

IN THE SUPREME COURT OF FLORIDA

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

Petitioners,

v.

Case Nos. SC01-1795
SC01-1796

GTECH CORPORATION,

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

Respondent.

**GTECH CORPORATION'S RESPONDENT'S BRIEF DIRECTED TO THE
INITIAL BRIEF BY PETITIONER, THE DEPARTMENT OF THE LOTTERY**

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PRELIMINARY STATEMENT

Respondent, GTECH, adopts the preliminary statement from the companion brief filed by GTECH directed to the brief of Automated Wagering International, Inc. There, GTECH addresses the state of the incomplete record before this Court.

STATEMENT OF THE CASE AND FACTS

This is a consolidated case in which the petitioners on certified questions are the State of Florida, Department of the Lottery ("the Lottery"), and Automated Wagering International, Inc. ("AWI"). A full recitation of the facts is provided in GTECH's separate brief directed to the initial brief of AWI, and will not be repeated here.

Briefly, the case involves the legality of a contract entered between the Lottery and AWI in March, 1999. The contract is to provide the Lottery's on-line gaming system and related services and was awarded to AWI following an "RFP" process that began in 1995.

¹ GTECH and AWI were the only companies who submitted proposals for the contract. After the contract was awarded, the Lottery and AWI engaged in private negotiations that resulted in a final contract that is materially different from, and more favorable to AWI, than AWI's winning proposal and the mandatory bid specifications.

Of course all proceedings were based on Chapter 287 as it existed prior to June 18, 2001, when competitive bidding requirements for state contracts were substantially amended pursuant to Chapter 2001-278, attached. The fact that this was a proceeding pursuant to an RFP under Section 287.057 is not in serious question. See GTECH Corp. v. State Dept. of Lottery, 737 So. 2d 615 (Fla. 1st DCA 1999, review denied, 749 So. 2d 502 (Fla. 1999)) ("GTECHI") (where the First District Court first dealt with this disputed contract award). The district court recognized that the contract was governed by the Lottery's **1995** RFP and that the entire process was governed by Section 287.057 as it existed in 1995. GTECH

¹ "RFP" stands for "Request for Proposals." A Request for Proposals is one of two vehicles for procuring public contracts for goods and services that existed when this contract was let in 1995. Section 287.057(2), Fla. Stat.

I at 617-621.

The circuit court declared the March, 1999 contract illegal and void and the First District affirmed in Fla. Dept. of Lottery v. GTECH Corp, 26 Fla.L.Weekly D621 (Fla. 1st DCA Feb. 28, 2001 and certification order of July 17, 2001). (GTECH II). Both the circuit court and the First District rejected petitioners' arguments that certain references in the RFP to "negotiations" following the award justified the deviations. Petitioners repeat that argument in this Court, characterizing the RFP provision as "largely restating" the Lottery's administrative rule regarding "competitive negotiations." (Lottery Brf., p. 28).

The District Court's GTECH II opinion was initially issued on February 28, 2001. Four and one-half months later, in a supplemental order addressing petitioners' motions for rehearing, rehearing en banc, and for certification, the First District certified two questions. The court was apparently not aware of the intervening legislation, which directly addressed the two issues raised in the dissenting opinion and the certified questions. The petitioners did not advise the District Court of the new legislation, nor have they advised this Court of the new legislation, which substantially changes the law on public contracts awarded by governmental agencies.

Two briefs have been filed in this Court by the Lottery and AWI. As previously noted, GTECH has, simultaneously with this brief, filed a separate brief directed to the arguments in those petitioners' briefs. This much shorter brief is limited in scope and will concern solely the question of whether this Court should exercise its discretionary jurisdiction in light of the 2001 amendments to Chapter 287.

² The amendments substantially revise Chapter 287. Also attached are excerpts from the extremely limited legislative history of Ch. 2001-278-278 as it existed before June 18, 2001, when the statute was substantially amended. The first certified question is directed at clearing up any confusion resulting from the First District's majority opinion on competitive bidding under Section 287.057. The second certified

² This brief only becomes relevant if the Court concludes that it does have subject matter jurisdiction. GTECH filed motions to dismiss based on the fact that the certified questions come solely from the dissent and were not passed upon by the majority. That motion of August 17, 2001 is pending and AWI has been recently required to respond to it in this Court's order of October 22, 2001.

question deals with pre-contract protests to the content of a request for proposal.

The Legislature's 2001 amendments directly address these two issues. The First District's opinion is now nothing more than an antique. The opinion deals with how the law used to be, rather than how the law *is* in light of the changes that became effective some 28 days before the First District's decision on certification. The First District was apparently not aware of the new legislation. If they ever were, the two certified questions are not of public importance under the current law, which now specifically permits the type of "competitive negotiation" that petitioners argue occurred in this case. Any confusion or lack of flexibility which the dissenting judge on the First District believed might arise from the First District's majority opinion has been thoroughly addressed in the new statutes. Thus, the district court's certification does not present any question or issue for this Court to decide. The issues are certainly no longer of public importance because henceforth all public contracts will be the subject of proceedings under the new statute and new administrative rules rather than the old statute. Therefore this Court should decline to exercise jurisdiction if jurisdiction is found to exist.

ARGUMENT

WHETHER THE DISTRICT COURT'S DECISION RENDERED JULY 17, 2001, IS OF ABSOLUTELY NO PUBLIC IMPORTANCE BECAUSE OF NEW LEGISLATION WHICH BECAME EFFECTIVE SHORTLY BEFORE THE DECISION.

The First District's certification of two questions does not require this Court to decide those issues or to even consider the case. Review is always discretionary, although it is certainly limited to the issues actually passed upon. Article V, Section 3(b)(4), Florida Constitution. This discretion not to answer a certified question is plain from the constitutional language itself. Zirin v. Charles Pfizer & Co., 128 So. 2d 594, 596-97 (Fla. 1961) (noting use of the word "may" in predecessor to Article V, Section 3(b)(4)). In Zirin, the Court stated:

[T]o cite just one example, a decision may be certified to this Court that does decide a question of great public importance but, on examination by this Court, we may conclude that the question answered was not essential to a determination of the case and is of such nature that no useful purpose would be served by rendering a decision.

Zirin, 128 So. 2d at 597.

In Poole v. Veteran's Auto Sales and Leasing Co., Inc., 668 So. 2d 189 (Fla. 1996), the Fifth District Court of Appeal certified a question raising the issue of whether Section 768.74 governing remittitur, additur and new trial was a basic abridgment of the right to a trial by jury under the Constitution. Although this Court concluded that it had jurisdiction pursuant to Article V, Section 3(b)(4), the Court stated that it would "decline to answer the question as worded." Poole at 190. In refusing to answer the certified question, this Court's opinion notes that the certified question was actually the result of a special concurring opinion by an individual judge, despite the fact that the majority had signed on to the certified question. Poole at 191. The Poole opinion also notes that the certified question was "an abstract scenario." This is very similar to the present certified questions.

Unlike most certified question cases which are based on existing law, this one presents an obvious and compelling reason not to exercise jurisdiction because the certified questions can no longer be of "great

public importance." A few days before the District Court's certification, the Legislature directly addressed both of the issues discussed in the dissent and later incorporated into the certified questions.

3

Both AWI and the Lottery moved the First District for certification under Article V, Section 3(b)(4). The Lottery's argument was as follows:

DOL moves for an order certifying that the decision in this case is of great public importance. As noted in the motion for rehearing en banc, this case involves one of the largest procurement contracts in Florida. Further, the panel decision has the effect of invalidating the procurement rules of both DOL and DMS, which, in turn, impairs (or at a minimum calls into question) the ability of those agencies to engage in substantive negotiations in procuring future contracts.

(R. 26).

The fact that this case "involves one of the largest procurement contracts in Florida" is surely not grounds for "great public importance" jurisdiction. The amount of money at issue is not a recognized basis for "public importance" jurisdiction. While the amount at stake is certainly significant, it pales in comparison to the amounts involved in many civil suits. Moreover, the fact that only money is involved renders the case arguably less important than the thousands of criminal cases involving substantial prison terms that do not reach this Court every year. The fact that the decisions of the circuit court and the First District invalidate AWI's "sweetheart" deal is certainly not an issue of great public importance.

The "competitive negotiation" issue is what the dissent by Judge Kahn is all about and is the only issue really addressed in the two briefs by the petitioners. The Lottery bemoans the uncertainty resulting

³ We do not fault the Lottery for failing to bring the new statute to the Court's attention. The Lottery's motion for rehearing and certification was filed in March of 2001 and the statute was passed on the last day of the 2001 session with the law becoming effective June 18, 2001. The motion for certification had remained pending this entire time and the court issued its certification on July 17, 2001. However, pleadings were filed by the Lottery in the First District subsequent to July 17, 2001 but those pleadings did not mention the new statute. The Lottery was certainly on notice of this new statute before the filing of its brief before this Court on September 26, 2001, and again the new statute is not mentioned.

from the majority opinion and the loss of flexibility that will result if state agencies cannot “engage in substantive negotiations” following a contract award. (R. 26). Indeed, the Lottery's motion for certification was specifically limited to its ability to procure "future contracts." (R. 26).

For good or bad, the Florida Legislature has rendered this issue totally moot. On June 18, 2001, the Legislature substantially amended Chapter 287 and authorized precisely the type of “competitive negotiation” process sought by petitioners. Specifically, the Legislature added the following provision to Section 287.057:

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

Section 287.057(3), Fla. Stat. (2001). Section 287.057 still retains the previous well known vehicles for procuring contracts -- Invitation to Bid and Request for Proposal -- but adds to the list the new Invitation to Negotiate and Request for a Quote.

The amendments define “Invitation to Negotiate” as “a written solicitation that calls for responses to select one or more persons or business entities with which to commence negotiations for the procurement of commodities or contractual services.” Section 287.012(20), Fla. Stat. (2001). The amendments also define and create a new "Request for a Quote" procedure which applies to vendors already under contract. The 2001 amendments specifically add these new methods to the list of approved procurement vehicles for goods and service contracts. Thus Florida procurement law now includes an ITB, an RFP, an ITN and RFQ. We again note that the Lottery issued the RFP in 1995, years before the new ITN procedure existed. However, as to future contract procurements, the new ITN procedure is presumably available.

Significantly, the 2001 amendments also directly address the second certified question in this case.

That question involves petitioners' contention that GTECH waived its right to challenge the 1999 contract by not initiating an administrative challenge to the "negotiation" provisions in the RFP upon its issuance in 1995. New Section 287.042(d), Fla. Stat. (2001) provides:

The terms, conditions, and specifications of a request for proposals, invitation to bid, or invitation to negotiate, including any provisions governing the methods for ranking proposals, awarding contracts, reserving rights of further negotiation, or the modification of [sic] amendment of any contract, are subject to challenge only by filing a protest within 72 hours after notice of the terms, conditions, or specifications as provided in 120.57(3)(b).

Though the Legislative history is silent on the issue, it appears that the 2001 amendments were designed, at least in part, to address the two specific issues certified in this case. The scant legislative history that is available reflects arguments by House Members virtually identical to those in this case. The proponents of the bill argued that it would provide state agencies needed "flexibility" in making procurement decisions. Opponents warned that it would "blow a hole" in Chapter 287 and result in "sweetheart" contracts. See Legislative History.

Representative Stansel stated:

Briefly the way I read this, this is almost giving us the opportunity to – some agencies the opportunity to – circumvent the bid process, the RFP process, and once you get a contract with the state you are just about locked in. Then they can come in and negotiate with you and continue to buy from you. You can give them a quote and just continue on and its going to really lock out other people being able to get into the bid process.

Representative Stansel was out-voted and his fears have arguably come to pass.

The 2001 amendments to Chapter 287 cannot be used to uphold the legality of the contract at issue in this case. There is nothing in the amendments stating that the provisions are to have retroactive effect. Absent such an express directive, the revisions operate only prospectively. Agency for Health Care Administration v. Associated Industries of Florida, Inc., 678 So. 2d 1239 (Fla. 1996); Middlebrooks v.

Department of State Division of Licensing, 565 So. 2d 727 (Fla. 1st DCA 1990). It must also be recognized that the Lottery did not use an "invitation to negotiate" (ITN) or a "request for a quote" (RFQ). It used an RFP under the law in existence before the newly created ITN and RFQ.

4

Though the 2001 amendments cannot resuscitate this illegal contract, they eliminate any contention that this case is one of "great public importance." Assuming, 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. That being the case, invalidating the AWI-Lottery contract will not prevent any flexibility, or cause any uncertainty, with respect to future contracting for public necessities. Any state agency desiring to award a contract through competitive negotiation can presumably do so under the 2001 amendments which became effective on June 18, 2001.

5

In short, the outcome of this now "antique" opinion by the First District will have no affect on future procurements in the State of Florida. The First District's decision cannot be of "great public importance." It will have no affect whatsoever on future public contracts, which are now governed by a new set of statutes. Indeed, the new statute provides for a totally new set of administrative rules on the whole subject. The task of providing these new rules has been placed on the Department of General Services. The validity of future "negotiated" state contracts will be determined based upon the new statute and the yet-unwritten administrative rules.

⁴The amendments are an indication that competitive negotiation did not previously exist, as the Lottery and AWI argue, now more tenuously than ever before this Court. The Legislature is presumed to have known the state of existing law when they changed that law in 2001. Wood v. Fraser, 677 So. 2d 15, 18 (Fla. 2d DCA 1996).

⁵The new statutory amendments are here presumed to be constitutional and until a constitutional challenge is brought in a circuit court, any constitutional infirmities are not before this Court. Memorial Hospital-West Volusia, Inc. v. News-Journal Corp., 729 So. 2d 373 (Fla. 1999).

Judge Kahn's dissent is the sole source of the certified questions and the dissent is internally inconsistent. Judge Kahn initially accepts the fact that this entire contract was the subject of a competitive bidding process under Chapter 287, but then he contradicts himself and states: "It is, of course, self evident that the ultimately negotiated contract was not the subject of a competitive bidding process." (R. 14). Thus the dissent has the contract outside the Chapter 287 process and if this is true, then the contract is void for that reason alone. The majority clearly ruled that the contract was within the competitive bidding process. This was also the stated view of the court in the GTECH I opinion.

This Court's time and resources are spread extremely thin. "It was never intended that the district courts of appeal should be intermediate courts." Jenkins v. State, 385 So. 2d 1356, 1357 (Fla. 1980). The district courts were created in 1956 with the intent that, in most instances, their decisions would be "final and absolute." Jenkins at 1358. Any other approach results in an unworkable caseload. That is why, even when a case has been certified, this Court retains discretion not to decide it if "no useful purpose would be served by rendering a decision." Zirin, 128 So. 2d at 597. Also see Poole, 668 So. 2d at 191.

The contract at issue in this case was entered almost three years ago. The issues have been thoroughly litigated in the circuit court and on direct appeal, at no small expense. Each court that has reviewed the case has found the contract illegal. Yet AWI continues to benefit from the more favorable financial terms during its appeals. AWI would like nothing better than further delay while this Court reviews the case.

⁶ Because accepting jurisdiction will serve no useful public purpose in light of the 2001 amendments to Chapter 287, this Court should exercise its discretion to refuse jurisdiction.

The case is now important to only the actual parties to the contract and to the disappointed bidder GTECH, which was never given a fair chance to compete for the contract ultimately entered. The present contract is illegal and the only practical step at this point is to simply rebid the contract. Although GTECH questions the public policy behind some of the new statutory amendments, they are now presumably the law of this state. At least GTECH and any other interested bidder will know the rules of the game going in and will not be the victim of secret negotiations which, by virtue of the Lottery's argument, could go on forever. If the Lottery's view as to its powers under the old law is accepted by this Court, then the Lottery can continue negotiating contracts whenever it gets close to the end of a contract and will be able to accomplish all of these negotiations arriving at new contracts in secret. Hopefully, even under the 2001 amendments, this would not be allowed.

It is hard to believe that this new statute was not the specific result of the GTECH II opinion, which of course had been issued but not rendered when the legislation was passed. Rendition occurred on July 17, 2001 with the denial of motions for rehearing and en banc rehearing, and the certification of the questions raised solely in the dissent. Whether or not the new legislation was the specific result of the GTECH litigation is not important. What is clear is that the Legislature specifically addressed any and all problems and uncertainties created by the GTECH II decision. None of these issues continue to exist. The GTECH II decision is now an "antique" which is unimportant to the public and to other agencies.

⁶ Both AWI and the Lottery argue that GTECH's appeals have caused tremendous delay. This is absolutely untrue. GTECH's first administrative protest resulted in a finding that the selection committee had given AWI extra points because it was the incumbent vendor. The committee was found to have acted arbitrarily and capriciously in this regard. The second administrative protest did result in an appeal by GTECH and during that appeal the First District Court denied a request for a stay by GTECH. This was based on arguments by the Lottery and AWI that they had to proceed immediately. When the circuit court declared the contract void, the effect of this order was stayed because the Lottery is a state agency and chose to appeal from the order. The First District granted a further stay after entry of its certification order. Thus, the appeals by GTECH have never resulted in the Lottery or AWI being prevented from going forward with this contract.

CONCLUSION

This case is not of great public importance under the law existing in this state which came into existence a matter of days before the First District issued its certification. The First District was almost certainly unaware of this new law. This Court should choose not to exercise its jurisdiction if it determines that jurisdiction does exist.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy has been furnished by mail to the following this _____ day of October, 2001:

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