STATE OF MAINE
MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Court Docket No. BCD-25-275

PENQUIS C.A.P., INC.
Petitioner/Appellant

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al.
Respondents/Appellees

ON APPEAL FROM THE BUSINESS AND CONSUMER DOCKET

Brief of Respondent/Appellee Department of Administrative and Financial Services

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INTRODUCTION

Appellee, State of Maine, Department of Administrative and Financial Services ("DAFS"), respectfully requests that the Court affirm the decision of the Business and Consumer Docket ("BCD"), which upheld a final agency action by DAFS (the "DAFS Decision" or "Decision") pursuant to M.R. Civ. P. 80C.

Appellant, Penquis C.A.P., Inc. ("Penquis"), appeals the BCD decision that upheld the DAFS Decision. Appendix ("A.") 8. The DAFS Decision, in turn, upheld a contract award decision by the Department of Health and Human Services ("DHHS"). A. 44 (DAFS Decision). Following a competitive bidding process, DHHS awarded contracts for Medicaid non-emergency transportation ("NET") brokerage services for Regions 2, 3, 4 and 8 to another incumbent broker, ModivCare Solutions, LLC ("ModivCare").[1] Penquis currently holds the NET contracts for Regions 3 and 4, and seeks to keep the contracts (worth over $30 million/year) through this litigation. A. 23 (Penquis Petition for Review of Final Agency Action, "Pet."), ¶ 9; CR 21460 (Penquis Region 4 contract).

Penquis has had its NET contracts with DHHS for over ten years (A. 24) and, understandably, does not wish to lose them. But state agencies cannot maintain permanent contracts with any vendors, due to Maine's competitive

[1] ModivCare, like Penquis, has been providing NET brokerage services in Maine since 2014, and has NET contracts for five Regions, including Regions 2 and 8. *See* Certified Record ("CR"), 656.

bidding requirements. 5 M.R.S.A. § 1825-B (Supp. 2025). As long as an agency adheres to the procurement laws, it generally has broad discretion to determine with whom it wishes to do business.[2] DHHS followed all requirements here, as did DAFS when it reviewed the contract award to ModivCare pursuant to 5 M.R.S.A. § 1825-E (Supp. 2025).

The issues in this appeal are straightforward: because Penquis's bids did not include all of the information required by the solicitation, and based on other concerns, such as inadequacy of the transportation network, they scored lower than ModivCare's bids, and DHHS awarded the contracts to ModivCare. DAFS considered all the evidence of record and was not clearly convinced that it should invalidate the contract awards. The Court should uphold the DAFS Decision.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

1. The request for proposals for Medicaid non-emergency transportation services.

Maine State agencies are generally required to contract for services through competitive bidding. 5 M.R.S.A. § 1825-B(1). The purpose of this requirement is to secure the best value for the State's use of taxpayer funding.

[2] Penquis does not have a right to an indefinite government contract. *Carroll F. Look Construction Co., Inc. v. Town of Beals*, 2002 ME 128, ¶ 16, 802 A.2d 994 (unsuccessful bidders for a government contract have no protected property interest, unless controlling law gives the government agency no discretion in whether to accept the bid or determining with whom to contract); A. 16 (BCD Decision).

Id. DAFS, through its Bureau of General Services ("BGS") and the Office of State Procurement Services, is authorized to oversee and assist other State agencies, including DHHS, with the purchase of goods and services. *Id.*; 5 M.R.S.A. §§ 1811(1)(2013); 1812 (2013).

Since 2014, DHHS has had a contract with Penquis to broker NET services in Regions 3 and 4. A. 24. Given that DHHS had utilized the same vendors as NET brokers since 2014, in or around 2021, DHHS and DAFS determined that they should conduct another competitive procurement process. DHHS and DAFS worked together to develop the Request for Proposals, or RFP, which, given the scope of the NET program, took about two years. CR 110.

DHHS adhered to the legal requirements for preparation of the RFP, including approval by the State Procurement Review Committee. CR 110-11; 5 M.R.S.A. §§ 1824-B (Supp. 2025); 1825-B; 18-554 C.M.R. Ch. 110 (2010)("Ch. 110")(A. 58). The RFP provided a description of the NET program, the proposal requirements and procedures, and a timeline for key RFP events. A. 67. Upon completion of the RFP process, DHHS anticipated making eight contract awards, one per region. A. 75.

By the submission deadline of July 11, 2023, DAFS received the following proposals:

- Four proposals for Region 1

- Five proposals for Region 2
- Five proposals for Region 3
- Five proposals for Region 4
- Five proposals for Region 5
- Five proposals for Region 6
- Five proposals for Region 7
- Six proposals for Region 8
  = **40 proposals total for all transit regions**.

CR 2231-21299.

Pursuant to the RFP, proposals were organized and scored in the following manner:

- Section I – Preliminary Information (No Points – Eligibility Requirements)
- Section II – Organization Qualifications and Experience (25 Points)
- Section III – Proposed Services (50 Points)
- Section IV – Cost Structure Acknowledgement (25 Points)

A. 118. Sections II and III were scored using a team consensus approach. *Id*. Proposals would score the full 25 points for Section IV if they included a completed Cost Structure Reimbursement Acknowledgement Form; in other words, cost was not a factor for DHHS to consider in making the NET contract award decisions. A. 118; 131.[3]

[3] Bidders did not need to submit information regarding proposed costs because, where NET services are part of the Medicaid program, reimbursement was established annually through a DHHS independent actuary and subject to approval by the federal Centers for Medicare and Medicaid Services. A. 131.

To review bids, DHHS convened an evaluation team of four individuals: Roger Bondeson, Melissa Simpson (Fuller), Richard Henning, and Stephen Turner (the "Evaluation Team" or "Team"). A. 118; CR 2227-30. Before meeting together, the Evaluation Team reviewed the proposals and took individual evaluation notes using the standard template provided by DAFS. CR 115-19. The Evaluation Team compared each proposal to the RFP requirements, as opposed to other bid proposals. CR 116-17. Pursuant to the instructions in the RFP, the Evaluation Team did not score proposals individually – instead, they waited to score until they met as a group. A. 118; CR 117-18; 122. Bondeson, a manager of the NET program, acted as the lead of the Evaluation Team and the subject matter expert on NET; it often took him several hours to review one or two proposals. CR 115-16; 119; 348-50; 386-87.

After all four Evaluation Team members completed their individual reviews of the 40 proposals, the Team began to meet to discuss and score the bids via the consensus scoring method. Using their individual notes to inform discussions, Team members went through each proposal, section by section, made observations, raised key points, and interpreted whether and how they met the RFP requirements; if there were disagreements, the Team would discuss them and come to a consensus, and then score each section of each bid.

CR 117; 120-21. A separate state employee acted as a meeting facilitator and took the Evaluation Team's consensus notes. CR 120-21. From July 18 through August 30, 2023, the Evaluation Team met 10 or 12 times to score the proposals. CR 119, 344.

The Team completed their consensus evaluation notes for each of the 21 proposals that were submitted for Regions 2, 3, 4 and 8. A. 146 (Region 2 Team notes); 188 (Region 3 Team notes); 230 (Region 4 Team notes); 272 (Region 8 Team notes). The notes reflect how the Team scored each section of Penquis's bids. A. 177; 219; 261; 303 (Team notes for Sections II and III of Penquis's bids). Although Penquis received positive feedback on its performance as the current broker for Regions 3 and 4, Penquis did not follow the outline of the RFP, which made its proposals difficult to review, and the Team deducted points for other reasons, such as failure to address procedures for late running vehicles, and concerns about transportation network adequacy, as reflected in the notes. *See, e.g.,* A. 222-26 (Team notes Region 3).[4] For Regions 2, 3, 4, and 8, ModivCare received the highest score (95) in each Region, while Penquis ranked third in Regions 2, 3 and 4 (75 points each), and fourth in Region 8 (73 points). A. 139-

[4] Penquis's bids in the Certified Record start on pages 14379 (Region 2); 14782 (Region 3); 15178 (Region 4); 15564 (Region 8), constituting over 1,500 pages of bid documents.

41; 145 (Master score sheets). On October 5, 2023, DHHS awarded ModivCare the contracts for Regions 2, 3, 4 and 8. A. 42.

2. The DAFS administrative appeal proceedings.

Appeals of State agencies' contract award decisions are administered by DAFS BGS. 5 M.R.S.A. § 1825-E; 18-554 C.M.R. Ch. 120 (1996)("Ch. 120") (A. 62). Penquis timely requested an appeal of the contract awards, as well as a stay, both of which were granted by DAFS.[5] Penquis Br. 8-9. DAFS appointed a presiding officer, as well as an appeal committee consisting of three State employees who were not employed by DHHS or involved in the RFP and contract award processes.[6] CR 64-68.

The appeal committee may not modify the contract award or grant a new award to a different bidder. 5 M.R.S.A. § 1825-E(3). Penquis had the burden to show by clear and convincing evidence that the contract awards to ModivCare: 1) violated the law; 2) contained irregularities creating a fundamental unfairness; or 3) were arbitrary and capricious. Ch. 120, § 3(2) (A. 64).

[5] Another disappointed bidder and current NET vendor, Waldo Community Action Partners ("Waldo"), also requested a stay and sought an appeal of the contract awards to ModivCare. A 44. With the consent of the parties, DAFS consolidated the appeal proceedings. CR 21873. ModivCare intervened in the administrative appeal. CR 21878-81.

[6] The statute and the Ch. 120 rule refer to an appeal "committee," whereas the DAFS Decision and the BCD Decision refer to the people involved in this case as the appeal "panel;" this brief follows that protocol.

A. Penquis's FOAA requests to DHHS

As it pursued its administrative appeal, Penquis filed four separate Freedom of Access Act ("FOAA") requests with DHHS on October 5, 2023; November 15, 2023; December 8, 2023; and December 22, 2023. *See* A. 13; CR 22520. The first FOAA request sought public records related to the RFP award decision; both DHHS and DAFS promptly made available to Penquis the nearly 20,000 pages of responsive public records. A. 12-16; CR 725; 23154. Penquis's remaining three FOAA requests were extremely broad, seeking, for example, emails and incident reports; DHHS continued to process those FOAA requests in the ordinary course of business and produced multiple tranches of public records prior to the hearing.[7] *Id*.; Penquis Br. 9.

On December 5, 2023, Penquis requested a continuance of the original hearing dates, to which all parties consented; the hearing was rescheduled for February 7-8, 2024. A. 46. On January 10, 2024, Penquis sought another continuance, seeking to postpone the hearing until after DHHS had responded in full to all of Penquis's outstanding FOAA requests; DHHS and ModivCare objected to this request. *Id*. The parties submitted arguments on the second continuance request. CR 79; 80-81; 84; 85; 87; 88; 90-91; 93; 95; 99. On

[7] Penquis mischaracterizes DHHS's document production efforts; by January 2024, DHHS had produced over 15,000 pages of documents responsive to the latter three FOAA requests. A. 13-14.

January 17, 2024, there was a pre-hearing conference regarding same where the parties presented their arguments. A. 46; CR 15-61 (transcripts from hearing). On January 23, 2024, following consideration of the written and oral arguments, the DAFS presiding officer rejected Penquis's second request for a continuance. A. 46; CR 22515.

B. Penquis's FOAA litigation in Superior Court

Thereafter, on January 29, 2024, Penquis filed a FOAA complaint against DHHS and DAFS in the Kennebec County Superior Court (the "Superior Court"), as well as a motion seeking a temporary restraining order ("TRO") and a preliminary injunction of the administrative proceedings. CR 22517. On January 31, 2024, the Superior Court (*Lipez, J.*) entered an order temporarily continuing the DAFS administrative hearing pending resolution of Penquis's motion for a TRO/preliminary injunction. *See* CR 22564.

Following briefing and oral argument, on February 16, 2024, the Superior Court denied Penquis's motion for a TRO/preliminary injunction. A. 23 (Pet. ¶ 26, Exh. Q (the "TRO Order")).[8] The Superior Court determined that Penquis was unlikely to succeed on its claims that DHHS violated FOAA and declined to

[8] DAFS received a copy of the TRO Order from counsel on February 16, 2024, which resulted in the presiding officer's February 20, 2024 notice to the parties to reschedule the hearing. CR 22565. Penquis's TRO Motion and exhibits are part of the Certified Record. CR at 22536; 23100 (Vol. II).

enjoin the DAFS contract award appeal process since it is separate from the FOAA processes.[9] *Id*. Penquis did not appeal the Superior Court's decision.

C. The DAFS administrative proceedings resume

On March 22, 2024, following three days of hearing, including testimony from seven witnesses and the admission of thousands of pages of documentary evidence, the hearing concluded. CR 62-646 (hearing transcripts); CR 648-64 (parties' opening statements); CR 665-723 (parties' closing statements). On April 24, 2024, DAFS issued its Decision. A. 44. DAFS determined that Penquis (and Waldo) failed to prove by clear and convincing evidence that DHHS's contract award: 1) was a violation of law; 2) contained irregularities creating a fundamental unfairness; or 3) was arbitrary and capricious. A. 47. Accordingly, DAFS validated the DHHS contract awards to ModivCare. A. 55.

3. Penquis's request for a further stay, the Rule 80C petition, the Rule 80C(e) motion, and this appeal.

On May 24, 2024, Penquis filed its Petition for Review of Final Agency Action in the Penobscot County Superior Court and sought a stay from DAFS, which was granted. A. 23. Thereafter, DAFS applied to transfer the case to the BCD, which application was granted on June 21, 2024. A. 5.

[9] The Superior Court subsequently dismissed Penquis's FOAA complaint. *Penquis C.A.P., Inc. v. Maine Dep't of Health & Human Servs.*, No. 24-CV-17, 2024 WL 5381969 (Me. Super. Sept. 25, 2024). Penquis did not appeal the order dismissing its FOAA complaint.

On October 1, 2024, Penquis filed a motion seeking additional evidence pursuant to 5 M.R.S.A. § 11006 (2013) and M.R. Civ. P. 80C(e)(2025), asking the BCD (A) to remand the case to DAFS; (B) to take additional evidence; and/or (C) to allow for discovery of the FOAA documents that Penquis asserts were erroneously excluded from the DAFS administrative hearing. A. 6. Following briefing and oral argument, on January 8, 2025, the BCD ruled from the bench and denied Penquis's motion.[10] A. 22.[11]

Briefing pursuant to M.R. Civ. P. 80C followed, along with oral argument. A. 7. On May 23, 2025, the BCD (*McKeon, J.*) issued its decision affirming the DAFS Decision, determining that Penquis did not satisfy its "heavy burden on appeal" of showing that the DAFS Decision was arbitrary and capricious or an abuse of discretion. A. 20. On June 11, 2025, Penquis filed a notice of appeal as well as a request to stay the contract awards. A.7; Penquis Br. 13.

[10] The entirety of DHHS's FOAA production are included in the Certified Record. CR 2231-21299; 22021; 23224-32; 22580; 23236-24467; 24932-39979.

[11] Notably, the denial of Penquis's Rule 80C(e) motion is not a subject of this appeal. *See generally* Penquis Br.; M.R. App. P. 8(d)(3)(d)(2025).

STATEMENT OF ISSUES FOR REVIEW

I. Whether the DAFS Decision is supported by substantial evidence of record and is not arbitrary or capricious?

II. Whether DHHS's response to Penquis's FOAA requests did not violate Penquis's right to a fair administrative hearing before DAFS?

ARGUMENT

Upon an appeal from the Superior Court or the BCD, this Court reviews "directly the original decision of the fact-finding agency, without deference to the ruling on the intermediate appeal by the court from which the appeal is taken." *Wood v. Dep't of Inland Fisheries & Wildlife*, 2023 ME 61, ¶ 14, 302 A.3d 18 (cleaned up); *Friends of Lamoine v. Town of Lamoine*, 2020 ME 70, 234 A.3d 214. The decision is reviewed "for errors of law, factual findings unsupported by substantial record evidence, or an abuse of discretion." *E. Me. Conservation Initiative v. Bd. of Envtl. Prot.*, 2025 ME 35, ¶ 21, 334 A.3d 706; *see also* 5 M.R.S.A. § 11007 (Supp. 2025). Review of administrative agencies' decisions are "deferential and limited." *Passadumkeag Mtn. Friends v. Bd. of Envtl. Prot.*, 2014 ME 116, ¶ 12, 102 A.3d 1181. The Court reviews questions of law *de novo* and will not substitute its judgment for that of the agency. *Doane v. Dep't of Health & Hum. Servs.*, 2021 ME 28, ¶ 15, 250 A.3d 1101; *see also* 5 M.R.S.A. § 11007(3).

When reviewing an agency's factual findings, the Court "examine[s] the record in its entirety." *Passadumkeag Mtn. Friends*, 2014 ME 116, ¶ 12, 102 A.3d 1181. The Court "must affirm findings of fact if they are supported by substantial evidence in the record, even if the record contains inconsistent evidence." *Id.* (cleaned up). An agency's factual findings will be vacated only "if the record contains no competent evidence to support them." *Id*.

This appeal arises from a final agency decision issued pursuant to 5 M.R.S.A. §§ 1825-E & 1825-F (Supp. 2025). Under Maine procurement law, an appeal from a contract award is heard by an appeal committee that may either validate or invalidate the contract award. 5 M.R.S.A. § 1825-E(3). In its appeal to DAFS, Penquis had the burden to show by clear and convincing evidence that the contract awards to ModivCare: 1) violated the law; 2) contained irregularities creating a fundamental unfairness; or 3) were arbitrary and capricious. Ch. 120, §§ 3(2) & 4 (A. 63-66). "Clear and convincing" is a high standard: Penquis was required to prove that it was not just probable, but highly probable, that Penquis established one of the three appeal criteria. *Pine Tree Legal Assistance, Inc. v. Dep't of Hum. Servs.*, 655 A.2d 1260, 1264 (Me. 1995).

As here, when,

> an appellant had the burden of proof before the agency, and challenges an agency finding that it failed to meet that burden of proof, [the Court] will not overturn the agency fact-finding

> unless the appellant demonstrates that the administrative record compels the contrary findings that the appellant asserts should have been entered.

Friends of Lamoine, 2020 ME 70, ¶ 20, 234 A.3d 214 (cleaned up). In such cases the Court shall reverse a finding of failure to meet a burden of proof "only if the record compels a contrary conclusion to the exclusion of any other inference." *Kelley v. Me. Pub. Emps. Ret. Sys.*, 2009 ME 27, ¶ 16, 967 A.2d 676.

I. The DAFS Decision is supported by substantial evidence of record and is not arbitrary or capricious.

Penquis failed to show, by clear and convincing evidence, that DHHS's contract awards should be invalidated based on one of three criteria in Ch. 120, § 3(2) (A. 64). *Pine Tree Legal Assistance, Inc*., 655 A.2d at 1264. Over three days, counsel for Penquis had the opportunity to question all seven witnesses who testified (the four Evaluation Team members for DHHS; two witnesses for Penquis; and one witness for Waldo). The administrative appeal process resulted in a massive record of nearly 40,000 pages.

The DAFS Decision is supported by substantial record evidence. Penquis challenges the actions and decision-making of both DAFS and DHHS. The record reflects the collaborative work of the two agencies to competitively bid and then award a contract for NET services; there is nothing arbitrary about the

DAFS Decision. The Court should review the record as a whole, and – based on the substantial evidence supporting it – affirm the DAFS Decision.

a. The DAFS Decision satisfies all statutory requirements.

A DAFS contract award appeal decision must include a brief summary of the nature of the petitioner's appeal; notification of the decision of the appeal committee; an explanation of the reasons for the decision; and notice regarding the petitioner's right to judicial review of final agency action. 5 M.R.S.A. § 1825-F. The DAFS Decision exceeds these basic requirements and is supported by substantial evidence in the record. A. 44-57.

Penquis alleges various deficiencies with DHHS's evaluation of its bids that constitute "errors of law," including problems with individual and team notes, and scoring; and the so-called COVID-19 vaccination rides. Penquis Br. 25-39. The Decision squarely addresses Penquis's arguments and why the Appeal Panel determined that Penquis did not satisfy any of the three criteria as required by law to invalidate the contract awards to ModivCare. A. 45-55.

i. Individual and Team notes, and scoring of Penquis bids

Penquis asserts that the Evaluation Team's review and scoring process were unlawful, partly because there was allegedly insufficient information or explanation about how the Team scored Penquis's proposals. Penquis Br. 25-30. It criticizes testimony from evaluators where they could not recall certain

specifics or translate a section of a proposal into points. *Id*. The DAFS Appeal Panel considered the entire record and properly determined that Penquis did not satisfy its burden. A. 47-55.

As noted above, Team members did not assign scores during the individual reviews, but rather scored the bids collaboratively during the Team consensus meetings. A. 19-20; 49. Also, the Team scored bids against the RFP requirements, not directly against other bids. *Id*. The Decision references the details included in the Team consensus notes, and how the Team reviewed and scored bids during the evaluation process. *Id*. 49-50; *see also* A. 146 (Team notes for Region 2); 188 (Team notes for Region 3); 230 (Region 4); 272 (Region 8). The Decision references Bondeson's testimony that a proposal would "start at the midpoint of the possible score for meeting the basic requirements of a section and during the consensus process the score was adjusted (up or down) as the reviewers agreed warranted based on the value of the proposal's responses under review." A. 50. "There was no scale or calculation algorithm used during this consensus process." *Id*. The type of precision in scoring desired by Penquis is not required by the law governing contract awards or the appeal process, nor by the RFP itself. *See* 5 M.R.S.A. §§ 1825-B; 1825-E; Ch. 110 (A. 58); Ch. 120 (A. 62); A. 118 (RFP description of scoring process). What is

required is for the Team to document its substantive comments that support the scoring, which clearly occurred here.

In *Pine Tree Legal Assistance, Inc. v. Department of Human Services*, this Court affirmed an agency's contract award following an appeal by an aggrieved bidder. 655 A.2d 1260 (Me. 1995). As Penquis does here, the losing bidder (Pine Tree) argued that the State violated its procurement laws and that, per those laws, the State was required to award the contract to Pine Tree. *Id.* at 1263. The Court rejected those arguments, determining that neither the procurement laws nor the RFP explained exactly how the State must award the contract. *Id*. at 1264. Instead, Maine's procurement process is focused on reaching a consensus, not strict adherence to a mathematical formula. *Id*. The Court therefore upheld an underlying contract award that did not go to the highest scoring bidder.[12] *Id*. Where Penquis has not satisfied its burden of showing that the record compels a different result, this Court should uphold the Decision. *Stein v. Maine Criminal Justice Acad*., 2014 ME 82, ¶ 11, 95 A.3d 612 (The fact that record evidence "is inconsistent or could support a different decision does not render the decision wrong."); *Carl L. Cutler Co. Inc. v. State Purchasing Agent*, 472 A.2d 913, 917-19 (Me. 1984) (agency's interpretation of

[12] If the outcome in *Pine Tree* is justified, then the DAFS Decision upholding DHHS's decisions to award the contracts to the highest scoring bidder (ModivCare) is surely sound.

bid was reasonable and court would not substitute its judgment for that of the agency).

Penquis also alleged that Team members made certain errors in their individual notes. Penquis Br. 36-39. For example, Penquis complained that Simpson copied and pasted certain information into her notes; that there were similarities between Turner's and Henning's notes; and that there were other minor errors. *Id.* The DAFS Appeal Panel properly determined that these arguments and claimed errors did not amount to clear and convincing evidence of any illegality or irregularity that resulted in fundamental unfairness. A. 44-57.

The RFP did not contain any specific content requirements or methods for taking individual notes; rather, individual notes are intended to assist evaluators "in remembering items for the purpose of consensus discussion and for transparency purposes." CR 21538 (Guidelines for Proposal Evaluations and Consensus Scoring). Simpson found it most effective to copy and paste key passages from the proposals into her notes, which made sense as a way for her to remember them, where evaluators are advised not to write on or highlight the proposals themselves. CR 393. Both Turner and Henning used short-hand phrases such as "met requirements," "minimally responsive," or "provided good

discussion of how bidder will meet this requirement," for some of their individual notes on Penquis's proposals. CR 1637-1660.

Unlike the Team consensus notes, the individual notes were not used to score proposals. CR 346-47 (Bondeson Test.); 21538 (DAFS guidance). The evaluation process is designed to ensure that any errors or omissions in the individual notes can be corrected via the Team consensus meetings, and that was the case here. For example, though some of the individual notes may have missed it, the Team consensus notes correctly reflect that Penquis's responses were insufficient for each Region. A. 180 (Region 2); 222 (Region 3); 265 (Region 4); 307 (Region 8). Any inconsistencies between the individual notes were resolved collectively by referring directly to the proposal being scored, and to the RFP itself. CR 431-33. Final scores were based on the Team consensus process, not the individual reviews. As such, as the Decision reflects, even if any errors in the individual notes could be considered "irregularities," they were not sufficient to show that there was any fundamental unfairness in the process. A. 54; 20 ("There is no evidence in the record that Ms. Simpson's copying and pasting mistakes impacted the scores that Penquis received.").

ii. *COVID-19 rides*

Penquis complains that the Team gave ModivCare undue credit for providing free rides to COVID-19 vaccination appointments, whereas the Team

allegedly did not consider Penquis's COVID rides. Penquis Br. 31-33. Again, the record shows that Penquis's criticism is misplaced. DHHS acted swiftly during the pandemic to get a separate contract regarding COVID in place with ModivCare as part of its effort to ensure that as many people as possible were vaccinated to protect public health. CR 209-14; 246. Bondeson estimated that ModivCare provided fewer than 1,000 of these COVID vaccination rides. *Id*. at 216-217. He further explained how all bidders put information in their proposals about charitable work, some of which was acknowledged via the notes, and some was not, and that ModivCare's COVID rides were not a major factor in the Team's scoring. CR 247. The Appeal Panel found that there was no evidence of any advantage to ModivCare based on the COVID rides issue and noted that both ModivCare and Penquis got the same maximum score of 25 for Section II of their proposals (where this issue factored into the Team's consideration). A. 52.

The DAFS Decision squarely addressed each of Penquis's arguments and the evidence that it presented regarding the individual notes, the Team consensus scoring, and the COVID rides, and it upheld the DHHS contract awards to ModivCare. A. 49-53. Penquis has not shown that the DAFS Decision is arbitrary or capricious or unsupported by substantial evidence.

Penquis relies heavily on previous DAFS administrative decisions to assert that the DAFS Decision is incorrect or insufficient.[13] Penquis Br. 22-25; 30-33.

Although such decisions may be instructive, neither DAFS nor this Court is bound to follow them. Each contract award appeal is highly fact-intensive, involving: different state agencies and legal authorities; the specific goods/services being procured; unique RFPs and proposals from bidders; the circumstances of each individual and team evaluation and scoring process; and the particular documentation in support of the evaluation process. For any given contract award where an aggrieved bidder appeals, an appeal committee must consider all evidence that an appellant presents, including the testimony and credibility of witnesses, to determine if they satisfied their burden of proof. As such, the seven DAFS administrative decisions relied upon by Penquis are simply examples of separate agency actions, based on the facts and circumstances of those cases.[14] They should not be afforded any weight by this Court.

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[13] *Camden & Rockland Water Co. v. Maine Public Utilities Com'n*, 432 A.2d 1284 (Me. 1981) does not require this Court to "consider the lawfulness of the present decision against the backdrop" of prior DAFS administrative decisions. Penquis Br. 23. Taken as a whole, the record reflects that DAFS's contract award appeal process was consistent with Maine procurement law.

[14] *See also* DHHS Brief, n. 9, 10, incorporated by reference herein.

b. The DAFS Decision was not arbitrary, capricious, or an abuse of discretion.

This Court has explained the general rule: "arbitrary and capricious action on the part of an administrative agency has been defined as wilful [sic] and unreasoning action, without consideration of facts or circumstances." *Central Me. Power Co. v. Waterville Urban Renewal Auth.*, 281 A.2d 233, 242 (1971). The party asserting that an agency acted arbitrarily under a statute that is valid on its face has the burden to establish the invalidity of the administrative action. *Id*. "Regularity is presumed." *Id*. When reviewing an agency's administrative adjudication to determine if it was arbitrary or capricious, a Court must assess the agency's decision based on the entire record before it. *AngleZ Behav. Health Servs.*, 2020 ME 26, ¶ 23, 226 A.3d 762. Similarly,

> [a]n abuse of discretion may be found where an appellant demonstrates that the decisionmaker exceeded the bounds of reasonable choices available to it, considering the facts and circumstances of the particular case and the governing law. It is not sufficient to demonstrate that, on the facts of the case, the decisionmaker could have made choices more acceptable to the appellant or even to a reviewing court.

Sager v. Town of Bowdoinham, 2004 ME 40, ¶ 11, 845 A.2d 567. Penquis failed to show that the DAFS Decision was arbitrary, capricious, or an abuse of discretion.

An important factor in determining whether an agency's action is arbitrary and capricious is the scope of authority delegated by the Legislature to the agency. *Central Me. Power Co.*, 281 A.2d at 242. Here, both DHHS and DAFS have been afforded broad statutory authority to administer the Medicaid (MaineCare) program (DHHS) and to oversee and implement the State's procurement of goods and services (DAFS). *See, e.g.,* 22 M.R.S.A. § 3173 (2021) (Powers and duties of DHHS regarding Medicaid); 5 M.R.S.A. § 1811 (Powers and duties of DAFS BGS regarding purchases).

Exercising its delegated authorities, DAFS, through its Decision, confirmed DHHS's evaluations of the numerous bids and the ultimate contract awards to ModivCare. The record reflects that Penquis scored less than other bidders based on the RFP's Section III (proposed services), where Penquis's proposals scored between 23-25 points out of 50. A. 138-145. For each of the four Regions on which it bid, in Section III, Penquis failed to "follow the outline of the RFP including the numbering, section, and sub-section headings making their submission difficult to review." A. 180 (Region 2); 222 (Region 3); 264 (Region 4); 306 (Region 8).

One of the factors for a state agency to consider in determining best value is conformity with the specifications of a solicitation, or compliance with the requirements of an RFP. 5 M.R.S.A. § 1825-B(7); *see also* Ch. 110, §

3(A)(iv))("Award must be made to the highest rated proposal which conforms to the requirements of the state as contained in the RFP.") (A. 60). Particularly where an agency must review a large number of proposals, it is important for bidders to comply with the RFP requirements, including with regard to organization of the information in their proposals and formatting. CR 374 (Bondeson testimony that adherence to RFP requirements can be a deciding factor: "…playing hide and seek to try to find a response to an omission that may be located somewhere else in the [] proposal becomes exasperating."); A. 115 (RFP requirements).[15]

Additionally, various comments from the consensus scoring process substantiate the concerns with Penquis's bids, including:

- Failure to address procedures for late running vehicles, or MaineCare members not being billed for no shows or schedule changes;
- Inadequacy of its transportation network;
- Failure to address issues regarding transporter termination and ensuring replacement coverage; and record retention.

A. 180-184 (Region 2); 222-226 (Region 3); 265-268 (Region 4); 307-310 (Region 8). The DHHS evaluators' concerns were mostly the same across the Team's scoring of each of Penquis's four bids, with some differences. *See, e.g.*,

[15] Bondeson testified that, given the volume of RFP proposals, both the individual and Evaluation Team review processes took a great deal of time. CR 115-16; 119; 348-50; 386-87. Turner estimated that the Evaluation Team spent 4-5 hours scoring each proposal. CR 440.

A. 181 (Region 2 concerns about proposed use of ad hoc transporters/network adequacy); 223 (Region 3 concerns about network adequacy but no mention of ad hoc transporters). The Team scoring notes reflect the careful deliberation of the DHHS evaluators as they reviewed and scored Penquis's bids.

The record reflects the RFP's careful development, the Evaluation Team's individual and collective consideration of 40 proposals, the consensus scoring process, and the DAFS administrative appeal process that resulted in the DAFS Decision. One member of the Evaluation Team testified that he read every proposal "word for word, and tried to glean as best [he] could what the bidder was proposing." CR 438. This record belies Penquis's assertion that the DAFS Decision was arbitrary and capricious, or an abuse of discretion. Penquis Br. 20-25. *See also*, A. 20 ("The record contains evidence that the evaluators conducted a thorough and fair review of the extensive materials submitted by the bidders and came to a reasonable conclusion that ModivCare was better suited to provide services under Section III than Penquis.").

Additionally, Penquis presented no evidence to suggest that either DAFS or DHHS acted outside their statutory authorities. As reflected by the record, the DAFS Decision correctly determined that DHHS meticulously exercised its authority to solicit and award new contracts for NET broker services, following an extended period of utilizing the same NET brokers. A. 47-51. Penquis simply

does not agree with the outcome of this lengthy process, but that is not enough to overturn the DAFS Decision upholding DHHS's contract award. "Where there is room for two opinions, action is not arbitrary and capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached." *Central Me. Power Co.*, 281 A.2d at 242. As the BCD explained when it affirmed the DAFS Decision,

> Penquis did not meet its burden to show with clear and convincing evidence that the appeal panel's decision was arbitrary or that the appeal panel abused its discretion. Thus, the court must defer to the appeal panel's findings. Although there is some evidence in the record to support aspects of Penquis's argument, nothing in the record compelled the appeal panel to reach a contrary conclusion.

A. 20.[16]

II. DHHS's responses to Penquis's FOAA requests did not violate Penquis's right to a fair administrative hearing before DAFS.

Penquis argues that because it did not receive all public records responsive to its four FOAA requests to DHHS prior to the DAFS administrative hearing, DAFS violated Penquis's rights. For the first time in the two years since this litigation arose, Penquis bases its arguments on the adjudicatory proceeding provisions of the Maine Administrative Procedure Act, 5 M.R.S.A. §§

[16] Furthermore, the BCD could have reversed the DAFS Decision if it was "unsupported by substantial evidence on the whole record," pursuant to 5 M.R.S.A. § 11007(4)(C)(5), but it did not do so. A. 20 ("The court finds that there is substantial evidence in the record to support the appeal panel's decision…").

9051-9064 ("APA"). Penquis Br. 14-20. These new arguments fail for multiple reasons, as shown below.

As an initial matter, Penquis waived these arguments by not making them below. *New England Whitewater Ctr. v. Dept. of Inland Fisheries and Wildlife*, 550 A.2d 56, 58 (Me. 1988) (issues not raised at the administrative level are deemed unpreserved for appellate review). At the BCD, Penquis argued that the process violated its rights under the federal and state constitutions. *See, e.g.*, A. 12; 28-30 (Pet., ¶¶ 34-40). Those arguments were consistently rejected, given that there is no property interest in a government contract, among other reasons. *See, e.g.,* A. 14-16; A. 27, ¶ 26; CR 22515-16; *Carroll F. Look Construction Co.*, 2002 ME at ¶ 16.

In any event, the APA does not apply to DAFS contract award administrative appeals, which are governed by 5 M.R.S.A. § 1825-E. Where the Legislature delegates separate authority to an agency for administrative appeals on a specific topic without reference to the APA, the APA adjudicatory proceeding statutes do not apply. *See, e.g., Hale v. Petit*, 438 A.2d 226, 231-33 (Me. 1981).

Moreover, DAFS afforded Penquis all the process to which it was entitled via the contract award appeal. Although Penquis had a right to pursue its FOAA requests per 1 M.R.S.A. § 409 (2016), the laws governing contract award

appeals are separate and do not allow for discovery; this is largely due to the importance of an expedited process. 5 M.R.S.A. § 1825-E; Ch. 120 (A. 62). As such, it was appropriate – and not a legal error – for the DAFS administrative proceeding to occur prior to the time that DHHS produced all public records responsive to Penquis's four FOAA requests. Additionally, the DAFS presiding officer properly excluded certain of Penquis's proposed exhibits as irrelevant and repetitious. DHHS complied with its obligations under FOAA.[17] Importantly, Penquis failed to appeal the Superior Court's orders denying its motion for a TRO/preliminary injunction and dismissing its FOAA complaint. Penquis's FOAA-related arguments are meritless.

A. The APA does not apply to DAFS contract award appeals.

The APA was enacted in 1977. P.L. 1977, c. 551 (eff. Jul. 1, 1978). Subchapter 4 generally applies to any "adjudicatory proceeding," defined as a "proceeding before an agency in which the legal rights, duties or privileges of specific persons are required by constitutional law or statute to be determined after an opportunity for hearing." 5 M.R.S.A. §§ 8002(1) (2013); 9051(1) (2013). The DAFS contract award appeals are not subject to the APA because they are governed by separate statutes and rules.

[17] There were no independent claims in Penquis's Petition, based on FOAA or otherwise (A. 23); thus, the Court may set aside Penquis's allegations about the timing and sufficiency of DHHS's FOAA document production.

In 1989, the Legislature passed *An Act to Create an Appeals Procedure for the State Bidding Process*. P.L. 1989, c. 785, § 2 (emergency, eff. Apr. 6, 1990). The Legislature emphasized that "the procurement of materials and services through competitive bidding is essential to the State for achieving the greatest efficiency and economy;" it sought to impose clear, consistent standards to "ensure an effective competitive bidding process." L.D. 2277, Summary (114th Legis. 1989). Through 5 M.R.S.A. § 1825-E, the Legislature delegated to DAFS the authority to administer appeals of contract awards, including rulemaking to implement those procedures.

In 1993, the Legislature enacted changes to 5 M.R.S.A. § 1825-E through *An Act to Shorten the Appeal Procedure for the State Bidding Process and to Provide Consistent Administration of Appeal Hearings*. P.L. 1993, c. 192 (eff. Oct. 13, 1993). The legislation reduced the time periods referenced in the statute, including: the time to request an appeal after notice of an award (from 30 to 15 days); and the time to request a stay (from 30 to 10 days). L.D. 613, § 1 (116th Legis. 1993). The bill was intended to shorten the contract award appeal procedure from "90 days or longer" to "45 days," and it also provided DAFS with "strengthened criteria to deny appeals without merit." *Id*., Statement of Fact.

Testimony in support of the bill indicated the need for DAFS to streamline and expedite the process.[18]

Unlike other statutes where the Legislature applied the APA to agency administrative hearings, it did not incorporate the APA into section 1825-E either at the time it was originally enacted or subsequently. *Compare, e.g.*, 22 M.R.S.A. § 3762(9)(B) (Supp. 2025) (DHHS hearings on TANF must be conducted pursuant to APA); 20-A M.R.S.A. § 3 (2025) (Department of Education adjudicatory proceedings shall be in accord with the APA, except as specified in Title 20-A). Additionally, in other procurement statutes, the Legislature incorporated different portions of the Maine Administrative Procedure Act. *See* 5 M.R.S.A. §§ 1825-C (Supp. 2025)(requiring rules to be adopted per 5 M.R.S.A. § 8001 et seq.); 1825-F (DAFS contract award appeal decisions constitute final agency actions subject to review pursuant to 5 M.R.S.A. § 11001 et seq.). The Legislature understands how to apply separate statutes within the procurement laws. The omission of the adjudicatory proceeding statutes from section 1825-E, combined with its legislative history,

[18] *An Act to Shorten the Appeal Procedure for the State Bidding Process and to Provide Consistent Administration of Appeal Hearings: Hearing on LD 613 Before the J. Standing Comm. On State & Local Gov't*, 116th Legis. (testimony of Richard B. Thompson, Dir., Div. of Purchases, DAFS, 1993). Mr. Thompson served as presiding officer for DAFS's administrative hearing in this matter. A. 44.

reflects the Legislature's intent for DAFS to have authority over its contract award appeal hearings separate from the APA requirements.

There are several differences between the APA and section 1825-E. First, and most importantly, the APA does not include the expedited timeframe required for contract award appeals. *See, e.g.*, 5 M.R.S.A. § 1825-E(3) (requiring that a hearing be held within 60 days of receipt of the request for an appeal).

Additionally, as Penquis notes, the APA allows discovery in adjudicatory proceedings, but only when the agency "adopt[s] rules providing for discovery." Penquis Br. 11; 5 M.R.S.A. § 9060(2) (2013). DAFS has adopted a rule, but it does not provide for discovery. A. 62 (Ch. 120 rules). Penquis argues, without citation to authority or the record, that: (a) the DAFS rule does not prohibit discovery in procurement appeal proceedings; (b) "the practice" is for disappointed bidders to obtain discovery by seeking public records through FOAA requests; and (c) DAFS "effectively fashions ad hoc procedures providing bidders with fair access to relevant information..." Penquis Br. 16-17. Contrary to Penquis's assertions, however, and given the expedited process required by statute, DAFS contract award proceedings intentionally omit discovery. And FOAA does not provide disappointed bidders with a right to discovery in contract appeal proceedings.

Further, the DAFS contract award appeals are within the exception contemplated by the APA. 5 M.R.S.A. § 8003 (2013) (statutes inconsistent with the APA shall yield and the APA shall govern, "except where expressly authorized by statute."). The plain language of 5 M.R.S.A. § 1825-E, its legislative history, and the substantive differences with the APA reflect express authority granted to DAFS to separately administer its contract award appeal hearings. *See, e.g., Sanford Highway Unit of Local 481, Council No. 74, American Fed. of State, County & Municipal Employees, AFL-CIO v. Town of Sanford*, 411 A.2d 1010, 1012-15 (Me. 1980) (determining that the APA did not apply to the separate, speedy procedures for public employee labor relations in Title 26).

In a similar case, petitioners argued that their rights were violated based on the APA because certain features, such as cross examination, were not present before DHHS's administrative hearings pursuant to the Certificate of Need (CON) Act, 22 M.R.S.A. §§ 301-322. *Hale,* 438 A.2d 226 at 231-33. The Court rejected their argument that CON proceedings are "adjudicatory proceedings" under the APA, because the statutory framework of the CON showed the Legislature's intent that the CON hearings would be separate from the APA. *Id*. at 231. Like here, the expeditious review and time limits applicable to the CON hearing process could not be achieved if the APA applied. *Id*.

Accordingly, this Court should reject Penquis's argument that the APA applies to DAFS contract award appeals.

B. The laws applicable to contract award appeals do not allow for discovery.

Even if the APA does apply, it allows an agency to establish its own rules on discovery "to the extent and in the manner appropriate to its proceeding." 5 M.R.S.A. § 9060(2); *see also In re Maine Clean Fuels, Inc.*, 310 A.2d 736, 746 (Me. 1973) ("…administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.") (quotation omitted). DAFS has implemented rules governing contract award appeals, but they do not allow for discovery. A. 62 (Ch. 120 rules). The DAFS rules allow for witness subpoenas in the limited circumstance where a witness is not willing to voluntarily testify. Ch. 120, § 3(6) (A. 65). That situation did not occur here, and Penquis never requested a subpoena during the administrative proceedings. A. 13.

Penquis asserts that the DAFS hearing should have been delayed until DHHS completed its response to Penquis's FOAA requests because Penquis had a "right" to the information under the APA. Penquis Br. 14-15 (citing 5 M.R.S.A. § 9056(2)(2013)). This assertion misreads the APA, where (assuming the APA applied here) immediately prior to the language that Penquis cited, the statute

provides, "unless otherwise limited by the agency to prevent repetition or unreasonable delay in the proceedings, every party shall have the right to present evidence and arguments on all issues…" 5 M.R.S.A. § 9056(2) (emphasis added). As discussed below, the DAFS rules allow the presiding officer to make relevancy determinations and exclude irrelevant information. Ch. 120, § 3(8) (A. 65).

Moreover, following the announcement of a contract award, under 5 M.R.S.A. § 1825-B(6), DAFS makes public all records associated with an RFP, including bid proposals, scoring sheets, individual and team evaluation notes, and other documents. *See also* Ch. 110 § 3(A)(iii)(recordkeeping requirements). DAFS followed this standard protocol here, and, when combined with DHHS's initial FOAA productions, Penquis received over 19,000 pages of documents prior to the hearing, including all bids and responses, master scoring sheets, and notes.[19] A. 13.

Section 3(4) of Chapter 120 governs the parties' presentation of evidence during a contract award appeal. A. 64-65. Generally, documents relating to any issue of fact in the proceeding may be presented and incorporated into the record, as long as they are made available to the parties before the hearing. Ch.

[19] Penquis's assertion that it was not provided with documents relevant to the contract award decision prior to the hearing is contrary to the record. Penquis Br. 15; A. 13; CR 725; 2231-21299; 23154.

120, § 3(4)(C). To be admitted into evidence, exhibits must be relevant to the appeal, and the type of "evidence upon which reasonable persons are accustomed to rely in the conduct of serious affairs." *Id*. § 3(8). "The presiding officer may exclude irrelevant or unduly repetitious evidence." *Id*.

As an aggrieved party to a contract award decision, Penquis was entitled to an administrative appeal hearing pursuant to the Title 5 procurement statutes and rules; these laws are separate from FOAA. As a FOAA requestor, Penquis had a right to receive responsive public records in a reasonable amount of time of making its request. 1 M.R.S.A. § 408-A (Supp. 2025). But as the Superior Court noted when it dismissed Penquis's FOAA complaint, Penquis "has not cited any authority for the proposition that a state agency must comply with a FOAA request prior to an RFP appeal hearing, the latter of which must occur on an expedited basis." *Penquis C.A.P., Inc.*, 2024 WL at *4. Thus, even if the APA applies to DAFS contract award appeal hearings, both DAFS and DHHS complied with all applicable requirements. Contrary to Penquis's contention, it did not have a right to receive all public records that it had requested from DHHS under FOAA prior to the DAFS administrative appeal hearing at issue.

C. <u>The DAFS presiding officer properly ruled on evidentiary issues</u>.

This Court reviews an administrative agency's decision to exclude evidence from a hearing for an abuse of discretion. *Mallinckrodt US LLC v.*

Department of Environmental Protection, 2014 ME 52, ¶ 31, 90 A.3d 428, 437. Penquis argues that documents about ModivCare's prior performance are "directly relevant" to its appeal and that the DAFS Decision must be reversed and remanded to afford Penquis the "opportunity to review relevant documents." Penquis Br. 20.

Yet many of these documents were admitted during the hearing. Penquis failed to make the threshold showing that any additional documents are material or relevant to the State's contract award decision making. Penquis also failed to show that the presiding officer abused his discretion or committed any legal error in his handling of these issues.

i. *The Evaluation Team did not consider internal DHHS documentation regarding performance*.

During the DAFS administrative hearing, all four Team members testified that they did not consider any internal DHHS documents for purposes of assessing the incumbent brokers' past performance or the RFP proposals. CR 142, 178. Instead, they relied upon the knowledge and experience of Bondeson for purposes of assessing the brokers' prior performance. CR 142.

Bondeson explained that all incumbent brokers had performance problems from time to time, and that none of them were 100% compliant with all contract requirements all the time. CR 348-50. For example, both ModivCare

and Penquis were under corrective action plans at different points, and all brokers struggled with missed trips sometimes, especially during the COVID pandemic. CR 164; 349-50. All the incumbent brokers worked to resolve any concerns, and overall, there was not much difference between the brokers in terms of their performance. Thus, Bondeson did not have concerns about working with any of the incumbent bidders under a new contract. *Id.* 348-50.

Despite the fact that the DHHS evaluators did not consult internal documentation regarding past performance during their evaluation of the proposals, Penquis introduced and questioned Bondeson about multiple contested exhibits that were internal DHHS documents, such as reports and emails.[20] CR at 166-71; 179-83; 184; 188-89; 196-99; 200-06; 214. Following careful consideration, until a certain point in the hearing, the presiding officer admitted each of the contested exhibits that Penquis introduced, over the objections of ModivCare and/or DHHS. *Id.;* CR 199-206. In order to preserve limited State resources and prevent Penquis from "going down rabbit holes" on thousands of emails, the presiding officer eventually limited Penquis from admitting "any more of this list of evidence... You'll be able to summarize and do what you need to, or maybe elicit from other witnesses as to their knowledge

[20] It appears that these are the same types of documents Penquis now complains it was denied an opportunity to review or admit.

about existing exhibits, but I see no real value to - - weight of all those documents." CR at 206; 22580. Penquis has not shown that the presiding officer erred or abused his discretion.

As noted above, although each broker had problems sometimes, DHHS was satisfied with each incumbent bidder's overall performance. CR 348-350. The Team considered this testimony as part of the brokers' prior performance and made the contract awards to ModivCare. There was no need for the admission of additional evidence (*i.e.*, internal DHHS documents) where they were not considered and not relevant to the Team's decision-making.

Nothing in the procurement laws requires an agency to consider all internal documentation when assessing a bidder's past performance. If such a requirement existed, where the current NET brokers have been in place since 2014, this would have further delayed an already extended procurement process and been an unreasonable burden on DHHS. A. 15 ("To have the evaluators collate and review such a large volume of documents would be overly burdensome on a review process that is meant to be efficient."). Accordingly, as the BCD determined, "[t]he hearing officer acted within its discretion to operate an efficient hearing when it excluded documents relating to specific events or complaints. Given the volume of both rides and incidents, individual histories have minimal relevance…" A. 15; Ch. 120, § 3(8) (A. 65).

Penquis asserts that it "was entitled to receive, review and present" any and all internal documents that it had sought via its FOAA requests because they could potentially be relevant and allow Penquis to assess the fairness of the procurement process.[21] Penquis Br. 20. This speculation is insufficient to permit, for example, the taking of additional evidence; indeed, the BCD denied Penquis's Rule 80C(e) motion.[22] *See, e.g., Decesere v. Thayer*, 468 A.2d 597, 599 (Me. 1983); *Carl L. Cutler Co. Inc.*, 472 A.2d at 917-19 (Court denied aggrieved bidder's requested discovery for purposes of judicial review of a contract award).

ii. The practical implications of Penquis's FOAA argument show its unreasonableness.

Taken to its logical conclusion, Penquis's FOAA argument is that, as an aggrieved bidder, it is entitled to any and all DHHS public records relating to the NET incumbent brokers' performance. Here, that would mean:

- Producing nearly 10 years' worth of DHHS internal documents regarding ModivCare's performance as an NET broker, free of redactions;
- Including confidential information such as MaineCare member names, identification numbers, health

[21] *Pozzi, LLC v. Maine Bureau of Alcoholic Beverages*, No. BCD-APP-2023-00003, 2024 WL 673158 (Me. B.C.D. Feb. 5, 2024) is inapplicable. Penquis Br. 19, n. 7. *Pozzi* involved a different statutory process, and, unlike here, the BCD remanded to the agency to take additional evidence pursuant to Rule 80C(e). In this matter, prior to hearing, DHHS and DAFS provided all documents used in making the contract award decisions; the Team did not review internal documents on the brokers' performance and were not required to do so.

[22] Again, the denial of the 80C(e) motion is not a subject of this appeal.

conditions, and services (by definition, not public records); and
- Providing Penquis with sufficient time for it to review those documents in advance of a contract award appeal hearing.

See Penquis Br. 14-20. Penquis's position is unreasonable on its face. Penquis's litigation strategy reflects why Maine's contract award appeal process does not include discovery akin to civil litigation. If every aggrieved bidder pursued its contract appeal the way that Penquis has done in this case, the State's procurement processes would be ground to a halt, leading many businesses not to pursue government contracts.

DAFS provided all documents related to the RFP process and the contract awards, and DHHS worked in good faith to produce thousands of pages of documents responsive to Penquis's FOAA requests. A. 12-15. DHHS rejected Penquis's offer to enter into an agreement to disclose confidential information pursuant to a protective order, "as is routinely done in a variety of adjudicatory contexts pursuant to federal rules allowing for the use of Protected Health Information without patient consent." Penquis Br. 15 (citing 45 C.F.R. § 164.512(e)(1)(v)). DHHS did not wish to remove redactions because there is no reason why Penquis needed access to MaineCare members' highly sensitive,

personal information for purposes of this litigation.[23] FOAA neither authorizes nor requires an agency to disclose confidential information by providing unredacted records. *See Gov't Oversight Comm. v. Dep't of Health & Human Servs.*, 2024 ME 81, ¶ 16, 327 A.3d 1115. Put simply, confidential information is not a matter of public record pursuant to FOAA. 1 M.R.S.A. § 402(3)(A) (Supp. 2025).

To the extent that Penquis's FOAA argument is one of procedural error, it has not shown that it was prejudiced by not having certain DHHS public records at the DAFS hearings. *See Town of Jay v. Androscoggin Energy, LLC*, 2003 ME 64, ¶ 9, 822 A.2d 1114 (a party must show that it was injured or substantially prejudiced from the alleged defect in procedure). As stated above, DHHS conceded that ModivCare sometimes had complaints, missed trips, untimely reports, and other performance concerns. The same is true for Penquis (and Waldo). DHHS evaluators considered each incumbent bidders' performance histories – both positive and negative – and found their performances roughly equivalent. It was within the State's discretion to make its contract awards to ModivCare in light of these and other considerations, through the RFP and subsequent contract award appeal processes. Penquis's desire to add more

[23] Further, DHHS worked in good faith to review specific redactions of concern to Penquis, or to expedite portions of the FOAA requests that were relevant for the appeal, but Penquis consistently rejected such offers. A. 14; *see also* DHHS Br. 9-15 (incorporated herein).

documents and testimony that might reflect additional negative performance information about ModivCare is futile. *In re Maine Clean Fuels, Inc*., 310 A. 2d at 744; A. 15 ("Penquis has not shown that either receiving the requested documents or admission of the documents it did offer would have made a difference in the outcome of the appeal hearing.").

CONCLUSION

For the reasons stated above, DAFS respectfully requests that the Court affirm the BCD judgment upholding the DAFS Decision.

Respectfully submitted,

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Dated: November 24, 2025

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CERTIFICATE OF SERVICE

I, Halliday Moncure, Assistant Attorney General, do hereby certify that (1) on this date, I caused an electronic copy of this brief to be sent to each of the parties listed below via e-mail; and (2) upon approval by the Clerk's Office of the pdf version of this brief, I will cause one paper copy of this brief to be served upon each of the parties listed below, by depositing those copies in the United States mail, first-class postage prepaid, addressed for delivery as follows:

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