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## **Florida Dep't of the Lottery v. Gtech Corp.**

FLORIDA SUPREME COURT, WEDNESDAY MAY 8, 2002. PLEASE RISE. HEAR YE, HEAR YE, THE SUPREME COURT OF THE GREAT STATE OF FLORIDA IS NOW IN SESSION. ALL WHO HAVE CAUSE TO PLEA, DRAW NEAR, GIVE ATTENTION. AND YOU SHALL BE HEARD. GOD SAVE THESE UNITED STATES, THE GREAT STATE OF FLORIDA, AND THIS HONORABLE COURT. LADIES AND GENTLEMEN, THE FLORIDA SUPREME COURT.

GOOD MORNING AND WELCOME TO THE ORAL ARGUMENT CALENDAR OF THE FLORIDA SUPREME COURT. THE FIRST CASE IN THE ORAL ARGUMENT CALENDAR IS THE FLORIDA DEPARTMENT OF LOTTERY VERSUS GTECH AUTOMATIC WAGERING VERSUS GTECH. MR. MARSHAL, I AM A LITTLE CONFUSED HERE ON THE TIME DIVISION.

AND MS. GIDDINGS, YOU MAY PROCEED.

GOOD MORNING, YOUR HONORS, MAY IT PLEASE THE COURT. A PLEASURE TO APPEAR BEFORE YOU TODAY. I AM KATHERINE GIDDINGS AND I AM HERE WITH MR. JEFF FREHN ON BEHALF OF THE DEPARTMENT OF LOTTERY. WITH US AT COUNSEL TABLE, SYLVIA WALBOLT AND MARTHA CHUMBLER. I WILL BE TAKING ABOUT NINE MINUTES TO ADDRESS THE CERTIFIED QUESTIONS. THEN I'M GOING TO RESERVE FOUR MINUTES FOR REBUTTAL.

I WOULD LIKE FOR YOU OR SOMEONE TO TALK ABOUT OUR JURISDICTION.

YES, SIR. FIRST CERTIFIED QUESTION, WOULD IT BE APPROPRIATE FOR ME TO ADDRESS JURISDICTION ON THAT QUESTION FOR YOU AND LET MRS. WALBOLT ADDRESS THE SECOND. YOUR HONOR, THE FIRST CERTIFIED QUESTION STATES DOES THE LOTTERY PURSUANT TO SPECIFICATION INCLUDE IN REQUEST FOR PROPOSAL HAVE THE AUTHORITY TO NEGOTIATE SUBSTANTIVE TERMS, CONTRACT TERMS WITH THE MOST HIGHLY QUALIFIED RESPONDENT? AND PURSUANT TO SUCH NEGOTIATIONS, AWARD A CONTRACT, IT MUST BE UPHELD ABSENT A FINDING OF ILLEGALITY, FRAUD, OPPRESSION OR MISCONDUCT. THE MAJORITY OPINION SPECIFICALLY STATES THAT THE PROCEDURES USED BY THE LOTTERY WAS AT ODDS WITH THE PRESCRIPTION OF 287, WHICH GOES TO ITS SPECIFIC AUTHORITY AND IT STATES THAT ITS CONCERN WAS THAT THE PROCEDURES USED IN THE AWARD AND THE RFP (LOST AUDIO) THE PARTIES AND THE DEPARTMENT MUST FOLLOW THAT RULE DURING THE COURSE OF THE PROCUREMENT. EVEN IF THE RULE IS SUBSEQUENTLY DECLARED INVALID, THE COURT MIGHT TAKE NOTE OF THE CAPPALETTI CASE FROM THE FIRST DISTRICT COURT OF APPEAL AT 499 SO2D 855. INDEED THE COURT DETERMINED THAT EVEN WHEN THERE HAS BEEN CONSTITUTIONAL CHALLENGES --.

HOW DO YOU RESPOND TO THE CHARGE THAT THIS PROCEDURE INVITES LOW BALLING? AND HOW DO YOU PROTECT AGAINST IT?

WELL YOUR HONOR, I THINK THAT THE EASY ANSWER TO THAT IS THE LOTTERY HAS SEVERAL OPTIONS UNDER THIS RFP. IT COULD HAVE ACCEPTED THE PROPOSALS AS IS, HAD IT MET ITS NEEDS. BUT IT ALSO PLACED PARTY ON NOTICE THAT IT ALSO HAD THE AUTHORITY TO NEGOTIATE AND IN THIS CASE, THE CONTRACT, BECAUSE OF THE LENGTHY BID PROTEST, THE GTECH FILE, WHICH WAS PERFECTLY ENTITLED TO DO, FOUR YEARS PASSED. AND YOU KNOW PRIVATE BUSINESS, WHICH THE LOTTERY CHARGE TO ACT LIKE, WOULD EVER TIE ITSELF INTO EXACT TERMS THAT HAS TO BE IMPLEMENTED IN A CONTRACT INVOLVING A SYSTEM. I MEAN

YOU'RE TALKING ABOUT A CONTRACT THAT GOVERNS EVERY TERMINAL IN EVERY STORE THROUGHOUT THE ENTIRE STATE OF FLORIDA.

BUT DOESN'T IT INVITE BOTH PARTIES OR ALL PARTIES THEN TO PUT IN UNREALISTICALLY LOW BIDS IN ORDER TO MAKE THE CUT?

NO YOUR HONOR, BECAUSE IF THE LOTTERY WANT -- IF THE LOTTERY HAD THE OPTION OF ACCEPTING THE PROPOSALS AS IS, SO IF A PARTY PUTS IN A LOW BID, THEY COULD BE COMPELLED TO ADHERE TO THAT. NOW IMPORTANTLY THE MAJORITY OPINION ACTUALLY WE BELIEVE THAT JUST THE OPPOSITE IS TRUE, IF THE MAJORITY OPINION NOTED, IT ACTUALLY --.

YOU'RE SPLITTING YOUR TIME?

YES. ACTUALLY, IT MIGHT ACTUALLY IMPAIR THE LOTTERY'S ABILITY TO EVER ENTER INTO CONTRACTS BECAUSE PEOPLE WOULD CONTINUALLY BE CONTESTING CONTRACTS AND DELAY THAT IS FOREVER. AND I WILL NOW TURN MY TIME OVER TO MS. WALBOLT.

JUSTICE QUINCE, I WOULD JUST LIKE TO FOLLOW UP ON MS. GIDDINGS ANSWER TO YOUR QUESTION. THE AWARD NOT ONLY SAID THAT THE LOTTERY, THE NOTICE OF AWARD NOT ONLY SAYS THAT THE LOTTERY INTENDS TO INITIATE NEGOTIATIONS WITH THE HIGHEST RANKING RESPONDENT BE, IT ALSO SPECIFICALLY SAID AND I'M QUOTING, AWARD IS CONTINGENT UPON SUCCESSFUL COMPLETION OF NEGOTIATIONS. JUSTICE HARDING --.

JUST A FOLLOW-UP TO THAT, HOW FAR CAN THEY GO AS FAR AS PRICE IS CONCERNED? YOU KNOW. ONE OF THE CRITERIA FOR AWARDED THIS BID IS THE PRICE, CORRECT? THAT'S GIVEN A CERTAIN NUMBER OF POINTS. SO DURING THIS NEGOTIATIONS, HOW FAR OUT OF LINE WOULD THAT PARTICULAR PRICE CAN YOU GO?

THE NEGOTIATIONS WOULD HAVE TO TAKE PLACE, YOUR HONOR, WITHIN THE CONTEXT OF THE OBJECTIVE STATED OF THE RFP. OBVIOUSLY YOU COULDN'T GIVE IT AS AN AWARD TO BUILD A BUILDING INSTEAD OF PUTTING IN A LOTTERY SYSTEM. SO IT HAS TO BE WITHIN THE OBJECTIVES. IT HAS TO BE WITHIN THE STATUTORY CRITERIA, THE STATUTE HAS A LOT OF SPECIFIC PROVISIONS CAN, OR CANNOT BE IN THE CONTRACT. SO IT WOULD HAVE TO BE CONSISTENT WITH THAT. BUT THE GOVERNING STANDARD IS ONCE THE LOTTERY RESERVES THOSE RIGHTS, AS IT DID, TO NEGOTIATE MATERIAL TERMS, THEN THE STANDARD IS GROSS WATKINS. IS THE CONTRACT. AND THAT WAS WHAT JUST KAHN SPECIFICALLY FOUND. ONCE YOU DETERMINE THAT THE CONTRACT -- THAT THE RFP DID RESERVE THE RIGHT TO NEGOTIATE MATERIAL TERMS, AS THIS ONE JUST CLEARLY DID ALL OVER ITS FACE, THEN, THEN YOU DETERMINE DOES THE CONTRACT -- IS THE CONTRACT INVALID UNDER GROSS WATKINS? JUSTICE HARDING, I'D LIKE TO ADDRESS YOUR QUESTION ON THE JURISDICTION. OF COURSE THE COURT HAS JURISDICTION OVER THIS CASE IF THERE IS JURISDICTION OVER EITHER OF THE QUESTIONS. CLEARLY THE FIRST DISTRICT PASSED ON THE FIRST QUESTION. THERE JUST CAN BE NO DOUBT READING THE DECISION THAT IT DID. WE SUBMIT IT ALSO PASSED ON THE SECOND QUESTION BECAUSE IT COULD NEVER HAVE REACHED THE ISSUE OF WHETHER GTECH COULD BRING ITS CHALLENGE IN COURT AFTER THE CONTRACT WAS EXECUTED, HAD IT NOT CONCLUDED AND REJECTED OUR POSITION THAT THAT CHALLENGE HAD BEEN WAIVED BECAUSE IT HAD NOT BEEN EXHAUSTED THROUGH THE ADMINISTRATIVE REMEDIES PROVIDED UNDER THE APA. AND THAT'S EXACTLY WHAT JUDGE KAHN CONCLUDED IN ITS DISSENT. AND WE SUBMIT THAT JUDGE KAHN'S DISSENT IS ABSOLUTELY CORRECT. IT FOLLOWS THE EXPLICIT LANGUAGE OF THE APA. IT IS CONSISTENT WITH THE CASE LAW INTERPRETING THE APA, IT IS CONSISTENT WITH 1.9 OF THE RFP WHICH SAID BIDS PROTEST HAVE TO BE FOLLOWED IN ACCORDANCE WITH THE APA.

COMMENT ON THE SUBSEQUENT LEGISLATION WHICH APPEARS NOW TO HAVE BROADLY INCLUDED THIS KIND OF LANGUAGE GENERALLY AND THE OTHER CONTROLLING STATUTE SO THAT THIS PERHAPS IS NOT GOING TO BE AN ISSUE IN THE FUTURE.

I SUGGEST UNDER THE MAJORITY'S DECISION, IT WILL STILL BE AN ISSUE BECAUSE THE APA HAS ALWAYS PROVIDED LONG EACH BEFORE THIS RFP, HAS ALWAYS PROVIDED THAT CHALLENGES TO THE SPECIFICATIONS OF AN RFP HAVE TO BE BROUGHT AT THE OUTSET OF THE PROCUREMENT PROCESS, NOT AT TEND. ALL THE AMENDMENTS DID JUSTICE ANSTEAD IS ADD THE WORDS INCLUDED. THOSE PARTICULAR SPECIFICATION THAT RESERVES THE RIGHT TO NEGOTIATE. BUT THE LANGUAGE WAS ALWAYS VERY BROAD THAT ANY PROTEST OF A SPECIFICATION OF THE LEGALITY, THE SPECIFICATION, WHICH IS EXACTLY WHAT HAPPENED HERE. GTECH SAID THE LOTTERY DID NOT HAVE THE RIGHT TO RESERVE NEGOTIATING RIGHT -- TO THE RIGHT TO NEGOTIATE MATERIAL TERMS. DIDN'T HAVE THE RIGHTS TO DO THAT. THAT APPEARED ON THE FACE OF THE RFP, THE LOTTERY WAS RESERVING THAT. THE APA HAS ALWAYS SAID THOSE TYPES OF CHALLENGES HAVE TO BE BROUGHT AT THE OUTSET OF THE PROCESS. AND THAT'S TO ELIMINATE EXACTLY THE TYPE OF DELAY AND UNCERTAINTY IN THE PROCUREMENT PROCESS THAT THE MAJORITY'S DECISION WILL HAVE FOR EVERY PROCUREMENT PROCESS INCLUDING THOSE GOING FORWARD, BECAUSE THEY HAVE ALLOWED THE CHALLENGE TO THE SPECIFICATION TO BE MADE NOT IN ACCORDANCE WITH THE APA, BUT RATHER AFTER THE CONTRACT.

HOW WAS THAT ISSUE BROUGHT TO THE FIRST DISTRICT'S ATTENTION? WAS THERE -- WAS THERE A MOTION TO DISMISS FOR CIRCUIT COURT FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES? WAS THIS A WAIVER ARGUMENT MADE?

ABSOLUTELY JUSTICE PARIENTE. IT WAS RAISED IN OUR AFFIRMATIVE DEFENSES. IT WAS SPECIFICALLY RAISED IN OPPOSITION TO GTECH'S MOTION FOR SUMMARY JUDGMENT THAT WAS IN FACT GRANTED AND THAT WENT PRIOR TO THE FIRST DCA. SO IT WAS CLEARLY RAISED AND PRESERVED BEFORE THE FIRST DCA AND THAT'S WHY IT WAS SPECIFICALLY ADDRESSED BY THE COURT AND PARTICULARLY BY JUSTICE ANSTEAD, WHO SAID THAT HE CONCLUDED THAT UNDER THE APA, THIS WAS EXACTLY THE TYPE OF CHALLENGE THAT HAD TO BE BROUGHT AT THE OUTSET SO THAT IF THERE WAS A QUESTION ABOUT THE INTERPRETATION OF THE SPECIFICATION, IT COULD BE CLEARED UP, THE OUTSET OF THE PROCESS NOT MANY YEARS LATER. THANK YOU, YOUR HONOR.

MR. BERANEK, ARE YOU GOING TO?

YES, SIR.

APPEAR ON BEHALF OF THE RESPONDENT.

MAY IT PLEASE THE COURT. I'M JOHN BERANEK. I'M HERE ON BEHALF OF GTECH. MR. MARTY SIPPLE WITH ME AT COUNSEL TABLE WAS TRIAL THAN COUNSEL AND ALSO COUNSEL IN THE FIRST DISTRICT COURT OF APPEAL. PASSED UPON. THAT IS THE QUESTION THAT'S INITIALLY RAISED AND WAS RAISED IN OUR MOTION TO DISMISS THIS ENTIRE CASE. THESE TWO CERTIFIED QUESTIONS WERE THE QUESTIONS THAT JUDGE KAHN TALKED ABOUT IN HIS DISSENT. THOSE TWO QUESTIONS WERE NOT PASSED UPON BY THE MAJORITY.

WELL LET ME POSE THE QUESTION THIS WAY. IF WE ANSWER THE FIRST QUESTION, FOR INSTANCE, IN FAVOR OF THE PETITIONERS, WOULDN'T THAT REALLY FORCE A QUASH OF THE MAJORITY DECISION AT THE FIRST DISTRICT LEVEL? IN OTHER WORDS, ANSWER TO THAT QUESTION IN FAVOR OF THE PETITIONERS WOULD INVALIDATE THE ANALYSIS OF THE REASONING OF THE FIRST DISTRICT MAJORITY OPINION, WOULD IT NOT?

JUSTICE ANSTEAD, I THOUGHT VERY CAREFULLY ABOUT THAT QUESTION BECAUSE KNOWING THAT I DON'T THINK THIS COURT HAS JURISDICTION AT ALL, AND I'D LIKE TO ARGUE A LITTLE MORE ABOUT THAT, BUT ANSWERING THAT QUESTION FIRST, IF THIS COURT WERE ANSWER BOTH THESE CERTIFIED QUESTIONS, IT WOULD NOT CHANGE THE MAJORITY OPINION OF THE FIRST

DISTRICT AT ALL. AND JUDGE MINOR, WHO WROTE THE MAJORITY OPINION SAID THAT THE DETERMINATIVE ISSUE CONCERNED THE REQUIREMENT OF A BEST METHOD DETERMINATION IN 8.7.2. GIN MINOR -- JUDGE MINOR ENFORCED 8.7.2. HE SAID THAT THE SECRETARY VIOLATED 8.7.2 BECAUSE IT REQUIRED HER TO FIRST ARRIVE AT THE CONCLUSION THAT THE PROPOSAL WOULD BE THE BEST METHOD OF OBTAINING THE SERVICES AND HARDWARE NEEDED. AND SINCE THE SECRETARY CONCLUDED THAT THIS PROPOSAL WAS NOT THE BEST METHOD, THEN THE 8.7.2 LANGUAGE, WHICH ALLOWED NEGOTIATIONS, WAS NEVER TRIGGERED. THAT'S WHAT JUDGE MINOR RULED. IT'S NOT, YOU KNOW, IT IS NOT EASY TO FOLLOW AND YOU HAVE TO LOOK CLOSELY AT JUDGE MINOR'S OPINION.

DOESN'T THAT IGNORE THE OTHER PROVISIONS THE AGENCY SAYS IT HAS SPECIFICALLY GRANTED TO IT UNDER THIS RFP AND THE AUTHORIZING STATUTES? IN OTHER WORDS, IF YOU DON'T BRING THAT INTO THE EQUATION, HAVE YOU DONE A COMPLETE ANALYSIS HERE OF THE ISSUES? CAN'T JUST IGNORE THE AUTHORITY THAT IS CLAIMED TO HAVE BEEN VESTED IN THE AGENCY HERE, CAN YOU, IN DOING AN ANALYSIS?

WELL, WE CERTAINLY DON'T SUGGEST YOU CAN IGNORE IT. HOWEVER, WE THINK THAT THE MAJORITY OPINION SPECIFICALLY ADDRESSED 8.7.2. AS A MATTER OF FACT, JUDGE KAHN CRITICIZES THE MAJORITY FOR NOT SAYING WHETHER 8.7.2 IS VALID OR INVALID. AND JUDGE MINOR SAYS THAT SINCE THE SECRETARY OBVIOUSLY DETERMINED THAT THIS PROPOSAL WAS AT THE TIME OF CONTRACTING, NOT THE BEST METHOD, THEREFORE THE SECRETARY DECIDED TO TOTALLY ABANDON THE RFP. COMPLETELY ABANDON IT AND JUST NEGOTIATE A NEW CONTRACT IN THE DARK. IN SECRET.

BUT WOULDN'T THAT ALWAYS BE, GO TO THE QUESTION OF THE BEST METHODS ON EVERY NEGOTIATING CONTRACT? WOULD THAT NOT THROW THE ENTIRE CONCEPT OF NEGOTIATED CONTRACT INTO QUESTION OR INVALIDITY IN EVERY CASE?

WELL JUSTICE LEWIS, CONCEIVABLY IT MIGHT, BUT THAT DOESN'T, E -- WE DON'T HAVE TO ANSWER THAT QUESTION IN THIS CASE AND WE WILL NEVER, THIS COURT WILL IN ALL LIKELIHOOD NEVER HAVE TO ANSWER IT IN VIEW OF THE BRAND NEW AMENDMENTS THAT SPECIFICALLY AUTHORIZE COMPETITIVE NEGOTIATION. YOU KNOW, THE LEGISLATURE FOR GOOD OR FOR BAD, HAS DECIDED THIS IS THE WAY IT CAN BE DONE. HOPEFULLY WE ARE GOING TO WRITE SOME NEW RULES AND THESE THINGS WILL BE OUT IN THE OPEN. BUT THIS COURT SHOULD REMEMBER THAT WHAT WE'RE DEALING WITH HERE IS A CONTRACT NEGOTIATED CONFIDENTIALLY BETWEEN THE LOTTERY AND THE BIDDER. WE ONLY KNOW ABOUT THE CONTRACT BECAUSE WE SENT THEM A PUBLIC RECORDS REQUEST. THIS IS GOVERNMENT BY PUBLIC RECORDS REQUEST. WE HAVE TO SEND THEM PUBLIC RECORDS REQUESTS EVERY OTHER DAY. THEY MAY HAVE WRITTEN A NEW CONTRACT YESTERDAY. IF THIS STUFF IS NOT OUT IN THE OPEN, I MEAN AS FAR AS WAIVING ANYTHING, AND JUSTICE LEWIS, I WILL TRY TO ANSWER YOUR QUESTION. I FEEL LIKE I HAVEN'T. THE EXPRESSION ON YOUR FACE TELLS ME I HAVEN'T.

NO, NO, I THINK YOU HAVE RESPONDED.

BUT THAT -- WE DIDN'T WAIVE ANYTHING BY FAILING TO OBJECT TO IT IN THE FIRST 72 HOURS AFTER WE RECEIVED THIS RFP OVER A HUNDRED PAGES, SINGLE SPACED. WE HAD NO IDEA THAT FOUR YEARS LATER THE LOTTERY WAS GOING TO NEGOTIATE A TOTALLY NEW CONTRACT IN THE DARK. AND I NEED --.

WELL WHY DIDN'T YOU HAVE AN OPPORTUNITY THEN, IF THEY SPECIFICALLY SAID THAT WHAT WE INTEND TO DO NOW IS TO ENTER INTO NEGOTIATIONS, AND IF ULTIMATELY YOUR POSITION IS, YOU DON'T HAVE ANY RIGHTS TO ENTER INTO NEGOTIATIONS, THAT IS, IT'S THE RFP AND THE RESPONSE TO THAT THAT IS GOING TO CONTROL THE DEAL HERE. THERE CAN BE NO SEPARATE NEGOTIATIONS NOW OF A SEPARATE CONTRACT. HAVEN'T YOU BEEN PUT ON EXPLICIT NOTICE BY

THOSE WORDS THAT THEY ARE NOTIFYING YOU THAT THEY'RE GOING TO NOW ENTER INTO NEGOTIATION, NOT THAT THEY'RE ACCEPTING PROPOSAL BY YOUR COMPETITIVE OPPONENT.

JUSTICE ANSTEAD, THE FINAL ORDER, WHICH IS THE NOTICE OF CONTRACT AWARD, IS THE FINAL ORDER BY THE SECRETARY. IT SAID, BEGINNING AT PAGE 1026 OF THE RECORD, WHICH IS AN APPENDIX BEFORE THIS COURT AND THE LAST PAGE OF IT SAYS THIS. THAT THE CONTRACTING RFP 9596001 A AWARDED TO AWI AND THE PETITIONERS AMENDED FORMAL WRITTEN PROTEST IS DISMISSED. THAT'S WHAT THE CONTRACT AWARD SAYS. THAT THE CONTRACT IN RFP 9596001 IS AWARDED TO AWI. THEY AWARDED THE CONTRACT IN THE RFP. NOW, THERE IS CLEARLY THE WORD NEGOTIATION IS IN THERE NUMEROUS PLACES. WHAT THE WORD NEGOTIATION MEANT WAS THAT THE LANGUAGE OF THE WRITTEN CONTRACT WAS OF COURSE SUBJECT TO DRAFTING AND NEGOTIATION. THAT THE IMPLEMENTATION OF THE CONTRACT IN THE RFP, THE LANGUAGE IN THE CONTRACT WAS SUBJECT TO NEGOTIATION. AND THAT MEANS THEY COULD OF COURSE DECIDED WHO IS GOING TO GET WHICH PARKING PLACE, WHAT DAY DELIVERIES ARE GOING TO BE MADE. ALL THE MANY, MANY FINE POINTS.

BUT AREN'T THOSE, YOU CLASSIFY THOSE AS FINE POINTS, IS THAT INCONSISTENT WITH THE LANGUAGE OF THE PROPOSAL THAT INDICATES THAT IF NEGOTIATIONS FAILED, WITH THE FIRST SELECTED BIDDER, THAT THEY'LL TURN THEN TO THE REMAINING BIDDER? SO ISN'T THE IMPLICATION FROM THAT THAT CLEARLY THESE NEGOTIATIONS ARE GOING TO BE MORE THAN JUST ABOUT --.

ABSOLUTELY JUSTICE ANSTEAD. AND IF THEY HAD GOTTEN TO THE SECOND BIDDER, AWI, THEY WOULD HAVE STARTED WITH THE MANDATORY REQUIREMENTS OF THE RFP. AND I THINK ITS, WE NEED TO TALK ABOUT --.

WOULD YOU COME BACK THEN IN TERMS OF THE POLICY THING AND THAT IS, THAT, WHETHER OR NOT THIS REALLY WAS A UNIQUE TREATMENT OF THE LOTTERY, THAT IS OF THIS PARTICULAR AGENCY OF GOVERNMENT, IN GIVING THEM BROADER AUTHORITY HERE, THIS ISSUE, IN OTHER WORDS, WOULD YOU ADDRESS THIS ISSUE ABOUT WHETHER OR NOT THERE WAS AN INTENT HERE TO TREAT THIS PARTICULAR GOVERNMENT AGENCY AS A PRIVATE BUSINESS AND SAY, LOOK, WE'RE TAKING THE SHACKLES OFF OF YOU. YOU'RE NOT JUST LIMITED TO EVALUATING BIDS AND THEN YOU'RE STUCK WITH THIS PARTICULAR BID AND THAT, WE'RE GIVING YOU MUCH GREATER FLEXIBILITY IN THE ANALOGY BEING -- WOULD YOU ADDRESS THAT?

YES, SIR, ABSOLUTELY. THE LOTTERY HAS A RULE ABOUT COMPETITIVE NEGOTIATION. THE LOTTERY HAS A RULE AND THEY'VE CITED IT TO THIS COURT. GUESS WHAT THEY DIDN'T CITE IN THE RFP? THEIR OWN COMPETITIVE NEGOTIATION RULE. NEVER MENTIONED. THAT RULE SAYS THAT WHEN YOU SEND OUT A REQUEST FOR PROPOSAL FOR COMPETITIVE NEGOTIATION, YOU HAVE TO ADVISE THE PARTIES THAT YOU'RE ENGAGED IN COMPETITIVE NEGOTIATION. THEY DIDN'T SAY THAT HERE. THEY DIDN'T CITE THE RULE. THEY ALSO DIDN'T FOLLOW ANY OF THE PROVISIONS OF THEIR OWN COMPETITIVE NEGOTIATION RULE. IT REQUIRES THEM TO SELECT AT LEAST THREE COMPETITIVE BIDDERS. OF COURSE HERE THERE WERE ONLY TWO, BUT THEY COULD HAVE SELECTED THE TWO. THEN THEY HAVE TO UNDER THEIR RULE, NOTIFY THEM THAT THEY'RE FINALISTS, INVITE THEM TO MAKE A PRESENTATION. NONE OF THAT OCCURRED. THEY DIDN'T DO ANY OF THIS. THEY DID NOT FOLLOW THEIR OWN COMPETITIVE NEGOTIATION RULE AND THE REASON WHY IS THEY WEREN'T COMPETITIVELY NEGOTIATING. THIS IS A -- THIS IS A REVISIONIST, RATIONALIZATION WHICH THEY CAME UP WITH AFTER WE SUED THEM. THAT'S EXACTLY WHAT IT IS. THEY NEVER COMPETITIVELY NEGOTIATED THIS. IT'S AN AFTER THE FACT EXPLANATION. COMPETITION IS WHAT 287 IS ALL ABOUT. AND COMPETITION WILL BE ABSOLUTELY DESTROYED IF YOU ALLOW THIS KIND OF THING TO GO ON. EVEN THEY SAY THAT THE LOTTERY HAD TO AT LEAST NEGOTIATE A CONTRACT THAT WOULD BE COMPETITIVE. WELL WHEN THIS LOTTERY NEGOTIATED THIS CONTRACT IN 1999, HOW DID THEY KNOW IT WAS COMPETITIVE? THEY DIDN'T INVITE THE COMPETITOR. HOW DID THOUGH KNOW WHAT ELSE THEY

COULD HAVE GOTTEN?

COULD YOU RESPOND TO THE ARGUMENT THOUGH THAT THE ONLY REASON THAT THEY WERE NEGOTIATING THIS CONTRACT IN 1999 WAS BECAUSE FROM 1995 OR 6, TILL THEN, THEY WERE INVOLVED IN THIS, IN EITHER ADMINISTRATIVE OR COURT PROCEEDINGS AND THAT THEY WEREN'T ABLE TO NEGOTIATE THE CONTRACT EARLIER.

YES, MA'AM. THIS CONTRACT -- THIS RFP WAS ISSUED IN 95. IT WAS SUPPOSED TO BE AT THAT TIME A FIVE YEAR CONTRACT. AWI HAS NOW HAD THIS FIVE YEAR CONTRACT FOR SIX YEARS. AS OF NOW. THERE HAS NEVER BEEN A DELAY IN ANY OF THE APPELLATE PROCEEDINGS BECAUSE EVERY TIME THERE HAS BEEN AN APPEAL, THEY GET AN AUTOMATIC STAY. WE ASK FOR A STAY, AND IT'S DENIED.

WELL IS THE CONTRACT, IT IS A FIVE YEAR CONTRACT AND BEEN IN EFFECT NOW FOR SIX YEARS, WHAT'S THE PRACTICAL EFFECT THEN OF UPHOLDING THE FIRST DISTRICT'S OPINION? WHAT HAPPENS?

THE FIRST DISTRICT HAS AFFIRMED JUDGE SALTZ'S DECISION WHICH SAYS THE CONTRACT IS VOID.

THEN WHAT HAPPENS?

IT WILL HAVE TO BE RE-BID.

SO -- UNDER WHAT YOU HAVE JUST SAID, IT IS GOING TO HAVE TO BE RE-BID ANYWAY BECAUSE THE FIVE YEARS IS UP.

HOWEVER, -- NO, JUSTICE PARIENTE, THE PROBLEM WE'RE FACING NOW IS ACCORDING TO THEM, BECAUSE OF 8.7.2, THEY CAN GO ON NEGOTIATING FOREVER. AND THEY HAVE. THEY HAVE HAD NINE INTERIM CONTRACTS SO FAR. EVERY TIME THEY GET CLOSE -- THEY RENEGOTIATE IT AND EXTEND THE TERM. THIS ONE EXTENDS THREE AND A HALF YEARS BEYOND THE ORIGINAL TERM NOW.

SO IN LOOKING AT THE DIFFERENCE BETWEEN SAYING THAT THIS CONTRACT IS NOT RESEMBLE THE RFP AT ALL, COULD YOU GIVE US THE HIGHLIGHT OF THE MATERIAL VARIATIONS THAT BASICALLY MAKE THIS RFP --.

I WAS HOPING, I WAS TRYING TO GET TO THAT. THE BIG BANG IMPLEMENTATION WAS THE HEART AND SOUL OF THIS CONTRACT. WAS THE HEART AND SOUL OF THIS RFP. NOW YOU GOT TO UNDERSTAND THAT ALL THESE TERMINALS SITTING IN FILLING STATIONS ARE NOT OWNED BY THE FLORIDA LOTTERY. THEY'RE OWNED BY THE VENDOR. AND THEY WANTED A WHOLE NEW SYSTEM AND THE VENDORS HAD TO AGREE TO DO IT IN SIX MONTHS FROM THE NOTICE OF THE AWARD. AND THAT WAS THE BIG BANG. THEY HAD TO DO IT WITHIN SIX MONTHS. AND AWI PROMISED AND WROTE A PROPOSAL THAT THEY'D DO IT IN SIX MONTHS. SIX MONTHS WENT BY AND THEY HADN'T DONE IT. THEY DID NOT DO IT. THEY FAILED.

MR. BERANEK, IF YOU'RE SPLITTING YOUR TIME, YOU NEED TO BE --.

I'LL JUST GO AHEAD. THEY FAILED. THEY DIDN'T CARRY OUT THE BIG BANG, SO WHAT DID THE LOTTERY DO? IN 1999, THEY LET THEM OFF THE HOOK. AND THEY GAVE THEM A CONTRACT THAT ADOPTED A PHASE IN IMPLEMENTATION WHICH WASN'T TO BE COMPLETED UNTIL 33 MONTHS AFTER THE NOTICE OF THE AWARD. WHEN AWI PUT IN ITS PROPOSAL, IT FIGURED OUT HOW MUCH MONEY IT WAS GOING TO COST IT TO PUT A PROGRAM TOGETHER AND BUY THE MATERIALS AND BUY THE LICENSES AND DO EVERYTHING ELSE AND OVER A THOUSAND PAGE PROPOSAL WHICH COST THEM OVER A MILLION, TO COMPLY WITH THE BIG BANG. SUDDENLY THE BIG BANG WENT

AWAY. AND INDEED WHAT WOULD HAPPEN IF AWI DIDN'T COMPLY WITH THE BIG BANG? THEY'D HAVE TO PAY LIQUIDATED DAMAGES UNDER THE RFP. BUT OF COURSE THE LOTTERY NEGOTIATED THE LIQUIDATED DAMAGES OUT OF EXISTENCE. THE LIQUIDATED DAMAGES STARTED AT A MILLION A DAY AND WENT UP TO AT LEAST SIX MILLION A DAY. THE LOTTERY IN THE NEW CONTRACT REDUCED IT BY, TO ONE ONE-HUNDREDTHS OF THE INITIAL AMOUNT OF LIQUIDATED DAMAGES. THE PRICE WAS INCREASED. THEY GAVE THEM INCENTIVE COMPENSATION. THE TERM OF THE CONTRACT WAS INCREASED. THE INITIAL CONTRACT WOULD HAVE EXPIRED ON JUNE 30. THE NEW CONTRACT EXTENDS THREE AND A HALF YEARS BEYOND THAT DATE TO DECEMBER 31, 04. THE INITIAL RFP REQUIRED A TERMINATION PROVISION WHERE THE LOTTERY COULD TERMINATE THE CONTRACT. THAT'S BEEN REMOVED. IF AWI HAD WRITTEN THIS PROPOSAL AND GIVEN IT TO THE LOTTERY, IF AWI HAD WRITTEN THIS KIND OF PROPOSAL AND GIVEN IT TO THE LOTTERY, THEY WOULD HAVE LAUGHED THEM OUT THE DOOR. IT WAS AN ABSOLUTE NON-COMPLIANCE. THE RFP SAYS SUCH A PROPOSAL WOULD NOT HAVE EVEN BEEN ACCEPTED.

DO YOU AGREE THAT UNDER THE NEW LEGISLATION THAT THIS IS EXACTLY WHAT CAN BE DONE NOW?

JUSTICE PARIENTE, I HOPE NOT. THAT IS WHAT JUST THE STATUTE SEEMS TO SAY. THAT THEY CAN ISSUE AN INVITATION TO NEGOTIATE OR THEY CAN ISSUE A REQUEST FOR QUOTE TO AN EXISTING VENDOR. WE DON'T KNOW WHAT THE RULES ARE GOING TO SAY ON ALL THIS YET. HOPEFULLY THE ADMINISTRATIVE RULES THAT ARE PROMULGATED WHICH SAY, WILL SHED SOME SUNLIGHT ON IT, YOU KNOW, HOPEFULLY THIS WILL HAVE TO BE PUBLIC, NOT PRIVATE. AND HOPEFULLY THEY'LL HAVE TO COMPLY WITH THE RFP. AND.

WILL THERE STILL BE RFP'S? YES, THERE STILL ARE. NOW UNDER 287 THERE ARE RFP'S, REQUESTS FOR PROPOSAL, INVITATIONS TO BID, ITB'S, RFQ'S, REQUESTS FOR QUOTES. AND ITN'S, INVITATIONS TO NEGOTIATE. SO THEY CAME UP WITH TWO NEW ONES.

BUT YOU'RE SAYING -- THAT IS DISTINCTION THEN, WE DON'T KNOW, BUT AN INVITATION TO NEGOTIATE WOULD BE SEPARATE.

OH, ABSOLUTELY, YES. AND THAT'S -- YOU KNOW, IT'S NOT IN THE RECORD BUT I'M SURE LOTTERY'S COUNSEL WILL AGREE. OF COURSE THEY'RE NOW USING INVITATIONS TO NEGOTIATE. OF COURSE. BUT THEY DIDN'T ON THIS ONE. THIS ONE WAS NOT COMPETITIVE NEGOTIATION. AND YOU KNOW, PEOPLE HAVE JOKED JOKINGLY SAID, WELL GEE WHIZ, YOU HAVE WON THAT CASE. AND I SAY YES, THE FIVE YEAR CONTRACT THEY HAVE HAD FOR SIX YEARS AND WE ARE STILL IN COURT. AND WHAT IS THE REMEDY GOING TO BE? YOU KNOW, WE ARE NOT TRYING TO BRING THE LOTTERY DOWN. GTECH, LARGEST LOTTERY COMPANY IN THE WORLD WANTS THE LOTTERY TO CONTINUE. WE'RE NOT TRYING TO TAKE MONEY AWAY FROM SCHOOL CHILDREN. WE WANT THIS LOTTERY TO CONTINUE AND WE HAVE NEVER DONE ANYTHING TO TRY AND STOP IT. WE WANT IT TO CONTINUE. WE WANT THIS CONTRACT TO BE RE-BID. ALL WE WANT, AND EVEN IF THEY GO TO AN INVITATION TO NEGOTIATE, WE BELIEVE THAT THE CURRENT SECRETARY OF THE LOTTERY WILL BE FAIR. HE'LL GIVE US AN EQUAL CHANCE TO GO IN AND NEGOTIATE. BUT WE DIDN'T HAVE THAT CHANCE. THAT'S THE CHANCE WE LOST. THE CONTRACT THAT WAS BID, WE NEVER HAD A CHANCE AT. WE DIDN'T EVEN KNOW WHAT IT WAS. WE ONLY SAW IT BECAUSE WE MADE A PUBLIC RECORDS REQUEST AND GOT IT. THERE IS MUCH, MUCH MORE I SHOULD SAY, BUT THANK YOU. AND JUSTICE ANSTEAD, YOU'RE LOOKING AT ME LIKE I STILL HAVEN'T ANSWERED YOUR QUESTION. AND YOU SEEM -- IF I CAN UNDERSTAND YOUR QUESTION, YOU SAY THAT 8.7.2 CONTAINS THE WORD NEGOTIATION. AND DOESN'T THAT OPEN THE DOOR VERY, VERY WIDE? THE ANSWER I THINK IS ONE OF FUNDAMENTAL FAIRNESS. NO, IT DOESN'T. IT OPENS THE DOOR TO NEGOTIATIONS WITHIN AT LEAST THE GENERAL PARAMETERS OF THE RFP. NOT FOR SOME TOTALLY NEW THING. AND WE DIDN'T CAUSE MUCH OF THE DELAY AND SOME OF THE DELAY WAS BECAUSE WE FILED ADMINISTRATIVE PROCEEDINGS IN WHICH WE WON, AS JUDGE MINOR

POINTS OUT.

THANK YOU MR. BERANEK. YOUR TIME IS UP.

REBUTTAL?

LET ME ASK ONE QUESTION. HOW FAR COULD LOTTERY GO IN RENEGOTIATING TO EXTEND THE TERMS OF AGREEMENT? EXTEND IT INDEFINITELY AS IS SUGGESTED?

JUSTICE SHAW, I'M GLAD YOU ASKED THAT QUESTION. IT ALSO ADDRESSES THE ISSUE OF WHETHER THE RFP IS ANYWHERE, IN ANY WAY ILLUSORY. THERE ARE IMPORTANT LIMITATIONS ON THE AUTHORITY TO NEGOTIATE HERE THAT MAKES THE RFP ANYTHING BUT ILLUSORY. FIRST OF ALL, YOU HAVE THE OPTION TO SIMPLY, AS WAS SAID EARLIER, YOU HAVE THE OPTION TO SIMPLY ACCEPT ALL THE PROPOSALS AS IS WITH NO CHANGE AT ALL. BUT IF YOU DECIDED THAT THE PROPOSAL WASN'T EXACTLY WHAT YOU WANTED OR BECAUSE OF THE PASSAGE OF TIME OR CHANGED CIRCUMSTANCES, YOU COULD NEGOTIATE. NOW WHAT THE SPECIFICATION SAYS IS YOU CAN NEGOTIATE, BUT ONLY AS TO CONDITIONS AND PRICE THAT YOU DEEM TO BE FAIR, COMPETITIVE AND REASONABLE. THAT IS AN APPROPRIATE STANDARD TO BE USED AND THAT RESTRAINS NEGOTIATION. AND IN FACT IT IS A STANDARD THAT THE LEGISLATURE ITSELF HAS USED IN 287055 IN DESCRIBING A SIMILAR PROCESS AND IT IS A STANDARD SET FORTH IN THE LOTTERY'S RULE. AND IF THERE IS ANY IMPROPRIETY IN CONNECTION WITH THOSE NEGOTIATIONS, THAT IN FAIRNESS COMPETITIVE AND REASONABLENESS CAN BE CHALLENGED. IT CAN BE CHALLENGED IF THERE IS FRAUD. IT CAN BE CHALLENGED IF THERE IS SOME SORT OF MISCONDUCT. THOSE ISSUES CAN BE RAISED. IT IS CLEARLY A MEANINGFUL LIMITATION.

THAT'S A PRETTY HIGH BAR, IT SEEMS TO ME, THAT IS PLACED THERE. IF LOTTERY IS SAYING THAT IN ORDER TO GET WHAT'S BEST FOR LOTTERY IN THE STATE OF FLORIDA, WE NEED TO DO X AND X AND EXTEND THE TERMS OF THIS CONTRACT IN ORDER TO DO IT. THAT'S PRETTY HARD TO ATTACK.

BUT THE NATURE OF THIS PRODUCT, THE PROJECT THAT WE WERE REQUESTING, THE GAMING SERVICES AND SYSTEM FOR THE ENTIRE STATE OF FLORIDA, WAS NOT SOMETHING THAT COULD BE SET DOWN WITH PRECISION. THE RFP DID NOT SET IT DOWN WITH PRECISION. IT ISSUED AND RFP IN PART BECAUSE IT COULD NOT DEFINE PRECISELY WHAT IT WAS. IF YOU WILL LOOK AT THE DEFINITION OF AN RFP, THAT'S WHAT AN RFP IS. IT IS REQUESTING PROPOSERS FOR SOLUTIONS. IT IS DIFFERENT THAN A COMPETITIVE SEALED BID.

COUNSEL, YOUR OPPOSING COUNSEL SUGGESTS YOU DID NOT FOLLOW ALL THE RULES AND REGULATIONS, YOUR OWN REGULATIONS WITH REGARD TO THE NEGOTIATION PROCESS. HOW DO YOU RESPOND TO THOSE CHARGES?

I HEARD GTECH'S ARGUMENT THAT THEY DID NOT KNOW THAT WE INTENDED TO FOLLOW OUR RULE AND BY THE WAY, I BELIEVE THEY CONCEDE THAT OUR RULE ALLOWS FOR THE SORT OF PROCESS THAT WE FOLLOWED IN THIS CASE.

I UNDERSTAND THE ARGUMENT A LITTLE DIFFERENTLY. IS THAT YOU MAY HAVE A RULE BUT YOU DID NOT IMPLEMENT IT OR USE IT OR FOLLOW IT IN THIS CASE.

I UNDERSTAND TO BE, THAT TO BE THE ARGUMENT AS WELL. BUT I NOTE THAT THEY SAY THAT OUR RULE ALLOWS FOR THE TYPE OF PROCEDURE THAT WE ACTUALLY FILED IN THIS CASE. THEY SAY OUR RFP DID NOT INTEND TO FOLLOW THE RULE. I DISAGREE. THE RULE WAS LARGELY INCORPORATED INTO THE RFP. HOW COULD YOU NOT KNOW THAT A RULE THAT BASICALLY INCORPORATES THE SAME PROCESS DID NOT INTEND TO FOLLOW THE RULE? MOREOVER, THE ALLEGED DIFFERENCES BETWEEN WHAT THE RFP SAID AND WHAT THE RULE SAID WERE MINOR IN NATURE. FOR INSTANCE, THEY SAY THERE WAS NO REQUIREMENT IN THE RFP TO MAKE A

PRESENTATION TO THE EVALUATION COMMITTEE. THAT'S WRONG. I WOULD LIKE TO DIRECT THE COURT'S ATTENTION TO GTECH APPENDIX 712 WHERE THERE IS A PROVISION FOR SUCH A PRESENTATION. THEY SAY THAT THE COURT COULD NOT PICK TWO FINALS BECAUSE ONLY TWO VENDORS SUBMITTED BIDS. WELL OF COURSE WE COULDN'T PICK TWO FINALISTS BECAUSE ONLY TWO VENDORS SUBMITTED PROPOSALS. AND I SUBMIT THOSE DEVIATIONS ARE MINOR.

THANK YOU COUNSEL.

THANK YOU YOUR HONORS.

THANK YOU COUNSEL FOR YOUR ASSISTANCE IN THIS CASE.