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.
Respondent/Appellee

On Appeal from the Business and Consumer Docket

Brief of Respondent/Appellee Department of Health and Human Services

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INTRODUCTION

The Department of Health and Human Services ("DHHS") respectfully requests that the Court affirm the decision of the Business and Consumer Docket ("BCD") upholding the final agency action of the Department of Administrative and Financial Services ("DAFS") validating DHHS's conditional contract award to ModivCare Solutions, LLC ("ModivCare").

STATEMENT OF FACTS AND PROCEDURAL HISTORY

DHHS agrees with and adopts the Statement of Facts and Procedural History set forth in the brief of Appellee DAFS and offers the following information for additional context.

The Competitive Bidding Process

The Director of the DAFS Bureau of General Services ("BGS") is tasked with "purchas[ing] collectively all goods and services for the State . . . in a manner that best secures the greatest possible economy consistent with the required grade or quality of the goods or services." 5 M.R.S.A. § 1825-B(1) (Supp. 2025). Unless otherwise provided by law, all such purchases must be made through competitive bidding. *Id.* Contracts must be awarded "to the best-value bidder, taking into consideration the qualities of the goods or services to be supplied, their conformity with the specifications, the purposes for which

they are required, the date of delivery and the best interest of the State." *Id.* § 1825-B(7).

In accordance with rules promulgated by DAFS, agencies notify the public of contracts for which bids are being requested, *see id.* § 1825-D (Supp. 2025), by issuing a "Request for Proposal," or "RFP." 18-554 C.M.R. ch. 110, § 1(A) (2010). The contracting agency – in this case, DHHS – reviews and scores all submissions received in response to such RFPs. *Id.* § 3(A). "The agency shall document the scoring, substantive information that supports the scoring, and make the award decision[.]" *Id.* "Written records must be kept by each person reviewing or ranking proposals[,]" and "[t]hese records must be made available upon request." *Id.* § 3(A)(iii).

BGS is responsible for ensuring that aggrieved parties have an opportunity to appeal a contract or grant award decision. 5 M.R.S.A. § 1825-E (Supp. 2025); *see also* 18-554 C.M.R. ch. 120 (1996).[1] If BGS determines that an appeal is appropriate, a "committee of 3 members shall hear petitioner's appeal within 60 days of receipt of the request for appeal." 5 M.R.S.A. § 1825-E(2), (3). The RFP appeal process does not provide for discovery, *see* 18-554 C.M.R. ch. 120, § 3, although the written records that were "kept by each person reviewing

[1] This DAFS rule is reproduced in its entirety at A. 62-66.

or ranking proposals" must be "made available upon request." 18-554 C.M.R. ch. 110, § 3(A)(iii).[2]

In an RFP appeal hearing, the "petitioner must present evidence to substantiate the specific grievances stated in the appeal." 18-554 C.M.R. ch. 120 § 3(4). "Evidence shall be admitted if it is the kind of evidence upon which reasonable persons are accustomed to rely in the conduct of serious affairs." *Id.* § 3(8). Further:

> The evidence presented must specifically address and be limited to one or more of the following:
>
> A. Violation of law;
> B. Irregularities creating fundamental unfairness; or
> C. Arbitrary or capricious award.

Id., § 3(2)(A)-(C). Subject to these rules, the appeal committee may either validate or invalidate the contract award under appeal. 5 M.R.S.A. § 1825-E(3).

NET Services

Non-emergency Transportation Services ("NET Services" or "NET") are transportation services provided to eligible MaineCare members, including for travel to covered MaineCare services; transportation to a pharmacy to obtain MaineCare-covered medication; and related travel expenses such as meals and

[2] This DAFS rule is reproduced in its entirety at A. 58-61.

lodging. 10-144 C.M.R. ch. 101, ch. II, § 113.04-1(A)-(E) (2015). Types of covered transportation include public transportation; transport by family, friends, or volunteers; commercial taxis; agency vehicles; wheelchair transport; and transport by other specialized vehicles. *Id.* § 113.04-2(A)-(F). For each of Maine's eight geographical regions, a Broker is responsible for arranging all NET services for eligible MaineCare Members residing in the assigned region. *Id.* § 113.02. The Brokers are paid by DHHS pursuant to contracts with DHHS; in turn, they pay the individual transporters pursuant to individual Service Agreements. *Id.* § 113.13(A), (B). Penquis has remained the Broker for Regions 3 and 4 during these proceedings. A. 8; C.R. 14385.[3]

Penquis's RFP Appeal and FOAA Requests

On October 5, 2023, Penquis was notified that ModivCare had received DHHS's conditional contract award to provide NET services in all eight regions of the State. A. 42. That same day, Penquis submitted a Freedom of Access Act ("FOAA") request to both DAFS and DHHS (the "October 5 Request") requesting copies of the submitted proposals and all scoring notes and instructions. A. 13; *see* 1 M.R.S.A. § 408-A (Supp. 2025). On October 13, 2023, it petitioned DAFS to stay the conditional award pending an administrative appeal. A. 25. Penquis

[3] "C.R." means the Certified Record filed in the Rule 80C proceedings in the BCD below.

submitted its Appeal to DAFS on October 19, 2023. A. 9. On November 7, 2023, Presiding Officer Richard Thompson notified the parties that a pre-hearing conference had been scheduled for November 15, 2023. C.R. 21891. In this communication, the Presiding Officer also informed the parties:

> Several questions have been raised regarding the process, availability of witnesses, documents, and opportunity for discovery. In order to address these matters most efficiently, I have scheduled a pre-hearing conference at **10:00 AM on November 15, 2023**, to discuss the issues in question and to provide a written summary of any rulings made . . . . The documents related to the RFP, bidder responses, evaluator notes and scoring summaries will be sent shortly to all parties. Any additional documents such as emails and other communications should be requested of the state agency responsible for those items through a normal Freedom of Access Act (FOAA) request. [] There is no formal discovery process within the appeal process. . . . **I have tentatively set the appeal hearing date for Wednesday, December 6, 2023 at 9:00 AM** and ask the parties to hold December 7, 2023 in the event we are unable to finish in one day.

C.R. 21891 (emphasis in original). On November 14, 2023, DHHS responded to Penquis's October 5 Request by producing nearly 20,000 pages worth of responsive public records. A. 13; C.R. 725, 2231-21299, 23154.

As a result of the November 15 pre-hearing conference, the Presiding Officer scheduled the hearing to take place on December 14, 2023, and set December 5, 2023, as the deadline for submission of joint exhibits agreed to by

all parties; any additional exhibits were to be submitted to DAFS and shared with all parties. A. 45-46; C.R. 21893. A few hours after the pre-hearing conference, Penquis submitted another FOAA request to DHHS ("the November 15 Request") seeking "all communications" between any and all DHHS "employees and agents" regarding transporting Maine residents to COVID-19 appointments and – separately – "all communications between the Department and ModivCare." A. 13; C.R. 22017. The November 15 Request was not limited to communications during any particular time period, nor was it limited to any specific DHHS or ModivCare employees; with respect to the request for communications between DHHS and ModivCare, it was not limited to communications on any specific topic. A. 13; C.R. 22017. After DHHS worked with Penquis to narrow the scope of the search and to use agreed-upon search terms to locate emails, *see* C.R. 23142-46, DHHS identified 1,784 responsive emails, which, when converted to PDF format along with their attachments, totaled over 15,000 pages of public records, many of which contained confidential, personally identifying MaineCare member information. A. 13; C.R. 23160, 24932-39979.

On December 6, 2023, with DHHS's consent, Penquis requested a continuance of the scheduled hearing. A. 46; C.R. 23153-54. On December 8, 2023, the Presiding Officer continued the hearing to February 7, 2024. A. 46;

C.R. 21983. Also on December 8, 2023, Penquis made yet another FOAA request, this time seeking reports that were required under ModivCare's previous contracts with the State. A. 13; C.R. 22019.

On December 22, 2023 – more than two months after it requested its initial stay and filed its appeal – Penquis made a fourth FOAA request, this time seeking *all* reports from both ModivCare and Penquis between July 2014 and November 2023 (the "December 22 Request"). A. 13; C.R. 22021-22. The DHHS Office of MaineCare Services estimated that the December 22 Request would result in approximately 194,000 responsive public records. A. 13; C.R. 22032.

On January 3, 2024, DHHS provided 2,850 pages of public records in response to the November 15 Request, explaining that these represented 19% of the total number of pages that had resulted from their search. A. 13; C.R. 22027. DHHS explained that certain documents had not been provided, as they were still being reviewed to determine whether they contained confidential information. A.13; C.R. 22027. Further, DHHS explained that it would likely be impossible to complete the necessary review of all of the requested public records before the week of February 5, 2024, unless the existing search criteria were narrowed. A. 14; C.R. 22027. The existing search criteria required DHHS to search the inboxes of every DHHS employee for any emails sent or received from any email address ending with "@ModivCare.com" or "@logisticare.com"

between November 1, 2020, and May 31, 2021, and including any of the following search terms:

COVID-19
Covid19
Covid
Coronavirus
SARS-CoV-2
Sars
Appointment
Vaccination
Shot
Inoculation
Immunization
Transportation

C.R. 22027. On January 5, 2024, Penquis expressed concern to DHHS about the number of redactions in the public records that DHHS had produced and the time it was taking for DHHS to review, redact, and produce the records. C.R. 23169-70. DHHS explained the redaction process, including the federal HIPAA regulations upon which it was relying to determine what specific categories of information to redact, and offered to review any specific redactions that Penquis identified as being of concern; DHHS also offered to seek out any specific records that Penquis believed that it might need for hearing and expedite its review of those records. A. 14; C.R. 23166-68. Penquis declined DHHS's offers of assistance, asserting that all the requested documents were necessary for hearing. A. 14; C.R. 23167.

On January 10, 2024, Penquis formally requested that the appeal hearing be postponed until after DHHS had fully responded to all of its outstanding FOAA requests to DHHS. A. 14, 46; C.R. 22003. Following a pre-hearing conference on January 17, 2024, during which DHHS expressed its commitment to consent to holding the record open in the event that evidence at hearing demonstrated that there were relevant public records that had not been provided to Penquis, C.R. 37, 44, the Presiding Officer denied the request on January 23, 2024, explaining:

> The evaluators for the award under appeal will be available as witnesses and coupled with the documentary evidence are anticipated to meet the needs of the parties. Objections can be raised during the hearing if relevant documents are needed and will be dealt with through the presiding officer.

A. 14, 46; C.R. 22515-16. The Presiding Officer reaffirmed the February 7, 2024 hearing date. A. 46.

The February 7, 2024 hearing was nevertheless delayed by Penquis's filing of a Verified FOAA Complaint and Motion for Preliminary Injunction in the Superior Court on January 29, 2024 – barely a week before the scheduled hearing. A. 14; C.R. 22518-56. Penquis's request to enjoin DAFS from conducting the hearing was denied by the Superior Court on February 16, 2024, following full briefing and oral argument by Penquis, DHHS, and DAFS, because

the Superior Court concluded Penquis was unlikely to succeed in demonstrating either a violation of FOAA or of its due process rights. *See Penquis's 80C Petition for Review and Request for Stay* (May 24, 2024), Exhibit Q.

The Hearing

The administrative appeal hearing was finally conducted over three days from March 20 through March 22, 2024. A. 9, 46. On April 18, 2024, the DAFS Appeal Panel issued a decision validating DHHS's contract award to ModivCare (the "DAFS Decision"). A. 45-56.

Penquis's Appeal

On May 24, 2024, Penquis timely appealed the DAFS Decision to Superior Court pursuant to M.R. Civ. P. 80C (2025). A. 4, 23-41. The BCD accepted transfer of the case on June 13, 2024. A. 5. On October 1, 2024, Penquis filed a motion requesting the taking of additional evidence pursuant to M.R. Civ. P. 80C(e). A. 6, 22. The BCD denied the motion from the bench at the conclusion of oral arguments on January 8, 2025. A. 6-7, 22. After Rule 80C briefing, the BCD heard oral argument on the merits of Penquis's Rule 80C petition on May 12, 2025; on May 23, 2025, the BCD (*McKeon, J.*) issued its Order denying the petition. A. 8-21. This appeal timely followed.

ISSUES PRESENTED FOR REVIEW

I. Whether the DAFS Presiding Officer's decision to conduct the administrative appeal hearing before Penquis's outstanding FOAA requests had been resolved was a proper and lawful exercise of his discretion.

II. Whether the DAFS Decision is supported by substantial record evidence.

ARGUMENT

In an appeal from a decision on a Rule 80C petition, the Court "review[s] 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 (quotation marks omitted); *see also Pine Tree Legal Assistance, Inc. v. Dep't of Hum. Servs.*, 655 A.2d 1260, 1264 (Me. 1995) ("Because the Superior Court acted solely as an intermediate appellate tribunal, we review directly the decision of the appeal committee."). In a review of final agency action, the reviewing court may affirm the agency's decision; remand the matter for "further proceedings, findings of fact or conclusions of law or direct the agency to hold such proceedings or take such action as the court deems necessary;" or reverse or modify the agency's decision. 5 M.R.S.A. § 11007(4) (Supp. 2025).

This Court may reverse or modify the decision only:

> [I]f the administrative findings, inferences, conclusions or decisions are:

> (1) In violation of constitutional or statutory provisions;
> (2) In excess of the statutory authority of the agency;
> (3) Made upon unlawful procedure;
> (4) Affected by bias or error of law;
> (5) Unsupported by substantial evidence on the whole record; or
> (6) Arbitrary or capricious or characterized by abuse of discretion.

Id. § 11007(4)(C); *see also Seider v. Bd. of Exam'rs of Psychologists*, 2000 ME 206, ¶ 8, 762 A.2d 551 (review of agency decision limited to whether the agency "abused its discretion, committed an error of law, or made findings not supported by substantial evidence in the record" (quotation marks omitted)); *Passadumkeag Mtn. Friends v. Bd. of Envtl. Prot.*, 2014 ME 116, ¶ 12, 102 A.3d 1181 ("review of administrative agency decisions is deferential and limited" (quotation marks omitted)). When considering an appeal of final agency action, the reviewing court "shall not substitute its judgment for that of the agency on questions of fact." 5 M.R.S.A. § 11007(3); *see also Duffy v. Town of Berwick*, 2013 ME 105, ¶ 22, 82 A.3d 148. The Court "review[s] de novo questions of statutory interpretation involved in Rule 80C appeals[.]" *Wood*, 2023 ME 61, ¶ 14, 302 A.3d 18.

I. DAFS's decision to conduct the hearing without awaiting final resolution of Penquis's outstanding FOAA request was neither unlawful nor an abuse of discretion.

DAFS's denial of Penquis's request to postpone the hearing is reviewed for an abuse of discretion.[4] *Waxler v. Me Real Estate Comm'n*, 1998 ME 65, ¶ 4, 708 A.2d 663. As the party seeking the continuance, it was Penquis's burden to show "sufficient grounds for granting the motion." *Id.*

Here, the DAFS Presiding Officer was authorized to control the conduct of the proceedings and to make determinations about the admission of evidence. 18-445 C.M.R. ch. 120, § 3(1) ("The presiding officer shall control all aspects of the hearing, rule on points of order, [and] rule on all objections[.]"), 3(2) ("Evidence of any type that cannot be related to [the appeal] criteria may be ruled inadmissible by the presiding officer[.]").[5] The Presiding Officer had

[4] To the extent Penquis asserts that the Presiding Officer committed an error of law because the continuance was mandated by the Maine Administrative Procedure Act, see Blue Br. 14-15, that argument has been waived. "In order to preserve an issue on appeal, that issue needs to be raised at the administrative agency level." *York Hosp. v. Dep't of Health & Hum. Servs.*, 2008 ME 165, ¶ 19, 959 A.2d 67. Before both the Presiding Officer and the BCD, as well as the Superior Court in proceedings on its verified FOAA complaint, Penquis argued only that requiring it to proceed to hearing without access unredacted MaineCare records would constitute a Fourteenth Amendment due process violation. C.R. 22003-12; *see also* A. 16 (addressing Penquis's argument below that its inability to obtain and/or offer as evidence confidential MaineCare records constituted a violation of its due process rights); *see also* Penquis's May 24, 2024, *Petition for Review of Final Agency Action and Request for Stay*, Exhibits O and P. That argument failed because Maine law is clear that a disappointed bidder has no constitutionally protected property interest in being awarded a state contract "unless the applicable law or regulation mandated that the contracting body accept the bid and gave it no discretion whatsoever to reject the bid." *E.g.*, *Carroll F. Look Constr. Co., Inc. v. Town of Beals*, 2002 ME 128, ¶ 11, 16, 802 A.2d 994.

[5] Even if, as Penquis contends, the Maine Administrative Procedure Act specifically applied to the conduct of the DAFS proceedings below, it would provide the Presiding Officer with functionally

already granted one request for a continuance, A. 46, even though, by statute, hearings on RFP appeals are required to take place within sixty days. 5 M.R.S.A. § 1825-E(3). And the administrative appeal hearing ultimately proceeded only after Penquis's arguments in favor of enjoining it had been rejected by the Superior Court. A. 46. Under these circumstances, the DAFS Presiding Officer acted well within the "bounds of reasonableness" by permitting the hearing to proceed. *Bradbury v. City of Eastport*, 2013 ME 72, ¶ 12, 72 A.3d 512 (quotation marks and alterations omitted).

Finally, Penquis cannot show that it was prejudiced by the denial of its request to postpone the hearing. *See Waxler*, 1998 ME 65, ¶ 6, 708 A.2d 663; *Farrell v. Theriault*, 464 A.2d 188, 192 (Me. 1983). Penquis, like all disappointed bidders, was entitled to – and received – a "full and fair hearing[.]" 5 M.R.S.A. § 1825-E(3); *see also* A. 16 (BCD's conclusion that "the record reflects that every party had a fair opportunity to present their case"). It was not entitled to receive documents that contained confidential information, as per

indistinguishable authority. *See* 5 M.R.S.A. §§ 9056(2) (2013)(right to "present evidence . . . on all issues" exists only to the extent that it is not "otherwise limited by the agency to prevent repetition or unreasonable delay in proceedings[.]"), 9057(2) (2013) ("Agencies may exclude irrelevant or unduly repetitious evidence."). For the reasons set forth in the brief of Appellee DAFS, however, the DAFS proceedings were governed instead by 5 M.R.S. § 1825-E and the DAFS procedural rules that implement it. *See Hale v. Petit*, 438 A.2d 226, 231-33 (Me. 1981).

FOAA those are not public records.[6] 1 M.R.S.A. §§ 408-A(1) ("Except as otherwise provided by statute, a person has the right to inspect and copy any public record . . . within a reasonable time[.]"), 402(3)(A) (Supp. 2025) ("public records" do not include records that have been designated confidential by statute, or information that is designated confidential by statute).

Penquis correctly notes that "agencies typically have an incentive to expedite the resolution of contract award disputes by expediting their responses to FOAA requests that pertain to a pending appeal." Blue Br. 17. That is exactly what occurred here. Penquis submitted FOAA requests to both DAFS and DHHS seeking "all responsive materials to RFP#202303047 which the State awarded on October 5, 2023." C.R. 22014. Each agency promptly provided approximately 19,000 pages of responsive documents in November 2023. C.R. 23154. Penquis then submitted an additional FOAA request to DHHS, and DHHS did not object to its request to continue the hearing to review

[6] This review of DAFS's final agency action pursuant to M.R. Civ. P. 80C is not the appropriate vehicle for litigating Penquis's objections to DHHS's response to its FOAA requests. *See* 1 M.R.S.A. § 409(1) (2016) (providing mechanism for determination by the Superior Court whether denial was for just and proper cause). DHHS provided the 15,011 pages of responsive documents, with confidential information redacted, on July 27, 2024. Blue Br. 11. Penquis provided specific objections, to which DHHS, through counsel, conclusively responded on September 24, 2024. *See* Penquis's Motion for Additional Evidence Pursuant to Rule 80C(e), Exhibit C. The deadline to challenge that response has long passed. *See* 1 M.R.S.A. § 409(1) (an aggrieved person "may appeal the refusal, denial or failure within 30 calendar days of the receipt of the written notice of refusal, denial or failure to the Superior Court"). Notably, Penquis's request for the taking of additional evidence pursuant to M.R. Civ. P. 80C(e) was denied by the BCD, A.22, and is not the subject of this appeal. *See generally* Blue Br.; *see also* M.R. App. P. 8(d)(3)(d) (2025).

and receive additional documents. C.R. 23153, 23154. Thereafter, Penquis submitted two more FOAA requests, with which, as described above, DHHS diligently endeavored to comply. Only when the volume of the records became unmanageable did DHHS object to a further continuance. *See* C.R. 33, 40-41.

Penquis argues that it was denied access to records relating to ModivCare's past performance, but its December 22 Request for reports that ModivCare provided to DHHS pursuant to contractual reporting requirements[7] was fulfilled prior to hearing and Penquis offered these reports as evidence at hearing. C.R. 22021, 23224-32, 22580, 23236-24467. Penquis has failed to identify any manner in which the additional records or remaining redacted information – consisting of the personally identifiable information of individual MaineCare members[8] –could have had any bearing on the issues before DAFS in the appeal hearing. *See, e.g.*, A. 15 ("During oral argument the court asked Penquis's counsel what he was hoping the documents he had not received yet

[7] These reports included: Observations/Spot Reports; Late and Missed Trip Reports; Call Center Metrics Reports; Call Center QA Reports; Denied Trip Reports; Level of Service Reports; Completed Trips by Destination Reports; Cancelled Trip Reports; No Show Reports; Agency Vehicle Inspection Reports; Damages/Sanctions Reports; Shared Trip Rate Paid for Non Members Reports; Cancellation Trip Reason and Member & Transportation Provider No Show Reports; and Trips by Level of Service Reports. C.R. 23236-24467.

[8] Penquis's specific objections to the redactions and DHHS's responses thereto appear in the record as Exhibit C to Penquis's Motion for Additional Evidence Pursuant to M.R. Civ. P. 80C(e).

through the FOAA process would show. [Counsel] answered that he does not know what the records would have shown.").

In short, Penquis did not explain why it needed the additional public records or the redacted information in the records that it had requested from DHHS under FOAA. Under these circumstances, the Presiding Officer's decision to proceed with the appeal hearing was neither unlawful nor an abuse of discretion. *See Waxler*, 1998 ME 65, ¶ 6, 708 A.2d 663.

II. The DAFS Decision is supported by substantial record evidence.

In general, the Court "must affirm findings of fact if they are supported by substantial evidence in the record, even if the record contains inconsistent evidence." *Passadumkeag Mtn. Friends*, 2014 ME 116, ¶ 12, 102 A.3d 1181 (quotation marks and alterations omitted). Moreover, 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 v. Town of Lamoine*, 2020 ME 70, ¶ 20, 234 A.3d 214 (quotation marks omitted). 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 (quotation marks omitted).

As the party seeking to vacate the DAFS Decision, Penquis bears the burden of persuasion to demonstrate error below. *Rossignol v. Me. Pub. Ret. Sys.*, 2016 ME 115, ¶ 6, 144 A.3d 1175. In its appeal to DAFS, Penquis had the burden to show by clear and convincing evidence that in awarding the contract to ModivCare: 1) DHHS violated the law, 2) irregularities in the evaluation process created a fundamental unfairness, or 3) the contract award was arbitrary and capricious. 18-554 C.M.R. ch. 120, §§ 3(2), 4(1). "Clear and convincing" is a high standard—Penquis was required to prove that it was not merely probable, but highly probable, that one of the three appeal criteria was satisfied. *Pine Tree Legal Assistance, Inc.*, 655 A.2d at 1264.

For the reasons set forth below, each of Penquis's arguments with respect to the sufficiency of the record is unpersuasive and should be rejected.

A. <u>The scores were supported by sufficient substantive information.</u>

Penquis's contention that DHHS violated the law by failing to document substantive information to support the scores that it assigned to each proposal, Blue Br. 26, is not supported by the record. The record demonstrates that DHHS documented the substantive information supporting each score. As the DAFS Decision notes, the scoring for each individual proposal was supported by

approximately five pages of Team Consensus Evaluation Notes ("TCENs") documenting the elements of each proposal that supported the overall score. A. 50-51; *see also* A. 167-75, 179-84, 210-17, 221-26, 251-59, 263-68, 293-301, 305-10. For instance, the TCEN for Penquis's Region 2 proposal provides a comprehensive, section-by-section overview of the substantive elements of the proposal that contributed to the score. A. 179-184. Notwithstanding Penquis's assertion that there was "no way for [it] to know if the substance of [its] proposals, the format, both, or some unknown other factor contributed to its loss of the contract award[,] Blue Br. 28-29, this TCEN plainly indicates that "the Bidder did not follow the outline of the RFP . . . making their submission difficult to review" and lists eight instances in which the bid failed to address certain of the RFP's requirements or provided only a minimal response. A. 180-84.

The rules governing competitive bidding require that the contracting agency review proposals "based on the criteria within the original Request for Proposal document" and "document the scoring [and] substantive information that supports the scoring." 18-554 C.M.R. ch. 110, § 3. Individual reviewers' inability to recount specific details of the consensus scoring process during testimony many months later is not, contrary to Penquis's assertion, Blue Br. 30, uncontested evidence that DHHS failed to comply with these requirements.

Despite its reliance on 18-554 C.M.R. ch. 110, § 3, it appears Penquis's argument about the scoring is not that there was a lack of substantive information supporting the scoring; rather, Penquis's complaint seems to be that the TCENs should have provided more detail about the numeric point value assigned to individual elements within each section to demonstrate how the evaluators arrived at the final score for each section. Blue Br. 26 ("[T]he team consensus notes simply recite a series of short observations about each proposal . . . without noting what increases or decreases in scoring were contributed by a given observation, nor even stating the midpoint from which adjustments were made."). The level of specificity Penquis argues is missing in the scoring process was not required by the terms of the RFP and is not required by law. *See Pine Tree Legal Assistance, Inc.*, 655 A.2d at 1264.

As this Court has recognized, in the context of evaluating proposals during the competitive bidding process, "[s]trict adherence to [a] mathematic formula is inconsistent with the search for consensus."[9] *Pine Tree Legal*

[9] To the extent the Court finds it useful to review earlier decisions by other DAFS appeal panels in the context of unrelated RFP appeals, the decisions cited by Penquis are not to the contrary. For instance, in an RFP appeal related to crisis mobile resolution and stabilization unit services, the DAFS Decision did *not* conclude that DHHS violated the requirement to document substantive information supporting the scores; rather, it found that the evaluators "chose to recognize [one bidder's] response that was virtually indistinguishable from [another bidder's] and used it as part of the basis for a score in a category . . . that it did not even relate to[.]" *In re: Appeal of Award of Contract for Crisis Mobile Resolution and Stabilization Unit Services* (RFP #20150611)(2016) at 9. Further, in that case the DHHS RFP facilitator testified that the evaluators overlooked certain information in a bidder's proposal, likely because "it was buried in a busy paragraph, and because [the] proposal did not follow

Assistance, Inc., 655 A.2d at 1264. Where neither the rules nor the RFP provide detailed instructions with respect to *how* to implement an RFP's scoring requirements, this Court previously upheld a decision in which the agency's actions were "not inconsistent with the required procedures." *Id.* at 1263-64. Here, Penquis has failed to show that any action taken by DHHS or DAFS was inconsistent with either the RFP or the applicable competitive bidding regulations. The RFP provided that "the evaluation team [would] use a consensus approach to evaluate and score Sections II and III[,]" which were respectively worth 25 and 50 points. A. 118 (emphasis in original). No additional breakdown of scores was required, A. 118, and Penquis identifies no other legal authority requiring greater granularity in the review and scoring of bids. Likewise, nothing in the record supports Penquis's suggestion, Blue Br. 30, that the process was "arbitrary."

The reviewing and scoring of bids will likely always require evaluators to exercise their judgment and discretion. *See, e.g., Pine Tree Legal Assistance, Inc.*, 655 A.2d at 164 (affirming process that awarded contract based on the fact that "[t]he combined ordinal rankings indicated that more panelists preferred [the

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the outline of the RFP[,]" but the DAFS Decision found that "both proposals had the information in similarly structured paragraphs in approximately the same location" and ultimately concluded, based on these and other findings, that the evaluation and scoring were arbitrary and capricious. *Id.* at 9, 11. No such findings were made in this case, nor would the record support such findings.

winning bidder] than any other bidder"); *see also Yang Enters., Inc. v. Me. Dep't of Transp.*, No. AP-01-59, 2001 WL 1794972, at *2 (Me. Super. Ct. Dec. 4, 2001) ("This is not a quasi-judicial or quasi-legislative function, rather it is a consumer-buying decision."); 5 M.R.S.A. § 1825-B(7) ("best-value bidder" must be determined by taking into consideration numerous factors, including "the best interest of the State"). Showing that evaluators used a degree of discretion in scoring does not render the process arbitrary and capricious. Arbitrary and capricious means "willful and unreasoning and without consideration of facts or circumstances." *AngleZ Behav. Health Servs. v. Dep't of Health & Hum. Servs.*, 2020 ME 26, ¶ 23, 226 A.3d 762. "Where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached." *Cent. Me. Power v. Waterville Urban Renewal Auth.*, 281 A.2d 233, 242 (Me. 1971) (internal citations omitted).

Here, the record shows that the DHHS evaluation team identified the substantive information in each section that it considered and, using the consensus scoring method, assigned an overall point value for the section based on that information. A. 51, 53. On this record, Penquis has not shown that actions taken by either DHHS or DAFS were unlawful or arbitrary and capricious.

B. Each evaluator reviewed every bid.

Penquis's assertion that it "presented uncontested evidence that the Reviewers failed to consider each of its proposals individually," Blue Br. 36, is contradicted by the record, and its insistence that the DAFS appeal panel was compelled to equate the use of a copy-and-paste function in the course of individual notetaking with a violation of law is legally and factually incorrect. The DAFS Decision correctly concluded that the minor errors in reviewers' individual notes did not result in a fundamental unfairness, A. 54, and the record does not compel this Court to overturn that finding. *See Kelley*, 2009 ME 27, ¶ 16, 967 A.2d 676.

As the factfinder, the DAFS appeal panel was free to "accept parts of the evidence and reject other parts." *Town of Southwest Harbor v. Harwood*, 2000 ME 213, ¶ 21, 763 A.2d 115. "It [was] not required to engage in all or nothing fact-finding." *Id*. As the DAFS Decision explained, the evidence demonstrated that there were instances where reviewers, when conducting their individual reviews, overlooked some differences in proposals for the same bidder in different regions. A. 50. The DAFS Decision likewise found that, given the "large volume of proposals to be read by the reviewers, one rater used a copy and paste function to complete the electronic record form provided to keep her notes." A. 54. The DAFS Decision concluded that this evidence was insufficient

to demonstrate, by clear and convincing evidence, that a fundamental unfairness occurred, explaining: "The consensus review process was where the scores were assigned." A. 54; *see also* A. 51 ("When discussing the proposals during the consensus scoring process, proposals were brought up on screen to review, confirm or correct errors or omissions between individual evaluator notes."). The record does not compel a contrary conclusion. *See Kelley*, 2009 ME 27, ¶ 16, 967 A.2d 676.

Contrary to Penquis's suggestion, there was no testimony that any of the reviewers failed to review each bid individually. Ms. Simpson testified that she read each of the proposals. C.R. 393 ("I read [what] was given to me, and with that I answered the questions that were asked according[] to what I had read."). The only record evidence concerning whether Ms. Simpson reviewed the proposals "thoroughly" and "accurately" is her testimony that "[she] thought [she] had" done so, even though she "probably could have done better." C.R. 425-26. She testified that, for some proposals, it took her an entire day to review them. C.R. 394. She never attended a team consensus scoring meeting for a proposal without having reviewed that proposal individually in advance. C.R. 431. As Ms. Simpson explained, to resolve any inconsistencies between individual evaluators' notes during the team consensus scoring, the team would discuss the issue and review the proposal itself before coming to an agreement

as to what should be reflected in the TCEN. C.R. 432-33. This testimony was corroborated by the testimony of fellow members of the DHHS evaluation team Roger Bondeson, C.R. 117 ("If there were disagreement, we would discuss them, open up the proposal and make sure we were all reading the same thing and interpreting it, if not the same way, why we felt a certain way about how a requirement was addressed."), and Richard Henning, C.R. 480. Penquis provided no evidence to the contrary. C.R. 01-39985.

Likewise, as DHHS reviewer Stephen Turner testified, cutting and pasting information between notes did not necessarily mean that the reviewer had failed to carefully review the bids. C.R. 455. When asked about notes that mentioned a Native American tribe not referenced in the proposal, Mr. Turner explained that this would represent a mistake, but he did not agree that this necessarily meant that the reviewer had failed to review each proposal on its own merits. C.R. 455-56.

Mr. Henning testified that it would be fundamentally unfair if a reviewer did not read each proposal in its entirety. C.R. 483. He further explained that he would not be surprised to learn that his individual evaluation notes for Penquis's Region 3 and 4 proposals were nearly identical "except for two sections" because "through the RFP, we're asking for basically the same service to be provided in different regions. . . . And so it doesn't surprise me at all that

a single bidder bidding on multiple locations to provide basically the same service, that their evaluation notes would be pretty similar." C.R. 469-70. He did not testify that he, or any other reviewer, failed to review any proposal.

Nothing in any rule or statute prohibits reviewers from using a copy-and-paste function in preparing their individual notes. *See generally* 5 M.R.S.A. §§ 1825-D, 1825-E; 18-554 C.M.R. ch. 110. Nor are there any legal requirements governing the content of each individual reviewer's notes; the only requirements are that "[w]ritten records [] be kept by each person reviewing or ranking proposals" and – separately – that the agency "document the scoring [and] substantive information that supports the scoring." 18-554 C.M.R. ch. 110, § 3(A); *see also* 5 M.R.S.A. § 1825-D(2) (DAFS rules must require "that written records be kept by each person directly reviewing or ranking bids"). As described above, the record shows that these requirements were met. Accordingly, the record does not compel a finding that the evaluators failed to review each proposal individually. *See Kelley*, 2009 ME 27, ¶ 16, 967 A.2d 676.

C. <u>The record contains no evidence that ModivCare received an unfair advantage.</u>

The DAFS Decision correctly found that there was no record evidence to support a finding that ModivCare received any unfair advantage as a result of the evaluation team taking note of the fact that it provided free rides to non-

MaineCare members for COVID-19 vaccinations during the pandemic. A. 52. ModivCare appropriately included this information in Section II of each of its proposals as part of its "brief statement of qualifications," including the "any special or unique characteristics of the organization[.]" *See, e.g.,* C.R. 9857; *see also* C.R. 559 (Penquis witness's testimony that it was appropriate for evaluators to consider information about providing free COVID-19 related rides because it "characterizes" the bidder "as helping to provide those important services"). In this context, it is therefore neither illegal nor unfair that the ModivCare TCENs mention this point in Section II. *See, e.g.,* A. 167. Penquis, however, did not include this information in Section II. *See, e.g.,* C.R. 14547, 14549 (Penquis mentioning its provision of free rides to COVID-19 vaccination appointments in Section III, "Proposed Services," under the subsection for "Non-Covered Transportation Services"). Thus, it is neither arbitrary nor capricious that the evaluators did not make a note of it in Section II of the TCENs for Penquis's proposals.[10] *See, e.g.,* A. 179 (noting Penquis's "overall positive work history"). Nor is it arbitrary or capricious that the evaluators failed to note Penquis's provision of these rides in Section III of Penquis's TCENs as this section was an evaluation of the services that Penquis was proposing to provide

[10] These factual circumstances differ from those at issue in the unrelated 2016 DAFS appeal decision involving crisis services. *See supra* n.9.

in the future pursuant to the requirements of the RFP. Providing COVID-19 rides to non-MaineCare members was not a service requested in the RFP; therefore, the evaluators properly did not factor this information into their scoring of Section III.

Finally, the record reflects that Roger Bondeson, whose personal familiarity with each of the incumbent bidders' performance history under their contracts was relied upon during the scoring process, was aware of Penquis's history of providing similar services. C.R. 1499. Based at least in part on Mr. Bondeson's positive characterization of Penquis's contract history, Penquis received 25 out of 25 available points for "Organizational Qualification and Experience." A. 179. On this record, this Court is not compelled to overturn DAFS Decision's finding that the evaluation team's consideration of the COVID-19 vaccination rides did not constitute an irregularity resulting in fundamental unfairness. A. 54; *see Kelley*, 2009 ME 27, ¶ 16, 967 A.2d 676.

D. <u>The evaluators appropriately considered each incumbent bidder's performance history.</u>

Finally, Penquis contends that the DHHS reviewers should have placed more weight on ModivCare's past performance, which Penquis characterizes as poor, specifically citing ModivCare's alleged failure to comply with certain reporting requirements. Blue Br. 33-34. As noted by the DAFS Decision, DHHS

did not consider these issues to be significant. A. 51. Penquis failed to persuade the DAFS appeal panel otherwise. A. 54-55. With respect to the significance of ModivCare's alleged noncompliance with contractual reporting requirements, this Court should not substitute its own judgment for that of the agencies. *Doane v. Dep't of Health & Hum. Servs.*, 2021 ME 28, ¶ 15, 250 A.3d 1101; 5 M.R.S.A. § 11007(3).

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Margaret Machaiek, Assistant Attorney General, do hereby certify that 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 attorneys and/or 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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