STATE OF FLORIDA
SCHOOL BOARD OF BROWARD COUNTY

LIFE INSURANCE COMPANY OF THE SOUTHWEST
d/b/a NATIONAL LIFE GROUP,

Petitioner,

vs. DOAH Case No. 19-5140 BID

SCHOOL BOARD OF BROWARD COUNTY

Respondent,

and

AXA EQUITABLE LIFE INSURANCE
COMPANY,

Intervenor.
_____/

PETITIONER'S EXCEPTIONS TO RECOMMENDED ORDER

Petitioner, Life Insurance Company of the Southwest, d/b/a National Life Group ("LSW"), by and through undersigned counsel, hereby files its Exceptions to the Recommended Order entered March 24, 2020. Pursuant to section 120.57(1)(*l*), Fla.Stat., LSW takes exception to the Recommended Order because it is fundamentally flawed as it includes: (a) findings of fact which are not supported by competent substantial evidence, and (b) conclusions of law which do not comport with the essential requirements of law or which may be revised by Agency conclusions which are as or more reasonable than the ALJ's conclusions.

STANDARD OF REVIEW

In entering its Final Order, the Agency may not base agency action on a finding of fact that is not supported by competent, substantial evidence in the record of a hearing conducted pursuant to Section 120.57, Florida Statutes. Section 120.57(1)(*l*), Florida Statutes, prescribes that an agency reviewing a recommended order may not reject or modify

the findings of fact of an ALJ, "unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law." § 120.57(1)(*l*), Fla. Stat. (2019); *Charlotte County v. IMC Phosphates Co.*, 18 So.3d 1089 (Fla. 2d DCA 2009); *Wills v. Fla. Elections Comm'n*, 955 So.2d 61 (Fla. 1st DCA 2007). The term "competent substantial evidence" does not relate to the quality, character, convincing power, probative value or weight of the evidence. Rather, "competent substantial evidence" refers to the existence of some evidence (quantity) as to each essential element and as to its admissibility under legal rules of evidence. *See Scholastic Book Fairs, Inc. v. Unemployment Appeals Comm'n*, 671 So.2d 287, 289 n.3 (Fla. 5th DCA 1996); *Nunez v. Nunez*, 29 So.3d 1191, 1192 (Fla. 5th DCA 2010). Moreover, the reviewing agency cannot reject any ALJ finding that is supported by competent substantial evidence, even to make alternate findings that are also arguably supported by competent substantial evidence. *See Resnick v. Flagler Cty. School Bd.*, 46 So.3d 1110, 1112 (Fla. 5th DCA 2010); *Green v. Fla. Dep't of Business and Professional Reg.*, 49 So.3d 315, 319 (Fla. 1st DCA 2010) (holding that the agency improperly re-weighed the evidence and substituted its own factual findings for those of the ALJ); *Strickland v. Fla. A & M Univ.*, 799 So.2d 276, 278-80 (Fla. 1st DCA 2001) (Agency abused its discretion by improperly rejecting ALJ's findings).

An Agency may "reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules," provided the Agency's conclusion of law is as or more reasonable than that which was rejected or modified. § 120.57(1)(l), Fla.Stat.; *State Contracting & Eng'g Corp. v. Dep't. of Transp.*, 709 So.2d 607 (Fla. 1st DCA 1998).

Where findings of fact are mislabeled as conclusions of law, an agency – and any subsequent reviewing court - must be guided by the true nature of the finding, not its title. *Pillsbury v. Department of Health and Rehabilitative Services*, 744 So.2d 1040 (Fla. 2d DCA 1999). Where a conclusion of law is improperly labeled as a finding of fact, the label is "disregarded and the item is treated as though it were properly labeled." *Battaglia Props. V. Fla. Land & Water Adjudicatory Comm'n*, 629 So.2d 161 (Fla. 5th DCA 1993); *J.D. v. Fla. Dep't. of Children & Families*, 114 So.3d 1127 (Fla. 1st DCA 2013).

EXCEPTIONS TO CONCLUSIONS OF LAW

The ALJ correctly found that negotiations with proposers were "closed-door." [RO at ¶81]. The ALJ also correctly found that during negotiations with Voya, it originally proposed to use a mix of W-2 employees and 1099 consultants. [RO at ¶82]. The ALJ also correctly found that during negotiations with Voya, the Evaluation Committee disclosed to Voya that "[s]alary and incentives is what we prefer, to have a W-2 for everyone and then an incentive type program of your design." [RO at ¶82]. The ALJ also correctly found that after this "preference" was made known to Voya, Voya agreed to use only W-2 employees as the sales force. [RO at ¶82]. Those findings of fact are supported by competent, substantial evidence and may not be disturbed by the SBBC.

It is undisputed that this "preference" was not made known to LSW during its negotiations with the Evaluation Committee. [JE-13 pp. 004127-004184]. The ALJ did not make a contrary finding of fact in her Recommended Order and the record evidence demonstrates she could not make such a finding because it would be unsupported by competent, substantial evidence (*e.g.* Evaluation Committee member Collado testified that even though it was a requirement to secure his vote, he did not disclose to LSW that it had to use only salaried (W-2) employees because LSW should have divined that requirement.

[Tr. 269-270]; Evaluation Committee member Zeppetella confirmed that he would have voted in favor of LSW had it pledged to use only W-2 agents, but that the Evaluation Committee never asked LSW to do so in negotiations. [Tr. 297-298]).

As explained in *Magnum Construction Management Corporation v. Broward County School Board*, where the school board's evaluation committee uses an undisclosed preference to make an intended award, the award is contrary to competition and in violation of Section 120.57(3)(*f*), Florida Statutes. 2005 WL 678869 (Div. of Admin. Hrgs. March 21, 2005). This is true even where the criteria for award were made known in the RFP itself, but a preference *as between the announced criteria* were undisclosed. *Id*.

In *Magnum*, the protestor contended that the Broward County School Board "employed an unstated evaluation criterion, namely a preference for builders who had previously done work for SBBC." *Id*. There, the RFP "contain[ed] a clear and unambiguous statement of experiential preferences, in Section 1.1(E), which states:

> The School Board of Broward County would prefer to select a Design/Builder with proven successful experience in the Design and Construction of 3 school projects completed within the past 5 years in the State of Florida.
>
> ***
>
> In evaluating the five short-listed proposals, seven of the eight participating board members did, in fact, award more points (on some criteria) to proposers that previously have built schools for SBBC (namely Pirtle, Cummings, and Seawood), while deducting or withholding points (on some criteria) from proposers who have not previously done work for SBBC (MCM and Stiles), based on each proposer's status as a former SBBC-contract holder or a newcomer to SBBC contracting. This strong parochial preference most dramatically affected the scoring of the Past Work Performance and References criterion, although some board members also considered a proposer's past work for SBBC (or lack thereof) in scoring Profile & Qualifications of Proposer's Team and even Proposed Project Scheduling.
> 23. The preference for builders having previous business experience with SBBC had a palpable impact on the scoring and was likely decisive.
>
> ***

In fact, the preference was so strong that SBBC experience was not, for seven evaluators out of eight, simply a factor to be considered in evaluating a builder's past work; it was effectively a condition of, or a prerequisite to, receiving the total possible points of 100. That is, the effect of the preference was such that unless a builder had previous experience with SBBC, the builder could not receive 10 points in the past work category from most of the board members, regardless of how extensive——and how successful——its experience in building schools for others had been.

27. In sum, it is determined that the School Board used an undisclosed preference for builders having experience with SBBC in scoring and ranking the proposals, and that the use of this preference had a material effect on the evaluation——probably even deciding the outcome.

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70. With that in mind, the undersigned is convinced that to ensure a fair competition, the letting authority should always clearly disclose such a preference in the procurement document. That way, would-be proposers who stand to suffer as a result of the preference at least can attempt to level the playing field before the contest begins by bringing a specifications challenge. That said, however, the undersigned need not conclude here that nondisclosure of a parochial preference is necessarily contrary to competition.

71. What happened in this case was worse than "mere" nondisclosure, for the RFP informed potential proposers that relevant work completed in one area of Florida would be afforded the same preference as relevant work completed in another area of the state. Thus, not only did potential proposers have no reason to suspect that SBBC's former contract holders would have an advantage; they reasonably should have concluded that SBBC's former contract holders would have no advantage (simply on the basis of having previously done work for SBBC) over proposers who had built schools in Florida for other owners. It almost goes without saying that proposers such as MCM had no reason to bring a specifications protest to object to a preference that the RFP excludes.

72. In sum, it is concluded that a status-based scoring preference for former contract holders, implemented via giving additional points to favored proposers while taking points away from disfavored proposers, is contrary to competition…

Magnum Construction Management Corporation v. Broward County School Board, 2005 WL 678869, at *5-7, 15–16.

As is made plain in *Magnum,* the school board acts contrary to competition and in violation of Section 120.57(3)(*f*), Florida Statutes where it bases an intent to award on an undisclosed preference engrafted onto existing RFP criteria. In the case at bar, the school board has not only repeated its past mistake from *Magnum*, but it compounded the error by disclosing the preference to Voya, which acted upon the information, and not to LSW.

Because the ALJ correctly made findings of fact that the SBBC's evaluation committee had a preference that was made known to Voya but not to LSW, it follows that the Conclusions of Law in the Recommended Order are erroneous and cannot stand.

Within this context, LSW submits the following Exceptions to Paragraphs 146 and 147 of the Recommended Order and demonstrates that the SBBC should adopt the substituted conclusions of law because they are as or more reasonable than those in the Recommended Order:

> 146. Petitioner ~~also fails to~~ demonstrated that SBBC created a new preference for an existing 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 but an~~d~~ undisclosed preference for that existing ~~no new~~ criterion was implemented. Section 5.2 of RFP 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, but it does not allow the evaluation committee to make an award based on a preference disclosed to fewer than all proposers. ~~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 failure to disclose its preference for W-2 agents only did not provide a level playing field for ~~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~~ supports Petitioner's assertion that ~~Gallagher told~~ the Insurance Committee ~~to~~ adopted 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.

[RO p. 37]

The portion of Paragraph 146 that reads: "The record is void of evidence that the evaluation committee decided to award contracts to proposers who only had W-2 agents" is a finding of fact mislabeled as a conclusion of law. Because there is no competent, substantial evidence in the record to support the finding, it is clearly erroneous and properly stricken. *Hill v. Jackson*, 497 So.2d 688 (Fla. 1st DCA 1986)("in the absence of conflicting evidence, a finding contrary to the weight of the evidence is clearly erroneous."); *Standard Oil Co. v. Gay*, 118 So.2d 212 (Fla. 1960)("Where the testimony and evidence are uncontradicted, a finding contrary to the manifest weight of such testimony and evidence could not be said to be supported by competent, substantial evidence.") Rather, the competent, substantial evidence in the record demonstrates that a majority of the Evaluation Committee testified that LSW's proposed use of 1099 agents as opposed to solely W-2 agents to service the contract was ***the reason*** they voted against recommending a contract be awarded to LSW. (Tr. 259-261, 269, 277-278, 297-298; LSW-58, p. 28).

Likewise, the clause "and independently" in Paragraph 146 is a finding of fact mislabeled as a conclusion of law. Because Voya agreed to use "salary and incentives…a W-2 for everyone" only after it learned of the evaluation committee's preference, it cannot be said that Voya's use of W-2 employees only was "independently" made.

WHEREFORE, LSW respectfully requests the SBBC grant the exceptions as stated

and enter a Final Order granting LSW the relief requested in its bid protest.

RESPECTFULLY SUBMITTED this 3rd day of April, 2020.

/s/ Cynthia S. Tunnicliff

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the true and correct copy of the foregoing has been filed with the School Board of Broward County by fax to (754) 321-0936 on April 3, 2020, and that a copy was provided by eservice to the parties of record:

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