2d 921 (Fla. 1995); Rupp v. Jackson, 238 So. 2d 86 (Fla.1970). Opinions of this Court are replete with instances where this Court has reworded certified questions to properly frame the issue before the Court. See, e.g. Resha v. Tucker, 670 So. 2d 56 (Fla. 1996) (stating that question was rephrased

to properly reflect issue raised by facts of case); Finkelstein; State v. Smith, 641 So. 2d 849 (Fla. 1994).

In summary, the questions certified are of great public importance and were expressly addressed and passed upon by the district court. If this Court has any doubt, however, that the questions certified do not accurately reflect the issues decided by the district court, this Court should exercise its authority to rephrase the questions.

## CONCLUSION

For the reasons set forth in this Initial Brief, DOL urges this Court to accept jurisdiction of this case, quash the district court's opinion, and remand this cause with directions that summary judgment be entered in favor of DOL and AWI.

Respectfully submitted,


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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Hand Delivery to Martha Harrell Chumbler and W. Douglas Hall, CARLTON FIELDS, 215 South Monroe Street, 5th Floor, Tallahassee, Florida 32301; John K. Aurell, John R. Beranek and Martin B. Sipple, AUSLEY & McMULLEN, 227 South Calhoun Street, Tallahassee, Florida 32301; and by U.S. Mail to Sylvia H. Walbolt and Joseph H. Lang, CARLTON FIELDS, One Progress Plaza, Suite 2300, 200 Central Avenue, St. Petersburg, Florida 33701-4352; and Thomas Panza, Mark A. Emanuele and Deborah Susan Platz, PANZA, MAURER, MAYNARD & NEEL, NationsBank Building, Third Floor, 3600 North Federal Highway, Fort Lauderdale, Florida 33308, this 26th day of September, 2001.

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**Katherine E. Giddings**

## CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that the type size and style used throughout this Brief is the 14 Point Times New Roman Proportionally-spaced Font.

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**Katherine E. Giddings**

# APPENDIX