

IN THE SUPREME COURT OF FLORIDA

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

Petitioners,

v.

GTECH CORPORATION,

Respondent.

Case No. SC01-1796
DCA Case No. 1D00-451/1D00-578
Circuit Court Case No. 99-592

Initial Brief of Automated Wagering International, Inc.

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PRELIMINARY STATEMENT

Petitioners, the Department of Lottery and Automated Wagering International, Inc., will be referred to as "the Lottery" and "AWI," respectively, and collectively as "the Defendants." Respondent, GTECH Corporation, will be referred to as "GTECH." Record matters that appear in GTECH's sequentially-numbered Appendix from below will be cited in the form "[volume number].[page number]". Other record matters will be cited by the name of the district court filing, with page numbers noted.

All cites to rules and statutes refer to the version in effect at the relevant time. The Lottery's and DMS's rules in effect at the time of this RFP are found at IV.1354-56 and behind Tab B of AWI's Reply Brief below, respectively. The request for proposal at issue here is found at II.512-712, and will be referred to as "the RFP."

The decision below is *State, Dep't of Lottery v. GTECH Corp.*, 26 Fla. L. Weekly D621, 26 Fla. L. Weekly D1733, 2001 WL 193770 (Fla. 1st DCA Feb. 28, 2001 & July 17, 2001), and will be cited at times as "Op. at ____." The decision is attached to this brief behind Tab 1.

All bolding and italics in quoted material in this brief is supplied unless otherwise noted.

INTRODUCTION

The questions certified to this Court by the district court as being of great public importance arose out of the Lottery's negotiation of a contract with AWI for a new gaming system and related services, following a procurement process that the Lottery initiated in 1995. Negotiation of the ultimate contract was authorized by the Lottery's enabling statute and rules and specifically provided for in the RFP specifications. The Lottery's right to conduct contract negotiations was never questioned by any of the respondents to the RFP until GTECH filed its post-award circuit court action below.

While this action was GTECH's first challenge to the Lottery's authority to negotiate the contract terms, it was not GTECH's first challenge of this procurement process. Prior to this action, GTECH brought three separate administrative bid protests, each of which had the effect of suspending the Lottery's ability to obtain a new gaming system. However, GTECH never administratively challenged the RFP's specifications or the Lottery's rules providing for negotiation of contract terms following the award to the successful respondent.

Instead, after having failed to overturn the Lottery's procurement decision through its administrative protests,

GTECH filed suit in circuit court seeking to have the contract negotiated between the Lottery and AWI declared void. For the first time, GTECH asserted that the Lottery had no legal authority to negotiate a contract on terms that differed from the RFP, even though the RFP expressly reserved that right to the Lottery.

The RFP specifications provided for post-award negotiations of the "conditions and price" of the contract and for contract provisions "contrary" to the RFP at the Lottery's option. These specifications were included pursuant to the Lottery's enabling statutes and rules, which expressly authorized the Lottery to procure all goods and services through contract negotiations. At the same time, the RFP reserved the Lottery's right to hold the successful respondent to its proposal, if the Lottery's negotiations failed to achieve satisfactory contract terms.

By a split decision, the district court voided the Lottery's Agreement, holding that the Lottery did not have authority under Florida law and the RFP to negotiate substantive contract terms with the successful respondent. Judge Kahn dissented, concluding that the Lottery was authorized to engage in such negotiations and thus the Lottery's Agreement should be upheld absent illegality, fraud, oppression or misconduct as required under *Department of Transp. v. Groves-*

Watkins, 530 So. 2d 912, 913 (Fla. 1988). As Judge Kahn pointed out, the trial court made no such finding.

The district court certified the following questions to this 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?

Op. at *7.

STATEMENT OF THE FACTS AND CASE

1. The RFP

The Lottery entered into a contract with AWI in 1988 for the implementation and operation of an on-line lottery system in Florida. I.164-65, ¶ 8. In 1995, in anticipation of that contract's June 1996 expiration, the Lottery issued a request for proposals ("the RFP") for a new on-line lottery system and

related services. I.165, ¶¶ 9-10. Simultaneously, the Lottery issued an "Alternate" request for proposals, which would have permitted the Lottery to perform some on-line services, while out-sourcing others. II.516, ¶ 1.1; IV.1187.

The RFP provided that, if the Lottery determined that "the proposals under this RFP" were "the best method of obtaining the desired gaming system and services," the Lottery would then begin negotiations toward a contract with the most highly qualified respondent under this RFP. II.516, § 1.1; II.607, § 8.7.2. If those negotiations were unsuccessful, the Lottery would undertake negotiations for a "satisfactory Contract" with "the second most qualified respondent." II.607, § 8.7.2. Negotiations would continue until an agreement was reached or all proposals were rejected by the Lottery. *Id.*

This process was set forth in Specification 8.7.2:

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** 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**.

II.607. Thus, the RFP specifically provided that the ultimate contract could include negotiated "conditions and price," on terms the Lottery deemed to be "fair, competitive, and reasonable" *Id.*

In addition, the RFP provided that the terms of the contract could be "contrary" to the provisions of both the RFP and the vendor's proposal: "Contract - 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.**"

II.517, § 1.3 (underlining in original).

The RFP further provided that the contract eventually negotiated would "incorporate this RFP, addenda to this RFP, and the Contractor's proposal as an integral part of this Contract **except to the extent that the Contract explicitly provides to the contrary.**" II.530, § 1.36. In the event of a conflict among the RFP, the proposal, and the contract, "the provisions and requirements of the Contract shall govern." *Id.*

In sum, under the RFP specifications for negotiations, the ultimate contract could vary in its "conditions and price"

from the RFP and the successful proposal. II.607, § 8.7.2. In addition, negotiated contract terms could be "contrary" to the successful proposal and to the RFP. II.517, § 1.3; II.530, § 1.36. The RFP explicitly reserved the Lottery's right to alter the scope of work through changes to "any and all plans, schedules, or work in progress." II.529, § 1.30.

At the same time, however, the Lottery also reserved the right to require the successful respondent to enter into a contract on the exact terms of its proposal. II.628, § 1.21. The right of negotiation was solely the Lottery's right, to be exercised or not at its discretion. *Id.* Consequently, a vendor who submitted an unrealistic low-ball proposal would run the risk that its proposal would be accepted by the Lottery as a binding contract, without negotiations. *Id.*

Under the RFP, vendors were required to administratively challenge any disputed specifications of the RFP *before* proposals were submitted:

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 Failure to both file a formal written protest as provided in Chapter 24.109(2) and post a bond in compliance with Section 287.042(2)(c), Fla. Stat., shall constitute a **waiver** of proceedings under Chapter 120, Fla. Stat.

II.521, § 1.9.

2. GTECH's Administrative Protests

Pursuant to § 1.9 of the RFP, GTECH submitted extensive questions regarding the RFP and also filed an administrative protest challenging certain of the RFP specifications. II.647-63, IV.1185-1200. GTECH did not, however, question or object to the RFP specifications providing for post-award contract negotiations. II.647-63, IV.1185-1200. GTECH's questions were answered by the Lottery (II.664-85), and GTECH's protest of the RFP was subsequently withdrawn. IV.1203.

Thereafter, AWI and GTECH submitted proposals in response to the RFP. I.165, ¶ 11. The Lottery's evaluation committee ranked AWI as the more qualified vendor. III.717. The Lottery then issued its notice of award to AWI. III.716. GTECH immediately filed a second administrative protest. III.720-71. As required by section 120.57(3), Florida Statutes, the Lottery suspended the procurement process, pending resolution of GTECH's protest. IV.1210.

GTECH's protest led to a three week administrative hearing (II.790), following which the administrative law judge found that AWI's proposal fully complied with the RFP. III.890-92, ¶¶ 269-74. However, he concluded that some aspects of the evaluation process did not comply with the RFP. III.786-87, ¶¶ 296-99. He accordingly recommended further evaluation of the proposals (III.906-07), a recommendation that was accepted

by the Lottery. III.786-87, ¶¶ 1-5.

The second evaluation ranked AWI higher than GTECH. III.915. The Lottery issued its notice of award to AWI on September 2, 1997. III.914. GTECH filed a third administrative protest (III.918-1025), again staying the procurement process. After a nine-day hearing, III.1037, GTECH's second protest was denied. III.1026-36. GTECH then appealed that order. III.1111.

On appeal, the First District affirmed the Lottery's award, with Judge Miner dissenting. *GTECH Corp. v. State Dep't of Lottery*, 737 So. 2d 615, 617 (Fla. 1st DCA 1999). GTECH subsequently filed two petitions with this Court, seeking further review of the Lottery's decision. The last of those petitions was dismissed on December 3, 1999, ending GTECH's administrative challenges to the Lottery's decision to award the contract to AWI. *GTECH Corp. v. State, Dep't of Lottery*, 743 So. 2d 509 (Fla. 1999) (mandamus denied); *GTECH Corp. v. State, Dep't of Lottery*, 749 So. 2d 502 (Fla. 1999) (review denied).

3. The Agreements Between the Lottery and AWI

During the period GTECH was pursuing its administrative remedies, the Lottery's contract with AWI expired. I.7, ¶ 9. In order to avert the loss of significant revenues, the Lottery entered into a series of emergency contracts with AWI. I.26-56. In effect, the Lottery utilized its emergency purchasing authority to require AWI to begin implementation of a new gaming system *before* the contract procured through the RFP became effective. I.42, 54-58.

By September 1998, GTECH's appeal still had not been resolved, and the Lottery and AWI began negotiations for a new contract. VI.1801. These negotiations resulted in the Amended Agreement for Gaming System and Services ("the Agreement"), which became effective on September 30, 1999, with a termination date of December 31, 2004. I.54-86. As a result of the negotiations, the Agreement included terms that differed from the RFP and AWI's proposal. It is uncontradicted, however, that the Agreement provided for enhanced terminals, as well as other benefits to the Lottery that were not in AWI's proposal, at a price that was still below GTECH's proposal.¹ I.246, 286, III.856.

Furthermore, the Agreement fully satisfies the objectives

¹ The differences in terms are discussed in more detail in the Lottery's brief.

set forth in the RFP (II.516, § 1.2): (1) it provides the Lottery with a gaming system and related services that meet the needs of the Lottery for the term of the contract; (2) that system is operationally sound, incorporates a high level of integrity and security, and minimizes the risk to the Lottery; and (3) it provides for the conversion of *all* retailer terminals to the new system *by a date certain*.

VI.1801. The agreed-upon date for that conversion--December 31, 2000--has now passed. I.285.

4. GTECH'S Circuit Court Action

GTECH filed this action in circuit court, seeking a declaration that the Agreement is null and void, and asking that the Lottery and AWI be enjoined from performing under the Agreement. I.180-81. For the first time, GTECH asserted that the Lottery lacked authority to negotiate substantive contract terms that differed from the RFP or the successful proposal. I.176, ¶ 42.

GTECH also contended that, as a result of the terms negotiated by the Lottery, the Agreement was more beneficial to AWI than the allegedly mandatory requirements of the RFP. I.169-70, ¶ 23. While AWI acknowledged that some provisions are different from terms in the RFP, it denied that the Agreement is, as a whole, more beneficial to AWI. I.295, ¶ 23. The Lottery also denied that allegation. I.308, ¶ 23.

All three parties moved for summary judgment. II.410-45. AWI and the Lottery asserted that GTECH was required to administratively protest the RFP specifications and the Lottery's rules for contract negotiations and, by failing to do so, had waived its right to challenge them in this action. II.415-24, ¶¶ 13-32. AWI and the Lottery further asserted that the Lottery's negotiations were expressly authorized under its enabling statutes, its negotiation rules, and the RFP's specifications providing for such negotiations. II.425-31, VI.1775-77.

Although seeking summary judgment in its favor, AWI filed evidence in opposition to GTECH's motion and asserted that summary judgment could not be entered for GTECH because there were disputed issues of fact whether the Agreement was more favorable to AWI than the allegedly mandatory requirements of the RFP. VI.1823. AWI submitted evidence that the Agreement culminated from good faith negotiations, was mutually beneficial to both the Lottery and AWI, and achieved the Lottery's objectives set forth in the RFP. VI.1801.

5. The Trial Court's Summary Judgment

Following a hearing on the motions for summary judgment, Circuit Judge Sander Sauls ruled from the bench, granting summary judgment in GTECH's favor. VI.1894-96. A final order was entered on January 28, 2000, declaring the Agreement null and void and permanently enjoining the Lottery and AWI from operating under it. VI.1833-34. In voiding the Agreement, the trial court did not invalidate Specification 8.7.2 or the Lottery's negotiation rules. *Id.*

6. The District Court's Split Decision

With Judge Kahn dissenting, the First District affirmed the circuit court's summary judgment for GTECH. *State, Dep't of Lottery v. GTECH Corp.*, 26 Fla. L. Weekly D621, 2001 WL 193770 (Fla. 1st DCA Feb. 28, 2001). The majority panel, Judges Miner and Booth, held that the Lottery did not have the authority under the RFP and Florida law to negotiate substantive contract terms with AWI. *Op.* at *3. It accordingly voided the Agreement in the light of those negotiations. *Op.* at *5.

In so holding, the panel noted that the Lottery "first had to determine that 'proposals under this RFP are the best method of obtaining the desired gaming system and services.'" *Op.* at *3. The panel stated that contract negotiations would be "contrary to the finding by the Secretary that AWI's

proposal was 'the best method.'" *Id.* Under the panel's view of Specification 8.7.2, the Lottery could only "finaliz[e] an agreement by turning the winning proposal into a contract." *Id.*

In addition to rejecting the Lottery's interpretation of its RFP specifications and its negotiation rules, the panel also rejected the Lottery's interpretation of its statutory enabling authority for such negotiations. *Op.* at *3, *5. The panel held that chapter 287 did not authorize the Lottery to negotiate a major purchasing contract such as this. *Id.*

Notwithstanding AWI's submissions disputing GTECH's claim that the negotiated contract was more favorable to AWI than the RFP and AWI's proposal, the panel accepted the trial court's finding that it was "uncontested" that "the Lottery treated its preferred vendor, AWI, more favorably in the negotiated contract which was not even the subject of the competitive bidding process." *Op.* at *1 n.1, *1, *4.

The panel acknowledged that this dispute should have been asserted "in an administrative tribunal rather than the circuit court." *Op.* at *2. However, stating that "there was no objection by appellants to the failure of appellees to exhaust administrative remedies," the panel concluded that "the point is waived." *Id.* It therefore upheld GTECH's attack upon the Agreement in circuit court, even though GTECH

had failed to administratively contest the RFP specifications it later challenged in this action. *Id.*

Judge Kahn dissented. He began his analysis with Specification 8.7.2, noting that it "closely resembles the language" of the Lottery's rule authorizing contract negotiations with the successful respondent under a request for proposals. *Op.* at *5. He explained that:

In particular, both the administrative rule and the RFP direct the Secretary of the Lottery to negotiate a contract with the most highly qualified firm. Both 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." 53ER87-13(5)(i)5, F.A.C.

Id. Because the rules and the RFP "contemplate failed negotiations," the RFP necessarily "envisioned negotiations of substantive terms such as price and implementation plans."

Id. Accordingly, he concluded that "Specification 8.7.2 is lawful, and that the Secretary of the Department of the Lottery followed the requirements of this provision by engaging in negotiations, ultimately successful, with AWI."
Id.

Judge Kahn went on to explain that "[t]he Department of the Lottery is uniquely endowed by the Legislature" and that "[t]he Legislature clearly intended the Lottery to function, to the extent possible, as a business." Op. at *6. Citing this Court's controlling decision in *Groves-Watkins*, 530 So. 2d at 913, Judge Kahn concluded that, "[g]iven the statutes and rules applicable to the Lottery's procurement function, the contract negotiated by the Lottery should be upheld absent a finding of illegality, fraud, oppression, or misconduct." Op. at *6. He pointed out that "[t]he trial made no such finding." *Id.*

Describing the final order affirmed by the majority panel as "troubling," Judge Kahn stated that:

[t]he order does not set aside specification 8.7.2, but merely finds that the Lottery treated AWI "more favorably in the negotiated contract which was not even the subject of the competitive bidding

process." It is, of course, self evident that the ultimately negotiated contract was not the subject of a competitive bidding process. This is the nature of the RFP here at issue. Certainly, the Secretary's right to negotiate under the RFP could not be made subject to a competitive bidding process.

Op. at *7. In his view,

. . . no one reading the final judgment can determine what the Lottery's authority now is. The trial court did not strike down or judicially alter Specification 8.7.2. How, then, is the Lottery to know whether its negotiations will later be found by a circuit judge to be unacceptable? This sort of uncertainty is the antithesis of the entrepreneurial business operation envisioned by the Legislature for the Florida Lottery. Again, no court should strike down this contract absent a finding that the contract transgresses the limitations imposed by *Groves-Watkins*.

Id.

In addition to his conclusion that Specification 8.7.2 was valid under Florida law and authorized the Agreement successfully negotiated between the Lottery and AWI, Judge Kahn concluded that GTECH had waived the right to challenge the validity of that specification by failing to exhaust its administrative remedies. Op. at *6. Stating that "GTECH was on notice that the RFP contemplated substantive negotiations between the Lottery and the highest ranked bidder," Judge Kahn wrote that GTECH was required to "protest the specification, if it felt such specification was contrary to Florida procurement law." *Id.*

Judge Kahn rejected GTECH's argument that it was not required to administratively challenge this specification because GTECH "did not interpret the negotiation provision as permitting negotiation on items such as scope of work and price." *Id.* In Judge Kahn's words:

This argument is unavailing, particularly in the context of the Lottery's need to implement a highly sophisticated and expansive on-line lottery system. During the time period in which this case has transpired, the area of information

technology has undergone incredible changes in almost unimaginably short time intervals. 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. I would therefore conclude the GTECH has waived its right to challenge Specification 8.7.2.

Id.

AWI and the Lottery moved for rehearing, rehearing en banc, and for certification of questions to the Florida Supreme Court. In its motion, the Lottery argued that it **had** complained below of GTECH's failure to exhaust its administrative remedies. Lottery Rehearing Motion at 3-4.

In response to those motions, the district court certified the questions quoted at page four above as being of "great public importance." *State, Dep't of Lottery v. GTECH Corp.*, 26 Fla. L. Weekly D1733, 2001 WL 193770 (Fla. 1st DCA July 17, 2001). The motions were otherwise denied. Specifically concurring in the certification of these

questions, Judge Miner stated:

*Because issues presented herein need to be resolved without further delay, I concur in the denial of the motions for rehearing and rehearing en banc. I also concur in the substance of the questions certified to the Florida Supreme Court although, were the decision mine alone to make, I might frame them a bit differently.*_

Op. at *7.

JURISDICTIONAL STATEMENT

The First District certified two questions to be of great public importance. This Court has jurisdiction to review decisions of district courts of appeal that pass upon a question certified to be of great public importance. See Art. V, § 3(b)(4), Fla. Const. Nevertheless, GTECH has challenged this Court's jurisdiction through its filing of an unauthorized jurisdictional brief, dressed up as a motion to dismiss. Accordingly, we address the Court's jurisdiction. While this summary demonstrates the Court's jurisdiction, the full context of this case, as presented in this brief, confirms that jurisdiction exists.

There can be no doubt that the questions certified here address issues of great public importance. Among other things, the district court's decision guts this Court's precedent in *Groves-Watkins*. It also violates settled Florida law requiring parties to exhaust their administrative remedies.

GTECH contends that the district court, though deciding that these questions were important enough to certify as being

of great public importance, nonetheless failed to pass upon either one of them.² This is utter nonsense.

The first certified question asks whether the Lottery is authorized, pursuant to an RFP specification, to negotiate substantive contract terms with the successful respondent and award a contract pursuant to those negotiations absent illegality, fraud, oppression, or misconduct. Op. at *7. The district court answered no. Op. at *3.

The court specifically rejected "the Lottery's interpretation of Provision 8.7.2 of the RFP," holding that it did not authorize the Lottery's negotiation of substantive contract terms with the successful respondent as the Lottery contended, but rather "envisions finalizing an agreement by turning the winning proposal into a contract." *Id.* The court's discussion of the "best method" language of Specification 8.7.2 is simply the court's *rationale* for that holding. The court clearly passed upon the first certified question.

² Jurisdiction exists if either certified question was passed upon below. Once the Court has jurisdiction, it can review the entire record and address any issue in the case. See *Ocean Trail Unit Owners Ass'n, Inc. v. Mead*, 650 So. 2d 4, 5 (Fla. 1994) ("Having accepted jurisdiction to answer the certified question, we may review the entire record for error.").

The second certified question asks whether the action brought by GTECH in circuit court was proper since GTECH failed to exhaust its administrative challenges. Op. at *7. AWI and the Lottery had argued on appeal, as they had below, that GTECH failed to exhaust its administrative remedies by challenging the Lottery's RFP specifications in a timely manner before bringing this circuit court action. The majority decision addresses this point in the broad context of its discussion of the need to exhaust administrative remedies before a circuit court action can be brought. Op. at *2.

Notably, this Court has held that a "discussion" in the district court decision of the issues raised in a certified question is helpful, but not necessary. See *Weiland v. State*, 732 So. 2d 1044 (Fla. 1999). There, the district court's statement that "we have examined each [issue raised] together with the entire trial transcript and conclude that none of the errors asserted require reversal" was held sufficient to establish that the certified questions were passed upon. See also *Finkelstein v. Dep't of Transp.*, 656 So. 2d 921, 922 (Fla. 1995)(the district court's failure to formulate the question, as required under article V, "does not render this Court to be without jurisdiction"). Here, of course, the district court discussed and formulated both of the questions it then certified to this Court.

Moreover, by examining the substance of the dissent, the Court can see that Judge Kahn certainly understood that the panel majority had necessarily passed upon these questions by failing to accept AWI's and the Lottery's positions on them. Although GTECH cites cases with respect to this Court's article V, section 3(b)(3) conflict jurisdiction as supposedly establishing that the dissent should be ignored in determining jurisdiction, GTECH cites no authority for its equation of conflict-jurisdiction with certified-question jurisdiction. Indeed, GTECH can identify no case wherein this Court refused to consider the dissent to determine whether a certified question was passed upon by the majority. This Court should not ignore the dissent here. Judge Kahn's careful dissent was not an exercise in futility--it was an explanation of his reasons for refusing to join in the majority's decision on the questions the full court then certified as being of "great public importance."

SUMMARY OF ARGUMENT

Characterizing the Lottery as a "unique" state agency, the Florida Legislature has directed that the Lottery is to operate like a business. The Legislature has specifically granted the Lottery all of the procurement powers of DMS, including the power to negotiate contracts for all goods and services. Both DMS and the Lottery enacted rules for such negotiations, and those rules were never administratively challenged by GTECH.

Pursuant to its statutory and rule authority, the Lottery included specifications in this RFP that explicitly reserved the Lottery's right to negotiate contract terms it believed to be fair, reasonable, and competitive, and to include contract terms contrary to the RFP and the successful proposal. In particular, the Lottery was permitted to negotiate the price, scope of work, and implementation schedules. The RFP provided the Lottery with various options if those negotiations failed, including the option of holding the successful respondent to its proposal. Here, however, the Lottery successfully negotiated a contract with AWI, and that contract should be upheld absent illegality, fraud, oppression, or misconduct, as required under *Grove-Watkins*.

The decision below voids the Agreement without any such showing and thus impermissibly interferes with the Lottery's

"honest exercise" of its "wide discretion" in its purchasing decisions, contrary to *Groves-Watkins*. The Lottery concluded it had negotiated a better deal for itself than AWI's proposal--otherwise, it would have held AWI to that proposal, as it had the absolute right to do. As among the Lottery, GTECH, and the courts, the Lottery is clearly in the superior position to gauge its best interests in negotiating terms it believed to be fair, competitive, and reasonable.

In addition, GTECH waived any challenge to these specifications of the RFP and the Lottery's rules by failing to assert those challenges by administrative protests. That point was squarely advanced by the Lottery and AWI below, and GTECH should not have been allowed to belatedly raise these challenges in circuit court.

For all the reasons set forth in this brief and in Judge Kahn's reasoned dissent, the certified questions should be answered as set forth herein and the district court's decision should be reversed.

ARGUMENT

STANDARD OF REVIEW

The certified questions from the district court present pure questions of law. This Court conducts a *de novo* review of those questions. See *Armstrong v. Harris*, 773 So. 2d 7, 11 (Fla. 2000).

In conducting that *de novo* review, "the administrative construction of a statute by an agency or body responsible for the statute's administration is entitled to great weight and should not be overturned unless clearly erroneous. The same deference has been accorded to *rules . . .* and to the meaning assigned to them by officials charged with their administration." *Pan American World Airways, Inc. v. Florida Pub. Serv. Comm'n*, 427 So. 2d 716, 719 (Fla. 1983)(emphasis in original).

Furthermore, in view of "the broad discretion accorded public agencies" in their purchasing decisions, this Court has established the following standard of review for measuring the exercise of that discretion: "[A]n honest exercise of this discretion cannot be overturned absent a finding of 'illegality, fraud, oppression or misconduct.'" *Groves-Watkins*, 530 So. 2d at 913.

Certified Question One

**UNDER APPLICABLE STATUTES,
RULES, AND RFP SPECIFICATIONS,
THE LOTTERY HAD THE AUTHORITY TO
NEGOTIATE SUBSTANTIVE TERMS OF THIS CONTRACT**

Characterizing the operation of the Lottery as a "unique activity for state government," the Florida Legislature has directed that the Lottery should function "as much as possible in the manner of an entrepreneurial business enterprise."

§ 24.102 (2)(b), Fla. Stat. To that end, the Legislature has provided that "structures and procedures appropriate to the performance of other governmental functions are not necessarily appropriate to the operation of a state lottery."

Id.

Thus, unlike other state agencies, the Lottery has been granted all of the procurement powers afforded under chapter 287 to the State's primary purchasing agent, the Department of Management Services ("DMS"). See § 24.105(14), Fla. Stat.

Like DMS, then, the Lottery has the power to purchase "all commodities and contractual services. . . by contractual negotiation." § 287.042(1)(a), Fla. Stat; see also, §§ 287.042 (2)(a) & (5), Fla. Stat.

By its express terms, this negotiation authority for DMS and the Lottery extends to "all" goods and services.

§ 287.042(1)(a), Fla. Stat. Contrary to the district court's

interpretation of chapter 287, see Op. at *5, the negotiation authority of DMS and the Lottery is not limited to consultant services, such as legal and engineering services, as provided under section 287.055 for *other* state agencies. Section 287.055(7) expressly provides that section 287.055 does not limit the broader authority granted to DMS and the Lottery under chapter 287.

In addition to the grant of DMS's statutory authority to negotiate for all goods and services, the Lottery is also authorized under section 24.105(14) to act pursuant to DMS's rules. Those rules specifically authorize use of "alternative negotiation procedures." See Fla. Admin. Code R. 60A-1.018, 60A-1.018(2)(g). Further, the Lottery is itself authorized to "adopt rules providing alternative procurement procedures." § 24.105 (14), Fla. Stat. The Lottery adopted such rules, which authorize it to "acquire goods and services, ***including major procurements***, through a competitive negotiation process." See Fla. Admin. Code R. 53ER87-13 (5)(i) (replaced by 53ER97-39 (5)(i)). IV.1355.

Challenges to the validity of an agency rule can only be raised by an administrative rule challenge. *Florida Marine Fisheries Comm'n v. Pringle*, 736 So. 2d 17, 22-23 (Fla. 1st DCA 1999). GTECH never administratively challenged the rules at

issue here. See GTECH 1st DCA Answer Brief (AWI) at p. 32, n.11. Consequently, the Lottery was fully entitled to act under those rules.

In accordance with this broad and unchallenged rule authority, the Lottery included a specification in its RFP providing that the Lottery would negotiate the ultimate contract terms with the highest-ranking proposer, after the award was made. Specification 8.7.2, entitled "Negotiation," provided:

If the Secretary determines that the proposals under the 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 the 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 anytime during **negotiations**.

II.607.

Just as GTECH failed to administratively challenge the Lottery's and DMS's negotiation rules, GTECH also failed to administratively challenge Specification 8.7.2, as it was required to do under both Florida law and the RFP itself. See Certified Question Two, *infra*, at 39-43. Consequently, had GTECH been the successful respondent, it would have had the same benefit of negotiation that it now complains AWI received as the successful respondent. It was not until GTECH's proposal was rejected and the Lottery had successfully negotiated the Agreement with AWI that GTECH challenged Specification 8.7.2 by its suit in circuit court.

For the first time, GTECH asserted that Specification 8.7.2 did not permit negotiations on material terms such as price and scope of work. But this restrictive reading of Specification 8.7.2 negates its explicit language directing the Lottery to negotiate "the conditions and price that the Lottery deems to be fair, competitive, and reasonable. . . ."

II.607. It also negates the other specifications granting the Lottery the power to negotiate contract terms that are "contrary" to the RFP. II.517, § 1.3; II.530, § 1.36. This reservation of the Lottery's negotiation rights is rendered meaningless if the Lottery cannot negotiate substantive terms of the contract.

The price of a contract is always a substantive term of the contract. See *LaFountain v. Estate of Kelly*, 732 So. 2d 503, 505 (Fla. 1st DCA 1999) (rental amount is "essential element of lease"); *Drost v. Hill*, 639 So. 2d 105, 106 (Fla. 3d DCA 1994) (price is a material contract term). So too is the scope of the work to be performed under the contract. See *Winter Haven Citrus Growers Ass'n v. Campbell & Sons Fruit Co.*, 773 So. 2d 96, 97 (Fla. 2d DCA 2000) (time of performance is material contract term); *Jacksonville Port Authority v. W.R. Johnson Enterprises, Inc.*, 624 So. 2d 313, 315 (Fla. 1st

DCA 1993) (essential contract terms had not been agreed upon since scope of work was still being negotiated).

By specifically reserving the right to negotiate the "conditions" of the contract, including price and scope of work, as well as to negotiate contract terms "contrary" to the RFP, the RFP plainly envisioned negotiations on the substantive terms of the contract. Indeed, in rejecting GTECH's interpretation, Judge Kahn pointed out that both the Lottery's rules and Specification 8.7.2 "direct" the Lottery "to negotiate a contract with the most highly qualified firm," and they "envision the prospect of failed negotiations" by their specific provision for that event. Op. at *5. Given its contemplation of "failed negotiations," the RFP necessarily "envisioned negotiations of substantive terms such as price and implementation plans." *Id.*

Judge Kahn's interpretation gives effect and meaning to this language, which the district court's restrictive interpretation improperly negates. Judge Kahn's interpretation also affords the judicial deference to an agency's interpretation of its own rules that this Court has required.

Where, as here, a state agency is operating under its own rules, it must be afforded great deference by the courts in the interpretation of those rules, including rules relating to

procurements. Indeed, the agency's interpretation "is entitled to great weight and should not be overturned unless clearly erroneous." *Pan American World Airways*, 427 So. 2d at 719. Hence:

a reviewing court should defer to any interpretation that is within the range of possible interpretations. . . . It is not for the courts to dictate to the agency the wisdom of the agency's policy actions if such actions do not clearly appear to contravene the express or reasonably implied scope of powers legislatively delegated to it.

Florida Dep't of Corrections v. Provin, 515 So. 2d 302, 305 (Fla. 1st DCA 1987) (citations omitted); see also *Best Western Tivoli Inn v. Dep't. of Transp.*, 448 So. 2d 1052, 1055 (Fla. 1st DCA 1984) (deferring to an agency's interpretation of its rule even when it arguably conflicts with the rule's plain meaning).

The Lottery's interpretation certainly is within the "range of possible" interpretations of its rules. In addition to giving effect and meaning to their language, it implements the Legislature's directive that the Lottery is to operate like an entrepreneurial business enterprise and is not to be constrained by the procedures controlling other governmental agencies. See § 24.102(2)(b). Judge Kahn correctly concluded that "[g]iven the statutes and rules applicable to the Lottery's procurement function, the contract negotiated by the

Lottery should be upheld absent a finding [of] illegality, fraud, oppression, or misconduct." Op. at *6.

In reaching that conclusion, Judge Kahn cited *Groves-Watkins*, where this Court "recognized the broad discretion legislatively accorded public agencies and held that an agency's decision based upon an honest exercise of this discretion cannot be overturned absent a finding of 'illegality, fraud, oppression or misconduct.'" *Groves-Watkins*, 530 So. 2d at 913. Under *Groves-Watkins*, an agency's "honest exercise" of its "wide discretion" in competitive bidding situations "'will not be overturned by a court even if it may appear erroneous and even if reasonable persons may disagree.'" *Id.* at 913.

In direct contravention of *Groves-Watkins*, the district court voided the Lottery's Agreement based upon its own view that allowing the Lottery to negotiate contract terms

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

Op. at *3. The court's reasoning is flawed and contrary to Florida law.

First, the court ignored the Lottery's additional reservation of the right to require the successful respondent to enter into a contract having the precise same terms as its proposal. II.628, § 1.21. Hence, any respondent who "low-balled" its proposal would run the risk that its proposal would be accepted by the Lottery as a binding contract, without negotiations. That prevents the submission of "non-competitive, unrealistic proposals solely for the purpose of receiving the highest ranking for subsequent negotiations." Op. at *3.

The point is, the right of negotiation is the Lottery's option alone, at its discretion. If its negotiations fail, the Lottery can elect either to hold the successful respondent to its original proposal "without further negotiations" (II.527, § 1.21), or to reject that proposal and negotiate with the next highest respondents for a "satisfactory Contract. . . ." II.607, § 8.7.2. As such, respondents cannot submit "unrealistic" proposals with any assurance they can improve their position through subsequent negotiations.³

³ Although the panel recited GTECH's *allegation* that AWI "purposefully 'low-balled' its proposal," intending to obtain more favorable terms through post-award negotiations, Op. at *1, there is not a

Furthermore, negotiations cannot be prohibited by the district courts merely because they could diminish "public confidence in the fairness of the process or that the Lottery has entered into the most beneficial agreement." Op. at *3. An agency's exercise of discretion is always open to suspicion, and whether it "has entered into the most beneficial agreement" is always subject to differing views. But, if that were the standard, an agency's purchasing decision would be overturned where it appears "erroneous," which this Court has held is not permitted. *Groves-Watkins*, 530 So. 2d at 913.

The district court's further reliance on the "proscriptions of Chapter 287" as a basis for voiding the Lottery's contract negotiations not only disregards the Lottery's special status among state agencies, it also disregards that the Lottery has been granted the same statutory powers under chapter 287 as DMS to negotiate *all* goods and services contracts. Chapter 287's limitation on

shred of evidence to that effect. Indeed, although GTECH told the circuit court that AWI's contract price was higher than GTECH's proposed price, VI.1864-65, that is simply not true; the record establishes that AWI's contract price was lower than GTECH's proposal, despite enhanced benefits for the Lottery under the Agreement. *Compare* I.286 with III.856. At the very least, this issue cannot be resolved on summary judgment.

contract negotiations by other state agencies does not apply to DMS and the Lottery. See § 287.055(7). The district court's contrary conclusion ignores that legislative directive.

Despite the Lottery's unique status and extraordinary powers with respect to negotiation of contracts, the district court did not defer to the Lottery's "honest exercise" of its "wide discretion" in competitive bidding situations. *Groves-Watkins*, 530 So. 2d at 913. Instead, the court held that the Lottery had only the limited alternatives of (1) rejecting the proposals and beginning the procurement process all over again or (2) "turning the winning proposal into a contract." Op. at *3.

The majority panel reached this conclusion by focusing on the first clause of the first sentence of Specification 8.7.2: "[i]f 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." II.607. The majority then reasoned that, "[i]f the AWI proposal was the 'best method,'" then "material changes to the proposal in the final contract would seem to be contrary to the finding by the

Secretary that AWI's proposal was the 'best method.'" Op. at *3.

This conclusion, however, flows from a flawed reading of Specification 8.7.2. That Specification refers to "the proposals under this RFP" as the subject of a determination of "best method," not a particular vendor's proposal itself. Accordingly, the Secretary does not determine that a particular proposal is the best method of obtaining the system and services. She determines that the group of proposals received in response to *this RFP*--rather than some other procurement vehicle--is the best method.

In short, the majority panel misread that clause when it described the Secretary's determination as being that "*the AWI proposal* was the 'best method.'" The actual determination is that "*the proposals under this RFP*" are the "best method" of obtaining a new gaming system. That is a critical distinction, and it destroys the majority's logic.

The "best method" clause reads as it does because, as explained in Specification 1.1, this RFP was not the only mechanism initiated by the Lottery to obtain the new system and services. II.516. The Lottery also sought proposals under an "Alternate" RFP. *Id.* Ultimately, the Secretary determined that the "proposals under this RFP," rather than

the proposals under the "Alternate" RFP, was the "best method of obtaining the desired gaming system and services." II.607.

Notably, this reading of the RFP is completely consistent with *GTECH v. State, Dep't of Lottery*, 737 So. 2d 615, 617 (Fla. 1st DCA 1999). In describing this procurement, the district court explained there that:

[t]he Secretary of the Lottery retained the authority to reject the committee's decision, but only if she found that **the entire process was not the best method** of obtaining the desired gaming system and services."

Id. at 617. Thus, the court correctly recognized that the "best method" determination related to the "process," not to a particular proposal as incorrectly stated in the majority opinion below.

Even apart from this error, the district court's restrictive reading of Specification 8.7.2 improperly rewrites it: the district court *eliminated* the negotiation rights the Lottery expressly reserved in this RFP and *limited* the Lottery to "turning the proposal into a contract." Op. at *3. For the reasons articulated in Judge Kahn's dissent, the Lottery should not be precluded from exercising the

negotiation rights it reserved in its RFP.⁴ To do so flies in the face of the Legislature's directive that the Lottery must operate like a business.

It bears emphasis that the Lottery and AWI have never asserted that they "were free to negotiate a contract without limitation. . .," as the district court stated. Op. at *4. The Lottery's negotiations must take place within the confines of the objectives set forth in Specification 1.2 of the RFP. Moreover, they must result in contract terms that the Lottery determines are "fair, competitive, and reasonable," as provided in Specification 8.7.2.

Equally important, the Lottery's negotiations are subject to the constraints dictated in *Groves-Watkins* and must constitute "an honest exercise" of the Lottery's discretion. *Groves-Watkins*, 530 So. 2d at 913. Here, however, the district court made its own value judgment that the potential for an *appearance* of impropriety and the possibility of public suspicion should override the Lottery's "honest exercise" of its "broad discretion" in negotiating the Agreement. That is

⁴ The district court accepted the trial court's finding that the Lottery's negotiations were "'not even the subject of the competitive bidding process.'" Op. at *3. As Judge Kahn quite correctly pointed out in dissent, however, that "is the nature of the RFP here at issue." Op. at *7.

contrary to *Groves-Watkins*, which establishes that the Lottery's discretionary judgment as to what constitutes fair, reasonable, and competitive contract terms cannot be overturned, absent a finding of illegality, fraud, oppression, or misconduct.

This Court should exercise its jurisdiction and answer the first certified question in the affirmative. Consistent with the carefully reasoned analysis set forth in Judge Kahn's dissent, this Court should hold that the Lottery, pursuant to Specification 8.7.2 in its RFP and Florida law, has the authority to negotiate substantive contract terms with the most highly qualified respondent and award a contract pursuant to successful negotiations, which contract must be upheld absent a finding of illegality, fraud, oppression, or misconduct under *Groves-Watkins*.

At a minimum, in the light of the deference this Court has held must be afforded an agency's discretion in competitive bidding decisions, this Court should reverse the summary judgment for GTECH and remand for trial on the disputed factual issue whether this Agreement was financially more beneficial to AWI than its proposal, as the circuit judge ruled.

Certified Question Two

**BECAUSE GTECH FAILED TO EXHAUST ITS
ADMINISTRATIVE REMEDIES FOR CHALLENGING THE RFP'S
PROVISIONS, IT WAS PRECLUDED FROM CHALLENGING
THE LOTTERY'S NEGOTIATED CONTRACT IN CIRCUIT COURT**

Until GTECH brought its action in circuit court, GTECH never challenged the negotiation provisions of the RFP or the Lottery's reservation of the right to negotiate a contract pursuant to them. Having failed to exhaust its available administrative remedies, GTECH could not later seek in circuit court to void the Agreement based on the Lottery's supposed lack of authority to negotiate the substantive terms of this contract, as specified in the RFP.

Florida law establishes an administrative remedy for potential bidders who dispute the legality of provisions in a request for proposals. See §§ 24.109(2) & 120.57(3)(b), Fla. Stat. The protesting bidder is entitled to a *de novo* hearing, during which the legality of the RFP specifications under the Lottery's governing statutes and rules can be determined. § 120.57(3)(f), Fla. Stat. See § 24.109(2), Fla. Stat. (incorporating the provisions of § 120.57(3)). Failure to file a timely protest constitutes a waiver of administrative remedies. § 120.57(3)(b), Fla. Stat. The RFP itself expressly reminded prospective bidders of this requirement. II.521, § 1.9.

GTECH initiated an administrative challenge to some of the RFP specifications. However, it did not challenge the specifications providing that the Lottery could negotiate "conditions and price," including the scope of work and implementation schedules, and that the negotiated contract could include terms "contrary" to the RFP. IV.1185-1200. A timely-filed administrative protest of the RFP would have afforded GTECH the opportunity to argue that such provisions were inconsistent with the Lottery's statutory authority, as they later argued in circuit court. See § 120.57(3)(f), Fla. Stat. (providing that the *de novo* hearing can determine "whether the agency's proposed action is contrary to the agency's governing statutes").

The purpose of sections 24.109(2) and 120.57(3)(b) and Specification 1.9 of the RFP is to allow an agency "to correct or clarify plans and specifications prior to accepting bids," thereby saving "expense to the bidders" and assuring "fair competition among them. . . ." *Advocacy Ctr. for Persons with Disabilities v. Dept. of Children & Family Servs.*, 721 So. 2d 753, 755 (Fla. 1st DCA 1998). Had GTECH successfully challenged the Lottery's authority under the RFP to negotiate substantive contract terms *before* responses were submitted,

that would have permitted the Lottery to revise its RFP early in the process.

Instead, GTECH failed to exercise its administrative remedies. Consequently, it could not later challenge the Lottery's contract negotiations in circuit court. "[W]here adequate administrative remedies are available, it is improper to seek relief in the circuit court before those remedies are exhausted.'" *Bankers Ins. Co. v. Florida Residential Property & Cas. Joint Underwriting Ass'n*, 689 So. 2d 1127, 1129 (Fla. 1st DCA 1997); see also *Optiplan, Inc. v. School Bd. of Broward County*, 710 So. 2d 569 (Fla. 4th DCA 1998) (holding that unsuccessful bidder waived its right to contest bid specifications by failing to timely challenge them).

AWI and the Lottery specifically asserted that GTECH failed to exhaust its administrative remedies by challenging the Lottery's RFP specifications in a timely manner before bringing this circuit court action. See I.299, I.311, II.415-24, VI.1777.

The majority decision addresses this point in the broad context of its discussion of the need to exhaust administrative remedies before a circuit action can be brought. As it stated:

[t]he Administrative Procedure Act affords a procedural mechanism to review any agency

decision that affects the substantial interests of a party. See § 120.569, Fla. Stat. Moreover, the Act provides the **exclusive** remedy for disputes arising in the competitive procurement process.

Id.

Yet, despite its correct enunciation of the requirement for exhaustion of administrative remedies in the procurement process, the court nevertheless allowed GTECH to by-pass its administrative remedy for challenging Specification 8.7.2. That is contrary to Florida law. As Judge Kahn correctly stated:

Because GTECH was on notice that the RFP contemplated substantive negotiations between the Lottery and the highest ranked bidder, it was required by statutory law to protest the specification, if it felt such specification was contrary to Florida procurement law.

Op. at *6.

If allowed to stand, the district court's decision undermines the long-held principle that administrative remedies must be exhausted. See generally *Flo-Sun, Inc. v. Kirk*, 783 So. 2d 1029, 1037 n.5 (Fla. 2001) (examining the companion doctrines of primary jurisdiction and exhaustion of remedies). That would have significant implications for all future government purchases. The losing respondent would get two bites at the apple: it could seek to have the benefit of

provisions if its proposal is successful, but then attack those provisions as unauthorized if its proposal is not accepted. This Court should not countenance such tactics, particularly where the RFP specifically forbids them.

The second certified question should be answered in the negative. This Court should hold that, where the negotiation clause in the request for proposals indicates that an agency will negotiate a contract with the most highly qualified respondent, including the conditions and price, an unsuccessful proposer who failed to administratively contest the negotiation clause may not later attack the contract in circuit court on the basis that the negotiations conducted pursuant to the terms of that clause were impermissible.

CONCLUSION

Given the "great public importance" of the certified questions to this state agency and other public agencies, those questions should be adjudicated by this Court. Indeed, in concurring in the denial of the motions for rehearing, Judge Miner emphasized that the "issues presented herein need to be resolved without further delay" Op. at *7. Accordingly, this Court should exercise its jurisdiction and answer the first certified question in the affirmative and the second certified question in the negative. At a minimum, the summary judgment for GTECH should be reversed. This case should then be remanded for proceedings consistent with this Court's opinion.

Respectfully submitted,

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I HEREBY CERTIFY that a copy of the foregoing Initial Brief, as amended at the direction of the Court to only reorder the Certificate of Service and Certificate of Type Size and Style and to reflect same in the Table of Contents, has been furnished, this 26th day of September, 2001, by U.S.

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