

STATE OF MAINE
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/Appellee

*ON APPEAL FROM THE BUSINESS AND
CONSUMER DOCKET NO. BCD-APP-2024-00009*

Brief of Respondent/Appellee
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INTRODUCTION

Appellee, State of Maine, Department of Administrative and Financial Services (“DAFS”), respectfully requests that the Court affirm the decision of the Business and Consumer Docket (“BCD”), which upheld a final agency action by DAFS (the “DAFS Decision” or “Decision”).

Appellant, Waldo Community Action Partners (“WCAP”), appeals the BCD decision that upheld the DAFS Decision per M.R. Civ. P. 80C. Appendix (“A.”) 7. The DAFS Decision, in turn, upheld a contract award decision by the Department of Health and Human Services (“DHHS”). A. 25 (DAFS Decision). Following a competitive bidding process, DHHS awarded a contract for Medicaid non-emergency transportation (“NET”) brokerage services for Region 5 to another incumbent broker, ModivCare Solutions, LLC (“ModivCare”).¹ WCAP currently holds the NET contract for Region 5 and seeks to keep the contract (worth over \$5 million/year) through this litigation. A. 15 (WCAP Petition for Review of Final Agency Action, “Pet.”), n. 2; WCAP Br. 7-8.

WCAP has had its NET contract with DHHS for over ten years (A. 16) and, understandably, does not wish to lose that contract. But state agencies cannot maintain permanent contracts with any vendors, due to Maine’s competitive

¹ ModivCare, like WCAP, has been providing NET brokerage services in Maine since 2014, and currently has NET contracts for five Regions (Certified Record, “CR,” 656).

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

This is not a novel or complex legal matter. Rather, this is a straightforward case where, because WCAP's bid did not include all of the information required by the solicitation, it scored lower than ModivCare's bid, and DHHS awarded the Region 5 contract to ModivCare. DAFS considered all the evidence of record, and was not clearly convinced that it should invalidate the contract award. The DAFS Decision should be upheld.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

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

Maine State agencies are generally required to contract for services through competitive bidding. 5 M.R.S.A. § 1825-B(1). The purpose of this requirement is to secure the "best value" for the State's use of taxpayer funding. *Id.* DAFS, through its Bureau of General Services ("BGS"), and the Office of State

² WCAP, indeed no one, has a right to an indefinite government contract. *Carroll F. Look Construction Co., Inc. v. Town of Beals*, 2002 ME 128, ¶ 16, 802 A.2d 994 (unsuccessful bidders for a government contract have no protected property interest, unless controlling law gives the government agency no discretion in whether to accept the bid or determining with whom to contract).

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

Since 2014, DHHS has had a contract with WCAP to broker Medicaid NET services in Region 5. A. 18 (Pet., ¶ 24). Given that DHHS had utilized the same vendors as NET brokers since 2014, in or around 2021, DHHS and DAFS determined that they should conduct another competitive procurement process. DHHS and DAFS worked together to develop the Request for Proposals, or “RFP,” which, given the scope of the NET program, took about two years. CR 110.

DHHS adhered to the legal requirements for preparation of the RFP, including approval by the State Procurement Review Committee. CR 110-11; 5 M.R.S.A. §§ 1824-B (Supp. 2025); 1825-B; 18-554 C.M.R. Ch. 110 (2010)(“Ch. 110”)(A. 38). The RFP provided a description of the NET program, the proposal requirements and procedures, and a timeline for key RFP events. A. 47. Upon completion of the RFP process, DHHS anticipated making eight contract awards, one per region. A. 55.

Between the May 31, 2023 deadline for questions and June 27, 2023, DHHS, working with DAFS, responded to over 170 questions from potential

bidders. CR 21411-55. By the submission deadline of July 11, 2023, DAFS received the following proposals:

- Four proposals for Region 1
 - Five proposals for Region 2
 - Five proposals for Region 3
 - Five proposals for Region 4
 - Five proposals for Region 5
 - Five proposals for Region 6
 - Five proposals for Region 7
 - Six proposals for Region 8
- = 40 proposals total for all transit regions.**

CR 2231-21299 (all NET bidders' proposals).

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

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

A. 98. Sections II and III were scored using a team consensus approach. *Id.* Proposals would score the full 25 points for Section IV if they included a completed Cost Structure Reimbursement Acknowledgement Form; in other words, cost was not a factor for DHHS to consider in making the NET contract award decisions. A. 98; 111.³

³ Bidders did not need to submit information regarding proposed costs because, where NET services are part of the Medicaid program, reimbursement was established annually through a DHHS

To review bids, DHHS convened an evaluation team of four individuals: Roger Bondeson, Melissa Simpson (Fuller), Richard Henning, and Stephen Turner (the “Evaluation Team” or “Team”). A. 98; CR 2227-30. Before meeting together, the Evaluation Team reviewed the proposals and took individual evaluation notes using the standard template for same provided by DAFS. CR 115-19; 346; 393-94; 438-39; 462-63. Each proposal was compared to the RFP requirements, as opposed to other bid proposals. CR 116-17. Per the instructions in the RFP, the Evaluation Team did not score proposals individually – instead, they waited to score until they met as a group. A. 98; CR 117-18; 122. Mr. Bondeson, a manager of the NET program, acted as the lead of the Evaluation Team and the subject matter expert on NET; it often took him several hours to review one or two proposals. CR 115-16; 119; 348-50; 386-87.

After all four Evaluation Team members completed their individual reviews of the 40 proposals, the Team began to meet to discuss and score the bids via the consensus scoring method. Using their individual notes to inform discussions, Team members went through each proposal, section by section, made observations, raised key points, and interpreted whether and how they

independent actuary, and subject to approval by the federal Centers for Medicare and Medicaid Services. A. 111.

met the RFP requirements; if there were disagreements, the Team would discuss them and come to a consensus, and then score each section of each bid. CR 117; 120-21. A separate state employee acted as a meeting facilitator and took the Evaluation Team's consensus notes. CR 120-21. From July 18 through August 30, 2023, a member of the Evaluation Team estimated that they met 10 or 12 times to score the proposals. CR 119, 344.

The Team completed their consensus evaluation notes for each of the four Region 5 bidders. CR 978-1021 (Team notes for all Region 5 bidders). The notes reflect how the Team scored each section of WCAP's bid. A. 129 (Team notes for WCAP bid Sections II and III). Although WCAP received positive feedback on its performance as the current Region 5 broker, as well as its proposed services, WCAP failed to provide three project examples as required by the RFP. A. 130; 132-37; 153 (WCAP's bid, Appendix D). The scoring of the proposals for Region 5 reflect that ModivCare received the highest score (95), while WCAP was second (91). A. 118 (Region 5 scoring sheet). On October 5, 2023, DHHS awarded ModivCare the Region 5 contract. CR 816 (10/5/23 notice to WCAP).

2. The DAFS administrative appeal proceedings.

Appeals of State agencies' contract award decisions are administered by DAFS BGS. 5 M.R.S.A. § 1825-E; 18-554 C.M.R. Ch. 120 (1996) ("Ch. 120") (A.

42). In October of 2023, WCAP timely requested an appeal of the contract award for Region 5, as well as a stay of the conditional contract award for Region 5, both of which were granted by DAFS. CR 21773-81; 21742-52.⁴ For WCAP's appeal, DAFS appointed a presiding officer, as well as an appeal committee consisting of three State employees who were not employed by DHHS, nor involved in the RFP and contract award processes. CR 64-68. The appeal committee may not modify the contract award or grant a new award to a different bidder. 5 M.R.S.A. § 1825-E(3).

On March 22, 2024, following multiple continuances, and three days of hearing, including testimony from seven witnesses and the admission of thousands of pages of documentary evidence, the hearing concluded. CR 62-646 (hearing transcripts); CR 648-64 (parties' opening statements); CR 665-723 (parties' closing statements). On April 24, 2024, DAFS issued its Decision. A. 25. DAFS determined that WCAP and Penquis failed to prove by clear and convincing evidence that DHHS's contract award: 1) was a violation of law; 2) contained irregularities creating a fundamental unfairness; or 3) was arbitrary

⁴ Another disappointed bidder and current NET vendor, Penquis CAP, Inc. ("Penquis"), also requested a stay and sought an appeal of the contract awards to ModivCare. CR 2. With the consent of the parties, DAFS consolidated the appeal proceedings. CR 21873. ModivCare intervened in the administrative appeal. CR 21878-81.

and capricious. A. 29. Accordingly, DAFS validated the DHHS contract award to ModivCare for Region 5. A. 36.

3. WCAP's request for a further stay, the Rule 80C petition, and this appeal.

On May 23, 2024, WCAP filed its Petition for Review of Final Agency Action in the Waldo County Superior Court, and sought a stay from DAFS. A. 13.⁵ Around the same time, Penquis also filed a Rule 80C petition in the Penobscot County Superior Court. WCAP Br. 6. On June 3, 2024, DAFS stayed its Decision during the pendency of the Rule 80C proceedings. WCAP Br. at 8. Thereafter DAFS applied to transfer both of the Rule 80C cases to the BCD, which applications were granted on June 21, 2024, though the cases were not consolidated. A. 4.

Briefing pursuant to M.R. Civ. P. 80C followed, along with oral argument. A. 5-6. On January 28, 2025, the BCD (*McKeon, J.*) issued its decision affirming the DAFS Decision, determining that WCAP did not satisfy its “heavy burden on appeal” of showing that the DAFS Decision was arbitrary and capricious or an abuse of discretion. A. 12. On February 14, 2025, WCAP filed a notice of appeal as well as a motion to stay the DAFS Decision.

⁵ At that juncture, WCAP's NET contract was set to expire on June 30, 2024; given this litigation, it has since been amended multiple times to extend the end date until June 30, 2026. *See, e.g.*, WCAP Br. at 7-8.

STATEMENT OF ISSUES FOR REVIEW

- I. Whether there is substantial evidence of record supporting the DAFS Decision, or whether the Decision is arbitrary and capricious?
- II. Whether the DAFS Decision upholding the DHHS contract award was consistent with Maine law and a proper exercise of DAFS's discretion?

SUMMARY OF ARGUMENT

Substantial evidence of record supports the DAFS Decision. WCAP alleges that the reduction of points for Section II of its bid was erroneous. WCAP Br. 24. WCAP focuses on and mischaracterizes part of the testimony of a single DHHS witness, Roger Bondeson, to challenge DHHS's scoring as arbitrary. But a thorough review of the record reflects a more accurate understanding of Mr. Bondeson's points, particularly in the context other testimony and documents that explain the DAFS Decision upholding DHHS's reasonable determination to award the Region 5 contract to ModivCare.

As the record reflects, WCAP did not include the information required for Appendix D. Because WCAP failed to follow the requirements of the RFP, its score was reduced. This court should not accept WCAP's invitation to second guess the agency decision makers. The DAFS appeal committee considered witness testimony and thousands of pages of documentary evidence, and properly upheld DHHS's careful, reasonable, and deliberate actions.

Importantly, both DAFS and DHHS properly interpreted and applied the laws for competitive bidding. The statute (5 M.R.S.A. § 1825-B(7)) is not limited to a consideration of quality, as WCAP alleges, but rather it includes several factors for an agency to consider in determining “best value,” and affords broad discretion to an agency to decide with whom it wishes to contract. The DAFS Decision considered the entire record, and upheld DHHS’s determination to award the Region 5 contract to ModivCare. WCAP is understandably disappointed, but that does not require this Court to reverse the DAFS Decision.

ARGUMENT

Upon an appeal from the Superior Court or the BCD, this Court reviews “directly the original decision of the fact-finding agency, without deference to the ruling on the intermediate appeal by the court from which the appeal is taken.” *Wood v. Dep’t of Inland Fisheries & Wildlife*, 2023 ME 61, ¶ 14, 302 A.3d 18 (cleaned up); *Friends of Lamoine v. Town of Lamoine*, 2020 ME 70, 234 A.3d 214. The decision is reviewed “for errors of law, factual findings unsupported by substantial record evidence, or an abuse of discretion.” *E. Me. Conservation Initiative v. Bd. of Env’tl. Prot.*, 2025 ME 35, ¶ 21, 334 A.3d 706; *see also* 5 M.R.S.A. § 11007 (Supp. 2025). Review of administrative agencies decisions are

“deferential and limited.”⁶ *Passadumkeag Mtn. Friends v. Bd. of Env'tl. Prot.*, 2014 ME 116, ¶ 12, 102 A.3d 1181. The Court reviews questions of law *de novo* and will not substitute its judgment for that of the agency. *Doane v. Dep't of Health & Hum. Servs.*, 2021 ME 28, ¶ 15, 250 A.3d 1101; *see also* 5 M.R.S.A. § 11007(3).

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

This appeal arises from a final agency decision issued pursuant to 5 M.R.S.A. §§ 1825-E & 1825-F (Supp. 2025). Under Maine procurement law, an appeal from a contract award is heard by an appeal committee that may either validate or invalidate the contract award. 5 M.R.S.A. § 1825-E(3). In its appeal to DAFS, WCAP had the burden to show by clear and convincing evidence that the contract award to ModivCare: 1) violated the law; 2) contained irregularities in the RFP evaluation process creating a fundamental unfairness;

⁶ WCAP suggests in passing, for the first time during this litigation, that this Court may wish to reconsider its precedent on agency deference based on *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024). WCAP Br. at 29, n. 13. This issue has not been preserved for appeal, nor is this case a proper vehicle by which to revisit well established Maine law regarding state administrative agencies' authority.

or 3) was arbitrary and capricious. Ch. 120, §§ 3(2) & 4 (A. 44-45). “Clear and convincing” is a high standard: WCAP was required to prove that it was not just probable, but highly probable, that WCAP established one of the three appeal criteria. *Pine Tree Legal Assistance, Inc. v. Dep’t of Hum. Servs.*, 655 A.2d 1260, 1264 (Me. 1995).

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

As here, when,

an appellant had the burden of proof before the agency, and challenges an agency finding that it failed to meet that burden of proof, [the Court] will not overturn the agency fact-finding unless the appellant demonstrates that the administrative record compels the contrary findings that the appellant asserts should have been entered.

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

As noted, at the administrative appeal, WCAP had the burden to show, by clear and convincing evidence, that DHHS’s contract award should be invalidated based on one of three criteria per 5 M.R.S.A. § 1825-E(3). *See also* Ch. 120, Sec. 3(2) (A. 44); *Pine Tree Legal Assistance, Inc.*, 655 A.2d at 1264. To satisfy its burden, WCAP was required to present evidence to substantiate its

grievances on appeal (*i.e.*, that DHHS's contract award to ModivCare met one or more of the three criteria listed above), including through witnesses and/or documentary evidence. 5 M.R.S.A. § 1825-E(3); Ch. 120, Sec. 3(2) and (4)(A. 43-44). Counsel for WCAP had the opportunity to question all seven witnesses who testified (the four Evaluation Team members for DHHS; two witnesses for Penquis; and one witness for WCAP). The administrative appeal process resulted in a massive record of nearly 40,000 pages.

The DAFS Decision subject to review is supported by substantial record evidence, as shown below. WCAP challenges the actions and decision-making of both DAFS and DHHS. *See generally* WCAP Br. The record reflects the collaborative work of the two agencies to competitively bid and then award a contract for NET services; there is nothing arbitrary about the DAFS Decision. The Court should review the record as a whole, and – based on the substantial evidence supporting it – affirm the DAFS Decision.

a. The DAFS Decision satisfies all statutory requirements.

A DAFS contract award appeal decision must include: a brief summary of the nature of the petitioner's appeal; notification of the decision of the appeal committee; an explanation of the reasons for the decision; and notice regarding the petitioner's right to judicial review of final agency action. 5 M.R.S.A. § 1825-

F. The DAFS Decision exceeds these basic requirements and is supported by substantial evidence in the record. A. 25-37.⁷

The focus of WCAP's appeal is the RFP's Section II, where WCAP's proposal scored 18 out of 25 points, resulting in the NET contract for Region 5 being awarded to ModivCare. The DAFS Decision's conclusion that WCAP failed to complete Appendix D as required (A. 33-35) has ample record support. For example, Mr. Bondeson explained that WCAP received fewer points because the Evaluation Team determined that WCAP failed to satisfy the RFP requirements for completion of Appendix D. CR 224-26; 233-44; 248-51; 347-50; 360-64. *See also* A. 95-97 (RFP proposal submission requirements); 105-07 (RFP Appendix D form). The DAFS Decision squarely addresses this issue and WCAP's arguments on this point. A. 33-36.

With regard to Appendix D, the RFP expressly stated that, “**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.” A. 95 (emphasis added). Consistent with these instructions, Appendix D then provided different fields/blocks for bidders to

⁷ WCAP implies that the DAFS Decision is problematic because much of it pertains to Penquis's appeal. WCAP Br. at 22, n. 9. As noted herein (n. 4), WCAP and Penquis agreed to consolidate their administrative appeals. WCAP simply did not raise as many arguments or issues as Penquis when it challenged the contract award for Region 5, thus the Decision includes fewer references to WCAP.

add the required information for projects one, two and three. A. 105-07. WCAP provided only one project in Appendix D, in the first box, referencing the “MidCoast Connector NET Brokerage.” A. 153-63 (WCAP’s Appendix D). In the other two boxes in Appendix D for bidders to add their second and third projects, WCAP included only the designation, “N/A.” A. 163. WCAP’s only witness, its CEO, Donna Kelly, confirmed that these “N/A” references meant “not applicable.” CR 611.

WCAP’s argument to the contrary, WCAP Br. at 24, ignores this evidence. WCAP minimizes its non-compliance with the RFP requirements, and contends that its non-compliance was merely a matter of form over substance. *See, e.g.,* WCAP Br. at 24-26. But a review of WCAP’s Appendix D reflects that WCAP’s failures were substantive and material. A. 153. The evidence in the record supports the Decision’s finding that the Team’s scoring was justified. *See International Paper Co. v. Board of Environmental Protection*, 1999 ME 135, ¶ 29, 737 A.2d 1047, 1054 (“This Court does not substitute its judgment for that of an agency and must affirm findings of fact if they are supported by substantial evidence in the record.”).

At the end of the lengthy text in Appendix D’s first box, WCAP included brief references to contractual performance measures for the Maine DHHS Office of Child and Family Services (“OCFS”) and Federal Transit

Administration/Maine Department of Transportation (“MDOT”), as well as metrics used. A. 162-63. WCAP did not make clear that it intended this information to be considered by DHHS as its projects two and three for Appendix D. *Id.*

Moreover, the information provided by WCAP would not satisfy the Appendix D requirements even if it had been placed in the correct part of the form. Although its argument on this point is unclear, WCAP seems to assert that its minor references to OCFS and DOT should be sufficient because Appendix D required the Team to consider bidders’ contract history with the State of Maine. WCAP Br. 21. The record reflects that the Team did indeed consider all incumbent bidders’ past performance in the NET program, and, based on Mr. Bondeson’s experience, the Team found them roughly equivalent in terms of quality. CR 142; 164; 348-50. Based on the ambiguous references to OCFS and DOT in WCAP’s bid, it was not clear that WCAP intended for this information to be considered as part of its contract history with the State. A. 162-163. Regardless, WCAP was still required (and failed) to describe three separate examples of projects that demonstrate their expertise, qualifications and skills. A. 95 (RFP requirements for Appendix D). The Evaluation Team was not required to search elsewhere for the missing information, nor find that WCAP’s

bid submission provided the required information for three projects. *See* A. 9 (BCD Decision).

Even assuming WCAP did intend the references to OCFS and DOT to be its other examples, WCAP not only failed to place the information in the proper location of Appendix D, it failed to provide virtually any of the substantive information that the RFP required for two of the three project examples. For example, WCAP did not describe the services that it provided under either the OCFS contract or the MDOT contract. A. 162-63. WCAP did not describe how these projects reflected the experience and expertise required to perform NET services, nor did it identify contact information related to either project, all of which were required by the RFP. *Id.* WCAP described a single project in the first box, the MidCoast Connector NET Brokerage (*ie*, the current Region 5 contract with DHHS). A. 156-162. Thus, WCAP's argument that it sufficiently described three different project examples under the first box (for project one), or elsewhere, does not survive scrutiny when one reviews WCAP's actual bid. A. 153-63 (WCAP's Appendix D).

Further, even if this Court believes that the WCAP bid does include the required substantive information, or that it should have received a higher score, that is not enough to reverse the DAFS Decision because the Court should not

substitute its judgment for that of the agency.⁸ *See, e.g., Carl L. Cutler Co., Inc. v. State Purchasing Agent*, 472 A.2d 913, 916 (1984) (“We will not substitute our judgment for the administrator’s where there may be a reasonable difference of opinion.”); *Seider v. Bd. of Exam’rs of Psychologists*, 2000 ME 206, ¶ 9, 762 A.2d 551 (“Inconsistent evidence will not render an agency decision unsupported.”); A. 12 (BCD Decision). The DAFS appeal committee considered all of the evidence and WCAP’s arguments, and was not clearly convinced that it should invalidate the contract award to ModivCare. A. 33 (DAFS Decision). The record does not compel a finding that the DAFS Decision was unreasoning and “without consideration of facts and circumstances.” *AngleZ Behav. Health Servs. v. Dep’t of Health & Hum. Servs.*, 2020 ME 26, ¶ 23, 266 A.3d 762.

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

This Court has explained the general rule: “arbitrary and capricious action on the part of an administrative agency has been defined as willful [sic] and unreasoning action, without consideration of facts or circumstances.”

⁸ WCAP suggests for the first time that if the Evaluation Team had scored differently, WCAP’s bid could have tied ModivCare’s bid, and then WCAP could have won based on its in-state bidder status, per 5 M.R.S.A. § 1825-B(8). WCAP Br. at 18, n.5. WCAP did not raise this argument at either the administrative level or the BCD, and it is thus waived. A. 13 (WCAP 80C Petition); CR 648 (WCAP opening brief); 665 (WCAP closing brief). Regardless, “[t]his Court should not substitute its judgment for the judgment of BGS on the evaluation of the proposals,” because “[t]his is not a proper role for a court reviewing an administrative agency.” *Bayside I, LLC v. Dahl*, 2014 WL 7920603, *5 (Me. Super. Ct. Mar. 24, 2014) (cleaned up).

Central Me. Power Co. v. Waterville Urban Renewal Auth., 281 A.2d 233, 242 (1971). The party asserting that an agency acted arbitrarily under a statute that is valid on its face has the burden to establish the invalidity of the administrative action. *Id.* “Regularity is presumed.” *Id.* When reviewing an agency’s administrative adjudication to determine if it was arbitrary or capricious, a Court must assess the agency’s decision based on the entire record before it. *AngleZ Behav. Health Servs.*, 2020 ME 26, ¶ 23, 226 A.3d 762. Similarly,

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

Sager v. Town of Bowdoinham, 2004 ME 40, ¶ 11, 845 A.2d 567.

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

Exercising its delegated authorities, DAFS, through the DAFS Decision, concluded that the absence of the required information in Appendix D “was the sole reason for the reduced score of 18 out of the available 25 points.” A. 34. DAFS disputes WCAP’s repeated assertions that, in substance, WCAP included the required content in Appendix D, just not in the proper location. *See, e.g.*, WCAP Br. at 34 (“...WCAP lost the bid because although its Appendix D does contain second and third qualifying examples, these examples were not in the two boxes in the end.”). Close assessment of the record shows that WCAP’s assertions are inaccurate.

WCAP mischaracterizes Mr. Bondeson’s testimony regarding Appendix D. *See, e.g.*, WCAP Br. at 16, 25-26. In fact, Mr. Bondeson did not agree with counsel for WCAP that WCAP’s errors and omissions in Appendix D were merely “form over substance.” He explained how the Evaluation Team “believed that because the instructions of the RFP say, ‘must provide three examples’ [see A. 95], that was an omission we just simply – we had to deduct for.” CR 240; *see also* CR 235 (“[T]he omission of the project examples is a requirement that wasn’t met. And so we deducted from the point value we set to get to, meets requirements.”).⁹ Another Evaluation Team member, Ms. Simpson, similarly testified that she

⁹ *See* 31, *infra*, regarding how the Evaluation Team handled consensus scoring of the bids.

understood WCAP's proposal in Appendix D to have included only one of the three required project examples. CR 428. The DAFS appeal committee credited the DHHS witnesses' testimony in making the DAFS Decision (A. 33-34), which should be afforded deference. *See N. Atl. Sec., LLC v. Office of Sec.*, 2014 ME 67, ¶ 45, 92 A. 3d 335.

If WCAP was confused about the RFP's instructions, it had the obligation to seek clarification during the question-and-answer process. The appeal committee found WCAP's failure to seek clarification relevant in its decision (A. 35), as did the BCD when it upheld DAFS's Decision. *See* A. 11 ("WCAP was on notice that it needed to fill out its proposal correctly, otherwise its score could be negatively impacted."). Where all the other 39 bidders properly completed Appendix D, any inference that the RFP itself was ambiguous fails. *See, e.g.*, A. 138 (ModivCare's Appendix D); CR 2235 (another bidder's Appendix D); A. 11 (DAFS Decision).

The record reflects the RFP's development, the Evaluation Team's individual and collective consideration of 40 proposals, the scoring process, and the DAFS administrative appeal process that resulted in the DAFS Decision. One member of the Evaluation Team, Mr. Henning, testified that he read every proposal "word for word, and tried to glean as best [he] could what the bidder was proposing." CR 438. Mr. Bondeson explained how, when reviewing

Appendix D, the Evaluation Team would initially “look to see [if] every box has been checked, so to speak.” CR 230. “[W]e look for a description of qualifications and experience in the narrative, we look for the three project examples, and we look at all the other information that’s provided in that section [to] come up with a score.” CR 230. This record undermines WCAP’s assertion that the DAFS Decision was arbitrary and capricious, or an abuse of discretion. WCAP Br. at 37-39. *See also*, A. 12 (BCD Decision)(“There is evidence to support the view that the evaluators gave the WCAP application full attention...WCAP did not show clear and convincing evidence that the [DAFS appeal] committee was arbitrary or abused its discretion.”).

Additionally, WCAP presented no evidence to suggest that either DAFS or DHHS acted outside its statutory duties. As reflected by the record, the DAFS Decision correctly determined that DHHS meticulously exercised its authorities to solicit and award new contracts for NET broker services, following an extended period of utilizing the same NET brokers. A. 28-32. WCAP simply does not agree with the outcome of this lengthy process, but that is not enough to overturn the DAFS Decision upholding DHHS’s contract award. “Where there is room for two opinions, action is not arbitrary and capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached.” *Central Me. Power Co.*, 281 A.2d at

242. As the BCD explained when it affirmed the DAFS Decision, “even if the court were to agree with WCAP, it does not mean the court can overturn the [DAFS] [D]ecision...The court must defer to the appeals committee findings.” A. 12.

II. The DAFS Decision complies with applicable law and was a proper exercise of the agency’s discretion.

The Court reviews and interprets statutes that are “both administered by [an] agency and within the agency’s expertise,” using “a two-part inquiry.” *E. Me. Conservation Initiative*, 2025 ME 35, ¶ 22, 334 A.3d 706 (cleaned up). The first part is to “determine whether the statute’s language is ambiguous.” *Id.* If the statute is unambiguous, it is construed “in accordance with its plain meaning.” *Id.* “If the statute’s language is ambiguous” the Court will “defer to the interpretation of a statutory scheme by the agency charged with its implementation as long as the agency’s construction is reasonable.” *Id.* (cleaned up).

a. DAFS properly determined that DHHS identified the best-value bidder in the contract award to ModivCare.

Through Title 5, section 1825-B, the Legislature authorized DAFS BGS to assist all State agencies to purchase goods and services in a manner that secures the “greatest possible economy” through competitive bidding. 5 M.R.S.A. § 1825-B(1); *see also* 5 M.R.S.A. §§ 1811(1); 1812; 1825-C (Supp. 2025) (DAFS’s

rulemaking authority for procurement process and contract award appeals); Ch. 110 (Rules for the Purchase of Services and Awards), A. 38; Ch. 120 (Rules for Appeal of Contract and Grant Awards), A. 42. A subsection of 5 M.R.S.A. § 1825-B specifies:

7. Awards to best-value bidder. Except as otherwise provided by law, competitively awarded orders, grants or 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, the purposes for which they are required, the date of delivery and the best interest of the State. If the bidder that was initially awarded the order, grant or contract does not perform, the Director of the Bureau of General Services may cancel the order, grant or contract and award a new order, grant or contract to the 2nd best-value bidder. The order, grant or contract may not be awarded to a bidder that the Director of the Bureau of General Services determined was not in compliance at the time the initial bid was submitted.

5 M.R.S.A. § 1825-B(7).

The plain language of this statute provides broad discretion to a contracting agency in determining what constitutes the “best-value bidder.” In determining the best value bidder for a contract award, factors for an agency to consider include not only the quality of services to be provided (as WCAP asserts), but also a bidder’s compliance with the RFP specifications, and the best interests of the State, among other things. 5 M.R.S.A. § 1825-B(7). The

Legislature thus afforded agencies with ample discretion in determining with whom they wish to do business. Both the DHHS Evaluation Team as well as DAFS, through its Decision, properly considered these factors.

WCAP's argument that DAFS violated 5 M.R.S.A. § 1825-B(7) reflects its misunderstanding of State procurement law. *See* WCAP Br. at 31-37. WCAP argues (incorrectly) that section 1825-B(7) "unambiguously provides that the award to ModivCare is unlawful if it is not based on the quality of [s]ervices to be supplied when cost is not a factor." WCAP Br. at 29, 31. However, the statute is not as narrow as WCAP asserts; rather, it includes several factors for agencies to consider, including "the best interests of the State." 5 M.R.S.A. § 1825-B(7).

WCAP further challenges the DAFS Decision for failing,

...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 reason for subtracting the seven points had nothing to do with the quality of Services supplied by WCAP'

WCAP Br. 26-27. Yet WCAP neglects to mention that it did not raise any argument that DHHS violated 5 M.R.S. § 1825-B during its administrative appeal; instead, this argument has evolved along with WCAP's litigation strategy. *See, e.g.*, CR 648 (WCAP opening brief for administrative appeal); 665

(WCAP closing brief for administrative appeal). The DAFS Decision cannot be faulted for not addressing an issue that WCAP did not raise.

This Court has previously scrutinized the State's contract award processes. In *Pine Tree Legal Assistance*, the Court affirmed an agency's contract award following an appeal by a disappointed bidder. 655 A.2d 1260. As WCAP does here, the losing bidder (Pine Tree) argued that the State violated the procurement laws, and that, per those laws, the State was required to award the contract to Pine Tree. *Id.* at 1263. The Court rejected Pine Tree's arguments. It determined that neither the procurement laws nor the RFP explained exactly how the State must award the contract. *Id.* at 1264. Instead, Maine's procurement process is focused on reaching a consensus, not strict adherence to a mathematical formula. *Id.* The Court therefore upheld an underlying contract award that did not go to the highest scoring bidder.¹⁰ *Id.*

Similarly here, DHHS considered many factors in determining to award the Region 5 contract to ModivCare, including but not limited to quality of services. A. 119-28 (Team consensus evaluation notes for ModivCare's Region 5 bid, Sections II and III). Other than using the scoring weights that are assigned by the RFP for each Section, the Evaluation Team had discretion by which it

¹⁰ If the outcome in *Pine Tree* is justified, then the DAFS Decision to uphold DHHS's award of the Region 5 contract to the highest scoring bidder (ModivCare) is sound.

determined scores on each proposal, and they properly scored the proposals together using the consensus method. A. 98 (RFP instructions for proposal evaluation and selection).

b. The consensus scoring process satisfied procurement law and guidance.

As addressed above, Evaluation Team members discussed their key points about each proposal and any disagreements on whether a bidder satisfied an RFP requirement, or what score should be assigned for each section. Additionally, the Evaluation Team considered bidders' previous contract history with the State, both positive and negative. *See* CR 142. The Evaluation Team reduced points on Section II of WCAP's bid because it did not provide the three projects in Appendix D, as required by the RFP; it included only one project example that was relevant as the Region 5 NET broker. A. 130; 153-63.¹¹

WCAP complains about the scoring of its proposal, and an alleged lack of specificity regarding how seven points were deducted from Section II. *See* WCAP Br. at 19-20. As shown above, scores were assigned collaboratively during the Team consensus meetings. A. 29-31. Bids were scored against the RFP requirements, not directly against other bids. *Id.* The record amply demonstrates how scores were assigned; the DAFS Decision references the

¹¹ As discussed *supra*, 18-20, WCAP's assertions to the contrary (WCAP Br. 13-15) are not supported by the Record. A. 153-163, WCAP's Appendix D.

details included in the Team consensus notes, and how the Team reviewed and scored bids during the evaluation process. *Id.* 30-31; *see also* A. 119-37 (Team notes for Region 5 bids of ModivCare and WCAP).¹²

In addition to compliance with statute and rule, the Evaluation Team's scoring of WCAP's bid was also consistent with the DAFS Office of Procurement Services' guidance for consensus scoring. *See* CR 21538-39. Specifically, the guidance sets forth two different methods an agency may choose in awarding points to bids. *Id.* 21539. One approach is to have every proposal start at zero and assign points for them to earn based on how well they satisfied the RFP criteria. *Id.* Another consensus scoring option is for an agency to set a minimum threshold amount, such as awarding half of the available points to proposals that met the minimum requirements of an RFP, and then giving more points to bids that exceed the minimum requirements. *Id.*

The DHHS Evaluation Team chose to follow the latter approach. Mr. Bondeson testified that a proposal would "start at the midpoint of the possible

¹² WCAP's score for Section II was not even the lowest score awarded: another bidder got a score of 13 out of 25, despite providing three project examples in Appendix D. A. 118 (Region 5 score sheet); CR 978-86 (EPICMD Consensus Evaluation Notes), 3627 (EPICMD Appendix D proposal). Additionally, another bidder, WellTrans, Inc., was disqualified from scoring altogether due to its failure to comply with the preliminary information requirements of the RFP. A. 118. This scoring reflects the fact that the Evaluation Team carefully considered the information that WCAP did provide, as well as its experience in Region 5, and properly and fairly scored WCAP's proposal, along with all other proposals. The DAFS Decision considered the evidence in its totality, and properly determined that the scoring was not arbitrary. *See* A. 36.

score for meeting the basic requirements of a section and during the consensus process the score was adjusted (up or down) as the reviewers agreed warranted based on the value of the proposal's responses under review." A. 31. "There was no scale or calculation algorithm used during this consensus process." *Id.* Indeed, the type of precision in scoring desired by WCAP is not required by the law governing contract awards or the appeal process, nor the RFP itself. *See* 5 M.R.S.A. §§ 1825-B; 1825-E; Ch. 110 (A. 38); Ch. 120 (A. 42); *Pine Tree Legal Assistance, Inc.*, 655 A.2d at 1264 ("Strict adherence to [a] mathematic formula is inconsistent with the search for consensus."); CR 777 (RFP description of scoring process).

The DAFS appeal committee determined, based on the entire record, that DHHS's scoring was reasonable. A. 25-37. That determination, which is reflected in the DAFS Decision, is supported by the record and is a sound exercise of DAFS's discretion. When the BCD reviewed the record along with the DAFS Decision, it properly found that,

[g]iven that the three areas of experience were clearly laid out as criteria, this court cannot conclude that the appeal committee erred by taking that into account and subtracting points either on the grounds that the application was not completed correctly to reflect the three experiences or that there was not sufficient evidence of WCAP's experience on other projects.

A. 12. *See also, Imagineering, Inc. v. Superintendent of Ins.*, 593 A.2d 1050, 1053 (Me. 1991)(“In reviewing the decisions of an administrative agency, we do not attempt to second-guess the agency on matters falling within its realm of expertise and limit our review to determining whether the agency’s conclusions are unreasonable, unjust or unlawful in light of the record.”).

One of the statutory factors in determining best value is conformity with the specifications of a solicitation, or compliance with the requirements of an RFP. 5 M.R.S.A. § 1825-B(7); *see also* Ch. 110, Sec. 3(A)(iv))(“Award must be made to the highest rated proposal which conforms to the requirements of the state as contained in the RFP.”) (A. 40). Particularly where an agency must review a large number of proposals, it is even more important for bidders to comply with the RFP requirements, including with regard to organization of the information in their proposals and formatting. CR 374 (Bondeson testimony that adherence to RFP requirements can be a deciding factor: “...playing hide and seek to try to find a response to an omission that may be located somewhere else in the [] proposal becomes exasperating.”); A. 95 (RFP requirements).¹³

¹³ Mr. Bondeson testified that, given the volume of RFP proposals, both the individual and Evaluation Team review processes took a great deal of time. CR 115-16; 119; 348-50; 386-87. Mr. Turner estimated that the Evaluation Team spent 4-5 hours scoring each proposal. CR 440.

The RFP for NET services put all bidders on notice that “failure to use the outline...or failure to respond to all questions and instructions throughout the RFP, may result in the proposal being disqualified or receiving a reduced score,” at the Evaluation Team’s “sole discretion.” A. 95. The BCD recognized the importance of this RFP instruction when it upheld the DAFS Decision. A. 8. Contrary to WCAP’s assertions, the problems with its Appendix D were not a minor issue for the Evaluation Team; rather, WCAP’s Appendix D substantively failed to satisfy what was required by the RFP, which resulted in a deduction of points.¹⁴ The DAFS Decision referenced this, and explained that the DAFS appeal committee was not clearly convinced by WCAP that the Evaluation Team’s scoring was arbitrary or capricious. A. 35-36. As such, the DAFS Decision should be upheld.

¹⁴ For the first time over the course of this litigation, WCAP complains that ModivCare’s litigation disclosures were insufficient, and questions why the Evaluation Team did not reduce the score on ModivCare’s bid on this basis. WCAP Br. 24; *see also* A. 13 (WCAP 80C Petition); CR 648 (WCAP opening brief); 665 (WCAP closing brief). Although WCAP waived its right to assert any argument on these issues, DAFS disagrees with the allegations. The DAFS Decision directly addresses the arguments that Penquis made on these issues, and the appeal committee considered the evidence presented during the administrative hearing. *See* A. 32. For example, Mr. Bondeson testified that ModivCare’s disclosures satisfied the RFP requirements, and that he was not surprised that ModivCare’s list of litigation was lengthy, given that they are a nationwide company. CR 352-53; 775 (RFP requirements); 6650 (ModivCare litigation disclosures). The Evaluation Team’s notes further reflect that the Team considered the bidders’ litigation disclosures, and determined that both WCAP and ModivCare satisfied the RFP requirements in this regard. *See, e.g.*, A. 130 (WCAP); A. 121 (ModivCare).

c. WCAP fails to satisfy its burden on appeal.

Throughout its Brief, WCAP asserts that there is scant evidence to support the Decision and/or the Evaluation Team's Region 5 contract award to ModivCare. As shown herein, the record reflects otherwise.

Moreover, **WCAP** had the burden of proof below. It was incumbent on WCAP to establish that: (i) the contract award conflicted with the law; (ii) there were irregularities in the bid evaluation process that established a fundamental unfairness; and/or (iii) that the contract award was arbitrary and capricious. Ch. 120, §§ 3, 4 (A. 44-45). Although the appeal committee acknowledged some irregularities (such as with the recording of individual notes), it did not find that they rose to a level of fundamental unfairness. A. 35. As demonstrated herein, WCAP failed to satisfy its burden at the administrative level to show by clear and convincing evidence that the contract award to ModivCare should be invalidated. A. 36 (Decision explains that the appeal committee considered testimony and evidence presented by WCAP in its totality, and it was "not clearly convinced [that the] actions performed by the DHHS reviewers were arbitrary.").

WCAP also must persuade this Court that no competent evidence exists in the record to support the DAFS Decision. *Stein v. Me. Criminal Justice Acad.*, 2014 ME 82, ¶ 11, 95 A.3d 612. The fact that record evidence "is inconsistent

or could support a different decision does not render the decision wrong.” *Id.* ¶ 11 (cleaned up). Courts “give considerable deference to the agency’s interpretation of its own rules, regulations, and procedures, and will not set aside the agency’s findings unless the rule or regulation plainly compels a contrary result.” *Beauchene v. Dep’t of Health & Hum. Servs.*, 2009 ME 24, ¶ 11, 965 A.2d 866 (cleaned up). Such deference is particularly appropriate in cases that involve the Medicaid program. *See, e.g., Palian v. Dep’t of Health & Human Servs.*, 2020 ME 131, ¶ 24, 242 A.3d 164.

Based on the substantial evidence of record, WCAP’s argument that the DAFS Decision upholding DHHS’s contract award violated 5 M.R.S.A. § 1825-B(7) fails. Where WCAP has not satisfied its burden before this Court to show that the record compels a contrary result, to the exclusion of any other possible conclusion, the Court should uphold the DAFS Decision. *See Kelley*, 2009 ME 27, ¶ 16, 967 A.2d 676; *Stein*, 2014 ME 82, ¶ 11, 95 A.3d 612.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Halliday Moncure, 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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