SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of the Application of, FREEDOM CARE LLC, Petitioner, For Judgment Pursuant to CPLR Article 78 - against - THE NEW YORK STATE DEPARTMENT OF HEALTH; JAMES V. MCDONALD, in his official capacity as Commissioner of the New York State Department of Health; and PUBLIC PARTNERSHIPS LLC, Respondents.	:	Index No. _____/2024 IAS Part Justice [ ]

PETITIONER'S MEMORANDUM OF LAW IN SUPPORT OF ITS ARTICLE 78 PETITION AND APPLICATION BY ORDER TO SHOW CAUSE FOR A TEMPORARY RESTRAINING ORDER, PRELIMINARY INJUNCTION, AND EXPEDITED DISCOVERY

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INTRODUCTION[1]

This action challenges the New York State Department of Health's ("DOH") sham bidding process that resulted in a multibillion-dollar contract award to Public Partnerships LLC ("PPL")—an out-of-state company with no relevant prior experience in New York—to be the Statewide Fiscal Intermediary, a position created pursuant to a recent amendment to New York's Consumer Directed Personal Assistance Program ("CDPAP"), a home personal care program for the chronically ill and physically disabled. To arrive at its predetermined outcome, DOH disregarded PPL's abysmal record in other states; rigged the bidding process by imposing extra-statutory requirements that narrowed the field of eligible bidders (while ignoring requirements actually imposed by the CDPAP statute and DOH's own Request for Proposals ("RFP")); refused to provide material information about its scoring metrics or guidelines to potential bidders (giving DOH virtually unfettered discretion to select PPL); and arbitrarily selected PPL's proposal over that of Freedom Care, in violation of DOH's statutory mandate to select the proposal offering the "best value" for the State. Specifically, Freedom Care proposed leveraging its considerable experience, established footprint, and longstanding relationships as the largest fiscal intermediary in New York to provide statewide fiscal intermediary services at a cost to the State that was lower than PPL's bid *on every component*.[2] Yet DOH selected PPL—confirming reports from months before the RFP was issued that PPL was already the predetermined winning bidder.[3] For these

[1] Unless otherwise noted, capitalized terms have the definitions ascribed in the accompanying Petition ("Pet."); citations to "Ex." reference exhibits to the accompanying Shapiro Affirmation; citations to "Weiner ¶" reference the named affidavit, filed herewith; and emphases have been added while quotation marks, citations and alterations have been omitted in quotations.

[2] Pet. ¶ 1.

[3] *Id.*

reasons, the bid award to PPL (the "Contract Award") was arbitrary and capricious, an abuse of discretion, affected by errors of law, and in violation of lawful procedure. It should be annulled.

Seeking to transform this fundamentally flawed award into a *fait accompli*, DOH and PPL are moving quickly to implement it—to the imminent, irreparable harm of Freedom Care and many others. Just this past Friday, November 22, Freedom Care learned that DOH has authorized managed care plans to reach out to Freedom Care's customers (called "consumers"—the individuals who received care under the program) to instruct them that Freedom Care will soon no longer be permitted to provide fiscal intermediary services in the State, to request contact information for their personal assistants (the individuals who provide care), and to direct them to register with PPL as soon as PPL is authorized to accept them.[4] In addition, DOH recently issued a "mandate" that purports to require fiscal intermediaries to provide confidential data regarding every single one of its consumers and their personal assistants to "help assist in expediating [sic] the transition of consumers from their current [fiscal intermediary] to the Statewide [Fiscal Intermediary]."[5] While Freedom Care has thus far not provided the requested information, despite a purported November 15 deadline, it is very concerned about potentially severe enforcement consequences if it continues not to provide this information, particularly once the secondary deadline of November 29, 2024, set out in the directive, passes.[6] These calls to consumers and information demands interfere with and will irreparably harm Freedom Care's customer relationships, its consumer and personal assistant goodwill, its ability to retain its customers, and its reputation—the lifelines of its business.[7]

[4] Affidavit of Cory Weiner ("Weiner") ¶ 13, dated Nov. 22, 2024 and filed herewith.

[5] *Id.* ¶14 & Ex. A.

[6] *Id.* ¶ 15.

[7] *Id.* ¶ 25.

This is just the beginning. DOH and PPL have announced that they will soon sign a Statewide Fiscal Intermediary contract and will begin directing and transitioning new and existing consumers and personal assistants to PPL starting on ***January 6, 2025***.[8] The transition of consumers and personal assistants to PPL will cause further severe, immediate, and irreparable harms to Freedom Care: new consumer enrollment will cease, and Freedom Care will immediately and irreversibly lose existing consumers and personal assistants.[9] The loss of these relationships and associated goodwill is an irreparable evil unto itself and it will also cause an irrecoverable loss of revenue that is impossible to quantify.[10] If the transition proceeds in short order across the state, as planned, Petitioner will be forced to close down its CDPAP business in New York entirely.[11] In addition, Petitioner's reputation as a leading, reliable, and trusted provider of fiscal intermediary services will be severely damaged by the flawed transition to PPL, making it more difficult to win contracts and retain consumers in other states.[12] Fiscal intermediaries are not the only ones that will be irreparably harmed while the Court reviews the merits. Based on its abysmal performance in other states, PPL's assumption of control over CDPAP is certain to cause interruptions in service, leaving personal assistants without pay and consumers without the care they need.[13]

Petitioner is therefore seeking emergency relief by Order to Show Cause to temporarily restrain and preliminarily enjoin Respondents from implementing the Contract Award during the pendency of this action, including by: (a) compelling Petitioner to turn over its consumer or

[8] Ex. 11 (November 12, 2024 Press Release); Ex. 12 (PPL Presentation). References to numbered exhibits are to the exhibits attached to the Affirmation of Akiva Shapiro, dated Nov. 25, 2024 and filed herewith.

[9] Weiner ¶¶ 26–27.

[10] *Id*. ¶ 28.

[11] *Id*. ¶ 29.

[12] *Id*. ¶ 30.

[13] *Id*. ¶ 31.

personal assistant data; (b) contacting or authorizing others to contact consumers or personal assistants enrolled with Petitioner for the purpose of directing them to transition to PPL; (c) entering into the Statewide Fiscal Intermediary contract; (d) enrolling consumers or personal assistants with, or transitioning them to, PPL. To prevent these imminent, irreparable harms, Petitioner needs immediate relief.

Created in 1995, CDPAP is a New York State program that allows chronically ill and physically disabled Medicaid beneficiaries to hire a personal assistant to provide personal care services in their own homes, for example, to help them get dressed or bathe.[14] In contrast to those employed through a licensed home care services agency, personal assistants under CDPAP are permitted to be members of the consumer's family, allowing the consumer to be cared for by someone they already know and trust, which leads to more stable and better care.[15] Since the inception of CDPAP, consumers have chosen a fiscal intermediary to manage the administrative, financial, and compliance responsibilities associated with receiving home care under the program.[16] As the program has grown, the number of fiscal intermediaries has increased to 600 mostly small businesses in New York State providing good jobs to thousands of New Yorkers.[17]

On April 20, 2024, in a late-breaking agreement with the Governor during the budget negotiations, the New York Legislature amended CDPAP to move from many fiscal intermediaries to a single statewide fiscal intermediary to be selected by DOH, ostensibly via a competitive bidding process.[18] The amended CDPAP statute requires this new Statewide Fiscal Intermediary to have previously provided these services on a statewide basis in a state other than New York and

[14] Pet. ¶ 5.
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.* ¶ 6.

to subcontract with existing fiscal intermediaries subject to certain requirements.[19] The amendment exempted the contract and bidding process from New York State Comptroller oversight, paving the way for DOH to reach its predetermined outcome—the selection of PPL.[20]

In fact, Assemblymember Ron Kim suggested earlier in April 2024—before the CDPAP amendment was adopted, and well before DOH issued its RFP in June—that it was already foreordained that PPL would be the winner of the RFP, stating: "Who wants to bet $500 million that PPL will be the winner?"[21] PPL similarly "came up again and again in conversations [a Capitol reporter] had with sources and lawmakers" in April, with "[m]ultiple sources" telling a reporter at the time that "the entity under consideration is Public Partnerships, LLP."[22] This, despite the fact that PPL is an out-of-state company with no experience providing fiscal intermediary services in New York and has a troubled history providing similar services in other states.

For example, PPL's assumption of Pennsylvania's program immediately left 20,000 home care workers without pay, in some cases for months. Pennsylvania authorities reported being "inundated with complaints" regarding the "problematic transition to PPL."[23] An audit by the

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[19] *Id.*

[20] *Id.*

[21] Ron Kim (@rontkim), X (Apr. 19, 2024, 2:14 PM), https://x.com/rontkim/status/1781385816930975943 ("RE: CDPAP and the state-backed monopoly FI system: Who wants to bet $500 million that PPL will be the winner?").

[22] Dan Clark, *Budget Talks Could Drag into Next Week, Hochul's Expected Secretary of State Nominee*, Capitol Confidential (Apr. 11, 2024), https://www.capitolconfidential.com/p/budget-talks-could-drag-into-next?utm_source=publication-search; Dan Clark, *Stressed N.Y. Cities Should Be Wary of Changing Economy, Comptroller Says*, Capitol Confidential (Oct. 3, 2024), https://www.capitolconfidential.com/p/nys-stressed-cities-and-a-changing.

[23] Eugene A. DePasquale, *Performance Audit: Department of Public Welfare's Oversight of Financial Management Services Providers*, Commonwealth of Pa. Dep't of the Auditor Gen. at iii (Nov. 2013), https://www.paauditor.gov/wp-content/uploads/audits-archive/Media/Default/Reports/speDPWPPL111413.pdf [hereinafter *Pa. Performance Audit*].

Pennsylvania Department of the Auditor General concluded that "the transition to PPL was problematic, even confusing, and left many waiver participants frustrated and overwhelmed."[24] Following the botched transition, PPL's mismanagement of the program continued to pose problems for participants. In 2017, 20,000 home care workers filed a class-action lawsuit against PPL, alleging that the company repeatedly failed to pay them for overtime hours, despite some consistently working 60 or more hours per week.[25] PPL had a similarly disastrous performance in numerous other states, including Oregon, Washington, and New Jersey, and it failed to have a contract renewed in Pennsylvania in 2018, Washington in 2019, Virginia in 2019, and Tennessee in 2023.[26]

Yet in drafting the RFP to select the new Statewide Fiscal Intermediary, DOH structured the process with an apparent eye toward PPL, imposing eligibility requirements that eliminated almost all of PPL's potential competitors—though, importantly, Freedom Care was able to jump through every hoop DOH erected. Specifically, DOH introduced a conflicts provision into the RFP that prohibits the Statewide Fiscal Intermediary from being owned or controlled by a licensed home care services agency in New York State but did not impose this restriction on entities based in other states.[27] In the RFP, DOH also adopted a narrow construction of the statutory phrase operating on a "statewide basis": those under a contract with the single state agency designated to administer the state's Medicaid program in a state other than New York.[28] Through both of these mechanisms, DOH gave a leg up to out-of-state operators, chief among them PPL.

[24] *Id.* at 34.

[25] Pet. ¶ 8.

[26] *Id.*

[27] *Id.* ¶ 9.

[28] *Id.*

After the RFP was issued, DOH invited questions from bidders but refused to provide critical information relating to the scoring or evaluation of bids in the Questions and Answers.[29] In response to several questions requesting basic information on the RFP's scoring metrics, including how DOH would score and weigh the dozens of discrete services, practices, and requirements constituting the majority of a bid's score, DOH repeatedly stated that such information would "not be shared with the bidding community."[30] The effect of DOH's evasion was to disadvantage PPL's competitors and provide DOH with the ability to select PPL, the company DOH desired, as the winner regardless of the relative strength or weakness of its bid.

DOH was also improperly coordinating with PPL behind the scenes during the restricted period of the bidding process. In a press release announcing PPL as the winning bidder, the State touted as a justification for selecting PPL the "new alliance" of proposed subcontractors that DOH had helped assemble—despite the fact that many of these proposed partners plainly do not satisfy the requirements for subcontractors set out in the CDPAP statute and the RFP, including that they must have been operating as a fiscal intermediary since 2012.[31] After selecting PPL, DOH subsequently purported to waive these and other requirements, fundamentally corrupting the bid process as Freedom Care had structured its bid, and its proposed pricing, with the understanding that it would be required to comply with these costly requirements.[32]

Regardless, Freedom Care's proposal was much stronger, including as to price. It offered *lower* administrative costs and *zero* initial transition costs—equating to millions of dollars more that the State will have to spend in initial costs, and over $1 million more per month on an ongoing

[29] Pet. ¶ 10.

[30] Ex. 4 (RFP #20524 Questions and Answers).

[31] Ex. 10 (September 30, 2024 Press Release).

[32] Pet. ¶ 11.

basis, on PPL's "winning" bid.[33] Further, unlike PPL, whose disastrous performance as a statewide fiscal intermediary in Pennsylvania left 20,000 care workers without pay for months, Freedom Care has never missed payroll in company history.[34] Had DOH conducted a genuinely competitive bidding process, Freedom Care would have won the award as it is a responsible bidder that offered the best value for the services required—unlike PPL.

For all these reasons, Petitioner respectfully requests that this Court annul and vacate DOH's determination to award the Statewide Fiscal Intermediary contract to PPL.

Petitioner also respectfully requests, by concurrently filed Order to Show Cause: (1) expedited discovery of limited materials directly relevant to its claims, including PPL's proposal, DOH's scoring matrix and guidelines, scoresheets for PPL and Freedom Care, and communications regarding the predetermined outcome of the bid; and (2) a temporary restraining order and preliminary injunction, to preserve the status quo and prevent irreparable harm to Petitioner and the public while the instant proceeding is pending.

FACTUAL BACKGROUND

Petitioner incorporates by reference the factual background section of its Verified Petition (¶¶ 23–104).

LEGAL STANDARD

An Article 78 proceeding requires the Court to decide whether a challenged agency's determination, such as the Contract Award issued here, "was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion." CPLR 7803(3).

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[33] *Id.* ¶ 12.

[34] *Id.*

Preliminary injunction relief is appropriate where a party demonstrates "a likelihood of success on the merits," "irreparable harm in the absence of the injunctive relief," and "a balancing of the equities in its favor." *City of New York v. Untitled LLC*, 51 A.D.3d 509, 511 (1st Dep't 2008).

Where the movant demonstrates imminent, irreparable injury—as Freedom Care does here—no further showing is necessary to obtain a temporary restraining order. *See* CPLR 6301 ("A temporary restraining order may be granted pending a hearing for a preliminary injunction where it appears that immediate and irreparable injury, loss or damage will result unless the defendant is restrained before the hearing can be had."); *see also* CPLR 6313.

ARGUMENT

I. DOH's Award of the Statewide Fiscal Intermediary Contract to PPL Was Made In Violation Of Lawful Procedure, Affected By Errors Of Law, Arbitrary and Capricious, And An Abuse Of Discretion.

A. The Contract Award to PPL Should Be Invalidated Because It Was the Product of a Predetermined and Sham Bid Process.

The central purposes of New York's competitive bidding statutes are "(1) protection of the public fisc by obtaining the best work at the lowest possible price; and (2) prevention of favoritism, improvidence, fraud and corruption in the awarding of public contracts." *N.Y. State Ch. Inc., Associated Gen. Contrs. of Am. v. N.Y. State Thruway Auth.*, 88 N.Y.2d 56, 68 (1996). The "power to reject any or all bids may not be exercised arbitrarily or for the purpose of thwarting the public benefit intended to be served by the competitive process." *Id.* at 82 (citation omitted). "*Post hoc* rationalization" cannot substitute for a showing that "the agency considered the goals of competitive bidding." *Id.* at 75.

The CDPAP Amendment directs the DOH Commissioner to award the contract to the bidder that "meets the criteria for selection and offers the best value for providing the services

required pursuant to this section and the needs of consumers."[35] All available evidence suggests that DOH instead engineered the RFP process to arrive at the selection of PPL, in violation of DOH's statutory duty to award the contract to the bidder that offers the objective "best value."[36]

In fact, Assemblymember Ron Kim suggested in April 2024—well before DOH issued its RFP in June—that it was already foreordained that PPL would be the winner of the RFP, stating: "Who wants to bet $500 million that PPL will be the winner?"[37] The *Capitol Confidential* and *New York Post* published similar reports.[38]

When it came time to solicit proposals for the contract, DOH then drafted the RFP to eliminate many of PPL's potential competitors from eligibility.[39] Specifically, DOH imposed an extra-statutory conflicts provision that prohibited the Statewide Fiscal Intermediary from being owned or controlled by a LHCSA or a MMCO in New York State, but did not impose this restriction on entities based in other states.[40] DOH then adopted a narrow construction of the phrase "statewide basis" in the RFP, which limits bidders to those under a contract with the single state agency established or designated to administer or supervise the administration of the state's Medicaid program in a state other than New York.[41] Although a very limited number of other

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[35] Ex. 1 (CDPAP Amendment), N.Y. Soc. Serv. Law § 365-f(4-a)(b)(iii); Pet. ¶ 32.

[36] Pet. ¶ 93.

[37] Ron Kim (@rontkim), X (Apr. 19, 2024, 2:14 PM), https://x.com/rontkim/status/1781385816930975943 ("RE: CDPAP and the state-backed monopoly FI system: Who wants to bet $500 million that PPL will be the winner?"); Pet. ¶¶ 7, 95.

[38] *See* Dan Clark, *Budget Talks Could Drag into Next Week, Hochul's Expected Secretary of State Nominee*, Capitol Confidential (Apr. 11, 2024), https://www.capitolconfidential.com/p/budget-talks-could-drag-into-next?utm_source=publication-search; Vaughn Golden, *Critics Furious over Hochul, Heastie Plan to Crack Down on NY's $8 Billion Home Care Medicaid Program: 'Recipe for Corruption'*, NY Post (Apr. 11, 2024), https://nypost.com/2024/04/11/us-news/critics-furious-over-hochul-heastie-plan-to-crack-down-on-nys-8-billion-home-care-medicaid-program/; Pet. ¶¶ 7, 95.

[39] Pet. ¶¶ 9, 93, 108.

[40] *Id*. ¶¶ 9, 41, 50, 93, 108.

[41] *Id*. ¶¶ 9, 44, 93, 108.

fiscal intermediaries—including Petitioner—were able to meet all these additional requirements, the apparent purpose and indisputable effect of these restrictions was to artificially constrain the pool of eligible bidders, setting up PPL—an out-of-state entity with a known track record of failure in other states—as the winning bidder.[42]

After the RFP was issued, DOH refused to provide critical information relating to scoring or evaluation of bids in the Questions and Answers, disadvantaging other fiscal intermediaries in their efforts to prepare and submit the strongest possible bid.[43] *See infra* Part E. At the same time, the vagueness of the RFP strategically provided DOH cover to select PPL as the winner regardless of the relative strength or weakness of its bid (which, as set forth below, in fact did not present the best value).[44] And DOH construed the statutory phrase "providing services as a fiscal intermediary" in another state to mean "performing services similar to those required under Social Service Law 365-f," leaving the agency with unbridled discretion to determine which bundles of services are sufficiently "similar to" the list of broadly defined "fiscal intermediary services" required by statute in New York.[45]

Not only did DOH hinder PPL's competitors by withholding information, but DOH also bolstered PPL by engaging with it and its "new alliance" of subcontractors during the restricted period—which began with the issuance of the RFP and concluded with the award—giving PPL unfair and unparalleled access to, and coordination with, DOH.[46] This coordination during the quiet period strongly buttresses the other evidence that DOH knew it was going to select PPL from the outset. DOH's behind-the-scenes role in facilitating PPL's coordination of these partnerships

[42] *Id*. ¶ 108.

[43] *Id*. ¶¶ 10, 47, 50, 94, 109.

[44] *Id*. ¶ 109.

[45] *Id*. ¶¶ 45, 109.

[46] *Id*. ¶¶ 11, 102, 110.

is evident from the September 30, 2024, press release, released only hours after the bid award was made yet includes quotes from Commissioner McDonald, Governor Hochul, PPL's CEO, each of PPL's four "core regional home care partners," and various other parties, which would not have been possible had DOH not coordinated with PPL and the proposed subcontractors during the restricted period of the bidding process.[47] That alone should be enough to annul the award. The rushed process and result—requiring bidders to submit proposals mere weeks after DOH issued over 1,000 Q&As, followed by DOH's selection of a winning bidder from 136 lengthy and detailed submissions mere weeks after that, resulting in the selection of the company identified in multiple press reports months before the RFP was even issued—is further evidence of the predetermined outcome.[48]

Finally, DOH improperly—and secretly—exempted PPL's bid from the RFP's requirement that subcontractors not be licensed home care services agencies and from the CDPAP Amendment's requirement that subcontractors must have been providing fiscal intermediary services since January 1, 2012.[49] As a result, DOH was able to promote PPL's "diverse alliance" of regional partners as a justification for its decision—notwithstanding the fact that at least two "core members" of that alliance are LHCSAs (one of which was formed after 2012), and thus could not qualify as subcontractors under the RFP and statute.[50] In fact, the vast majority of the more than 30 "regional partners" that PPL is working with—with DOH's blessing—are barred from being subcontractors by the CDPAP Amendment's plain terms, because only a few entities have been providing fiscal intermediary services in New York State since January 1, 2012.[51] In this

[47] *Id*. ¶¶ 98, 102, 110.

[48] *Id*. ¶¶ 43, 51, 95.

[49] *Id*. ¶ 112.

[50] *Id.*

[51] *Id*. ¶ 136.

case, DOH's attempted rationalization was not only *post hoc* but invalid on its face. *See N.Y. State Thruway Auth*, 88 N.Y.2d at 75.

All of the foregoing was made possible because the CDPAP Amendment removed Comptroller review of both the RFP and the award.[52] As a consequence, DOH was free to structure the RFP and select a winner without external oversight.[53] It appears that DOH was involved in these and all aspects of the conception and formulation of the CDPAP Amendment.[54]

Because it was the product of a rigged RFP process, the Statewide Fiscal Intermediary contract awarded to PPL was made in violation of lawful procedure, was affected by errors of law, was arbitrary and capricious, and was an abuse of discretion. *See In re Laro Serv. Systems, Inc. v. New York City Business Integrity Com'n*, No. 1128842005, 2005 WL 8145613, at *10 (N.Y. Sup. Ct. N.Y. Cnty. Sept. 30, 2005) (finding that the petitioner had shown "a likelihood of success of its claims that . . . [the agency] conducted a related 'sham' bidding process in furtherance of its predetermined outcome to" grant the award to the respondent).

B. Under the RFP, DOH Should Have Disqualified PPL as an Irresponsible Bidder in Light of its Abysmal Performance Record

Where an agency fails to act in compliance with a governing statute, its actions are affected by errors of law, violate lawful procedure, and are arbitrary and capricious and an abuse of discretion. *See N.Y. Skyline, Inc. v. City of New York*, 94 A.D.3d 23, 29 (1st Dep't 2012). In addition, "[i]t is well settled that an agency acts arbitrarily and capriciously by failing to comply with its own rules and regulations." *Church v. Wing*, 229 A.D.2d 1019, 1020 (4th Dep't 1996); *see also Steck v. Jorling*, 219 A.D.2d 727, 729 (2d Dep't 1995) (granting Article 78 petition where

[52] *Id*. ¶¶ 6, 33, 94, 111.

[53] *Id*. ¶ 111.

[54] *Id.*

agency's determination that petitioners operated a solid waste management facility without a permit was inconsistent with plain language of agency regulations).

The RFP requires the selected bidder to be "responsible."[55] The State Finance Law defines "responsibility" in the context of a competitive procurement process as "the financial ability, legal capacity, ***integrity, and past performance*** of a business entity and as such terms have been interpreted relative to public procurements."[56] In its Guide to Financial Operations, the Office of the State Comptroller explains that, as part of the assessment of responsibility, an agency should examine whether a bidder "performed at acceptable levels on other government contracts" and should consider factors such as "reports of less than satisfactory performance."[57]

PPL's abysmal record in other states, including as the single statewide contractor for healthcare-related fiscal services, establishes that PPL is not a "responsible" bidder.[58] It should have been excluded. *See Mid-State Indus. Ltd. v. City of Cohoes*, 221 A.D.2d 705, 706 (3d Dep't 1995) (upholding bidder's exclusion as not responsible "[b]ased on petitioner's past history of dishonest work practices and inadequate performance of prior public works contracts"); *see also DeFoe Corp. v. N.Y.C. Dep't of Transp.*, 87 N.Y.2d 754, 763 (1996) ("An agency has an obligation to consider the responsibility of a bidder, including its skill, judgment and integrity, and may, on the basis of the prior criminal record of some of its principals, rationally reject that bidder.").

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[55] RFP at 25; Pet. ¶¶ 38, 117.

[56] N.Y. State Fin. Law § 163(c) (emphasis added). Although the RFP is exempted from State Finance Law 103, DOH reasonably imposed upon itself the requirement that the selected bidder by "responsible." It is therefore appropriate to look to State Finance Law 103's definition of "responsibility" and related guidance in evaluating DOH's compliance with its own rules. In any event, "responsible" in the context of a bidder for a state contract necessarily, under case law, and by its plain meaning must include past performance on other government contracts and integrity.

[57] *Vendor Responsibility*, Office of N.Y. State Comptroller (revised Sept. 6, 2019), https://www.osc.ny.gov/state-agencies/gfo/chapter-xi/xi16-vendor-responsibility#:~:text=Factors%20Affecting%20a%20Vendor's%20Responsibility,levels%20on%20other%20government%20contracts?.

[58] *See* Pet.¶¶ 68-91.

As the statewide provider of financial management services in Pennsylvania, for example, PPL left 20,000 home care workers without pay, in some cases for months, as described in a Pennsylvania Auditor General's audit.[59] PPL's disastrous performance serving a population less than one-tenth the size of New York's CDPAP consumer base alone renders it irresponsible for the role of Statewide Fiscal Intermediary. Recent complaints that PPL's "egregious fiscal and operational failures" caused interruptions in service for two New Jersey Medicaid programs, and that many caregivers in Washington had difficulty getting paid on time as a result of PPL's botched rollout—where it reportedly took approximately two years to have the bugs worked out of the system— confirm that PPL's troubling performance failures continue to be repeated.[60] Moreover, PPL's mismanagement extends beyond failing to deliver timely and accurate payments to intended recipients. In Oregon, for example, PPL directed rental assistance to those who neither requested nor were eligible to receive it, with a close to a 30% error rate in one random sample.[61] Finally, PPL has been accused of having history of making misrepresentations in other RFPs, including in Arkansas in 2022 and in Tennessee and Pennsylvania as recently as last year.[62] PPL has apparently failed to have state contracts renewed in multiple states in recent years.[63]

It was arbitrary and capricious for DOH to ignore—or fail to review or investigate—voluminous reports of PPL's repeatedly atrocious past performance on other government contracts, multiple states' refusal to renew PPL's contracts, and apparent lack of integrity. The

[59] Pet.¶¶ 8, 12, 71-79; *Pa. Performance Audit*, supra n.23.

[60] *See* Pet. ¶¶ 87-88 & *Egregious Fiscal and Operational Failures by Public Partnerships, LLC Were Predictable*, Alliance for the Betterment of Citizens with Disabilities (Jan. 20, 2020), https://abcdnj.org/wp-content/uploads/2020/08/ABCD-PPL-Operational-Failures-White-Paper.pdf (New Jersey); Pet. ¶¶ 85-86 & House Bill Report ESSB 6199, H.R. Reg. Sess. (Wa. 2018), app.leg.wa.gov/documents/billdocs/2017-18/Htm/BillReports/House/6199-S.E HBR APH 18.htm (Washington).

[61] Pet. ¶¶ 80-84.

[62] *Id*. ¶¶ 89-91.

[63] *Id*. ¶ 90.

latter includes PPL's abandonment of Alpharetta, Georgia. PPL relocated its headquarters there from Boston in early 2024 with great fanfare—promising "to grow[] our business and expand[] our services in partnership with Alpharetta's diverse and highly skilled workforce," and receiving praise from the Georgia Department of Economic Development and city officials—only to jump ship mere months later in promising to "move its national headquarters to New York State" as part of its winning bid here, as touted in the Governor's press release announcing the bid award.[64]

In light of PPL's manifest irresponsibility, DOH should have eliminated it from consideration and should not have awarded it the contract for Statewide Fiscal Intermediary.

C. DOH Acted Contrary to the Governing Statute and Rules in Failing to Award the Contract to the Proposal Presenting the "Best Value."

Where an agency fails to act in compliance with a governing statute, its actions are affected by errors of law, violate lawful procedure, and are arbitrary and capricious and an abuse of discretion. *See N.Y. Skyline, Inc.*, 94 A.D.3d at 29 (granting Article 78 petition where "no fair reading of the statute" could lead to NYPD's determination that amusement park tickets constituted "goods or services"); *Cap. City Rescue Mission v. City of Albany Bd. Of Zoning Appeals*, 235 A.D.2d 815, 816–17 (3d Dep't 1997) (annulling decision denying request for a building permit where zoning board's decision was inconsistent with definitions in the applicable city ordinance). Courts have, moreover, "repeatedly held in a variety of contexts that an agency acts arbitrarily when it fails to comply with its own rules." *Acme Bus Corp. v. Orange Cnty*, 28 N.Y.3d 417, 425 (2016). An agency's action is also arbitrary and capricious if it is made "without a sound basis in reason and generally without regard to the facts." *Nestle Waters N. Am., Inc. v.*

[64] *Id.* ¶ 101.

City of New York, 121 A.D.3d 124, 127 (1st Dep't 2014) (citing *Pell v. Bd. of Educ. of Union Free Sch. Dist. 1*, 34 N.Y.2d 222, 231 (1974)).

The CDPAP Amendment requires DOH to award the contract to "the contractor that meets the criteria for selection and offers the best value for providing the services required pursuant to this section and the needs of the community."[65] The RFP states that "DOH will evaluate each proposal based on the 'Best Value' concept," which means that "the proposal that best 'optimizes quality, cost, and efficiency among responsive and responsible bidders' shall be selected for award."[66]

In awarding PPL the Single Fiscal Intermediary contract over Petitioner, DOH failed to select the proposal that "offers the best value" for providing fiscal intermediary services, despite the statutory command to do so, and specifically failed to select the proposal that optimized quality, cost, and efficiency, even though the RFP instructs that DOH "shall" do so. For each component of the RFP, Petitioner's bid was superior to PPL's bid.

First, as to the Technical Proposal, which demonstrates "the qualifications, competence, and capacity of the bidder to perform" the required services, Petitioner boasts a history of uninterrupted service as a fiscal intermediary, without ever having missed a payroll.[67] Moreover, Petitioner already has the infrastructure, partnerships with other entities, and relationships with 30,000 existing consumers built over its eight-year history of operations in New York State.[68]

By contrast, PPL has no history of providing fiscal intermediary services in New York, and its dismal performance in other states has left tens of thousands of personal assistants without pay

[65] Ex. 1 (CDPAP Amendment), N.Y. Soc. Serv. Law § 365-f(4-a)(b)(iii); Pet. ¶ 32.

[66] Pet. ¶ 38.

[67] Pet. ¶ 127.

[68] *Id.*

for months.[69] Meanwhile, in other instances, PPL was responsible for providing erroneous payments to recipients who were ineligible to receive the benefits.[70] Its history of mismanagement performing other government contracts reflects poorly on the quality of service that PPL can offer for CDPAP.

Second, as to the Cost Proposal (*i.e.*, cost and efficiency), Freedom Care offered to complete all fiscal intermediary statewide administrative functions for the price of $126 Per Member Per Month ("PMPM")—and to complete all initial transition activities at *no cost to the State*.[71] Upon information and belief, PPL proposed a higher administrative functions cost of at least $130, as well as significant transition costs of $13 Per Member Per Month.[72] The transition costs alone will cost the State many millions of dollars given that all 280,000 current CDPAP consumers will need to be transitioned to a new fiscal intermediary, in a process that will take months. And the administrative functions bid difference equates to over $1 million per month in cost savings ($4 PMPM * 280,000 members) if Freedom Care had been selected. Petitioner's cost proposal thus came in at a far lower price than, and was unambiguously superior to, PPL's.

In sum, DOH had, on the one hand, a proven fiscal intermediary in Freedom Care—the largest in New York State, serving approximately 30,000 consumers in every county—that had been operating in New York since its founding in 2015 without ever missing a single payment.[73] Instead, DOH chose an out-of-state operator with an abysmal track record in other states—including Pennsylvania, where PPL was tasked with taking over for just 36 existing fiscal intermediaries serving just 20,000 patients—whose bid was materially *more* expensive.

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[69] *Id.* ¶ 128.

[70] *Id.*

[71] *Id.* ¶ 129.

[72] *Id.*

[73] *Id.* ¶ 130.

Because DOH's award of the contract to PPL violated the statutory command to the select the proposal that "offers the best value," and failed to comply with the RFP's directive and guidelines for determining "best value," the award was made without sound basis in in reason and in violation of lawful procedure, was affected by errors of law, and was arbitrary and capricious and an abuse of discretion.

D. The Award Is Invalid Because DOH Failed To Enforce the Statute's and RFP's Requirements and Relied on Extraneous Considerations

As discussed, when an agency fails to act in compliance with a governing statute, its actions are affected by errors of law, violate lawful procedure, and are arbitrary and capricious and an abuse of discretion. *See N.Y. Skyline, Inc.*, 94 A.D.3d at 29. In addition, "[i]t is well settled that an agency acts arbitrarily and capriciously by failing to comply with its own rules and regulations." *Church*, 229 A.D.2d at 1020; *see also Steck*, 219 A.D.2d at 729 (granting Article 78 petition where agency's determination that petitioners operated a solid waste management facility without a permit was inconsistent with plain language of agency regulations). In awarding the contract to PPL, DOH ignored the requirements in the CDPAP Amendment and its own RFP and Questions and Answers.

Among DOH's stated reasons for awarding the contract to PPL was its proposed "alliance" with more than 30 "regional partners" in New York.[74] Yet at least two of the "four core" proposed partners—Chinese-American Planning Council Home Attendant Program and Angels in Your Home—are licensed home care services agencies, which plainly do not satisfy the RFP's conflicts provision prohibiting an "entity that is owned or controlled by a Licensed Home Care Services Agency" in New York State from being a subcontractor.[75]

[74] Pet. ¶ 135.

[75] *Id.*

Moreover, Angels in Your Home cannot qualify as a subcontractor in any event because it was formed after 2012 and is not an independent living center.[76] In fact, the vast majority of the more than 30 unnamed "regional partners" with whom PPL will be working—with DOH's blessing—are barred from being subcontractors by the CDPAP Amendment's plain terms, as only a handful of entities have provided fiscal intermediary services in New York State since January 1, 2012.[77] DOH's consideration of this proposed alliance as a factor in favor of selecting PPL's bid was arbitrary and capricious and an error of law. Had Petitioner known that DOH would flout its own requirements for subcontractors, it too would have proposed partnerships with many (otherwise) ineligible fiscal intermediaries as subcontractors in its bid.[78] And given the opportunity for many consumers and personal assistants to remain with their existing fiscal intermediaries as subcontractors, eliminating significant transition costs, Freedom Care would have proposed an even lower price for administrative functions.[79]

The same is true of DOH's post-award, post-facto waiver of the regulatory health assessment requirement for any personal assistant who obtained one within the last 12 months.[80] In arriving at its proposed price, Freedom Care factored in the requirements of the RFP and governing regulations, including the anticipated costs of ensuring the health status for all personal assistants who would transition to Freedom Care as the Statewide Fiscal Intermediary, pursuant to the requirements set out in the RFP.[81] Had Freedom Care known that the Statewide Fiscal

[76] *Id*. ¶ 136.

[77] *Id.*

[78] *Id*.

[79] *Id*.

[80] *Id*. ¶ 60.

[81] *Id*. (citing Ex. 2 (Request for Proposals #20524) at 22 (indicating that the Statewide Fiscal Intermediary would be responsible for ensuring that "the health status of each [personal assistant] is assessed prior to service delivery pursuant to 10 NYCRR § 766.11(c) and (d) or any successor regulation").

Intermediary would not incur the costs of health assessments it would have proposed an even lower PMPM price for administrative functions.

In addition to ignoring these statutory and agency requirements, DOH also improperly relied on criteria extraneous to the RFP in awarding the contract to PPL. The press release's announcement that PPL will move its headquarters to New York, which would purportedly create 1,200 "new" jobs in the State,[82] indicates that DOH gave weight to this promise in evaluating PPL's bid—even though company relocation, and resultant job creation, were not criteria listed in the RFP. Allowing DOH "to consider additional criteria not specified in the bid request effectively circumvents the open bidding process." *AAA Carting & Rubbish Removal, Inc. v. Town of Southeast*, 17 N.Y.3d 136, 144 (2011). DOH's consideration of PPL's pledge to relocate its headquarters, which could only apply to an out-of-state operator like PPL, was therefore arbitrary and capricious. *See Acme Bus Corp.*, 28 N.Y.3d at 425–26 (granting Article 78 petition where the "the municipality evaluate[d] a proposal using a standard that deviates from a standard expressly set forth in the RFP" and noting that "[c]hanging the expressly defined rules midway gives rise to speculation of fraud or corruption"); *Browning-Ferris Indus. of N.Y., Inc. v. City of Lackawanna*, 204 A.D.2d 1047, 1048 (4th Dep't 1994) (annulling the awarded contract where the city "awarded the contract . . . based on a material criterion not disclosed in the specifications").

In any event, there is little reason to believe that PPL will follow through on its promise to move its headquarters to New York—at all or in any meaningful way—now that it has been awarded the Statewide Fiscal Intermediary contract, or that it will create any net new jobs in the State (as opposed to simply hiring some of the people who currently work for existing fiscal intermediaries and will lose their jobs upon the transition to a Single Statewide Intermediary). In

[82] *Id*. ¶ 137.

fact, given its history, there is every reason to believe that PPL will now move on to the next state where it will again promise to move its headquarters to obtain yet another fiscal intermediary contract on false pretenses.[83]

E. The Award is Fatally Flawed Because it is the Product of DOH's Refusal To Provide Sufficiently Precise Scoring Criteria to Bidders.

Even if DOH had not preselected PPL as the "winning" bidder, DOH acted arbitrarily and capriciously in withholding vital information from bidders, which rendered the resultant contract award arbitrary and capricious. During the Questions and Answers process, DOH provided little guidance on key components of the RFP, which made it difficult for the most qualified bidders to submit their strongest proposals. *See Sagamore Auto Body, Inc. v. Nassau Cnty.*, 104 A.D.2d 818, 821 (2d Dep't 1984) (finding "the bid specifications set forth in bid proposal . . . ambiguous" and "insufficiently precise to comply with the public policy underlying the competitive bidding statutes"); *O'Henry's Film Works, Inc. v. Bureau of Ferry & Gen. Aviation Operations*, 111 Misc. 2d 464, 469 (Sup. Ct. N.Y. Cnty. 1981) (granting injunctive relief where the RFP was vague and ambiguous and directing respondents to draft an RFP using "certain and clear" terms).

In response to over 200 submitted questions, many of which concerned scoring or evaluation of bids, DOH summarily claimed that the questions were either "not relevant" or that the answers would "not be shared with the bidding community."[84] For example, DOH refused to provide information in response to questions regarding how DOH would "score and weigh the dozens of discrete services, practices, and requirements set out in Sections 4.0 through 4.7 in determining a total Technical Proposal score"[85] and whether the "total Cost Proposal-related score

[83] Pet. ¶ 101.

[84] *See* Pet. ¶¶ 46–47; *see also* Ex. 4 (RFP #20524 Questions and Answers) at 26 (Question No. 330), 31–33 (Question Nos. 403–24), 47 (Question Nos. 582–87), 64 (Question No. 815).

[85] Ex. 4 at 33 (Question No. 424).

[is] based purely on Proposed PMPM."[86] Thus, fiscal intermediaries were provided insufficient guidance on what (if any) objective criteria DOH would use in weighing and evaluating competing bids. The absence of objective scoring criteria and guidelines also provided DOH with insufficiently bounded, and indeed unfettered, discretion to select a winner based on improper or utterly subjective grounds—which is exactly what it did.

II. This Court Should Enter Emergency Injunctive Relief Prohibiting DOH and PPL from Implementing The Contract Award During the Pendency of this Action.

The purpose of a preliminary injunctive relief "is to maintain the status quo pending a hearing on the merits, rather than to determine the parties' ultimate rights." *360 W. 11th LLC v. AGC Credit Co. II, LLC*, 46 A.D.3d 367, 367 (1st Dep't 2007). Such relief is appropriate where a party demonstrates "a likelihood of success on the merits," "irreparable harm in the absence of the injunctive relief," and "a balancing of the equities in its favor." *Untitled LLC*, 51 A.D.3d at 511. A temporary restraining order may be granted, meanwhile, on a showing of immediate, irreparable injury alone—a showing Petitioner makes here. *See* CPLR 6301 & 6313; *infra* Part B.

A. Freedom Care Is Likely To Succeed on the Merits.

To obtain preliminary injunctive relief, a plaintiff need only demonstrate a "prima facie showing," not a "certainty of success." *Parkmed Co. v. Pro-Life Counselling, Inc.*, 91 A.D.2d 551, 553 (1st Dep't 1982); *accord Ying Fund Moy v. Hohi Umeki*, 10 A.D.3d 604, 605 (2d Dep't 2004). And where, as here, the requested "injunctive relief can be tailored to preserve the status quo with little prejudice to either side, the degree of proof required as to the elements, other than irreparable injury and the balancing of the equities, for a preliminary injunction may be accordingly reduced." *O'Henry's Film Works, Inc.*, 111 Misc. 2d at 469. For the reasons stated above, *supra* Section I, Petitioner is likely to succeed on the merits of its Article 78 petition.

[86] *Id*. at 31 (Question No. 400).

B. Freedom Care Will Suffer Imminent, Irreparable Harm if Respondents Are Not Immediately Enjoined.

A party suffers irreparable harm from an injury that cannot be adequately compensated with money damages or that "would be difficult to quantify." *Interoil LNG Holdings, Inc. v. Merrill Lynch PNG LNG Corp.*, 60 A.D.3d 403, 404 (1st Dep't 2009). "It is well settled in New York that the loss of the business relationship which ostensibly took time and money to cultivate, constitutes irreparable harm that cannot be compensated by money damages." *Liberty Ashes, Inc. v. Taormina*, 43 Misc. 3d 1213(A) (Sup. Ct. Nassau Cnty. 2014). Freedom Care will suffer a number of severe, immediate, and irreparable harms absent an injunction as Respondents move full steam ahead with the implementation of the fatally flawed Contract Award.

First, Freedom Care just learned—on November 22, 2024—that managed care plans have begun to contact Freedom Care's consumers to instruct them that Freedom Care will soon no longer be permitted to provide fiscal intermediary services in the State, to request contact information for their personal assistants, and to direct them to register with PPL as soon as PPL is authorized to accept them.[87] This solicitation of Petitioner's consumers and personal assistants—with DOH authorization—interferes with and irreparably harms Petitioner's customer relationships, consumer and personal assistant goodwill, its ability to retain its customers, and its reputation.[88] *See Clarion Assocs. v. Colby Co.*, 276 A.D.2d 461, 463 (2d Dep't 2000) (concluding that "the continued improper contact and solicitation of [Plaintiff's] customers would result in irreparable harm"); *Chernoff Diamond & Co. v. Fitzmaurice, Inc.*, 234 A.D.2d 200, 203 (1st Dep't 1996) (finding that "[P]laintiff would suffer irreparable harm should its clients terminate their relationships with it in order to use defendant's services"); *Carleton v. Pindus*, 2006 WL 4568308

[87] Weiner ¶¶ 13–14.

[88] Weiner ¶ 25.

(Sup. Ct. N.Y. Cnty. Aug. 08, 2006) (acknowledging that "loss of clients and revenue to a competing service constitutes irreparable injury").

Second, multiple plans have recently demanded that Freedom Care immediately provide them with large swaths of confidential personal data for every single one of the tens of thousands of consumers and personal assistants with which it has relationships—including Social Security Number, contact information, address, date of birth, and identification number.[89] This directive is made pursuant to a DOH "mandate" which makes clear that it is "the Statewide FI" (*i.e.*, PPL) and DOH that "seek to gain data on current CDPAP Consumers" via this demand.[90] DOH has promulgated no public rulemaking or authorization for such a directive, which purports to require fiscal intermediaries to provide this information to help expedite "the transition of consumers from their current [fiscal intermediary] to the Statewide [Fiscal Intermediary]," *i.e.*, PPL.[91] If Freedom Care is forced to turn over vast amounts of its consumers' and personal assistants' data, that will cause similar irreparable harms to customer relationships, goodwill, retention, and reputation.[92] Yet Petitioner is caught in a Catch-22, as it faces potential DOH enforcement action that could have severe and irreparable consequences to the company, including to its reputation, if it continues to refuse to turn over this information while it challenges the contract award.[93]

Third, once DOH and PPL sign the statewide fiscal intermediary contract in the New Year and DOH starts funneling all new consumers to PPL, Freedom Care will no longer be able to enroll new consumers.[94] It will be impossible to quantify how many consumers, and therefore how much

[89] Weiner ¶ 14.

[90] *Id*. ¶ 14 & Ex. A.

[91] *Id*.

[92] *Id*.

[93] *Id*. ¶ 15.

[94] *Id*. ¶ 25.

revenue, Freedom Care will irrevocably lose as a result. *See Willis of N.Y., Inc. v. DeFelice*, 299 A.D.2d 240, 242 (1st Dep't 2002) (finding irreparable harm where plaintiff established that, absent injunctive relief, it "would likely sustain a loss of business impossible, or very difficult, to quantify"). At the same time, Freedom Care will immediately and irreversibly start losing its existing consumers as they are contacted and encouraged to immediately transition to PPL.[95] Almost 30% of consumers enrolled with Petitioner live in upstate New York, the first region targeted to transition to PPL beginning on January 6, 2025.[96] Due to the cumbersome nature of transitioning consumers and personal assistants from one fiscal intermediary to another, once consumers and personal assistants have begun the process of transitioning—and certainly once they have completed it—most will decline to switch back to their former fiscal intermediary even if they are later permitted to do so.[97] As a result, Freedom Care is at imminent risk of irrevocably losing almost one-third of its CDPAP consumers and business, with the rest to follow in a matter of weeks. Because Petitioner has "no recourse" to recoup these lost customers, it will "clearly suffer[] irreparable harm" once these consumers transition to PPL, even if the Court ultimately annuls the contract award to PPL. *AEP Res. Serv. Co. v. Long Island Power Auth.*, 179 Misc. 2d 639, 653 (Sup. Ct. Nassau Cnty. 1999).

Fourth, if the transition proceeds across the state and more consumers are transitioned to PPL, the volume of work will dramatically decrease for Freedom Care staff, diminishing the profitability—and ultimately the viability—of retaining their jobs and Petitioner's business in New York.[98] As a result, Petitioner—the largest fiscal intermediary in the State—will be forced to

[95] Weiner ¶ 27.

[96] *Id.*

[97] *Id*. ¶ 16–23.

[98] Weiner ¶ 29.

prematurely close down its business. Moreover, should the Court grant the Petition and annul the contract award, Petitioner will be in a much less favorable position to bid for a new Statewide Fiscal Intermediary contract. This threat to its existence and future business prospects in New York State constitutes an additional irreparable harm to Petitioner. *See Nemer Jeep-Eagle, Inc. v. Jeep-Eagle Sales Corp.*, 992 F.2d 430, 435 (2d Cir. 1993) (clarifying that the "*threat* to the continued existence of a business can constitute irreparable injury" (emphasis in original)).

Finally, the imminent transition of consumers and personal assistants to PPL will have an irreversible, negative impact on Freedom Care's reputation as a leading, reliable, and trusted provider of fiscal intermediary services.[99] "Harm to business reputation is harm for which money damages are insufficient and for which injunctive relief may be appropriate." *Destiny USA Holdings, LLC v. Citigroup Glob. Mkts. Realty Corp.*, 69 A.D.3d 212, 222 (4th Dep't 2009); *see also In re Laro Serv. Systems, Inc.*, 2005 WL 8145613, at *10 (finding irreparable harm where petitioner alleged that the loss of a bid, and the resulting contract, would injure its reputation). In addition, based on PPL's dismal record with previous (and much smaller-scale) transitions to a single fiscal intermediary model in other states, PPL's transition of 280,000 consumers and nearly 600,000 personal assistants from their 600 current fiscal intermediaries to a single statement fiscal intermediary in a matter of weeks is bound to result in disruptions to patient services in New York.[100] When these disruptions occur, as they inevitably will, personal assistants may blame Petitioner—their current employer—for any delays, further undermining its customer goodwill and harming its well-developed reputation for outstanding performance and service.[101] These

[99] Weiner ¶ 30.

[100] Weiner ¶ 30.

[101] *Id.*

harms to Freedom Care's image will make it more difficult to win contracts and bring on and retain consumers in other states in the future.[102]

C. The Balance of Equities Weighs Decidedly in Freedom Care's Favor.

Finally, the balance of the equities weighs in Freedom Care's favor. Equity favors the movant where, as here, the irreparable harm to the movant outweighs any potential harm to the other party. *Barbes Rest. Inc. v. ASRR Suzer 218, LLC*, 140 A.D.3d 430, 431 (1st Dep't 2016).

As discussed above, absent injunctive relief to preserve the status quo pending a determination on the merits, Freedom Care will suffer imminent and irreparable harm through the loss of customers, consumer relationships, goodwill, revenue, and reputation, as well as the continued viability of its business in New York. By contrast, DOH and PPL will suffer no prejudice from a temporary order preserving the status quo under which the fiscal intermediary industry has operated for over a decade. *See Gramercy Co. v. Benenson*, 223 A.D.2d 497, 498 (1st Dep't 1996) ("[T]he balance of equities tilts in favor of plaintiffs, who merely seek to maintain [the] status quo."); *Ballato v. Young Dong Jang*, 30 Misc. 3d 1240(A), 2011 WL 1044616, at *3 (Sup. Ct. Nassau Cnty. Feb. 16, 2011) (granting injunction where equities tipped in plaintiff's favor to preserve the status quo that had existed for over ten years). Unlike Petitioner, PPL is not at risk of losing any current business if an injunction were to issue because PPL does not provide fiscal intermediary services in New York State.

Moreover, considerations of the public interest weigh in favor of granting emergency relief. Should the Court ultimately grant the Petition and annul the award, consumers and personal assistants across New York State will have been subjected to a burdensome and unnecessary

[102] *Id.*

transition to PPL. Preserving the status quo will allow CDPAP consumers and personal assistants to remain with their current, chosen fiscal intermediary pending this Court's decision.

III. The Court Should Grant Expedited Discovery Germane To Petitioner's Claims.

Petitioner should also be granted expedited discovery pursuant to CPLR 408 to obtain relevant materials from Respondents that are needed to fully and adequately assess DOH's challenged selection of PPL as the winning bidder.

Courts have "broad discretion" to determine whether discovery is warranted in an Article 78 proceeding. *See Nespoli v. Doherty*, 17 Misc. 3d 1117(A), 2007 WL 3084870, at *3 (Sup. Ct. N.Y. Cnty. Sept. 28, 2007) (granting petitioner-plaintiffs' application for discovery in Article 78 proceedings against City Department of Sanitation) (citing *Town of Pleasant Valley v. N.Y. State Bd. of Real Prop. Servs*., 253 A.D.2d 8, 16 (2d Dep't 1999)). "[E]xpedited discovery is warranted where there is ample need for it" and the "information is within the exclusive possession and knowledge of the respondents." *Stop BHOD v. City of New York*, 22 Misc. 3d 1136(A), 2009 WL 692080 at *14 (Sup. Ct. Kings Cnty. Mar. 13, 2009); *Sylmark Holdings, Ltd. v. Silicone Zone Int'l Ltd.*, 5 Misc. 3d 285, 302 (Sup. Ct. N.Y. Cnty. Aug. 9, 2004); *see also Town of Pleasant Valley*, 253 A.D.2d at 15 ("[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action."). The need for expedited discovery is "interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity." *Id*. at 16 (citation omitted).

Petitioner's proposed discovery requests and document subpoena to Respondents (which are attached to the accompanying Shapiro Affirmation as Exhibit 13) seek a narrow scope of materials directly relevant to the instant bid protest, including: (1) PPL's submitted proposal; (2) the scoring matrices or guidelines used by DOH in evaluating proposals; (3) the scorecards and

other records reflecting DOH's evaluation and scoring of PPL's and Petitioner's proposals; (4) relevant communications that DOH and the Executive Chamber had with PPL, its proposed "core" subcontractor partners, and 1199SEIU, or that PPL had with other government officials, supporting Petitioner's claims that PPL was preordained to be selected the "winner" of a sham bid process and that communications between these parties violated the RFP's restricted period. The requested materials are therefore germane to Petitioner's claims and should be produced. *See Id.* at 15 ("[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action.").

The first three categories listed above—PPL's submitted proposal, DOH's scoring matrices or guidelines, and the scorecards reflecting DOH's evaluation and scoring of PPL's and Petitioner's proposals—are fundamentally necessary to adequately review DOH's award. *See Acme Bus Corp.*, 28 N.Y.3d at 422 (noting that "[t]he County disclosed the proposals submitted by [the winning bidders], as well as the score sheets used by the County to evaluate the proposals"). Put simply, while there are many independent grounds on which to annul the award, the Court cannot fully and adequately evaluate DOH's determination without these materials. The fourth category, meanwhile, is central to Petitioner's specific claims.

The requested information, moreover, could not be obtained from other sources, despite Petitioners' diligent efforts. Petitioner's counsel filed FOIL requests with DOH and the Executive Chamber for these exact materials within days of the Contract Award, but no documents have yet been produced.[103] And PPL has apparently required former employees who worked on its efforts to obtain the Single Fiscal Intermediary contract to sign nondisclosure agreements when they leave the company. In this way, PPL has prevented former employees from acting as whistleblowers

[103] Petition ¶ 66.

despite the fact that it sought to obtain, and has now been awarded, a multibillion-dollar contract from the State of New York.[104]

Given the urgent need for these documents—including because of the imminent and irreparable harm Petitioner is facing, the documents' direct relevance to Petitioner's claims in this action, and their necessity for the Court to fully and adequately review DOH's contract award to PPL—Respondents should be required to produce the materials sought in the proposed document request and subpoena on an expedited basis.

CONCLUSION

For the foregoing reasons, Freedom Care respectfully requests, pursuant to CPLR 408, 6301, 6311, 7801–06, that this Court grant the relief requested in the Verified Petition in full, including: (1) issuing a temporary restraining order and preliminary injunction enjoining DOH and PPL from implementing the contract award for the provision statewide fiscal intermediary services during the pendency of this Action; (2) granting Petitioner leave to obtain the requested expedited discovery in support of its Verified Petition; and (3) annulling and vacating DOH's award of the statewide fiscal intermediary contract to PPL.

[104] *Id*. ¶ 67.

Dated: New York, New York
November 25, 2024

Respectfully submitted,
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ATTORNEY CERTIFICATION PURSUANT TO UNIFORM RULE 202.8-b

I, Akiva Shapiro, an attorney duly admitted to practice law before the courts of the State of New York, hereby certify that this Memorandum of Law complies with the word count limit set forth in Rule 202.8-b of the Uniform Civil Rules for the Supreme Court and the County Court because it contains 8,515 words, excluding the parts of the affirmation exempted by Rule 202.8-b, and Petitioner has requested leave of the Court to file a brief of this length. In preparing this certification, I have relied on the word count of the word-processing system used to prepare this affirmation.

Dated: New York, New York
November 25, 2024

/s/ *Akiva Shapiro*
Akiva Shapiro