STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LIFE INSURANCE COMPANY OF THE SOUTHWEST,

Petitioner,

vs. Case No. 14-3549BID

BROWARD COUNTY SCHOOL BOARD,

Respondent.
_____/

RECOMMENDED ORDER

This case came before Administrative Law Judge Darren A. Schwartz for final hearing on October 1, 2014, in Fort Lauderdale, Florida.

APPEARANCES

For Petitioner: Cynthia S. Tunnicliff, Esquire
Brian A. Newman, Esquire
Pennington, P.A.
Second Floor
215 South Monroe Street
Post Office Box 10095
Tallahassee, Florida 32302-2095

For Respondent: Robert Paul Vignola, Esquire
Office of the General Counsel
Eleventh Floor
600 Southeast Third Avenue
Fort Lauderdale, Florida 33301

STATEMENT OF THE ISSUES

Whether the recommended decision to award AXA Equitable Life Insurance Company ("AXA Equitable") a contract to

provide 403(b) annuity retirement products to employees of Respondent, Broward County School Board ("School Board"), is clearly erroneous, arbitrary, capricious, contrary to competition, contrary to the School Board's governing statutes, rules or policies, or contrary to the specifications within Request for Proposal ("RFP") 15-010P; and, if so, whether Petitioner, Life Insurance Company of the Southwest ("LSW"), should be awarded a contract to provide annuity retirement products to School Board employees pursuant to the RFP.

PRELIMINARY STATEMENT

On March 4, 2014, the School Board issued its RFP entitled "403(b)/457(b) Program for School Board Employees," RFP 15-010P, for the purpose of soliciting replies from vendors seeking to provide 403(b) annuity and 457(b) mutual fund retirement products to School Board employees. The School Board received bids from 13 proposers on or before April 17, 2014.

On June 16, 2014, the School Board posted the RFP's Recommendation/Tabulation for award for 403(b)/457(b) Program for School Board Employees to the following annuity vendors: ING Life Insurance and Annuity Company ("ING"), The Variable Annuity Life Insurance Company ("VALIC"), and AXA Equitable; and to the following mutual funds vendors: ING, Metropolitan Life Insurance Company ("MetLife"), and VALIC.

On June 17, 2014, LSW timely filed its Notice of Intent to Protest. LSW timely filed its Formal Written Protest and Petition for Administrative Hearing within ten days thereafter.

LSW's protest concerns only that portion of the School Board's recommendation to award contracts for vendors proposing to provide annuity retirement products. The recommendation to award contracts for vendors proposing to provide mutual fund retirement products is not in dispute in this proceeding.

On July 30, 2014, the School Board referred the matter to the Division of Administrative Hearings ("DOAH") to assign an Administrative Law Judge to conduct the final hearing. On July 31, 2014, a pre-hearing conference was held with the parties, wherein the parties agreed to waive the statutory deadline for conducting the final hearing. On August 1, 2014, a Notice of Hearing was issued by the undersigned setting this matter for a final hearing on October 1 through 3, 2014. On September 29, 2014, LSW filed an unopposed motion for leave to file amended petition, which was granted by the undersigned.[1/]

The final hearing commenced as scheduled on October 1, 2014, with both parties present. At the hearing, LSW presented the in-person testimony of Dr. Dildra Martin-Ogburn, Maryann Ellis, Jeffrey Angello, Virgil Cruz, Camille Ferguson, and Carol Nicome-Brady. In addition, LSW offered the depositions of Annie Feldman, Ted Victor, Jeff Whitney, Glynda Linton, Lisa Maxwell,

Eric Chisem, Dale Spear, Gerard Desmond, and Carol Nicome-Brady, in lieu of their in-person testimony.[2/] The School Board did not present any witnesses during its case-in-chief. The parties' Joint Exhibits 1 through 18 were received into evidence upon stipulation of the parties.

At the hearing, the parties requested that proposed recommended orders be filed within 20 days after the filing of the final hearing transcript. The final hearing Transcript was filed on October 30, 2014. On November 18, 2014, LSW filed an unopposed motion to extend the deadline for the parties to file proposed recommended orders until December 1, 2014. On November 18, 2014, the undersigned entered an Order granting the motion. The parties timely filed proposed recommended orders, which were given consideration in the preparation of this Recommended Order.

Unless otherwise indicated, citations to the Florida Statutes refer to the 2014 Florida Statutes.

FINDINGS OF FACT

LSW

1. LSW is a life insurance company that sells fixed annuity deferred plans to school districts, hospitals, churches, governments, and other qualified employer plans. LSW is an active supplemental retirement benefit vendor in 5,300 school

districts throughout the country. LSW serves 321,000 annuity policyholders with over $12.7 billion dollars invested.[3/]

2. LSW is a current provider of supplemental retirement benefits to the School Board, and it has over 3,700 existing School Board employees as policyholders with over $69 million dollars invested.

The School Board's RFP for Annuities (RFP 15-010P)

3. On March 4, 2014, the School Board issued its RFP entitled "403(b)/457(b) Program for School Board Employees," RFP 15-010P, for the purpose of soliciting replies from vendors seeking to provide tax sheltered annuity and/or mutual fund retirement products to the School Board's active, full-time employees (approximately 25,139 employees). The School Board issued Addendum No. 1 to the RFP on March 26, 2014.

4. The retirement benefit products offered as a result of this procurement are optional and supplement the retirement benefits available to qualified School Board employees through the Florida State Retirement System.

5. In issuing the RFP, the School Board seeks to "streamline its 403(b) and 457(b) offerings to a limited number of vendors in an effort to generally improve retirement awareness of all eligible employees and improve retirement savings of participating employees." The School Board seeks proposals with competitive fee and expense structures and

minimal to no surrender charges and/or sales charges. The RFP does not limit the number of vendors that may be selected for negotiation or award.

6. The RFP was developed by the School Board's Benefit and Employment Services Department in collaboration with its consultant, Gallagher Benefit Services ("Gallagher"). Gallagher has served as the School Board's consultant on insurance matters for over 20 years.

7. The RFP describes the School Board's current landscape of nine current active annuity vendors, which offer fixed annuities, variable annuities, equity indexed annuities, and mutual funds. The current active annuity vendors include the three recommended annuity product awardees under the RFP (ING, VALIC, and AXA Equitable), as well as LSW. In addition, the School Board has 17 current inactive vendors with a total of 690 accounts.[4/]

8. The RFP provides that mutual fund proposals and annuity proposals will be evaluated and ranked separately.

9. The RFP further provides that the School Board "at its sole option will then decide based on the top-ranked Proposer(s) in each category, if a sole provider or multiple providers with annuity and/or mutual fund options are more beneficial to SBBC and its employees."

10. Under the RFP: "A sole provider is either one Awardee for both annuity and mutual fund products or is the only vendor for one of the product offerings. A multiple Awardee(s) is one of many vendors for the same product offerings."

11. On or before April 17, 2014, at 2:00 p.m., the School Board's Supply Management and Logistics Department received proposals in response to the RFP. Proposals for the annuity products were submitted by AXA Equitable, Great American, Horace Mann, ING, LSW, MetLife, and VALIC. Six companies submitted proposals for mutual fund products. In addition, a proposal was submitted by Aspire Financial Services, LLC. The proposals for both annuities and mutual funds were delivered to the School Board's Superintendent's Insurance Advisory Committee ("Insurance Committee") members within two or three days of receipt by the School Board on April 17, 2014. Each of the proposals was several hundred pages in length and described as being roughly the size of a telephone book.

12. The proposals were evaluated by the Insurance Committee. The Insurance Committee is a standing committee composed of persons appointed by the superintendent of schools, including representatives of various labor unions and "meet and confer" groups (populations of employees that are not represented by a labor union). The purpose of the Insurance Committee is to make recommendations regarding insurance matters

including the subject RFP. The Insurance Committee regularly provides input in the development of the school district's competitive procurements for insurance and employee benefits and evaluates proposals for such services. No member of the Insurance Committee had any special expertise in mutual funds or annuities. There was a training session and review of the RFP at the Insurance Committee meetings on January 9 and 15, 2014.

13. Section 5.1 of the RFP provides that the Insurance Committee:

> shall evaluate all Proposals received, which meet or exceed Section 4.2, Minimum Eligibility Requirements and Section 7.1 Indemnification, according to the following criteria:

CATEGORY	**MAXIMUM POINTS**
A. Experience and Qualifications	10
B. Scope of Services	40
C. Cost of Services	40
D. Supplier Diversity & Outreach Program	
D.1. Participation	3
D.2. Diversity	4
D.3. Community Outreach	3
TOTAL[:]	**100**

> Failure to respond, provide detailed information or to provide requested Proposal elements may result in the reduction of

> points in the evaluation process. The Committee may recommend the rejection of any Proposal containing material deviations from the RFP. The Committee may recommend waiving any irregularities and technicalities.

14. "Cost of Services" is an integral part of the RFP. Section 4.7 of the RFP addresses Cost of Services and requires proposers of annuity products to submit their Cost of Services by completing the RFP's Attachment B1, Financial Response Form ("B1 form").

15. The B1 form requires a series of responses to various items relating to the Cost of Services offered for annuity products. The RFP and B1 form solicit two cost proposals, only: one for "Sole Carrier" and one for "Multiple Carrier." The B1 form has two columns: one for "Sole Carrier" and one for "Multiple Carrier." The RFP and B1 form do not allow for proposers to submit more than one multiple carrier proposal and to alter the B1 form to include an additional column for more than one multiple carrier proposal. The B1 form specifically advises proposers in bold letters that: "**If you are proposing annuity product(s), please complete the following form for both being a sole carrier or one of multiple carriers.**" Reproduced below are the two pages of the B1 form included within the RFP:

ATTACHMENT B1

FINANCIAL RESPONSE FORMS

If you are proposing annuity product(s), please complete the following form for both being a sole carrier or one of multiple carriers.

	Sole Carrier	Multiple Carrier
Annual Participant Account Charge		
Wrap Fees		
Mortality, Expense, Administrative Charges		
Total Fund Management or Separate Account Charges for each fund offered (not covered above)		
Front Loads		
CDSC or Surrender Charges & Terms		
Other Fees & Expenses		
Fourth Quarter Interest Rate		
Implementation/Conversion fee (Included or $)		
Fixed annual fee (Included or $)		
Per participant charge (Included or $)		
Non-discrimination tests (each) (Included or $)		
Trustee services (Included or $)		
New enrollments (Included or $)		
Buy-out fees		
Surrender charges		
Other discontinuance fees		
What is the Net Revenue Pricing for this plan in basis points?		
What is the total dollar amount or percent of assets you need to collect on this plan to be profitable in basis points?		
What is the contract termination charge? (Included or $)		
What is the Stable Value Contract termination charge? (Included or $)		
Annual Audit Fee (Included or $)		
Participant Education Materials distribution Expenses (Included or $)		
Plan Document/Determination Letter Filing Fee (Included or $)		
Participant Termination Processing Fee (Included or $)		

ATTACHMENT B1

FINANCIAL RESPONSE FORMS

If you are proposing annuity product(s), please complete the following form for both being a sole carrier or one of multiple carriers.

	Sole Carrier	Multiple Carrier
Are there any fees for plan amendments? (Included or $) If yes, please state these fees. (Included or $)		
Administrative/Recordkeeping Services (Included or $)		
Cost per Eligible Employee (Included or $)		
Optional Services (Included or $)		
Enrollment Kits (Included or $)		
Additional Service Fees (Included or $)		
Participant Fees (per unit of occurrence) (Included or $)		
Corporate Actions (Merger/Acquisition) (Included or $)		
Comprehensive enrollment outsourcing (Included or $)		
Payroll deferral percentage tracking (Included or $)		
Loan administration (Included or $)		
Loan origination fee (Included or $)		
In-service, non-hardship withdrawals (Included or $)		
QDRO processing (Included or $)		
Return of excess contributions (Included or $)		
Minimum required distributions (Included or $)		
Ad hoc plan level reports (Included or $)		
Fees for preparation of Summary Plan Description? (Included or $)		
Identify additional miscellaneous costs not disclosed in previous questions? (Included or $)		
Costs and Fees for Participant Statements mailed to Participant Home? (Included or $)		
Fee Schedule guarantee (in years)		
Are all of your fees fully disclosed? Yes___ No___		

16. Section 4.7 of the RFP unequivocally warns: "No deviations from this form are permitted. No conditions or qualifications (e.g., participation requirements) to the quoted rates are acceptable."

AXA Equitable's Non-Responsiveness Based on Its Alterations to the B1 Form and Two Multiple Vendor Proposals, and the Insurance Committee's Evaluation of AXA Equitable's Proposals, Recommendation, and Award

17. Notwithstanding the RFP's admonition against alterations to the B1 form, AXA Equitable modified the B1 form in responding to the RFP by adding an additional column and providing two separate multiple carrier proposals. Significantly, AXA Equitable labeled its modified B1 form to provide the following three separate cost proposals: (1) "Sole Carrier"; (2) "Multiple Carrier (2-4 Investment Providers)"; and (3) "Multiple Carrier (2-4 Investment Providers)." Reproduced below are the two pages of the B1 form submitted by AXA Equitable:

ATTACHMENT B2

FINANCIAL RESPONSE FORMS

If you are proposing annuity product(s), please complete the following form for both being a sole carrier or one of multiple carriers.

	Sole Carrier	**Multiple Carrier (2-4 Investment Providers)**	**Multiple Carrier (2-4 Investment Providers)**
Annual Participant Account Charge	$0	$0	$0
Wrap Fees	NA	NA	NA
Mortality, Expense, Administrative Charges	0.25%	0.50%	0.70%
Total Fund Management or Separate Account Charges for each fund offered (not covered above)	Separate Account fees vary by investment option. Information regarding each fund expenses is provided in Attachment O.	Separate Account fees vary by investment option. Information regarding each fund expenses is provided in Attachment O.	Separate Account fees vary by investment option. Information regarding each fund expenses is provided in Attachment O.
Front Loads	NA	NA	NA
CDSC or Surrender Charges & Terms	5 year participant level CWC	5 year participant level CWC	10 year participant level CWC
Other Fees & Expenses	NA	NA	NA
Fourth Quarter Interest Rate	GIO Interest Rate 4th Q 2013=1.75%	GIO Interest Rate 4th Q 2013=1.75%	GIO Interest Rate 4th Q 2013=1.75%
Implementation/Conversion fee (Included or $)	Included	Included	Included
Fixed annual fee (Included or $)	Included	Included	Included
Per participant charge (Included or $)	Included	Included	Included
Non-discrimination tests (each) (Included or $)	It is our understanding that this service would be provided by the TPA	It is our understanding that this service would be provided by the TPA	It is our understanding that this service would be provided by the TPA
Trustee services (Included or $)	Included	Included	Included
New enrollments (Included or $)	Included	Included	Included
Buy-out fees	NA	NA	NA
Surrender charges	See above	See above	See above
Other discontinuance fees	$25 fee for third party transfers	$25 fee for third party transfers	$25 fee for third party transfers
What is the Net Revenue Pricing for this plan in basis points?	1.70	This would be higher than 1.70 if we are not the single provider.	This would be higher than 1.70 if we are not the single provider.
What is the total dollar amount or percent of assets you need to collect on this plan to be profitable in basis points?	We cannot answer this question at this time given that there are many variables that come into play including, but not limited to: Whether we are the exclusive provider; how many eligible employees will participate in the plan with AXA; and the average deferral amount for the participants in the plan.		
What is the contract termination charge? (Included or $)	There is not a separate contract termination fee. See CWC or Surrender charges & Terms above.	There is not a separate contract termination fee. See CWC or Surrender charges & Terms above.	There is not a separate contract termination fee. See CWC or Surrender charges & Terms above.
What is the Stable Value Contract termination charge? (Included or $)	NA	NA	NA
Annual Audit Fee (Included or $)	NA	NA	NA
Participant Education Materials distribution Expenses (Included or $)	Included	Included	Included
Plan Document/Determination Letter Filing Fee (Included or $)	Included	Included	Included
Participant Termination Processing Fee (Included or $)	Included	Included	Included

ATTACHMENT B2

FINANCIAL RESPONSE FORMS

If you are proposing annuity product(s), please complete the following form for both being a sole carrier or one of multiple carriers.

	Sole Carrier	Multiple Carrier (2-5 Investment Providers)	Multiple Carrier (2-5 Investment Providers)
Are there any fees for plan amendments? (Included or $) If yes, please state these fees. (Included or $)	Included	Included	Included
Administrative/Recordkeeping Services (Included or $)	Included	Included	Included
Cost per Eligible Employee (Included or $)	Included	Included	Included
Optional Services (Included or $) Convenience Fees (for receiving disbursement checks): Personal Income Benefit (PIB): ProNvest Managed Account Service: Enhanced Death Benefit:	Express Mail: $35 Wire: $90 Direct Deposit: Free of charge 1.00% of PIB account balance 0.25% 0.15% of account value	Express Mail: $35 Wire: $90 Direct Deposit: Free of charge 1.00% of PIB account balance 0.25% 0.15% of account value	Express Mail: $35 Wire: $90 Direct Deposit: Free of charge 1.00% of PIB account balance 0.25% 0.15% of account value
Enrollment Kits (Included or $)	Included	Included	Included
Additional Service Fees (Included or $)	NA	NA	NA
Participant Fees (per unit of occurrence) (Included or $)	NA	NA	NA
Corporate Actions (Merger/Acquisition) (Included or $)	NA	NA	NA
Comprehensive enrollment outsourcing (Included or $)	NA	NA	NA
Payroll deferral percentage tracking (Included or $)	Included	Included	Included
Loan administration (Included or $)	$6.25/quarter	$6.25/quarter	$6.25/quarter
Loan origination fee (Included or $)	$25.00	$25.00	$25.00
In-service, non-hardship withdrawals (Included or $)	Included	Included	Included
QDRO processing (Included or $)	Included	Included	Included
Return of excess contributions (Included or $)	Included within one month of contribution	Included within one month of contribution	Included within one month of contribution
Minimum required distributions (Included or $)	Included	Included	Included
Ad hoc plan level reports (Included or $)	Included	Included	Included
Fees for preparation of Summary Plan Description? (Included or $)	Included	Included	Included
Identify additional miscellaneous costs not disclosed in previous questions? (Included or $)	NA	NA	NA
Costs and Fees for Participant Statements mailed to Participant Home? (Included or $)	Included	Included	Included
Fee Schedule guarantee (in years)	Life of contract	Life of contract	Life of contract
Are all of your fees fully disclosed? Yes X No___	Yes	Yes	Yes

18. The last two columns of AXA Equitable's B1 form, although labeled the same, offer different costs for certain categories. Significantly, in the second column, AXA Equitable listed "0.50%" for "Mortality, Expense, and Administrative Charges." However, in the third column, AXA Equitable listed "0.70%" for "Mortality, Expense, and Administrative Charges." In the second column, AXA Equitable also listed a "5 year participant level" for "CDSC or Surrender Charges & Terms." However, in the third column, AXA Equitable listed a "10 year participant level" for "CDSC or Surrender Charges & Terms."

19. The form in AXA's proposal for annuities was also mislabeled "Attachment B2," which is the form for mutual fund submissions. Although AXA Equitable provided information on the wrong form (B2 instead of B1), and mislabeled the second and third columns on its Attachment B2, the information within its response to the RFP made it clear to Gallagher that the second column on both pages was intended to contain AXA Equitable's two separate multiple carrier proposals. The second column on both pages was intended to contain AXA Equitable's two-to-four multiple vendor annuity proposal, and the third column on both pages was intended to contain AXA Equitable's five or more multiple vendor annuity proposal.[5/]

20. No other proposer altered the B1 form or submitted more than one multiple carrier proposal. At the hearing, the

School Board conceded that it expected the proposers to complete the B1 form without deviation, and that no deviation should be permitted that would allow one vendor to obtain a competitive advantage over another vendor. The School Board conceded at the hearing that AXA Equitable deviated from the B1 form by including an additional column in the form for two separate multiple proposals that was unsolicited.

21. Gallagher prepared executive summaries of the annuity and mutual fund proposals which assembled the proposers' verbatim responses in a side-by-side format corresponding to the RFP's evaluation scoring criteria. The Insurance Committee received these summaries about one week prior to their June 11, 2014, meeting at which a decision was to be made on the various proposals. The summaries for the annuity proposals were over 800 pages in length. A similar-sized comparison was prepared for the mutual fund proposals.

22. The Insurance Committee met on June 11, 2014, to evaluate the annuity and mutual fund proposals. The meeting started at 10:30 a.m. and adjourned at 5:30 p.m., with a break for lunch. No proposal scoring was conducted before the meeting.

23. The Insurance Committee determined at the start of its June 11, 2014, meeting that Aspire's proposal was non-responsive because it lacked the most recent three years of independent

audited financial statements required by Section 4.2.5 of the RFP.

24. Substantial discussion occurred during the June 11th meeting as to how to score AXA Equitable because of its two multiple vendor proposals. Some of the Insurance Committee members expressed concern over how to score AXA Equitable's annuity proposal because of its three separate proposals and modifications to the B1 form.

25. In response, Gallagher recommended during the June 11, 2014, meeting that AXA Equitable be scored separately and have three separate scores. During the meeting, AXA Equitable was treated differently than all of the other annuity proposals, because each of the other annuity proposals were scored only twice while AXA Equitable receive three separate scores.

26. Gallagher provided the Insurance Committee with a separate scoring sheet just for AXA Equitable because of its three separate proposals: one for sole carrier, another for two-to-four carriers, and the third proposal for five or more carriers. Once the Insurance Committee scored and ranked each of the proposals for all of the proposed annuity vendors, it was recommended that only then should the committee determine whether the award should be given to a sole vendor or to multiple vendors.

27. At the conclusion of Gallagher's presentation on the annuity and mutual fund proposals, the Insurance Committee was given 20 to 30 minutes to score all of the proposals. Thirteen members of the Insurance Committee scored the proposals. The Insurance Committee's scores ranked the annuity proposals as follows:

Sole Vendor	Total
ING	90
AXA Equitable	76.9
VALIC	74.2
MetLife	69.2
LSW	67.5
Great American	64.2
Horace Mann	61.0

Multiple Vendors	Total
ING	86.9
VALIC	71.2
AXA Equitable (based on its 2-4 vendor proposal)	69.7
LSW	67.0
AXA Equitable (based on its 5+ vendor proposal)	65.2
MetLife	64.7
Great American	61.9
Horace Mann	59.5

28. Thus, AXA Equitable's proposal was deemed responsive by the Insurance Committee, and it received three separate scores for its annuity proposals: a score of 76.9 for its sole vendor proposal; a score of 69.7 for its two-to-four vendor proposal; and a score of 65.2 for its five or more vendor

proposal. The scoring sheets reflect that AXA Equitable received different scores for cost of services under its two multiple vendor proposals. Notably, nine of the Insurance Committee members scored AXA Equitable's two-to-four vendor proposal higher for cost of services than AXA Equitable's five or more vendor proposal for cost of services.[6/]

29. After seeing the rankings of the scores during the meeting, the committee proceeded to pass a motion authorizing negotiations between the committee and the top three ranked annuity vendors, only, until a successful negotiation with three annuity vendors is reached.

30. Day two of the Insurance Committee's meeting (held June 12, 2014) consisted of negotiations between the Insurance Committee and the three highest ranked vendors for annuity and mutual fund products.

31. After negotiating with the top three ranked proposers, the Insurance Committee members voted to award the contracts for annuities to ING, VALIC and AXA Equitable (under its two-to-four vendor proposal), as the three top-ranked responsive proposers with whom the Insurance Committee was able to successfully conduct contract negotiations. The Insurance Committee also voted to award the contracts for mutual fund services to ING, MetLife, and VALIC and to reject Aspire's proposal as non-responsive for failure to meet the RFP's minimum eligibility

criteria. The superintendent accepted the Insurance Committee's recommendations.

32. On June 16, 2014, the School Board's Supply Management and Logistics Department posted the School Board's intended recommendation for the award of the RFP. The intended decision is to: (a) award contracts for the provision of annuity programs to ING, VALIC, and AXA Equitable (under its two-to-four vendor proposal); (b) award contracts for the provision of mutual fund programs to ING, MetLife, and VALIC; and (c) to reject Aspire's proposal as being non-responsive for failure to meet the RFP's eligibility criteria.

33. On June 17, 2014, LSW timely filed its Notice of Protest. On Monday, June 30, 2014, LSW filed its Formal Written Protest and Petition for Administrative Hearings and bid protest bond with the School Board. Because the School Board was closed on Friday, June 27, 2014, the formal written protest was timely filed on the School Board's next business day.

34. No bid specification protest was filed concerning either the RFP or Addendum No. 1.

35. AXA Equitable's alteration to the B1 form, which adds a third column and offers one sole vendor proposal and two separate multiple cost proposals, is non-responsive to the RFP and a material deviation.

36. AXA Equitable's alteration to the B1 form affected its price by giving it the opportunity to fine-tune its bid and submit a third cost proposal that was not solicited.

37. AXA Equitable's two multiple vendor proposals contained different charges. The charges for "Mortality, Expense, Administrative Charges" and "CDSC or Surrender Charges & Terms" were higher for AXA Equitable's five or more multiple vendor proposal than its two-to-four vendor proposal.

38. AXA Equitable received three separate scores that were evaluated by the committee while all other annuity proposals received only two scores that were evaluated. Most of the committee members gave AXA Equitable higher scores for its two-to-four cost of services proposal than its five or more cost of services vendor proposal.

39. AXA Equitable's two multiple vendor proposals, which contained different cost proposals, and which were scored separately, allowed AXA Equitable to receive an extra bite at the apple not afforded to any of the other vendors competing for the award and allowed AXA Equitable to gain an unfair competitive advantage over all of the other proposers.

40. Nevertheless, the School Board contends there is no provision in the RFP which prohibits AXA Equitable from submitting more than one multiple vendor proposal, and that at best, AXA Equitable's alteration of the B1 form by adding a

third column and submitting three separate proposals, each of which were scored separately, is a minor irregularity that can be waived.

41. The School Board did not determine prior to the filing of LSW's bid protest that AXA Equitable's submission of two multiple proposals was a minor irregularity, and not a material deviation.

42. At hearing, the School Board argued that AXA Equitable, or any other vendor for that matter, could have submitted an infinite number of multiple proposals. The School Board relies on the following language within Section 2.1 of the RFP, which states:

> SBBC is requesting Proposals with competitive fee and expense structures; minimal to no surrender charges and/or sales charges; performance and/or guaranteed returns that exceed objective benchmarks and peer groups; and education resources and tools that will help SBBC employees understand the importance of retirement savings and plan for the future. Proposers should propose an investment lineup that is in line with current trends in the 403(b) and 457(b) market. For example, group versus individual annuity products, open architecture mutual funds, and institutional share-classes. SBBC encourages the proposal of features that may or may not be offered today, such as designated Roth accounts, investment advice, managed portfolios, etc. At its sole option, SBBC reserves the right to annually review each Awardee and its product offerings for such things including, but not limited to: enrollment; fees and expenses; performance; and benchmarks.

43. This language requests the submission of competitive cost proposals. In no way, however, does this language allow for the submission of more than one multiple vendor proposal and AXA Equitable's modifications to the B1 form by including an additional column and second multiple vendor proposal.

44. The School Board also contends that AXA Equitable's alteration to the B1 form and submission of two multiple vendor proposals is authorized by language within Section 4.7 of the RFP that requires a proposer to complete a B1 form "for each program offered." This language, however, pertains to the requirement to disclose the costs for each type of annuity product offered. It does not allow the submission of a second multiple vendor proposal and AXA Equitable's modification to the B1 form by including an additional column and second multiple vendor proposal.

45. The School Board also relies on Section 5.1 of the RFP, which states that the Insurance Committee "shall evaluate all Proposals received, which meet or exceed Section 4.2, Minimum Eligibility Requirements and Section 7.1 Indemnification." Section 4.2 of the RFP, entitled "Minimum Eligibility," provides as follows:

> 4.2 **Minimum Eligibility** In order to be considered for award and to be further evaluated, Proposer must meet or exceed the following criteria as of the opening date of the Proposal. Proposer is responsible for

> providing the following information in its response. The Proposer must also include a statement of acknowledgement for each item below.
>
> 4.2.1 Proposer must agree to the language in Section 7.1, Indemnification.
>
> 4.2.2 Proposer must be licensed in the State of Florida. Provide a copy of the current license and/or certificate that allows Proposer to provide the services proposed.
>
> 4.2.3 If Proposer is an insurance carrier, Proposer must be licensed to provide the proposed services in the State of Florida with an AM Best rating of A- or higher and financial size category of VI or larger. In the alternative to the foregoing AM Best and financial-size category, a licensed carrier may satisfy the requirements of 4.2.4.
>
> 4.2.4 If Proposer is not an insurance company or lacks an AM Best or financial size category, Proposer must provide the most recent three (3) years available of **independent**, **audited** financial statements.
>
> 4.2.5 Each Awardee will agree to provide SBBC an annual fee of $10 per active and inactive participant.
>
> 4.2.6 Each Awardee will agree to provide an annual fee of $12 per active and inactive participant to fund third-party administrative services.

46. The plain reading of Section 4.2 is that the phrase "following criteria" as used therein pertains to the critera within Section 4.2 (4.2.1, 4.2.2, 4.2.3, 4.2.4, 4.2.5, and 4.2.6), only. To accept the School Board's position would render meaningless the admonitions in Section 4.7 of the RFP and

the B1 form against submitting more than one multiple vendor proposal and deviating from the form.

47. Contrary to the School Board's contention, nothing in the RFP allows the alterations to the B1 form and submission of more than one multiple vendor proposal, as submitted by AXA Equitable. In fact, Section 4.7 of the RFP and the B1 form unequivocally prohibit it.

48. To accept the School Board's argument would have allowed AXA Equitable or any other proposer to submit <u>any</u> number of separate multiple proposals with different costs of services and have each of them scored separately. Under the School Board's view, AXA Equitable could have submitted separate multiple vendors of say, for example, one-to-three providers; two-to-four providers; three-to-five providers; four-to-six providers; five-to-seven providers; eight-to-nine providers, etc. (each with different costs of services), until one of them hits and is a winner.

49. The School Board's argument fails to consider that each multiple proposal allowed the committee to give AXA Equitable an extra look and opportunity to fine-tune its bid with the hope that one of its proposals would stand out to the committee and be chosen as a winner. That is precisely what happened in the instant case.

50. Indeed, the Insurance Committee viewed each of AXA Equitable's multiple proposals as a separate proposal and scored them separately with different results. Only after each of the multiple proposals were viewed and scored did the committee then choose to negotiate with the companies that submitted the three topped-ranked proposals.

51. The committee had the opportunity to view AXA Equitable's five or more proposal alongside its two-to-four proposal and sole provider proposal, view the scores from all the proposals, and then determine which way it wanted to go in terms of the number of vendors.

52. After observing that AXA Equitable provided higher costs of services for its five or more proposal than its two-to-four proposal, most of the committee members gave AXA Equitable higher scores for its lower two-to-four cost proposal, and then the committee chose to go with the top three ranked proposals.

53. The Insurance Committee had the opportunity to view AXA Equitable's two-to-four proposal and its five plus proposal separately, rank each of these proposals separately along with the <u>one</u> multiple proposals submitted by each of the other vendors, and then the committee was able to stack each of the proposals against each other, compare them, and decide to go with the top three. This clearly gave AXA Equitable a competitive advantage over the other proposals, which was

prohibited by the RFP, and constitutes a material deviation that cannot be waived.

AXA Equitable's Non-Responsiveness for Failure to Provide Cost Information Required by the RFP

54. In addition, one of the questions asked in the B1 form was: "What is the Net Revenue Pricing for this plan in basis points?" For the sole carrier proposal, AXA Equitable stated that its net revenue pricing is 1.70. For each of its two multiple carrier proposals, however, AXA Equitable stated: "This would be higher than 1.70 if we are not the single provider."

55. AXA Equitable failed to commit to a specific pricing in basis points for net revenue pricing in each of its two multiple carrier proposals. Net revenue pricing is material to the evaluation of a proposer's cost of services, yet AXA Equitable failed to sufficiently respond to this question on the B1 form in response to the RFP.

56. Some of the Insurance Committee members did not understand what the phrase "net revenue pricing" meant or appreciate the significance of this omission from AXA Equitable's multiple vendor proposals. The evidence presented at hearing failed to establish that any of the committee members deducted points because AXA Equitable failed to provide net revenue pricing for its multiple vendor proposals.

57. AXA Equitable's failure to provide net pricing in basis points in the B1 form for its multiple proposals constitutes a material deviation from the RFP, provided AXA Equitable with a competitive advantage, and is not a minor irregularity that can be waived. The proposers were required to provide the net revenue pricing for their annuity product cost offerings. Net revenue pricing is material to the cost of the services. Thus, AXA Equitable was non-responsive to the RFP by failing to include its net pricing in basis points for its multiple vendor proposals.

58. Nevertheless, the School Board contends that AXA Equitable's omission of net revenue pricing is simply a factor that the committee could consider when scoring its cost proposal. The School Board relies upon Section 5.1 of the RFP, which provides that a "failure to respond, provide detailed information or to provide requested Proposal elements may result in the reduction of points in the evaluation process" and does not require a rejection of AXA Equitable's proposal.

59. The School Board's reliance on Section 5.1 of the RFP is misplaced. The Insurance Committee members did not understand what the phrase "net revenue pricing" meant or appreciate the significance of this omission from the proposal. The evidence did not show that any of the members deducted

points because of AXA Equitable's failure to provide net revenue pricing for its multiple carrier proposals.

60. The School Board did not determine prior to the filing of LSW's bid protest that AXA Equitable's failure to provide net pricing in basis points in the B1 form for its multiple proposals was a minor irregularity, and not a material deviation.

The Existence of Legacy Carriers Did Not Preclude Negotiations with the Three Top Ranked Annuity Vendors

61. Alternatively, LSW contends that even if AXA Equitable's two-to-four vendor proposal is not rejected as non-responsive, the Insurance Committee lacked the authority to choose to negotiate with the three top-ranked annuity vendors given the number of "legacy carriers" (more than four) that can continue to participate in the payroll deduction even if not selected as a vendor going forward pursuant to the instant RFP. Although it is unnecessary for the undersigned to reach this issue, LSW's contention in this regard is without merit.

62. A selection of the top three vendors in response to the instant RFP does not mean that the legacy carriers must be counted toward the number of vendors ultimately allowed to offer products under the instant RFP. Simply put, the legacy carriers and inactive vendors may continue to provide products to its

existing employees alongside the top three vendors chosen pursuant to the instant RFP.

CONCLUSIONS OF LAW

63. DOAH has personal and subject matter jurisdiction in this proceeding pursuant to sections 120.569, 120.57(1), and 120.57(3), Florida Statutes.

64. Pursuant to section 120.57(3)(f), the burden of proof rests with LSW as the party opposing the proposed agency action. State Contracting & Eng'g Corp. v. Dep't of Transp., 709 So. 2d 607, 609 (Fla. 1st DCA 1998). LSW must sustain its burden of proof by a preponderance of the evidence. See Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778, 787 (Fla. 1st DCA 1981).

65. Section 120.57(3)(f) describes the rules of decision applicable in bid protests and, in pertinent part, provides:

> In a protest to an invitation to bid or request for proposals procurement, no submissions made after the bid or proposal opening which amend or supplement the bid or proposal shall be considered . . . . Unless otherwise provided by statute, 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, proposals, or replies, 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 solicitation specifications. The standard of proof for such proceedings shall be whether the proposed agency action was

> clearly erroneous, contrary to competition, arbitrary, or capricious.

66. The phrase "de novo proceeding," as used in section 120.57(3)(f), describes a form of intra-agency review. "The 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." State Contracting, 709 So. 2d at 609.

67. In framing the ultimate issue to be decided in this de novo proceeding as being "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 statute effectively establishes a standard of conduct for the School Board, which is that, in soliciting, evaluating, and accepting bids or proposals, the School Board must obey its governing statutes, rules, and the project specifications. If the School Board breaches this standard of conduct, its proposed action is subject to reversal in a protest proceeding. Phil's Expert Tree Serv., Inc. v. Broward Cnty. Sch. Bd., Case No. 06-4499BID, 2007 Fla. Div. Admin. Hear. LEXIS 161, *13-14 (Fla. DOAH Mar. 19, 2007); Care Access PSN, LLC v. Ag. for Health Care Admin., Case No. 13-4113BID, 2014 Fla. Div. Admin. Hear. LEXIS 3, *42-43 (Fla. DOAH Jan. 2, 2014).

68. Consequently, the party protesting the intended award must prove, by the greater weight of the evidence, a specific instance where the School Board's conduct in taking its proposed action was either: (a) contrary to the agency's governing statutes; (b) contrary to the agency's rules or policies; or (c) contrary to the bid or proposal specifications. Phil's Expert Tree Serv., Inc., 2007 Fla. Div. Admin. Hear. LEXIS 161, at *13-14; Care Access PSN, LLC, 2014 Fla. Div. Admin. Hear. LEXIS 3, at *43.

69. It is not sufficient, however, for the protester to merely prove that the agency violated the general standard of conduct. By virtue of the applicable standards of "proof," which are best understood as standards of review, the protester additionally must establish that the agency's misstep was: (a) clearly erroneous; (b) contrary to competition; or (c) an abuse of discretion. Phil's Expert Tree Serv., Inc., 2007 Fla. Div. Admin. Hear. LEXIS 161, at *14; Care Access PSN, LLC, 2014 Fla. Div. Admin. Hear. LEXIS 3, at *43.

70. The three review standards mentioned in the preceding paragraph are markedly different from one another. The abuse of discretion standard is more deferential (or narrower) than the clearly erroneous standard. The bid protest review process necessarily entails a decision regarding which of the several standards of review to use in evaluating a particular action.

To do this requires that the meaning and applicability of each standard be carefully considered. Phil's Expert Tree Serv., Inc., 2007 Fla. Div. Admin. Hear. LEXIS 161, at *14-15; Care Access PSN, LLC, 2014 Fla. Div. Admin. Hear. LEXIS 3, at *44.

71. The clearly erroneous standard is generally applied in reviewing a lower tribunal's findings of fact. The Florida Supreme Court explained this standard as follows:

> A finding of fact by the trial court in a non-jury case will not be set aside on review unless there is no substantial evidence to sustain it, unless it is clearly against the weight of the evidence, or unless it was induced by an erroneous view of the law. A finding which rests on conclusions drawn from undisputed evidence, rather than on conflicts in the testimony, does not carry with it the same conclusiveness as a finding resting on probative disputed facts, but is rather in the nature of a legal conclusion. . . . When the appellate court is convinced that an express or inferential finding of the trial court is without support of any substantial evidence, is clearly against the weight of the evidence or that the trial court has misapplied the law to the established facts, then the decision is "clearly erroneous" and the appellate court will reverse because the trial court has "failed to give legal effect to the evidence" in its entirety.

Holland v. Gross, 89 So. 2d 255, 258 (Fla. 1956)(citation omitted).

72. Because administrative law judges are the triers of fact charged with resolving disputed issues of material fact

based upon the evidence presented at hearing, and because bid protests are fundamentally de novo proceedings, the undersigned is not required to defer to the School Board with regard to any findings of objective historical fact that might have been made prior to the School Board's proposed action. It is exclusively the undersigned's responsibility, as the trier of fact, to ascertain from the competent, substantial evidence in the record what actually happened in the past or what facts presently exist, as if no findings previously had been made. Phil's Expert Tree Serv., Inc., 2007 Fla. Div. Admin. Hear. LEXIS 161, at *17-18; Care Access PSN, LLC, 2014 Fla. Div. Admin. Hear. LEXIS 3, at *46-47.

73. If, however, the challenged agency action involves an ultimate factual determination——for example, an agency's conclusion that a proposal's departure from the project specifications was a minor irregularity as opposed to a material deviation——then some deference is in order, according to the clearly erroneous standard of review. To prevail on an objection to an ultimate finding, therefore, the protester must substantially undermine the factual predicate for the agency's conclusion or convince the undersigned that a defect in the agency's logic unequivocally led to a mistake. Phil's Expert Tree Serv., Inc., 2007 Fla. Div. Admin. Hear. LEXIS 161, at *18;

Care Access PSN, LLC, 2014 Fla. Div. Admin. Hear. LEXIS 3, at *47.

74. There is another species of agency action that also is entitled to review under the clearly erroneous standard: interpretations of statutes for whose administration the School Board is responsible, and interpretations of the School Board's own rules. State Contracting & Eng'g Corp. v. Dep't of Transp., 709 So. 2d 607, 610 (Fla. 1st DCA 1998). In deference to the School Board's expertise, such interpretations will not be overturned unless clearly erroneous. Id.

75. This means that if a petitioner objects to the proposed agency action on the ground that it violates either a governing statute within the agency's substantive jurisdiction or the agency's own rule, and if further, the validity of the objection turns on the meaning of the subject statute or rule, then the agency's interpretation should be accorded deference; the challenged action should stand unless the agency's interpretation is clearly erroneous (assuming the agency acted in accordance therewith). Phil's Expert Tree Serv., Inc., 2007 Fla. Div. Admin. Hear. LEXIS 161, at *19; Care Access PSN, LLC, 2014 Fla. Div. Admin. Hear. LEXIS 3, at *49.

76. The same standard of review also applies in a protest following the announcement of an intended award, with regard to preliminary agency action taken upon the agency's interpretation

of the project specifications——but for a reason other than deference to agency expertise. Section 120.57(3)(b) provides a remedy for vague or ambiguous specifications: they may be protested within 72 hours after the posting of the specifications. The failure to avail oneself of this remedy results in a waiver of the right to complain about the specifications. Phil's Expert Tree Serv., Inc., 2007 Fla. Div. Admin. Hear. LEXIS 161, at *45-46, n.6; Care Access PSN, LLC, 2014 Fla. Div. Admin. Hear. LEXIS 3, at *50.

77. Consequently, if the dispute in a protest challenging a proposed award turns on the interpretation of an ambiguous or vague specification, which could have been corrected or clarified prior to acceptance of the bids or proposals had a timely specifications protest been brought, and if the agency has acted thereafter in accordance with a permissible interpretation of the specification (i.e., one that is not clearly erroneous), then the agency's intended action should be upheld——not out of deference to agency expertise, but as a result of the protester's waiver of the right to seek relief based on a faulty specification. Phil's Expert Tree Serv., Inc., 2007 Fla. Div. Admin. Hear. LEXIS 161, at *45-46, n.6; Care Access PSN, LLC, 2014 Fla. Div. Admin. Hear. LEXIS 3, at *49-50.

78. The statute also requires that agency action (in violation of the applicable standard of conduct) which is "arbitrary, or capricious" be set aside. The phrase "arbitrary, or capricious" can be equated with the abuse of discretion standard because the concepts are practically indistinguishable—and because use of the term "discretion" serves as a useful reminder regarding the kind of agency action reviewable under this highly deferential standard. Phil's Expert Tree Serv., Inc., 2007 Fla. Div. Admin. Hear. LEXIS 161, at *19; Care Access PSN, LLC, 2014 Fla. Div. Admin. Hear. LEXIS 3, at *51.

79. An arbitrary decision is one that is not supported by facts or logic, or is despotic. Agrico Chemical Co. v. Dep't of Envtl. Reg., 365 So. 2d 759, 763 (Fla. 1st DCA 1978), cert. denied, 376 So. 2d 74 (Fla. 1979). Thus, under the arbitrary or capricious standard, "an agency is to be subjected only to the most rudimentary command of rationality. The reviewing court is not authorized to examine whether the agency's empirical conclusions have support in substantial evidence." Adam Smith Enters., Inc. v. Dep't of Envtl. Reg., 553 So. 2d 1260, 1273 (Fla. 1st DCA 1989). Nevertheless,

> the reviewing court must consider whether the agency: (1) has considered all relevant factors; (2) has given actual, good faith consideration to those factors; and (3) has used reason rather than whim to progress

> from consideration of each of these factors to its final decision.

Id.

80. Whether the standard is called "arbitrary or capricious" or "abuse of discretion," the scope of review, which demands maximum deference, is the same. Accordingly, the narrow "arbitrary or capricious" standard of review cannot properly be applied in evaluating all agency actions that might be challenged in a bid protest; rather, this highly deferential standard appropriately applies only to those decisions which are committed to the agency's discretion. Phil's Expert Tree Serv., Inc., 2007 Fla. Div. Admin. Hear. LEXIS 161, at *22; Care Access PSN, LLC, 2014 Fla. Div. Admin. Hear. LEXIS 3, at *53-54.

81. Therefore, where a petitioner objects to agency action that entails the exercise of discretion, but only in such instances, the objection cannot be sustained unless the agency abused its discretion, i.e., acted arbitrarily or capriciously. Phil's Expert Tree Serv., Inc., 2007 Fla. Div. Admin. Hear. LEXIS 161, at *22; Care Access PSN, LLC, 2014 Fla. Div. Admin. Hear. LEXIS 3, at *54.

82. The third standard of review articulated in section 120.57(3)(f) is unique to bid protests. The "contrary to competition" test is a "catch-all" which applies to agency actions that do not turn on the interpretation of a statute or

rule, do not involve the exercise of discretion, and do not depend upon a determination of ultimate fact. Phil's Expert Tree Serv., Inc., 2007 Fla. Div. Admin. Hear. LEXIS 161, at *23; Care Access PSN, LLC, 2014 Fla. Div. Admin. Hear. LEXIS 3, at *54.

83. Although the contrary to competition standard is less well defined than the other review standards, the undersigned concludes that the set of proscribed actions should include, at a minimum, those which: (a) create the appearance of and opportunity for favoritism; (b) erode public confidence that contracts are awarded equitably and economically; (c) cause the procurement process to be genuinely unfair or unreasonably exclusive; or (d) are unethical, dishonest, illegal, or fraudulent. Phil's Expert Tree Serv., Inc., 2007 Fla. Div. Admin. Hear. LEXIS 161, at *23; Care Access PSN, LLC, 2014 Fla. Div. Admin. Hear. LEXIS 3, at *54.

84. Turning to the merits of the instant case, AXA Equitable's bid was non-responsive and deviated materially from the RFP by altering the B1 form to add a third column with three separate cost proposals. The B1 form solicits two cost proposals, one for "Sole Carrier" and one for "Multiple Carrier." The RFP and B1 form do not allow for proposers to include more than one multiple carrier proposal.

85. To be sure, the form specifically advises proposers in bold letters that: **"If you are proposing annuity product(s), please complete the following form for both being a sole carrier or one of multiple carriers."** Section 4.7 of the RFP unequivocally warns: "No deviations from this form are permitted. No conditions or qualifications (e.g., participation requirements) to the quoted rates are acceptable."

86. Clearly, the B1 form unambiguously requires proposers of annuity products to complete the form "<u>for both being a sole carrier or one of multiple carriers</u>." (emphasis added). There are only two columns on the form, one for being a sole carrier, and another column for being "<u>one</u> of multiple carriers." (emphasis added). The use of the word "one" in the instructions unambiguously refers to the singular and a requirement to submit only one multiple proposal, as opposed to any number of multiple proposals in excess of one.

87. Had the School Board intended to allow the submission of more than one multiple proposal and an alteration of the B1 form to include more than one multiple proposal, it would have said so. It did not. It used the word "one" for a reason, to disallow more than one multiple proposal. It also provided only one column for a single multiple carrier proposal.

88. The resolution of this issue of responsiveness necessarily turns on the meaning of the terms used in the RFP.

Because no one timely protested the specifications, the School Board's interpretation of this provision would stand unless clearly erroneous, provided the terms were ambiguous, vague, or unreasonable. On the other hand, if the terms were unambiguous and otherwise lawful, then the School Board's interpretation is not entitled to deference because plain language requires no interpretation. The question, in that instance, would be whether the School Board implemented the clear and unambiguous language of the RFP. If not, then the School Board's action would be clearly erroneous or contrary to competition.

89. The School Board does not contend that the language within the RFP is ambiguous. Instead, the School Board argues that AXA Equitable's multiple vendor proposals met or exceeded Sections 4.2 and 7.1 and were consistent with the RFP's terms and conditions or, in the alternative, constituted waivable technicalities under Sections 5.1 and 7.33.2 of the RFP. The School Board's arguments are without merit.

90. The plain reading of Section 4.2 is that the phrase "following criteria" as used therein pertains to the critera within Section 4.2 (4.2.1, 4.2.2, 4.2.3, 4.2.4, 4.2.5, and 4.2.6), only. To accept the School Board's position would render meaningless the admonitions in Section 4.7 of the RFP and the B1 form against submitting more than one multiple vendor proposal and deviating from the form.

91. Section 7.1 of the RFP relates to "Indemnification," and in no way relates to whether multiple vendor proposals or alterations to the B1 form are allowed.

92. Contrary to the School Board's contention, nothing in the RFP allows the alteration to the B1 form and submission of more than one multiple vendor proposal, as submitted by AXA Equitable.

93. The undersigned thus concludes, as a matter of law, that the RFP is unambiguous in its requirement to limit each proposer to one multiple vendor proposal. Consequently, the language does not need to be interpreted; it can be applied to the circumstances at hand as a fact-finding function. Pottsburg Utilities, Inc. v. Daugharty, 309 So. 2d 199, 202 (Fla. 1st DCA 1975)("Where a contract is plain and unambiguous, there is no room for, and the court may not resort to, construction or interpretation, but must apply the contract as it is written.").

94. Even if the RFP were ambiguous, which it is not, the School Board's interpretation would be clearly erroneous.

95. For the above reasons, the undersigned determines, as a matter of ultimate fact, that AXA Equitable's bid was not responsive to the plain language of the RFP by including an additional column and two multiple carrier proposals.

96. It remains to be determined whether the School Board's intended award might be upheld on the theory that the

irregularity in AXA Equitable's bid was a minor one that the School Board could waive. Because the School Board found AXA Equitable's bid to be responsive, however, the intended award was not based on a finding that AXA Equitable's alterations to the B1 form by adding an additional column and two multiple carrier proposals constituted a minor deviation, which means that there exists no ultimate factual determination in this regard to review for clear error.

97. "When an agency asserts for the first time as a party litigant in a bid protest that an irregularity was immaterial, the contention must be treated, not with deference as a presumptively neutral finding of ultimate fact, but with fair impartiality as a legal argument; in other words, the agency is entitled to nothing more or less than to be heard on an equal footing with the protester." Phil's Expert Tree Serv., Inc. v. Broward Cnty. Sch. Bd., Case No. 06-4499BID, 2007 Fla. Div. Adm. Hear. LEXIS 161, *24 (Fla. DOAH Mar. 19, 2007).

98. As a result, the question whether AXA Equitable's alterations to the B1 form by adding an additional column and two multiple carrier proposals is a minor deficiency must be decided de novo.

99. It has long been recognized that "although a bid containing a material variance is unacceptable, not every deviation from the invitation to bid is material. [A deviation]

is material if it gives the bidder a substantial advantage over the other bidders and thereby restricts or stifles competition." Tropabest Foods, Inc. v. State Dep't of Gen. Servs., 493 So. 2d 50, 52 (Fla. 1st DCA 1986). "The test for measuring whether a deviation in a bid is sufficiently material to destroy its competitive character is whether the variation affects the amount of the bid by giving the bidder an advantage or benefit not enjoyed by other bidders." Harry Pepper & Assoc., Inc. v. City of Cape Coral, 352 So. 2d 1190, 1193 (Fla. 2d DCA 1977).

100. In the present case, the evidence adduced at hearing demonstrates that AXA Equitable's alteration to the B1 form by adding an additional column and two multiple vendor proposals is material. As detailed above, the alterations affected the price of the bid. AXA Equitable submitted multiple cost proposals with different prices which allowed it to fine-tune its bid, get an extra look, and gain a competitive advantage over other bidders who submitted only one multiple vendor proposal.

101. For the same reasons detailed above, AXA Equitable's failure to provide a figure for net revenue pricing on the B1 form is non-responsive, material, and allowed it to obtain a competitive advantage over other bidders. The failure to provide a figure for net pricing affected the price of the bid. To suggest, in response to the two multiple vendor proposals that: "This would be higher than 1.70 if we are not the single

provider," says nothing about what the net revenue pricing will be. AXA Equitable was required to commit to a figure in basis points for net revenue pricing in response to the RFP, and its failure to do so was non-responsive and material.

102. Finally, LSW contends that the Insurance Committee's scoring of AXA Equitable as being the third-ranked multiple vendor should be rejected as arbitrary and capricious because the members lacked experience in supplemental retirement benefits, annuities, or mutual funds, and they were not given sufficient time to evaluate thoughtfully and score the proposals. This argument is rejected.

103. The evidence adduced at hearing demonstrates that the Insurance Committee routinely develops RFP's and evaluates other vendor responses for insurance and employee benefits programs. The Insurance Committee's deliberations on the RFP were in conjunction with recommendations from district staff, legal counsel, and the School Board's consultant Gallagher. Gallagher provided the Insurance Committee with an overview of tax sheltered annuities and a Powerpoint presentation of the glossary of terms concerning annuities and mutual funds in advance of the release of the RFP.

104. The Insurance Committee members had ample opportunity to review the proposals prior to the scoring. The Insurance Committee received the RFP responses a month before the scoring

meeting. Gallagher provided the Insurance Committee with executive summaries which placed the various proposers' verbatim responses in a side-by-side format. Gallagher made a presentation to the Insurance Committee at its scoring meeting, and committee members asked questions during that meeting of the insurance consultant, school district staff, and legal counsel regarding the RFP responses and evaluation process.

105. Although the Insurance Committee members spent approximately 20 to 30 minutes scoring the proposals, no evidence was presented to demonstrate that any committee member lacked sufficient time to complete the scoring of the proposals.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Broward County School Board enter a final order rescinding the proposed award to AXA Equitable for annuity products in favor of an award to LSW as the third-ranked responsive and responsible vendor for supplemental annuity retirement benefits.

DONE AND ENTERED this 31st day of December, 2014, in Tallahassee, Leon County, Florida.

DARREN A. SCHWARTZ
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 31st day of December, 2014.

ENDNOTES

[1/] On August 1, 2014, the undersigned also issued the Order of Pre-hearing Instructions. Among other things, this Order required the School Board's counsel to "forthwith furnish to all bidders other than the Petitioner a copy of the formal protest in this case, a copy of the Notice of Hearing in this case, and a copy of this Order." At the same time, counsel for the School Board was required to "notify all bidders other than the Petitioner that their substantial interests may be affected by the ultimate disposition of this proceeding and that, if they wish to participate as a party in this proceeding, they must file a petition to intervene as a party." The Order of Pre-hearing Instructions further states that: "Any petition to intervene must substantially conform with the requirements of Florida Administrative Code Rule 28-106.205 and should be filed at the earliest practicable date."

In the present case, no petitions to intervene were filed by any of the bidders. However, a representative of AXA Equitable was present during the hearing and observed the hearing.

[2/] The parties stipulated at the final hearing that these witnesses were unavailable for the final hearing, and therefore,

their depositions could be received into evidence and considered by the undersigned in lieu of their live testimony.

[3/] LSW is headquartered in Addison, Texas, and is a wholly-owned subsidiary of the National Life Insurance Group. LSW operates throughout the country, with its major sales in Florida, California, and Texas.

[4/] The RFP states: "For inactive vendors, at SBBC's sole option, SBBC may or may not continue to maintain payroll deductions for participating employees; however, all new enrollments will be discontinued." School Board Policy 3601 prohibits the discontinuance of payroll deduction for existing enrollees. School Board Policy 3601 provides: "Any company currently participating in the TSA program but not recommended will be authorized to continue payroll deductions and service activity for their existing enrollees only. Acceptance of new enrollments will be suspended."

[5/] Gallagher determined that the last column of AXA Equitable's B1 form should have been its five or more multiple vendor annuity proposal based on a review of the different "Mortality, Expense, and Administrative Charges," which are set forth in the three columns of AXA Equitable's B1 form.

[6/] Three of the Insurance Committee members scored AXA Equitable's two-to-four vendor proposal the same for the cost of services as AXA Equitable's five or more vendor proposal. Only one Insurance Committee member scored AXA Equitable's five or more vendor proposal for cost of services higher than its two-to-four vendor proposal.

COPIES FURNISHED:

Robert Paul Vignola, Esquire
Office of the General Counsel
Eleventh Floor
600 Southeast Third Avenue
Fort Lauderdale, Florida 33301
(eServed)

Cynthia S. Tunnicliff, Esquire
Brian A. Newman, Esquire
Pennington, P.A.
Second Floor
215 South Monroe Street
Post Office Box 10095
Tallahassee, Florida 32302-2095
(eServed)

Lois S. Tepper, Interim General Counsel
Department of Education
Turlington Building, Suite 1244
325 West Gaines Street
Tallahassee, Florida 32399-0400
(eServed)

Robert W. Runcie, Superintendent
Broward County School Board
600 Southeast Third Avenue
Fort Lauderdale, Florida 33301-3125
(eServed)

Pam Stewart, Commissioner
Department of Education
Turlington Building, Suite 1514
325 West Gaines Street
Tallahassee, Florida 32399-0400
(eServed)

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 should be filed with the agency that will issue the Final Order in this case.