



JANET T. MILLS
GOVERNOR

STATE OF MAINE
BUREAU OF GENERAL SERVICES
77 STATE HOUSE STATION
AUGUSTA, MAINE 04333-0077

DEPARTMENT OF
ADMINISTRATIVE & FINANCIAL
SERVICES

KIRSTEN LC FIGUEROA
COMMISSIONER

BUREAU OF GENERAL SERVICES

WILLIAM LONGFELLOW
DIRECTOR

4/24/2024

SUBJECT: Decision of Appeal of Award – RFP# 202303047
Non-Emergency Transportation Services

To All Parties:

Enclosed please find the final decision of the appeal panel for the above-referenced appeals. The Panel validates the awards for the reasons set forth in the attached decision.

This represents final agency action in this matter and as such may be eligible for judicial review. Any person aggrieved by this decision may appeal to Maine's Superior Court in the manner provided in 5 M.R.S.A. 11001, et seq, and M.R. Civ. P. 80C. A party must file a petition for review within thirty days after receipt of notice of the decision.

Regards,

DocuSigned by:

William Longfellow

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William Longfellow, Director
Bureau of General Services

cc: Richard Thompson, Presiding Officer
David Morris, Acting Chief Procurement Officer

Phone: (207) 624-7314 TTY Relay: 711 Fax: (207) 287-4039
www.maine.gov

**MAINE DEPARTMENT OF ADMINISTRATIVE
AND FINANCIAL SERVICES
BUREAU OF GENERAL SERVICES**

Re: PENQUIS CAP and Waldo CAP }
Appeals of Contract Award of }
RFP# 202306124 for Non-Emergency } Decisions on Appeal
Transportation Services for the Department }
of Health and Human Services in }
Regions 2, 3, 4, 5 and 8 }

INTRODUCTION AND BACKGROUND

The Bureau of General Services received and granted two requests for hearing of appeal on contract award decisions by the Department of Health and Human Services (DHHS) for Non-Emergency Medical Transportation Services (NET) to provide transportation to eligible individuals within Maine’s eight transit Regions. The awards were made following a request for proposal (RFP) process governed by Maine statute and the Division of Purchases promulgated rule, Chapter 110. The requests for appeal were timely filed on October 19, 2023, by Penquis C.A.P., Inc (PENQUIS) covering the award for regions 2, 3, 4 , and 8, and on October 15, 2023, by Waldo C.A.P., Inc (WALDO) for region 5, under the process defined in Division of Purchases rule Chapter 120. These requests for appeal were granted. A request for intervenor status was subsequently filed by ModivCare, Inc. (MODIV) on October 19, 2023, the recipient of the conditional award for all eight regions in the State. This status was granted.

A pre-hearing conference was held on November 15, 2023, using Zoom video conferencing to address process, availability of witnesses, documents and other matters. At

the conclusion of the conference, a written summary was produced by the hearing officer, confirming that there would be a single hearing to consider the appeals by the appellants and establishing a schedule to begin the hearing on December 14, 2023.

At the request of all parties on December 5, 2023, the hearing was rescheduled to February 7 and 8, 2024 and the hearing officer provided a schedule for submission of evidence and other matters.

A request for continuance was submitted by PENQUIS and WALDO on January 10, 2024, to allow time for recent FOAA requests to be processed and to ensure the availability of all key witnesses. DHHS and MODIV objected to this request. A pre-hearing conference was held on January 17 to address arguments submitted by the parties related to this request to continue the hearing until all documents requested through multiple FOAA filings had been furnished. The presiding officer rejected the request for continuance and reaffirmed the February 7, 2024, date. This decision was taken to the Superior Court and a temporary stay of the hearing was issued. The Court reviewed the matter and in late February 2024 the stay was lifted, and the hearing was to take place as soon as practical.

The hearing to take testimony and accept documentary evidence was held on March 20, 21 and 22, 2024. The parties were allowed to offer written opening statements which were provided to the Appeal Panel (“Panel”), comprised of three members chosen from within state service. The hearing remained open to allow for the submission of written closing statements by all parties, after which the Panel reviewed the evidence and arguments presented by the parties.

The Panel makes the following findings of fact and decision on appeal.

**GOVERNING LAW AND STANDARD OF
REVIEW**

The issue, in this case, is whether PENQUIS and WALDO have met their burden of proof by clear and convincing evidence that the DHHS award decision (1) was in violation of law, (2) contained irregularities creating a fundamental unfairness, or (3) was arbitrary or capricious. This standard is contained in the law at 5 M.R.S. § § 1825-D and 1825-E and in the Bureau of General Services' Rule, Chapter 120 – Rules for Appeal of Contract and Grant Awards. The clear and convincing standard requires that the Panel be convinced that the appellant's assertions are highly probable, as opposed to more probable than not. *Pine Tree Legal Assistance, Inc. v. Department of Human Services*, 655 A.2d 1260, 1264 (Me. 1995). The Panel may only decide whether to validate or invalidate the contract award decision under appeal. *See*, 5 M.R.S. § 1825-E (3) and Chapter 120 (4) (1) of the rules.

In determining whether an award is arbitrary or capricious, the Panel must not substitute its judgment for that of the Review Team. *International Paper Co. v. Board of Environmental Protection*, 1999 ME 135, ¶ 29, 737 A.2d 1047, 1054. There is a presumption that the team's actions were not arbitrary or capricious. *Central Maine Power Co. v. Waterville Urban Renewal Authority*, 281 A.2d 233, 242 (Me. 1971).

FACTUAL BACKGROUND

The DHHS issued a competitive Request for Proposal (RFP), for the purpose of contracting with one or more vendors to provide brokerage services for Maine's non-emergency medical transportation program. The RFP included details and instructions for bidders to participate in a written question and answer process to seek further clarification

related to the published RFP, instructions for preparing and for submitting proposals, and information required by the DHHS. In addition, the RFP generally noted the key process events and the application evaluation, relative scoring weights, and selection procedures. Proposals were timely submitted by nine bidders, covering one or more regions, and were distributed by the Division of Procurement Services to the DHHS RFP coordinator for review and scoring by the selected review team. The DHHS review team consisted of persons employed by the DHHS and one non-scoring coordinator to facilitate the review process.

Maine DHHS has eight regions requiring transportation brokerage services. Bidders were allowed to bid on one or more of the regions by submitting individual proposals for each region they wished to pursue. Proposals were submitted by seven bidders across the eight regions.

The review team followed the process detailed in the RFP, section one of which was to review each proposal's preliminary information to determine if each bidder was qualified. One bidder's proposals were deemed not qualified at this point. The remaining proposals were then evaluated under the following sections as follows:

- Section II. Organization Qualifications and Experience (25 points)
- Section III. Proposed Services (50 points)
- Section IV. Cost Structure Acknowledgement (25 points)

The evaluation team used a consensus process to evaluate and score sections II and III¹. Each evaluator read the qualified proposals individually, took notes using a template, and then met as a group several times to determine scores for sections II and III based on reaching consensus

¹ Section IV required bidders to agree to a cost structure established by DHHS and its actuary. All bidders who agreed to this process received full points for Section IV.

among the evaluators. Records were kept at the individual and team consensus stages to support the final score. The result was that Modivcare had the highest score in all eight (8) regions and a notification of award was sent to all participants announcing this result.

FINDINGS

PENQUIS and WALDO raised several issues on appeal as follows:

Fundamental errors in the review and scoring.

Through evidence and testimony, PENQUIS demonstrated that the reviewers read and took notes on the proposals, but it claimed the resulting record did not meet the requirement set in rule² requiring that those notes contain “substantive information” that supports the scoring. They also claimed that the review was not thorough, considered outside information about the bidders, scored proposals arbitrarily and evaluations were inconsistent.

The first witness called by Penquis was a manager within DHHS. He described the process used where each reviewer read all proposals and made notes on electronic forms, turning those forms in to the RFP coordinator prior to attending scheduled consensus meetings to collaboratively score each proposal. No scores were assigned during the individual reviews. Some of the reviewers used statements including “met requirements” to characterize bidders’ responses to various specifications, sometimes dozens of times for some proposals.

The review process continued with joint meetings where all reviewers discussed each proposal and where all reviewers participated in the assignment of scores for each Section. Notes were taken during this process and were presented to support the final consensus scores. The proposals were scored against the requirements published in the RFP, not directly against

² Chapter 110 of the Division of Purchases Rule, Section 3, A.

each other. The RFP included relative scoring weights to inform bidders of the potential score available for each section (Section II -25points, Section III -50 points).

Roger Bondeson, the Director of the program, testified that a bidder's proposal would start at the mid-point of the possible score for meeting the basic requirements of a Section and during the consensus process the score was adjusted (up or down) as the reviewers agreed warranted based on the value of the proposal's responses under review.

One reviewer, during her individual reviews, copied her comments from a bidder's proposal for one region and cut and pasted that same comment on the following regions proposed by the same bidder. The appellants demonstrated that in some cases there were differences in a bidder's responses which were missed by this reviewer. PENQUIS and WALDO claimed that this demonstrates the proposals were not read and that this created fundamental unfairness.

In many cases the notes of the reviewers were simply "met requirements" if they met the specified requirements of the RFP. Proposals that were considered to exceed expectations would receive a higher score and those that were less than satisfactory would be reduced in score from the mid-point. There was no scale or calculation algorithm used during this consensus process.

At least one reviewer did a Google search on each bidder, but testified he was just looking to see what might pop up, he found nothing noteworthy on the Google search page, he took no notes of this process or findings, and testified that this did not impact his review and ultimate participation in the consensus scoring. The RFP allowed information from other sources beyond the proposals to be considered.

The 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.

PENQUIS, WALDO and MODIV are incumbent service providers in one or more regions of Maine and have been for several years. This was evident in the scores under Section II for Qualifications and Experience. PENQUIS and MODIV each received the highest possible score in this section (25 points). This was so true even though both had some pending litigation reported as part of their proposals. When 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 MODIV he did not find the number of recent or outstanding litigations as a problem. PENQUIS had only three litigations in its response and that was also not a concern. WALDO had no litigation listed.

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.

Covid-19 Transportation by MODIV

Appellants claimed that MODIV was favored based on its provision of transportation of non-medical clients to vaccination appointments during the pandemic at the DHHS request.

These rides were for individuals not eligible for NET services. Appellants claimed the provision of this service without charge gave MODIV an advantage other bidders did not have. The Consensus scoring sheets for Section II for MODIV include this statement:

“At the Department’s request during the pandemic provided rides for any Maine resident who needed assistance getting to a vaccination site, regardless of their location or MaineCare Status.”

There was no evidence of any advantage to MODIV beyond the evaluators’ notes of this experience as a service MODIV had performed. It is noted that in Section II that both MODIV and PENQUIS received the same score, the maximum score of 25 points. WALDO did not receive the maximum score, but this was unrelated to this issue.

WALDO point reduction in Section II

WALDO received the highest score of all bidders on the Section III proposed services, a score of 48 out of a possible score of 50 in this category. Like other bidders, WALDO was given 25 points for Cost Structure Acknowledgement. The scoring matrix demonstrated that WALDO received only 18 of 25 points in Section II – Organizational Qualifications and Experience. 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 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. WALDO contends the content of the immediate prior section of their Appendix D should have been considered to answer those questions. It is noted that

Contact information and project descriptions were not included in their submission.

DHHS added that the instructions stated bidders must provide a minimum of one project that satisfies the eligibility criteria. 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. This was considered arbitrary by WALDO and unfair.

DECISION

The Panel reviewed the testimony and evidence presented at the hearing, read, and considered the closing statements presented after the hearing. PENQUIS and WALDO claimed all three appeal criteria were violated by the DHHS in this process. They are addressed below:

Violation of law

The appellants challenged the recorded information created by DHHS reviewers as not meeting the requirements of the law and rules regarding contract awards. They claim the information captured failed to meet the “Substantive information” requirement in the law and that it was not possible to determine how score was awarded. Further, there were claims that the scoring weights were not detailed to a level to allow scrutiny of the award decision.

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. This Panel was not clearly convinced that the law was violated.

Irregularities that created a fundamental unfairness

PENQUIS and WALDO presented through testimony and evidence that there were some irregularities in the recording of the notes during the initial individual scoring. With the large volume of proposals³ to be read by the reviewers, one rater used a copy and paste function to complete the electronic record form provided to keep those notes. She failed to notice some differences within a bidder's response from one region to the next. Some reviewers used short phrases to characterize bidder's responses to specifications.

This Panel was not clearly convinced that this was a fundamental unfairness. The consensus review process was where scores were assigned, and the Panel is not convinced this was irregular.

Other claims of irregularities included how MODIV'S experience providing COVID 19 Vaccination Rides was considered by the reviewers. The Panel was not convinced this was an irregularity that created fundamental unfairness.

The Panel also considered the other claims and testimony from the two plus days of testimony and was not clearly convinced that there were irregularities that created a fundamental unfairness.

Arbitrary and Capricious Award

WALDO presented testimony and evidence that its score under Section II was assigned arbitrarily and caused it to lose the award of Region 5. 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

³ The estimated number of pages of all proposals was approximately 19,000.

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.

The Panel looked at the testimony and evidence in its totality presented by the appellants and is not clearly convinced actions performed by the DHHS reviewers were arbitrary.

For the reasons stated above the Panel finds the DHHS award of Regions 2,3,4 and 8, under appeal by PENQUIS are validated.

For the reasons stated above the Panel finds the DHHS award of Region 5, under appeal by WALDO is validated.

APPEAL PANEL

Dated: 4/18/2024

DocuSigned by:
Gilbert M. Bilodeau
42CA3829F43B44E...
Gilbert Bilodeau, Service Center Director
Department of Administrative and Financial
Services

Dated: 4/18/2024

DocuSigned by:
Douglas E. Cotnoir
DACC4530B7FF4EC...
Douglas Cotnoir, State Controller
Department of Administrative and Financial
Services

Dated: 4/18/2024

DocuSigned by:
Michelle Johnson
165F3C295F9143C...
Michelle Johnson, Procurement Analyst
Department of Administrative and Financial
Services

STATEMENT OF APPEAL RIGHTS

This decision constitutes a final agency action. Any aggrieved party may appeal this decision by filing a petition for review in Superior Court for the County where one or more of the parties reside or have their principal place of business, where the agency has its principal office, or where activity which is the subject of this proceeding is located. Any such appeal must be filed within 30 days of the receipt of this decision.