

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

ARTHUR J. GALLAGHER RISK  
MANAGEMENT SERVICES, INC.,  
D/B/A GALLAGHER,

Petitioner,

vs.

Case No. 20-4844BID

THE SCHOOL BOARD OF MIAMI-DADE  
COUNTY, FL,

Respondent,

and

MARSH USA, INC.,

Intervenor.

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RECOMMENDED ORDER

Pursuant to notice, a final hearing in this case was conducted before Administrative Law Judge Mary Li Creasy of the Division of Administrative Hearings (“DOAH”) by Zoom video teleconference on December 2 through 4, 2020.

APPEARANCES

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For Respondent: Jeff James, Esquire  
The School Board of Miami-Dade County, Florida  
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For Intervenor: David C. Ashburn, Esquire  
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#### STATEMENT OF THE ISSUE

Whether Respondent's, School Board of Miami-Dade County ("Board"), decision to award a contract to Intervenor, Marsh USA, Inc. ("Marsh" or "Intervenor"), pursuant to Request for Proposal Number 019-010-CM (Risk Management and Insurance Broker Services), was clearly erroneous, arbitrary or capricious, or contrary to competition.

#### PRELIMINARY STATEMENT

In June 2020, the Board issued Request for Proposal Number 019-010-CM for Risk Management and Insurance Broker Services ("RFP"), followed by the issuance of two addenda to the RFP, the second of which was published in July 2020. No challenges to the RFP specifications were filed. Timely responses to the RFP were filed by: Petitioner, Arthur J. Gallagher Risk Management Services, Inc. ("AJG"); Intervenor, Marsh; and Aon Risk Services, Inc., of Florida ("Aon"). The Board's procurement staff reviewed all three proposals and determined that each proposal satisfied the minimum criteria set forth in the RFP, and were responsive to the RFP.

A selection committee comprised of seven members (the “Selection Committee”) reviewed the AJG, Marsh, and Aon proposals, received a presentation by a consultant retained by the Board, received presentations by each of the proposers, engaged in a deliberation among themselves, and scored the proposals on five criteria. Marsh’s Proposal received the Selection Committee’s highest score, followed by AJG, and then Aon. The Selection Committee then voted to recommend that the Board authorize Board staff to negotiate with Marsh for a contract to provide the services solicited by the RFP. AJG filed a protest to challenge the Selection Committee’s recommendation.

On November 2, 2020, the Board referred the protest to DOAH to conduct formal administrative proceedings pursuant to chapter 120, Florida Statutes.

The final hearing was held as scheduled via Zoom video teleconference on December 2 through 4, 2020. AJG presented the testimony of 12 witnesses: Nelson Izquierdo, Jr., Selection Committee Member from the Office of Labor Relations; Jorge Wright, Selection Committee Member from the Office of Economic Opportunity; Renny Neyra, Selection Committee Member from the Office of School Operations; Edward Mcauliff, Selection Committee Member from the Office of Information Technology; Aston Henry, Jr., Selection Committee Member from Broward County Public Schools; Jorge Davila, Executive Director for the Office of Risk and Benefits Management; Vanessa Flores, Procurement Director; Charisma Montfort, District Director for Procurement; Mario De Barros, Chief Procurement Officer; Michael Fox, Selection Committee Member and Risk and Benefits Officer; Kathy Gordon, Independent Consultant from Siver Insurance Agency, Inc.; and Ron Steiger, Selection Committee Member and Chief Financial Officer for the Board.

The Board and Marsh did not present any witnesses. However, the parties agreed that the Board and Marsh would conduct their cross-examination at the conclusion of the direct examination of AJG's witnesses and that cross-examination not be limited to the scope of direct to avoid calling witnesses multiple times and in the interest of efficiency.

AJG's Exhibits 1 through 8, 10, and 12 through 15 were admitted into evidence. The Board's Exhibits 1 through 8 were admitted into evidence. Marsh's Exhibits 1 through 3 and 5 through 8 were admitted into evidence.

The four-volume Transcript was filed with DOAH on December 14, 2020. The parties timely filed proposed recommended orders which were taken into consideration in the drafting of this Recommended Order. All references to the Florida Statutes refer to the 2020 version unless otherwise specified.

## FINDINGS OF FACT

### The Parties

1. The Board is a duly constituted school board charged with the duty to operate, control, and supervise all free public schools within the School District of Miami-Dade County, Florida, pursuant to Article IX, section 4(b) of the Florida Constitution and section 1001.32(2), Florida Statutes.

2. AJG is an Illinois corporation engaged in the business of supplying broker services for risk management and insurance. AJG is the incumbent provider for risk management and insurance services for the Board.

3. Marsh is a corporation authorized to do business in the State of Florida and engaged in the business of supplying broker services for risk management and insurance.

### The RFP

4. The Board issued the RFP for the purpose of qualifying and selecting a Risk Management and Insurance Broker of Record (broker). The Board

requested that interested firms present broker qualifications and conceptual submittals for property and casualty insurance programs for the Board. The initial term of the contract was for a period of five years, commencing January 1, 2021, through December 31, 2025.

5. Due to the nature of the RFP, the Board hired Kathy Gordon, an Independent Consultant with Siver Insurance Agency, Inc., to assist with drafting the RFP and creating a comparison chart of all the responses submitted by proposers.

6. The RFP required all proposers to provide the following certification (the “Proposer Certification”):

I hereby certify that: I am submitting the following information as my firm’s Proposer and I am authorized by Proposer to do so. Proposer agrees to complete an unconditional acceptance of contents of all pages in this Request For Proposals, and all appendices and the contents of any Addenda released hereto; Proposer agrees to be bound by any and all specifications, terms and conditions contained in the RFP, 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. 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.

7. The Marsh Proposal included this required Proposer Certification.

8. The provisions in Section 1 of the RFP, entitled “Instructions to Proposers,” are “boilerplate” provisions that typically do not change from one Board request for proposals to another. By its express provisions, the RFP’s “Specifications” and “Special Conditions” take precedence over the “Instructions to Proposers,” to the extent there is any inconsistency between those RFP sections, with “Specifications” assigned the highest level of precedence.

9. Section 2 of the RFP, entitled “RFP Timetable,” established the timetable under which the Board would accept questions concerning the RFP and set a deadline for receipt of proposals.

10. Section 4 of the RFP, entitled “Scope of Services,” provided general information regarding the Board, explained the purpose of the RFP, and identified “Required Services” solicited by the RFP.

11. Section 5 of the RFP, entitled “Minimum Qualification Requirements,” established the minimum qualifications each proposer was required to satisfy to be a responsive proposer whose proposal would thereby qualify for review, and included the following statement:

All proposers are required to submit the following information to be considered for award. Failure to submit any of the required documents with the proposal may cause the proposer to be considered non-responsive and ineligible for further consideration.

12. Section 6 of the RFP, entitled “Submission Requirements,” also imposed additional requirements pertaining to technical components of the RFP.

13. Section 7 of the RFP, entitled “Evaluation/Selection Process,” identified the criteria pursuant to which proposals would be evaluated, and assigned total points that were available to be awarded with respect to each criterion.

14. Section 8 of the RFP, entitled “Proposal Pricing,” directed prospective proposers to an Excel workbook which proposers were required to complete in order to provide in detail the commission they proposed to charge for the services solicited by the RFP. Marsh’s Proposal included the required Excel workbook, and it included pricing terms (commission-based compensation) as required by the RFP.

15. Section 9 of the RFP, entitled “Insurance Requirements,” described insurance the awarded proposer would be required to maintain, and included

the following statement: “In consideration of this Contract, if awarded, the Vendor agrees without reservation to the indemnification and insurance clauses contained herein.”

16. Section 10 of the RFP included the forms and attachments prospective proposers were to submit with their proposals. It is undisputed that Marsh’s Proposal included all of the forms and attachments included in Section 10.

17. On July 17, 2020, Addendum No. 2 to the RFP (“RFP Addendum 2”) was published, which included the Board’s responses to questions received regarding the RFP and, in addition, 12 attachments included in response to those questions. RFP Addendum 2 modified the conditions of the RFP.

18. Specifically relevant to these proceedings is the following question and answer included within RFP Addendum 2:

Q2: Under Exhibit 17- Proposed Contract (specifically section 4.6), can [the Board] confirm if it will accept any limitation of liability provisions in its broker contract.

A2: Proposers should clearly state with specificity any contract provisions which they propose to deviate. All proposals which meet the minimum qualifications will be considered. The selection committee will determine which deviations are acceptable and to what extent deviations will impact the evaluation. Contract amendments, including reasonable limitations of liability, will be subject to final contract negotiations with the [Board].

19. At no point in time after the publication of the RFP documents and the subsequent addenda did any proposer file any “Specification Protest” to the RFP and/or subsequent addenda.

#### Review Process

20. Proposals in response to the RFP were required to be submitted in sealed envelopes or boxes to the Board's Division of Procurement by 1:00 p.m., August 4, 2020.

21. Following the Board's receipt of the Marsh, AJG, and Aon Proposals, Vanessa Flores, a Procurement Director for the Board, conducted a review of the proposals to determine whether the proposals were, as submitted, responsive to the RFP. To determine such responsiveness, Ms. Flores checked for compliance with Section 5 of the RFP, as it is that section alone that governed the responsiveness determination for the RFP. Ms. Flores determined that each of the proposals received by the Board in response to the RFP, including Marsh's Proposal, satisfied all of the requirements set forth in Section 5 and were, therefore, responsive to the RFP and qualified for review.<sup>1</sup>

22. Based on the determination that the Marsh, AJG, and Aon Proposals met the RFP's minimum qualifications and, therefore, qualified for review, those proposals were provided to Ms. Gordon. Ms. Gordon took information from the proposals and created a comparison sheet for use by the Selection Committee (the "Initial Comparison").

23. Included within the Initial Comparison is a "Tab 4" in which Ms. Gordon applied the proposers' proposed commission percentages to assumed premiums for each of three categories of insurance: property insurance, NFIP flood insurance, and other insurance.

24. After the Initial Comparison was created, it was determined that the assumed premium for the "other insurance" category should have been \$3.2 million instead of the \$6.5 million that was included within the RFP and upon which the proposers had based their proposed percentage commission.

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<sup>1</sup> Section 4.3 of the RFP identifies "Required Services," and Section 6 of the RFP identifies "Submission Requirements." However, while the failure of a proposer to satisfy Section 5's Minimum Qualification Requirements would render the proposer's proposal non-responsive, the failure of a proposer to satisfy the requirements of Section 4.3 or 6 do not include a determination of non-responsiveness. Instead, Sections 4 and 6 of the RFP provide as follows: "The inability or denial expressed in a proposal, or omission in the proposal, to offer to comply/conform with the technical requirements of this Section of the RFP may result in deductions in the allocation of points by the Selection Committee."



During the oral presentations, each of the proposers was asked whether the change in assumed premium for “other insurance” would change its proposed commission for “other insurance.” Each of the proposers responded that their proposed commissions would not change based on the reduction in assumed premium for “other insurance.” Having received that information, Ms. Gordon created an updated spreadsheet that was presented in the final hearing as Exhibit 7 (the “Updated Comparison”).

25. To review the proposals and select the proposer with whom the Board should negotiate for a contract for the RFP-solicited services, the Selection Committee, comprised of the following persons, was constituted:<sup>2</sup>

- a. Ron Steiger, the School Board’s Chief Financial Officer;
- b. Renny Neyra, the School Board’s District Director of Alternative Education;
- c. Edward McAuliff, Executive Director of Data Security, Governance and Compliance for the School Board;
- d. Nelson Izquierdo, the School Board’s Administrative Director for Labor Relations;
- e. Michael Fox, Officer of Risk and Benefits for the School Board;
- f. Jorge Wright, Director of Contract Compliance, Office of Economic Opportunity for the School Board; and
- g. Aston Henry, Director of Risk Management for the Broward County Public Schools.

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<sup>2</sup> Ms. Neyra was a representative of Deputy Superintendent Valtena Brown. Ms. Neyra’s scores for the proposals are those shown on the Board’s Exhibit 2, the “Composite Tabulation Sheet” for Ms. Brown. Mr. Izquierdo was a representative of Jose Dotres. Mr. Izquierdo’s scores for the proposals are those shown on the Board’s Exhibit 2, the “Composite Tabulation Sheet” for Mr. Dotres.

26. The Selection Committee met on two separate days. On September 1, 2020, the Selection Committee and Ms. Gordon met to discuss the Selection Committee procedures. It was decided that a subsequent Selection Committee meeting would take place that would include a presentation from Ms. Gordon and oral presentations of all proposers, followed by a debriefing session among the Selection Committee and Ms. Gordon.

27. The subsequent meeting was held on September 4, 2020. After a presentation by Ms. Gordon, the proposers were each allowed up to one hour to make an oral presentation and to answer any questions from the Selection Committee Members. Each of the proposers availed itself of that opportunity.

28. Prior to the September 4, 2020, meeting, each of the Selection Committee Members was provided with the following documents: Selection Committee Procedures; the RFP; the three proposals; the Initial Comparison; and the Updated Comparison. Each of the Selection Committee Members reviewed each of those documents.

29. After hearing each of the proposers' presentations, the Selection Committee deliberated and discussed all three proposals during the "debriefing session." During the Selection Committee debriefing session, but prior to submitting the scores for each proposer, Ms. Gordon and Ms. Flores stated that committee member scores must be based on what was proposed and submitted by the proposers.

30. During the debriefing session, the Selection Committee Members discussed the fact that Marsh did not have a price cap as part of the property insurance commission and how that will affect future pricing.

31. Selection Committee Members, Ron Steiger, the Chief Financial Officer for the Board, and Mike Fox, the Risks and Benefit Officer for the Board, both stated that they were well aware of the fact that Marsh's Proposal did not include a price cap on commission and that, due to budgetary constraints, price cap on commissions was not relevant.

32. Mr. Fox made it clear that, due to budgetary constraints, the Board would not exceed the dollar figure of any price cap, and that is why whether a proposer had a price cap was inconsequential.

33. Prior to submitting their scores, all committee members stated that they felt that they had all of the information they needed, that they were comfortable with that information, and that they knew that they can only rely on the information included in the actual proposals.

34. Following the debriefing, the Selection Committee Members provided their scores for each proposal on each of the “Criteria for Evaluation” specified in Section 7 of the RFP. Those scores are shown on the “Composite Tabulation Sheet.”

35. The Composite Tabulation Sheet revealed that Marsh was the highest ranked proposer. Accordingly, the Selection Committee then voted unanimously to seek approval from the Board to negotiate and contract with Marsh for the services solicited by the RFP.

36. As the next step in the process, Board staff began to prepare for presentation of the Selection Committee’s recommendation to the Board’s fiscal committee and, thereafter, to the Board itself. Mr. Steiger and his staff, with the assistance of the Board’s procurement staff, met and prepared an RFP proposal “agenda item” for submission to and consideration by the fiscal committee and the Board (the “Agenda Item”).

37. On October 9, 2020, the Board posted the notice of intended action to recommend the award of the RFP to Marsh (the “Notice of Award”). On October 12, 2020, AJG submitted its "Notice of Intent to Protest RFP # 19-010-CM for Risk Management and Insurance Broker Services." The Agenda Item and recommendation of the Selection Committee was originally scheduled to be presented to the Board on October 21, 2020. However, that recommendation was withdrawn due to AJG’s filing of its letter of protest.

### AJG's Protest

38. AJG's protest raises three primary issues with the recommendation of Marsh for the award of the broker services contract.<sup>3</sup> AJG alleges that Marsh was non-responsive to the specifications of the RFP due to its inclusion of a sample agreement that differs from the agreement set forth in the RFP. AJG asserts that the Selection Committee's scoring was arbitrary and capricious as to Marsh's pricing, particularly as to the effect of no cap on certain commissions, and extra fees. Further, AJG asserts that Marsh was permitted to change its proposal after the bid opening.

### Marsh's Sample Agreement and Alleged Non-Responsiveness

39. Section 6, Paragraph 10 of the "Submission Requirements" of the RFP, states:

The Proposer must complete, sign and submit Exhibits 1 through 17 in Section 10 as part of the Proposal. By submitting a proposal, the Proposer agrees to be bound by and to execute the Sample Agreement, Exhibit 17 of this RFP.

40. AJG contends that when Marsh included its own "Sample form of Client Services Agreement" ("Marsh sample agreement") as part of the proposal packet, Marsh did not agree to be bound by the RFP sample agreement, Exhibit 17 of the RFP.

41. AJG fails to take into account that on Exhibit 17, Marsh included the following language on the exhibit:

Prior to the commencement of any work in connection with this RFP, Marsh will work with MDCPS to arrive at a mutually acceptable service agreement, which will incorporate the terms and conditions of the RFP together with such additional

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<sup>3</sup> The Pre-hearing Stipulation includes an additional contention by AJG on whether the cone of silence was violated. However, AJG failed to plead that allegation in its formal written protest, nor did AJG ever timely amend its formal written protest to add that allegation. At the hearing, the undersigned ruled that because AJG failed to amend the pleadings prior to the final hearing, it would be unfair to move forward with any allegations regarding the cone of silence.

terms and conditions as may be useful for the particular insurance brokerage services requested by the RFP. See the enclosed sample form of Client Service Agreement for additional terms and conditions which would be applicable to this agreement.

42. Marsh then included a sample agreement that has a “SAMPLE” watermark on all pages. At the hearing, several witnesses stated that they understood that Marsh’s sample agreement was in fact just that--a sample. The witnesses further testified that Marsh agreed to be bound by Exhibit 17, the RFP sample agreement, when Marsh included the language “ ... which will incorporate the terms and conditions of the RFP.”

43. As it relates to the RFP’s responsiveness requirement, Section 5 of the RFP states that “All proposers are required to submit the following information to be considered for award. Failure to submit any of the required documents with the proposal may cause the proposer to be considered non-responsive and ineligible for further consideration.” Also, per the response to a question posed in the addendum to the RFP, the Board clarified that proposers should clearly state with specificity any contract provisions from which they propose to deviate. “*All proposals which meet the minimum qualifications will be considered.*” (Emphasis added).

44. As Selection Committee Members explained, Marsh’s statements regarding the potential for additional terms were of no consequence to them because the Board would be under no obligation to agree to any such terms. What mattered was the fact that Marsh agreed to the terms of the RFP sample agreement. As Mr. Fox, Selection Committee Member and Board Officer of Risk and Benefits, testified, “My understanding was that [Marsh] would agree to our terms and conditions, but if there were other items we wanted to negotiate to include in our agreement, we could do so.”

45. Terms of the RFP sample agreement make clear that negotiations between the Board and the selected proposer would be necessary. Section 4.1

of the RFP, entitled “Scope of Services,” provides only, “See Attachment A.” The referenced “Attachment A” identifies the Scope of Services as “TBD.” Additionally, the RFP explicitly contemplates negotiations. Section 7.6 of the RFP provides for negotiations between a proposer and the Board. RFP Addendum 2 provides that proposers should identify “any contract provisions which they propose to deviate” and that “[c]ontract amendments, including reasonable limitations of liability, will be subject to final contract negotiations with the School Board.”

46. Marsh’s Proposal did just what RFP Addendum 2 authorized. On the page immediately preceding the Marsh sample agreement, Marsh specifically identified two proposed modifications to the RFP sample agreement. The fact that Marsh specifically identified only two modifications to the RFP sample agreement is further support for the clear fact that the Marsh sample agreement merely identified potential terms to which Marsh would be amenable if the parties, following negotiations, found to be useful.

47. AJG argues that Marsh’s Proposal deviated from the RFP specifications regarding provisions relating to insurance and indemnification. Specifically, relying solely upon Section 8 of the Marsh sample agreement, AJG argued that Marsh’s Proposal deviated from the requirements of Sections 1 and 9 of the RFP. However, because the Marsh sample agreement was nothing more than the “sample” described above, AJG’s argument fails.

48. The nature of the Marsh sample agreement also requires rejection of AJG’s contention that the Initial and Updated Comparison failed to accurately depict Marsh’s Cost Proposal. For example, AJG pointed to portions of Section 3 of the Marsh sample agreement that refer to “compensation” that “will not be credited against the annual fee” as compensation that was additional to that included in Marsh’s Cost Proposal and not included in the Initial or Updated Comparison.

49. Ms. Gordon properly did not include the compensation described in Section 3 of the Marsh sample agreement, because the Marsh sample

agreement was, as Ms. Gordon recognized, nothing more than the “sample” described above. Moreover, doing so would have been illogical, since Marsh did not propose an “annual fee” against which any fee could be credited.

### Pricing and Scoring

50. AJG alleges that Marsh’s Proposal contained additional charges, beyond those reflected in Marsh’s Cost Proposal, for services required by the RFP that were not considered by the Selection Committee. As an example, AJG pointed to a chart in Marsh’s Proposal on which Marsh identified numerous services Marsh performs, one of which is “CATDQ-Catastrophic Data Quality” and for which it is stated, “Additional Cost depending on service offering selected.”

51. However, when Mr. Henry, Selection Committee Member and Director of Risk Management for Broward County Public Schools, was asked if the described services were “similar to or different from” a particular service described in Section 4.3 of the RFP, he replied that the services are different. Moreover, it was clear that any services for which Marsh would expect to receive compensation in addition to that reflected in Marsh’s Cost Proposal would be in addition to services required by the RFP.

52. AJG also contends that the Selection Committee improperly calculated potential cost savings of the Marsh commission percentage proposal as compared to AJG’s Proposal.

53. The Agenda Item noted the following:

The Marsh proposal includes 5-year savings of \$1,235,000 versus the incumbent [AJG] based upon the premium levels assumed in the RFP process. Additionally, the Marsh proposal provides estimate annual wholesale commission savings of \$306,453.

54. AJG attempted to call into question the amount of the savings that would result from an award of a contract to Marsh by contending that insurance premiums are subject to change each year, and that those changes

could be so significant as to eliminate savings attributable to Marsh's lower proposed commissions, in the absence of a cap on those commissions.

55. AJG did not, however, provide any evidence to support a conclusion that insurance premiums would rise sufficiently during the anticipated term of the contract to eliminate the savings associated with Marsh's lower percentage commissions. AJG's contention ignores the undisputed fact that, even in the face of rising insurance costs, the amount the Board will pay for insurance is limited by budget constraints.

56. Further, even if there are increases in the costs of insurance coverage, the Board has tools at its disposal to control the amount it will pay for insurance (and concomitantly, the commissions it will pay to a broker). For example, instead of paying increased premiums, the Board could: (i) choose to buy less coverage and increase the amount by which it already self-insures; or (ii) increase its insurance deductibles.

#### Alleged Change to Marsh's Cost Proposal

57. AJG argues that Marsh changed its Cost Proposal to include a cap on property insurance commissions after the Board opened the proposers' proposals, and that the Selection Committee's decision to recommend Marsh for negotiation and contract was predicated on that change. Both arguments are rejected.

58. Marsh's Proposal did not include a cap on property insurance commissions. Marsh does not dispute that fact, and the Board's procurement staff, Ms. Gordon, and the Selection Committee Members understood that fact. Twice during the Selection Committee's debriefing session, each time prior to the scoring of the proposals, the Selection Committee was informed that its scoring of the proposals could only be based on the information included in the Marsh, AJG, and Aon Proposals; the information provided by Ms. Gordon; and the proposers' oral presentations.

59. Recognizing that their scoring was limited to the proposers' proposals, two of the seven Selection Committee Members commented that a cap on



property insurance commissions might, at some point prior to execution of a contract, be a subject for negotiation.

60. In response to those comments, Ms. Flores, Procurement Director, and Ms. Gordon reiterated that the scoring of the proposals by the Selection Committee Members was required to be limited to what had actually been proposed by Marsh, AJG, and Aon. Indeed, Ms. Gordon specifically stated that, with regard to the Marsh Proposal, the Selection Committee Members had to take “into consideration in the scoring that [Marsh’s Proposal] had no cap, compared to the others.”

61. With full knowledge that Marsh’s Proposal did not include a cap on property insurance commissions, and full knowledge that the absence of such a cap had to be “taken into account” in their scoring of the proposals, the Selection Committee Members scored the proposals in the manner reflected in the Composite Tabulation Sheet. As reflected on the Composite Tabulations Sheet, Marsh’s Proposal received the highest score, and it was on that basis that the Selection Committee Members unanimously recommended Marsh be presented to the Board as the proposer with which the Board procurement staff should negotiate and contract for the services solicited by the RFP.

62. Almost a month after the completion of the Selection Committee’s work, and unanimous vote to recommend the Marsh Proposal to the Board, the Board’s procurement staff emailed Marsh to inquire regarding an application of a cap on the commissions proposed by Marsh. Marsh’s response indicated Marsh’s willingness to be subject to such a cap.

63. Ron Steiger, as the Board’s Chief Financial Officer, was responsible for presenting the Selection Committee’s recommendation to the Board’s fiscal committee members and the Board’s governing body. The cap inquiry to Marsh occurred simply because Mr. Steiger, based on his experience with those various members, anticipated that some of them may be interested in whether Marsh would be open to including a cap on property insurance

commissions in the contract to be ultimately entered into between the Board and Marsh.

64. Notably, Mr. Steiger explained that Marsh's response to the inquiry would not affect the recommendations to the Board. If Marsh responded by saying it was not open to a cap on commissions, Mr. Steiger intended to explain that costs could be "managed through the budget process." If Marsh responded by expressing a willingness to agree to a cap, then the issue of a cap could be the subject of the negotiations that would take place following provision by the Board's governing body of the authorizations being sought.

65. In any event, the Agenda Item prepared for presentation to the Board's fiscal committee and the Board's governing body included no mention of a cap on property insurance commissions in Marsh's Proposal, nor any mention of Marsh's willingness to agree to such a cap. The fact that the Selection Committee's scores were provided based on the express direction that they had to "take into consideration" the absence of a property insurance cap in the Marsh Proposal, combined with the absence of any mention of such a cap in the Agenda Item, reflects the fact that the Selection Committee's recommendations were not predicated upon inclusion of such a cap in Marsh's Proposal.

66. AJG failed to establish that the Selection Committee's recommendations were arbitrary, capricious, clearly erroneous, or contrary to competition.

#### CONCLUSIONS OF LAW

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

68. Pursuant to section 120.57(3)(f), the burden of proof rests with AJG 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). AJG 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).

69. Section 120.57(3)(f) provides, in part, as follows:

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.

70. An arbitrary decision is one that is not supported by facts or logic, or is despotic. *See Agrico Chemical Co. v. State Dep't of Envtl. Reg.*, 365 So. 2d 759 (Fla. 1st DCA 1978). 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. State Dep't of Envtl. Reg.*, 553 So. 2d 1260 (Fla. 1st DCA 1989); *see also Dravo Basic Materials Co., Inc. v. State Dep't of Transp.*, 602 So. 2d 632, 634 n.3 (Fla. 2d DCA 1992) ("If an administrative decision is justifiable under any analysis that a reasonable person would use to reach a decision of similar importance, it would seem that the decision is neither arbitrary nor capricious.").

71. Florida's District Court of Appeal articulated the "capricious" standard as follows:

A capricious action is one which is taken without thought or reason or irrationally. An arbitrary decision is one not supported by facts or logic, or despotic. Administrative discretion must be reasoned and based upon competent substantial

evidence. Competent substantial evidence has been described as such evidence as a reasonable person would accept as adequate to support a conclusion.

*Agrico Chemical Co.*, 365 So. 2d at 763.

72. The “clearly erroneous” standard has been explained by the Florida Supreme Court as follows:

A finding of fact is clearly erroneous when, although there is evidence to support such finding, the reviewing court upon reviewing the entire evidence is left with the definite and firm conviction that a mistake has been committed. This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. Such a mistake will be found to have occurred where findings are not supported by substantial evidence, are contrary to the clear weight of the evidence, or are based on an erroneous view of the law. Similarly, it has been held that a finding is clearly erroneous where it bears no rational relationship to the supporting evidentiary data, where it is based on a mistake as to the effect of the evidence, or where, although there is evidence which if credible would be substantial, the force and effect of the testimony considered as a whole convinces the court that the finding is so against the great preponderance of the credible testimony that it does not reflect or represent the truth and right of the case.

*Dorsey v. State*, 868 So. 2d 1192, 1209 n.16 (Fla. 2003).

73. To establish that the actions challenged in this proceeding are “contrary to competition,” AJG must establish that those actions, at a minimum:

- (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.

74. The specifications of the RFP and its addenda were never challenged. Therefore, AJG waived any challenges to those specifications. *See* § 120.57(3)(b), Fla. Stat.

75. Section 5 of the RFP established the criteria that a proposer had to satisfy to qualify for review. While a proposer's failure to satisfy other RFP requirements might negatively impact scores assigned to the proposer's proposal, only a failure to satisfy the requirements of Section 5 would, pursuant to the terms of the RFP, disqualify a proposer from review.

76. AJG has failed to provide any evidence that the Marsh Proposal failed to satisfy any of the requirements in Section 5 of the RFP. Therefore, AJG has failed to satisfy its burden to establish that the Board's determination that Marsh's Proposal was responsive to the RFP was arbitrary, capricious, clearly erroneous, or contrary to competition.

77. AJG's contentions that Marsh's Proposal deviated from sections of the RFP other than Section 5, based upon provisions in the Marsh sample agreement, must also fail.

78. Marsh did not, in its proposal, refuse to be bound by the terms of the RFP sample agreement. To the contrary, Marsh expressly certified its agreement to be bound by the terms of the RFP sample agreement, while also expressing a willingness to negotiate with the Board to include "additional terms and conditions as may be useful" in a contract with the Board.

79. Marsh's Proposal did not deviate from the insurance and indemnification provisions in the RFP. Once again, AJG's arguments concerning Marsh's alleged failure to comply with those RFP provisions are based solely on the Marsh sample agreement. The Board reasonably determined that the Marsh sample agreement was, as the watermark on

each page of the Marsh sample agreement states, a “sample,” and that Marsh agreed to be bound by the terms of the RFP.

80. AJG contends that Marsh proposed to charge the Board extra for certain services identified by the RFP as “required services.” Once again, the evidence offered by AJG in support of its argument is limited solely to the Marsh sample agreement. The uncontroverted testimony at the final hearing was that Marsh’s Cost Proposal included all RFP-required services.

81. AJG failed to prove that the Board’s determinations, regarding Marsh’s agreement to be bound by the terms of the RFP sample agreement, were arbitrary, capricious, clearly erroneous, or contrary to competition.

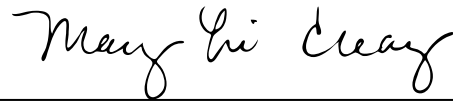
82. AJG’s allegation that Marsh changed its proposal after the bid opening is simply erroneous, as is its contention that the Selection Committee’s recommendations to the Board were based upon the alleged change. The Selection Committee Members were specifically made aware--and acknowledged--that their scoring and recommendation were required to be based solely on the proposers’ proposals and oral presentations. AJG failed to carry its burden to demonstrate that the determinations were arbitrary, capricious, clearly erroneous, or contrary to competition based upon an alleged change to Marsh’s Cost Proposal.

83. In sum, AJG has failed to carry its burden to establish that the Marsh Proposal was non-responsive or that any challenged determinations or actions by the Board were arbitrary, capricious, clearly erroneous, or contrary to competition.

#### RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Miami-Dade County School Board enter a final order that adopts the foregoing Findings of Fact and Conclusions of Law, upholds the challenged recommendations, and awards a contract, pursuant to the RFP, to Intervenor Marsh.

DONE AND ENTERED this 13th day of January, 2021, in Tallahassee, Leon County, Florida.



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MARY LI CREASY  
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Filed with the Clerk of the  
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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 should be filed with the agency that will issue the Final Order in this case.