

**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.**

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**REPLY BRIEF OF THE  
DEPARTMENT OF LOTTERY**

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## 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

Gtech Corporation (“Gtech”) uses flawed arguments in attempting to subvert the Florida Department of Lottery’s (“DOL”) unequivocal authority for the competitive negotiation process used to procure the on-line gaming contract at issue (the “Contract”).<sup>1</sup> Gtech’s arguments misconstrue or ignore the law and the record.

First, Gtech characterizes DOL’s analysis of its negotiating authority as “very complicated,” suggesting that the alleged complexity casts doubt on the correctness of that authority. AB1 at 38. To the contrary, the basis for DOL’s negotiating authority is straightforward, logical, and specifically authorized by statute and rule. The Legislature authorized DOL to procure goods and services using any rule promulgated by the Department of Management Services (“DMS”). See § 24.105(14), Fla. Stat.<sup>2</sup> At the time of this procurement, DMS had codified Rule 60A-1.018(2)(g), F.A.C.,<sup>3</sup> which expressly authorized the adoption of “alternative negotiation procedures.” In accordance with § 24.105(14), DOL complied with DMS Rule 60A-1.018(2)(g) by formally adopting a competitive negotiation procurement process,

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<sup>1</sup>Gtech has filed two answer briefs, referencing Docket Nos. SC01-1795 and SC01-1796 on face of both. The cover sheets to those briefs state that one is directed to the initial brief filed by DOL (SC01-1795), and one is directed to the initial brief filed by Automated Wagering International, Inc. (“AWI”) (SC01-1796). The answer brief directed to DOL addresses only the issue of jurisdiction. The answer brief directed to AWI focuses on both jurisdiction and the merits. Of necessity, this Reply Brief thus responds to the arguments in both briefs. Gtech’s Answer Brief directed to AWI will be referenced “AB1”; its Answer Brief directed to DOL will be referenced “AB2.”

<sup>2</sup>Unless otherwise stated, all statutory and rule references are for 1995.

<sup>3</sup>In attempting to counter DOL’s explanation of its authority, Gtech completely ignores DMS Rule 60A-1.018. That rule is mentioned in neither of its answer briefs.

which was the procurement procedure followed here. DOL's competitive negotiation process was codified in Rule 53ER87-13(5)(i) (later renumbered 53ER97-39), F.A.C.

Next, to rebut DOL's negotiating authority, Gtech argues that DOL is "[l]ike any other state agency." AB1 at 29. According to Gtech, because state agencies like DOL have no negotiating authority under Chapter 287, DOL's competitive negotiation rule is being used to "trump the statutes." *Id.* at 40-41. Again, this argument is incorrect.

Rule 53ER87-13(5)(i) did not "trump" any statute or otherwise thwart the Legislature's will. To the contrary, § 24.105(14) sanctioned DOL's development of an alternative negotiation procedure by giving DOL the statutory authority to use DMS's Rule 60A-1.018(2)(g). Section 24.105(14) clearly establishes that the Legislature empowered DOL to act like DMS and not just like "every other agency." Because DMS is the state's primary purchasing agent, Chapter 287 gave DMS broader purchasing powers than it gave to other agencies. *See, e.g.*, § 287.057(3)(b) (exempting DMS from bidding requirements). This includes the authority to negotiate contracts. *See, e.g.*, § 287.042(1)(a) (delegating to DMS alone the power to "contract for the purchase . . . of all commodities and contractual services required by any agency under competitive bidding or by contractual negotiation") (emphasis added). Thus, when DOL enters into contracts pursuant to DMS's statutory or rule authority, DOL is indeed unlike other agencies.

Gtech is also incorrect in arguing that § 287.055 implicitly prohibited DOL from negotiating the Contract. Section 287.055 requires certain professional services contracts to be competitively negotiated. The Contract in this case is a non-professional services agreement which § 287.055 did not cover. Gtech therefore asserts that the doctrine of *expressio unius est exclusio alterius* precluded any

negotiations relative to this non-287.055 contract. This argument, which the majority apparently found persuasive,<sup>4</sup> totally ignores § 287.055(7), which states that nothing in 287.055 shall limit any authority conferred on DMS by other provisions of law. Such other provisions of law include, for instance, DMS's broad negotiating authority under § 287.042(1)(a). Since DOL is statutorily equivalent to DMS for purchasing purposes, § 287.055(7) applies equally to DOL, meaning that 287.055 also does not operate as an implicit limitation on DOL's contracting authority.

In light of DOL's clear statutory and rule authority to negotiate the contract at issue, Gtech's alternative strategy has been to argue that the process used by DOL was somehow tainted or unfair. Under this baseless scheme, Gtech attempts to cast a negative light on DOL and AWI through innuendo. Gtech's briefs are replete with disparaging buzz words such as "private negotiations," "preferred bidder," "lowball proposal," "favoritism," "in-house favorite," and "sweetheart contract." Gtech couples these labels with non-record evidence and irrelevant hearsay to create an impression of wrongdoing.

For instance, with no record citation, Gtech states as a "fact" that, "for several years, AWI's employees . . . worked alongside the Lottery's employees at the

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<sup>4</sup>In its opinion, the majority finds the competitive negotiation process used by DOL to be "at odds with the proscriptions of Chapter 287," but makes no specific reference to any sections therein. It states, however, in an apparent reference to § 287.055, that "we are not persuaded by Appellants' arguments that the type of contract involved here is the same as ones for provision of legal or engineering services or the like which may be statutorily acquired through a process of direct negotiations without complying with requirements of Chapter 287." Fla. Dept. of Lottery v. Gtech Corp., 26 Fla. L. Weekly D621, 2001 WL 193770 at 5 (Fla. 1st DCA Feb. 28, 2001). Neither DOL or AWI ever argued that the Contract at issue was the type of contract that could be negotiated under § 287.055; both directed the court's attention to § 287.055(7), which negates any implied limitation on DMS's authority that might otherwise be read into § 287.055.

Lottery’s headquarters.” AB1 at 2. Gtech then insinuates that the former DOL secretary, a Democrat, negotiated and signed the successor contract in October 1998 to get a new contract in place before a Republican was elected governor. Gtech supports this irrelevant comment only with newspaper articles, stating that they show “the timing and substance of the October, 1998 contract generated harsh criticism.” AB1 at 8. The “fact” that criticism occurred as to the October 1998 contract has no bearing on any issue here. Count II of Gtech’s complaint is directed only to the Contract at issue, which was executed in March 1999, and which was negotiated by the new Republican administration to replace the October 1998 contract.

In portraying the process as unfair, Gtech also misstates DOL’s position on the scope of its negotiating authority. According to Gtech, DOL engaged in unfettered negotiations that were not “constrained by the mandatory specifications of the RFP or AWI’s proposal.” AB1 at 6. This, in turn, made the negotiations “open ended” or “unlimited.” AB1 at 36-37. As explained in DOL’s Initial Brief, DOL has never viewed or treated its negotiating authority as “open ended.” DOL complied with Rule 53ER87-13 and Specification 8.7.2, which limited negotiations to terms deemed to be “fair, competitive, and reasonable.” Because this fair, competitive, and reasonable standard is the same standard required by the Legislature in the context of negotiations under § 287.055, it is undeniable that this standard is an appropriate and meaningful constraint on DOL’s authority. See § 287.055(5)(a) (“agency shall negotiate a contract . . . which the agency determines is fair, competitive, and reasonable.”)

Also imbedded in Gtech’s argument in this regard is an incorrect assumption as to the purpose of the “mandatory requirements” in the RFP. The “mandatory requirements” were not, as Gtech implied, mandatory contract terms. Rather, the “mandatory requirements” were terms that had to be included in each bidder’s

proposal so that the various proposals could be compared and ranked prior to negotiations. See V.II, 524 § 1.18 (titled “Mandatory Requirements”) (“The Lottery 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). Consistently, the RFP 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., V.II,700 § 1.36 (“the Contract shall incorporate this RFP, addenda to this RFP, and the Contractor’s proposal . . . except to the extent that the Contract explicitly provides to the contrary”).

Gtech also exaggerates (and even creates) facts to give the impression that the negotiations resulted in more substantial changes than is actually the case. Gtech claims that the omission of a termination for convenience clause is “startling” because “such a provision is included in virtually every state contract.” There is nothing in the record or otherwise to support this statement. Gtech also asserts that the Contract’s term ends 3½ years later than what the RFP indicated. Although the RFP states that the agreement “shall be in effect from date of execution through June 30, 2001,” the context makes clear that the RFP contemplated a five year term. See, e.g., V.III, 856 § 3.4.1. This meant that, because the bid protest delayed the Contract’s execution, for the Contract to have a 5-year term, its termination date had to be extended beyond June 30, 2001. Next, Gtech overstates the significance of the “big bang” implementation schedule by describing it as the “central premise of the RFP.” In fact, DOL had the right under the RFP to “modify, cancel or stop any and all plans, schedules or work in progress.” V.II, 529 § 30 (emphasis added). Finally, in numerous places, Gtech illogically calculated the difference between the original “big bang” implementation schedule and the Contract’s revised schedule using the notice

of award date (Mar. 23, 1998) rather than the Contract's effective date (Sept. 30, 1999), thereby assuming that AWI could have started work before the Contract was in effect. Gtech neglects to advise the Court that any issue as to the implementation schedule is now moot because the gaming system has already been implemented under the revised schedule.

As the only legal support for its unfairness argument, Gtech cited four dated cases: Wester v. Belote, 138 So. 721 (Fla. 1931); Robert G. Lassiter & Co. v. Taylor, 128 So. 14 (Fla. 1930); Miami Marinas Assoc., Inc. v. City of Miami, 408 So. 2d 615 (Fla. 3d DCA 1981); and Glatstein v. City of Miami, 399 So. 2d 1005 (Fla. 3d DCA 1981). Each of these cases is factually distinguishable:

- (a) Unlike DOL, the contracting agencies in those cases had no express negotiating authority codified in a statute or rule; in fact, Chapter 287 was not even at issue in those cases.
- (b) Unlike the specifications in the RFP here, the published specifications or plans in those cases did not include an express provision notifying bidders that the final contract terms would be negotiated.
- (c) Unlike here, in those cases there was no notice of award issued by an agency clearly stating an intention to "initiate negotiations with the highest ranked respondent," and there was no administrative protest following such a notice in which, as here, the lower-ranked bidder (Gtech) administratively contested its ranking but failed to raise any question regarding the agency's intention to negotiate.

These stark distinctions likely explain why even the majority panel in this case declined to cite or rely on those cases in support of its analysis of DOL's authority under Chapter 287.

In short, the process DOL followed was fundamentally fair because it gave all contractors, including Gtech, an equal opportunity “to compete for the contract ultimately entered.” Gtech was presumed to have knowledge of the laws that authorized DOL to procure goods and services via negotiations. In the event, however, that Gtech somehow overlooked the duly promulgated statutes and rules, it was also on notice of DOL’s intent to negotiate through the plain language of the RFP, which unambiguously stated DOL’s intention to negotiate the Contract in this case. Further, so that there could be no mistake as to its intentions, upon completing the initial evaluation of the proposals, DOL issued a notice of award which expressly stated its intention to negotiate a contract with the highest ranked proposer. AWI had no competitive advantage in the process. Gtech knew or should have known that these were the rules of the procurement, and it was given the same opportunity as AWI to compete for and become the highest ranked proposer and DOL’s contractor.

As an alternative argument, Gtech asserts that the “Lottery never treated this procurement as a ‘competitive negotiation’ until after GTECH filed this lawsuit.” AB1 at 41 n.11. Gtech then states that “the Lottery in fact did not use a competitive negotiation process in this case. It used an RFP.” As proof of this, Gtech maintains that “several mandatory procedures were not followed in this case.” *Id.* at 41.

No credible argument can be made that DOL recast this procurement as a competitive negotiation process after Gtech collaterally challenged the contract. Not only did DOL reserve the right to negotiate in the RFP itself, but, upon completing the evaluation of the proposals, DOL issued a Notice of Award announcing that DOL “**intends to initiate negotiations** with the highest ranked Respondent.” V.III,716. DOL issued the Notice of Award on November 5, 1996, more than two years before Gtech initiated this lawsuit.

Further, contrary to Gtech's suggestion, the fact that DOL used an "RFP" does not signify that DOL intended to use something other than a competitive negotiation process. Indeed, Rule 53ER87-14(5)(i)1 required DOL to issue a "Formal Request for Proposal" to initiate the competitive negotiation process. In other words, DOL's rule contemplated that an RFP and competitive negotiations were to be used in combination, so that they were not mutually exclusive processes.

A side-by-side comparison of RFP Specification 8.7.2 with Rule 53ER87-13(5)(i) confirms DOL's clear intention to follow its rule. Gtech implicitly conceded the close parallel between the RFP and the rule by its failure to identify more than the following three minor differences:<sup>5</sup> First, Gtech claims that the RFP did not comply with paragraph(5)(i)1 because the RFP failed to inform prospective bidders that the award "will be through a competitive negotiation process." The RFP fully complied with that requirement by describing in detail the negotiation process to be used and stating that the negotiated "conditions and price" would be fair, **competitive**, and reasonable. That the term "competitive negotiation" is not included in the RFP per se is of no significance; the rule only requires that the RFP inform the bidders of the competitive process to be used.

Second, Gtech contends that DOL failed to follow paragraph (5)(i)2 because that provision contemplates the selection and ranking of three "finalists" from among

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<sup>5</sup>As the standard for procedural errors, Gtech maintains that "[t]his is not horseshoes and close is not good enough." However, per § 120.68(7), not every procedural error or failure to follow a prescribed procedure requires overturning the agency action. If DOL had issued an RFP that deviated from the procedure set forth in its rule, and the deviations were material, Gtech might have had the right to challenge the validity of the RFP on the grounds that DOL failed to follow the correct procedure. Nevertheless, having never pursued such an action, Gtech waived the right to contest the procedure followed.

the proposals submitted and here DOL only received and ranked two proposals. Obviously, DOL had no control over how many vendors responded to the RFP. Nothing in the rule required DOL to abandon the competitive negotiation process simply because it received only two proposals.

Third, Gtech asserts that it was never notified that it might be required to make a formal presentation to the evaluation committee per paragraph (5)(i)3 of the rule. In making this assertion, Gtech has overlooked the timetable in the front of the RFP, which specifically placed Gtech on notice of that requirement. That timetable states:

During evaluation of technical proposals, the Evaluation Committee may . . . require oral presentations or demonstrations as described in Section 3.11, of all responsible Respondents who submitted responsive technical proposals.

V.II,699-700 § 1.7 (emphasis added).

**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**

Gtech essentially concedes that administrative protests challenging specifications in a procurement document must be filed within 72 hours of the document's issuance. AB1 at 46-47. It asserts, however, that its circuit court challenge here is permissible because it "could not reasonably foresee that DOL would negotiate a contract materially different than the bid specifications." AB1 at 46. For support, Gtech, for the first time, argues that the "best method" language in Specification 8.7.2. justifies its explanation. Gtech states: "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.” AB1 at 47 (emphasis added). Common sense and the record both refute Gtech’s assertions.

The “best method” analysis was a creature of the majority; at no time has Gtech made such an argument. In the district court, Gtech simply (and “inconceivably”) argued that it did not know that “negotiate” “conditions and price” meant that DOL would negotiate material terms. Further, the “best method” interpretation is inconsistent with the record.

As pointed out by AWI, the “best method” language of Specification 8.7.2 makes perfect sense when read in conjunction with Specification 1.1. AWI Ini. Br. at 5, 39. Specification 1.1 states that: “Simultaneously [with this RFP], the Lottery via a different RFP . . . is seeking proposals that will permit the Lottery to perform some of the elements of the desired gaming system and services with Lottery personnel and purchase others from Respondents under that RFP.” V.II,516 § 1.1 (emphasis added). That Specification further provides that: “Each of the RFPs will be mutually exclusive and evaluated as such. The Lottery reserves the right to select the proposal(s) or concept that is in the best interest of the State . . . .” Id. (emphasis added). In other words, because there were two different RFPs, DOL would have to decide which RFP was the “best method” for securing the services it desired.

Gtech dismisses this, stating only (and again without record support) that the second RFP was not an option at the time the contract was negotiated because it had been abandoned. Gtech’s argument ignores that the second method of procuring the services explains why the “best method” language was included in the RFP when it was issued. Further, if the alternative RFP was abandoned as suggested by Gtech, then negotiation became the only alternative under the RFP at issue because the “best method” language became moot when the other RFP was abandoned.

In a footnote, Gtech also attempts to distinguish Optiplan, Inc. v. School Bd. of Broward County, 710 So.2d 569 (Fla. 4<sup>th</sup> DCA 1998), and Capeletti Brothers, Inc. v. Dept. of Trans., 499 So.2d 855 (Fla. 1<sup>st</sup> DCA 1986). Those cases stand for the proposition that a disgruntled proposer cannot collaterally attack a contract award based on an allegedly invalid specification that was untimely challenged. Gtech counters that the belated challenges to the specifications in those cases were based on mere constitutional defects. AB1 at 49 n.13. By contrast, Gtech’s belated challenge to the negotiation provisions of the RFP here is based on purported statutory and public policy grounds. Gtech fails to explain why a constitutional defect is waivable per § 120.57(3)(b) if not asserted within 72 hours (as Optiplan and Capeletti hold), but alleged defects of the kind Gtech complains, which arise from laws subordinate to the constitution, cannot be waived. Certainly nothing in § 120.57(3)(b) creates an exception of this nature to the general waiver rule.

**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**

As thoroughly discussed in DOL’s Initial Brief, (1) the district court unquestionably passed upon the two certified questions; and (2) both of those questions are of immense public importance. Gtech raises only one issue in rebuttal meriting discussion. Gtech dedicates one whole brief to the assertion that the 2001 legislative amendments to Chapter 287 “totally moot” any issue of public importance.<sup>6</sup>

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<sup>6</sup>Gtech has attached as an appendix to its Answer Brief a document entitled “House Floor Debate On SB N. 1738.” That document is not in the record and is not something for which this Court can take judicial notice. See State v. Kaufman, 430 So. 2d 904 (Fla. 1983) (recordings and transcripts of legislative proceedings are not official records).

AB2. Not only is this assertion incorrect, to the extent that the new legislation is applicable to a jurisdiction determination in this matter, the legislation provides even greater (not less) support for why the certified questions are so very important. Gtech's argument is, in Gtech's words, a "red herring."

The district court certified two questions of great public importance: (1) whether DOL had the authority to negotiate substantive terms of the Contract; and (2) whether Gtech's contest to the Contract could be brought in circuit court. Gtech's arguments regarding the amendments to Chapter 287 primarily apply only to the first question, i.e., the authority to negotiate.<sup>7</sup> Contrary to Gtech's assertions, those amendments in no way resolve the impact of the majority's opinion on (1) issues in this case on a prospective basis; (2) the contract at issue, which impacts all Florida citizens by impairing DOL's ability to fund public education; (3) the many state procurement contracts executed under negotiation proposal requests that were issued before the amendments were adopted; and (4) the erroneous standard of review established by the majority in this case as to all agency procurement decisions.

First, Gtech's assertion that the new amendments moot any issue of public importance is vitiated by its own arguments to the contrary. Gtech states: "[a]ssuming, arguendo, that the 2001 amendments are constitutional, a state agency desiring to engage in a process like the one used in this case now has the means and authority to do so." AB2 at 12. Despite its lengthy diatribe in support of this assertion, Gtech then contrarily argues that the negotiation process used by DOL

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<sup>7</sup>As to the second question, Gtech asserts that the amendments now require that any protests to bid specifications must be challenged within 72 hours. Because this is the same requirement imposed by § 120.57(3)(b) and the RFP at issue, Gtech's argument is misplaced. As discussed in the Initial Brief, the majority's holding on the second question will subject every state procurement contract to collateral attack in circuit court long after the procurement process and contract award are complete.

would not be allowed “even under the 2001 amendments.” AB2 at 15. This latter argument concedes that the 2001 amendments do not resolve the issues in this case on a prospective basis.

Second, as explained in DOL’s Initial Brief, the majority’s decision invalidates the State’s largest procurement contract and thus jeopardizes DOL’s ability to maximize revenues and fund public education. That issue alone should be sufficient justification to support a finding of public importance.

This Court should not adopt Gtech’s bald and unsubstantiated suggestion as to what consequences flow from voiding this contract. With no record support, Gtech states that, if the Contract is invalidated, “the only practical step . . . is to simply rebid the contract.”<sup>8</sup> AB1 at 15. To alleviate any concern this Court might have about the impact this action might have on the public treasury, Gtech additionally asserts that:

AWI retained ownership of the terminals and shouldered the financial burden of installing them. . . . 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.<sup>9</sup>

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<sup>8</sup>DOL disagrees with Gtech’s suggestion that the remedy in this case is to rebid the contract. If the Court decides that the Contract is invalid, DOL and AWI must be allowed to return to the status quo that existed on March 23, 1998, which is the date DOL issued its final decision that AWI was the better respondent. That decision was affirmed in Gtech Corp. v. State Dept. of Lottery, 737 So.2d 615 (Fla. 1<sup>st</sup> DCA 1999). Since the RFP and March 23 decision were upheld, and are not now subject to challenge, DOL still has the authority to enter into a new contract under the RFP if the current Contract be voided.

<sup>9</sup>Gtech’s answer brief in the district court similarly stated: “the vendor assumes the financial risk that all of the terminals might have to be removed if the March, 1999 contract is declared illegal and void. There is no danger that the Lottery will be required to spend public dollars replacing AWI terminals that might have to be removed or dismantled.”

AB2 at 13. As Gtech's statement implicitly concedes, the Contract has been implemented and the terminals and other computer facilities have been installed.

Gtech is wrong, however, as to its assertion that there would be no possibility of harm to DOL and the public if AWI had to remove its gaming system and terminals. Without the gaming system, no lottery tickets could be sold. This, in turn, would obviously disrupt the flow of lottery dollars into the Educational Enhancement Trust Fund. Additionally, when a new gaming system could be installed under Gtech's scheme is unclear. According to Gtech, DOL would have to seek new bids. Then, assuming the eventual award of another contract, DOL would have to wait while the contractor installed the new system, which Gtech itself characterizes as a "daunting" task. AB1 at 4-5. Under Gtech's view that the terminals are AWI's to take, the loss of funding for education could be substantial.

Third, Gtech's arguments ignore the impact of the majority opinion on the many state contracts executed through a negotiation process initiated before the amendments were adopted. This Court can take judicial notice of the many notices published in the Florida Administrative Weekly seeking proposals for purposes of negotiating procurement contracts.<sup>10</sup> The majority opinion places all of those contracts in question.

Fourth, the majority opinion impacts the standard of review applicable to all state procurement decisions. The majority rejects DOL's construction of the RFP as permitting negotiations that are fair, competitive, and reasonable because that

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<sup>10</sup>See, e.g., DCFS, Invitation to Negotiate, 26 Fla. Adm. W. 50 (Dec. 15, 2000); Foster Care Recruitment Serv., Invitation to Negotiate, 26 Fla. Adm. W. 50 (Dec. 15, 2000); DCFS, Invitation to Negotiate, 26 Fla. Adm. W. 49 (Dec. 8, 2000); State Bd. Admin., Intent to Procure (via negotiation), 27 Fla. Adm. W. 7 (Feb. 16, 2001); AHCA, Invitation to Negotiate, 27 Fla. Admin. W. 13 (Mar. 30, 2001).

construction is “at odds with the proscriptions of Chapter 287” and “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. It then states: “We ascribe no intentional wrongdoing to any party to this dispute. The failure here seems to us to be one of commitment, rather than conscience.” Id. at 5.

As discussed in the Initial Briefs, the majority’s holding is contrary to this Court’s well-established standard of review, to-wit: An agency’s determination as to what constitutes fair, competitive, and reasonable in the process of procuring goods and services cannot be overturned absent a finding of illegality, fraud, oppression, or misconduct. Dept. of Transp. v. Groves-Watkins, 530 So. 2d 912, 913 (Fla. 1988). The majority made no finding of illegality, fraud, oppression, or misconduct as to the exercise of DOL’s discretionary judgment that the negotiated terms in the Contract were fair, competitive and reasonable. Instead, the majority substituted its judgment for that of DOL by invalidating the Contract. If the district court’s decision is left to stand, it will allow courts to continually second-guess agency decisions long after contracts have been executed, even where the agency acted in good faith.

For the reasons expressed in DOL’s Initial Brief and this Reply Brief, this Court should exercise jurisdiction and conclude that the Amended Agreement is valid.

## **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 19th day of November, 2001.

Respectfully submitted,

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## **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**