STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Court Docket No. BCD-25-63

Waldo Community Action Partners

Petitioner-Appellant

v.

Department of Administrative and Financial Services et al.

Respondent-Appellees

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

Reply Brief for Appellant

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

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Waldo Community Action Partners ("WCAP") replies to the Appellees as follows.

I. Appellees misstate the relief sought by WCAP. Appellees several times misstate the relief sought by WCAP. WCAP did not ask the Court to award the contract to WCAP. (Blue Br. at 40) Instead, WCAP asks the Court to rule that the award to ModivCare was invalid and to remand to BCD to remand to DAFS (to presumably return it to DHHS) for further proceedings consistent with the Court's opinion. (*Id*.) Presumably, if the Court agrees with WCAP, this means that the Court's opinion would remind DHHS that on remand, DHHS must follow § 1825-B(7) by awarding Region 5 to the best-value bidder based on the quality of the NET Services to be supplied. For DHHS to select ModivCare again based on the bids already submitted, this means that DHHS would have to articulate, if it can, how, based on its expertise, it is rational to infer that (a) the alleged missing information in WCAP's Appendix D, or (b) the alleged placement of that information in the wrong place, negatively affects WCAP's organizational qualifications and experience it needs to properly supply the NET Services in contrast with ModivCare's organizational qualification and experience.[1] If this

[1] Appellees assert that the missing information is contact information for MDOT, OCFS or other agencies of the State and/or insufficient commentary on the responsibilities of WCAP as the MDOT designated Federal Transit Authority in Region 5 and as a service provider to OCFS, OADS, and other agencies of the State.

missing information (if it is missing) or putting it in the wrong place (if it was in the wrong place) really does negatively and significantly affect the quality of Services to be supplied by WCAP, then based on § 1825-B(7), the award may go to ModivCare. On the other hand, if it is not rational to infer that the alleged missing information or having it in the wrong place negatively affects WCAP's organizational qualifications and experience needed to do the work, then WCAP should not have lost the bid due to such alleged missing or wrongly placed information.

Consider this important difference.

Section II, among other things, also required each bidder to submit financial statements showing its financial viability to supply the Services. (App. 96) If that information was missing from WCAP's Section II, File 2, or if that information disclosed that WCAP is financially infirm, that would be logically connected to WCAP's organizational qualification to do the work, and hence, to the quality of Services to be supplied. So, too, if, e.g., a bidder had no proof of insurance, which was another Section II requirement. (App. 96) But unless DHHS can show some logical connection between the alleged missing or wrongly placed information in WCAP's Appendix D and WCAP's organizational qualification and experience to supply the Services in Region 5, there is no rational basis under § 1825-B(7) for the award of Region 5 to ModivCare.

II. Appellees' briefs prove WCAP is right. Appellees' briefs prove the basic point that WCAP is making. Specifically, in their nearly 120 pages, no one can say that anyone believed that WCAP's organizational qualifications and experience to supply the Services in Region 5 was actually inferior to that of ModivCare's. Yet the only reason WCAP lost the bid was its low score compared to ModivCare in the category of organizational qualifications and experience. This, alone, shows that the award to ModivCare had no rational basis. The clincher is that even though § 1825-B(7) requires that the contract be awarded based on the quality of Services to be supplied, no one can point to any evidence in the record that shows, or any evidence that any evaluator concluded, that WCAP's quality of Services in Region 5 is or would be one iota inferior to that of ModivCare's. In fact, *it was just the opposite*, namely, WCAP scored higher than ModivCare in the category of the Proposed Services to be supplied. (App. 118)

III. WCAP is not making a new argument for the first time on appeal. DAFS Br. at 29 accuses WCAP of raising § 1825-B(7) for the first time on appeal. This is false. WCAP's Closing Argument submitted after the administrative Hearing referred the Appeals Panel *specifically* to § 1825-B(7) and to a previous DAFS' decision that cites and quotes § 1825-B(7) for the fundamental proposition that "Maine law requires that contracts subject to competitive bidding . . . 'must be awarded to the best-value bidder, taking into consideration the qualities of the . . .

services to be supplied.'" (CR 672 (citing DAFS Decision in RFP # 201506114 at 4-5) (quoting § 1825-B(7))). This reference to § 1825-B(7) in WCAP's Closing Argument was integral to WCAP's argument below that the award to ModivCare violated the law because the scoring exalted form over substance, meaning, that the award failed to go to the "best-value bidder" taking into account the quality of the Services to be supplied, to the detriment of the quality of the Services that would be supplied to the end-users in Region 5. (CR 665, 669, 671-672, 676-677) In presenting this argument below, WCAP—just as it does in this Court—emphasized that WCAP scored highest in the quality of Services to be supplied (CR 665, 667); and that no evaluator could point to anything to support the notion that ModivCare is actually in any way more organizationally qualified or experienced than WCAP to supply the Services in Region 5 (CR 666, 673, 676). WCAP's arguments presented to this Court were presented below.

IV. The three project examples requirement was absurd from the outset, leading to an absurd contract award in violation of § 1825-B(7) and to the Appellees' fallacious interpretation of § 1825-B(7). The three project examples requirement was absurd from the outset and produced an absurd result in violation of § 1825-B(7). This is seen by the following hypothetical.

Suppose the RFP sought office cleaning services for the State in Cumberland County. Suppose Clean Co. is a small Maine family business that has been

supplying those same services well in Cumberland County to the satisfaction of the State for more than a decade. Suppose Clean Co. only works for the State and has never cleaned elsewhere, much less across the nation. The State, for some bizarre reason, decides to spend an immense amount of time and energy over two years developing an RFP for bids to clean in Cumberland County. Suppose the price is fixed by the State so cost is not a factor. Suppose Clean Co. scores highest among the bidders for Cumberland County in the services it will supply, scoring higher than Big Company, the next highest bidder in that category. Big Company has never cleaned in Cumberland County, but Big Company operates elsewhere across the country where the quality of its work is comparable to that of Clean Co. Suppose, then, that the RFP has a Section II named "Organization Qualifications and Experience." Suppose that Section requires proof of insurance, bonding, identification of subcontractors (if any), the disclosure of litigation, and evidence of financial viability. Suppose Clean Co. scores as highly as Big Company on all those factors. So, despite the fact Big Company also cleans in Oklahoma and in West Virginia, Clean Co. wins, right? Well, not so fast.

Suppose Section II also requires each bidder to "include three examples of projects which demonstrate their experience and expertise in performing these services." Big Company gives as its three examples its work in Kennebec County and two other states, Oklahoma and West Virginia. What can Clean Co. say?

Clean Co. only cleans for the State and only in Cumberland County. Clean Co. has intentionally limited the scope of its operations to maximize the quality of the services it supplies the State. Clean Co. has no other examples of projects showing its organizational qualifications and experience to clean for the State in Cumberland County—other than the fact that it has done just that for more than a decade and satisfies all the other requirements, such as bonding, etc. Consequently, far from a "level playing field," the RFP has a built-in preference from the outset for Big Company who can give examples of projects in many states across the nation. Big Company wins the bid for Cumberland County, even though Clean Co.'s score was higher than Big Company's score on the proposed services. Clean Co. lost only because it couldn't give examples of two other projects showing its organizational qualification and experience to clean in Cumberland County. Surely, the Legislature when it enacted § 1825-B(7), never envisioned such an absurd result.

This hypothetical drives home the absurdity of the "two other examples requirement" to "prove" organizational qualification and experience when the bidder already has been performing those same services in question well for more than a decade *and* has shown the financial viability, etc., needed to continue to do so. To be blunt: What does it even matter to the quality of the NET Services to be supplied, as contemplated by § 1825-B(7), if WCAP does or does not provide

transportation services to MDOT and OCHS? What if the only thing WCAP does is provide the Services well in Region 5? Did the Legislature intend for that to disqualify WCAP? The fact that WCAP also performs transportation services for MDOT and OCFS, in addition to the NET Services, should only *increase* WCAP's score, not decrease it—regardless of how well or where WCAP describes these other "projects" in Appendix D. The fact that ModivCare brokers in West Virgina and Oklahoma, the two other examples contained in its Appendix D (App. 148, 151), makes no difference to the quality of Services ModivCare can be expected to provide in Region 5—unless, on remand, using its expertise, DHHS can perchance explain why it is rational to infer that ModivCare's organization and work in Region 5 will be superior to that of WCAP because ModivCare operates in Oklahoma and West Virginia, and WCAP does not.

Simply put, the Legislature did not intend by § 1825-B(7) for ModivCare to win Region 5 because it works in West Virgina and Oklahoma and WCAP didn't provide enough commentary about what it does for MDOT, MSHA, MDOE, and OCHS, or provide their phone numbers and email contacts for these agencies of the State. This, in a nutshell, is the fallacy upon which Appellees' arguments are based when they repeatedly cite 18-554 C.M.R. Ch. 110 ("Chapter 110") for their view that it was within the realm of reason for DHHS to award Region 5 to

ModivCare because WCAP failed to "conform to the requirements of the state as contained in the RFP." (E.g., ModivCare Br. at 19, 25, 26; DAFS Br. at 34)

To be sure, Section 1825-B(7) does indeed use the phrase "conformity with the specifications." However, the "specifications" to which § 1825-B(7) refers are the specifications in the RFP *for the services to be supplied*—not specifications in the RFP about how many other projects to list or where to list them or in what order.[2] That's because the whole point of the RFP is to obtain the highest quality services at the best price. That's accomplished when the RFP specifies as best as it can exactly what types of services the State wants and how the State wants or needs them supplied. When price is not a factor, the quality of the services is all that matters, which logically includes whether the bidder has the organizational qualifications and experience to supply those services.[3]

Thus, contrary to the Appellees, § 1825-B(7) is not a license for DHHS to reject a bidder (a) who scores highest in its proposed services to be supplied when those services conform to the specification *for those services* in the RFP, and (b),

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[2] DAFS Br. at 34 especially confuses this by trying to read into § 1825-B(7) the concept of "conformance to the specifications *of the solicitation*," rather than what § 1825-B(7) plainly means, which is conformance to the specifications *for the services contained in the solicitation*.

[3] The disparity is palpable that whereas ModivCare's overt failure to conform to the requirements of Section II of the RFP by not providing settlement amounts still yielded a *perfect* score for ModivCare in Section II (Blue Br. 20-21), WCAP's alleged failure to provide more than one example in Appendix D was by itself *fatal* to WCAP's bid. The double standard is undeniable, unjustifiable, and was an abuse of discretion.

who also shows the organizational qualifications and experience to deliver those services—much less is § 1825-B(7) a license for DHHS to reject that bidder for the sole reason that the bidder did not "conform to specifications" in the RFP that have nothing to do with that bidder's ability to supply the services.[4]

If, for the taste of DHHS, WCAP provided less commentary in Appendix D on its work for MDOT or OCFS than DHHS desired, or wrongly placed that commentary, it is incumbent upon DHHS on remand to apply its agency expertise by explaining how the evaluators rationally inferred from that that WCAP's quality of Services would be inferior to ModivCare, or how they rationally inferred that WCAP's relevant organizational qualifications and experience is inferior to ModivCare's for purposes of Region 5.

V. Appellees' explanation of the scoring methodology makes no sense.

DHHS Br. at 30-31 and ModivCare's Br. at 8-9 try to make sense of how the evaluators awarded 18 points to WCAP in Section II. (App. 118) They say, citing Mr. Bondeson's testimony, that the method was to start at a "mid-point" or "baseline" score in the middle of the range of the total allowable points for each section, and then add or deduct points based on whether the bidder submitted more

[4] To the extent DAFS believes that Chapter 110 provides that license via DAFS' rulemaking authority, DAFS is wrong. That's because Chapter 110, like any other regulation, always yields to contrary legislative intent gleaned from the plain meaning of a statute. *National Industrial Constructors, Inc. v. Superintendent of Ins.*, 655 A.2d 342, 345 (Me. 1995).

or less than the baseline requirements. (DHHS Br. at 30-31; ModivCare Br. at 8-9) If this is how they did it, then wouldn't WCAP have scored less than 18 points? Specifically, Section II allowed for a maximum of 25 points. The "mid-point" would have been 12.5 points. The undisputed testimony is that either because WCAP didn't give enough information and/or it was wrongly placed, they had to *deduct* points for that. (CR 235, 239-240, 250) As Mr. Bondeson put it:

> 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 (emphasis added)) No one said they awarded extra points to WCAP for exceeding the baseline. Hence, according to the Appellees' explanation of the scoring methodology, WCAP would have scored something less than 12.5 points because the evaluators would have deducted points from the mid-point for WCAP's alleged failure to provide three-examples. The evidence is thus clear and convincing that no one has the slightest idea why they gave WCAP 18 points for lack of information in Appendix D or having it in the wrong place—especially when no one can articulate how such allegedly missing or wrongly placed information impacts WCAP's organizational qualifications and experience to supply NET Services in Region 5.

The arbitrariness and capriciousness of the scoring is also seen from the fact that giving three examples were only *one of seven* distinct requirements in Section

II. (App. 95-96) One might think that the evaluators would have assigned approximately 3.57 points per each of these seven requirements—so that if the bidder satisfied all seven requirements, the bidder would get 3.57 multiplied by 7 points, which equals 25 points. And everyone agrees that WCAP provided at least one good example in Appendix D. So, unless the "three-example requirement" was *inordinately* important compared to, e.g., financial viability, insurance, and bonding, WCAP should have gotten full Section II points for satisfying six of these requirements, and one-third of the points available for having three examples. If each of these seven were equally important, then WCAP should have been awarded 3.57 multiplied by 6, which is 21.42 points, plus another 1.19 points for having one example, which is 22.62 points—and this still gives WCAP no credit at all for including MidCoast Public Transportation, MDOT's Region 5 Federal Transit Authority, as a project example, albeit not in a box at the end.

VI. The "use the boxes or you will lose the bid requirement" is not in the RFP. DHHS's Brief at 28 quotes from Part IV of the RFP trying to show that WCAP should have been on notice that it was required to put the information in the two boxes at the end of Appendix D. The attempt fails. The only thing this quoted material says is that WCAP had to follow "the outline used below" in Section II, ¶¶1-7, with Attachments 1-7 included in numerical order as part of its File 2 submission, all as specified in Part IV, Section II, ¶¶ 1-7 (App. 95-96). This

repeats what the RFP says in Part III, Section C(3)(f), namely, File 2 must contain Appendix D, Appendix E (if applicable), and all "required information and attachments stated in PART IV, Section II." (App. 94) Part IV, Section II, only says that bidders must include three examples of projects, but says nothing about where or in what order those examples must be provided (other than in Appendix D). (App. 95) WCAP complied by submitting its File 2, beginning with an Appendix D (with more than three examples), followed, in order, by Appendix E, an organizational chart, list of current and closed litigation, three most recent years of Financial Statements, payment and performance bond information, and a certificate of insurance. (App. 95-96) The fact that WCAP didn't put its examples of other work in two boxes at the end of Appendix D doesn't show WCAP failed to provide those examples—this is especially so because the Team Consensus Evaluation Notes (App. 130, 132), Individual Evaluation Notes (CR 1781, 1763) and testimony (CR 251), all conclusively show that the panelists saw that WCAP supplied significant transportation services to MDOT, OCFS, and others, too.

VII. DHHS's interpretation of the RFP is Kafkaesque. DHHS Br. at 34 makes an astonishing assertion: "The Evaluation Team *could not* consider WCAP's experience in Region 5 as compared to other bidders" (emphasis added). This is utterly Kafkaesque. If the Team could not consider that, then what on earth were they doing? What the RFP actually says is that the Team "will judge the

merits of the proposals received in accordance with the criteria defined in the RFP" and the goals are to "ensure fairness and objectivity . . . and to ensure that the contract is awarded to the Bidder whose proposal provides the best value to the State of Maine." (App. 98) This is not an admonition for the Team to check its common sense at the door and ignore plain and relevant facts, such as the fact that WCAP is more experienced than ModivCare in Region 5.

Appellees make a straw-man argument when they say WCAP thinks it should win because it is the incumbent. Of course not. However, it is perfectly sensible in competitive bidding—and certainly intended by § 1825-B(7)—to consider that an incumbent bidder has a very long and good track record. The Legislature could not have intended for DHHS not to consider that important fact. The important other considerations in this situation are that the incumbent bidder, WCAP, scored highest among the bidders in Section III, Proposed Services, received all 25 points in Section IV, was plainly as experienced as ModivCare in Region 5, and satisfied all the other requirements of Section II (i.e., Appendix E; organizational chart; litigation; financial viability; payment and performance bonds, and certificate of insurance). (App. 96) The only reason WCAP lost was because WCAP wrote about its work as MDOT's designated Federal Transit Authority in Region 5, and its work for other agencies of the State, outside the two boxes at the end of Appendix D. If this is what the Court believes the Legislature

intended by § 1825-B(7), then it seems likely that WCAP will not prevail in this appeal.

VIII. WCAP wants the Court to determine Legislative intent from the plain wording of a statute, not substitute its judgment for that of an agency in an area of agency expertise. The proper disposition of this appeal boils down to a familiar question for the Court: What did the Legislature intend by a statute, in this case § 1825-B(7), and did DHHS and DAFS act in accordance with the intent of the statute? For all the reasons above, and in its Blue Br., WCAP believes the award to ModivCare was very probably—i.e., by clear and convincing evidence—not made to the best-value bidder for the State of Maine based on the quality of the NET Services to be supplied as intended by § 1825-B(7). The Court should therefore invalidate the award to ModivCare and remand for DHHS to award Region 5 to the best-value bidder as intended by § 1825-B(7).

Respectfully submitted,

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

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

Attorneys for Waldo Community Action Partners