

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
19 DHR 01959

Optima Family Care of North Carolina
Inc,

Petitioner,

v.

North Carolina Department of Health
and Human Services Mandy Cohen MD
MPH in her ofc capacity as Sec of the
Dept and Dave Richard in his ofc
capacity as Deputy Sec of the Dept of NC
Medicaid,

Respondent,

and

UnitedHealthcare of North Carolina,
Inc.,

Respondent-Intervenor,

and

Blue Cross and Blue Shield of North
Carolina,

Respondent-Intervenor,

and

WellCare of North Carolina, Inc.,

Respondent-Intervenor,

and

AmeriHealth Caritas of North Carolina,
Inc.,

Respondent-Intervenor,

and

Carolina Complete Health, Inc.,

Respondent-Intervenor.

**ORDER ON
PETITIONER'S
MOTION FOR STAY**

THIS MATTTTER COMES on for consideration on the Motion for Stay (the
“Motion”) filed by Petitioner, Optima Family Care of North Carolina, Inc.
 (“Petitioner” or “Optima”). In support of, and in opposition to, the Motion,
Petitioner, Respondent, and Respondent-Intervenors filed numerous affidavits and

other evidentiary materials. On 16 May 2019 this Tribunal held a hearing on the Motion.

Having considered the Motion, briefs, exhibits, and affidavits supporting and opposing the Motion, and the parties' arguments at the hearing on the Motion, the Undersigned finds and concludes that the Petitioner's request for a stay of contested action should be DENIED for the reasons explained below.

I.

BACKGROUND

1. This case arises from the State's transformation of its Medicaid delivery system from one that is primarily based on a fee-for-service model to a managed care system operated by Prepaid Health Plans ("PHPs") under capitated contracts. N.C. Sess. Law 2015-245, as amended (the "Transformation Act").¹ The transformation is intended to "provide budget predictability for the taxpayers of this State while ensuring quality care to those in need." N.C. Sess. Law 2015-245, § 1.

2. Pursuant to the Transformation Act, the General Assembly mandated that Respondent, the North Carolina Department of Health and Human Services (the "Department"), conduct a procurement as directed in the Transformation Act and award PHP contracts resulting from that competitive process. *See generally* N.C. Sess. Law 2015-245, as amended. The Department issued a request for

¹ N.C. Sess. Law 2015-245 was amended by N.C. Sess. Law 2016-121; N.C. Sess. Law 2017-57, § 11H.17.(a); N.C. Sess. Law 2017-186, Part IV; N.C. Sess. Law 2018-5, § 11H.10.(c); N.C. Sess. Law 2018-48; N.C. Sess. Law 2018-49, §§ 4-6.

proposals, and, after receiving eight proposals, the Department conducted an evaluation process.

3. At the conclusion of the evaluation process, the Department's Evaluation Committee determined that Optima was the eighth-ranked offeror. The Department awarded four statewide PHP contracts and two regional PHP contracts to five separate awardees but did not award any contract to Optima. Petitioner's Motion seeks a stay of the implementation efforts for the awarded PHP contracts pending the resolution of this contested case.

II.

PROCEDURAL HISTORY

4. On 4 March 2019, Optima submitted a request for a bid protest meeting to the Department protesting the Department's decision not to award it regional contracts. A bid protest meeting was held on 9 April 2019, and the Department denied Optima's request for relief by the Protest Denial Letter on 12 April 2019. Amended Petition ¶ 6. Optima filed its Amended Petition and the Motion on 22 April 2019.²

5. Optima filed its brief in support of its motion on 2 May 2019 and the Department and Respondent-Intervenors³ filed their memoranda in opposition on 9

² Optima initially commenced this contested case by filing a Petition for a Contested Case Hearing with this Tribunal on April 5, 2019.

³ This Tribunal granted the following four intervenors the right to intervene for purposes of Optima's request for a stay and has otherwise deferred ruling on their motions to intervene: UnitedHealthcare of North Carolina, Inc. ("United"); Blue Cross and Blue Shield of North Carolina ("BCBSNC"), WellCare Health Plans of North Carolina, Inc. ("WellCare"); and AmeriHealth Caritas North Carolina, Inc. ("ACNC"). This Tribunal granted Carolina Complete Health, Inc.'s ("CCH")

May 2019. The Tribunal heard argument on the request for a stay on 16 May 2019. The Motion is now ripe for determination.

III.

FACTUAL BACKGROUND

6. This Tribunal recites the following factual basis solely for the purpose of deciding this Motion. These facts are not binding at a final hearing on the merits. *Lohrmann v. Iredell Mem'l Hosp., Inc.*, 174 N.C. App. 63, 75 (2005) (noting that it is “well settled that findings of fact made during a preliminary injunction proceeding are not binding upon a court at a trial on the merits”).

A. The Medicaid Transformation Act

7. In September 2015, the General Assembly enacted the Transformation Act, North Carolina Session Law 2015-245, requiring transformation of the State’s Medicaid program for most beneficiaries and services from a predominantly fee-for-service model to a Medicaid managed care model. The Transformation Act was amended several times between 2015 and 2018. *See supra*, footnote 1.

8. North Carolina’s Medicaid managed care program is expected to serve over 1.6 million people and involve annual funds of about \$6 billion. *See* Affidavit of James Edward Ludlam, IV (“Ludlam Aff.”), ¶ 7.

9. The Transformation Act gives the Department the “full authority to manage the State’s Medicaid and NC Health Choice programs” and requires it to “be responsible for planning and implementing the Medicaid transformation

motion to intervene in full. With regard to this Motion, all five intervenors (the “Intervenors”) filed briefs and materials with the Tribunal and made oral argument for the Tribunal’s consideration.

required by this act.” N.C. Sess. Law 2015-245, § 4(1). Among many other tasks, the Transformation Act further requires the Department to “[o]versee, monitor, and enforce capitated PHP contract performance;” “[e]nsure sustainability of the transformed Medicaid and NC Health Choice programs;” and “[e]nter into capitated PHP contracts for the delivery of the Medicaid and NC Health Choice services ...” *Id.* § 5(3), (4), (6).

10. The Transformation Act required the Department to award four statewide PHP contracts to entities to operate and administer an at-risk, Medicaid managed care business. *Id.* § 4(6), as amended by N.C. Sess. Law 2018-48. The Transformation Act also directed the Department to award “up to 12” regional PHP contracts. N.C. Sess. Law 2015-245, § 4(6), as amended by N.C. Sess. Law 2018-48. It further directed the Department to define six regions comprised of whole contiguous counties that reasonably distribute covered populations across the State. *Id.* § 5(2).

11. A PHP is defined in pertinent part as “an entity, which may be a commercial plan *or* provider-led entity that operates or will operate a capitated contract for the delivery of services” *Id.* § 4(2), as amended by N.C. Sess. Law 2018-48 (emphasis added).

12. A commercial plan (“CP”) is “a person, entity or organization, profit or nonprofit, that undertakes to provide or arrange for the delivery of health care services to enrollees on a prepaid basis except for enrollee responsibility for

copayments and deductibles and holds a PHP license issued by the Department of Insurance.” *Id.* § 4(2)a, as amended by N.C. Sess. Law 2018-48.

13. A provider-led entity (“PLE”) is an entity that meets all of the following criteria:

1. A majority of the entity’s ownership is held by an individual or entity that has as its primary business purpose the ownership or operation of one or more capitated contracts described in subdivision (3) of this section or Medicaid and NC Health Choice providers.
2. A majority of the entity’s governing body is composed of individuals who (i) are licensed in the State as physicians, physician assistants, nurse practitioners, or psychologists and (ii) have experience treating beneficiaries of the North Carolina Medicaid program.
3. Holds a PHP license issued by the Department of Insurance.

Id. at 4(2)b, as amended by N.C. Sess. Law 2018-48.

14. CPs could submit offers for statewide contracts only. PLEs could submit proposals for one of the statewide contracts, for a contract for one or more of six regions covering the state, or for both. *See* Affidavit of Mona M. Moon (“Moon Aff.”) ¶ 16, Ex. A (RFP § II, p. 8).

B. Design of the Procurement

15. The procurement that is the subject action is the culmination of efforts by many people over several years and has spanned two administrations. Ludlam Aff. ¶¶ 3, 6. It has involved multiple divisions within the Department and other

state agencies, such as the Department of Insurance. Affidavit of Sarah Gregosky (“Gregosky Aff.”), ¶ 3.

16. In developing RFP #30-190029-DHB (the “RFP”), the Department acknowledged the significance of Medicaid managed care succeeding, and the risk and potential implications of its failure including the potential impacts on beneficiaries, providers, and PHPs. Ludlam Aff. ¶¶ 7-11. It also considered the risk to the financial viability of a plan if a PHP does not secure enough members. *Id.*; Affidavit of Julia Kraemer Lerche (“Lerche Aff.”), ¶ 3.

17. The Department developed the RFP using not only its own employees, who had relevant experience, but also subject matter expert consultants. Ludlam Aff. ¶ 12. For example, the Department retained Manatt, Phelps & Phillips, LLP (“Manatt”), a national consulting firm with Medicaid managed care experience, for review and assistance with development of the RFP. *Id.*

18. The Department also employed Mercer, a global consulting firm, as an actuarial consultant. Lerche Aff. ¶ 4. Among other things, Mercer assisted the Department in considering the minimum number of covered lives needed to ensure financial viability of PHPs providing Medicaid managed care under contracts awarded through the Department’s competitive procurement process. *Id.* Based in part on the information reviewed by Mercer, for this initial implementation of Medicaid managed care, the Department exercised its discretion to establish an outside limit of 10 regional PLE contracts with no more than one PLE contract in

each of Regions 1 and 6 and no more than two PLE contracts in the other four regions. *Id.* at ¶ 8.

19. Before issuing the RFP, the Department sought input from legislators, the United States Centers for Medicare and Medicaid Services (“CMS”), other states, industry experts, and stakeholders regarding the design and implementation of Medicaid managed care in North Carolina. Ludlam Aff. ¶ 7.

C. The RFP and the Department’s Evaluation Process

20. The Department issued the RFP on 9 August 2018 to solicit offers for PHPs through a competitive procurement process. Moon Aff. ¶ 3.

21. The RFP sought responses and explanations to at least 65 questions not including subparts, along with 7 use case scenarios, which set out detailed, multifaceted health care scenarios and requested the offerors to respond with “the program and services listed within each use case.” Moon Aff. ¶¶ 4,5.

22. At proposal opening on 19 October 2018, the Department received proposals from eight offerors: Aetna; ACNC; BCBSNC; CCH; North Carolina Provider Owned Plans, Inc. dba MyHealth by Health Providers (“My Health”); Optima Family Care of North Carolina, Inc. (“Optima”); United; and WellCare. Ludlam Aff. ¶ 25. Optima, a PLE, submitted a proposal for contracts in Regions 4, 5, and 6. Optima Reply, Ex. H, Excerpts of Optima Proposal, p. 3.

23. To review the proposals, the Department established an Evaluation Committee that included individuals with significant experience with Medicaid, complex government programs, and managed care. Ludlam Aff. ¶¶ 26-27. The

Evaluation Committee consulted subject matter experts during the evaluation process, including a physician, pharmacists, nurses, and social workers, with expertise in various areas relevant to the evaluation. *Id.* ¶ 28.

24. The RFP states that the scoring of proposals will be based on the following criteria:

- Offeror Qualifications/ Experience (20% weight)
- Scope of Services (70% weight)
- Use Cases (5% weight)
- Client References (5% weight)
- Bonus Points: Marketplace Participation (2.5% weight)

Moon Aff. Ex. A (RFP § II, pp. 17-19). The “Scope of Services” subsection was further broken down into eight sub-subsections, with individual weights ranging from 5% to 25% of the total evaluation. *Id.*

25. Over the course of four months the Evaluation Committee conducted 46 meetings. Moon Aff. ¶ 6. The Evaluation Committee rated the proposals by section for each offeror using a consensus method of scoring by which the voting members would agree on a particular rating for each offeror’s response to each question. *Id.* at ¶ 8. At least five of the seven voting members were required to be present for purposes of rating or scoring responses. *Id.* The Evaluation Committee made, recorded and kept notes of its meetings. *Id.* at Ex. G. After the Evaluation Committee completed its scoring, the Department’s Medicaid contracting section conducted a quality assurance review of the scoring. *Id.* ¶ 15.

26. Of the offerors that submitted proposals, WellCare received the highest score followed by United, BCBSNC, ACNC, Aetna, My Health, CCH, and Optima. *Id.* ¶ 17.

27. The highest scoring offeror, WellCare, received 71.824% of the total possible points (with a score of 736.19304), and the fourth ranked statewide offeror, ACNC, received 68.943% of the total possible points (with a score of 706.66204). *Id.*

28. CCH, which also sought regional contracts, received a score of 628.39969 (or 61.307% of the total available points), and Optima (which only sought regional contracts in Regions 4, 5, and 6) received a score of 573.48539 (or 55.950% of the total available points). *Id.* Optima scored the lowest, or tied for the lowest score in seven out of 11 areas scored under the Scope of Services and also had the lowest score of all offerors for the use case scenarios. *Id.* at ¶ 22.

D. Contract Awards

29. After conducting its evaluation process, the Evaluation Committee recommended the award of the statewide contracts to the four highest rated offerors (WellCare, United, BCBSNC, and ACNC). Moon Aff. ¶ 20. The committee did not recommend the award of any regional contracts. *Id.* at ¶ 21.

30. The Evaluation Committee made its recommendation to Mona M. Moon, North Carolina Medicaid's Chief Operating Officer. *Id.* ¶ 26. Ms. Moon then made the recommendation to the Department's Deputy Secretary of NC Medicaid, Dave Richard. *Id.* Mr. Richard accepted the Evaluation Committee's

recommendation regarding the award of the four statewide contracts, and he also recommended the award of a contract to CCH for Regions 3 and 5. *Id.*

31. Department Secretary Mandy Cohen accepted Mr. Richard's recommendation, and, on 4 February 2019, the Department awarded statewide PHP contracts arising out of the RFP to WellCare, United, BCBSNC, and ACNC, and regional PHP contracts covering Regions 3 and 5 to CCH. *Id.* The contracts consisted of the RFP and the successful offerors' responses, along with other documents specifically enumerated in the RFP. *Id.* at Ex. A (RFP § I, p. 8).

E. Implementation Activities

32. Following the 4 February 2019 contract awards, the Department and the Intervenors began work toward implementing Medicaid managed care. Gregosky Aff. ¶ 4.

33. Over 300 Department employees, consultants, and contractors are working on behalf of the Department to implement Medicaid managed care. *Id.* Vendor support staff has been trained in the details of North Carolina Medicaid managed care design. Ludlam Aff. ¶ 35.

34. As of April 8, 2019:

- a. The Department had hosted 208 meetings with the contract awardees;
- b. The contract awardees had provided 819 deliverables to the Department required under their contracts; and
- c. The Department had reviewed and provided feedback on 196 of those deliverables.

Gregosky Aff. ¶ 5.

35. The Department has identified features and tasks that must be completed before performance of the contracts. *Id.* ¶ 8. The Department expected 210 features and 790 tasks to have been completed by the end of April 2019, and an additional 274 features and 650 tasks to have been completed by the end of May 2019. *Id.* Additional CMS approvals are needed before launch. Ludlam Aff. ¶ 32. Notices to potential program beneficiaries must be printed, beneficiaries must be educated about their choices, and open enrollment must occur. Gregosky Aff. ¶¶ 6, 7. Provider contracts also must be finalized. *See id.* ¶ 9.

F. Optima’s Bid Protest

36. Optima submitted a request for a bid protest meeting pursuant to 1 N.C. Admin. Code 05B .1519(c)(1) and the terms of the RFP. *See* Petition, ¶ 14. A protest meeting was held before Principal Deputy Secretary Susan Perry-Manning on 9 April 2019. Amended Petition, ¶ 6. On 12 April 2019, Principal Deputy Secretary Perry-Manning issued her decision denying Optima’s protest. *Id.* This contested case followed.

IV.

ANALYSIS

A. Standard of Review

37. Petitioner brings this contested case pursuant to the Administrative Procedure Act of North Carolina (“NC APA”), N.C. Gen. Stat. § 150B-23 *et. seq.* The NC APA specifically authorizes an Administrative Law Judge to “[s]tay the contested action by the agency pending the outcome of the case, upon such terms

[s]he deems proper, and subject to the provisions of G.S. 1A-1, Rule 65[.]” N.C. Gen. Stat. § 150B-33(b)(6).

38. Rule 65 of the North Carolina Rules of Civil Procedure authorizes the issuance of a preliminary injunction. Like a temporary restraining order, a preliminary injunction serves to maintain the status quo pending trial on the merits. *Providence Volunteer Fire Dep’t v. Town of Weddington*, __ N.C. App. __, 800 S.E.2d 425, 435 (2017).

39. A preliminary injunction “is an *extraordinary measure*.” *Ridge Cmty. Inv’rs, Inc. v. Berry*, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977) (emphasis added). It will be issued *only* if: (i) a petitioner is able to show the likelihood of success on the merits of its case *and* (ii) is likely to sustain irreparable loss unless the injunction is issued or if, in this Tribunal’s opinion, such relief appears necessary for the protection of petitioner’s rights during the course of litigation. *Providence Volunteer Fire Dep’t*, __ N.C. App. at 435; *see also* G. Gray Wilson, North Carolina Civil Procedure § 65-1 (2018). The burden is on the petitioner to establish its right to a preliminary injunction. *Pruitt v. Williams*, 288 N.C. 368, 372, 218 S.E.2d 348, 351 (1975).

B. Analysis

40. Optima argues that it is entitled to a stay because it is likely to succeed on the merits of its claims and it will suffer irreparable harm absent a stay. In support of its Motion, Optima argues the merits of its claims. This Tribunal has

carefully considered the parties' arguments and, in summary, concludes that Optima has not demonstrated the likelihood of success on the merits of its claims.

(i) Standards Governing Contested Cases

41. Prior to addressing the merits of Optima's claims, this Tribunal first sets out the basic principles which governs its review of this contested case.

42. The actions contested by Optima in this contested case relate to the Department's procurement of capitated PHP contracts as part of the State's Medicaid Transformation.

43. The Department is the "single state agency" charged with administering the State's Medicaid program. 42 U.S.C. § 1396a(a)(5) (requiring "the establishment or designation of a single State agency to administer or to supervise the administration of the plan . . ."); N.C. Gen. Stat. § 108A-54 ("The Department is authorized to establish a Medicaid Program . . ."); N.C. Gen. Stat. § 108A-54.1A ("The Department [] is expressly authorized and required to take any and all necessary action to amend the State Plan and waivers in order to keep the program within the certified budget, except as provided in G.S. 108A-54(f)."). Because the Department has the "full authority to manage the State's Medicaid and NC Health Choice programs," it is unsurprising that the General Assembly vested it with the responsibility "for planning and implementing the transformation required by the [a]ct." N.C. Sess. Law 2015-245, § 4(1). This included the procurement of capitated PHP contracts. *Id.* at § 4(3).

44. The Department's discretion under the Transformation Act is broad, but it is not unbridled. Under the NC APA, the Department, may not exceed its authority or jurisdiction, act erroneously, fail to use proper procedure, act arbitrarily or capriciously, or fail to act as required by law or rule. N.C. Gen Stat. §150B-23. Indeed, to prevail in this contested case, Optima must demonstrate that it was deprived of property or otherwise substantially prejudiced⁴ and the Department acted in a manner contrary to the NC APA. *Id.*

45. In contested case proceedings, due regard is to be given to the demonstrated knowledge and expertise of the agency with respect to facts and inferences with the agency's specialized knowledge. N.C. Gen. Stat. Ann. § 150B-34. But this does not mean complete deference. It is generally recognized that, when reviewing the underlying merits of an agency's interpretation, "courts consider, but are not bound by, such the interpretations of administrative agencies []." *Morris Commc'ns Corp. v. City of Bessemer City Zoning Bd. of Adjustment*, 365 N.C. 152, 156 (2011).

46. However, a reviewing body "does not have authority to override" discretionary decisions made by an agency when that "discretion is exercise in good faith and in accordance with law." *Lewis v. N.C. Dep't of Human Res.*, 92 N.C. App. 737, 740, 375 S.E.2d 712, 714 (1989). Rather, such decisions may be reversed as arbitrary, capricious, or an abuse of discretion when they are "patently in bad faith" or "whimsical" in the sense they "indicate a lack of fair and careful consideration" or

⁴ The harm required to establish substantial prejudice cannot be conjectural or hypothetical; it must be concrete, particularized, actual or imminent. *Surgical Care Affiliates*, 235 N.C. App. 620, 631 (2014).

“fail to indicate any course of reasoning and the exercise of judgment.” *Id.* at 740 (internal citations and quotations omitted). It is presumed, absent evidence to the contrary, that an agency “discharge[d] its duties in good faith and exercise[d] [its] power in accord with the spirit and purpose of the law.” *Painter*, 288 N.C. 165, 178, (1975); *see also Richardson v. N.C. Dept of Pub. Instruction Licensure Section*, 199 N.C. App. 219, 223-24 (2009) (recognizing that an “agency’s decision is presumed to be made in good faith and in accordance with governing law.”) Thus, the “arbitrary or capricious standard is a difficult one to meet.” *Lewis*, 92 N.C. at 740.

(ii) Likelihood of Success on the Merits

a. Optima Has Not Shown It Is Likely to Prevail on Its “Threshold Criteria” Argument

47. Optima argues that the Department denied Optima’s proposal on the sole basis that it fell short of an undisclosed “threshold” to meet overall expectations. Amended Petition ¶ 16.

48. The record evidence shows that Optima received the lowest score of all eight Offerors, including the lowest score awarded in 7 out of the 11 areas scored under Scope of Services: 1) Administration and Management; 2) Program Operations; 3) Members; 4) Quality and Value; 5) Stakeholder Engagement; 6) Claims and Encounter Management; and 7) Compliance. In addition, Optima had the lowest score among all offerors for the use case scenarios. Moon Aff. ¶ 22.

49. After completing scoring of all proposals, the Evaluation Committee discussed whether to award regional contracts to the two offerors that had submitted proposals for regional contracts: CCH and Optima. The Evaluation

Committee noted that “CCH and Optima are the lowest scoring Offerors by a margin of more than 75 points relative to the fourth highest scoring Offeror.” The Evaluation Committee stated that “Optima’s total score indicates the Offeror, on average, failed to achieve the threshold to “meet expectations,” i.e., 60% of the total possible points or 615.” Moon Aff. ¶ 18 and Ex. H, Summary of Evaluation Process, p. 6. The tabulation of the scores on that page similarly notes Optima “did not achieve average score of Meets.” *Id.*

50. The average score of “Meets” refers to the five-level rating scale that the Department used to evaluate offeror responses to most questions. This rating scale assigned 60% of possible points to those responses for which the Evaluation Committee determined the response “met” expectations and indicated “the capacity, capability, or experience to implement or operationalize the approach” described. Moon Aff. ¶ 24. Under the five-level rating scale, 100% of available points were only given if the offeror “substantially exceed[ed]” expectations, and 85% of available points were given if the offeror “exceed[ed]” expectations. *Id.*

51. Based on the current record, it appears that the Department rationally discussed whether to award regional contracts to PLEs, and in particular whether to award a regional contract to Optima. Nothing in the RFP required that a contract be awarded to an offeror scoring at least 600 (or 625) points. It thus makes no difference whether Optima was rejected for failing to reach a threshold to meet overall expectations. It was within the Department’s discretion not to award a contract to the lowest scoring offeror.

52. Optima has therefore not demonstrated a likelihood of success that it can show that the Department's failure to award Optima a contract "evinces a lack of fair and careful consideration or want of impartial, reasoned decision making." *R.J. Reynolds Tobacco Co. v. N.C. Dep't of Env't & Natural Res.*, 148 N.C. App. 610, 618, 560 S.E.2d 163, 168-169 (2002) (internal quotation marks and citation omitted).

b. Optima has Not Shown That It is Likely to Prevail on Its Claims That the Department Improperly Scored Optima's Proposal

53. Optima also asserts that the Department's scoring of Optima's responses to certain discrete RFP questions was arbitrary and capricious and constituted an abuse of discretion. In particular, Optima alleges that the Department should have awarded it the maximum points available for its responses to Questions 7, 10, and 11, which would have increased its score by 55 points. Optima, however, has not demonstrated it is likely to succeed on this contention.

54. Again, it appears from the record currently before this Tribunal that the Department's evaluation process was extensive, thorough, and fair. The Evaluation Committee consisted of numerous individuals who have experience in past procurements and the health care industry, including some who have experience with Medicaid and managed care organizations. The Evaluation Committee held over 40 meetings from October 2018 to January 2019, and consulted with subject matter experts. Additionally, after the Evaluation Committee completed the initial consensus scoring, the Department conducted a quality assurance review to ensure consistency and accuracy of the scores awarded

to the proposals. This Tribunal will not, under these circumstances, step into the shoes of the Evaluation Committee and rescore Optima's proposal. *See e.g., Shields Enters., Inc. v. United States*, 28 Fed. Cl. 615, 632 (1993) (“[i]t is not the role of the courts to step into the shoes of the evaluators and make a technical assessment of the merits of a plaintiff's proposal submitted in response to an RFP.”).

55. Without an increase to its score of at least 55 points, Optima would still remain the last place Offeror. Accordingly, because Optima has not demonstrated a likelihood of proving that it was not awarded at least 55 additional points because of scoring errors, it similarly has not demonstrated the necessary element that it suffered “substantial prejudice” as a result of any claimed error. *Blue Ridge Healthcare Hosps. Inc. v. N.C. Dep't of Health & Human Servs.*, ___ N.C. App. ___, 808 S.E.2d 271, 279 (2017) (quoting *Surgical Care Affiliates*, 235 N.C. App. at 628, 762 S.E.2d at 473-74).

c. Optima is Not Likely to Prevail on Its Claim That the Procurement Evaluation and Contract Award did not Comply with State Law.

56. Optima contests the Department's evaluation of regional PLE offerors and the award of two regional PHP contracts as contrary to law and otherwise erroneous; it contends that the RFP design and scoring methodology were, in essence, biased against PLEs. Optima's argument primarily relies on its assertion that the Transformation Act requires the Department to award, at a minimum, six regional contracts to PLEs – one in each region designated by the Department. Resolution of Optima's claim first requires this Tribunal to interpret the provisions

of the Transformation Act as they relate to the procurement of capitated PHP contracts.

57. As an initial matter, this Tribunal notes that the Transformation Act gives the Department *broad discretion* in designing the RFP and procuring capitated PHP contracts for the State's Medicaid transformation. The General Assembly "[d]efine[d] the overall goals of transformation and the structure of the delivery systems for the program." N.C. Sess. Law 2015-245, § 2(1). But the Department was responsible for "entering into capitated PHP contracts for the delivery of . . . services" to the Department. N.C. Sess. Law 2015-245, § 5(6), as amended by N.C. Sess. Law 2016-121 and N.C. Sess. Law 2018-49. Thus, the Department's procurement was not simply to include PLEs in the State's Medicaid transformation but to *procure PHPs* (which could be a CP or PLE) *to operate capitated contracts for the delivery of services to the State's Medicaid beneficiaries.*

58. The key question in this contested case is whether there was a legislative mandate requiring the Department to award a minimum of six regional contracts to PLEs. This Tribunal concludes that, while the General Assembly designed a delivery system in which PHPs could be CPs or PLEs, it granted the Department discretion to determine the number of PHP regional contracts that would be as part of that system.

59. The "first principle of statutory interpretation is to ascertain the intent of the legislature and carry out such intention to the fullest extent." *Parkdale America, LLC v. Hinton*, 200 N.C. App. 275, 278 (2009) (internal citations and

quotations omitted) (recognizing that “[a] question of statutory interpretation is ultimately a question of law.”)

60. The words chosen by the General Assembly are the primary consideration in determining its intent. *Id.* In certain circumstances, it is also appropriate for this Tribunal to consider “[t]he construction adopted by the administrators who execute and administer a law in question [.]” *John R. Sexton & Co. v. Justus*, 342 N.C. 374, 380 (1995).

61. The starting point for answering the dispute in this case is Section 4(6) of the Transformation Act. In final form, Section 4(6) provides in pertinent part as follows:

Number and nature of capitated PHP contracts. – *The number and nature of the contracts required under subdivision (3)⁵ of this section shall be as follows:*

a. *Four contracts* between the Division of Health Benefits and PHPs *to provide coverage* to Medicaid and NC Health Choice recipients *statewide* (statewide contracts).

b. *Up to 12 contracts* between the Division of Health Benefits and PLEs *for coverage of regions* specified by the Division of Health Benefits pursuant to subdivision (2) of Section 5 of this act (regional contracts). *Regional contracts shall be in addition to the four statewide contracts required* under sub-subdivision a. of this subdivision. Each regional contract shall provide coverage throughout the entire region for the Medicaid and NC Health Choice services required by subdivision (4) of this section. A PLE may bid for more than one regional contract, provided that the regions are contiguous. (emphasis added)

⁵ Section 4(3) of the Transformation Act details the “capitated contract with PHPs” required to be entered into by the Department as part of the State’s Medicaid transformation.

N.C. Sess. Law 2018-48 (emphasis added). Section 5(2) of the Transformation Act requires the Department to:

Define six regions comprised of whole contiguous counties that reasonably distribute covered populations across the State to ensure effective delivery of health care and achievement of the goals of Medicaid transformation set forth in Section 1 of this act. Every county in the State must be assigned to a region.

N.C. Sess. Law 2015-245, § 5(2).

62. Thus, as to *the number* of PHP contracts, the General Assembly, in Section 4(6), mandated only that the Department enter into a certain number of statewide contracts with “PHPs,” but it did not mandate that the Department award any of those statewide contracts to PLEs specifically. Further, while the General Assembly explicitly mandated the award of four statewide contracts to PHPs, it used permissive language to authorize “[u]p to 12” regional contracts with PLEs. N.C. Sess. Law 2015-245 § 4(6), as amended by N.C. Sess. Law 2018-48 § 1. By using the phrase “up to,” the General Assembly set a range (12 or less) on the number of contracts to be awarded under Section 4(6)b.⁶

63. The “coverage of regions” language appearing in Section 4(6)b does not set a floor on *number* of contracts; it instead distinguishes between the *nature* of the contracts authorized under Section 4(6)a and 4(6)b. While Section 4(6)a mandates the award of statewide contracts for statewide coverage, Section 4(6)b

⁶ None of the parties have cited, nor has this Tribunal found, any North Carolina cases specifically interpreting the meaning of the phrase “up to.” While this Tribunal is not bound by the reasoning of courts in other jurisdictions, it does note that other courts have interpreted the plain meaning of the phrase “up to” as one that sets a range. *See e.g., Kipp v. Kipp*, 844 So. 2d 691, 693 (Fla. Dist. Ct. App. 2003) (“the plain meaning of the phrase “up to” leads us to the inescapable conclusion that the phrase set a cap but not the amount[.]”); *Arness v. Franks*, 138 F.2d 213, 216 (C.C.P.A. 1943) (interpreting the phrase “up to 30%” to mean “anything from zero to 30%”).

permits the Department to award PLEs regional contracts in the six regions designed by the Department for coverage of an entire region. Thus, based on the plain language of Section 4(6)b, the Department not only had the authority to enter into statewide contracts for “coverage. . . statewide,” but it also could enter into regional contracts for “coverage of regions.” Again, the General Assembly leaves it within the discretion of the Department as to the exact *number* of regional contracts, which, based on the plain language of Section 4(6)b, could be “up to 12.”

64. The Department, exercising this discretion, awarded CCH regional contracts in Regions 3 and 5 for coverage of those regions. Optima contends that the award of this contracts was improper because CCH was not a PLE. Based on the current record currently before this Tribunal, Optima is not likely to succeed on this argument as CCH, at this time, appears to satisfy to qualify as a PLE, as that term is defined in section 4(2)b of the Transformation Act. N.C. Sess. Law 2015-245 § 4(2)b, as amended by Session Law 2018-48.

65. In conclusion, Optima’s position regarding the minimum number of PLE regional contracts required under the Transformation Act does not appear to be supported by the plain language of the statute. The General Assembly clearly stated that it was its intent in enacting the Transformation Act to ensure a sustainable delivery system of services to the State’s Medicaid beneficiaries. N.C. Sess. Law 2015-245, § 1(4). The delivery system chosen by the General Assembly was capitated contracts with PHPs, which, based on the plain language of the Transformation Act, could be a CP *or* PLE. The General Assembly could have

mandated that the Department award a minimum number of PLE regional contracts, like it did for the statewide contracts, *or* award PLE contracts for each of the six regions in the state. It did neither. This Tribunal therefore concludes that Optima is not likely to succeed on this claim.

66. In sum, this Tribunal concludes that Optima is not likely to prevail on the merits of its claims raised at this point in this contested case.

(iii) Irreparable Harm

67. Having determined that Optima has failed to establish a likelihood of success on the merits of its claims, this Tribunal need not reach the question of whether Optima will suffer irreparable harm.

V.

CONCLUSION

68. The dispute in this contested case shows that, as in most RFPs, reasonable people could reach different conclusions on how an RFP should be designed and evaluated. However, the current record before this Tribunal shows that the Department properly exercised the discretion granted to it in designing and procuring contracts for Medicaid transformation in North Carolina. It does not appear that anything about the development of the RFP, the evaluation process, the Department's award decisions, or its bid protest process and decision could be considered unlawful, arbitrary and capricious, whimsical, erroneous, or lacking in any judgment.

69. Under these facts, Optima is unlikely to succeed on the merits of its claims against the Department. Optima's request for a stay of contested actions, therefore, is denied.

SO ORDERED this the 26th day of June, 2019.



Tenisha S Jacobs
Administrative Law Judge

CERTIFICATE OF SERVICE

The undersigned certifies that, on the date shown below, the Office of Administrative Hearings sent the foregoing document to the persons named below at the addresses shown below, by electronic service as defined in 26 NCAC 03 .0501(4), or by placing a copy thereof, enclosed in a wrapper addressed to the person to be served, into the custody of the North Carolina Mail Service Center who subsequently will place the foregoing document into an official depository of the United States Postal Service:

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This the 26th day of June, 2019.



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