

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LIFE INSURANCE COMPANY OF THE
SOUTHWEST, D/B/A NATIONAL LIFE
GROUP,

Petitioner,

Case No. 19-5140BID

vs.

BROWARD COUNTY SCHOOL BOARD,

Respondent,

and

AXA EQUITABLE LIFE INSURANCE
COMPANY,

Intervenor.

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was conducted in this case on January 13 and 14, 2020, in Fort Lauderdale, Florida, before June C. McKinney, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

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STATEMENT OF THE ISSUES

The issues for determination in this case are whether Respondent, The School Board of Broward County, Florida's ("SBBC" or "Respondent"), determination not to award a contract to Petitioner, Life Insurance Company of the Southwest, d/b/a National Life Group ("LSW" or "Petitioner"), is clearly erroneous, contrary to competition, or arbitrary and capricious, and whether LSW should be awarded a contract under the request for proposals ("RFP"). Intervenor, AXA Equitable Life Insurance Company ("AXA" or "Intervenor"), has intervened in these proceedings to support its substantial interests in SBBC's intended award to AXA under the RFP.

PRELIMINARY STATEMENT

On February 1, 2019, SBBC issued RFP FY20-013, 403(b)/457(b) Program for School Board Employees ("RFP 20") for selection of tax-sheltered annuity ("TSA") contracts.

Four vendors timely responded to RFP 20. Those vendors were AXA, LSW, Variable Life Insurance Company ("VALIC"), and Voya Retirement Insurance and Annuity Company ("Voya"). All four vendors were found to be responsive and responsible. However, only the three highest ranked proposers advanced to the negotiation stage. LSW, the lowest ranked proposer, did not advance.

On May 8, 2019, after negotiations, the evaluation committee voted to award AXA, VALIC, and Voya contracts.

On May 13, 2019, SBBC posted its intended award of RFP 20 to AXA, VALIC, and Voya.

On May 14, 2019, LSW timely filed its notice of intent to protest and a Formal Written Protest of the intended award challenging, among other issues, the defective score sheets.

SBBC agreed that the score sheets were defective because the maximum amount of allowable points on the score sheets did not correspond to RFP 20 for scoring criteria. The parties waived the error, halted the solicitation, and stipulated to reconvene and to re-score the proposals.

On June 24, 2019, SBBC's evaluation committee reevaluated and re-scored all four proposals. All four vendors were advanced to the negotiation stage. After negotiating with LSW, the nine-member evaluation committee unanimously voted not to award LSW a contract.

On June 26, 2019, SBBC posted a revised recommendation, notifying the RFP 20 proposers of the revised intended award to AXA, Voya, and VALIC.

On June 27, 2019, LSW filed a timely Notice of Protest and Amended Formal Written Protest ("Protest").

On September 13, 2019, an opportunity to resolve the protest meeting was held. The bid protest committee voted unanimously to reject LSW's Protest.

On September 25, 2019, LSW's Protest was referred to the Division of Administrative Hearings ("DOAH"). The parties waived the 30-day final hearing requirement contained in section 120.57(3)e, Florida Statutes. By Order dated November 5, 2019, AXA was permitted to intervene in the proceedings.

On January 6, 2020, the undersigned granted LSW leave to file its Second Amended Formal Written Protest and Petition.

The hearing was held as scheduled on January 13 and 14, 2020, in Ft. Lauderdale, Florida.

At hearing, the parties presented Joint Exhibits 1 through 18, which were admitted into evidence. Petitioner presented the testimony of 14 witnesses: Darlene Flagg; Daniel Adams; Charles High; Dildra Martin-Ogburn; Jacob Marley; Barbara Lyn Crowe; Alan Strauss; Oleg Gorokhovskiy; John Vesey; Washington Collado; Carol Nicome-Brady; Joseph Zeppetella; Gerald Desmond; and Matthew Frazee. Petitioner's Exhibits numbered 4, 7 through 11, 14, 17 through 24, 34 through 36, 38, 39, 41, 43 through 48, 55, 58, 73, 74, and 76 were admitted into evidence. Respondent provided expanded cross-examination of nine LSW witnesses: Charles High; Dildra Martin-Ogburn; Barbara Lyn Crowe; Alan Strauss; Oleg Gorokhovskiy; John Vesey; Washington Collado; Carol Nicome-Brady; and Joseph Zeppetella during its case-in-chief.

The proceedings of the hearing were recorded and transcribed. A two-volume Transcript of the hearing was filed at DOAH on January 29, 2020. The parties agreed to file their proposed recommended orders by February 18, 2020. The parties timely filed proposed recommended orders, which have been considered in preparation of this Recommended Order.

Unless otherwise indicated, all statutory references are to the Florida Statutes (2019).

FINDINGS OF FACT

THE PARTIES

1. SBBC is the district school board for the school district for Broward County, Florida, operating pursuant to Article IX, section 4, of the Florida Constitution and section 1001.30, Florida Statutes. SBBC is the sixth largest school district in the United States and employs approximately 26,000 active full-time employees. SBBC is an "educational unit" and meets the definition of an agency under the Administrative Procedures Act.

2. LSW, a member of National Life Group, is a Texas corporation authorized to do business in Florida. LSW is a national company that does business in 49 states. As of SBBC's release of RFP 20, LSW had policies with approximately 2,768 SBBC employees actively contributing funds to LSW through payroll deduction through SBBC's existing 403(b)/457(b) program

3. AXA is a New York stock life insurance company authorized to do business in Florida and to provide insurance coverage in Florida. AXA is a national company that does business in all 50 states, Puerto Rico and the U.S. Virgin Islands. As of SBBC's release of RFP 20, AXA had the following approximate number of policies with SBBC employees: 10,263 in 403(b) plans, and 648 in 457(b) plans.

2015 RFP

4. Since 1991, LSW has provided annuities to SBBC employees.

5. In 2015, SBBC awarded TSA contracts to AXA, LSW, VALIC, Voya, and MetLife through RFP 15-010P, 403(b)/457(b) Programs for School Board Employees ("RFP 15"). The contract was for a three-year period with two one-year renewals.

6. SBBC has a Superintendent's Insurance and Wellness Advisory Committee ("Insurance Committee"), a ten-member standing committee that meets and addresses all issues that arise concerning the procurement of or changes in employee benefits. The ten members are representatives from various SBBC constituent groups and unions including Broward Teachers Union, Federation of Public Employees, Educational Support and Management Association, accounting and financial reporting unit, benefits and employment services, principals, and administrative and food service personnel. The members do not have expertise in insurance matters.

7. The Insurance Committee voted to renew the TSA services contracts for AXA, LSW, Voya, VALIC, and MetLife for the year 2018.

8. Gallagher Benefit Services, Inc. ("Gallagher"), provides consultant services to SBBC for health and welfare benefits, retirement, and actuarial

services, including retirement services. Gerald Desmond (“Desmond”), Barbara Lyn Crowe (“Crowe”), and Sharon Leach are the Gallagher consultants who work on the SBBC account.

9. Gallagher served as an insurance consultant utilizing its expertise to advise the Insurance Committee about insurance matters during RFP processes and related matters.

10. During 2018, the Insurance Committee decided it was important to ensure that the fees TSA vendors charged SBBC employees were comparable to the industry and instructed Gallagher to produce a fee benchmarking report. Gallagher contracted with Fiduciary Benchmarks (“Fiduciary”), a company that holds a patent in the fee benchmarking industry, to collect the data of SBBC’s then-five TSA providers, benchmark their fees, and create a report.

11. Rebecca Lavalley (“Lavalley”) and Haley Oliver (“Oliver”) were the Fiduciary representatives assigned to work on SBBC’s fee benchmarking report. On March 29, 2018, Fiduciary sent the initial information request to LSW.

12. LSW first provided data to Fiduciary on April 13, 2018. On May 9, 2018, Fiduciary followed up with LSW and requested additional data by asking three questions.

13. On May 14, 2018, Lavalley let Desmond know that all five TSA providers needed to provide data so that the fee benchmarking reports could be completed. As it related to LSW, the additional data identified by Lavalley to Desmond were the identical three questions requested of LSW on May 9, 2018.

14. On May 16, 2018, the Insurance Committee met and voted to renew all five RFP 15 TSA providers for 2019, including LSW, contingent on each providing the requested data for the fee benchmarking report within ten days.

15. That same day, Desmond informed LSW that the three questions were the only outstanding data requests needed.

16. On May 25, 2018, a day before the deadline of May 26, 2018, LSW provided timely answers to Fiduciary regarding the three fee benchmarking questions. LSW believed that it was in compliance with the Insurance Committee's renewal vote of May 16, 2018.

17. On June 5, 2018, Oliver requested additional data from LSW, to which LSW responded to Oliver and complied the same day even though the request was after the May 26, 2018, deadline the Insurance Committee set.

18. On July 27, 2018, Lavalley emailed Desmond that Fiduciary was not able to benchmark LSW, "because the only investments are fixed indexed annuity products that do not have explicit expenses (all expenses are embedded within the products) and there are no explicit recordkeeping costs. Attached are the materials we received."

19. On August 2, 2018, LSW and Gallagher had a follow-up conference call during which LSW reviewed and clarified its responses with Desmond.

20. Desmond reported to Dildra Martin-Ogburn ("Martin-Ogburn"), SBBC director of benefits and employment services and a non-voting member of the Insurance Committee, that LSW did not timely submit the required materials by the deadline.

21. On August 21, 2018, Desmond emailed his colleague Crowe and informed her "looks like LSW will be a no renewal." Desmond asked Crowe to report LSW's status on his behalf to the Insurance Committee because he would not be able to attend the next meeting.

22. On August 29, 2018, at the next Insurance Committee meeting, Crowe followed Desmond's instructions and reported that LSW had not provided any data and that Desmond had made numerous calls and emailed them. Crowe stated it is important to know that Gallagher sent out a huge questionnaire to all the vendors, and LSW has not responded. She explained to the

Insurance Committee that, “We want to know how LSW is performing compared to their peers. At this time, I don’t have the information.”

23. Crowe’s LSW report led to a discussion among the Insurance Committee members. Craig Nichols (“Nichols”) commented, “if [LSW is] going to be flagrantly nonresponsive we don’t need to bother.” Jack Vesey (“Vesey”) agreed and stated, “Right I get that.” Harold Osborn (“Osborn”) indicated his organization’s concerns were “[LSW’s] employees were fly by night, worked off commission where others had full time W-2 employees.” He also indicated his second concern was that the contracts were long and included surrender charges.

24. During the meeting, the Insurance Committee did not change LSW’s non-renewed status.

25. The minutes from the August 29, 2018, Insurance Committee meeting summarizes Crowe’s report as “Crowe informed the Committee that all the TSA vendors submitted the requested information with the exception of LSW.” The minutes also reflect that “all of the vendor’s representatives were present during the renewal meeting and were aware of the Committee’s comments and vote.”

26. On September 24, 2018, during a telephone conference call, Martin-Ogburn mentioned that LSW did not respond by May 26, 2018, to all the data requests for the fee benchmarks and were not renewed for 2019. LSW was participating on the call. LSW attempted to address the non-renewal announcement without success.

27. After the call, since LSW had answered the questions timely, LSW made every effort to demonstrate compliance and be placed in a renewal status by contacting Fiduciary and Gallagher.

28. On September 26, 2018, Lavallee responded to an LSW inquiry by emailing Desmond “LSW was responsive and provided us with the materials we were seeking.” She further outlined the timeline of LSW’s communications with Fiduciary. Lavallee also explained in her email that Fiduciary reviewed

the materials and determined LSW did not have comparable benchmarks because of LSW's unique recordkeeping fee structure. She summarized that Fiduciary did not have similar plans like LSW to compare the investments to in its database.

29. By letter dated November 29, 2018, SBBC informed LSW that the “[Insurance] Committee’s recommendation to not renew LSW’s contract for 2019” was being upheld.

30. On December 12, 2018, the Insurance Committee had its next meeting. The members in attendance were Joseph Zeppetella (“Zeppetella”), Vesey, Erum Motiwala (“Motiwala”), Osborn, Peter S. Tingom (“Tingom”), Donna Sacco (“Sacco”), Jennifer LaMont (“LaMont”), and Glynda Linton (“Linton”). The agenda for the meeting included a review of the draft RFP for TSA services starting in 2020. The Insurance Committee discussed requirements and items they would like to see in the new RFP. Gallagher was at the meeting providing advice and answering questions.

31. Martin-Ogburn served as the technical advisor at the meeting. She was the first to bring up LSW during the meeting. While explaining the inactive list, Martin-Ogburn clarified that LSW is “not listed here as active but they are active today. Their contract will expire December 31st of [2018].” Tingom responded by asking “What are the numbers on people with LSW and the amount of money?” Martin-Ogburn provided the numbers and further explained that currently there were five TSA providers, but because LSW was not renewed, they will not have a current contract but will have the opportunity to bid.

32. The Insurance Committee continued to discuss LSW’s accounts and its monthly cash flow as well as its nonrenewal.

33. While deciding what content would go in the RFP, the Insurance Committee discussed including two questions to deal with whether employees are 1099 or not, so that the evaluators could look at that information on the front end when the proposals came in. During that portion of the Insurance

Committee's discussion, Desmond explained, "And there's always questions in the RFP on how the representatives are compensated, whether its commission versus salary, whether they're paid bonuses on production, et cetera."

34. Next, the Insurance Committee reviewed the 15 inactive TSA providers SBBC had partnered with and when they would drop off the list. The Insurance Committee conferred on the percentage of fees employees were paying on a monthly basis. As an inactive TSA provider, LSW was included in the fee discussion regarding the need to know LSW's fees but the inability to determine its fees.

35. The Insurance Committee was collectively concerned that SBBC employees with LSW contracts could be stuck with fees for up to ten years or until they turned a certain age as well as acquire penalties to move into another TSA account.

36. Vesey specifically expressed his concern and suggested that the committee look at LSW and "evaluate what has happened there as far as what [employees] are getting returns on, how much they're being charged." Martin-Ogburn reminded the members that LSW was part of the fee benchmarking. Desmond followed up, summarized LSW's response to the benchmarking information request, and told the Insurance Committee, "Yeah they didn't provide any data after multiple requests, conversations. They basically said that the product is the product and they don't supply data to consultants or to the District to give any analysis on the workings of the indexed annuities that they have." The Insurance Committee continued discussing its inability to have LSW independently evaluated, which prevented assistance for SBBC's employees, because without the data, a benchmarking analysis could not be performed.

37. Tingom also told the Insurance Committee:

My only comment to that is, if they are not providing us with the data, why do we want to go

forward with them? Because they're not giving us what we've asked for, whereas these other companies have provided it for us, and I'm sure we'll have a lot of bidders on this, because if you look down, every month they're taking out close to three million dollars, almost four million a month is going to somebody. They have failed in their responsibility, in my opinion and I don't think they deserve any special credit.

38. Lamont reported to the Insurance Committee that "I have heard the stories about LSW" and described LSW as "noncooperative with providing data."

39. Afterwards, Zeppetella reminded the Insurance Committee that they were not going forward with LSW, because LSW was no longer active since they would not be getting new business as of January 2019, and he pointed out that LSW was not able to become a vendor again unless they get the next bid for 2020.

40. After listening to committee members express their concerns about LSW being allowed to bid on the new RFP, Martin-Ogburn followed up and clarified for the Insurance Committee that LSW was not getting business as of January 1, 2019. She also instructed the Insurance Committee in no uncertain terms that "any company that qualifies can [bid]." She further emphasized her directions and said, "Yeah, we can't say you can't bid."

2020 RFP

41. On February 1, 2019, the SBBC issued RFP 20. RFP 20 sought TSA services for a contract period commencing January 1, 2020, and concluding December 31, 2022, with two one-year renewal options.

42. Section 2.1 of RFP 20 notified proposers that SBBC was attempting to limit its TSA vendors, trying to improve retirement awareness, and looking for competitive fees, minimal surrender charges, guaranteed returns, and returns that exceed benchmarks. Section 2.1 provides as follows:

SBBC would like 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. 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. In 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. Once RFP 20 was advertised, Gallagher provided assistance to SBBC by answering incoming questions from proposers regarding the RFP. Charles High (“High”), SBBC’s purchasing agent, subsequently posted three addenda with the answers Gallagher drafted to the proposers’ questions.

44. SBBC did not receive any bid specification protests with regard to RFP 20 or any of the three addenda.

45. AXA, LSW, VALIC, and Voya timely submitted proposals by the submission deadline, March 21, 2019.

EVALUATION PROCESS

46. Gallagher assisted the Insurance Committee with the evaluation process. After the four vendors responded to RFP 20, Gallagher took all four proposals and evenhandedly put together an analysis of the responses to

RFP 20. The format was a side-by-side columned document divided in sections corresponding to the four areas of criteria in RFP 20. The format allowed the Insurance Committee to review each proposer's answers for each specific question next to each other. Gallagher's compiled analysis was placed in an executive black binder for use by the evaluation committee when evaluating the responses to RFP 20.

47. Gallagher did not include everything from each proposal in the black binder. There were missing materials from each of the four proposers. Crowe and Desmond decided, when compiling the black binder, to leave out some items, including the section on minority business participation, the prospectuses, marketing materials, charts, the actual investment line up, and any submissions that were massive, e.g., audited financial statements.

48. Gallagher put at the bottom of each page in the black binder the statement: "IMPORTANT: This proposal analysis is a summary outline of the proposed vendor(s), based on information provided by each vendor. It does not include all of the details in the RFPs. The RFPs themselves must be read for those details."

49. Several weeks before the meeting, the four proposals and a black binder were sent to each of the Insurance Committee members, who also served as the evaluators for RFP 20.

50. On May 8, 2019, the Insurance Committee met as the evaluation committee to evaluate and score the four proposals. Present were members Oleg Gorokhovsky ("Gorokhovsky"), designee for Judith Marte ("Marte"); Zeppetella; Vesey; Gerri Arlotta, designee for Motiwala; Osborn; Tingom; Dan Reynolds ("Reynolds"); Linton; Anna Fusco ("Fusco"); and LaMont. The evaluation committee members were instructed, if they had any questions, to please ask for clarification. They were also told to score independently.

51. Gallagher representatives started the process, leading the evaluation committee through a detailed review of the black binder section by section reviewing the proposer's answers to RFP 20 questions. Different Gallagher

representatives were assigned sections of the proposal. Crowe led the presentation, and Desmond followed.

52. The evaluation committee was very involved in the presentation and asked numerous questions. Gallagher provided its expertise and advised the evaluation committee during the presentation. Often times, when a member had a specific question not in the proposal, Desmond would suggest that the member ask the proposer during negotiations to flush out the information.

53. While reviewing the proposals for the members, Desmond discussed question 29 and explained that the proposers were asked if they were utilizing subcontractors. He summarized the answers and pointed out the lists of subcontractors for some proposers that went on for several pages.

54. Osborn interjected and commented that, Voya had subcontractors. Then, he asked about the level of Voya's subcontractors, because previously one of the concerns had been the amount of LSW subcontractors.¹

55. Desmond replied some vendors do the majority of work in house and other vendors use subcontractors for their services because they believe it is more efficient.

56. Osborn followed up that he was addressing the sales force. Crowe informed the members that the Scope of Services portion of the proposal addresses whether an insurance company has W-2 or 1099 employees coming in the schools.

57. Osborn also addressed question 53 and asked, "is there a positive or a negative across the companies about how they're compensated and would that—would that motivate—would that motivate the salesperson to do what's best for them versus what's best for our employees?"

58. Desmond utilized his expertise and answered the question based on previous feedback he had received. He responded, "Yeah. We firmly believe

¹ Unlike other proposers, SBBC union groups had received complaints in the past regarding LSW's agents under the prior contract. There were no complaints about the other TSA vendors during the prior contract award.

that the optimum compensation structure would be salary plus bonus based upon participant feedback so that there's really nothing to incentivize them for certain investments." He also told Osborn when he asked whether everyone was following the best, straight salary plus bonus model, "I would say that would be something to clarify in negotiations."

59. As Desmond continued his portion of the Gallagher presentation, he explained to the evaluation committee that the proposers were asked to discuss due diligence, selection, and monitoring of outside parties. He went on to page 156, which addressed subcontractors but did not get far. Osborn interrupted and asked whether this would be the right time to ask about the 1099 and W-2 employees for question 86 on page 149. Desmond explained that portion is for entities, but some earlier questions are more specific. He also told the members that the question would apply if a vendor was bringing in an unrelated third party and asked each vendor to identify its process for maintaining that.

60. Desmond continued reviewing the proposals for the members following the outline in the black binder. He examined question 105, the bidders proposed products. He also introduced LSW's new platform during his presentation. He pointed out the differences between the proposers on question 109 and explained that three vendors agreed to direct brokerage but LSW's proposal indicated it would not be offering direct brokerage.

61. Osborn asked, as the consultant, whether there is an advantage or disadvantage over a target, and Desmond objectively told the members that they would have to look at the underlying performance for each offering and evaluate the criteria to help make a decision as to whether it is good or bad.

62. Osborn also initiated the surrender charge discussion among the members and commented that his concern was some employees received certain advice but, once they were in it, the product seemed out of proportion to some other products. Desmond pointed to question 179, and Osborn responded that SBBC would not want its employees to have fewer

restrictions, to which Desmond agreed. Desmond also went on to explain that the responses are more beneficial to the participants from all the vendors than responses from five years ago.

63. While reviewing the sections, Martin-Ogburn reported that none of LSW’s three listed references that had been contacted replied. Therefore, the evaluation committee had no references to check LSW’s background. However, the evaluation committee had input from at least one reference from the other three proposers, which allowed the evaluation committee to weigh qualifications about each proposer in areas such as: description of services; amounts; length of service; responsiveness; accessibility; staff; consistency of services; knowledge; expertise; experience; commitment; consistency of services; length of contract; strength(s); weaknesses; and reselection preferences.

64. Desmond summarized what the committee was looking for in a vendor by asking them to look for the lowest expenses, best quality funds, and, on the expense side, the lowest expenses possible.

65. Section 5.1 of RFP 20 states, in part, as follows:

5.1 The Evaluation Committee (hereinafter referred to as “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	<u>10</u>
	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. If only one responsive proposal is received, the Committee will proceed without scoring the one responsive proposal and may negotiate the best terms and conditions with that sole proposer or may recommend the rejection of all proposals as permitted by Section 6A-1.012(12)(c), F.A.C.

66. The evaluation committee determined that AXA, LSW, Voya and VALIC were each responsive and responsible vendors and eligible for evaluation. The average scores for all four proposers were: AXA 87.3, Voya 84.8, VALIC 83.9, and LSW 67.7.

67. The evaluation committee also voted at the May 8, 2019, meeting to negotiate with the three highest ranked proposers. The members did not include LSW, the lowest ranked proposer, among the proposers with which it would engage in negotiations.

68. Section 5.4 of RFP 20 detailed the award and provides as follows:

Award: SBBC intends to make award(s) to the Proposer(s) that has complied with the terms, conditions and requirements of the overall RFP. After the conclusion of negotiations, the recommended award would be made for the goods and services sought in the RFP in accordance with the terms of negotiations. The award(s) shall not be a guarantee of business or a guarantee of specified quantities of products or volume of service. An Agreement (in the form of SBBC's Sample Agreement attached hereto as **Attachment "M"**) shall be prepared for execution by the Awardee and The School Board, and shall be governed by the laws of the State of Florida, and must have venue established in the 17th Judicial Circuit Court of

Broward County, Florida or the United States Court for the Southern District of Florida. The agreement approved by the SBBC General Counsel will be submitted to SBBC for final approval. **Approval shall not be a guarantee of business, a guarantee of specified volume of service or minimum dollar revenue to be received on this contract.**

69. After conducting negotiations, the evaluation committee subsequently voted to recommend the award of the TSA contracts to AXA, Voya, and VALIC.

70. On May 13, 2019, SBBC posted its intended award of RFP 20 to AXA, Voya, and VALIC.

71. On May 14, 2019, LSW timely filed a notice of intent to protest and a Formal Written Protest of the intended award and bond in accordance with section 120.57(3).

72. The score sheets used by the evaluation committee on May 8, 2019, were defective. Gallagher failed to correctly apply the points that were in RFP 20 to the score sheets, and the maximum amount of allowable points on the score sheets did not correspond to RFP 20 for the scoring criteria.

73. SBBC acknowledged the use of erroneous scoring criteria by the evaluation committee on May 8, 2019. The error was corrected, and any protests to the error were waived when the parties agreed to lift the stay imposed by section 120.57(3), to allow the evaluation committee to reconvene and rescore in order to apply the correct scoring criteria and maximum points per category as had been published within RFP 20.

REEVALUATION AND RESCORING MEETING

74. On June 24, 2019, the evaluation committee met to reevaluate and rescore the proposals for RFP 20. Four of the original Insurance Committee members who scored proposals on May 8, 2019, were unavailable to attend the June 24, 2019, meeting. The unavailable committee members designated

replacements to reevaluate the proposals on June 24, 2019. Not all of the replacement members read each proposal.

75. At the meeting, Gallagher consultants repeated their entire presentation for the four proposals since the composition of the evaluation committee had changed and over a month had passed. Gallagher successfully guided the evaluation committee through the RFP questions by going through the sections in the black binder to review the proposals and pointing out proposal differences.

76. Gallagher fairly and professionally answered numerous questions from the evaluation committee about all the proposals during the presentation.

77. After reevaluating and rescoring the four proposals using the correct scoring criteria and maximum point allocations published in Section 5.1 of RFP 20, the scores at the June 24, 2019, meeting were: AXA 86.7, Voya 85.1, VALIC 84.1, and LSW 78.1.

NEGOTIATION STAGE

78. The evaluation committee properly implemented RFP Sections 5.2 and 5.3 of RFP 20 for the next stage of the process, negotiations. Section 5.2 notified proposers that the Insurance Committee might question them on their proposal or request a presentation and provides as follows:

The Committee reserves the right to ask questions of a clarifying nature once Proposals have been opened, require presentations from all Proposers, interview any or all Proposers that respond to the RFP, or make their recommendations based solely on the information contained in the Proposals submitted. Presentations, if required, will be part of the evaluation process.

79. Section 5.3 notified proposers of the negotiation process and provides as follows:

Based upon Section 5.1, the Committee, at its sole discretion, may commence negotiations with

selected Proposer(s). The Committee reserves the right to negotiate any term, condition, specification, or price (other than Section 4.2 and Section 7.1) with a selected Proposer(s). In the event that mutually agreeable negotiations cannot be reached with a Proposer, the Committee may negotiate with the next ranked Proposer(s), and so forth. An impasse may be declared by the Committee at any time. The Committee will make a recommendation to the Superintendent. The Superintendent may choose to post the recommendation as its intended action of the District in accordance with Section 120.57(3) Florida Statutes or the Superintendent may choose to return the recommendation to the Committee for further deliberations consistent with the RFP.

80. Martin-Ogburn and Gallagher led the negotiations. The same evaluation committee members asked proposers questions and determined whether to recommend an award to a proposer after negotiations.

AXA

81. The evaluation committee first voted to negotiate with AXA as the highest ranked proposer. In its proposal, AXA proposed the use of a mix of W-2 and 1099 agents to service the contract. During the negotiations, AXA changed its proposal from offering a mix to using only W-2 agents. After conducting closed-door negotiations with AXA, the evaluation committee subsequently voted to recommend the award of a contract to AXA upon the terms negotiated with that proposer.

VOYA

82. The evaluation committee voted next to negotiate with Voya as the second highest ranked proposer. Voya's proposal provided 60 percent of its sales force was commission based. During negotiations, Crowe asked for compensation details on both the 1099 and W-2 agents. Voya's representative responded, "So the compensation can be structured, I mean, either way. It's either a traditional commission schedule or it can be done as a salary and

bonus. We're happy to do it either way." Desmond responded that the preference of the evaluation committee, and he did not want to speak for the committee, "was salary and some type of bonus based upon some" Tingom did not allow Desmond to finish and explained the members' preference, "Salary and incentives is what we prefer, to have a W-2 for everyone and then an incentive type program of your design." Voya agreed to that condition. After finishing the negotiations with Voya, the evaluation committee subsequently voted to recommend the award of a contract to Voya upon the terms negotiated with that proposer.

VALIC

83. The evaluation committee next voted to negotiate with VALIC as the third highest ranked proposer. After voting to negotiate with VALIC, one member of the evaluation committee, Tingom, left the proceedings.

Thereafter, the evaluation committee was comprised of only nine voting members.

84. VALIC proposed using only W-2 agents and never changed that proposal during negotiations. After conducting negotiations with VALIC, the evaluation committee subsequently voted to recommend the award of a contract to VALIC upon the terms negotiated with that proposer.

LSW

85. The evaluation committee voted, five to four, to negotiate with LSW. Matthew Frazee ("Frazee") represented LSW and had binding authority to negotiate on the company's behalf. The negotiation discussion began with Crowe asking LSW about a buyout.

86. During negotiations, as the evaluation committee had done with AXA and Voya, LSW was questioned about its proposal to use a mix of 1099 consultants and W-2 employees. Under its proposal, LSW products would be offered to SBBC employees by agents who were compensated on a 1099 basis as opposed to a W-2 basis. Some of LSW's 1099 agents also worked for other entities.

87. Crowe addressed question 17 and discussed the structure used, and the people used, to sell LSW's products. Frazee responded that "the folks selling directly to school employees are 1099."

88. Marte commented that, by IRS definition, employees must be paid on W-2, so 1099 agents are consultants. She next asked whether the agents were to be employees of LSW. Frazee responded and confirmed, "They are not an employee of the company." The evaluation committee's discussion next clarified with Frazee that the 1099s were commission based and not eligible for a bonus.

89. After Martin-Ogburn explained the procedures for representatives being allowed on a SBBC school campus, Frazee explained LSW's process for keeping up with LSW affiliated representatives when the District is not aware of the affiliation. He detailed that LSW quarterly has a call to facilitate "who is and who is not allowed in the District."

90. Frazee further explained the discipline LSW provides if LSW finds out a company that might be LSW affiliated comes into the schools to provide other types of information and is doing something outside of what it is supposed to be doing. He said that LSW has conversations with the consultant and explains why the agent cannot be on campus, and that the agent can be reprimanded up to termination.

91. Marte responded to Frazee's explanation that it in and of "itself concerns me."

92. Frazee next addressed Martin-Ogburn's concern of subcontractors providing information outside of the approved products and he explained that LSW controlled such actions by holding training to obtain 403(b) certification to teach the consultants the parameters of what they can and cannot do in the school.

93. Martin-Ogburn told Frazee that the explanation did not answer her question, and she rephrased her question and asked Frazee whether subcontractors are utilized to provide educational type sessions at the school.

Fraze responded that LSW is mainly using ValuTeachers to provide educational sessions for its products.

94. Marte followed up and asked Fraze, “if one of your consultants were to come on our school property and sell and get someone to contract for a product that is not within the scope of what we signed with you, how would you intend to remedy that for our employee?” Fraze explained that LSW would not accept the business.

95. During the negotiations, the evaluation committee continued, at length, to discuss its concerns with LSW regarding subcontractors working for someone else, selling something that is not in LSW’s portfolio under LSW’s name, and harming the employees. Fraze was unable to ever satisfactorily explain to the evaluation committee how SBBC’s employees would be protected or remedied for such actions. Instead, Fraze repeatedly presented termination sanctions and training as a solution, which failed to adequately alleviate the evaluation committee’s concerns.

96. After being asked, Fraze also reported that LSW’s 1099 consultants were not certified financial planners but were registered. Vesey expressed being uncomfortable with LSW’s 1099 consultants’ lack of certification when the consultants are able to make lifelong decisions for SBBC employees. He questioned what would happen if a retirement plan did not work out and whether LSW could correct mistakes. Vesey asked, “will our employees be made whole on a decision that has significantly impacted their retirement?”

97. Emery continued the discussion Vesey had started and asked, “Has it happened?” Vesey replied, “It has happened in our District. Do I know it’s specific to LSW? I don’t. But it has happened in our District.”

98. Fraze also explained to the members during the negotiations that LSW had a significant 1099 consultant base and that LSW’s registered consultants were the number one provider of fixed index annuity products in K-12 nationwide. He noted 1,300 consultant agents had gone through LSW certification trainings in the last year, and LSW believes training is the right

way to prevent the issues the members were suggesting. Frazee re-emphasized that there is an extensive amount of training LSW does to look out for SBBC's best interest.

99. During the negotiations, Marte asked LSW directly whether, if it was discovered that a consultant sold an unauthorized product, LSW would be willing to make the employee whole as far as fees it cost to undo the mistake. Frazee responded that LSW would have to look at it on a case by case basis. Frazee also explained that that if LSW determined an employee was harmed by buying a product that was not within the scope of the contract, LSW would move for termination and check with the Department of Insurance to find out if the agent had done something illegal.

100. Frazee then explained to the negotiation committee that, "The reason I hesitate a little bit is, when it's outside of—if that were to happen with a product outside of ours, sometimes it's hard to understand what those things are and where the damages are. It just—it gets a little fuzzy when we have no visibility into it."

101. In response, the evaluation committee told LSW that it was still concerning that LSW could bring unsupervised consultants into a school that LSW had no control over, and the negotiation point became even more lengthy while the members tried to get LSW to clarify the issue to their satisfaction.

102. Collado pointed out that LSW had said during its presentation that it does not necessarily go through every item that is sold by the consultants, and Frazee nodded in agreement. Collado then asked Frazee to appease his concern as to how SBBC will assess the damage to an employee during a private conversation without oversight. Frazee expounded that LSW only brought in 1099 consultants that had the values of LSW, and their motto was "helping teachers retire with dignity." Frazee also reiterated that termination was the tool for any agent's unauthorized action, and he explained the second line of defense, subcontractors keeping in constant contact with LSW, which

helps to monitor the subcontractors. Desmond suggested a fiduciary pledge, which LSW agreed to produce for its 1099 consultants.

103. Among the other items negotiated, LSW agreed to modify additional portions of its proposal when asked to do so. LSW agreed to provide a semi-annual report showing net required revenue; to waive its loan fees and hardship fees; to extend its supplier diversity commitment of \$50,000 per year through contract renewal; to fund school specific projects for the base period and renewal of \$10,000 per year; to allow SBBC to change the mutual fund offerings due to poor fund performance; and to reduce basis points for certain expenses by five basis points.

104. Within its proposal in response to question 15, LSW also provided a bond as security, which provides:

15. Does your company provide a bond or guarantee to protect the program, the employer, and participants from any loss resulting from fraud or dishonesty by your employees or representatives? Yes X No ___ If yes, what amount?

Our National Life Group affiliated broker-dealer carries an errors and omissions liability policy with coverage of up to \$1,000,000. Additionally, a fidelity bond provides up to \$25,000,000 in liability coverage for other losses.

105. Within its proposal, LSW also provided the following indemnification clause:

By AWARDEE: AWARDEE agrees to indemnify, hold harmless and defend SBBC, its agents, servants and employees from any and all claims, judgments, costs, and expenses including, but not limited to, reasonable attorney's fees, reasonable investigative and discovery costs, court costs and all other sums which SBBC, its agents, servants and employees may pay or become obligated to pay on account of any, all and every claim or demand, or assertion of liability, or any claim or action

founded thereon, arising or alleged to have arisen out of the product, goods or services furnished by AWARDEE, its agents, servants or employees; the equipment of AWARDEE, its agents, servants or employees while such equipment is on premises owned or controlled by SBBC; or the negligence of AWARDEE or the negligence of AWARDEE's agents when acting within the scope of their employment, whether such claims, judgments, costs and expenses be for damages, damage to property including SBBC's property, and injury or death of any person whether employed by AWARDEE, SBBC or otherwise.

106. After the evaluation committee reviewed the negotiated terms, Fusco commented that termination of a 1099 consultant who mistakenly guided one of SBBC's employees cannot truly rectify the employee because "that doesn't rectify it for us." Vesey and Marte chimed in, agreed, and indicated they had addressed the same issue of not providing a remedy for the employees earlier in the negotiations. Frazee attempted to remediate the evaluation committee's major concerns again and explained once more that only vetted and properly trained LSW 1099 consultants are placed in the schools. He further stated that LSW agents act in the best interest of employees, and Frazee reminded the evaluation committee that transactions are monitored by a secondary review.

107. Fusco then requested that LSW make the employees whole for possible misguidance or mistakes regarding products except for the FRS component, and Frazee finally agreed.

108. Ultimately, LSW's negotiations did not alleviate the members' major concerns. The evaluation committee was neither convinced that LSW had control over its 1099 consultants nor that it would be able to provide a remedy for the SBBC employees harmed by unauthorized actions. LSW's responses to the questions in an attempt to satisfy the members' concerns failed to ever clarify the issues for the members.

109. After no further questions from the members, at the conclusion of the negotiating session with LSW, the evaluation committee decided not to move forward. Vesey made a motion for the evaluation committee to decline to recommend the award of a contract to LSW as a TSA vendor for RFP 20. Fusco seconded the motion. The evaluation committee did not accept LSW's final proposal, and all nine members voted unanimously to approve the motion.

110. On June 26, 2019, SBBC posted a revised recommendation notifying the proposers of the revised intended award to AXA, Voya, and VALIC under RFP 20.

111. On June 27, 2019, LSW filed a timely Notice of Protest and filed a timely Amended Formal Written Protest ("Protest").

BID PROTEST COMMITTEE

112. When a vendor files a protest under the RFP process, School Board Policy 3320, Part VIII, Sections (J) and (L), provide the following:

(J) The School Board shall provide an opportunity to resolve the protest by mutual agreement between the parties within seven days, excluding Saturdays, Sundays, and days during which the school district administration is closed, after receipt of a formal written protest.

* * *

(L) If the subject of the protest is not resolved by mutual agreement within seven days, excluding Saturdays, Sundays, and days during which the school district administration is closed, after receipt of the formal written protest, and if there is a disputed issue of material fact, The Board shall refer the protest to the Division of Administrative Hearings for proceedings under Chapter 120.57(1), Florida Statutes, upon the written request of the protestant. This written request by the protestant shall be filed at the same place at which the formal written protest was filed within three days, excluding Saturday, Sunday, and days during

which the school district administration is closed, after the attempt to resolve the protest by mutual agreement.

113. On September 13, 2019, the bid protest committee convened an opportunity to resolve the protest meeting with LSW to consider the protest of the posted award under RFP 20.

114. Martin-Ogburn, Strauss, and Gorokhovsky served on the bid protest committee. Robert Vignola (“Vignola”) served as the committee’s attorney and advisor. Brandice Dickson (“Dickson”), Susan Jennings, Frazee, and Lisa Muller appeared on behalf of LSW. Crowe and High also attended as technical advisors.

115. The meeting started by Vignola introducing himself and identifying the purpose of the bid protest meeting. He informed the attendees that the “agency shall provide an opportunity for the parties to meet and attempt to resolve the matter.” Vignola explained Section (L) of School Board Policy 3320. He then stated that the meeting was an opportunity for the parties to address the current, dispute on this bid protest. Vignola also advised the committee to view the protest and discussions with the same sort of eyes as an administrative law judge. The burden rests with the challenger to consider whether the agency’s proposed action is contrary to the agency’s governing statutes, rules or policies, or the bid proposal specifications.

116. Next, Mary Coker (“Coker”) went through the procedural history of RFP 20. She ended it with, “[s]o here we are, September 13th, in an attempt to resolve the process, the formal protest, as defined by Policy 3320.”

117. LSW attempted to resolve the dispute and started its presentation by having its attorney, Dickson, provide background about LSW. She also explained how LSW would like to keep its relationship with SBBC. Dickson further explained to the committee that LSW did not believe it had been treated equitably and summarized that the dispute could be resolved. She pointed out modifications LSW offered to make during the negotiations that

were provided to the members, and she outlined how most of the negotiation discussions focused on the 1099 consultants, specifically pointing out that “some of the committee members believe that potential agent misconduct would be better regulated if the agent is compensated on a W-2, as opposed to a 1099 basis.” She maintained that LSW’s Fidelity bond and indemnification provision were not even raised during negotiations. She emphasized LSW’s willingness to terminate any agent that sold unauthorized products and LSW’s agreement to sign a fiduciary pledge, which demonstrated commitment. After addressing some other portions of the negotiations with the bid protest committee, Dickson concluded the presentation by informing the bid protest committee that LSW was committed to use W-2 employees for all new business with SBBC, and she offered W-2 use only.

118. Coker responded on behalf of the bid protest committee. Among other items, she addressed the committee’s sole discretion to determine how to negotiate with the proposer on any terms or conditions. Vignola assisted Coker and directed the committee to a number of policies, including Section 5.4 of RFP 20, which provides “SBBC to make awards to proposers that have complied with the terms and conditions and requirements of the RFP, and after the conclusion of negotiations, the recommendation of award will be made ... with the terms of negotiations.”

119. Coker also referenced Attachment A of LSW’s proposal and commented that SBBC was not listed as a reference in question five. She next went to question six and pointed out to the bid protest committee that when asked who had terminated LSW’s plans, SBBC was listed there. She then went on to show the committee that under the reason for SBBC’s termination, LSW’s proposal listed competitive bid process, and she stated, “which I don’t think is factually accurate.”

120. Coker explained further that the evaluation committee had the sole discretion to negotiate with vendors as it wished and to award contracts. She pointed out that since LSW was the only proposer that had a performance

problem, a previous termination of a contract, when other vendors did not, those actions impacted LSW's scoring and played a role in the committee choosing not to award LSW.

121. Afterwards, Vignola walked through the transcript of the negotiation meeting of June 24, 2019, with the bid protest committee and reminded them that the evaluation committee raised a number of issues after engaging in negotiations with LSW. However, the evaluation committee's major concern was neither about compensation of agents nor about the types of agents proposed, 1099 agents versus W-2 agents. Vignola reminded the bid protest committee that the members' main concern had been if consultant agents engaged in unauthorized matters with SBBC employees, how LSW would prevent unauthorized activities from happening, and if LSW could remedy the problems that occurred with SBBC employees. Vignola summarized that the committee was collectively very concerned about the 1099 consultant control issues, and LSW was neither able to satisfy the evaluation committee with its responses nor clear up their concerns, and, therefore, the bid protest committee unanimously voted not to award LSW a contract.

122. When it was time to vote, Vignola advised the bid protest committee to determine if the protest lacked merit, or to take any other action from a revised recommendation that the committee believed to be appropriate.

123. The bid protest committee did not respond to LSW's offer to have only W-2 agents, found no reason to find the protest valid, and voted unanimously to reject LSW's Protest.

FORMAL HEARING

124. At hearing, negotiation committee members explained the LSW 1099 consultant control issue in detail and why it was a major concern that needed to be resolved during the negotiation meeting before LSW could obtain an award.

125. Zeppetella credibly testified he voted against making an award to LSW because “there was a lack of confidence moving forward after the negotiations based on the lack of controls of possible 1099 contractors.”

126. Carol Nicome-Brady admitted that she was against awarding LSW the contract because, among other things, LSW had received the lowest score during evaluations; she was concerned about LSW’s consultants selling unauthorized products; and LSW’s offer to make employees whole if they were sold unauthorized products failed to adequately address her concerns.

127. Collado also testified that he declined to vote to award the contract to LSW because of the company’s lack of accountability for its consultants and that LSW’s explanations regarding the committee’s concerns during negotiations were a concern because of LSW’s inability to explain things to satisfy his concerns.

CONCLUSIONS OF LAW

128. DOAH has jurisdiction of the parties and subject matter of this proceeding. §§120.569 and 120.57(1) and (3), Fla. Stat.

129. Pursuant to section 120.57(3)(f), the burden of proof rest with LSW as the party contesting SBBC’s 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 the preponderance of the evidence. *See Dep’t of Transp. v. J.W.C. Co., Inc.*, 396 So. 2d 778, 787 (Fla. 1st DCA 1981).

130. 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.

131. A bid protest proceeding is not simply a record review of the information that was before the agency. Rather, a new evidentiary record

based upon the facts established at DOAH is developed. *J.D. v. Fla. Dep't of Child. & Fams.*, 114 So. 3d 1127, 1132-33 (Fla. 1st DCA 2013).

132. After determining the relevant facts based on the evidence presented at hearing, SBBC's intended action will be upheld unless it is contrary to the governing statutes, rules, or the bid specifications. The agency's intended action must also remain undisturbed unless it is clearly erroneous, contrary to competition, arbitrary, or capricious.

133. The standard of proof is "whether the proposed agency action was [clearly erroneous]." § 120.57(3)(f), Fla. Stat. The purpose of the proceeding, which is de novo, is 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." *Id.*

134. The Florida Supreme Court explained the clearly erroneous standard 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).

135. The contrary to competition standard precludes actions which, 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. *Care Access PSN, LLC v. Ag. for Health Care Admin.*, Case No. 13-4113BID, 2014 Fla. Div. Admin. Hear. LEXIS 3, at *54 (Fla. DOAH Jan. 2, 2014); *Phil's Expert Tree Serv., Inc. v. Broward Cty. Sch. Bd.*, Case No. 06-4499BID, 2007 Fla. Div. Admin. Hear. LEXIS 161, at *23 (Fla. DOAH Mar. 19, 2007).

136. An action is “arbitrary if it is not supported by logic or the necessary facts,” and “capricious if it is adopted without thought or reason or is irrational.” *Hadi v. Lib. Behavioral Health Corp.*, 927 So. 2d 34, 38-39 (Fla. 1st DCA 2006). If agency action is justifiable under any analysis that a reasonable person would use to reach a decision of similar importance, the decision is neither arbitrary nor capricious. *J.D.*, 114 So. 3d at 1130. 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.

137. Petitioner maintains that SBBC engaged in numerous actions during the RFP 20 process that were clearly erroneous, contrary to competition, arbitrary, capricious, and contrary to the governing statutes, school board policy, and solicitation specifications.

EVALUATION ALLEGATION

138. Petitioner alleges that Gallagher was partial and tainted the RFP evaluation process to LSW's detriment by reporting to the Insurance Committee that no data was submitted for the 2018 benchmarking report, creating the erroneous criterion for the score sheets, leaving LSW items out of the black binder, and leading the Insurance Committee as a de facto decision maker member. The undersigned is not persuaded by LSW's assertions.

139. First, minimal evidence exists of the Insurance Committee discussing LSW's data submission after Martin-Ogburn instructed the Insurance Committee that LSW had the right to bid for RFP 20 at the December 12, 2018, meeting. The instruction was provided almost two months before the RFP process started and the RFP was even advertised. Petitioner refers to the data submission as a misrepresentation. Even if it is a misrepresentation, the record demonstrates that Gallagher's data misrepresentation from the past did not impact the RFP 20 process. As in the holding of *J.D.*, the misrepresentation is not arbitrary or capricious because any reasonable person analyzing the RFP 20 process would reach the same conclusion—any data misrepresentation from the past neither played a role in nor impacted the LSW status because the evaluation committee's decision about the award was based on the 1099 consultant control issues.

140. Second, the score sheet error was corrected when the parties stipulated to lift the stay imposed and waive the error to allow the evaluation committee to reevaluate and rescore all four proposals. The evidence shows that when LSW was reevaluated and rescored, it was found both responsive and responsible, and the Insurance Committee properly moved LSW forward

to the negotiation stage. Therefore, Gallagher's incorrect scoring weights, in the score sheets for the first evaluation of May 8, 2019, were waived and are a moot issue in this matter.

141. Additionally, no evidence demonstrates that LSW's missing materials from the black binder played any role in the evaluation committee's decision. Instead, the record shows that Gallagher created the black binder in an objective fashion, and it omitted materials from each of the four proposers. Therefore, no favoritism was shown to demonstrate the binder composition was contrary to competition.

142. The record also lacks evidence that Gallagher was partial or misled the Insurance Committee to the detriment of LSW. To the contrary, the evidence only shows that Gallagher was rational, evenhanded, and fair across the board with all four proposers regarding RFP 20. In fact, the evidence even proves that on at least one occasion, Gallagher assisted LSW with advice to the members when Desmond broke up the monotony of the lengthy LSW consultant control discussion and suggested that the members might want to have LSW agents sign fiduciary pledges, which LSW ultimately agreed to do.

143. It is important to note that any consideration of LSW's past performance problem neither stemmed from the data submission of the past nor was it initiated by Gallagher during the RFP 20 process. Instead, LSW's proposal response brought it to the members' attention. Attachment A contained a misstatement regarding how SBBC's previous contract ended, which was available for the evaluation committee to review. Also, LSW was the only proposer who did not have any reference checks for its qualifications.

144. Petitioner also contends that the evaluation committee ceded authority to Gallagher, which made Gallagher a de facto decision maker member of the Insurance Committee acting contrary to competition against LSW. However, the evidence in this cause only shows that Gallagher strictly served in the capacity of advisor and competent consultant during the RFP 20 process. Petitioner specifically points to Gallagher's discussion of the

salary plus commission with the evaluation committee as an example of Gallagher making decisions. However, the record demonstrates the opposite. The evidence proves Desmond did not show favoritism towards salary structure, because his explanation regarding the salary plus bonus was based on participant feedback and was only in response to a direct question from Osborn. Additionally, Gallagher's explanation of the structure took place during the May 8, 2019, evaluations that are not at issue; that LSW protest was waived and redone because of the score sheet error. The credible evidence shows that Gallagher consistently rationally advised, explained, demonstrated, consulted, drafted, and answered questions and made suggestions ethically but never evaluated during the RFP 20 process. All of Gallagher's actions were the reasonable services and activities of a consultant. Moreover, the record is void of any evidence that Gallagher acted as a decision maker during the RFP 20 process. Instead, the evidence establishes the committee made the decisions. Accordingly, Petitioner's contention that Gallagher served as a de facto member of the Insurance Committee contrary to competition and that Gallagher's actions were arbitrary and capricious is rejected because LSW did not meet its burden to demonstrate de facto decision maker membership.

145. Section 5.1 of RFP 20 provides that the evaluation committee has the "right to ask questions of a clarifying nature." The credible evidence in this matter shows that the evaluation committee worked within the parameters of the solicitation specifications. The evaluation committee was very deliberative and rational in its LSW review by performing independent in-depth questioning during the LSW negotiations. The record supports Gallagher demonstrated evenhanded explanations while guiding fair issue development. Moreover, the evidence confirms the evaluation committee developed their own major LSW concerns, 1099 consultant control and remedies for LSW employees, independently by dedicated lengthy clarifying questioning. Accordingly, Petitioner's allegations that the evaluation was

contrary to governing rules, the RFP specifications, and contrary to competition are without merit. Additionally, Petitioner's burden has not been met to demonstrate any of the combined aforementioned allegations to prove a tainted process. Hence, the clearly erroneous, contrary to competition, arbitrary and capricious standards also have not been met.

NEW CRITERION ALLEGATION

146. Petitioner also fails to demonstrate that SBBC created a new award criterion, W-2 agent use only, for other vendors and excluded LSW from the change contrary to competition. The opposing evidence shows that the only criteria used during RFP 20's process were contained in the RFP and that no new criterion was implemented. Section 5.2 of RPF 20 allows the evaluation committee to negotiate **any** term or condition it chooses with each individual proposer to get the best product for its employees. The record is void of evidence that the evaluation committee decided to award contracts to proposers who only had W-2 agents. Even though AXA and Voya ultimately and independently negotiated to only use W-2 agents, which VALIC had already proposed, the record shows that the evaluation committee's negotiation focus with LSW was to allow LSW to use its 1099 consultants if controlled. By negotiating with LSW about the terms for 1099 consultants at length, it was established that there was neither a requirement of W-2 employees nor change in criteria.

147. It is also important to note that the evidence does not support Petitioner's assertion that Gallagher told the Insurance Committee to adopt a preference of salary plus commission. Instead, the evidence indicates Gallagher did not initiate the discussion about the salary plus bonus structure, only responded to Osborn's specific question, and explained that it was the "optimum structure" based on "participant feedback." Therefore, Petitioner has not successfully carried its burden to demonstrate W-2 agent use only, even if in the form of salary plus bonus, was an undisclosed criterion that was either contrary to competition, arbitrary, or capricious.

IMPASSE ALLEGATION

148. Petitioner also maintains that SBBC violated SBBC policy by not declaring an impasse during negotiations. The undersigned is not convinced by such an allegation. The negotiation committee's processes are outlined in Sections 5.2 and 5.3 of RFP 20. Section 5.3 is at issue here. Section 5.3 provides that the evaluation committee reserves the right to negotiate any term, condition, specification, or price. The policy also allows "[a]n impasse may be declared by the committee at any time."

149. In this matter, during other proposers' negotiations, a vote was taken by the evaluation committee on impasse. Petitioner advances its position that a violation of the governing rule, Section 5.3, exists because the evaluation committee did not declare an impasse orally during LSW's negotiations before voting no contract award. However, the evidence does not support such an allegation. Cambridge Dictionary defines impasse as "a situation in which progress is impossible, especially because the people involved cannot agree." Dictionary.cambridge.org, <https://dictionary.cambridge.org/us/dictionary/english/impasse> (last visited Mar. 15, 2020). The record shows that the evaluation committee chose not to accept LSW's offers from the negotiation stage, which created a deadlock between parties—LSW provided negotiated terms but the members would not agree. After the nine-member committee determined they could not move forward with an award for LSW, the members unanimously took a vote not to award LSW because of their dissatisfaction with LSW's major concerns, 1099 consultant control. It is important to note that Section 5.3 uses "may," and does not mandate that an impasse "shall" be declared. Additionally, the policy does not require that the words "impasse" be said out loud. The absence of a verbal declaration of impasse does not invalidate the unanimous nine-member vote against LSW. The evidence of a unanimous rejection from the evaluation committee is a de facto declaration of impasse in and of itself.

Therefore, Petitioner fails to meet its burden to prove SBBC violated Section 5.3 of RFP 20.

SBBC POLICY VIOLATION ALLEGATIONS

150. Petitioner's contention that SBBC abused its discretion during the bid protest conference by failing to apply the plain meaning of the section 120.57(3)(d) and School Board Policy 3320, Part VIII, Sections (J) and (M), and School Board Policy 3320, Part II, Section (HH), Rules 2 and 8, is unfounded.

151. Section 120.57(3)(d) and School Board Policy 3320, Part VIII, Section (J), both provide that an agency "shall provide an opportunity to resolve the protest by mutual agreement between parties."

152. School Board Policy 3320, Part VIII, Section (M), provides that "these persons shall meet with the protestant in an effort to mutually resolve the protest. If the protest is mutually resolved, then no further action is required by either."

153. School Board Policy 3320, Part II, Section (HH), Rules 2 and 8, provides that personnel should "make every reasonable effort to obtain an equitable and mutually agreeable settlement of any controversy with a vendor"

154. Petitioner contends the bid protest committee did not know their purpose for convening. However, the evidence establishes that Vignola instructed the bid protest committee regarding School Board Policy 3320 twice at the beginning of the meeting. In his instructions, he stated that the committee was to "provide an opportunity for the parties to meet and attempt to resolve the matter," and "this is an opportunity for the parties to address the current dispute on this bid protest." Also, Coker reemphasized the committee's purpose in her comments that the meeting was "an attempt to resolve the process, the formal protest, as defined by Policy 3320" before the bid protest committee deliberated. Hence, the evidence at hearing demonstrates that, in real time, during the meeting, each member was

properly instructed and made aware of their role three times before participating. The record further supports that the committee listened to the presentation of LSW's attorney and Coker and Vignola's presentations before voting to reject the protest.

155. Contrary to Petitioner's claims, neither section 120.57(3)(d) nor School Board Policy 3320, Part VIII, Sections (J) and (M), serve as authority to mandate settlement results during the bid protest committee meeting. The bid protest committee is only required by the directive verb "shall" to "provide an opportunity to resolve." It is undisputed in this matter that SBBC presented LSW the opportunity required under the law and SBBC policy on September 13, 2019.

156. Additionally, Petitioner claims that the bid protest committee did not attend the meeting with the goal to resolve the protest and did not follow the Code of Ethics. School Board Policy 3320, Part II, Section (HH), provides that personnel should "[m]ake every reasonable effort to obtain an equitable and mutually agreeable settlement of any controversy with a vendor"

Petitioner's position that Section (HH) applies to the bid protest committee is not persuasive. First, Section (HH) is entitled Code of Ethics for Personnel Authorized to Purchase to define the section's applicability. It is clear from the evidence presented at hearing that the Insurance Committee, evaluation committee, and bid protest committee are each collegial bodies not acting in the capacity of SBBC personnel. To that end, the committees' responsibilities are to evaluate, score, vote, award, and ultimately make a recommendation or advise SBBC, which acts on the recommendations and advice. Specifically, the bid protest committee considers protests. Additionally, the Insurance Committee, evaluation committee, and bid protest committee neither purchase nor have the authority to purchase any goods. Hence, Section (HH) is not applicable to this matter.

157. Additionally, no law, policy, or specification required the bid protest committee to accept LSW's offer of W-2 agents at the bid protest meeting. The

record reflects that the bid protest committee listened to LSW's presentation but did not find any validity to its protest to change the negotiation committee's decision. Such evaluation committee actions were squarely within the parameters of section 120.57(3)(d) and School Board Policy 3320, Part VIII, Section (J) and (M). Accordingly, Petitioner, did not prove SBBC abused its discretion during the bid protest conference by not following section 120.57(3)(d) and School Board Policy 3320, Part VIII, Section (J) and (M); and, therefore, Petitioner failed to meet its burden to demonstrate SBBC acted contrary to competition, clearly erroneous, or arbitrary and capricious regarding the governing law and SBBC policies.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that The School Board of Broward County, Florida, enter a final order dismissing the formal written protest of Life Insurance Company of the Southwest, d/b/a National Life Group.

DONE AND ENTERED this 24th day of March, 2020, in Tallahassee, Leon County, Florida.



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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.