

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GREAT AMERICAN FINANCIAL)
RESOURCES, INC.,)
)
Petitioner,)
)
vs.) Case No. 03-0614BID
)
THE SCHOOL BOARD OF BROWARD)
COUNTY,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings, conducted the final hearing in Fort Lauderdale, Florida, on April 23-25, 2003.

APPEARANCES

For Petitioner: William G. Salim, Jr.
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Moskowitz, Mandell, Salim & Simowitz, P.A.
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For Respondent: Robert Paul Vignola
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Office of the School Board Attorney
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STATEMENT OF THE ISSUE

The issue is whether, in connection with a procurement of vendors of tax-sheltered annuity programs for Respondent's

employees, Respondent's failure to select Petitioner's proposal instead of, or in addition to, the proposals of ten offerors that were accepted is contrary to the agency's governing statutes, the agency's rules or policies, or the solicitation specifications, in violation of Section 120.57(3)(f), Florida Statutes.

PRELIMINARY STATEMENT

By Request for Proposals 23-089V dated October 7, 2002, Respondent requested proposals from vendors of products for a tax-sheltered annuity program for Respondent's employees. Offerors submitted their proposals by October 20, 2002. Respondent's Insurance Advisory Committee evaluated the proposals and negotiated contracts with the ten offerors whose proposals scored the highest. The next step in the procurement process would have been for the Insurance Advisory Committee to recommend these offerors to the Superintendent for recommendation, in turn, to the School Board. However, prior to the recommendation of the Insurance Advisory Committee to the Superintendent, Petitioner, whose proposal had not been selected by the Insurance Advisory Committee, filed a notice of intent to protest and formal written protest, pursuant to provisions of the Request for Proposals.

At the hearing, Petitioner called 11 witnesses, and Respondent called three witnesses. The following exhibits were

admitted into evidence: Joint Exhibits 1-42 and 44-59, Petitioner Exhibits 1-14, 16-91, 94, and 97, and Respondent Exhibits 1-5, 12-15, and 17-18.

The court reporter filed the transcript on May 29, 2003. The parties filed their proposed recommended orders on July 22, 2003.

FINDINGS OF FACT

1. On October 7, 2002, Respondent issued RFP 23-089V--Tax Sheltered Annuity Program for School Board Employees (RFP). The purpose of the procurement is to select multiple vendors to sell tax-sheltered annuities to Respondent's 26,000 fulltime employees through a payroll-deduction plan. In general, Respondent sought to improve its existing tax-sheltered annuity program that it offered its employees by selecting vendors whose products would improve the quality of investment products, decrease expenses, establish service standards, increase participation, improve the dissemination of program information, maintain consistent communications, and ensure compliance with the applicable provisions of the Internal Revenue Code of 1986, as amended (IRC).

2. Under the existing tax-sheltered annuity program, 31 percent of Respondent's eligible employees make payroll deductions totalling about \$36 million annually to 21 vendors. If Respondent does not select an existing vendor in the

procurement that is the subject of this case, the vendor's enrollment will be frozen, and the vendor may not enroll new members.

3. RFP Section 2.0 seeks annuities and mutual funds, under IRC Sections 403(b)(1) and 403(b)(7), respectively (collectively, TSAs), but not life insurance unless directly connected to an annuity. Section 2.0 states that Respondent will not contract with "independent agents or brokers," but will contract "directly with one or more financial organizations independently or . . . with multiple financial organizations from the same vendor(s)." Section 2.0 explains that it will be the "carrier's/company's responsibility to appoint, supervise, and maintain properly licensed and trained agents to offer these products." Respondent imposed this requirement on vendors so that they would be directly responsible for the persons who undertook the marketing of TSAs to Respondent's employees.

4. RFP Section 1.0 includes a certification from the offeror. Part of the Required Response Form, the certification states:

I hereby certify that: I am submitting the following information as my firm's (proposer) proposal and am authorized by proposer to do so; proposer agrees to complete and unconditional acceptance of the contents of Pages 1 through 19 inclusive of this Request for Proposals, and all appendices and the contents of any Addenda released hereto; proposer agrees to be bound

to any and all specifications, terms and conditions contained in the Request for Proposals, and any released Addenda and understand [sic] that the following are requirements of this RFP and failure to comply will result in disqualification of proposal submitted; proposer has not divulged, discussed, or compared the proposal with other proposers and has not colluded with any other proposer or party to any other proposal; proposer acknowledges that all information contained herein is part of the public domain as defined by the State of Florida Sunshine and Public Records Laws; all responses, data and information contained in this proposal are true and accurate.

5. RFP Section 3.4 warns: "Any modifications or alterations to this form shall not be accepted and proposal will be rejected. The enclosed original Required Response Form will be the only acceptable form."

6. RFP Section 3.7 sets forth the "minimum eligibility" criteria, which an offeror must meet "[i]n order to be considered for award" The criteria are:

- 3.7.1 Insurance carriers must be licensed in the State of Florida and provide a copy of your license and/or certificate.
- 3.7.2 Insurance carriers must have, and maintain, a minimum size category of VI and a financial rating of A- from A.M. Best.
- 3.7.3 If proposer is proposing a fixed or variable annuity program, the proposer must be licensed as a life insurance carrier within the State of Florida.
- 3.7.4 If the proposer is not an insurance carrier, it shall represent and

warrant that it is a broker-dealer registered with the U.S. Securities and Exchange Commission under the Securities Exchange Act of 1934 and with any applicable State securities commission, and also is a member of the National Association of Securities Dealers, Inc.

3.7.5 Proposer must be a direct provider of the product(s) offered versus a marketing unit for the product(s) offered.

7. RFP Section 3.8 requires each offeror to complete the 14-page questionnaire attached as Attachment A. Section 3.8 states: "If you are unable to answer a question, indicate why. If you are unable or unwilling to disclose particular information asked in a question, indicate why."

8. Question 3 of the "Company Information" part of the questionnaire asks: "How long has your company (not parent company) been licensed to do business?"

9. Question 4 of the "Company Information" part of the questionnaire asks: "How long has your company been licensed to do business in the State of Florida?"

10. Question 5 of the "Company Information" part of the questionnaire asks: "In how many states is your company licensed to do business?"

11. Question 6 of the "Company Information" part of the questionnaire asks: "Do you currently have all the necessary licenses and registration to perform the activities proposed?"

12. Question 7 of the "Company Information" part of the questionnaire asks: "What is your company's (not parent company) total assets under management for 403(b) Programs including the number of plans and number of participants as of December 31, 2001?"

13. Question 8 of the "Company Information" part of the questionnaire asks: "If applicable, what was your company's ratings during each of the most recent three years?" This question contains a matrix with the years 2000-2002 and four sources of ratings: "A.M. Best," "Moody's," "S&P," and "Duff & Phelps."

14. Question 13 of the "Company Information" part of the questionnaire asks: "Provide the name, address, and telephone number of three public entities (preferably public schools) 403(b) clients we may contact as references."

15. Questions 1 and 2 of the "Contract Overview" part of the questionnaire ask the offeror to identify its investment options.

16. Questions 7-19 of the "Contract Overview" part of the questionnaire ask the offeror detailed questions about the expenses associated with its TSA programs.

17. Question 16 of the "Variable Annuity" part of the questionnaire asks the offeror to identify each variable-annuity fund, by name, that it offers participants. Question 19 of this

part asks for the rate of return for each investment option for the period ending June 30, 2002. Question 21 of the "Mutual Fund" part of the questionnaire asks the offeror to identify each mutual fund, by name, that it offers participants.

Question 25 of this part asks for the total cumulative rate of return for each investment option for the period ending June 30, 2002. Question 26 of this part asks for the Morningstar Rating for each investment option, as of June 30, 2002, if applicable.

18. Question 29 of the "Contract Overview" part of the questionnaire asks if the offeror will provide a toll-free and local number for participants to conduct specified financial transactions, including changing investment mixes and beneficiaries. Question 30 of the "Contract Overview" part of the questionnaire asks the same question regarding internet access for participants.

19. Question 22 of the "Administration" part of the questionnaire asks: "Do you offer electronic investment advice to program participants? . . ."

20. Question 23 of the "Administration" part of the questionnaire asks: "Do you offer an asset allocation program? . . ."

21. Question 10 of the "Enrollment Procedures and Services" part of the questionnaire asks: "Do you provide any

communications to participants on a regular basis (e.g., newsletters)? Please provide examples."

22. Question 11 of the "Enrollment Procedures and Services" part of the questionnaire asks: "How will you restrict your representatives from selling other products to [Respondent's] employees?"

23. Question 12 of the "Enrollment Procedures and Services" part of the questionnaire asks: "Has your organization had a SAS 70 internal controls review? Please attach."

24. RFP Section 3.10 states that the "following services are requested by" Respondent and asks each offeror to "[c]learly describe how [it] can accomplish each of the following[.]" Section 3.10.1 provides a matrix with three columns: "Yes, Can Comply," "Yes, Can Comply But With Deviations," and "No, Cannot Comply." The rows describe specific services, such as providing customer service telephone numbers that are local calls, a toll-free telephone number for employees who reside outside the local area codes, and videotapes or websites educating participants about TSAs.

25. RFP Section 3.11 requires each offeror to complete Attachment C, which is a Financial Response form. This document requires each proposal to list the "annual participant account charge," "wrap fees," "mortality, expense, [and] administrative

charges," "total fund management or separate account charges for each fund offered," "front loads," "CDSC or surrender charges & terms," "other fees & expenses," and "4th quarter interest rate." Section 3.11 also requires each offeror to calculate the "cumulative account balance," "average compound annual net rate of return," and "cash surrender value" for a specified sum over a specified period.

26. RFP Section 3.12 requires each offeror to provide the following information to receive points for minority or women business enterprises:

3.12.1 Proposers must provide information regarding diversity of proposer's company. Complete and submit Attachment F. Proposer must provide information regarding diversity of the proposer's local . . . agents and/or representatives. Complete and submit Attachment G.

Proposer must provide information and/or documentation of the Proposing Company's outreach program for employment and/or contracting of local agents.

3.12.2 Proposer shall submit information of its involvement in the minority community. Such evidence may include, but not be limited to, minority sponsored events, and purchases made from minority companies funds targeting minority students, financial considerations and/or providing other corporate resources for minority community projects.

27. Attachment G provides a chart to be completed by the offeror. The chart lists "Broker/Agents" and "% of Total Workforce" and requests the following data for each category: total, non-Hispanic white males, non-Hispanic white females, non-Hispanic black males, non-Hispanic black females, Hispanic males, Hispanic females, Asian males, Asian females, American Indian/Alaskan Native males, and American Indian/Alaskan Native females.

28. RFP Section 5.0 requires offerors to submit their proposals by 2:00 p.m. on November 20, 2002. The events calendar states that, on January 13, 2003, the Evaluation Committee will review proposals and recommends awards, and, on January 21, 2003, Respondent will post the recommendation.

29. RFP Section 6.1 states:

The Superintendent's Insurance Advisory Committee (hereinafter referred to as "Committee"), [Respondent], or both reserve the right to ask questions of a clarifying nature once proposals have been opened, interview any or all proposers that respond to the RFP, or make their recommendations based solely on the information contained in the proposals submitted.

30. RFP Section 6.2 states:

The Committee shall evaluate all proposals received, which meet or exceed Section 3.7, Minimum Eligibility Requirements. The Committee reserves the right to ask questions of a clarifying nature and interview any or all proposers that meet or exceed Section 3.7.

31. RFP Section 6.3 states that the Insurance Advisory Committee (Committee) shall evaluate "[p]roposals that meet or exceed Section 3.7," pursuant to the following criteria (with maximum points indicated in parentheses): "Experience and Qualifications" (30 points), "Scope of Services Provided" (30 points), "Minority/Women Business Enterprise--Diversity of Proposer's Company" (5 points), "Documentation of the Proposing Company's Minority/Women Business Enterprise Outreach Programs" (5 points), and "Cost of Services Provided" (30 points).

32. RFP 6.3 warns: "Except for those requirements stated in Section 3.7 and Section 9.0, the failure to respond, provide detailed information or to provide requested proposal elements may result in the reduction of points in the evaluation process."

33. RFP Section 6.4 states:

Based upon the results of Section 6.3, the Committee, at its sole discretion, may: interview; recommend award to the top ranked proposer; may recommend award to more than one top ranked proposer; may short-list the top ranked proposers (short-list number to be determined by the Committee) for further consideration or, may reject all proposals received.

34. RFP Section 6.5 states:

In the event that the Committee chooses to short-list proposers, the list of short-listed proposers may be further considered by the Committee, [Respondent], or both. The Committee, [Respondent], or both may re-

interview the short-listed proposers in order to make an award recommendation (by the Committee) or an award by [Respondent]. During the interview process, no submissions made, after the proposal due date, amending or supplementing the proposal shall be considered.

35. RFP Section 6.6 states:

In the event that an Agreement between the Committee, [Respondent] or both, and the selected proposer(s) is deemed necessary, at the sole discretion of the Committee, [Respondent] or both, the Committee will begin negotiations with the selected proposer(s). The Committee reserves the right to negotiate any term, condition, specification or price with the selected proposer(s). . . .

36. RFP Section 7.4 provides that the term of the contract will extend through December 31, 2010, plus possible renewals through December 31, 2015.

37. RFP Section 8.11 states:

The award of this RFP is subject to the provisions of Chapter 112, Florida Statutes, as currently enacted or amended from time to time. All proposers must disclose with their proposal the name of any officer, director or agent who is also an employee of [Respondent]. In addition, *Gallagher Benefit Services, Inc.* will be providing consulting services to [Respondent] in relation to this RFP. All proposers must disclose with their proposal the name of any officer, director or agent, who is also an employee of *Gallagher Benefit Services, Inc.* or any subsidiaries of *Gallagher Benefit Services, Inc.*

38. RFP Section 8.13 provides that, in the event of a conflict among documents, the order of priority is as follows: the agreement between offeror and Respondent, RFP addenda (the latest receiving the highest priority), RFP, and offeror's proposal.

39. RFP Section 8.22 specifies the procedure under which a person may protest the specifications of the RFP and warns that the failure to timely protest the RFP specifications "shall constitute a waiver of proceedings"

40. RFP Section 8.23 provides that Respondent will post the Committee's recommendations and tabulations on January 21, 2003. Section 8.23 provides that any person seeking to protest the "decision or intended decision" shall file a notice of protest and formal written protest within certain time limits. Citing School Board Policy 3320 and Chapter 120, Florida Statutes, Section 8.23 warns that the failure to timely protest the Committee's recommendations "shall constitute a waiver of proceedings"

41. RFP Section 8.24 states that Respondent "reserves the right . . . to directly negotiate/purchase per School Board policy and/or State Board Rule 6A-1.012, as currently enacted or as amended from time to time, in lieu of any offer received or award made as a result of this RFP if it is in its best interest to do so."

42. RFP Section 8.28 states:

- 8.28.1 By [Respondent]: [Respondent] agrees to be fully responsible for its acts of negligence, or its agents' acts or negligence when acting within the scope of their employment and agrees to be liable for any damages resulting from said negligence. Nothing herein is intended to serve as a waiver of sovereign immunity by [Respondent]. Nothing herein shall be construed as consent by [Respondent] to be sued by third parties in any manner arising out of any contract.
- 8.28.2 By VENDOR: VENDOR agrees to indemnify, hold harmless and defend [Respondent], its agents, servants and employees from any and all claims, judgments, costs and expenses including, but not limited to, reasonable attorney's fees, reasonable investigative and discovery costs, court costs and all other sums which [Respondent], its agents, servants and employees may pay or become obligated to pay on account of any, all and every claim or demand, or assertion of liability, or any claim or action founded thereon, arising or alleged to have arisen out of the products, goods or services furnished by the VENDOR, its agents, servants or employees; the equipment of the VENDOR, its agents, servants or employees while such equipment is on premises owned or controlled by [Respondent]; or the negligence of VENDOR or the negligence of VENDOR's agents when acting within the scope of their employment, whether such claims, judgments, costs and expenses be for damages, damage to property including [Respondent]'s property, and injury or death of any

person whether employed by the
VENDOR, [Respondent] or otherwise.

43. RFP Section 8.35.1 provides that Respondent "reserves the right to request additional information [or] reject any or all proposals that do not meet mandatory requirements . . ."

44. RFP Section 8.35.2 provides that Respondent "reserves the right to waive minor irregularities in any proposal," although "such a waiver shall in no way modify the RFP requirements or excuse the proposer from full compliance with the RFP specification and other contract requirements if the proposer is awarded the contract."

45. RFP Section 8.35.3 states that Respondent "may" reject a proposal "if it does not conform to the rules or requirements contained in this RFP." Section 8.35.3 cites as "[e]xamples for rejection" such nonconformities as the failure to file the proposal by the deadline, the failure to execute and return the Required Response Form described in RFP Section 1.0, the failure to respond to all subsections of the RFP, or the addition of provisions by an offeror that reserve the right to accept or reject an award or to enter into a contract or add provisions contrary to those in the RFP.

46. RFP Section 8.42 states: "No submissions made after the proposal opening, amending or supplementing the proposal shall be considered."

47. RFP Section 8.43 states: "The Committee and/or [Respondent] reserves the right to waive minor irregularities or technicalities in proposals received."

48. RFP Section 9.0 states:

Proposer agrees, by submission of their [sic] proposal, that any Agreement resulting from this RFP will include the following provisions, which are not subject to negotiation.

Proposer agrees to the following:

--Obtain and maintain insurance with coverage limits in Special Conditions 7.6 for the term of any Agreement.

* * *

49. Twenty-three offerors timely submitted offers in response to the RFP. In addition to Petitioner, the offerors were: American Express Financial Advisors (American Express), Americo Financial Life and Annuity Insurance Company (Americo), CitiStreet Associates LLC (CitiStreet), Equitable Life Assurance Society of the United States and AXA Advisors LLC (Equitable), First Investors Corporation (First Investors), Horace Mann Life Insurance Company (Horace Mann), ING, Life Insurance Company of the Southwest (Southwest), Lincoln Financial Group (Lincoln), MassMutual, MetLife, Inc. (MetLife), Nationwide Life Insurance Company (Nationwide), New York Life Insurance & Annuity Corp. (New York Life), PFS Investments, Inc. (PFS), Pioneer Funds Distributor, Inc. (Pioneer), Putnam Investments (Putnam),

Security Benefit Group of Companies (Security Benefit), The Hartford (Hartford), The Legend Group (Legend Group), The Variable Annuity Life Insurance Company (VALIC), TIAA-CREF, and Veritrust Financial, LLC (Veritrust).

50. The responsibility of the Committee is to score the proposals, adopt a scoring threshold, negotiate agreements with offerors scoring at and above the threshold, and recommend to the Superintendent those offerors with which the Committee successfully negotiates agreements. The responsibility of the Superintendent is to recommend to the School Board the offerors that it should accept as vendors of TSAs to its eligible employees.

51. The Committee comprises 15 members, who represent administrators and nonmanagerial employees of Respondent, as well as three of Respondent's nine members of the School Board. The purpose of the Committee is to provide the Superintendent with advice regarding insurance matters. The Superintendent rarely overrides the recommendations of the Committee. In the present procurement, Respondent makes no financial contributions to any vendors, so Respondent's sole interest is the satisfaction of its employees. Thus, it is highly unlikely that the Superintendent or even the School Board would override the recommendations of the Committee.

52. However, as authorized by RFP Section 8.23, Petitioner has protested the recommendations of the Committee. Neither the Superintendent nor the School Board has yet considered the Committee's recommendations, which are the sole subject of this bid protest.

53. Members of the Committee received copies of the proposals shortly after they were submitted. At the same time, the Committee chair assigned to Respondent's insurance consultant, Gallagher Benefit Services, Inc. (Gallagher), the task of examining and evaluating the proposals.

54. Ultimately owned by Arthur J. Gallagher & Company, Gallagher is part of a large family of corporations involved in the financial-services industry. Arthur J. Gallagher's annual revenues exceed \$1 billion. Gallagher is the third largest insurance broker in the United States and the fourth largest in the world. A fee-based consultant, Gallagher employs 1000 persons, and the Gallagher family of corporations employs over 7000 persons. GBS Retirement Services, Inc., which is a broker-dealer and part of the Gallagher family of corporations, manages over \$3 billion in retirement plan assets.

55. In examining and evaluating the proposals, Gallagher prepared an Analysis of Proposals, which it supplied to each member of the Committee one week prior to its meeting on January 13, 2003. The Analysis of Proposals contains a useful

glossary of terms, a "Summary of Returns," an "Individual Fund Expenses Handout," as well as 507 pages of materials consisting almost exclusively of analysis of offers by way of matrices reflecting various provisions of the RFP.

56. The Analysis of Proposals comprises four parts: "Minimum Eligibility," "Experience & Qualifications," "Scope of Services," and "Cost." The first part corresponds to the Minimum Eligibility criteria set forth in RFP Section 3.7. The second, third, and fourth parts correspond to the three 30-point scoring categories set forth in RFP Section 6.3--omitting only the two five-point categories for minority or women business enterprises, which Gallagher did not consider or analyze.

57. As discussed below, Gallagher prepared scoring sheets for the parts of the Analysis of Proposals corresponding to the three 30-point scoring categories. Except for the area of references, as discussed below, these scoring sheets were derived from the more extensive information contained in the Analysis of Proposals. However, Gallagher did not prepare any synopsis of the Minimum Eligibility analysis contained in the Analysis of Proposals.

58. Gallagher did not analyze the proposals of New York Life and Putnam, which submitted proposals, but failed to sign the Required Response Form. Respondent's Purchasing Department determined that these unsigned proposals were nonresponsive and

did not forward them to Gallagher for evaluation. Gallagher determined that each of the 21 remaining proposals met the Minimum Eligibility criteria. However, as stated in the Executive Summary of the Analysis of Proposals, Gallagher relayed the doubts of Respondent's Purchasing Department that the proposal of Mass Mutual was signed by an authorized representative and deferred for the Committee's determination whether the proposals of PFS, Legend Group, and Veritrust complied with RFP Section 3.7.5.

59. In general, Gallagher treated the Minimum Eligibility criteria as requirements of substance, not form. Thus, if an offeror neglected to provide the specified documentation in its proposal, Gallagher researched readily available sources to determine if the offeror satisfied the criterion.

60. For RFP Section 3.7.1, which requires that offerors that are insurers must be licensed in Florida and provide a copy of their license, Gallagher checked online with the Florida Department of Financial Services, a publicly available website, to determine whether each such offeror was licensed in Florida. Gallagher determined that each such offeror was properly licensed. Gallagher did not recommend the disqualification of vendors that failed to provide a copy of their current insurance licenses. By these means, Gallagher insured that no unlicensed offeror would be deemed compliant merely by providing an

apparent copy of a license and that no properly licensed offeror would be deemed noncompliant merely for omitting a copy of its license or including a copy of an old license.

61. For RFP Section 3.7.2, which requires that offerors that are insurers have an A.M. Best minimum size category of VI and financial rating of A-, Gallagher again checked online with A.M. Best, a subscriber-available website, to determine whether each such offeror was so rated by A.M. Best. Gallagher determined that each such offeror met the minimum A.M. Best ratings.

62. For RFP Section 3.7.3, which requires that offerors that are proposing fixed or variable annuity programs must be licensed in Florida as life insurers, Gallagher relied on its verification under RFP Section 3.7.1. Gallagher reasoned that Section 3.7.3 was redundant because the sale of such programs requires licensure only as an insurer, not as a life insurer.

63. For RFP Section 3.7.4, which requires that offerors that are not insurers must warrant that they are registered broker-dealers, Gallagher checked other online resources to verify the status of noninsurer offerors as registered broker-dealers.

64. For RFP Section 3.7.5, which requires that offerors must be "direct provider[s] of the product(s) offered," Gallagher largely deferred to the Committee because this

criterion is not an industry standard. Finding some doubt as to two offerors, Gallagher required them to provide letters clarifying their status as direct providers, but did not analyze any of the proposals for compliance with this criterion.

65. Gallagher's treatment of the Minimum Eligibility criteria as requirements imposed upon an offeror's actual status, and not merely formal requirements imposed upon an offeror's proposal, is the correct interpretation of RFP Sections 3.7.1, 3.7.2, and 3.7.3. These sections require that an offeror, in fact, meet certain requirements. The additional provision in Section 3.7.1 concerning a copy of an insurance certificate serves the convenience of Respondent and does not transform the requirement from one of fact to one of fact and clerical competence in assembling a proposal.

66. RFP Section 3.7.4 seems to require only a representation by noninsurer offerors that they are registered broker dealers. These types of provisions often raise issues in bid challenges when the procuring agency attempts to verify a bidder's response. The issue is somewhat simpler in this case, though, because only four offerors were not insurers: Pioneer, PFS, Legend Group, and Veritrust. None of these offerors scored sufficient points to be designated for negotiations. Also, these four offerors did not compete with Petitioner, which, as an insurer, was not required to comply with Section 3.7.4, so

that Gallagher's interpretation of Section 3.7.4, which effectively recommended that these four offerors proceed to scoring, was not especially significant to Petitioner. Under the circumstances, Gallagher's interpretation of Section 3.7.4, which is a reasonable interpretation, if not the better interpretation, is moot.

67. RFP Section 3.7.5, which requires that the offeror be a direct provider, was designed by Respondent to ensure accountability among vendors of TSAs. Gallagher's determination, in effect, to defer to the Committee any close determinations concerning an offeror's compliance with this unusual criterion was entirely reasonable. This decision was preferable to Gallagher's attempting to construe this requirement, with which it had no experience, and possibly recommend the exclusion of an offeror that Respondent would not have excluded.

68. Gallagher also prepared "GBS Scoring Sheets" for each proposal and an overall "Gallagher Benefit Services TSA Evaluation." Although based on the RFP, the GBS Scoring Sheets are products of Gallagher's design and are not a comprehensive restatement of all of the RFP provisions applicable to each category. The GBS Scoring Sheets identify five scoring items for Experience and Qualifications, nine scoring items for Scope of Services Provided, and four scoring items for Cost of

Services Provided. The GBS Scoring Sheets assign a maximum of ten points for each of the three categories and deduct a specific number of points from a proposal's score if the proposal fails to satisfy certain items. For ease of reference, at the suggestion of Mr. Weintraub, Gallagher tripled its raw scores, so that the maximum possible scores for each of the three categories are 30 points, which is the maximum possible scores of each of these categories in the RFP.

69. The GBS Scoring Sheets gave each offeror two raw points in Experience and Qualifications, one raw point in Scope of Services Provided, and two raw points in Cost of Services. Petitioner correctly contends in its proposed recommended order that this feature of the scoring in the GBS Scoring Sheets is unexplained, but it is also harmless.

70. For each of the three categories, Gallagher identified items for scoring based in part on the variability of the proposals concerning their responses to such items. It appears that Gallagher also drew on its financial expertise in identifying critical features of the RFP.

71. For Experience and Qualifications, the scoring items are: "403(b) Assets," "Number of Participants," "Rating," "Years," and "References." For "403(b) Assets," the GBS Scoring Sheets reduce a score by two points if the value is under \$1 billion, by one point if over \$1 billion but not over \$10

billion, and by zero points if over \$10 billion. For "Number of Participants," the GBS Scoring Sheets reduce the score by two points if less than 100,000 participants or the proposal did not provide the information, by one point if over 100,000 participants but not over 1,000,000 participants, and by zero points if over 1,000,000 participants. For "Rating," the GBS Scoring Sheets reduce the score by one point if the A.M. Best Rating is A or A- and by zero points if the A.M. Best Rating is A+. For "Years," the GBS Scoring Sheets reduce the score by one point if less than 10 years. For "References," the GBS Scoring Sheets reduce the score by two points for "Negative Comments."

72. For Scope of Services Provided, the scoring items are: "VRS" [Voice Response System], "Internet," "Routine Communication," "Electronic Investment Advice," "Allocation Program," "SAS 70," "Restrict Sale of Other Products," "954 Area Code," and "Video or Website." For "VRS" and "Internet," the GBS Scoring Sheets reduce the score by one point each for a limited, rather than full, voice recognition system or Internet access in terms of the ability of a participant to use this medium to change his or her beneficiary. For the remainder of the items, the GBS Scoring Sheets reduce the score by one point if the proposal fails to comply with the item.

73. For Cost of Services Provided, the scoring items are: "Fees," "Investment Performance," "Morningstar Ratings," and

"Morningstar Category Rank." For "Fees," the GBS Scoring Sheets reduce a score by two points if "poor," by one point if "reasonable expenses relative to universe," and by zero points if "no front/back end [charge] and competitive total." For "Investment Performance," the GBS Scoring Sheets reduce a score by two points if the proposal did not report performance, by one point if "wrong date or data," and by zero points if "as requested." For "Morningstar Ratings," the GBS Scoring Sheets reduce the score by two points if the average rating is less than three stars, by one point if the average rating is three stars, and by zero points if the average rating is four or five stars. For "Morningstar Category Rank," the GBS Scoring Sheets reduce the score by two points if less than 20 percent of the funds are in the top half, by one point if more than 20 percent but not more than 40 percent of the funds are in the top half, and by zero points if more than 40 percent of the funds are in the top half.

74. Although the GBS Scoring Sheets obviously produced scores for the Committee, a preliminary statement about Experience and Qualifications in the Executive Summary underscores Gallagher's intention not to usurp the Committee's scoring function. Gallagher stated that it was assuming that Respondent would select multiple vendors to sell TSAs to its employees; if so, "the experience and qualifications of all

vendors was considered sufficient." If Respondent selected only one or a more limited number of vendors, Gallagher warned: "size and experience would become more critical and should be revisited." In these statements, Gallagher implicitly invited the Committee to concentrate its scores for Experience and Qualifications, even though Gallagher's GBS Scoring Sheets did not do so.

75. The five scoring items for Experience and Qualifications in the GBS Scoring Sheets are fair issues on which to differentiate proposals. These five scoring items are derived from provisions of the RFP, and, although other important provisions are omitted, the included items are significant. Although perhaps not of direct interest to Petitioner, which is an insurer, a potential problem existed with the use of the A.M. Best rating, which is unavailable to noninsurers. However, Gallagher did not reduce the score of any of the four noninsurers for lacking a specific A.M. Best rating.

76. Section 403(b) assets and numbers of plan participants are the subjects of question 7 of the "Company Information" part of the questionnaire. The A.M. Best rating is a Minimum Eligibility criterion set forth in RFP Section 3.7.2. Duration of experience is the subject of questions 3 and 4 of the "Company Information" part of the questionnaire. References are

requested in question 13 of the "Company Information" part of the questionnaire.

77. Gallagher's scoring of Experience and Qualifications ranged from a low of 9 points for Americo to a high of 30 points for Legend Group and TIAA-CREF. Petitioner received a 15, which is the third lowest score for this section on the GBS Scoring Sheets. In its proposed recommended order, Petitioner complains primarily about two aspects of its scoring.

78. First, Petitioner contends that Gallagher incorrectly deducted two points for the alleged failure of Petitioner's proposal to state the number of participants. This contention is correct. Petitioner's proposal contained information from which Gallagher should have determined that the proper score for Petitioner on this item was -1 point, not -2 points, which Gallagher assigned to Petitioner. When tripled, this deficiency amounts to three points.

79. However, this scoring anomaly invites consideration of the relationship of Gallagher's scoring to the Committee's scoring. As already noted, Gallagher did not attempt to preempt the Committee's responsibility for scoring. The GBS Scoring Sheets assigned Petitioner 15 points for Experience and Qualifications, but the Committee average score for Petitioner on Experience and Qualifications was a 19. This was the largest difference in scoring between the GBS Scoring Sheets and the

Committee average score in Experience and Qualifications. For only one other offeror, Southwest, did the Committee average score in this category differ from the GBS Scoring Sheet score by four points and again the Committee raised Gallagher's score by this amount.

80. Overall, though, the average scores that the Committee assigned each offeror in Experience and Qualifications tracked the GBS Scoring Sheets scores. Cumulatively, the differences amounted to only 18 points, so the increases assigned to Petitioner and Southwest amount to nearly half of the total difference between Gallagher and the Committee members. This fact suggests that the Committee members exercised independence and may have generated a more reliable score than Gallagher did for Petitioner's proposal for the category of Experience and Qualifications.

81. Second, Petitioner contends that Gallagher incorrectly deducted one raw point for references. References was the only item among the three main scoring categories for which Respondent's employees collected the data. One of Respondent's employees in the Benefits Department contacted references for all the offerors and carefully noted their responses to three basic questions. The employee consistently applied a simple, but fair, test for the question at issue, so that an offeror received credit only if the reference answered, "yes" in

response to a question regarding its satisfaction with the offeror. One reference of Petitioner answered, "somewhat," and Petitioner lost credit.

82. Gallagher merely applied this data to its scoring matrix when it deducted one raw point from Petitioner's score for this item in Experience and Qualifications. Petitioner argues that other offerors would have suffered a reduction in points, if Gallagher had used another feature to measure customer satisfaction, such as exclusive reliance on 1-800 telephone numbers for service. However, Petitioner has not demonstrated that reducing credit for the absence of an affirmative response to a reference check, even in isolation, is unreasonable, especially when service issues, apart from overall customer satisfaction, receive considerable attention in the items cited in the GBS Scoring Sheets for the category of Scope of Services Provided.

83. In conjunction with its attack on the reference item in the GBS Scoring Sheet, Petitioner argues in its proposed recommended order that investment performance was already covered in three of four items in the category of Cost of Services Provided in the GBS Scoring Sheets. However, Gallagher's decision to emphasize performance in its evaluation of TSAs to be sold to Respondent's employees is entirely reasonable.

84. The nine scoring items for Scope of Services Provided in the GBS Scoring Sheets are fair issues on which to differentiate proposals. Telephone and voice response systems and Internet, as means to change beneficiaries or perform other transactions, are the subjects of Questions 29 and 30 of the "Contract Overview" part of the questionnaire. Electronic investment advice and an asset allocation program are set forth in Questions 22 and 23 of the "Administration" part of the questionnaire. Routine communications with participants, the means by which sales representatives will be restricted from selling other products, and SAS internal controls review are stated in Questions 10, 11, and 12, respectively, in the "Enrollment Procedures and Services" part of the questionnaire. The availability of a local area code and educational video or website are cited in RFP Section 3.10.1.

85. Gallagher's scoring of the Scope of Services Provided ranged from a low of 9 points for Americo to a high of 30 points for Hartford and TIAA-CREF. The next highest score was 27, which was assigned to CitiStreet, MetLife, Security Benefit, and VALIC. The next highest score was 24, which was assigned to five offerors, including Petitioner.

86. Petitioner challenges Gallagher's selection of criteria, but, for the reasons already noted, they fairly

reflect important features of the RFP concerning Scope of Service Provided.

87. Petitioner identifies some scoring anomalies where other offerors received no point reductions for omissions or Petitioner received a point reduction when another offeror did not, although Petitioner handled an item in the same way. However, at best, Petitioner showed minor imperfections in Gallagher's scoring, but did not prove that any such minor imperfections misinformed the actual scoring by the Committee.

88. Although the average score assigned by the Committee for Petitioner in Scope of Services Provided was the same as that assigned by Gallagher, the difference between the Committee's average scores and Gallagher's scores was 30 points, as compared to merely 18 points separating them in Experience and Qualifications.

89. Also, the difference in Experience and Qualifications between the Committee and Gallagher was the result of nine increases and one decrease by the Committee. In Scope of Services Provided, the difference between them was the result of 12 increases and 4 decreases. Of the five offerors cited in Petitioner's proposed recommended order as improperly failing to receive reductions in the GBS Scoring Sheets, the Committee reduced the score of one offeror by one point, did not change the scores of two offerors, increased the score of one offeror

by one point, and increased the score of one offeror by two points.

90. As Petitioner argued in its proposed recommended order, Gallagher culled a limited number of items from the RFP for scoring Scope of Services Provided in the GBS Scoring Sheets. It is as likely as not that the Committee members, many of whom would be using these vendor services, independently scrutinized a wider range of services than the nine items included in the GBS Scoring Sheets.

91. The four scoring items for Cost of Services Provided in the GBS Scoring Sheets are fair issues on which to differentiate proposals. "Cost--Fees" is specified in Questions 7-19 of the "Contract Overview" part of the questionnaire and Attachment C. "Investment Performance" is covered in Question 19 of the "Variable Annuity" part of the questionnaire and Question 25 of the "Mutual Fund" part of the questionnaire. The "Morningstar Ratings" is the subject of Question 26 of the "Mutual Fund" part of the questionnaire. Although the RFP did not request any Morningstar Ratings information about variable annuities or any Morningstar Category Ranks about any mutual or variable annuity funds, these sources of information about such investments are readily available and reliable. Gallagher's use of such information as scoring items was reasonable.

92. For "Investment Performance," Gallagher deviated from its general approach of evaluating actual facts and instead evaluated formal compliance with the RFP. Points for this item reflect the extent to which an offeror reported the information requested, not the actual performance of the funds. Although Petitioner argues for a more formal approach elsewhere, it contends that Gallagher overemphasized form over substance by making this formal item one of only four items that it scored for Cost of Services.

93. Petitioner's argument is not without its appeal. However, the RFP amply warned that Respondent might award points based on formal compliance with the RFP provisions. Misstated or omitted data in financial performance is especially pernicious and, from Gallagher's perspective, probably vexing, because it impedes analysis of one of the more important features of the proposed TSAs--their rates of return. Also, the record does not suggest that the Committee members reduced their scoring exercise to the items used by Gallagher.

94. The three attachments to the Analysis of Proposals all address cost and performance issues and provide the Committee members with ample bases on which to score the proposals in terms of cost and performance, without regard to the four items selected by Gallagher. The glossary explains common terms, nearly all of which involve cost and performance. The

Individual Fund Expenses Handout comprises a series of tables setting forth specific expenses of specific funds offered by the offerors. The Summary of Returns lists each fund identified by each offeror and provides one-, three-, five-, and ten-year returns.

95. Evidencing perhaps a keen interest in the cost and performance of the TSAs in which many Committee members would be investing, the Committee assigned average scores in Cost of Services Provided that varied from Gallagher's scores by the largest amount--a total of 44 points. The Committee increased the scores of 15 offerors in Cost of Services and decreased no scores. Two offerors, TIAA-CREF and Veritrust, received increases of five points, one offeror, Nationwide, received an increase of four points, and six offerors, including Petitioner, received increases of three points.

96. Still, though, Petitioner received an average Committee score of only 15 points for Cost of Services Provided. One offeror received the same score, and one offeror received 11 points; the rest of the offerors received more points, with the highest score being 26 points.

97. The extensive record on the cost and performance of the TSAs that offerors proposed to sell to Respondent's employees provides a rational basis for the low score that Petitioner received in Cost of Services Provided. The

Individual Fund Expenses Handout reveals that the range of Petitioner's total fees was from 1.72 percent to 2.69 percent, with all but three of the funds bearing fees of at least 2.0 percent. Security Benefit, which received the highest score for Cost of Services, imposed fees ranging from 0.50 percent to 1.94 percent. TIAA-CREF, which received the second highest score for Cost of Services, imposed fees ranging from 0.34 percent to 0.63 percent. Horace Mann, which received the same score as Petitioner, imposed fees ranging from 1.30 percent to 3.14 percent--in general, comparable to Petitioner's fees.

98. Likewise, Petitioner imposes the highest back-end load or surrender charge--14 percent--on its fixed annuity product, tapering off to 4 percent in the seventh year that the policy has been in effect. Only three offerors had longer periods during which they imposed surrender charges.

99. The Summary of Returns reveals the performance among Petitioner's funds over the last ten years. A scorer might reasonably decide that the high cost of Petitioner's TSAs is not offset sufficiently by their performance, so as to warrant more than 15 points. The Summary of Returns lists 33 funds of Petitioner with total returns for the past ten years. In percentages, these cumulative returns, over ten years, are:
-18.17, -12.11, -10.35, -7.54, -4.82, -3.85, -2.64, -0.24, 0.41, 1.28, 1.4, 1.54, 4.12, 4.38, 5.2, 5.36, 5.63, 5.92, 5.94, 6.06,

6.37, 6.73, 7.1, 7.87, 8.01, 9.05, 9.21, 9.96, 9.99, 10.56, 10.6, 10.87, and 13.48.

100. Gallagher did not provide the individual GBS Scoring Sheets to the Committee. At a Committee meeting on January 13, 2003, Gallagher discussed these individual scoring sheets with the Committee and presented the Committee with a two-page synopsis of the overall scores of each of the 21 offerors that it scored for each of the three categories. The two-page scoring synopsis concludes with the following warning:

This information represents Gallagher Benefit Services summary comparison of the proposals and is provided solely to assist in the evaluation and scoring process. It is not intended nor should it be construed as direct guidance as to how these firms should be scored. As a committee member, it is within your pervue [sic] to score the proposals as you deem appropriate using all of the information and guidance provided to you. Should you feel based on the information provided that someone deserves a significantly greater or lesser score than might be indicated through our process, you should rely on your own judgment. Our ranking was based on a 10 point system. For illustrative purposes we have multiplied our rankings by three to more closely reflect the range on a 30 point system.

101. Overall, given the presence of School Board members and Respondent's management, as well as the personal attention that a procurement of this type would generate among Respondent's nonmanagement employees on the Committee, it is highly unlikely that Committee members would give undue weight

by the GBS Scoring Sheets or two-page evaluation. It is far more likely, given the nature of the procurement and membership of the Committee, that individual members scored these proposals based on their independent examinations of the proposals.

102. These factors also undermine Petitioner's argument concerning undisclosed conflicts of interest. As Petitioner states in its proposed recommended order, no offeror disclosed the name of any of its officers, directors, or agents were employees of Gallagher or its subsidiaries. Employees of Gallagher serve as agents for many financial service providers, including some of the offerors in this case. One of Gallagher's employees is an agent of Petitioner.

103. In its proposed recommended order, Respondent states that the last two sentences of RFP Section 8.11, which impose the relevant conflict-of-interest provisions, are "ineffectual and appear to be misplaced." The use of "agent" was ill-advised because it extends the reach of the conflict-of-interest provision to a vast number of employees of Gallagher, which is part of a very large organization, and thus captures mostly persons who would be unaware of, and uninvolved in, this procurement.

104. Petitioner argues in its proposed recommended order that Gallagher failed to disclose the conflicts. RFP Section 8.11 imposes the responsibility to disclose on the offerors, not

Gallagher, and Gallagher was under no responsibility to discharge an obligation of the financial service providers which it represents. Nondisclosing offerors risked the displeasure of the Committee, but the failure of the Committee to penalize such offerors is consistent with the immateriality of these conflicts, which are the product of an overly broad definition.

105. As already noted, Gallagher had no part in the evaluation of the Minority/Women Business Enterprise--Diversity of Proposer's Company (Diversity) and Documentation of the Proposing Company's Minority/Women Business Enterprise Outreach Programs (Outreach). Respondent's Minority and Business Enterprise Contract Compliance Administrator, Michelle-Bryant Wilcox, initially evaluated the proposals under the Diversity and Outreach categories.

106. In its proposed recommended order, Petitioner notes that the Diversity and Outreach provisions do not reflect School Board Policy 7007, which was incorporated by reference into the RFP. However, no prospective offeror challenged the specifications of the RFP, which clearly identified the Diversity and Outreach scoring categories.

107. However, other challenges of Petitioner concerning Ms. Wilcox's scoring of the proposals for Diversity and Outreach are more meritorious. RFP Section 3.12.1 requires offerors to provide diversity information and outreach information. Section

3.12.2 requires offerors to provide information of their involvement in the minority community. Respondent's contention in its proposed recommended order that the flush language on outreach beneath Section 3.12.1, but above Section 3.12.2, is somehow part of Section 3.12.2 is incorrect. Thus, the scoring categories identified in RFP Section 6.3 clearly draw upon the two elements of RFP Section 3.12.1, and not upon any part of Section 3.12.2. Most likely, the language about involvement in the minority community was borrowed from another procurement.

108. In any event, Ms. Wilcox decided to count outreach twice, under both categories, and to count involvement in the minority community under the Outreach category. These decisions cannot be characterized as refinements of the relevant provisions of the RFP, which already suffered from poor draftsmanship, but these decisions do not distort or undermine the procurement process. Outreach is obviously important in maintaining and increasing the diversity of a workforce, and involvement in the minority community may assist in this important effort.

109. Ms. Wilcox fared more poorly in her construction of outreach, for which she unduly emphasized internal recruitment efforts and, thus, the mere existence of antidiscrimination and affirmative action statements of policy. Also, her counting of women was unreliable, leaving the impression that, for example,

at times, female blacks might generate double credit and, at other times, female blacks might generate single credit, or white females might not generate any credit at all.

110. Notwithstanding the shortcomings in Ms. Wilcox's work, again, the Committee was able to evaluate the proposals independently when it met on January 13, 2003. At that meeting, the Committee understood that Ms. Wilcox's analysis was merely staff analysis. Given the membership of the Committee, each of the 15 members undoubtedly understood his or her duties to examine the proposals, not merely Ms. Wilcox's analysis, for scoring under the Diversity and Outreach categories.

111. Eventually, the Committee assigned Petitioner 3.5 points for Diversity and 3.7 points for Outreach. These were, respectively, the sixth- and fourth-highest score for these two categories. The higher scores for Diversity were 4.5 for VALIC, 4.3 for TIAA-CREF, 4.1 for MetLife, 3.9 for Southwest, and 3.7 for CitiStreet. The higher scores for Outreach were 4.4 for MetLife, 4.2 for VALIC, and 3.9 for CitiStreet and ING.

112. Even if Petitioner had received the maximum scores for Diversity and Outreach, its total score would have increased by only 2.8 points, which would still leave it under the 70-point threshold. Petitioner has not demonstrated scoring irregularities of such a magnitude for itself or other vendors with respect to these two categories to require such an

adjustment. Given the resolution of Petitioner's challenge to the three main scoring categories, Petitioner's challenge to the Diversity and Outreach categories is therefore immaterial.

113. On January 6, 2003, Respondent sent a letter to all offerors that the Committee would meet, as disclosed in RFP Section 5.0, on January 13, 2003, to review proposals and recommend awards. The letter states that Committee decided to interview offerors, so each offeror should have an authorized representative to speak with the Committee.

114. At the January 13 meeting, the Committee decided to reject the MassMutual proposal because its Required Response Form had not been executed by an authorized representative. With the prior elimination of New York Life and Putnam, the Committee proceeded to score the remaining 20 proposals.

115. The Committee's average scores were as follows:

TIAA-CREF:	90
VALIC:	88
ING:	86
MetLife:	86
CitiStreet:	82
Security Benefit:	80
Lincoln:	78
Hartford:	75
Equitable:	75
Southwest:	70
Petitioner:	65
Legend Group:	65
American Express:	64
Nationwide:	64
Horace Mann:	63
PFS:	61
First Investors:	60

Pioneer:	56
Veritrust:	51
Americo:	42

116. After examining the scores, the Committee decided to negotiate contracts with the ten offerors that received at least 70 points. Three days later, the Committee successfully completed negotiations with all ten offerors, and it recommended that the Superintendent approve these negotiated agreements and refer them to the School Board for final approval. Pursuant to the provisions of the RFP, which provided a point of entry to protest these actions of the Committee, Petitioner timely filed a notice of intent to protest and formal written protest.

117. Pursuant to Respondent's policy, Respondent and Petitioner presented their dispute to Respondent's Bid Protest Committee on February 13, 2003. By a two-to-one vote, the Bid Protest Committee initially decided to lower the scoring threshold to 65 points, which would include Petitioner and Legend Group. However, after receiving advice of Respondent's counsel concerning the ability of this committee to lower the scoring threshold set by the Committee, the Bid Protest Committee rescinded its earlier vote and unanimously voted to reject Petitioner's protest. The earlier vote was designed entirely to mollify Petitioner and was not based on any determination of a deficiency in the procurement found by the Bid Protest Committee.

CONCLUSIONS OF LAW

118. The Division of Administrative Hearings has jurisdiction over the subject matter. Section 120.57(3), Florida Statutes. (All references to Sections are to Florida Statutes (2002).)

119. Section 120.57(3)(f) provides:

. . . the burden of proof shall rest with the party protesting the proposed agency action. In a competitive-procurement protest, other than a rejection of all bids, the administrative law judge shall conduct a de novo proceeding to determine whether the agency's proposed action is contrary to the agency's governing statutes, the agency's rules or policies, or the bid or proposal specifications. The standard of proof for such proceedings shall be whether the proposed agency action was clearly erroneous, contrary to competition, arbitrary, or capricious. In any bid-protest proceeding contesting an intended agency action to reject all bids, the standard of review by an administrative law judge shall be whether the agency's intended action is illegal, arbitrary, dishonest, or fraudulent.

120. Section 120.57(3)(f) states that the ultimate issue in an award case is whether the proposed agency action is contrary to statutes, rules, policies, or the specifications. Section 120.57(3)(f) states that the standard of proof in an award case is whether the proposed agency action is clearly erroneous, contrary to competition, arbitrary, or capricious (Clearly Erroneous Standard).

121. Section 120.57(3)(f) also states that an award case, but not a nonaward case, is a de novo proceeding. In the typical de novo proceeding, pursuant to Section 120.57(1)(j), the administrative law judge finds facts using the preponderance standard, not a standard more deferential to the agency. In the typical de novo proceeding, the administrative law judge determines the basic and ultimate facts, as long as they are determinable by ordinary methods of proof and are not infused with policy considerations. See, e.g., Holmes v. Turlington, 480 So. 2d 150 (Fla. 1st DCA 1985); Bush v. Brogan, 725 So. 2d 1237 (Fla. 2d DCA 1999); Gross v. Department of Health, 819 So. 2d 997 (Fla. 5th DCA 2002); South Florida Cargo Carriers Association, Inc. v. Department of Business and Professional Regulation, 738 So. 2d 391 (Fla. 3d DCA 1999); and Belleau v. Department of Environmental Protection, 695 So. 2d 1305 (Fla. 1st DCA 1997).

122. Whether the facts are denominated basic or ultimate, the factfinding responsibility of the administrative law judge in the typical de novo hearing encompasses all of the facts that are necessary to reduce the remaining issues to pure questions of law. Cf. Pierce v. Piper Aircraft Corp., 279 So. 2d 281 (Fla. 1973). These facts include direct facts and reasonable inferences drawn from these direct facts. See, e.g., Southpointe Pharmacy v. Department of Health and Rehabilitative

Services, 596 So. 2d 106 (Fla. 1st DCA 1992), and Heifetz v. Department of Business Regulation, 475 So. 2d 1277 (Fla. 1st DCA 1985).

123. The Clearly Erroneous Standard, which applies to the assessment of the proposed agency action, does not conflict with the requirement of Sections 120.57(3)(f) and 120.57(1)(j) that the administrative law judge apply the preponderance standard to the basic and ultimate facts. The court in Asphalt Pavers, Inc. v. Department of Transportation, 602 So. 2d 558 (Fla. 1st DCA 1992), held that the administrative law judge retained typical factfinding responsibility even after Department of Transportation v. Groves-Watkins Constructors, 530 So. 2d 912 (Fla. 1988), in which the Supreme Court held that the hearing officer occupied a deferential role in a nonaward case. (Maintaining the Groves-Watkins deferential standard for a nonaward case, Section 120.57(1)(j) establishes a less-deferential standard for an award case.)

124. The Asphalt Pavers court rejected the agency's attempt, in reliance upon Groves-Watkins, to preempt the hearing officer's typical factfinding responsibilities. In Asphalt Pavers, the agency overturned a finding by the hearing officer that a bid package had included a disadvantaged business enterprise (DBE) form. The Asphalt Pavers court reaffirmed the post-Groves-Watkins responsibility of the hearing officer--as to

factual matters susceptible to ordinary methods of proof and not infused with policy considerations--to engage in typical factfinding, including drawing permissible inferences and making ultimate findings of fact.

125. In addition to applying the Clearly Erroneous Standard to the determination whether the proposed decision to award is contrary to statutes, rules, policies, or the specifications, the administrative law judge applies the Clearly Erroneous Standard to questions of fact requiring the application of the agency's technical expertise, such as whether, and the extent to which, a specific product or service qualitatively complies with the specifications; questions infused with agency policy; and all questions of law within the substantive expertise of the agency, such as the meaning of its nonprocedural rules.

126. The administrative law judge also applies the Clearly Erroneous Standard in addressing mixed questions of fact and law. In a legal action, a judge resolves mixed questions of fact and law as a matter of law if only one resolution is reasonable; if more than one resolution is reasonable, the trier of fact resolves the issue. See, e.g., Adams v. G.D. Searle & Co., Inc., 576 So. 2d 728 (Fla. 2d DCA 1991), and Hooper v. Barnett Bank of West Florida, 474 So. 2d 1253 (Fla. 1st DCA 1985).

127. Similarly, in a case requiring the interpretation of a contract susceptible to more than one interpretation, a judge determines as a matter of law whether the contract is ambiguous and, if so, the trier of fact resolves the ambiguity. See, e.g., North Star Beauty Salon, Inc. v. Artzt, 821 So. 2d 356, (Fla. 4th DCA 2002), and Barclays American Mortgage Corp. v. Bank of Central Florida, 629 So. 2d 978 (Fla. 5th DCA 1993). The trier of fact may have to resolve factual disputes to enable the legal determination of whether a contract is ambiguous. Board of Trustees of the Internal Improvement Trust Fund v. Lost Village Corp., 805 So. 2d 22 (Fla. 4th DCA 2001). These legal principles governing the interpretation of contracts are applicable to the interpretation of an agency's specifications, bidder's bid, or offeror's proposal--all of which are forms of offers to contract.

128. The question often arises whether a deviation in a bid or offer constitutes a material variance, which the agency may not waive, or a minor irregularity, which the agency may waive. Although the ultimate question of responsiveness requires the application of a deferential standard, as discussed below, the fact-intensive determination of such issues as competitive advantage, which underlie most determinations concerning the significance of deviations, requires the application of the preponderance standard, except in situations

in which the agency's determination concerning the significance of a deviation is infused with agency policy or agency expertise.

129. This dual approach to the standard of proof is consistent with State Contracting and Engineering Corporation v. Department of Transportation, 709 So. 2d 607 (Fla. 1st DCA 1998). In State Contracting, the court affirmed the agency's final order that rejected the recommendation of the administrative law judge to reject a bid on the ground that it was nonresponsive. The bid included the required DBE form, but, after hearing, the administrative law judge determined that the bidder could not meet the required level of participation by DBEs. The agency believed that responsiveness demanded only that the form be facially sufficient and compliance would be a matter of enforcement. Rejecting the recommendation of the administrative law judge, the agency reasoned that the administrative law judge had failed to determine that the agency's interpretation of its rule was clearly erroneous.

130. In affirming the agency's final order, the State Contracting court quoted the provisions of Section 120.57(3)(f) for evaluating the proposed agency action against the four criteria of contrary to statutes, rules, policies, and the specifications and against the Clearly Erroneous Standard.

Addressing the meaning of a de novo hearing in an award case, the court stated, at page 609:

In this context, the phrase "de novo hearing" is used to describe a form of intra-agency review. The [administrative law judge] may receive evidence, as with any formal hearing under section 120.57(1), but the object of the proceeding is to evaluate the action taken by the agency.

131. The State Contracting court applied the Clearly Erroneous Standard to the agency decision to award, the agency's interpretation of one of its rules, and the agency's determination that the bid was responsive. The State Contracting case did not feature prominently factual disputes concerning the basic and ultimate facts.

132. The present case requires interpretation of the RFP. Interpretation of the RFP should be "consistent with reason, probability and the practical aspect of the transaction." Iniguez v. American Hotel Register Co., 820 So. 2d 953 (Fla. 3d DCA 2002) (citing with approval Maines v. Davis, 491 So. 2d 1233 (Fla. 1st DCA 1986)).

133. The Committee properly interpreted the RFP to determine that the 20 offerors met the Minimum Eligibility criteria. With one exception, the deviations did not confer competitive advantage, and the Committee properly decided to overlook such technical shortcomings.

134. The lone exception concerns a revision that Equitable made to the indemnification required of all offerors in the RFP. This recommended order has not addressed the facts concerning this potentially material deviation. Respondent incorrectly contends in its proposed recommended order that the deviation is immaterial because the Committee and Equitable eventually negotiated it away. However, a proposal is not responsive if it leaves the offeror an option effectively to withdraw its proposal, post-award, by later declining to remove the nonresponsive provision from its proposal. The Equitable modification is not material to the present case because Respondent awarded contracts to multiple offerors and did not set ten as the number of desired vendors. Thus, the inclusion or exclusion of Equitable is irrelevant to Petitioner, absent evidence, which does not exist, that a significant number of other vendors also submitted nonresponsive proposals.

135. The Commission also properly interpreted the RFP in connection with its scoring of the various proposals.

136. As for the scoring itself, it is typically easier to prove that an agency has acted contrary to law or the RFP in determining whether proposals are responsive than it is to prove that an agency has acted contrary to law or the RFP in scoring responsive proposals. The former determination is pass/fail, but the latter determination--at least with a scoring range of

the scope involved in this procurement--is a more nuanced exercise. Also, scoring proposals in response to a reasonably complex RFP, such as this one, demands application of agency expertise, so that the bid protestor must prove that the scoring deviates from law or the RFP by the more deferential Clearly Erroneous Standard.

137. For the reasons set forth above, Petitioner has failed to prove, by the Clearly Erroneous Standard, that the Committee made material scoring errors in evaluating the proposals.

138. Petitioner has moved to stay this case until the Superintendent and School Board act on the recommendation of the Committee. In its present posture, the agency action falls short of the intended agency action that normally precedes the request for a formal administrative hearing. Normally, the agency has taken the final step toward agency action, and the only event that prevents the agency action from taking place is the request of a substantially affected person for a hearing.

139. In this case, pursuant to the RFP, Petitioner has protested the intended action of the Committee, which, obviously, is not the intended action of the Superintendent or School Board. Notwithstanding the improbability of the Superintendent or even the School Board overturning the work of the Committee, for the reasons previously discussed, the fact

remains that this bid protest has taken place, pursuant to the RFP, at a stage prior to the end of the agency procurement process.

140. The administrative law judge declined to stay the case when presented with this motion at the close of the final hearing. If the RFP gives an aggrieved party the right to a hearing prior to the end of the agency process, then the party and the agency are entitled to such a hearing.

141. Petitioner nonetheless raises a good point in its request for a stay. Absent the RFP provision creating a point of entry after the Commission designates successful vendors to the Superintendent, Petitioner and other losing offerors would have had a chance to argue their cases to the Superintendent and School Board. In these arguments, Petitioner and other losing offerors could legitimately make a variety of legal and political contentions to induce these superior authorities to exercise the discretion that Florida bid law vests in them to evaluate proposals. Petitioner is justifiably apprehensive that, after a final hearing and recommended order, these superior authorities may erroneously believe that they now lack the discretion that they otherwise would have had to evaluate these proposals.

142. The early point of entry in the RFP is only to examine the actions of the Committee. Neither the

Superintendent nor the School Board has yet acted on the Committee's recommendations, nor may either party act on the Committee's recommendations until after the disposition of this case. To avoid the scenario described in the preceding paragraph, and consistent with the specific agency action protested (i.e., the Committee's imminent recommendations to the Superintendent), this recommended order recommends that the School Board, on behalf of the Committee, issue the final order to dismiss Petitioner's protest to the Committee's recommendations and allow the procurement process to continue with the Committee's recommendation to the Superintendent, who may consider the Committee's recommendation, as the School Board may consider the Superintendent's recommendation, without regard to this proceeding.

RECOMMENDATION

It is

RECOMMENDED that, on behalf of the Insurance Advisory Committee, Respondent enter a final order dismissing the protest of Great American Financial Resources, Inc., and directing the Insurance Advisory Committee to proceed to recommend to the Superintendent the ten offerors of tax-sheltered annuity programs with which it has negotiated tentative contracts.

DONE AND ENTERED this 2nd day of October, 2003, in
Tallahassee, Leon County, Florida.



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Division of Administrative Hearings
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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 10 days from the date of this recommended order. Any exceptions to this recommended order must be filed with the agency that will issue the final order in this case.