STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Court Docket No. BCD-25-275

Penquis C.A.P., Inc.

Petitioner-Appellant

v.

Department of Health and Human Services, et al.

Respondents-Appellees

On Appeal from the Business and Consumer Court
Docket No. BCD-APP-2024-0008

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 Regions 2, 3, 4, and 8 for the State's Office of MaineCare Services. Appendix ("App.") 139-41, 145. Disappointed bidder Penquis C.A.P. ("Penquis") came in third and fourth place for each of these bids, scoring at least 20 points lower than ModivCare. *Id*. The review committee found Penquis's bid proposals "difficult to review" because Penquis failed to follow the outline the RFP mandated, and Penquis's proposals missed numerous RFP requirements – which Penquis does not dispute.

Instead, Penquis seeks a do-over of the RFP process because 1) it was allegedly denied a fair appeal hearing, and 2) the scoring of the bid proposals was allegedly arbitrary and capricious, unlawful, or fundamentally unfair in various ways. Neither of Penquis's bases for overturning the contract awards has merit. First, while Penquis argues in the abstract that a bid protester has a right to full discovery before an administrative hearing, it fails to explain how it was prejudiced here, where it received tens of thousands of pages before the hearing and examined witnesses across three days of testimony. Second, Penquis's attempt to overturn the State's careful, fair RFP process also fails. The administrative hearing panel correctly concluded that Penquis failed to carry its burden of proving by clear and

convincing evidence that there was no competent evidence in the record to support the awards to ModivCare, or that the RFP process was unfair or contrary to law. None of Penquis's arguments compel invalidating the awards. DAFS's decision validating the contract awards to ModivCare should be affirmed, and this appeal finally resolved.

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. 67. The RFP contemplated the award of eight contracts, one for each of eight regions in Maine. App. 75. NET brokerage services are currently provided by incumbent brokers ModivCare (Regions 1, 2, 6, 7, and 8), Penquis (Regions 3 and 4), and Waldo Community Action Partners ("WCAP") (Region 5). Each of these incumbent brokers has 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. 118, 131. 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. 118 (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. Certified Record ("CR") 805 (DHHS Award Justification Statement). Each proposal was hundreds of pages long; the combined submissions exceeded 19,000 pages. *See* CR 2231-21299. Penquis submitted proposals for Regions 3 and 4, in which it is the incumbent broker, and for Regions 2 and 8, which Penquis hoped to take over from ModivCare. CR 805.

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.* The scoring committee conducted an initial review of the proposals for eligibility and disqualified proposals by bidder

WellTrans, Inc. CR 344-45, App. 138-45. The scoring committee members reviewed each remaining proposal individually and kept individual notes on a template form. *E.g.*, CR 115-17, 438-39, 462-63, 1163-2226. The committee members each spent several hours reviewing each proposal, although some proposals for bidders who submitted multiple bids took less time due to repetition. *E.g.*, CR 115-16, 394, 463.

After individual review, the scoring committee held consensus meetings where each proposal was discussed and scored. CR 117. The scoring committee held 10 to 12 consensus meetings, each 4 to 5 hours long on average, during which they spent "hours" per proposal. CR 119-20, 393-94, 440. The consensus scoring discussions for Penquis's bid proposals took place over four days between August 2 and August 11, 2023. App. 177, 219, 261, 303.

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. 53, 118

(RFP scoring rubric), 139-41, 145 (score sheets for Regions 2, 3, 4, and 8). No member of the evaluation committee dominated the scoring discussions; any member proposed initial scores to begin discussions. CR 465. Disagreements were resolved through discussion and a review of the proposals against the requirements of the RFP. CR 117, 242-43, 259, 432-33, 480.

Consistent with the RFP's instruction that the Department "will consider . . . internal Departmental information of previous contract history with the Bidder (if any)," Mr. Bondeson, as manager of the NET brokerage program, shared with the scoring committee that the Department had a positive work history with each of the incumbent brokers. CR 348; App. 74. This information is reflected in consensus notes for each of the incumbent bidders' proposals. *E.g.*, App. 167 (ModivCare), 179 (Penquis); CR 1011 (WCAP). 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. CR 141-42, 178, 348-49.

The scoring committee awarded the highest score – 95 points – to ModivCare in Regions 2, 3, 4, and 8. App. 139-41, 145. MTM, another bidder that provides NET brokerage services nationwide, received the second-highest scores in each of these regions, with 90 points. *Id*. Penquis received the third-highest scores in Regions 2, 3, and 4, with 75 points, and the fourth-highest score in Region 8, with 73 points. *Id*.

For each Region for which both bid, Penquis and ModivCare each received full points –25 out of an available 25 points – on Section II of the RFP, for "Organization Qualifications and Experience," but Penquis scored at least twenty points lower than ModivCare on Section III, "Proposed Services." *Id*. The consensus notes for Section III of each of Penquis's proposals states: "Per PART IV, Proposal Submission Requirements, the Bidder did not follow the outline of the RFP including the numbering, section, and sub-section headings making their submission difficult to review." App. 180, 222, 264, 306. The consensus notes identify at least nine sections in each of Penquis's proposals that did not satisfy the RFP requirements for Section III. App. 180-84, 222-26, 264-68, 306-10. The committee gave Penquis credit for RFP requirements where they were able to identify the missing information in other sections of Penquis's proposals but doing so was "extremely difficult." CR 147-48. The committee had the right to disqualify Penquis's proposal for not following the sequence of the requirements laid out in the RFP, but chose not to. CR 147; *see also* App. 115 (From the RFP: "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.").

The Office of MaineCare Services informed bidders on October 5, 2023, that ModivCare was selected as the winning bidder for all 8 transportation regions. App. 42.

II. Penquis received thousands of pages of documents through FOAA requests before the hearing.

Penquis timely appealed the contract awards to DAFS. CR 21758. In the following months, Penquis filed multiple document requests under Maine's Freedom of Access Act ("FOAA") with DHHS and the Department of Administrative and Financial Services ("DAFS"), seeking ten years' of records about ModivCare's performance as NET broker, communications between DHHS and ModivCare about ModivCare's brokerage of vaccination rides for non-MaineCare Members in 2021, and other documents. CR 23201-9. Penquis then sought and obtained a continuance of the administrative hearing to permit DHHS to complete its productions under FOAA before the hearing. *E.g.*, CR 21901-2. After the hearing officer denied another continuance request, Penquis filed suit in the Superior Court to enjoin the administrative hearing until it received the remaining documents it sought through FOAA and to resolve its disputes with DHHS about redactions on certain documents. CR 22515-16, 22518-55. Justice Lipez denied Penquis's motion for a temporary restraining, but the motion practice further delayed the administrative hearing to March 20, 2024 – five months after

Penquis filed its request for appeal, and over seven months after the reviewers scored Penquis's bid proposals. CR 22565.

By this time, Penquis had obtained tens of thousands of pages pursuant to its FOAA requests, including all the bid proposals and the scoring committee's records from the review process, ten years of unredacted reports showing ModivCare's aggregate performance metrics for each region it serves, and thousands of emails and other documents relating to ModivCare's performance as NET broker. Penquis included all of these documents on its exhibit list for the hearing. CR 22580-81.

III. DAFS and the Business and Consumer Court validated the awards to ModivCare.

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. 56. The hearing panel rejected Penquis's argument that the scoring was arbitrary, unlawful, or fundamentally unfair. Based on the hearing panel's findings, DAFS affirmed the contract awards to ModivCare. App. 44.

Penquis appealed DAFS' decision to the Superior Court under Maine Rule of Civil Procedure 80C, and the case was transferred to the Business and Consumer Docket. App. 23. Thereafter, DHHS completed its production of documents in response to Penquis's FOAA requests. All of those documents were

added to the certified record for the Rule 80C appeal at Penquis's request. CR 24932-39944. Penquis moved under Rule 80C(e) and (j) and 5 M.R.S.A. § 11006 for unredacted versions of certain documents in the FOAA productions, and for an evidentiary hearing on those documents. The Court denied the motion. App. 22. The Court thereafter upheld the contract awards to ModivCare. App. 8-21. This appeal followed.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Did Penquis receive a "full and fair hearing" regarding its challenge to the State's contract awards to ModivCare where it received all the documents that the review committee relied on in scoring the bid proposals and thousands of additional pages requested through FOAA before the hearing and was able to examine witnesses and present evidence over the course of a three-day hearing?

Did DHHS conduct a fair and lawful RFP review process where the reviewers read every bid proposal, reviewed each proposal against the requirements of the RFP, documented where each proposal did or did not meet RFP requirements, reached consensus on the scoring of each proposal consistent with the State's "best practices," and applied the same review and scoring methodology to each bid proposal?

Did the appeal panel correctly conclude that Penquis failed to meet its burden of proving by clear and convincing evidence that the review committee unfairly favored ModivCare?

ARGUMENT

I. Standard of review applicable to all arguments.

DAFS' decision validating the contract awards 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. 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). Penquis has a high burden to overturn the hearing panel's findings: this Court may vacate the factual findings "only if there is no competent evidence in the record to support the findings." *Id.* (citation omitted).

Under DAFS's rules for appeals of contract awards, the hearing panel was tasked with determining whether Penquis 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. 64-66 (18-554 C.M.R. ch. 120, §§ 3(2), 4(1)). The "clear and convincing" standard required Penquis 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 Penquis did not meet its burden of proof, and DAFS therefore validated the awards to ModivCare.

The Court below could 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 found the decision 1) in violation of constitutional or statutory provisions; 2) in excess of the agency's statutory authority; 3) made upon unlawful procedure; 4) affected by bias or error of law; 5) unsupported by substantial evidence on the whole record; or 6) or arbitrary or capricious or characterized by abuse of discretion. 5 M.R.S.A. § 11007(4). The Court affirmed the agency's decision validating the contract awards to ModivCare. This Court should affirm the lower court's decision.

II. Penquis was afforded a "full and fair hearing."

Penquis claims that various statutes provide bid protesters the right to present whatever evidence they want in support of their contract award challenges, and a curtailment of that right results in an unfair hearing. Br. 14-20. Penquis

claims that the administrative hearing in this case was unfair because it did not receive a complete, unredacted, production of documents in response to its expansive FOAA requests before the hearing. *Id*. at 17. That is not how public procurement works. Penquis's version of the appeals process would give any disappointed bidder a means to effectively hold the State hostage by filing successive, voluminous FOAA requests, as Penquis did here, and would make it nearly impossible for the State to purchase anything more complicated than paper and pencils.

Penquis does not, and cannot, claim a due process right in any particular procedures in connection with its protest, as this Court has held that bidders like Penquis lack a property interest in a contract award to support either a procedural or substantive due process claim. *See Carroll F. Look Construction Co. v. Town of Beals*, 2002 ME 128, ¶ 16, 802 A.2d 994, 999. Regardless, "in the administrative arena procedure can be adjusted to reflect the competing interests involved and the context of the hearing." *Fichter v. Bd. of Envtl. Prot*., 604 A.2d 433, 437 (Me. 1992) (citing *Goss v. Lopez*, 419 U.S. 565 (1975)). The Legislature, and DAFS through rulemaking, have crafted an appeal hearing process that adequately balances a bid protester's interest in being heard on contracting decisions with the agencies' need to conduct procurements in a timely and efficient manner for the

public good. Penquis fully availed itself of this process. Nothing more was required.

A. The governing laws and rules do not give a bid protester an unfettered right to present any evidence it wishes at an appeal hearing.

Penquis finds no support for its position in the governing statutes or DAFS's procurement rules. Penquis quotes 5 M.R.S.A. § 1825-E(3), which states in part that the appeal committee shall meet "at the appointed time and place in the presence of the petitioner and such individuals as the petitioner determines necessary for a full and fair hearing" and the "petitioner may present to the appeal committee any materials the petitioner considers relevant to the appeal." Br. at 14. Penquis contends that this provision gives bid protesters an unlimited right to present evidence, and a corollary right to access any and all documents they deem relevant before the hearing. *Id*. 14-15. To the contrary, and as one would expect, the governing laws and rules limit a bid protester's rights in significant ways.

1. The procurement laws and rules balance the State's procurement needs with a bid protester's interest in being heard.

Penquis appears to concede that the governing laws and regulations contradict, or at least fail to support, its position. First, as Penquis concedes, neither the procurement laws nor DAFS's regulations provide for discovery in connection with a procurement appeal. Br. at 16-17; *see also* 5 M.R.S.A. §§ 1825-A *et seq*. (State laws governing competitive bidding), 18-554 CMR ch. 120 (DAFS

rules governing procurement appeals). The only documents Penquis was entitled by law to review before the hearing were the bid proposals and other "written records utilized in the award process," such as the reviewers' notes and score sheets. *W. Maine Ctr. for Children v. Dep't of Human Services*, No. Civ.A. AP-03-02, 2003 WL 23576268, at *11-12 (Me. Super. June 6, 2003) (holding that an agency was required to make the "written records . . . kept by each person directly reviewing or ranking bids" available for use in a subsequent bid protest); *see also* 5 M.R.S.A. § 1825-B(6) ("Each bid, with the name of the bidder, must be entered on a record. Each record, with the successful bid indicated, must be open to public inspection after the letting of the contract or grant."). Penquis received these documents before the hearing.

Second, Penquis recognizes that the agency controls the timing of the hearing. Br. at 16-17. The timing of the agency hearing and presentation of evidence is subject to the presiding hearing officer's discretion to control the conduct of the hearing. "The presiding officer shall control all aspects of the hearing, rule on points of order, rule on all objections and may question witnesses." App. 64 (18-554 C.M.R. ch. 120, § 3(1)). The procurement rules likewise permit the presiding hearing officer to "exclude irrelevant or unduly repetitious evidence" and evidence that does not "specifically address" one of the appeal criteria. *Id*. at 64-65 (18-554 C.M.R. ch. 120, §§ 3(2), 3(8)).

Third, Penquis admits that neither the FOAA statute, 1 M.R.S.A. § 400, *et seq*., nor the procurement laws contain any time limits for the State's completion of a FOAA production, nor require the State to fully respond to a FOAA request by a bid protester before an administrative hearing. Br. at 17. To the contrary, Maine Rule of Civil Procedure 80C(e) and the Administrative Procedure Act, 5 M.R.S.A. § 11006, contemplate that a bid protester might receive material evidence *after* the agency renders a decision, including through the completion of a FOAA request. On an appeal from a final agency action, section 11006 and Rule 80C(e) permit an appellant to petition the Superior Court to remand to the agency for consideration of additional evidence if "it is shown that the additional evidence is material to the issues presented in the review, and could not have been presented or was erroneously disallowed in proceedings before the agency." 5 M.R.S.A. § 11006(1)(B); M. R. Civ. P. 80C(e).

These provisions create a mechanism through which the administrative record may be reopened and the agency may consider previously unavailable evidence and incorporate that evidence into its decision-making. "The Superior Court has the discretion to determine whether to take additional evidence on appeal from an agency's decision" under the APA and Rule 80C(e). *York Hosp. v. Dep't of Human Services*, 2005 ME 41, ¶ 22, 869 A.2d 729, 735; *see e.g*., *Forest Ecology Network v. Land Use Regulation Comm'n*, 2012 ME 36, ¶¶ 64-65, 39 A.3d 74, 94-

95 (Business and Consumer Court did not abuse its discretion in denying appellant's motion to develop additional evidence about a topic addressed in the agency proceedings). This framework balances the mandate that procurement appeals proceed on an expedited basis, *see* 5 M.R.S.A. § 1825-E(3) (administrative hearing is to be held within 60 days of the request for appeal), with an appellant's interest in presenting material evidence in support of its appeal. Penquis's purported right to all requested documents *before* the administrative hearing runs directly contrary to this statutory scheme.

2. Penquis's authorities in support of its position are inapposite.

Penquis's reliance on 5 M.R.S.A. § 9056(2) is misplaced. Br. at 14. Assuming this statute, which applies to "adjudicatory proceedings" conducted under the APA, applies to this bid protest, it does not expand Penquis's right to obtain or present evidence at the hearing.[1] This Court has recognized that procurement appeals are governed by the more specific State laws governing the competitive bidding process, 5 M.R.S.A. § 1825-A, *et seq.*, and agency rules promulgated thereunder. *See, e.g., Pine Tree Legal Assistance, Inc. v. Dep't of Human Services*, 655 A.2d 1260, 1263-64 (Me. 1995); *Families United of Washington Cnty. v. Comm'r, Dept. of Mental Health & Mental Retardation*, 617

[1] The Maine APA defines "adjudicatory proceeding" as "any proceeding before an agency in which the legal rights, duties or privileges of specific persons are required by constitutional law or statute to be determined after an opportunity for hearing." 5 M.R.S.A. § 8002.

A.2d 205, 206 & n.2 (Me. 1992). As explained above, these laws do not provide for discovery nor provide an unlimited right to present evidence at a procurement appeal.

Regardless, section 9056(2) does not state that a party has a right to present whatever evidence it wishes at a hearing. Penquis omits the portion of the statute that clarifies that a party has the "right to present evidence and arguments on all issues" "[u]nless limited by stipulation under section 9053, subsection 4,[2] or by agency order pursuant to section 9054, subsections 2 or 4,[3] or unless otherwise limited by the agency to prevent repetition or unreasonable delay in proceedings[.]" 5 M.R.S.A. § 9056(2); *see Lowell v. Dunlap ex rel. Bureau of Motor Vehicles*, No. Civ.A. AP–2005–01, 2005 WL 2723438, at *3-4 (Me. Super. Sept. 12, 2005) (holding that a hearing officer did not violate the APA "by limiting cross-examination to only relevant issues as exploration of [other] issues would unreasonably delay the proceedings"). The following section explains that in an adjudicatory proceeding, "[a]gencies may exclude irrelevant or unduly repetitious evidence." 5 M.R.S.A. § 9057(2).

[2] Providing that "agencies may . . . Limit the issues to be heard or vary any procedure prescribed by agency rule or this subchapter if the parties and the agency agree to such limitation or variation, or if no prejudice to any party will result." 5 M.R.S.A. § 9053(4).

[3] Providing that agencies may permit intervention by interested parties in full or limited capacities, and may "require consolidation of presentations of evidence and argument by members of a class entitled to intervene[.]" 5 M.R.S.A. §§ 9054(2), (4).

Penquis mischaracterizes *Pozzi, LLC v. Maine Bureau of Alcoholic Beverages*, No. BCD-APP-2023- 00003, 2024 WL 673158 (Me. B.C.D. Feb. 05, 2024). *Pozzi* does not stand for the proposition that "[a] governmental agency's failure to make documents that it relied on *or should have relied on* available to the parties appealing a decision prior to the hearing 'runs afoul of the APA's requirements, constitutes legal error, and offends due process," as Penquis contends. Br. at 19 n.7 (emphasis added). The *Pozzi* Court held that the Bureau of Alcoholic Beverages and Lottery Operations failed to make an inspection report available to a license applicant before it was received into evidence at a hearing as required by 5 M.R.S.A. § 9059(5), which was an error of law that required remand to the agency for a new hearing. The *Pozzi* court said nothing about evidence that an agency purportedly "should have relied on" but didn't. And here, no evidence was admitted at the hearing that was not previously made available to Penquis. Penquis complains instead that certain evidence was neither admitted at the hearing nor considered by the hearing panel – a scenario not before the court in *Pozzi*.

The State must be able to purchase goods and services. The governing laws and rules do not subordinate the State's procurement needs to a disappointed bidder's desire to obtain unlimited discovery for use in a bid protest hearing.

B. Penquis was not unfairly deprived of evidence or an opportunity to argue its case at the hearing.

As far as a party has a right to present relevant evidence at a bid protest hearing, Penquis does not demonstrate that its right was violated here. Penquis received tens of thousands of pages of documents before the hearing. Penquis also availed itself of multiple procedural mechanisms to obtain documents in pursuit of its bid appeal before the hearing. Penquis made its case to the hearing officer to postpone the administrative hearing while DHHS completed its FOAA production, and the hearing officer received written statements and heard argument on the request. CR 22515-16. Penquis filed a separate lawsuit to enjoin the hearing pending completion of the FOAA production, and a hearing was held on Penquis's request for a temporary restraining order. CR 22557, 22559-61. After DHHS completed its FOAA production, Penquis filed a motion in the Business and Consumer Court under Rule 80C(e) for an evidentiary hearing, and for production of unredacted versions of certain documents, and the Court held oral argument on that motion. App. 22. Penquis had ample opportunities to be heard on this issue.

Penquis never satisfactorily explained why it needed the FOAA documents (or unredacted versions of any documents) to challenge the contract awards. The record is clear that the scoring committee did not review any reports, emails, or other documentary evidence pertaining to ModivCare's performance as an incumbent broker in connection with scoring the bid proposals. CR 141-42, 178.

Penquis's only articulated need for the documents produced after the hearing (or for unredacted versions of documents) is to be able to challenge Roger Bondeson's good opinion of ModivCare through a comprehensive 10-year audit of ModivCare's past performance. *See* Br. at 19 ("To understand whether Roger Bondeson's oral summaries of, in his words, the 'totality' of past performance were an accurate reflection of reality, Penquis's only option was to review the records that memorialized each incumbent bidder's past performance and if necessary, to then question Roger Bondeson about the records and complaints."). But this Court has explained that the court may not substitute its judgment for the agency "where there may be a reasonable difference of opinion." *Carl L. Cutler Co., Inc. v. State Purchasing Agent*, 472 A.2d 913, 916 (Me. 1984). The agency's decision must be upheld "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. And the appeal process is not an opportunity for an aggrieved bidder to try to change the reviewers' minds about their scoring.

Regardless, Penquis was able to, and did, confront Mr. Bondeson with evidence purportedly demonstrating ModivCare performance issues. Penquis had aggregate reports –with no redactions – containing ModivCare's missed or late trips, call center metrics, and other metrics that ModivCare was required to report to the State. These reports date back to 2015, for every region that ModivCare

serves. Penquis also had examples of rider complaints against ModivCare received in response to its FOAA requests. Penquis included all of these documents in its proposed hearing exhibits. *See, e.g.*, CR 22580 (Penquis's Exhibit List, designating DHHS's FOAA responses as exhibits P-1 through P-7); CR 23236-24931 (Penquis's unadmitted proposed exhibits).

Penquis introduced documents from this trove of records at the hearing to show that ModivCare's performance was less than perfect. CR 21701-06. A substantial portion of the three-day hearing was devoted to ModivCare's purported performance issues, its alleged failure to comply with contractual reporting requirements, and of complaints made about ModivCare's services. Penquis examined Roger Bondeson extensively about his assessment of ModivCare's performance. Approximately three pages of Penquis's closing argument addressed the scoring committee's consideration of ModivCare's past performance. CR 689-692; *see, e.g.*, CR 692 ("The reviewers' decision to ignore the negative prior performance of ModivCare was arbitrary and capricious."). The hearing panel summarized the evidence and testimony on this issue: "Both PENQUIS and MODIV have also been put under corrective action plans for various issues with performance in past years under their current contracts. These plans called for actions and reporting. Testimony around the quality and completeness of MODIV's reporting was raised but the incomplete data was considered not significant by

DHHS witnesses." App. 51. The issue was fully investigated at the hearing. Penquis does not explain how any additional evidence on the same topic would have made any difference.

III. Penquis did not carry its burden of persuading the hearing panel that the RFP process was arbitrary and capricious, unfair, or unsupported by substantial evidence.

Upon reviewing "the testimony and evidence in its totality," the hearing panel "was not clearly convinced that the scoring" of Penquis's bid proposal "was arbitrary or capricious," that "the law was violated," or that the scoring process was tainted by "irregularities that created a fundamental unfairness." App. 53-55. 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 Penquis provided clear and convincing evidence that the scoring committee's scoring was unlawful, arbitrary or capricious, or fundamentally unfair. 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). Penquis has not demonstrated a basis for overturning the hearing panel's conclusions.

A. Penquis did not prove that purported irregularities in the individual reviewer notes affected the scoring of the bid proposals.

Penquis did not establish that the individual review process rendered the scoring of any bid proposals fundamentally unfair, arbitrary or capricious, or contrary to law. The reviewers reviewed each bid proposal individually before the consensus meetings where the proposals were scored and took notes in connection with their review. Penquis argues that, because some of the reviewers missed nuances in the proposals during their individual reviews, or because they cut and pasted portions of their individual review notes across proposals, that the scoring of the proposals was also flawed. *See, e.g*., Br. at 36-39.

The individual reviewer notes are irrelevant to the scoring, and Penquis's arguments fail to the extent they rely on the content of those notes. State law requires that administrative rules governing the competitive bid review process "includ[e] the requirement that written records be kept by each person directly reviewing or ranking bids[.]" 5 M.R.S.A. § 1825-D(2); *see also* App. 60 (18-544 CMR ch. 110, § 3(A)(iii) (incorporating such a rule)). This record-keeping requirement was met here: each reviewer completed individual reviewer notes for each bid proposal. *See* CR 1163-2226. Neither State law nor the administrative rules prescribe the substantive content of those notes; they require only that these records "be kept."

A reviewer testified that they used the individual notes to highlight points for the consensus discussions, but they played no role in the scoring of any bid proposal.[4] CR 346-47. Penquis did not provide clear and convincing evidence that the scores were arbitrary and capricious, or that the review process was fundamentally unfair, because of any individual reviewer's individual review or notetaking. Ms. Simpson agreed that, perhaps, she could have done a better job reviewing the proposals before the consensus meetings, but she did, in fact, review each of them (as did all the committee members), and she participated in the consensus meetings where the proposals were reviewed, discussed, and scored by consensus. CR 115, 425- 26, 432-33, 438-39, 462, 480, 483.

Penquis does not demonstrate that any deficiencies or inconsistencies in the individual reviewer notes carried over to the scoring of any proposals. The reviewers testified that during the consensus meetings they reviewed and scored each proposal, section by section, by comparing the proposals against the requirements of the RFP. The reviewers collectively agreed to the scoring of each proposal and the content of the consensus notes. CR 117, 242-43, 259, 432-33,

[4] This approach was consistent with the State Guidelines, which advise that "individual notes should highlight significant points in the proposals (for example, strengths/weaknesses) and note any questions they would like to discuss in the evaluation team meeting(s). The evaluators are **not** to score the proposals in their individual notes, as the scoring is done in the consensus/group setting." CR 21538 (emphasis in original).

439, 465. The hearing panel concluded: "[t]he records kept by DHHS during the consensus scoring process were approximately 5 pages in length and ranged from short phrases to detailed paragraphs associated with specific responses to the RFP requirements. When discussing the proposals during the consensus scoring process, proposals were brought up on screen to review, confirm or correct errors or omissions between individual evaluator notes." App. 50-51; *accord, e.g.*, CR 117, 242-43, 259, 432-33, 439.

The hearing panel correctly concluded that Penquis failed to clearly demonstrate any flaw in the actual scoring of the proposals, notwithstanding imperfections in the individual reviewer notes. App. 54. The hearing panel concluded: "The consensus review process was where scores were assigned, and the Panel is not convinced this was irregular." *Id*. Any irregularity in the individual reviews did not render the process fundamentally unfair because it was superseded by the reviewers' thorough consensus review and scoring process. *Pine Tree Legal Assistance, Inc.*, 655 A.2d at 1264. Substantial evidence supports the hearing panel's conclusion.

B. The consensus notes contain adequate substantive information that supports the scoring of the bid proposals.

The procurement rules require that the "agency shall document the scoring," and "substantive information that supports the scoring[.]" App. 60 (18-544 CMR ch. 110 § 3(A)). Here, the consensus notes contain "substantive information that

supports the scoring" of a proposal. The reviewers gathered together and reviewed each proposal, section by section, against the requirements of the RFP, and came to a consensus score. The consensus notes were taken during these consensus scoring meetings to reflect the basis for the score. App. 146-325. They denote where the reviewers concluded that a proposal met or did not meet requirements, and they summarized aspects of the bid proposal that contributed to the scoring decision. *Id.* For instance, the consensus notes state with respect to each of Penquis's proposals, "Per PART IV, Proposal Submission Requirements, the Bidder did not follow the outline of the RFP including the numbering, section, and sub-section headings making their submission difficult to review." App. 180, 222, 264, 306. The consensus notes identify at least nine sections in each of Penquis's proposals that did not satisfy the RFP requirements for Section III. App. 180-84, 222-26, 264-68, 306-10. With respect to Penquis's bid for Region 8, the consensus notes identify additional deficiencies in Penquis's Section III submission, which corresponded to a lower score for that Region compared to Penquis's other bids, demonstrating the committee's careful attention to the RFP criteria and to scoring.[5]

[5] *Compare, e.g.*, App. 308 (consensus notes for Penquis's Region 8 proposal, noting with respect to Section III, Part G, subsections 10 and 11, that Penquis did not address the requirements that the bidder identify a central business office or call center in the region) *with* App. 182 (consensus notes for Penquis's Region 2 proposal, omitting the deficiencies noted in the Region 8 proposal); App. 139-41, 145 (score sheets showing that Penquis received a lower Section III score for Region 8 as compared to its other regional bids). Notably, Penquis does not argue,

DHHS created master score sheets reflecting the scoring rubric and the scores each proposal earned and prepared an Award Justification Statement summarizing the scoring committee's conclusions. App. 138-45; CR 805. 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. 53. This is all that the procurement laws require. *See* App. 60, 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").

C. The scoring methodology was not unlawful, arbitrary and capricious, or unfair.

As Penquis concedes, Br. at 26, the scoring methodology 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

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much less point to clear and convincing evidence, that its third- and fourth-place scores were wrong.

> 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.

Penquis argues that the scoring was arbitrary and capricious because the Reviewers did not record in the consensus notes how many points they deducted for any particular RFP criteria, and reviewers at the hearing could not remember precisely what midpoint number they used or what numerical score they attributed to any RFP criteria. Br. at 27-29. 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. As the hearing panel acknowledged, the scoring followed the RFP's scoring rubric. App. 53. Within that rubric, the reviewers were free to determine how to allocate points. *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 and would be "inconsistent with the search for consensus"). As noted above, the reviewers identified in the consensus notes the factors that contributed to their scoring, such as Penquis's many missed RFP criteria. Penquis failed to provide clear and convincing evidence that the scoring methodology was flawed, unlawful, or inconsistently applied.

D. Penquis did not clearly demonstrate "disparate treatment" amongst bidders.

Penquis had the burden to convince the appeal panel, through clear and convincing evidence, that the scoring of the bid proposals was arbitrary and capricious or unfair. Here, Penquis points to examples of alleged "disparate treatment" that purportedly show that the scoring committee applied its scoring methodology differently between bidders or granted ModivCare an unfair advantage. Br. at 30. The appeal panel "was not clearly convinced" by Penquis's arguments, and Penquis fails to demonstrate that this conclusion was error. App. 55.

First, Penquis makes much of the fact that the consensus notes for ModivCare's bid proposals reference, with regard to Section II of the RFP, ModivCare's provision of COVID-19 vaccination rides to non-MaineCare Members during the pandemic. Penquis suggests that DHHS showed favoritism by giving ModivCare – but not the other incumbent brokers – the opportunity to

participate in this program, and then considering the program a plus factor in ModivCare's bid proposals unavailable to the other bidders. *E.g*. Br. at 30-32. The hearing panel correctly concluded that Penquis's complaint about the COVID-19 vaccination program was irrelevant because a) both Penquis and ModivCare received the same score for section II of the RFP (25 out of 25 points), and b) there was no evidence that ModivCare received an improper advantage because of this program. App. 51-52. Substantial evidence supports the hearing panel's conclusion.

Mr. Bondeson testified that ModivCare offered to provide rides for non-MaineCare Members to vaccination clinics during the COVID-19 pandemic. CR 210. DHHS and ModivCare entered into an agreement for ModivCare to provide vaccine trip brokerage services in 2021. CR 210, 21301. ModivCare referenced its brokerage of COVID-19 vaccination rides for non-MaineCare Members in the narrative portion of Section II, Appendix D, along with other examples of relevant NET brokerage experience and investments in its communities. *E.g*., CR 11090-98. Section II measured the bidder's "qualifications and experience," and Appendix D invited bidders to provide "a brief statement of qualifications, including any applicable licensure and/or certification," the "history of the Bidder's organization," and "any special or unique characteristics of the organization which would make it especially qualified to perform the required

work activities." CR 11090. Mr. Bondeson explained that bidders typically use this portion of the RFP to highlight their various community support and charitable efforts that are outside the scope of the RFP requirements, and ModivCare's vaccination rides were appropriately included in that vein. CR 217-18, 247.

ModivCare's provision of COVID-19 transportation was no more of an "unfair advantage" than Penquis's provision of "DHHS Child Welfare transportation since 1984" – a plus factor noted in Penquis's Section II consensus notes – or any other unique or "special" programs that bidders listed in this portion of their bid proposals and which the reviewers referenced positively in the consensus notes. *See, e.g.*, App. 179. The hearing panel correctly held that Penquis presented no evidence that DHHS had treated the bidders unfairly, either in working with ModivCare during the pandemic to increase access to vaccines, or in the scoring of the bid proposals, years later.

Penquis misleadingly argues that the scoring committee favored ModivCare because it failed to recognize Penquis's own COVID-19 vaccination program. Br. at 32. Penquis's Section II submission nowhere mentions vaccination rides. *See, e.g.*, CR 14384-92. Penquis referenced its vaccination rides about 150 pages later in its bid proposal, in Section III, part D, which addressed the treatment of "Non-Covered Transportation Services." CR 14549. That section of the RFP sought the bidder's understanding of and adherence to the rules regarding the provision of

non-covered NET services in various scenarios. CR 736. In its response for that section, Penquis gratuitously and irrelevantly commented that, "[t]hrough the pandemic, Penquis provided and continues to provide non-MaineCare transportation to COVID-19 related appointments throughout both Region 3 and Region 4." CR 14549. Penquis does not explain why it should have received any credit for its provision of COVID-19 rides when it failed to mention those rides in the RFP section where that information might have been considered in the scoring (Section II, relating to qualifications and experience), but instead buried it in a section where that information was irrelevant (Section III, relating to the scope of services to be provided under the contract). The RFP admonished bidders to follow the format of the RFP, including placing information in the correct sections. App. 115.

Regardless, as the hearing panel found, neither party's COVID-19 vaccination trips made a difference in the scoring, as both Penquis and ModivCare, as well as second-highest bidder MTM, received the maximum available points for Section II. App. 52, 139-41, 145. ModivCare's COVID-19 vaccination program could not have been the deciding factor in the contract awards.

Second, Penquis's arguments that the hearing panel ignored evidence about ModivCare's purported lack of compliance with its contractual reporting requirements likewise fail. Br. at 33-34. As a threshold issue, the hearing panel's

job was not to weigh the reviewers' findings against any contrary evidence that Penquis adduced at trial. *Ouellette*, 2022 ME 42, ¶ 20, 278 A.3d at 1191. Their job was to decide whether substantial evidence supported the reviewers' scoring. Accordingly, the reviewer's fact-findings may be overturned only if "there is no competent evidence in the record" to support it. *Id.* The existence of evidence contradicting the reviewer's conclusions is irrelevant, if there is substantial competent evidence to support them.

Penquis claims that the hearing panel "failed to address the fact that ModivCare had not complied with reporting requirements for years." Br. at 34. To the contrary, the hearing panel squarely addressed ModivCare's reporting compliance, concluding: "Both PENQUIS and MODIV have also been put under corrective action plans for various issues with performance in past years under their current contracts. These plans called for actions and reporting. Testimony around the quality and completeness of MODIV's reporting was raised but the incomplete data was considered not significant by DHHS witnesses." App. 51.

Substantial evidence supports the hearing panel's finding: The scoring committee noted in its consensus notes that ModivCare had a "positive work history in the State of Maine" across its ten years as an NET broker. *E.g.*, App. 210. ModivCare maintains a complaint-free rating of over 99 percent across more than one million trips annually for MaineCare Members, meaning that complaints

are made in less than one percent of its trips. *Id.*; CR 11092. Mr. Bondeson, who administers the NET program for DHHS, acknowledged past performance issues as part of his overall assessment of ModivCare, as well as the other two incumbent brokers (Penquis and WCAP), and based his assessment on the "totality of performance" over time. CR 232. Mr. Bondeson testified about his assessment of the three incumbent brokers' prior performance:

> So because I'm the subject matter expert . . . in working with the incumbents, basically the question was something to the effect, . . . how do you view or rate past performance? So when an incumbent proposal was being reviewed, I would – I would offer the statement, Positive work history, or Good work history, or words to that effect.
>
> I did not share reports or incidents of things that occurred in the past because, in my high-level assessment of that – that exercise, it's been my experience that every broker has had its warts, so to speak, and every broker has worked to rectify whatever deficiencies I've identified along the way. I personally just don't think there's a lot of daylight between the three [incumbent brokers] in terms of, you know, everyone's meeting the complaint metric, for example, of no more than one complaint per 100 trips. Each of them have experienced problems with missed trips over time.
>
> …
>
> I did think about reporting from the lens of, Am I getting the critical key performance indicators that I use on the dashboards? But even there, nobody had clean hands in this.
>
> . . .
>
> But again, they worked to resolve it. They did. We moved on. And so that's the lens I'm looking at it through when I'm assessing past performance. Right? Everyone's had a problem and everyone has worked to rectify it to my satisfaction.

CR 348-350. The hearing panel's discussion of ModivCare's performance accurately reflects the hearing testimony and evidence.

Penquis also claims that "previous contracts contained a provision such that failure to comply with reporting requirements was to be considered in future contract awards, and Roger Bondeson testified that he believed that the Reviewers were obligated to consider an incumbent bidder's prior performance." Br. at 33. Penquis misrepresents the contractual requirement. Penquis's brokerage contract indicates that the Department "may factor" a broker's "continued poor performance in its assessment and scoring of the next scheduled RFP" if the Broker fails to improve after a corrective action plan is instituted and also does not become compliant by a date set by the Department by formal letter. CR 21497. This language suggests that substantial, sustained performance issues are required before the Department "may factor" poor performance into an incumbent's scoring. *Id*. There is no evidence that the Department ever issued such a formal letter to ModivCare or that ModivCare failed to resolve issues identified in any corrective action plan.

Regardless, there is no question that the scoring committee considered ModivCare's performance – as well as Penquis's– in its review of the bid proposals. Penquis does not demonstrate that its consideration of the incumbents' respective performances was arbitrary and capricious. Penquis fails to establish that no competent evidence supports the hearing panel's conclusions.

CONCLUSION

DAFS's decision upholding the Region 2, 3, 4, and 8 contract awards to ModivCare should be affirmed.

Dated November 24, 2025

Respectfully submitted,

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