STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Court Docket No. BCD-25-63

Waldo Community Action Partners

Petitioner-Appellant

v.

Department of Administrative and Financial Services et al.

Respondent-Appellees

On Appeal from the Business & Consumer Court
Docket No. BCD-APP-2024-0009

Brief for Appellant

Brent A. Singer, Esq. (Bar No. 7708)
Rudman Winchell
Attorneys for Appellant
P.O. Box 1401
Bangor, ME 04402-1401
207.992.2575
bsinger@rudmanwinchell.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Treatises

INTRODUCTION

Maine's statute governing state contract awards requires that

> competitively awarded . . . contracts made by the Director of the Bureau of General Services or by any department or agency of the State ***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 [for those goods or services], the purposes for which they are required, the date of delivery and the best interest of the State.

5 M.R.S. § 1825-B(7) (emphasis added) (hereinafter "Section 1825-B(7)"). By corollary, Maine law provides that a contract award cannot stand if the award is arbitrary or capricious, i.e., without an articulable, rational basis. *See* 5 M.R.S. § 11007(4); 18-445 C.M.R. Ch. 120, § 3(2) & § 4(1); *Maine Power Co. v. Waterville Urban Renewal Authority*, 281 A.2d 233, 242 (Me. 1971) (an agency conclusion is arbitrary and capricious if it has no rational basis).

This appeal presents this Court with a unique question of first impression, and by corollary, a related question.

The question of first impression is just how completely untethered can the basis of a contract award be from any consideration of the quality of the services to be supplied for the award to still satisfy the basic, unambiguous, statutory requirement in Section 1825-B(7), that the award go to the best-value bidder "taking into account the quality of the services to be supplied"? By corollary, is an award valid if there is no rational, articulable basis for the award, much less one that is logically connected to the quality of the services to be supplied?

STATEMENT OF FACTS AND PROCEDURAL HISTORY

This case arises out of RFP #202303047 (the "RFP") published by the Office of MaineCare Services ("OMS") within Maine's Department of Health and Human Services ("DHHS"). (App. 47-117)[1] The RFP solicited proposals for non-emergency transportation brokerage services (the "NET Services" or "Services") for members of MaineCare in Region 5 of Maine, as well as seven other Regions in Maine. Only Region 5 is implicated in this case. Region 5 encompasses Waldo, Knox, Lincoln, and Sagadahoc Counties, as well as a bit of northern Cumberland County. (CR 601)[2]

Bidders were required to submit a separate bid for each Region in which they were interested. (App. 55) On July 11, 2023, petitioner/appellant Waldo

---

[1] "App. 47-117" refers to Appendix pages 47-117. The Appendix page numbers are written in the top right corner of the Appendix pages to avoid those numbers being written over other numbering in the bottom middle and bottom right corner of most pages in the Appendix.

[2] "CR 601" refers to Bates stamped document DAFS-000601 in the Certified Record filed with the BCD by the Department of Administrative & Financial Services ("DAFS") on July 18, 2024. The abbreviation "CR" stands for "Certified Record." The Certified Record was filed on a thumb drive. The Certified Record starts with bates stamped page DAFS-000001, which is referred to herein as "CR 1." A similar convention applies for other citations, so, e.g., "CR 112" refers to Bates stamped document DAFS-000112. The Certified Record is over 22,000 pages—mostly because DAFS consolidated WCAP's appeal with appeals of Penquis, C.A.P., Inc. ("Penquis") pertaining to several other Regions in Maine. Penquis's 80C Petition was not consolidated with WCAP's 80C Petition.

Community Action Partners ("WCAP"), a Maine IRC § 501(c)(3) nonprofit community action agency, submitted its Region 5 bid to continue providing NET Services to members in Region 5. (CR 17007) At that time, WCAP had been continuously and successfully providing "good and positive" NET Services in Region 5 for almost 10 years without once being subject to a corrective action plan. (CR 229, 231, 232-233, 605; App. 130) WCAP provided these NET Services in Region 5 to OMS through WCAP's d/b/a MidCoast Connector. (CR 610; App. 156) No other Region 5 bidder had ever supplied these Region 5 Services, and WCAP continues to supply these Services today. (CR 229)

Procedural History

Five bidders bid for Region 5: EPICMD Technologies; Medical Transportation Management, Inc. ("MTM"); ModivCare Solutions, LLC ("ModivCare"); WCAP; and WellTrans, Inc. (App. 118)

A few months after bids were submitted, OMS notified the bidders by letter dated October 5, 2023, that OMS was awarding Region 5 to ModivCare. Under the terms of the RFP, WCAP was to cease providing the NET Services in Region 5 on June 30, 2024, and ModivCare was to start providing those NET Services on July 1, 2024. (App. 55)

WCAP requested and received an appeal hearing to challenge the validity of the award of Region 5 to ModivCare. Respondent/appellee Maine's Department of

Administrative and Financial Services ("DAFS") conducted the three-day appeal hearing (the "Hearing") in March of 2024 and issued its "Decisions on Appeal" (the "Decision") in April of 2024. The Decision, which was final agency action, upheld the validity of the award to ModivCare. (App. 25-37) WCAP then filed a Rule 80C Petition in Superior Court. (App. 13-24)

WCAP also requested from DAFS a stay to maintain the status quo in Region 5 throughout the judicial review of the Decision. By letter dated June 3, 2024, DAFS acknowledged that DHHS had already determined to continue the status quo through December 31, 2024. DAFS agreed to maintain the status quo "during the pendency of the 80C petition proceedings in the Superior Court." DAFS explained that this "prevents the execution and finalization of a new contract with ModivCare for NET services in Region 5" during Superior Court review.

Late in 2024, WCAP communicated, through counsel, with DAFS and DHHS to see if they would consent to maintaining the status quo for the duration of an appeal to the Law Court. DAFS and DHHS did not then agree to such a stay. Meanwhile, DHHS did agree to extend WCAP's Region 5 NET Services contract through June 30, 2025.

The BCD affirmed the Decision in its Rule 80C Decision dated January 28, 2025 (the "BCD Decision"). (App. 7-12) WCAP filed a Notice of Appeal. In

February of 2025, WCAP renewed its request to DAFS, DHHS, and ModivCare that they consent to a stay to maintain the status quo for the duration of the appeal. ModivCare responded then that it objected to such a stay. DAFS and DHHS did not reply. WCAP filed a motion for such a stay with Court. DAFS and DHHS consented to the stay and ModivCare took no position. This Court granted the stay.

Statement of Facts

Pursuant to the RFP, Bidders received scores in four sections, namely, Section I—Preliminary Information (Eligibility); Section II—Organization Qualifications and Experience; Section III—Proposed Services; and Section IV—Cost Structure Acknowledgment. (App. 118)

Section I

Section I was pass or fail. If a bidder failed Section I, the bidder failed to meet minimum eligibility requirements and was eliminated without further scoring. Four bidders for Region 5 passed Section I, including ModivCare and WCAP. (App. 118)

Section IV

Section IV, pertaining to cost, was worth 25 points. A bidder received all 25 points automatically just by including in its bid a signed Appendix G (Cost Structure Reimbursement Acknowledge Form) whereby the bidder agreed to provide all Services in accordance with rates established by DHHS for that Region. (App. 111) Thus, unlike many competitive bids, cost was not a factor in determining the best-value bidder for purposes of Section 1825-B(7). No bidder could gain an advantage by offering its services at lower cost to the State. All four bidders for Region 5 who passed Section I also submitted a signed Appendix G and were awarded all 25 points for Section IV. (App. 118)

Section III

Section III was worth up to 50 points. Section III was the heart of the RFP because that was where the bidder was scored for specifying just what Services the bidder would provide and how the bidder would and could provide them. Those proposed Services and how the bidder would and could provide them had to be described in the bidder's Appendix F. The RFP required that Appendix F respond point-by-point to Part II of the RFP titled "Scope of Services to be Provided," which is a detailed, 36-page outline starting with "Assessment and Certification of Readiness" and ending with "Performance Measures" (and a nine-page table of "Mandatory Performance Measures"). (App. 56-92) Much of this 36-page outline is highly technical. WCAP's Appendix F is 267 pages long. (CR 17135-17402) ModivCare's Appendix F is similarly long. WCAP received 48 points for its Section III. (App. 118) ModivCare received 45 points for its Section III, and the other two bidders received 18 and 40 points, respectively. (*Id.*) Hence, in terms of the quality of the Services to be supplied, in circumstances in which the cost of the Services is not a factor, WCAP scored the highest in Region 5 among all bidders, making WCAP the presumptive best-value bidder in Region 5. (CR 222, 388)

Section II

Section II, Organization Qualifications and Experience, was worth up to 25 points—half as many points as Section III. The RFP explains that for Section II, bidders must, among other things,

> complete **Appendix D** (Qualifications and Experience Form) describing their qualifications and skills to provide the requested services in the RFP. Bidders must include three examples of projects which demonstrate their experience and expertise in performing these services as well as highlighting the Bidder's stated qualifications and skills. [emphasis in original]

(App. 95) ***The RFP does not say where in Appendix D a bidder must include three examples***, but only that Appendix D must include three examples. (CR 260-61, 385; App. 95, 105-107) WCAP's Appendix D is reproduced at App. 153-163 and includes three examples.

The Bid Review Process and Appendix D

The bid review process began with individual evaluations in which each of a panel of four evaluators reviewed the bids and filled out an Individual Evaluation

Notes form. The four evaluators were Melissa Simpson (f/k/a Melissa Fuller), Stephen Turner, Richard Henning, and Roger Bondeson.[3]

The instructions on the Individual Evaluation Notes form were that the evaluators were to record their notes but not do any numerical scoring. (*E.g.* CR 1771) The instructions said numerical scoring would occur during a later team consensus evaluation meeting. (*Id.*)

Ms. Fuller noted that in terms of Section II, Organization Qualification and Experience," WCAP has provided transportation services to both Maine Care members and DHHS since the early 1980s. (CR 1771) Mr. Turner noted the same. (CR 1787) Mr. Henning noted WCAP's project examples included supporting not just DHHS, but also Maine Department of Education ("MDOE"), and Maine Department of Transportation ("MDOT"). (CR 1781) He noted that WCAP has provided services to MaineCare members since 1980. (*Id.*) Mr. Bondeson noted that WCAP's Appendix D states that WCAP, in addition to being the incumbent Region 5 Services supplier to OMS, supplies transportation services to MDOT and the Office of Child and Family Services ("OCFS") in DHHS. (CR 1763)

---

[3] Mr. Bondeson has been the Director of Division Operations for OMS since February of 2013. (CR 107) In that capacity, Mr. Bondeson has overseen the NET Services in Region 5 supplied by WCAP ever since WCAP started supplying those Services in 2014. (CR 107-09; 219-20; 229) Mr. Bondeson participated in drafting the RFP. (CR 110, 114-15) Mr. Bondeson was the evaluation panel's "subject matter expert" on the supplying of NET Services by incumbent bidders, such as WCAP (CR 348), and he shared his assessment of the past performance of incumbent bidders with the other three panelists. (CR 348, 386-87)

Mr. Bondeson noted that WCAP has performed well in its role as the OMS Region 5 Services supplier since 2014, and he noted, too, that WCAP has provided Medicaid (i.e., MaineCare) transportation since the 1980's. (*Id.*)

The four-member evaluation team then got together to score WCAP in Section II and to complete their Team Consensus Evaluation Notes (the "Team Notes") for WCAP for Section II. (App. 130) The panel's Team Notes reiterate that "WCAP has performed well in its role as the Region 5 broker"; that WCAP also provides "transportation for the DHHS Office of Child and Family Services"; that WCAP's division named MidCoast Public Transportation is the "Maine Department of Transportation's designated Federal Transit Authority in [Region 5]"; and that WCAP supplies services to "DOE, DOT, Maine Housing." (*Id.*)

Correspondingly, WCAP's Appendix D does begin by explaining how WCAP "manages, and is fully licensed and credentialed to administer, approximately 50 contracts annually with local, state of Maine, and federal agencies, including Department of Health and Human Services, Office of Head Start, Maine Department of Transportation and the Federal Transit Administration, Maine Housing, and more." (App. 153-154)

WCAP then elaborates on its separately maintained transportation service division called MidCoast Public Transportation, as the Team Notes indicate. WCAP explains that this separate division started supplying transportation services to MaineCare Members back in 1970 and did so until 2014 when WCAP's d/b/a MidCoast Connector came into being as the OMS Region 5 Service provider. WCAP explains how after 2014, MidCoast Public Transportation continued to operate and continues to provide public transportation services to indigent and other Mainers in Region 5, who are not MaineCare members, but who need non-emergency transportation. WCAP explains, as indicated in the Team Notes, that MidCoast Public Transportation is MDOT's designated Federal Transit Authority ("FTA") in MDOT's Transit Region 5.[4] (App. 154-155) WCAP even included in Appendix D some performance metrics for its MidCoast Public Transportation division. (App. 163)

As further project examples contained in its Appendix D, WCAP explains that after 2014, MidCoast Public Transportation continued and continues in Region 5 to provide low income and child welfare transportation services to other traditional clients, such as MDOE and offices of DHHS other than OMS, such as OCFS. (App. 154-155) The Team Consensus Evaluation Notes also indicate that WCAP supplies services to OCFS. (App. 130) WCAP also included in Appendix D some performance metrics for its work for OCFS. (App. 162-163)

WCAP further explains in its Appendix D that in addition to MidCoast Connector and MidCoast Public Transportation, WCAP (a) is a Head Start and

[4] MDOT's Transit Region 5 is geographically the same as the OMS NET Region 5. (CR 21325)

Early Head Start program provider under the auspices of the Office of Head Start and Maine's Head Start State Collaboration Office in DOE; (b) provides housing services under the auspices of the Maine State Housing Authority ("MSHA"); and (c) provides transportation services as a subcontractor for the Office of Aging and Disability Services ("OADS"). (App. 154-155)

WCAP also explains in detail, as its primary example of organizational qualifications and experience in Region 5, its history of providing good and positive NET Services for OMS in Region 5 as OMS's only broker in Region 5 since July of 2014. (App. 156-163)

These examples taken together—MidCoast Connector, MidCoast Public Transportation, transportation services supplied to OCFS, transportation services supplied to OADS, transportation services provided to MDOE, and services supplied to MSHA and others—are more than three examples in WCAP's Appendix D showing that WCAP has organizational qualifications and experience to continue as the Region 5 broker.

Testimony about Why WCAP Lost its Bid for Region 5

The first witness at the Hearing was Mr. Bondeson. (CR 106) As noted above, Mr. Bondeson has been the Director of Division Operations for OMS since February of 2013 and, in that capacity, he oversaw the NET Services in Region 5 supplied by WCAP since WCAP started supplying those Services in 2014.

(CR 107-09; 219-20; 229) Mr. Bondeson testified that he and the other three panelists agreed that WCAP had a "good history" of providing the Services. (CR 231) Mr. Bondeson was "satisfied" with WCAP's "performance overall" and characterized it as "good" and "positive." (CR 232-33) He agreed that WCAP "did not lose [the] contract [for Region 5] because of any objective review of performance metrics in comparison with other bidders." (CR 233)

Mr. Bondeson also agreed that WCAP's Appendix D does in fact refer, in addition to its work for OMS, to its long-standing MidCoast Public Transportation division and to the transit services it supplies to OCFS in DHHS, as well. (CR 251) So, when asked whether WCAP provided the requisite three examples in its Appendix D, Mr. Bondeson summed it up as follows:

> [Attorney Walker] **Q. Yep. So [WCAP's] content was there in Appendix D; however, not in the boxes that you anticipated it would be in, correct?**
>
> [Mr. Bondeson] A. Correct.

(CR 226; *see also* CR 239, 250-51)

The "boxes" to which this testimony refers are two boxes at the end of the form Appendix D in the RFP. Instead of putting its second, third, and additional qualifying examples in these two boxes, WCAP put that content in narrative earlier in its Appendix D—as explained above. Consequently, Mr. Bondeson, the subject matter expert on the panel, had to agree that WCAP's content—i.e., at least three qualifying examples—was in fact included in its Appendix D—just not where the panel thought it should be. In other words, he agreed that WCAP's examples of work for MDOT and OCFS would have qualified it for all 25 points for Section II if WCAP had put those examples in the two boxes at the end. (CR 250-51) Mr. Bondeson's testimony was plain and undisputed that the *only* reason WCAP didn't score a perfect 25 in Section II, and received only 18 out of 25 points, is because WCAP failed to put these examples in the two boxes at the end. (CR 239, 250)

Mr. Bondeson's testimony is corroborated by the Team Consensus Evaluation Notes for WCAP for Section II. Those Notes expressly include the facts that WCAP also supports MDOT (as the designated FTA in Region 5), OCFS, MDOE, and MSHA, as well as, of course, OMS as its the current Region 5 NET Services supplier. (App. 130) Paradoxically, however, the Notes begin with the bullet that WCAP did "not provide 3 projects as required by the RFP, only provided a description of one (1) project example . . . as the Region 5 broker." (*Id.*)

The statement in the Team Consensus Notes that WCAP provided only one example is even more baffling because the Team Consensus Notes for WCAP for Section III reiterates that MidCoast Public Transportation is operated by WCAP, MidCoast Public Transportation is the Region 5 FTA/MDOT designated public transportation provider, and that division is "fully integrated with other [WCAP] transportation services." (App. 132) The Notes therefore prove that the panel saw and considered these other examples, namely, MidCoast Public Transportation, WCAP's work for OCFS, and so forth, but the panel gave WCAP no credit for having these other examples in Appendix D because, as Mr. Bondeson explained, they were not in the two boxes at the end. Consequently, the panel decided to take away seven points from WCAP based on the incorrect statement that WCAP "only provided a description of one (1) project example." (App. 132) Moreover, the subtraction of these seven points caused WCAP to lose the bid by four points to ModivCare. (App. 118) Had the panel given WCAP credit for including the examples of MidCoast Public Transportation and its work for OFCS, and others, or had the panel only subtracted three points because the content was there, just not in the two boxes at the end, WCAP would have won.[5]

Needless to say, neither Mr. Bondeson nor anyone else could explain the inexplicable, namely, any logical connection between the quality of NET Services to be supplied by WCAP in Region 5 and where in Appendix D WCAP identified

[5] If the panel had subtracted only 3 points, WCAP would have scored 22 points in Section II and tied ModivCare, overall, with 95 points. (App. 118) WCAP is an in-state bidder (App. 153) and ModivCare is not. ModivCare is a Delaware LLC that operates nationally and that is itself a wholly owned subsidiary of an even larger, publicly traded Delaware corporation named "ModivCare, Inc." (CR 10410, 10852, 10857, 10996) By statute, 5 M.R.S. § 1825-B(8), if there is a tie between an in-state and out-of-state bidder and the quality of services supplied by the in-state bidder is better or equivalent to the out-of-state bidder, and the cost is the same, the contract must be awarded to the in-state bidder.

its work for MDOT, OCHS, MDOE, MSHA, and OADS. Thus, remarkably, but truly, the record is undisputed that the award of Region 5 to ModivCare was for a reason untethered to any consideration of the quality of NET Services that would be supplied in Region 5. ModivCare won Region 5 because WCAP didn't put its other Appendix D examples in the boxes at the end.

What's more, no one could give a cogent explanation of why the panel decided to deduct seven points rather than, e.g., three points. When asked why seven points, Mr. Bondeson said "And so we deducted from the point value we set to get to, meets requirements"—which literally makes no sense. (CR 235) When given another chance, Mr. Bondeson said "we settled on, I think, whatever score that you [meaning WCAP]—you received"—which literally explains nothing. (CR 240) When given another chance, he said "We arrived at the score we arrived at because we agreed that the omissions, these two project, warranted the point deduction that we gave"—which, again, explains nothing. (CR 242) On a fourth try, he said (a bit defiantly) "I'm not going to score—I'm not going to go through this what's this worth and what's that worth because that's part of our *consensus* scoring" (emphasis added), to which he honestly added, "I just—I don't know." (CR 242)[6]

[6] Mr. Turner, one of the 4 original evaluators, simply answered "No" to the question "Was there a methodology or a system for how much weight will be given to various items." (CR 457)

On direct examination, Mr. Bondeson did start to describe a fancy sounding, though vague and essentially uninformative process for awarding consensus points to bidders in each Section based on starting with a "mid-range number." (CR 121-22) Mr. Bondeson did not, however, say that that process was used to deduct seven points from WCAP. Much less did he or anyone else suggest that that process was applied to make WCAP lose the bid on the ridiculous basis that it lacked Organization Qualifications and Experience to render NET Services in Region 5, when the panel knew that WCAP has been performing those Services well for over a decade. Being able to give no rational explanation for a decision is the very definition of a decision that is arbitrary or capricious.

The lack of any rational basis for what happened is underscored even more by the fact that in addition to Appendix D, Section II of the RFP also required each bidder to submit (a) an Appendix E (Subcontractors Form); (b) an organizational chart; (c) a list of current litigation and closed cases for the past five years; (d) financial statements for the past three years; (e) evidence of payment and performance bonds; and (f) a valid certificate of insurance. (App. 96) WCAP fully complied with each of these other six requirements, but ModivCare did not. Specifically, ModivCare failed to follow the *explicit* instruction in the RFP that for

---

Mr. Henning, also one of the 4 original evaluators, also could not give a cogent explanation of why WCAP lost 7 points even though the content was there. (CR 465) every settled case, the bidder must provide the amount the bidder paid out in settlement or by decree. (App. 96) ModivCare failed to show the amount it paid for any of the 100's of the settled cases that it listed. (CR 11109-11152). Yet, the panel did not subtract a single point from ModivCare due to ModivCare's failure to comply. (App. 118, 120-121)

In contrast, as already stated, nothing in the RFP warns bidders that examples of other work in Appendix D must be put in the boxes at the end in order for the bidder to receive credit. The RFP even states *in bold print* that for purposes of Appendix D, "**contract history with the State of Maine, whether positive or negative, may be considered in rating proposals even if not provided by the Bidder**" (emphasis in original). (App. 106) Elsewhere, the RFP reiterates that DHHS "will consider . . . internal Departmental [i.e., DHHS] information of previous contract history with the Bidder." (App. 54) Consequently, rather than being punished for where in Appendix D WCAP identified its other contract work for the State, such as for MDOT and OCFS, WCAP could have omitted those examples completely and DHHS would still have considered WCAP's extensive, other contract work for the State.[7]

---

[7] Donna Kelley, the CEO of WCAP, explained that WCAP did not repeat in the two boxes at the end of Appendix D what WCAP already said in Appendix D because the RFP admonished bidders to be "<u>succinct</u>" (App. 95 (emphasis in original) and WCAP had already put at the beginning of Appendix D many qualifying project examples of its work for other agencies and offices of the State of Maine apart from and obviously known to DHHS and OMS. (CR 598, 609)

The Decision[8]

After the Hearing, the appeal panel issued its Decision.[9] The caption of the Decision mistakenly refers to "RFP #202306124" and not "RFP #202330347." (App. 26, 47) The Decision also mistakenly identifies "ModivCare, Inc." as the company that won Region 5 and intervened. (App. 26) The company that won Region 5 and intervened is a Delaware company named "ModivCare Solutions, LLC" with headquarters in Denver, CO. (CR 10410, 21878) ModivCare Solutions, LLC is one of many subsidiaries of ModivCare Inc., and ModivCare Inc., is a very large, publicly traded Delaware corporation. (CR 10852, 10996)

In any event, the law required the appeal panel to invalidate the contract award to ModivCare if the evidence showed that it is highly probable that the award to ModivCare was arbitrary or capricious and/or if the evidence showed that it is highly probably that the award did not go to the best-value bidder for the State of Maine taking into consideration the quality of the Services to be supplied. (CR 68-69) 5 M.R.S. § 1825-B(7); 5 M.R.S. § 1825-E(3); 18-445 C.M.R. Ch. 120, § 3(2) & § 4(1) (CR 22713 et seq.); *Pine Tree Legal Assistance, Inc. v. Department*

---

[8] On appeal from a Superior Court judgement on a Rule 80C petition, this Court reviews the underlying administrative agency decision directly. *See, e.g., Gordon v. Me. Comm'n on Pub. Def. Servs.*, 2024 ME 59, ¶ 10 n.5.

[9] Much of the Decision is irrelevant in this case because it pertains to Penquis C.A.P.'s appeal of contract awards to ModivCare in several other Regions.

of Human Services, 655 A.2d 1260, 1264 (Me. 1995) ("Clear and convincing evidence" means that the appeal panel is convinced that the truth of the appellant's assertions is highly probable.").

As demonstrated above, it's not just highly probable, but beyond a reasonable doubt, really, that the contract award to ModivCare (a) violated Section 1825-B(7) because the reason for the award to ModivCare was that WCAP's second, third, and other examples in Appendix D were not in two boxes at the end (which has no logical connection with the quality of the Services to be supplied), and (b) was arbitrary or capricious (because there is no cogent explanation for why WCAP lost seven points for putting its other examples earlier in Appendix D, rather than using the two boxes at the end).

The Decision is elsewhere fundamentally unsound, as well.

For example, the Decision describes how Mr. Bondeson testified about the process of starting at a mid-point in scoring (App. 31), but the Decision fails to point out that no such process was used, or even attempted to be used, when the evaluators subtracted seven points from WCAP in Section II. As detailed above, Mr. Bondeson was given numerous opportunities, but neither he nor anyone else could articulate a rational explanation for how the panel arrived at a seven-point subtraction.

Furthermore, the Decision correctly recounts that ModivCare listed a large amount of current and recent litigation, but the Decision falsely states that WCAP listed none. (App. 32; CR 11109-11152)[10] WCAP listed three cases. (CR 17031) And the Decision utterly fails to address that the evaluators unaccountably gave ModivCare a perfect score in Section II even though ModivCare failed to follow the express instruction in the RFP to provide the amount paid out in the settlement of a claim. (CR 11117-11152; App. 96)

Moreover, the Decision says that Mr. Bondeson "explained that [WCAP] failed to complete Appendix D as required." (App. 33) This is fundamentally incorrect. First, Mr. Bondeson agreed that the RFP did *not* specify that the examples in Appendix D must be put in the boxes at the end rather than in narrative format. (CR 261) Second, Mr. Bondeson said it is "correct" that WCAP's Appendix D included the necessary content, just not in the two boxes. (CR 226, 239)

The Decision says it is "noted that Contact information and project descriptions were not included in their submission." (App. 33-34) This is partly irrelevant and partly wrong. This is wrong because WCAP did describe in some detail the "project information" for its MidCoast Public Transportation division, including performance metrics for it and metrics for its work for OFCS, as well.

---

[10] ModivCare's list of litigation is 43 pages long.

As for contact information, nobody is seriously suggesting that the reason WCAP lost the bid is because it didn't give DHHS/OMS contact information for other offices in DHHS, such as OCFS and OADS, or contact information for MDOT. None of the Individual Evaluation Notes or the Team Consensus Notes even mentions contact information or lack thereof. Moreover, whether WCAP inserted phone numbers for OCFS, OADS, MDOE, etc., has nothing to do with the quality of Services it would supply in Region 5, and nothing to do with whether WCAP has the organizational qualifications and experience needed to supply NET Services in Region 5. So, even if the reason WCAP lost seven points was missing contact information for other offices of the State of Maine—and the record does not support that conclusion—the award to ModivCare would still be invalid because the award would have nothing to do with a consideration of the quality of the Services to be supplied.

The Decision concludes its section titled "WALDO point reduction in Section II" by saying that the "absence of the required information and with the detail requested is the *sole reason* for the reduced score of 18 out of the available 25 points" (emphasis added) (App. 34) This is plainly false. No substantial evidence supports this incorrect conclusion. Rather, Mr. Bondeson, the subject matter expert, unequivocally agreed that WCAP had enough content in Appendix D, just "not in the boxes that [he] anticipated it would be in." (CR 226) And, as for the "sole reason" that WCAP lost seven points, Mr. Bondeson could not have been clearer. When asked "Would you agree . . . that the ***sole reason*** that [WCAP] lost seven points, notwithstanding your personal knowledge of their history, was because those two boxes were empty?" (emphasis added), he answered, "I believe that's correct." (CR 239) He later acknowledged and agreed that "what this really boils down to . . . is that in the project box two and the project box three, they're blank. And that's really the reason [WCAP] . . . didn't score perfect on Qualifications and Experience"—despite the fact that WCAP has "vastly more years of experience providing transportation services to needy individuals in the actual region, Region 5." (CR 250)[11] In short, the evidence compels the conclusion that the real and sole reason WCAP lost is that WCAP *was deemed to have omitted examples two and three entirely because they were not in the two boxes at the end of Appendix D*.

The Decision fails even to cite 5 M.R.S. § 1825-B, much less grapple with the basic issue in this case, namely, "Was the award to ModivCare based on the quality of Services to be supplied, as required by Section 1825-B(7), when the sole

[11] Mr. Bondeson candidly admitted that although ModivCare outscored WCAP by 7 points in Organizational Qualifications and Experience, he believes ModivCare is *not* more experienced than WCAP in providing NET Services in Region 5. (CR 253) How, then, was it not irrational to award ModivCare the contract based on WCAP's supposed lack of Organizational Qualifications and Experience?

reason for subtracting the seven points had nothing to do with the quality of Services supplied by WCAP."[12]

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Whether the Decision must be reversed because the evidence at the Hearing demonstrates beyond a reasonable doubt that the sole reason WCAP lost the bid to ModivCare, when cost was not a factor, has nothing to do with the quality of the NET Services to be supplied, with the consequence that the contract award violates the unambiguous requirement in Section 1825-B(7) that contracts be awarded to the best-value bidder taking into consideration the quality of the services to be supplied.

Whether the Decision must be reversed because there is no rational explanation for why WCAP lost seven points in Section II, Organizational Qualifications and Experience, when WCAP included three or more project examples in Appendix D, has vastly more experience in supplying Region 5 NET Services than any other bidder, and has been supplying these same Services well for over a decade.

---

[12] The BCD Decision also fails to cite Section 1825-B(7).

ARGUMENT

Generally Applicable Law and Standard of Review

The executive power in Maine is not uncircumscribed. Instead, citizens in Maine and throughout this country enjoy "a profound, tradition-taught reliance on the courts as the ultimate guardian and assurance of the limits set upon executive power by the constitutions and legislatures." Louis L. Jaffe, *Judicial Control of Administrative Action* 321 (1965). Judicial review of administrative action has long been an independent check on the faulty exercise of executive power, and that independent check has never been more important than it is today. *Medical Imaging & Tech. All. v. Library of Congress*, 103 F.4th 830, 838-89 (D.C. Cir. 2024).

On appeal from a Superior Court judgement on a Rule 80C petition, this Court reviews the underlying administrative agency decision directly. *See, e.g., Eastern Me. Conservation Initiative v. Board of Environmental Protection*, 2025 ME 35, ¶ 21; *Gordon v. Me. Comm'n on Pub. Def. Servs.*, 2024 ME 59, ¶ 10 n.5. This Court reviews the agency's decision for errors of law, factual findings unsupported by substantial record evidence, or an abuse of discretion. *Eastern Me. Conservation Initiative*, 2025 ME 35, ¶ 21.

When interpreting a statutory scheme administered by an agency, this Court applies a two-part inquiry. *Eastern Me. Conservation Initiative*, 2025 ME 35, ¶ 22.

The first part of the inquiry, which is the part that controls in this appeal, is that if the statute's language is unambiguous, this Court construes the statute in accordance with its plain meaning. *Id*; *see also National Industrial Constructors, Inc. v. Superintendent of Ins.*, 655 A.2d 342, 345 (Me. 1995) (deference to an agency "'must yield to the fundamental approach of determining the legislative intent'" and the "plain meaning of a statute always controls over an inconsistent administrative interpretation" (quoting *Agro v. Public Util. Comm'n*, 611 A.2d 566, 569 (Me. 1992))).[13]

Section 1825-B(7), already described above, unambiguously provides that the award to ModivCare is unlawful if it is not based on the quality of Services to be supplied when cost is not a factor.

Technical, lesser rules for the purchase of services and awards, are set forth in 18-544 C.M.R. Ch. 110. (App. 38-41)

Title 5, M.R.S. § 1825-E governs initial appeals from contract awards. That statute permits an aggrieved person to an appeal hearing. That statute provides that

[13] WCAP is uncertain whether any party in *Eastern Me. Conservation Initiative v. Board of Environmental Protection*, 2025 ME 35, asked this Court to follow (or not to follow) *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), the U.S. Supreme Court decision that overturned so-called "Chevron deference," the doctrine whereby federal courts for decades previously deferred to an agency's reasonable interpretation of an ambiguous statute administered by the agency. This Court in *Eastern Me. Conservation Initiative*, 2025 ME 35, ¶ 22, recites what is essentially the two-part Chevron deference inquiry and cites as authority for it several prior decisions of this Court and no federal case.

the appeal panel may decide to do only one of two things: validate the contract award or invalidate it. 5 M.R.S. § 1825-E(3). DAFS's rules add that (a) the burden of proof lies with the petitioner and (b) the appeal panel should invalidate the contract award if, considering all the evidence, there is clear and convincing evidence that the contract award violated the law; there were irregularities that created fundamental unfairness; and/or the award was arbitrary or capricious. 18-445 C.M.R. Ch. 120, § 3(2) & § 4(1). (App. 42-46)

Agency conclusions are arbitrary or capricious when they are unreasonable, without reason, have no rational justification, and/or lack substantial support in the evidence. *Central Me. Power Co. v. Waterville Urban Renewal Authority*, 281 A.2d 233, 242 (Me. 1971). "Clear and convincing evidence" means evidence showing that the truth of the petitioner's assertions is highly probable. *E.g., Pine Tree Legal Assistance, Inc. v. Department of Human Services*, 655 A.2d 1260, 1264 (Me. 1995).

An appeal panel, therefore, must invalidate a contract award if it finds that the petitioner has shown that it is highly probable that the award violated an unambiguous statute (such as Section 1825-B(7)) and/or that the petitioner has shown that it is highly probable that the award was arbitrary or capricious.

Similarly, this Court must reverse the Decision if the appeal panel was compelled by the evidence to invalidate the award to ModivCare because the award violated Section 1825-B(7) and/or was arbitrary or capricious. In that circumstance the Court must reverse the Decision because the Decision will have violated an unambiguous statute and/or was arbitrary or capricious. 5 M.R.S § 11007(4)(C)(1) & (6).

The Court may not substitute its judgment for that of DAFS on a question of fact, unless there is no genuine factual dispute about that issue and DAFS is plainly mistaken. Where an agency has discretion, the maxim that judges may not substitute their judgment for that of the agency means that courts should defer to agency conclusions when they do not violate an unambiguous statute and when they are based on substantial evidence that "a reasonable mind might accept as adequate to support a conclusion." *Gulick v. Board of Environmental Protection*, 452 A.2d 1202, 1209 (Me. 1982) (citation and quotation omitted).

I. THE EVIDENCE IS CLEAR AND CONVINCING THAT THE CONTRACT AWARD TO MODIVCARE VIOLATED SECTION 1825-B(7).

Section 1825-B(7) unambiguously requires that the Region 5 contract award go to the best-value Region 5 bidder for the State of Maine based on the quality of the NET Services to be provided. The documentary evidence and testimony at the Hearing are unequivocal that the *only* reason WCAP didn't score a perfect 25 in Section II, and therefore lost the bid, is because WCAP failed to put its second and third examples of other qualifying State of Maine contract work in two boxes at the end of Appendix D, and put those two examples (and others) earlier in Appendix D, not where the panel anticipated they would be. (CR 226, 239, 250-51)

The Team Consensus Evaluation Notes for WCAP for Section II even give WCAP organizational qualification and experience credit for being MDOT's designated FTA in Region 5 and for doing transportation work for OCFS and MDOE, as well. (App. 130) Accordingly, WCAP's Appendix D does in fact elaborate on its separately maintained transportation division called MidCoast Public Transportation, the designated FTA for Region 5, and WCAP's Appendix D states that it performs transportation services for OCFS and MDOE, as well. (App. 154-55) WCAP even provided the panel with performance metrics in Appendix D for its work for MDOT and OCHS. (App. 162-63) Yet, WCAP received no credit in Section II for these other examples, and was instead penalized seven points because they were not put in the boxes at the end of Appendix D.

Mr. Bondeson therefore agreed that "what this really boils down to . . . is that in the project box two and the project box three, they're blank. And that's really the reason [WCAP] . . . didn't score perfect on Qualifications and Experience"—even though WCAP has "vastly more years of experience providing transportation services to needy individuals in the actual region, Region 5." (CR 250)

Moreover, Mr. Bondeson's opinion, which is uncontradicted by the evidence, is that although ModivCare outscored WCAP by seven points in Organizational Qualifications and Experience, ModivCare is *not* more experienced than WCAP in providing NET Services in Region 5. (CR 253) The Team Consensus Evaluation Notes for WCAP for Section II plainly states that "WCAP has performed well in its role as the [NET Services] Region 5 broker." (App. 130) Mr. Bondeson likewise testified that he and the other panelists agreed that WCAP had a "good history" of providing the Services in Region 5. (CR 231) He also agreed that WCAP "did not lose [the] contract [for Region 5] because of any objective review of performance metrics in comparison with other bidders"—in other words, WCAP did not lose the contract for any reason having anything to do with the quality Services to be supplied. (CR 233)

Equally important, not a single original evaluator remotely suggested that based on the bids, anyone thought or expected the quality of Region 5 Services supplied by ModivCare would be better than the Services supplied by WCAP. The record contains *no evidence at all* to support an inference that WCAP's Region 5 Services would be inferior to those of ModivCare—even to the slightest degree.[14]

[14] Pursuant to 5 M.R.S. § 1825-B(8), tie bids are awarded to in-state bidders. Consequently, if the evaluators had concluded the quality of Services supplied by WCAP and ModivCare would be essentially identical, pursuant to § 1825-B(8), the contract had to be awarded to WCAP because (a) in this RFP, cost was not a factor, and (b) considering the quality of the Services to be supplied, there would have been no meaningful distinction. Of course, WCAP outscored

Heck, in light of the fact that the only reason WCAP lost is due to its low score in Organizational Qualifications and Experience, it's all the more shocking that none of OMS, DHHS, DAFS, or any evaluator, remotely suggested or implied that WCAP's organizational qualifications and experience in Region 5 is actually less than or inferior to ModivCare. That's because there is simply no logical or empirical connection between where WCAP put its second and third examples in Appendix D and the quality of its organizational qualifications and experience—and no one suggested otherwise. The record therefore supports only one conclusion. That conclusion is that the sole reason WCAP lost the bid has nothing to do with the quality of Services it would supply or its actual organizational qualifications and experience. Rather, WCAP lost the bid because although its Appendix D does contain second and third qualifying examples, these examples were not in the two boxes at the end. It necessarily follows that the evidence clearly and convincingly shows that the award to ModivCare violated Section 1825-B(7) because the award was untethered to any consideration of the quality of the Services to be supplied.

Two further points deserve mention.

ModivCare in the Proposed Services section of the RFP, making the award to ModivCare even more irrational. (App. 118)

First, the BCD Decision drops a footnote that says WCAP "invites the court to make a qualitative or quantitative analysis into the experience of the two entities competing for Region 5." (App. 12) WCAP must not have made itself clear in the BCD. WCAP never contended that the court should weigh in on such a judgment call. On the contrary, WCAP's position was that the Decision by DAFS improperly validated the award to ModivCare because DHHS clearly and convincingly did ***not*** award the bid based upon an analysis of the quality of the Region 5 NET Services to be supplied or the experience of the bidders in providing those Services. Instead, the panel subtracted enough points for WCAP to lose the bid solely because WCAP failed to put its second and third examples of qualifying projects in two boxes at the end of Appendix D. No one concluded that because the two boxes were empty, the quality of NET Services that WCAP has supplied, or would supply, would be inferior to ModivCare. There's just no logical connection between where WCAP put its examples in Appendix D and its organizational qualifications and experience in supplying Region 5 NET Services. So, WCAP is most definitely not asking this Court to make a judgment about the quality of NET Services WCAP has supplied or will supply. WCAP is asking this Court to use its authority to declare that the award to ModivCare violated Section 1825-7(B) because the sole reason WCAP lost the bid, and ModivCare won, has nothing to do with an assessment of the quality of NET Services to be supplied.

Second, the BCD Decision and DAFS briefing below made much out of the concept that DHHS/OMS had the right to determine the submission requirements and bidders were on notice that failure to fill out the form correctly could result in a lower score. There is some truth to that, of course, that the agencies have the right to make up the rules. But that discretion is not limitless. Ultimately, Section 1825-B(7) requires that the award must still go the best-value bidder for the State of Maine *taking into account the quality of Services to be supplied*. That's a basic and unambiguous statutory requirement that OMS and DAFS are not free to ignore.

The absurdity of what happened here can be seen if the RFP had expressly required that the fifth letter on every page of the bid be the letter "k." If, as in this RFP, cost is not a factor, OMS would have acted arbitrarily, capriciously, and in violation of Section 1825-B(7), if OMS were to have awarded the contract to the bidder who scored *lower* on the quality of NET Services to be supplied, simply because the bidder who scored higher on that measure forgot to put the letter "k" as the fifth letter on some of its pages.

It's not different with the two boxes. Hypothetically, even if the RFP did state—which it does not—that bidders ***must*** put their second and third other qualifying examples in the two boxes at the end of Appendix D, the award to ModivCare based on where WCAP put its examples would still violate Section

1825-B(7). That's because, again, where WCAP put its examples and why WCAP lost the bid would still be untethered from any consideration of what Section 1825-B(7) requires, namely, a consideration of the quality of the Services to be supplied. This Court should therefore reverse the Decision pursuant to 5 M.R.S. § 11007(C)(1), on the grounds that the evidence is clear and convincing that the award to ModivCare violated a statute, specifically, Section 1825-B(7).[15]

II. THE EVIDENCE IS CLEAR AND CONVINCING THAT THE CONTRACT AWARD TO MODIVCARE WAS ARBITRARY AND CAPRICIOUS.

No one could give a cogent explanation why the panel decided to deduct seven points, rather than, e.g., three points. When asked why seven points, Mr. Bondeson said "And so we deducted from the point value we set to get to, meets requirements"—which literally makes no sense. (CR 235) When given another chance, Mr. Bondeson said "we settled on, I think, whatever score that you

[15] A red herring in this case is a fallback position of DAFS, specifically, that not only did WCAP not use the two boxes at the end, but WCAP was too skimpy in explaining its other examples, at least with regard to its work for OCFS and OADS. There is also some testimony to the effect that WCAP did not provide phone numbers or other contact information for MDOT, OCFS and OAD. As already discussed, the Decision wrongly concludes that WCAP's failure to provide "Contact information and [fuller] project descriptions [of its other work for DHHS]" was the "sole reason" WCAP lost the bid. That's just plain false. No substantial evidence supports such a conclusion, because, as detailed above, the evidence shows that the *sole reason* WCAP lost is that *WCAP was deemed to have omitted these other examples entirely because they were not in the two boxes at the end of Appendix D*. (App. 130 ("only provided a description of one (1) project example")). And, of course, OMS and DHHS have at their fingertips contact information for MDOT, OCHS, and OADS, and DHHS was very aware of WCAP's transit services supplied to MDOT and to other offices in DHHS.

[meaning WCAP]—you received"—which literally explains nothing. (CR 240) When given another chance, he said "We arrived at the score we arrived at because we agreed that the omissions, these two project, warranted the point deduction that we gave"—which, again, explains nothing. (CR 242) On a fourth try, he said (a bit defiantly) "I'm not going to score—I'm not going to go through this what's this worth and what's that worth because that's part of our *consensus* scoring" (emphasis added), to which he honestly added, "I just—I don't know." (CR 242)[16]

On direct examination, Mr. Bondeson did begin vaguely to explain what started to sound like a cogent process for awarding consensus points to bidders in each Section based on starting with a "mid-range number." (CR 121-22) But neither Mr. Bondeson nor anyone else tried to explain, or could explain, how such a process resulted in WCAP's Section II score, much less how anyone actually tried to apply that process, or how that process could result in WCAP losing the bid on the ridiculous basis that it lacked Organization Qualifications and Experience to render NET Services in Region 5, when the panel knew that WCAP has been performing those Services well for over a decade.

[16] Mr. Turner, one of the 4 original evaluators, simply answered "No" to the question "Was there a methodology or a system for how much weight will be given to various items." (CR 457) Mr. Henning, also one of the 4 original evaluators, also gave no rational explanation of why WCAP lost 7 points even though the content was there. (CR 465).

Being able to give no rational explanation for a decision is the very definition of a decision that is arbitrary or capricious. This Court should therefore reverse the Decision pursuant to 5 M.R.S. § 11007(C)(6), on the grounds that the evidence is clear and convincing that the award to ModivCare was arbitrary and capricious.

CONCLUSION

When the Legislature enacted Section 1825-B(7), the Legislature surely never intended that a contract be awarded to an out-of-state, for profit bidder, in a situation (i) where cost of the Services is not a factor, (ii) when the incumbent bidder is an in-state 501(c)(3) community action agency, (iii) when the incumbent has supplied the exact same services *well* for over a decade (App. 130 ("WCAP has performed well in its role as the Region 5 broker")), and (iv) when the incumbent scored *higher* than the out-of-state bidder in the Proposed Services Section of the RFP. More so, in that situation, the Legislature surely never intended that the "best-value bidder for the State of Maine" was the out-of-state bidder solely because the incumbent bidder didn't put two of its three examples in two boxes at the end of Appendix D, and for that reason alone, was marked down in Organizational Qualifications and Experience, even though it has supplied the same services to the full satisfaction of the State for over a decade. Even more so, the Legislature surely never intended such an absurd result when the location of the incumbent's examples in Appendix D has zero to do with either the quality of Services the incumbent will continue to supply or its organizational qualifications and experience to supply those Services.

WHEREFORE, for the reasons set forth above, the record is clear and convincing that the contract award to ModivCare was in violation of Section 1825-B(7) and arbitrary or capricious. WCAP therefore respectfully requests that this Court exercise its power of judicial review over improper agency action by reversing the Decision and remanding this case to the BCD to remand to DAFS for further proceedings consistent with the opinion of this Court.

Respectfully submitted,

/s/ Brent A. Singer
Brent A. Singer
Maine Bar No. 7708
bsinger@rudmanwinchell.com

Rudman & Winchell, LLC
P.O. Box 1401
Bangor, ME 04402-1401
207.992.2575

Attorneys for Waldo Community Action Partners