STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LIFE INSURANCE COMPANY OF THE SOUTHWEST,

Petitioner,

vs. Case No.: 14-3549BID

BROWARD COUNTY SCHOOL BOARD,

Respondent.
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AXA EQUITABLE'S EXCEPTIONS TO RECOMMENDED ORDER

Intervener, AXA Equitable Life Insurance Company ("Intervener" or "AXA Equitable"), by and through undersigned counsel, and pursuant to section 120.57(3)(e), Florida Statutes, and Fla. Admin. Code R. 28-106.217, hereby files its exceptions to the following findings in DOAH's Recommended Order (the "RO").[1]

I. INTRODUCTION

The Broward County School Board (the "School Board") should reject the RO as to its determination that the proposal of AXA Equitable was nonresponsive. Its factual findings regarding such conclusion are not based on competent substantial evidence, and its legal determinations as to responsiveness are incorrect as a matter of law in an area in which the School Board has substantive jurisdiction. Put simply, AXA Equitable gained a lawful, strategic advantage by complying with the mandatory requirements of the solicitation, but by also thinking outside the box, i.e., providing alternative solutions to the School Board to offer a better

[1] AXA Equitable has standing to file these exceptions because it entered an appearance in this action as a specifically-named person pursuant to Fla. Admin. Code R. 28-106.205(3). The timing of such filing in no way prejudices the existing parties. Indeed, Petitioner actually provided Respondent with an extension to submits its exceptions, but refused to do so as to AXA Equitable even where AXA Equitable agreed that any such extension would be without prejudice to Petitioner challenging AXA Equitable's right to file such exceptions.

value. Rather than recognize the School Board's authority to accept a responsive, better value proposal, the Recommended Order improperly interprets the solicitation to prohibit alternative solutions where no such prohibition exists. (Further, the third alternative of AXA Equitable was ranked lower than the Petitioner's offer so it was not prejudiced by this alternative.) In doing so, the RO substitutes its judgment for that of the School Board as to the application of the standards in the School Board's RFP.

To compound the RO's initial flaw as to concluding that an irregularity exists, the RO then applies an incorrect legal standard in determining whether any such irregularity may be waived by the School Board as a minor irregularity. The Recommended Order ignores binding precedent holding that even where a government agency had made an award based on an understanding that a proposal was responsive, but then raises the defense during the bid protest hearing that any such irregularity was a minor irregularity, the administrative law judge is still to give great deference to the agency's position rather than to treat the issue de novo. *Intercontinental Properties, Inc. v. Dep't of Health & Human Rehab. Servs.*, 606 So.2d 380, 386 (Fla. 1st DCA 1992) (in a *de novo* proceeding, "It does not mean, as the hearing officer apparently thought, that the hearing officer sits as a substitute for the Department and makes a determination whether to award the bid *de novo*. Instead, the hearing officer sits in a review capacity, and must determine whether the review criteria in *Baxter's Asphalt* [whether an irregularity is minor] have been satisfied.")

II. STANDARD OF REVIEW

Under section 120.57(1)(l), Florida Statutes, the School Board may reject or modify the conclusions of law over which it has substantive jurisdiction. The School Board may also reject or modify DOAH's findings of fact if it first determines from a review of the entire record, and

states in its final order, that the finding was not based on competent substantial evidence or that the proceedings below did not comply with the essential requirements of the law. § 120.57(1)(l), Fla. Stat.

In a post-award bid protest the interpretation of a solicitation and the evaluation of proposals are within the substantive jurisdiction of the agency:

> In Florida . . . a public body has wide discretion in ***soliciting and accepting bids*** for public improvements and its decision, when based on an honest exercise of this discretion, will not be overturned by a court even if it may appear erroneous and even if reasonable persons may disagree.

Liberty Cnty. v. Baxter's Asphalt & Concrete, Inc., 421 So. 2d 505, 507 (Fla. 1982) (*quashing* district court decision that an awardee's failure to bid on one of two mutually exclusive alternate proposals was a material deviation from the terms of the solicitation, agency had determined it was not and the decision was based on an honest exercise of its discretion) (emphasis added); *see also Tropabest Foods, Inc. v. Dep't of General Servs.*, 493 So. 2d 50, 52-53 (Fla. 1st DCA 1986) (*aff'g* agency's rejection of a recommended order sustaining protest where agency awaredee's bid had been accepted as responsive even though it contained an irregularity, the irregularity was a minor, waivable one); *Affiliated Computer Servs., Inc. v. Agency for Health Care Administration*, DOAH Case No. 05-3676BID; AHCA Rendition No. AHCA-06-0062-FOF-BID (March 3, 2006), at 12-14 (granting exceptions as to paragraphs ¶¶ 85-86 of the recommended order as to nonresponsiveness and whether any deviation was a minor irregularity that the agency may waive).

II. AXA EQUITABLE'S EXCEPTIONS

1. AXA Equitable takes exception to following identified findings of fact, conclusions of law, and recommendation. These exceptions are grouped around the following

two areas. First, AXA Equitable submitted a responsive proposal. Second, even if its proposal contained an irregularity, then the School Board properly waived such irregularity.

A. AXA Equitable's Proposal Was Responsive

(1) The Request for Proposals Did Not Prohibit Alternative Offers

2. AXA Equitable takes exception to all findings and conclusions that interpret the solicitation to prohibit the alternative offers presented by AXA Equitable as part of its multiple vendor proposal, including the following: The RO's finding in Page 9, Paragraph 15 that "[t]he RFP and [Form B-1] solicit two cost proposals only one for 'Sole Carrier' and one for 'Multiple Carrier.' The RFP and [Form B-1] do not allow for proposers to submit more than one multiple carrier proposal and to alter [Form B-1] to include an additional column for more than one multiple carrier proposal." *See* also the RO's finding at Page 23, Paragraph 44, and Page 25, Paragraph 47, and at Page 41, Paragraph 90, and Page 42, Paragraph 92, that the RFP and Form B-1 offerors could not alter Form B-1 and submit more than one multiple-carrier proposal and that Section 4.7 of RFP and Form B-1 prohibited the submission of more than one multiple-carrier proposal.

3. The RO's interpretation of the RFP and Form B-1 is not based on substantial and competent evidence because the plain language of those documents simply does not make these prohibitions. Put simply, nothing in Section 4.7 of the RFP or Form B-1 prohibits alternative solutions for an offeror's Multiple Carrier solution. The only prohibition in Section 4.7 is that "No deviations from this form are permitted. No conditions or qualifications (e.g., participation requirements) to the quoted rates are acceptable." RFP, at 10 of 26. The addition of a third column, which could have easily have been submitted within the one column on the form is not a deviation.

4. Similarly, the instruction on Attachment B1 that "If you are proposing annuity product(s), please complete the following form for both being a sole carrier or one of the multiple carriers" does not limit the offerrors to only "one" alternative for its proposal under the multiple carrier solution. Thus, the RO's finding in Page 40, Paragraph 86 that Form B-1 that the RFP required offerors to submit only one multiple-carrier proposal is not based on substantial and competent evidence. In reaching this conclusion, DOAH impermissibly deleted the "of" from the phrase "one of multiple carriers" in Form B-1.

5. The interpretation of a solicitation for a government contract, like the interpretation of a contract, is a question of law. *See, e.g., NVT Tech., Inc. v. U.S.*, 370 F.3d 1153, 1159 (Fed. Cir. 2004). Under Florida law, a court may not rewrite, alter, or add to the terms of a contract. *Jacobs v. Petrino*, 351 So. 2d 1036, 1039 (Fla. 4th DCA 1976) (rev'g trial court that interpreted contract in a manner that altered its plain language). Even though AXA Equitable submitted two multiple-carriers alternatives, they were mutually exclusive. One multiple-carrier proposal could be accepted by the School Board if two to four awards were made, and the other could be accepted by the School Board if there five or more awards, but the School Board could not accept both multiple-carrier proposals. Thus, AXA Equitable's offer did not violate the plain language of the RFP or Form B1. *Group Seven Assocs., LLC v. U.S.*, 68 Fed. Cl. 28, 32-33 (2005). Based on this improper factual conclusion that the language of the RFP prohibits multiple solutions, the RO improperly makes a similar improper legal conclusion that AXA Equitable takes exception to for the same reason. *See* RO, at Page 40, Paragraph 87; Page 41, Paragraph 89 (last sentence); and at Page 42, Paragraphs 93, 94, and 95.

6. Although it is non-binding, the case *Group Seven Assocs., LLC v. U.S.*, 68 Fed. Cl. 28, 32-33 (2005) is persuasive authority to reject the findings of the RO on this point. In that

case, the solicitation's price proposal form contained spaces allowing the bidders to offer prices for the start-up transition period and for each of the subsequent years, and stated that "The offeror's initial proposal should contain the offeror's best terms from a cost or price and technical standpoint." *Group Seven*, 68 Fed. Cl. at 32-33. The awardee submitted three alternative price proposals, one for three variations of a transition period plan, and each of those variants conformed to the solicitation. The protester argued that the awardee's proposal should have been rejected as non-responsive because the awardee submitted multiple price proposals and the solicitation referred to an "offeror's initial proposal" in the singular, however the court found that multiple offers were not prohibited and dismissed the protest. *Group Seven*, 68 Fed. Cl. at 32-33.

(2) AXA Equitable's Proposal Did Not Contain an Irregularity

7. As discussed above, because the RFP did not prohibit alternative offers for the Multiple Vendor proposal, AXA Equitable's proposal did not contain a material deviation for that reason alone. Moreover, several other related findings of fact and conclusions of law are subject to exception based on the RO not being based on substantial and competent evidence or because the RO erred as a matter of law.

8. The RO fails to recognize that the RFP is very specific as to when an irregularity in a proposal renders a proposal nonresponsive rather than is merely a matter to be taken into account as to the evaluation and scoring of proposals. The RO's finding in Page 12, Paragraph 17 that Section 4.7 of the RFP and Form B-1 prohibited "alterations" to AXA's Equitable's Form B-1 is deficient. The words used in the RFP simply do not mean that. Specifically, Section 4.7 of the RFP provides that "No ***deviations*** from [Form B-1] are permitted." (emphasis added). "Deviation" means "(1) an action, behavior, or condition that is different from what is usual or

expected; (2) the difference between the average of a group of numbers and a particular number in that group."[2] By contrast, "alteration" means "the act, process or result of changing or altering something."[3]

9. The conclusion that AXA Equitable was allowed to make a third column and submit multiple bids is further strengthened by the language contained in Section 4.1.4 of the RFP: "(Page 1 of RFP) with all required information and signatures as specified (blue ink preferred in original). Any modifications or ***alterations*** to this form shall not be accepted and Proposal may be rejected." (emphasis added). In sum, not only does "deviation" have a different meaning than "alteration," the record shows that when the School Board actually wanted to prohibit an "alteration," it explicitly said so in the RFP.

10. The RO's finding in Pages 15-16, Paragraph 20 that the School Board conceded at the hearing that AXA Equitable "deviated" from Form B1 is not based on substantial and competent evidence. A careful review of the transcript of the final hearing shows that the School Board did not make such a concession. The following excerpt from the hearing transcript confirms this:[4]

> Q: And it is clear, looking at this portion of AXA's proposal, that AXA ***altered*** the Form B1 that it submitted with its proposal over the form that is provided in the RFP; correct?
>
> A: Yes, they include[d] an additional column.

Hearing Transcript, at 113/21-25 (emphasis added). The School Board conceded that AXA Equitable "altered" Form B-1, however, as explained in AXA Equitable's exception to Page 12,

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[2] MERRIAM-WEBSTER ONLINE DICTIONARY, http://www.merriam-webster.com/dictionary/deviation (last visited Jan. 10, 2015).

[3] MERRIAM-WEBSTER ONLINE DICTIONARY, http://www.merriam-webster.com/dictionary/alteration (last visited Jan. 10, 2015).

[4] Counsel for LSW is examining Jeffrey Angello, President of Gallagher Benefits Services, the School Board's outside consultant regarding insurance and benefits

Paragraph 17 of the RO, it never conceded that such an "alteration" was equivalent to a deviation that or irregularity rendering AXA Equitable nonresponsive. Moreover, at no point does the transcript show that the School Board conceded that AXA Equitable deviated from Form B-1.

11. AXA Equitable also takes exception to the RO's findings in Pages 25-26, in the last sentence of Paragraph 46 and throughout Paragraph 47 that the RFP and Form B-1 prohibited offerors from "altering" Form B-1 and/or submitting more than one multiple-vendor proposal. As explained above, an "alteration" on Form B-1 is not a "deviation," and plain language of the RFP did not prohibit alterations to Form B-1 or the submission of more than one multiple-vendor proposals.

12. The RO's findings in Page 39, Paragraph 84 that AXA Equitable's bid contained a material deviation that rendered it non-responsive because AXA Equitable altered its Form B-1 and submitted more than one multiple-carrier proposal and that RFP and Form B-1 did not allow offerors to submit more than one multiple-carrier proposal are similar in error as a matter of law. As explained above, an "alteration" is not a "deviation," and nothing in the RFP or Form B-1 prohibited the submission of more than one multiple-carrier proposal. *Group Seven*, 68 Fed. Cl. at 32-33.

(3) AXA Equitable's Response to the Net Revenue Pricing Question Did Not Render Its Proposal Nonresponsive.

13. AXA Equitable takes exception to any factual findings or legal conclusions regarding its response to the net revenue pricing question. Simply, any such response, if insufficient, was to be addressed in the evaluation or scoring by the Evaluation Committee.

14. AXA Equitable takes exception to the RO's findings in Page 27, Paragraph 56, that the Insurance Committee was required (as opposed to permitted) to deduct points from AXA

Equitable because it failed to provide net revenue pricing for its multiple vendor proposals. There is simply nothing in the RFP that required the Insurance Committee to deduct points for that reason.

15. Similarly, AXA Equitable takes exception to the RO's findings in Page 28, Paragraph 57 that AXA Equitable's failure to provide net pricing in basis points was a material deviation that could not be waived because of the competitive advantage that it conferred upon AXA Equitable. AXA Equitable also takes exception to the RO's finding in the same Paragraph that this was a responsiveness issue and its proposal was non-responsive. Net pricing was an issue for scoring, not responsiveness, and therefore such findings are not based on substantial and competent evidence.

16. The RO's findings in Page 28-29, Paragraph 59 that the Insurance Committee did not understand what "net revenue pricing" means or that the Insurance Committee's decision to not deduct points from AXA Equitable's proposal somehow converts the issue into a responsiveness criterion is also not based on substantial and competent evidence as the RFP does not make the response to the net revenue pricing question a responsiveness issue. As demonstrated above in relation to the alternative solution for multiple carriers, the RFP was very clear when an issue is one of responsiveness, which was quite limited, rather than another subjective component for evaluation and scoring.

B. If AXA Equity's Proposal Contained an Irregularity, then it May be Waived by the School Board for the First Time in Defending the Protest

17. The RO is factually and legally flawed because it fails to recognize the School Board's authority to determine any irregularity, if it existed, is a minor irregularity that may be waived even for the first time during the bid protest hearing.

18. Consistent with law and its procurement policies, the School Board reserved the right to waive any irregularities in the RFP. Section 7.33.2 of the RFP expressly states that "[the School Board] also reserves the right to waive irregularities or technicalities in any Proposal received if such action is in the best interest of [the School Board]."

19. To the extent that AXA Equitable's alteration of Form B-1 was an irregularity, the School Board had the right to waive it as a technicality. It is well-established law that when an agency, in an honest exercise of its discretion, elects to waive a minor irregularity in a proposal, the agency's decision is entitled to great deference even if such waiver occurs during the bid protest hearing. *Intercontinental Properties, Inc. v. Dep't of Health & Rehab. Servs.*, 606 So. 2d 380, 385-87 (Fla. 3d DCA 1992) (*aff'g* agency rejection of recommended order sustaining bid protest where decision to waive technical irregularity in awardee's bid where decision was based upon an honest exercise of discretion); *Tropabest Foods, Inc. v. Dep't of Gen. Servs.*, 493 So. 2d 50, 52-53 (Fla. 1st DCA 1986) (*aff'g* agency's rejection of a recommended order sustaining protest where agency awaredee's bid had been accepted as responsive even though it contained an irregularity, the irregularity was a minor, waivable one). Notably, *Tropabest* is a case relied upon in the RO, but such case actually supports the School Board to accept these exceptions. In that case, the ALJ had sustained a protest, holding that the intended awardee was nonresponsive because it offered a product that produced a yield of 3.5 gallons instead of 1 gallon as called for in the solicitation. Also as to other products, the solicitation permitted bidders to exceed the yield, but as to this line item, the solicitation lacked such language. The agency entered a final order that rejected the ALJ's findings and found the intended awardee to be responsive. The appellate decision disagreed with the agency's reasoning, but affirmed the final order on the basis of the agency's authority to waive a minor deviation even though there was no indication

that the agency had ever taken such a position. In providing no deference to the School Board's position during the hearing that any irregularities in the proposal of AXA Equitable were waivable, the RO's factual conclusions are not based on substantial and competent evidence and the legal conclusions are in error.

20. The RO improperly decided this issue on a de novo basis, contrary to the law in the above cited cases. Accordingly, both the factual findings and the legal conclusions as to whether any deviation is a minor irregularity are in error as they are not based on substantial and competent evidence and are wrong as a matter of law.

21. AXA Equitable takes issue with the RO's finding in Page 17, Paragraph 25 that "AXA 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[d] three separate scores." This finding of fact is not based on substantial and competent evidence because, under the facts of this case, it is literally impossible for the School Board to have treated AXA Equitable differently. AXA Equitable submitted three proposals and received three scores – one score per proposal. The other offerors submitted two proposals and received two scores – one score per proposal. Had AXA Equitable submitted three proposals and received three scores, and other proposers submitted three proposals and received two scores, ***that*** would be unequal treatment. However, that is not the case here. Rather, the School Board treated all offerors equally by assigning one score to each offeror's proposal.

22. The RO's finding in Page 20, Paragraph 35 that AXA Equitable's alteration of the Form B-1 and submission of two multiple-carrier proposals was a material deviation that rendered its proposal non-responsive is also not based on substantial and competent evidence. As explained above, an "alteration" is not a "deviation." Furthermore, Section 4.7 of the RFP and

Form B-1 simply do not state that what AXA Equitable did would render its proposal non-responsive. By contrast, Section 7.1 of the RFP (Indemnification) explicitly states that "**This General Condition of the RFP is NOT subject to negotiation and any Proposal that fails to accept these conditions will be rejected as "non-responsive".** (emphasis in original). Section 7.30 of the RFP (Cone of Silence) provides in relevant part that "**Any vendor or lobbyist who violates this provision shall cause their Proposal to be considered non-responsive and therefore be ineligible for award.**" (emphasis in original). In short, when the RFP intended to make something a mandatory responsiveness criterion, it explicitly said so with emphasized text. However, Section 4.7 of the RFP and Form B-1 do not contain this kind of language.

23. AXA Equitable takes exception to the RO's findings regarding whether any irregularities, if they existed, affected AXA Equitable's pricing, including The RO's finding in Page 21, Paragraph 36 that AXA Equitable's second multiple-carrier proposal affected AXA Equitable's pricing and allowed it to fine-tune its prices.

24. The Petitioner did not present any such proof at the hearing as no witnesses testified as to how the pricing in AXA's 2-4 vendor solution would have been affected if it had not submitted a 5 or more vendor solution. The RO's assumption that AX Equitable's pricing would have changed is mere speculation and not based on any substantial and competent evidence.

25. In a section 120.57(3) bid protest, the burden of proof lies with the protester. *State Contracting & Eng'g Corp. v. Dep't of Transp.*, 709 So. 2d 607, 609 (Fla. 1st DCA 1998) (*aff'g* agency's rejection of recommend order sustaining bid protest) A review of the hearing transcript shows that no one from AXA Equitable testified at the hearing (either as an individual or as a Fla. R. Civ. P. 1.310(b)(6) representative). Therefore, LSW could not possibly have

demonstrated that AXA Equitable's price was affected by the alteration of its bid or allowed it to "fine-tune" its bid. For the same reason, AXA Equitable takes exception to the finding in Page 44, Paragraph 100 that AXA Equitable's alteration of its Form B-1 is a material deviation, and that it affected the price of AXA Equitable's multiple-carrier proposals and allowed it to fine-tune its prices.

26. Furthermore, to the extent that the alteration of the Form B-1 conferred any competitive advantage on AXA Equitable it was not an unfair advantage. *Group Seven*, 68 Fed. Cl. at 32-33. By definition, every contractor who proposes the best technical proposal or the lowest price in a procurement has a "competitive advantage" over its competitors, yet it would be nonsensical to overturn an award because of that competitive advantage. Procurement regulations are not meant to eliminate all competitive advantages, only ***unfair*** competitive advantages. *See, e.g.*, *PAI Corp. v. U.S.*, 614 F.3d 1347, 1353-54 (Fed. Cir. 2010) (*aff'g* denial of bid protest where protestor alleged that agency had failed to equalize competitive advantage enjoyed by awardee due to its status as incumbent; agency is not required to eliminate every competitive advantage enjoyed by an offeror). Any competitive advantage that AXA Equitable had is akin to that held by incumbent contractor who is able to prepare a superior proposal because of its first-hand knowledge of how to perform the work called for in a solicitation.

27. The RO's finding in Page 21, Paragraph 39 that "AXA Equitable [. . .] receive[d] 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" is not based on substantial and competent evidence. AXA Equitable takes exception to this clearly erroneous finding of fact. *Group Seven*, 68 Fed. Cl. at 32-33. There is no proof in the record that had an offeror besides than AXA Equitable submitted multiple proposals that offeror

would have been rejected as non-responsive. The mere fact that AXA Equitable saw and took an opportunity to be creative while others did not is no basis for DOAH's finding that the School Board gave AXA Equitable an unfair competitive advantage. *Group Seven*, 68 Fed. Cl. at 32-33. For the same reason, AXA Equitable takes exception to the findings in Pages 26-27, Paragraph 53 that AXA Equitable was given an impermissible competitive advantage. *PAI Corp.*, 614 F.3d at 1353-54 (agency is not required to eliminate every competitive advantage enjoyed by an offeror)

28. Even the RO's determination that the School Board did not treat any irregularity as a waiver is not based on substantial and competent evidence. If the alteration of the B-1 form by adding a third column was in irregularity, then such is so obvious it is implicit that the School Board waived this. Thus, AXA Equitable takes exception to the RO's findings in Page 22, Paragraph 41; Page 29, Paragraph 60; and Pages 42-43, Paragraph 96 that the School Board did not determine that AXA Equitable's third proposal was a waiveable minor irregularity. Because AXA Equitable's alteration of Form B-1 was so obvious, the School Board must have implicitly decided that it was non-material. *Sunshine Towing @ Broward, Inc. v. Dep't of Transp.*, DOAH Case No.: 10-0134BID, ¶¶ 5, 15-22, 2010 WL 1417770, at * 2, 6-7 (Fla. Div. Admin. Hrgs. Apr. 6, 2010) (*denying* bid protest – agency asserted during litigation that any deviation in awardee's proposal was non-material, and even though there was no direct evidence that agency ever made a contemporaneous decision to waive deviation as immaterial, fact that defect in proposal was patent meant that agency must have made a contemporaneous decision to waive it as immaterial and agency's waiver was entitled to great deference) (Van Laningham, A.L.J.).

29. For the same reason, AXA Equitable takes exception to DOAH's finding in Page 43, Paragraphs 97 and 98 that the School Board's finding that any waiver of an irregularity in

AXA Equitable's proposal is not entitled to deference and can be reviewed by DOAH de novo. *Intercont'l*, 606 So. 2d at 385-87 (*aff'g* agency rejection of recommended order sustaining bid protest, agency decision to accept a bid with a technical irregularity is entitled to deference "regardless of whether the agency has expressly waived a condition in the Invitation to Bid, as was true in *Baxter's Asphalt*, or whether, as here, the agency believed that the bid was fully conforming and awarded the contract on that basis."); *Tropabest*, 493 So. 2d at 52-53; *Sunshine Towing*, DOAH Case No.: 10-0134BID, ¶¶ 5, 15-22, 2010 WL 1417770, at *6-7. DOAH's power to review bid protests is purely a creation of section 120.57(3), Florida Statutes, which provides that in a post-award bid protest an agency's conduct is subject to the "clearly erroneous, contrary to competition, arbitrary, or capricious" standard of review. *Intercont'l*, 606 So. 2d at 385-87.

30. For all of the same reasons, RO's findings that net pricing issue cannot be waived are not based on substantial and competent evidence and are wrong as a matter of law. *See* RO, at Pages 44-45, Paragraph 101 ("AXA Equitable's failure to provide a figure for net revenue pricing on [Form B-1] is non-responsive, material, and allowed it to obtain a competitive advantage over other bidders. The failure to provide 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.") As explained above, AXA Equitable's responsive was responsive to the terms of the RFP, especially because prices were to be subject to negotiations.

C. The RO's Recommendation is Contrary to Law

31. The RO's Recommendation at Page 46 that an award be made to LWS is contrary to the law. AXA Equitable takes exception this exception because DOAH does not have the authority to make such a recommendation as to whom to award a contract to in a procurement. Moreover, the Recommendation fails to recognize that even if the RO's finding that AXA Equitable's alternative offer was a material deviation that could not be waived, then the School Board has the authority to reject all proposals and revise the solicitation to make such intent clear, and solicit new proposals from all offerors. For example, in *Harry Pepper & Assoc., Inc. v. City of Cape Coral,* 352 So. 2d 1190, 1193 (Fla. 2d DCA 1977), as case relied upon in the RO, the appellate court held that when faced with a nonconforming bid that included an unacceptable product under the terms of the solicitation the agency had two proper alternatives – either award the contract to the next low bidder who complied with the solicitation or reject all and resolicit.

Respectfully submitted,

s/ Joseph M. Goldstein
Joseph M. Goldstein
Florida Bar No. 820880
Andrew Schwartz
Florida Bar No. 096127
SHUTTS & BOWEN LLP
200 East Broward Blvd., Suite 2100
Fort Lauderdale, FL 33301
Telephone: (954) 524-5505
Facsimile: (954) 524-5506
Email: jgoldstein@shutts.com
aschwartz@shutts.com
jnolan@shutts.com

Attorneys for AXA Equitable Life Insurance Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by electronic mail to those on the service list below, on this 12th day of January, 2015.

Cynthia S. Tunnicliff, Esq.
Brian A. Newman, Esq.
Pennington, P.A.
Counsel for Petitioner
215 South Monroe Street, Second Floor
Post Office Box 10095
Tallahassee, FL 32302-2095

Robert Paul Vignola, Esq.
Office of the General Counsel
Counsel for Respondent
600 SE Third Avenue, 11th Floor
Fort Lauderdale, FL 33301

s/ Joseph M. Goldstein
Attorney

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