

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.

Respondents-Appellees

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

Brief for Appellee ModivCare Solutions, LLC

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INTRODUCTION

ModivCare Solutions, LLC (“ModivCare”) was the highest-ranking bidder for a new contract to provide non-emergency transportation (“NET”) brokerage services in Region 5 for the State’s Office of MaineCare Services. Appendix (“App.”) 118.¹ Disappointed bidder Waldo Community Action Partners (“WCAP”) came in second place. *Id.* WCAP’s complaint that the award to ModivCare was “completely untethered . . . from any consideration of the quality of the services to be supplied” under the contract is plainly untrue. Appellant’s Brief (“Br.”) at 5. Both ModivCare and WCAP scored high on the section of the Request for Proposals (“RFP”) that evaluated the services the bidder offered to provide under the contract, with WCAP scoring only three points higher. At issue in this appeal is WCAP’s substantially lower score on a different section of the RFP, measuring the bidders’ qualifications and experience, which resulted in WCAP’s lower overall score. The scoring committee tasked with evaluating the bid proposals concluded that WCAP failed to provide all the required information for that section of the RFP. An administrative hearing panel concluded that WCAP failed to present clear and convincing evidence that the scoring of its bid proposal violated the law, was tainted by irregularities creating a fundamental unfairness, or was arbitrary and capricious. App. 33-36. This Court will review the

¹ ModivCare adopts the citation convention described at footnotes 1 and 2 of Appellant’s Brief.

administrative hearing panel's decision under established principles – no “unique question of first impression” is presented here. Br. at 5.

The State's procurement laws require contracts to be awarded to the “best-value bidder.” 5 M.R.S.A. §1825-B(7). To comply with this statutory mandate, the “[a]ward must be made to the highest rated proposal which conforms to the requirements of the state as contained in the RFP.” App. 40, 18-554 C.M.R. ch. 110 § 3(A)(iv). In other words, the RFP encompasses all the qualities and requirements that the State deems important for determining the “best-value bidder,” such that the highest-ranking bidder is the “best-value bidder” under the statute. It was WCAP's responsibility to ensure that its bid proposal demonstrated to the RFP scoring committee the breadth of its qualifications and experience consistent with the RFP instructions. WCAP failed to do so. The scoring committee found that WCAP's bid proposal was incomplete and was compelled to give WCAP a less-than-perfect score. The award went to ModivCare, the highest-ranking bidder, consistent with the procurement laws. WCAP's arguments that it should have won the award because it scored highest on Section III of the RFP, or that it lost points on immaterial criteria, or that the State should have weighted its score based on criteria outside the RFP requirements, are simply arguments with the State's policy choices as reflected in the RFP, and not bases for overturning the award.

Neither the deduction in WCAP's score for its incomplete submission, nor the contract award to ModivCare, was arbitrary or capricious. The section of the RFP in which ModivCare scored higher than WCAP evaluated the bidders' overall experience relevant to providing NET brokerage services. There is no question that ModivCare's NET brokerage experience dwarfs WCAP's. ModivCare has served as one of the State's NET brokers since 2013, when the current NET brokerage program began. App. 139. ModivCare serves five out of the State's eight transit regions. *Id.* Its Maine NET program is run in Maine by Mainers with decades of local NET operations experience, and it partners with a network of local businesses and agencies to serve MaineCare Members. App. 139-41. ModivCare leverages its experience providing NET brokerage services nationally to over 34.5 million Medicaid and Medicare Members. App. 143. ModivCare maintains a 98.8% complaint-free rating and a 99.9% safety rating across more than 48 million trips per year across the country. *Id.*

Crucially, ModivCare's bid proposal reflected the depth and breadth of its experience. The RFP required bidders to provide a description of "three examples of projects which demonstrate their experience and expertise in performing" the services requested in the RFP. App. 95, 106. ModivCare described in detail NET brokerage programs in three states. App. 147-52. In contrast, WCAP described only one project and perplexingly wrote "NA" in the boxes provided for describing

two additional project examples. App. 156-63. Reasonably (and correctly) construing “NA” to mean “not applicable,” the scoring committee found that WCAP did not provide descriptions of three projects and scored WCAP’s proposal accordingly. Substantial evidence supports the scoring committee’s determination. The Department of Administrative and Financial Services’ (“DAFS”) decision to uphold the contract award to ModivCare should be affirmed.

STATEMENT OF THE FACTS OF THE CASE

I. ModivCare was awarded NET brokerage contracts after an extensive RFP process.

Department of Health and Human Services (“DHHS”), Office of MaineCare Services, issued Request for Proposals No. 202303047 (the “RFP”), seeking proposals for new contracts to provide NET brokerage services. App. 47. The RFP contemplated the award of eight contracts, one for each of eight regions in Maine. App. 55. NET brokerage services in these eight regions are currently provided by incumbent brokers ModivCare (Regions 1, 2, 6, 7, and 8), Penquis C.A.P. (Regions 3 and 4) and WCAP (Region 5). Each of these incumbent brokers has successfully provided these services to the State for over a decade.

The RFP contained four sections that were scored on a 100-point scale: Section I, Preliminary Information, was worth no points, but determined eligibility; Section II, Organization Qualifications and Experience, had a maximum score of 25 points; Section III, Proposed Services, had a maximum score of 50 points; and

Section IV, Cost Structure Acknowledgement, was worth 25 points, to be awarded in full to every bidder that completed a form certifying that the bidder agreed to provide services in accordance with the rates established by DHHS's independent actuary. App. 98, 111. The RFP explained that the "evaluation team will use a consensus approach to evaluate and score Sections II & III above. Members of the evaluation team will not score those sections individually but, instead, will arrive at a consensus as to the assignment of points for each of those sections." App. 98 (emphasis in original). The RFP did not assign a point value to any criteria within Sections II and III, leaving the allocation of points within those sections to the scoring committee's discretion.

Seven bidders submitted a total of forty proposals. CR 805. Each proposal was hundreds of pages long. See CR 2231-21299. The Department assembled a 4-person scoring committee, which included Roger Bondeson, Director of the Division of Operations for the Office of MaineCare Services. CR 107. Mr. Bondeson oversees the NET brokerage program that is the subject of this RFP. *Id.* Mr. Bondeson was also involved in drafting the RFP. CR 110. After individual review, the scoring committee held consensus meetings where each proposal was discussed and scored. CR 117. Proposals were scored by consensus, section-by-section, against the requirements of the RFP. *E.g.*, CR 117, 230-31, 347, 439-40. The scoring committee agreed upon a "baseline" score in the middle of the range

of the total allowable points for each section, which would be awarded if a proposal met the baseline requirements of the RFP for that section. Points were added or deducted based on whether the bidder submitted more or less than the baseline requirements. CR 121-122, 233-234, 440-441. The hearing panel acknowledged that the scoring committee's award of points followed the scoring rubric in the RFP. App. 34, 98 (RFP scoring rubric), 118 (score sheet for Region 5).

The scoring committee awarded the highest score – 95 points – to ModivCare in Region 5. App. 118. WCAP received the second-highest score in Region 5, with 91 points. *Id.* WCAP scored 18 out of 25 points in Section II (Qualifications and Experience), whereas ModivCare scored 25 out of 25 points on that section. *Id.* On Section III (Proposed Services), WCAP scored 48 out of 50 points while ModivCare scored 45 out of 50 points.² *Id.* Accordingly, although WCAP scored three points higher than ModivCare on Section III, it scored seven points lower on Section II, resulting in a lower overall score than ModivCare.

Section II measured the bidder's "qualifications and experience." The RFP instructions for Section II directed bidders to "complete Appendix D (Qualifications and Experience Form) describing their qualifications and skills to

² Both ModivCare and WCAP received a "pass" score for Section I (Eligibility) and 25 out of 25 points for Section IV (Cost Structure Acknowledgement). App. 118.

provide the requested services in the RFP.” App. 95. The instructions continue: “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.” *Id.* At issue in this appeal is the scoring of WCAP’s Appendix D submission.

Appendix D contains two sections, the first section calling for a narrative response, and the second section containing three boxes for the bidder to complete, labeled “Project One,” “Project Two,” and “Project Three.” App. 105-107. These two sections mirror the two sentences of the RFP instructions quoted above.

Following the first sentence of the RFP instructions, the first part of Appendix D – the narrative section – asks for “a brief statement of qualifications, including any applicable licensure and/or certification,” the “history of the Bidder’s organization, especially regarding skills pertinent to the specific work required by the RFP and any special or unique characteristics of the organization which would make it especially qualified to perform the required work activities.” App. 105. The directions for the first part of Appendix D do not reference projects.

“Projects” are referenced only in the second part of Appendix D, corresponding to the second sentence of the RFP instructions quoted above (“Bidders must include three examples of projects which demonstrate their experience and expertise in performing” the RFP services). App. 95, 106. The

directions on this second part of Appendix D ask for “a description of *projects* that occurred within the past five years which reflect experience and expertise needed in performing the functions described in the ‘Scope of Services’ portion of the RFP.” App. 106 (emphasis added). The form directs bidders to list with each project example “a contact person from the client organization involved . . . along with that person’s telephone number and e-mail address.” *Id.* The three boxes in this part of Appendix D, labeled “Project One,” “Project Two,” and “Project Three,” include spaces for this contact information for each project example. App. 106-07.

The Appendix D directions explain that one of the provided projects, or a cumulation of several projects, must demonstrate that the bidder meets the RFP’s threshold eligibility requirements.³ App. 106. Accordingly, the second part of Appendix D calls for a description of three projects, at least one of which must satisfy the eligibility requirements. Mr. Bondeson testified that the RFP drafters intended that bidders would supply their three project examples in the “Project One,” “Project Two,” and “Project Three” boxes. CR 261 (“we provided three – three boxes just for that purpose”).

³ It states: “In order for the Department to determine eligibility (refer to Appendix C), the Bidder must provide a minimum of one (1) project or a cumulation of multiple projects . . . which demonstrates five (5) years of experience in providing transportation services” App. 106. Appendix C (which is also part of Section II) likewise anticipates that the bidder would complete all three project boxes on Appendix D. Appendix C directs the applicant to identify which of the three projects listed on Appendix D (“Project One, Project Two, Project Three”) satisfies the eligibility requirements. App. 104.

Every bidder except WCAP completed all three project boxes. CR 240. WCAP provided one project example relating to its NET brokerage services in Region 5 in the box marked “Project One” on Appendix D. App. 156-63. Its “Project One” response spanned more than seven pages and included contact information for a reference for that project as directed by the form. *Id.* WCAP did not complete the boxes for Project Two and Project Three. WCAP wrote only “NA” in those boxes and provided no additional reference contacts. App. 163. The scoring committee interpreted “NA” to mean “not applicable.” CR 363. The scoring committee’s team consensus notes for WCAP’s Section II submission noted that WCAP “[d]id not provide 3 projects as required by the RFP, only provided a description of one (1) project example which is relevant as the Region 5 contracted NET Broker.” App. 130.

ModivCare, in contrast, completed all three project boxes on its Appendix D submission, and provided contact information for each project as directed. App. 147-152. ModivCare’s Project One, Project Two, and Project Three submission describe in detail ModivCare’s experience providing NET brokerage services in three states. *Id.*

The RFP twice instructed bidders to strictly adhere to its format and content requirements, stating: “All proposals must adhere to the instructions and format requirements outlined in the RFP and all written supplements and amendments

(such as the Summary of Questions and Answers), issued by the Department. Proposals are to follow the format and respond to all questions and instructions specified below in the ‘Proposal Submission Requirements’ section of the RFP.” App. 54 (section B(3)). The “Proposal Submission Requirements” section, in turn, warns bidders that their proposals “must follow the outline used [in the RFP], including the numbering, section, and sub-section headings. Failure to use the outline specified in Part IV, or failure to respond to all questions and instructions throughout the RFP, may result in the proposal being disqualified as non-responsive or receiving a reduced score.” App. 95. The RFP continues: “The Department, and its evaluation team, has sole discretion to determine whether a variance from the RFP specifications will result either in disqualification or reduction in scoring of a proposal.” *Id.* Additionally, “[t]he Department, at its sole discretion, reserves the right to recognize and waive minor informalities and irregularities found in proposals” App. 54 (section B(8)).

The RFP admonished that “[i]t is the responsibility of all Bidders . . . to examine the entire RFP and to seek clarification, in writing, if they do not understand any information or instructions.” App. 93 (section A(1)). Bidders submitted 170 written questions about the RFP. CR 21411-21455. No bidder submitted a question about the project boxes on Appendix D or about where in Appendix D the bidder should include its three project examples.

DHHS's Award Justification Statement concluded that "[t]he strengths of ModivCare Solutions, LLC outweighed the other bidders through both their qualifications and experience as well as the services they intend to provide through the RFP" and that ModivCare's proposals "represent[ed] the best value to the State of Maine." CR 805. The Office of MaineCare Services informed all bidders on October 5, 2023, that ModivCare was selected as the winning bidder for all 8 transportation regions. CR 806-819.

II. DAFS validated the awards to ModivCare after a three-day hearing.

WCAP and another disappointed bidder, Penquis C.A.P. ("Penquis"), requested an appeal of the contract awards from DAFS on October 19, 2023. CR 21758, 21773. Penquis and WCAP sought multiple continuances of the administrative hearing date to permit Penquis to request and review documents through FOAA. The administrative hearing was held on March 20, 2024. CR 22565. The hearing panel was comprised of Gilbert Bilodeau, Service Center Director for DAFS; Maine State Controller Douglas Cotnoir; and Michelle Johnson, Procurement Analyst for DAFS. App. 37.

The hearing panel rejected WCAP's argument that its score under Section II was assigned arbitrarily or unlawfully. The hearing panel noted that "Evaluator Bondeson explained that WALDO failed to complete Appendix D as required. WALDO presented documentary evidence showing it had responded to the

requirement in Appendix D [to provide three project examples] using a long narrative that contained detail of its service to the region and work for other entities. WALDO did not complete the form which included three fields (titled Project One, Project Two and Project Three) to capture project name, contact information and description. . . . Contact information and project descriptions were not included in their submission. . . . The absence of the required information and with the detail requested was the sole reason for the reduced score of 18 out of the available 25 points.” App. 33-34. It concluded: “WALDO did not question the Appendix D requirements during the Question and Answer process and chose to submit what was provided and in this format. DHHS had cautioned bidders to follow the RFP instructions as they could reject, or lower scores based on a bidder’s compliance. While it is true that the score assigned during the consensus review was low, this Panel was not clearly convinced that the scoring was arbitrary or capricious.” App. 35-36. Based on the hearing panel’s findings, DAFS affirmed the contract award to ModivCare.

WCAP appealed DAFS’ decision to the Superior Court under Maine Rule of Civil Procedure 80C. The Court upheld the contract award to ModivCare. This appeal followed.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Did DHHS award a contract to the “best-value bidder” as required by the State’s procurement laws when it awarded the contract to the bidder that submitted the highest-rated bid, that has satisfactorily delivered the same services in other regions of the State for over a decade, and that has a track record of successfully delivering similar services nationwide?

Did the RFP scoring committee reasonably conclude that WCAP earned a less-than-perfect score on its bid proposal because WCAP did not provide all the information required by the RFP?

ARGUMENT

I. Standard of review applicable to all arguments.

DAFS’ decision validating the contract award to ModivCare is a final agency action subject to judicial review under Maine Rule of Civil Procedure 80C and the Administrative Procedure Act, 5 M.R.S.A. § 11001, *et seq.* 5 M.R.S.A. § 1825-F. On appeal from a Superior Court judgment on a Rule 80C petition, this Court reviews the underlying agency decision directly. *Ouellette v. Saco River Corridor Comm’n*, 2022 ME 42, ¶ 8, 278 A.2d 1183, 1187 (citation omitted).

This Court reviews the agency decision for “abuse of discretion, errors of law, or findings unsupported by substantial evidence in the record.” *Id.*; *see also* 5 M.R.S.A. § 11007(4)(C). “Arbitrary or capricious action on the part of an administrative agency occurs when it can be said that such action is unreasonable,

has no rational factual basis justifying the conclusion or lacks substantial support in the evidence.” *Cent. Maine Power Co. v. Waterville Urban Renewal Auth.*, 281 A.2d 233, 242 (Me. 1971). “Regularity” of administrative action “is presumed.” *Id.*

When determining whether substantial evidence supports an agency decision, this Court “examine[s] the entire record to determine whether, on the basis of all the testimony and exhibits before it, the agency could fairly and reasonably find the facts as it did,” and will “affirm the agency’s findings even if the record contains inconsistent evidence or evidence contrary to the result reached by the agency.” *Ouellette*, 2022 ME 42, ¶ 20, 278 A.3d at 1191 (citations and internal quotation marks omitted). This Court may “not substitute [its] judgment for that of the agency and will affirm findings of fact if they are supported by substantial evidence in the record.” *Id.* (citation omitted); *see also* 5 M.R.S.A. § 11007(3). “[T]he substantial-evidence standard of review does not involve any weighing of the merits of evidence[.]” *Ouellette*, 2022 ME 42, ¶ 20, 278 A.3d at 1191 (citation and internal quotation marks omitted). WCAP has a high burden to overturn the hearing panel’s findings: this Court may vacate the decision “only if there is no competent evidence in the record to support the findings.” *Id.*

Under DAFS’s rules for appeals of contract awards, the hearing panel was tasked with determining whether WCAP proved by “clear and convincing

evidence” that the scoring committee’s review of the RFP bid proposals and scoring decisions were in “violation of law,” were tainted by “irregularities creating fundamental unfairness,” or resulted in an “arbitrary or capricious award.” App. 44-45, 18-554 C.M.R. ch. 120, §§ 3(2), 4(1). The “clear and convincing” standard required WCAP to convince the hearing panel that “the truth of its factual contentions was highly probable, rather than merely more probable than not.” *Pine Tree Legal Assistance, Inc. v. Dep’t of Human Services*, 655 A.2d 1260, 1264 (Me. 1995). The hearing panel determined that WCAP did not meet its burden of proof, and DAFS therefore validated the award to ModivCare.

This Court may affirm the agency decision; remand the case for further proceedings, findings of fact or conclusions of law or direct the agency to hold such proceedings or take such action as the court deems necessary; or reverse or modify the decision if it finds the decision unlawful, unsupported by substantial evidence on the whole record, or arbitrary or capricious or characterized by abuse of discretion. 5 M.R.S.A. § 11007(4). This Court should affirm the decision validating the contract award to ModivCare.

II. The award to ModivCare was consistent with the State’s procurement laws for determining the “best-value bidder.”

The State procurement laws require competitively bid contracts to 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.” 5 M.R.S.A. §1825-B(7). The statute does not define “best-value bidder” or “best interests of the State.” The following section, titled “Rulemaking,” directs the State’s Chief Procurement Officer to adopt rules to carry out the procurement process. 5 M.R.S.A. §1825-C.

DAFS’ procurement rules, contained in 18-554 Code of Maine Rules chapter 110, guide the determination of the “best-value bidder.” They provide that “[t]he contracting agency is responsible for reviewing all RFP’s based on the criteria established within the original Request for Proposal document,” and that an “[a]ward must be made to the highest rated proposal which conforms to the requirements of the state as contained in the RFP.” App. 40, 18-554 C.M.R. ch. 110 §§ 3(A) & (A)(iv). In other words, the State crafts the RFP requirements to embody those qualifications and characteristics that the State deems relevant to determining the “best-value bidder.” The bidder that best meets those requirements, and earns the highest rating, is the best-value bidder. Counterfactually, if the agency ignored the rating of the bid proposals in awarding the contract, the agency would run afoul of these procurement rules.

The link between “best-value bidder” and the RFP scoring is confirmed in the RFP itself, which explains that the scoring committee’s job was to “judge the merits of the proposal received in accordance with the criteria defined in the RFP”

“to ensure that the contract is awarded to the Bidder whose proposal provides the best value to the State of Maine.” App. 98 (sections A(1)-(2)). DHHS’s award to ModivCare, the bidder with the highest overall score, is consistent with an award to the “best-value bidder.”

WCAP appears to argue that there is an overarching concept of “best-value bidder” that exists separate and apart from the RFP requirements, or that the RFP did not give proper weight to the factors that WCAP argues makes it the “best-value bidder” for the Region 5 contract. Similarly, WCAP contends that it lost points – and therefore, the contract award – for reasons that are irrelevant to the “qualities of the services to be supplied,” as that phrase is used in 5 M.R.S.A. §1825-B(7). WCAP’s arguments fail.

1. WCAP attempts to impose criteria for “best-value bidder” found nowhere in the RFP or procurement laws.

WCAP’s argument is, at bottom, a disagreement with the qualities that the State deemed relevant to determining the “best-value bidder” for this contract. WCAP contends that it should have been chosen as the “best-value bidder” over ModivCare because it is a Maine-based, not-for-profit entity with a long history in Region 5, because it has the most experience providing NET brokerage services in Region 5, and it has done so for over a decade. *E.g.*, Br. at 20, 26 & n.11, 27, 3233, 38. But these attributes were not the RFP’s criteria for selecting the winning

bidder— and accordingly, that’s not how “best-value bidder” was measured with respect to this RFP.

First, Section II of the RFP evaluated the bidders’ overall NET brokerage expertise, not their experience providing brokerage services in a particular contract region. *E.g.*, Br. at 20, 26-27, 32-33. The fact that WCAP had the most experience providing NET brokerage services in Region 5 specifically gave WCAP no scoring preference in Section II.

Mr. Bondeson testified that, in evaluating the bidder’s qualifications and experience for Section II, the scoring committee did not focus on the bidder’s experience in any particular region. CR 128-29, 131, 234. When asked whether he thought it was appropriate for a bidder to get the same score for qualifications and experience as the incumbent broker for that region, Mr. Bondeson responded, “I do. I do. Because we didn’t get into geographical coverage within the State” when assessing a bidder’s experience. CR 131. “This was about overall experience[.]” *Id.*; *see also* CR 128-129.

That makes sense from a policy perspective: if the award turned on whether the bidder had the most experience providing the requested services in the particular service region, there would have been no need to issue an RFP. As WCAP notes, it was the only bidder that has provided NET brokerage services in Region 5 since the current NET brokerage program began, and therefore, it has

“vastly more years of experience providing transportation services . . . in the actual region, Region 5.” Br. at 26. Similarly, ModivCare and Penquis were the only bidders with experience providing NET brokerage services in their respective Regions. All three incumbents would have won the new contracts if experience in the particular contract region were the deciding factor. But as Mr. Bondeson explained, Section II of the RFP focused on overall experience, not experience in the particular contract region. CR 131.

Additionally, the RFP deliberately required that the winning bidder have relevant experience beyond providing NET brokerage services in the region in question. Section II of the RFP asks for three project examples demonstrating the bidder’s qualifications and experience relevant to NET brokerage, such that – by design – WCAP could not have obtained full points for that section solely for its experience as the incumbent broker for Region 5. This too makes sense, ensuring that the State does not choose the same vendor over and over again simply because the vendor has done the job before.

Mr. Bondeson commented further that “some of the other respondents actually had quite a bit more years of experience in – specific to non-emergency medical transportation” than WCAP. CR 223-24. ModivCare, which has for decades provided NET brokerage services to millions of Medicaid and Medicare Members nationwide, is one of them. CR 224, App. 143-44. ModivCare’s

experience dwarfs WCAP's by trip volume and number of Members served. ModivCare has participated in Maine's NET brokerage program since 2013 – longer than WCAP – serving five out of the eight transit regions, compared to WCAP's single region. App. 147, 156. ModivCare brokers over a million trips annually in Maine, while WCAP claims to have brokered 1.6 million trips total since 2014. App. 141, 157. ModivCare – as WCAP points out – is part of a nationwide company focused on providing NET brokerage services to over 34.5 million Medicaid and Medicare Members. App. 143. Mr. Bondeson distinguished WCAP's other transportation-related services referenced in its bid proposal as “quite different” from brokering a NET program. CR 224. In contrast, all of ModivCare's project examples were NET brokerage programs. App. 147-52.

Second, WCAP's contention that it was “the presumptive best-value bidder in Region 5” because it scored the highest on Section III, which scored the services to be provided under the contract, again ignores how the RFP is drafted. Br. at 10-11. The RFP recognized the importance of Section III, in that it was worth twice the points of Section II, and half of the total available points. No bidder could have obtained the highest overall score without a very high score for Section III. But Section III was not the sole determining factor in the RFP. Nothing in the RFP states that the bidder awarded the highest score in Section III would be awarded the contract. If that were the case, there would be no reason to score Section II.

Instead, the scores for all RFP sections were tallied and the award was granted to ModivCare based on its highest overall ranking. *See* App. 118; CR 805-07 (Award Justification Statement and notice of contract award).

Third, nothing in the RFP gives preferential treatment to not-for-profit entities or entities incorporated in Maine.⁴ To the contrary, the RFP states that “[o]fficials responsible for making decisions on the award selection will ensure that the selection process accords equal opportunity and appropriate consideration to all who are capable of meeting the specifications.” App. 98 (section A(2)). WCAP’s pronouncement that the “Legislature surely never intended that a contract be awarded to an out-of-state, for profit bidder” in these circumstances is unsupported and ignores that the State has contracted with ModivCare to provide these same services for longer than WCAP.⁵ Br. at 39. ModivCare’s Maine operations are run in Maine by experienced and deeply committed Mainers who have been successfully providing NET brokerage services to MaineCare Members for over a decade.

⁴ WCAP’s citation to 5 M.R.S.A. §1825-B(8) (“Tie bids”), which favors in-state bidders “if the price, quality, availability and other factors are equivalent” is irrelevant, as it says nothing about how bids are scored in the first place. Br. at 18 n.5, 33 n.14. There was no tie bid here; DHHS ranked ModivCare higher than WCAP.

⁵ ModivCare has served as a broker since the current NET program began in 2013; WCAP was brought on in 2014. App. 147, 156.

2. WCAP's interpretation of "best-value bidder" is unduly narrow.

WCAP erroneously argues that the contract award violates 5 M.R.S.A. §1825-B(7) because it was not awarded on the basis of the "qualities of services to be supplied" under the contract. *E.g.*, Br. at 23, 25, 34-37. But the "qualities of the services to be supplied" is only one factor that the State is required to consider when determining the "best-value bidder" for a contract award. Section 1825-B(7) requires that the determination of "best-value bidder" "tak[e] 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." 5 M.R.S.A. §1825-B(7). WCAP's laser-focus on the "qualities of services to be supplied" ignores these other factors, including conformity with the RFP specifications and the best interests of the State. At any rate, the statute requires only that the contract award decision "tak[e]" these factors "into consideration," and does not direct how these factors influence the decision-making. There is no question that the RFP evaluates the quality of services to be provided under the contract, and WCAP does not claim otherwise.

Moreover, WCAP takes an unduly narrow view of what goes into evaluating "the qualities of services to be supplied." WCAP contends that it is the best-value bidder because it a) scored the highest on Section III, the section measuring the services to be provided under the RFP, and b) has successfully provided those same

services in the contract region. *E.g.*, Br. at 20, 26-27, 33-34, 38. WCAP suggests that its lower score on Section II is merely technical and irrelevant to the “quality of services to be provided.” But a bidder’s qualifications and experience (as measured in Section II of the RFP) are directly relevant to assessing a bidder’s ability to deliver on the services described in Section III of the RFP. The bidder with the highest combined score in those sections (here, ModivCare) is likely to be the bidder most capable of delivering the highest quality services to the State and therefore serve the best interests of the State. Section II’s requirements were not merely technical, but rather substantive components of determining the bidder likely to provide the highest-quality services. Thus, in determining that ModivCare’s proposals “represent[ed] the best value for the State,” DHHS found that ModivCare’s strengths “outweighed the other Bidders through both their qualifications and experience as well as the services they intend to provide through the RFP.” CR 805.

The RFP reflected the State’s policy choices for selecting the “best-value bidder” for the contract award. ModivCare was awarded the contract award because its bid proposal received the highest ranking, consistent with the procurement laws. WCAP’s disagreement with the State’s policy choices for picking the new NET broker does not render the award unlawful.

III. WCAP's imperfect score was not arbitrary or capricious.

Upon reviewing “the testimony and evidence in its totality,” the hearing panel “was not clearly convinced that the scoring” of WCAP’s bid proposal “was arbitrary or capricious.” App. 36. The hearing panel’s job was not to decide whether it would have reached the same conclusion as the scoring committee, but rather to decide whether WCAP provided clear and convincing evidence that the scoring committee’s scoring was unlawful, arbitrary or capricious, or tainted by irregularities. Similarly, this Court may “not substitute [its] judgment for that of the agency and will affirm findings of fact if they are supported by substantial evidence in the record.” *Ouellette*, 2022 ME 42, ¶ 20, 278 A.3d at 1190 (citation omitted); *see also* 5 M.R.S.A. § 11007(3). The hearing panel found that “the absence of the required information and with the detail requested [on Appendix D] was the sole reason for the reduced score of 18 out of the available 25 points.” App. 34. Substantial evidence supported the hearing panel’s conclusion that the scoring of WCAP’s proposal was not arbitrary or capricious.

1. The scoring committee’s interpretation of WCAP’s bid proposal was reasonable and therefore must be affirmed.

The scoring committee’s interpretation of WCAP’s bid proposal, including whether WCAP provided the requisite three project examples on Appendix D, will be upheld so long as there was a “rational factual basis justifying the conclusion.” *Carl L. Cutler Co., Inc. v. State Purchasing Agent*, 472 A.2d 913, 916 (Me. 1984).

In *Cutler*, a disappointed bidder for a State contract argued – like WCAP here – that it lost the bid because its proposal was misinterpreted in an unreasonable manner. The Court determined that the State’s interpretation of the bid proposal was “logical and reasonable,” and it therefore would not substitute its judgment for the State’s. *Id.* at 916. The Court upheld the contract award.

At the hearing, the scoring committee attributed WCAP’s lower Section II score to WCAP’s failure to provide three examples on its Appendix D submission as required by the RFP instructions. Mr. Bondeson testified: “So we believed that because the instructions of the RFP say, Must provide three examples, that was an omission we just simply – we had to deduct for.” CR 240; *see also, e.g.*, 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.”); CR 225 (“[T]he primary issue in that section for Waldo CAP’s proposal is that they did not complete three projects as required by the RFP.”); CR 428 (“Waldo Cap didn’t give three examples.”). Mr. Bondeson testified that, while WCAP satisfactorily filled out the Project One box, there was nothing in the Project Two or Three box but “NA,” which he construed (and which most people would construe) as meaning “not applicable.” CR 363. Donna Kelley, WCAP’s CEO, confirmed that “NA” in the project boxes meant “not applicable,” because the other project examples were

referenced above, in the narrative section of Appendix D, and not repeated in the project boxes. CR 611.

The question here is whether the scoring committee, confronted with WCAP's bid proposal, in which WCAP wrote only "NA" in two of the three project boxes on Appendix D and provided only fleeting references to other transportation services in the narrative portion of Appendix D, reasonably concluded that WCAP did not provide descriptions of three project examples, and therefore earned less than a perfect score. The scoring committee's interpretation of WCAP's bid proposal and the RFP requirements was reasonable, and the hearing panel, in turn, reasonably found that the scoring committee had a rational basis for reaching the conclusions that it did. WCAP has not demonstrated that "there is no competent evidence in the record to support the findings," as required to invalidate the award. *Ouellette*, 2022 ME 42, ¶ 20, 278 A.3d at 1191 (citation omitted).

2. The scoring committee reasonably concluded that WCAP failed to provide three project examples with the requisite information.

WCAP erroneously argues that it lost points simply for putting information in the wrong section of Appendix D. In fact, the hearing panel found several deficiencies in WCAP's Appendix D submission in addition to WCAP's failure to follow the Appendix D format, including WCAP's failure to "capture project name, contact information and description" of its project examples, and concluded that

the scoring panel reduced its score based on “[t]he absence of the required information and with the detail requested.” App. 33-34.

WCAP described in detail – in both the first section of Appendix D, and in the Project One box on the second part of Appendix D – WCAP’s NET brokerage services offered by its MidCoast Connector service line. App. 153-62. There is no question that the description of WCAP’s NET brokerage in Region 5 counts as one of its three required project examples. The scoring committee reasonably concluded that the brief, unelaborated references to WCAP’s other transportation services in the narrative part of Appendix D were insufficient as additional project examples. WCAP does not include the same level of detail – or, in fact, any detail or explanation – about these other transportation services, much less how those services “demonstrate [WCAP’s] experience and expertise in performing [NET brokerage services] as well as highlighting [WCAP’s] stated qualifications and skills” as required by the RFP. App. 95.

WCAP mischaracterizes Mr. Bondeson’s testimony. Mr. Bondeson did *not* testify that WCAP would have received full points had it only moved its references to MDOT or other projects from the narrative portion of Appendix D down to the Project Two and Project Three boxes. *E.g.*, Br. at 16-17, 24-26. At most, he agreed that the narrative portion of Appendix D *referenced* other projects. CR 226. Regarding programs that were referenced in Appendix D, WCAP’s counsel asked:

Q. Let me ask you this: Are those programs that, in your mind, would qualify -- had they been put in the boxes in the second section of Appendix D, would those programs have qualified as examples had all the information been there requested?

A. In my opinion, yes.

CR 251. Mr. Bondeson agreed the programs briefly referenced in the top portion of Appendix D would qualify as project examples if they had been put in the boxes, *and* had WCAP provided all the requested information. In other words, Mr. Bondeson said only that the projects referenced in the top portion of Appendix D were the kinds of project examples the RFP was looking for, not that WCAP submitted adequate information about three project examples. Mr. Bondeson also explained that the scoring committee could not presume that any projects referenced in the narrative were intended to be the required three projects, because information in that section could also have counted towards other RFP requirements. CR 240-41.

Further, merely moving the fleeting references to other projects down to the Project Two and Project Three boxes would have yielded one-sentence “descriptions” with no useful information.⁶ For instance, WCAP claims its

⁶ WCAP’s claim that it provided performance metrics for its transportation services for to the Office of Child and Family Services and Maine Department of Transportation is misleading. Br. at 14, 24, 32. Those metrics were included at the end of the Project One box describing WCAP’s NET brokerage, without explanation that these metrics were intended to describe two separate project examples. App. 162-63. Those metrics also contain no description or explanation about the services WCAP provided to those agencies.

transportation services provided to the Maine Department of Education serves as a qualifying project example. Br. at 14, 32. But the only information provided about this program is that “MidCoast Public Transportation continu[es] to provide services to . . . The Maine Department of Education.” App. 154-55. This statement does not explain the nature, scope, or length of its service for the Department of Education, nor demonstrate WCAP’s “experience and expertise needed in performing the functions described in the ‘Scope of Services’ portion of the RFP.” App. 106. There are no contacts listed for this project, even though the RFP expressly requires contact information. *Id.* (“For each of the project examples provided, a contact person from the client organization involved should be listed, along with that person’s telephone number and e-mail address.”).

WCAP argues that DHHS should have excused its failure to provide more project information due to its long contract history with the State. Br. at 21. But the scoring – and ultimately, the contract award – was based on the scoring committee’s review of the bid proposals, and it was WCAP’s responsibility to make sure its bid proposal reflected the depth and breadth of its relevant experience. While the RFP provided that “contract history with the State of Maine, whether positive or negative, *may* be considered in rating proposals even if not provide by the Bidder,” it did not direct the scoring committee to independently research the bidder’s history with the State. App. 106 (emphasis added). The

scoring committee did not review any documents or reports about any of the incumbent bidders' performance outside of what was included in the RFP submissions, nor was it required to. CR 141-42. Scoring committee members testified that they were unfamiliar with WCAP's transportation services outside of its NET brokerage contract. CR 251, 477. Mr. Bondeson testified that he would not know who WCAP's contacts would be for the various other projects referenced in the top portion of Appendix D. CR 241.

The scoring committee reasonably concluded that WCAP did not provide adequate descriptions of three relevant projects. The record supports the hearing panel's conclusion that the scoring was supported by the lack of "detail" or "description" about WCAP's projects, in addition to WCAP's failure to complete the three project boxes. App. 33-34.

3. The RFP unambiguously required completion of all three project boxes in Appendix D.

The scoring committee reasonably concluded that the RFP required bidders to complete the three project boxes on the second part of Appendix D. Mr. Bondeson, who helped draft the RFP, stated that the project boxes were included for just that purpose. CR 261. WCAP counters that the "RFP does not say where in Appendix D a bidder must include three examples[.]" *E.g.*, Br. at 11, 21. While the RFP instructions do not expressly say "bidders must place their three required project examples in the three project boxes on Appendix D," context clues make it

obvious this was required. Every other bidder for this RFP understood that the project examples belonged in the portion of Appendix D that instructed bidders to provide “a description of *projects* that occurred within the past five years which reflect experience and expertise needed in performing the functions described” in the RFP, and which supplied three boxes labeled “Project One,” “Project Two,” and “Project Three.” App. 106-07 (emphasis added).

WCAP also understood that the requisite three project examples were supposed to go in the second part of Appendix D. It provided one of its three examples in the box labeled “Project One.” App. 156-63. WCAP’s CEO testified at the hearing that WCAP wrote “NA” in each of the “Project Two” and “Project Three” boxes because the information was already referenced in the top portion of Appendix D, and WCAP wanted to provide a “succinct” response that avoided duplication. CR 609-11. In other words, WCAP recognized that it needed to fill out these boxes with its project examples, but chose not to.

Regarding WCAP’s lower Section II score, the hearing committee noted that “DHHS had cautioned bidders to follow the RFP instructions as they could reject, or lower scores based on a bidder’s compliance.” App. 35-36; *see also* App. 95 (“[Failure to use the outline specified . . . , or failure to respond to all questions and instructions throughout the RFP, may result in the proposal being disqualified as non-responsive or receiving a reduced score.”); App. 54 (section B(3)) (“All

proposals must adhere to the instructions and format requirements outlined in the RFP”). If the instructions or Appendix D were confusing or subject to multiple interpretations, it was WCAP’s “responsibility . . . to seek clarification, in writing, if they do not understand any information or instructions.” App. 93 (section (A)(1)). No written question was submitted regarding whether the three projects could be described in the narrative portion of Appendix D as opposed to the three project boxes. WCAP assumed the risk that its Appendix D submission, including the “NA” notation in the “Project Two” and “Project Three” boxes, would be misconstrued or deemed noncompliant.

4. The scoring methodology was not unlawful or arbitrary or capricious.

Notwithstanding the deficiencies in its Section II submission, the scoring committee generously awarded WCAP the majority of available points for that section— 18 out of 25. App. 118. WCAP derides the committee’s scoring methodology, stating that “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.’” Br. at 20. The process described by the scoring committee perfectly corresponds with the State’s “best practices” for scoring bid proposals as set forth in the State’s Guidelines for Proposal Evaluations and Consensus Scoring. CR 21538-21539 (“Awarding points”). The Guidelines state:

In determining how well a proposal scored, the recommended approach for evaluation teams is to determine how many points for the section being evaluated did the proposal ‘earn’. With this approach, all proposals start off with zero points and are awarded points based on how well they responded to the criteria of the RFP. Evaluation teams can also set a minimum threshold amount, such as awarding half the available points in a particular section to those proposals which only met the minimum requirements. Proposals which exceed the minimum requirements would receive higher scores. This approach not only allows for a clear indication of which proposals met the minimum requirements, it also allows for a natural separation between outstanding, adequate and substandard proposals.

CR 21539. The scoring committee here followed this approach. CR 121-22, 233-34, 440-41.

WCAP complains that the scoring committee could not explain at the hearing how it settled on a 7-point deduction for its Section II submission. Br. at 19, 23, 37-38. This is hardly surprising, given that the consensus scoring discussions for WCAP’s bid proposal took place on or around August 30, 2023 – seven months before the hearing – amid discussions relating to 39 other bid proposals, each hundreds of pages long. App. 129. Moreover, the reviewers testified that they scored each section of the bid proposals holistically, and did not necessarily assign a particular point score to each criterion in the RFP. *E.g.*, CR 159, 457, 465. Nothing in the RFP or the procurement laws required them to do so, and – given that the RFP itself is about 70 pages long and contains hundreds of separate requirements – it would have been exceedingly complicated and time-

consuming for the scoring committee to assign points at that granular level across all 40 bids.

The hearing panel acknowledged that the scoring followed the RFP's scoring rubric. App 34. Within that rubric, the reviewers were free to determine how to allocate points. The team consensus notes summarized aspects of the bid proposal that contributed to the scoring decision, including the scoring committee's determination that WCAP did not provide three project examples in Section II, and DHHS released the master score sheets documenting the scoring. App. 118, 129-37. This is all that the procurement laws require. *See* App. 40, 18-544 C.M.R. ch. 110 § 3(A) (requiring only that the "agency shall document the scoring," and "substantive information that supports the scoring"). The hearing panel correctly concluded: "The relative scoring weights were published in the RFP and were used in the final consensus scoring. The information collected was sufficiently substantive to document the effort made by the reviewers and to support their scoring." App. 34.

WCAP fails to show that the reviewers did not follow the same methodology for each bid proposal, or that the reviewers weighed RFP requirements inconsistently between bidders. The scoring methodology was consistent with the procurement rules and the State's Guidelines, and WCAP does not demonstrate that it was fundamentally unfair or a violation of law. *See, e.g.,*

Pine Tree Legal Assistance, Inc, 655 A.2d at 1264 (where consensus scoring methodology did not contravene the RFP or applicable regulations, “strict adherence” to a “mathematical formula” was not required).

In short, WCAP’s lower score was supported by the scant information it submitted, regardless of where in Appendix D that information appeared. The hearing panel’s conclusion that the scoring was not arbitrary or capricious is supported by substantial evidence, and its validation of the resulting contract award was not unlawful or an abuse of discretion.

5. The scoring of ModivCare’s litigation disclosure was not arbitrary or capricious.

WCAP makes a throw-away, and meritless, argument that it was arbitrary and capricious for the scoring committee to dock points from its proposal for its Appendix D submission, but not to dock ModivCare’s proposal for its purportedly incomplete litigation disclosure. Br. at 20-21, 24. WCAP claims that ModivCare’s litigation disclosure was noncompliant because it did not disclose the amounts of confidential settlements.

Section II of the RFP required bidders to provide a list of current litigation and closed cases from the past five years and, for each, “list the entity bringing suit, the complaint, the accusation, amount, and outcome.” App. 96. The RFP does not assign a weight to the litigation disclosure, and the scoring committee was free to assign whatever weight or significance it chose to this requirement.

ModivCare’s disclosure included 98 current litigations and 276 closed litigations from the past five years, nationwide, among them declaratory judgment actions, smalls claims, contract disputes, and personal injury matters, and including matters in which ModivCare was the plaintiff. CR 6650-6693. Of the closed litigations, nearly half were dismissed or resolved by judgment in ModivCare’s favor.

CR 6658-6693. For context, ModivCare serves 34.5 million Medicaid and Medicare Members and brokers over 48 million trips per year – or several hundred million trips over the period covered by the litigation disclosure. App. 143. The consensus notes state that WCAP and ModivCare both met the requirements with respect to their litigation disclosures, and “the team has no concerns at this time.” App. 120-21, 130. MTM, another nationwide company with a “similar long list” of litigation, received the same comment for its litigation disclosure. CR 352, 989.

In its decision, the hearing panel noted that, “[w]hen asked if the number of cases and limited information about litigation from at least one bidder was of concern, Mr. Bondeson responded that given the multiple state contracts and large numbers of clients served by [ModivCare] he did not find the number of recent or outstanding litigations as a problem.” App. 32; *see also* CR 352-353 (Bondeson testimony). The scoring committee reasonably believed ModivCare’s litigation history was acceptable due to its multi-state coverage, the large number of trips and transporters, and the high-risk nature of the work. CR 140-41, 352-53.

Substantial evidence supports the hearing panel's conclusion that the scoring committee's consideration of ModivCare's litigation disclosure was not arbitrary and capricious, in violation of law, or unfair.

The scoring committee's interpretation of RFP requirements and bid proposals will be upheld so long as those interpretations are reasonable. *Cutler*, 472 A.2d at 916. The scoring committee was entitled to find that ModivCare met the litigation requirement even though it did not disclose the amounts of confidential settlements. Mr. Bondeson testified that it was not unusual for bidders to indicate in their litigation disclosures that settlements were confidential. CR 136. The RFP made clear that all bid proposals were public records available for public inspection under FOAA. App. 54 (section B(7)). Although ModivCare designated its litigation disclosure "confidential," WCAP received it in response to its FOAA requests, demonstrating that ModivCare was right to withhold settlement amounts to preserve their confidentiality. CR 6650-6693.

Even if there were a technical defect in ModivCare's bid proposal, the scoring committee was entitled to waive it. App. 54 (section B(8)). Whatever information could be gleaned from confidential settlement amounts relating to a relatively small number of lawsuits compared to the size and scope of ModivCare's nationwide operations would not have added very much to the overall mix of information available to the reviewers. The scoring committee also reviewed

ModivCare's audited financial statements, letters from its surety company demonstrating ModivCare's ability to obtain payment and performance bonds, and a certificate of liability insurance. *See, e.g.*, CR 6694-6701. Mr. Bondeson, who was familiar with ModivCare's performance in the State for over a decade, had no concerns about ModivCare's ability to do the job. CR 354-55. WCAP does not explain why the omission of settlement amounts matters to the contract award, much less demonstrate that the scoring was arbitrary and capricious or unlawful.

CONCLUSION

DAFS's decision upholding the Region 5 contract award to ModivCare should be affirmed.

Dated July 18, 2025

Respectfully submitted,

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