

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
21 DOA 04990

<p>Long Term Care Management Services LLC d/b/a Liberty Healthcare and Rehabilitative Services Petitioner,</p> <p>v.</p> <p>North Carolina Department of Administration Respondent,</p> <p>and</p> <p>PruittHealth Veteran Services-North Carolina, Inc. Respondent-Intervenor.</p>	<p style="text-align: center;">AMENDED FINAL DECISION (PORTIONS FILED UNDER SEAL)</p>
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THIS MATTER PRESENTS to the Office of Administrative Hearings (“OAH”) under authority of the state Constitution, Art III, Sec 11, *accord* Art IV, Sec 3; N.C. Gen. Stat. § 7A-750; and N.C. Gen. Stat. § 150B (the “APA”); following *hearing on the merits* in Raleigh 12-16 September 2022 before Jonathan S. Dills, Administrative Law Judge (“ALJ”); for Final Decision. It is the function and mandate of the ALJ to determine facts, apply conclusions of law, and then “decide the case” within the bounds of law and therefore justice. N.C. Gen. Stat. § 150B-34(a).

APPEARANCES

For Petitioner Long Term Care Management Services, LLC d/b/a Liberty Healthcare and Rehabilitation Services (“Petitioner” or “Liberty”):

J. Mitchell Armbruster
Grace A. Gregson
Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P.
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Raleigh, NC 27602-2611

For Respondent North Carolina Department of Administration (“Respondent” or the “Agency”¹):

¹ For purposes of this Final Decision, the term “Agency” includes the Respondent agency, North Carolina Department of Administration (“NCDOA”), as well as the North Carolina Department of Military and Veterans Affairs (“NCDMVA”), the North Carolina Veterans Affairs Commission (“NCVAC”), and the evaluation team (“Evaluation Team”) who reviewed the responses to the RFP and issued the Recommendation of Award. As set forth in § 1.0 of the RFP, the NCDOA conducted this procurement on behalf of the NCDMVA. The NCVAC operates under the supervision and direction of the Secretary of the NCDMVA. (Jt. Ex. 3, § 1.0, p. 4) Pursuant to N.C. Gen. Stat. § 143B-

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Assistant Attorney General
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For Respondent-Intervenor PruittHealth Veteran Services-North Carolina, Inc. (“Respondent-Intervenor” or “PruittHealth”):

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ISSUES PRESENTED

N.C. Gen. Stat. § 150B-23(a)

1. Whether Respondent has substantially prejudiced Petitioner’s rights by awarding the contract for the Operation and Management of Licensed Nursing Facilities, RFP 13-DOA 154085146, to Respondent-Intervenor; and
2. Whether Respondent: (1) exceeded its authority or jurisdiction; (2) acted erroneously; (3) failed to use proper procedure; (4) acted arbitrarily or capriciously; or (5) failed to act as required by law or rule when it awarded the contract for the Operation and Management of Licensed Nursing Facilities, RFP 13-DOA 154085146, to PruittHealth.

APPLICABLE LAW

1. The procedural law applicable to this contested case hearing is the APA, N.C. Gen. Stat. § 150B.
2. The substantive law applicable to this contested case is Article 3 of Chapter 143 of the North Carolina General Statutes, including N.C. Gen. Stat. § 143-52; Article 8 of Chapter 143 of the North Carolina General Statutes, including N.C. Gen. Stat. § 143-135.9(a)(1); and Article 14 of Chapter 143B of the North Carolina General Statutes, including N.C. Gen. Stat. § 143B-1295.

1295, the procurement statute applicable to the NCSVH, the NCVAC is empowered to recommend or select the vendor who, in its opinion, offers the proposal most advantageous to the veterans and the State.

3. The administrative regulations applicable to this contested case hearing are the Office of Administrative Hearings regulations at 26 N.C.A.C. 03.

PROCEDURAL HISTORY

1. On 5 April 2021, the Agency issued an RFP to operate and manage the NCSVH. Three vendors responded: Liberty, PruittHealth, and Principle Long Term Care, Inc. (“Principle”). NCDOA issued the RFP on behalf of the NCDMVA.

2. On 10 May 2021, the Agency opened the vendors’ bids and subsequently began its review of each bid.

3. On 24 August 2021, the NCDMVA issued a letter awarding the RFP to PruittHealth.

4. On 22 September 2021, pursuant to Attachment B, Section 32 of the RFP and 01 NCAC 05B.01519, counsel for Liberty submitted a written protest of the Award and request for protest meeting (“Protest”). The Protest was addressed to David O’Neal, State Purchasing Officer, NCDOA.

5. On 14 October 2021, Mr. O’Neal held a virtual protest meeting. Representatives for Liberty, NCDOA, NCDMVA, and PruittHealth were in attendance.

6. On 29 October 2021, Mr. O’Neal denied the Protest in a written decision (“Decision”). The Decision advised Liberty of its appeal rights to the North Carolina Office of Administrative Hearings (“NCOAH”).

7. On 19 November 2021, Liberty timely filed its Petition for Contested Case pursuant to N.C. Gen. Stat. § 150B-23(a).

8. On 23 November 2021, PruittHealth filed an unopposed Motion to Intervene with all the rights of a party to participate fully in all matters within the scope of this contested case pursuant to 26 N.C.A.C. 03.0117(d)(2). The motion was granted 6 December 2021.

9. On 11 May 2022, following discovery, each Party filed a Motion for Summary Judgment or Partial Summary Judgment (“Motions”). On 1 June 2022, the Tribunal heard arguments. On 10 June 2022, the Tribunal issued an order denying the Motions.

10. On 2 September 2022, PruittHealth filed a Motion *in limine* to exclude evidence regarding Liberty’s argument that PruittHealth’s RFP response failed to meet the cash flow requirements set forth in Section 4.5.2.H. of the RFP. PruittHealth contended that Liberty had failed to raise the cash flow issue in its Petition or Prehearing Statement and had failed to amend its pleadings as required by N.C. R. Civ. P. 15(a). PruittHealth further asserted that it did not consent to an attempt by Liberty to amend its pleadings to conform to the evidence pursuant to N.C. R. Civ. P. 15(b). On 12 September 2022, after considering the written briefs and argument of counsel, the Tribunal permitted Liberty to orally amend its pleadings to assert its argument about cash flow and then denied PruittHealth’s Motion *in limine*.

11. On 9 September 2022, Liberty filed a Motion *in limine* to limit evidence justifying the Award to the written basis in the Agency's record. Liberty contended that CMS Star Ratings are the only documented comparison between the bids and the only distinguishing factor whereby the Evaluation Team articulated its decision for the Award to PruittHealth. Liberty further asserted that evidence of any other basis for comparison between the bids must be excluded, as it was not included in the procurement file and was therefore inadmissible. On 12 September 2022, the Tribunal heard argument and then denied the motion.

12. The parties received appropriate notice of hearing for 12-16 September 2022. The parties were all present and participatory. A lawful hearing on the merits was conducted and concluded.

WITNESSES

For Liberty:

1. Timothy J. Walsh, Director of Business Development, Liberty. Mr. Walsh holds a bachelor's degree in finance from the University of North Carolina-Wilmington. Mr. Walsh has been employed by Liberty since graduating college in 2015. His job duties entail regulatory affairs, CCRC (continuing care retirement community) licensure applications, and Certificate of Need preparation and analysis. Mr. Walsh also supports finance operations. (Walsh, Vol. 1, p. 129, l. 21-24; p. 130, l. 1-5; p. 247, l. 22 - p. 248, l. 1; Vol. 2, p. 318, l. 10-13)
2. Meredith D. Swartz, Purchasing Officer, NCDOA (adverse). Ms. Swartz first joined NCDOA as a contract specialist in 2015 and has been in her present position since 2017. Ms. Swartz has worked on hundreds of procurements since joining NCDOA. Ms. Swartz has over 17 years of experience in procurement including 10 years with the National Guard. (Swartz, Vol. 2, p. 427, l. 5-19; Vol. 3, p. 583, 4-9; p. 584, l. 21-25, p. 585, l. 1-11)
3. Jane E. Campbell, Captain, United States Navy (Ret.) and Chair of NCVAC (adverse). Captain Campbell is a retired officer who served 26 years in the Navy. She graduated from Davidson College in 1987 and later obtained a master's degree in national security strategy from the National War College. For much of her Naval career, Captain Campbell served as a public affairs officer. Captain Campbell was first appointed to the NCVAC in 2018. (Campbell, Vol. 3, p. 687, l. 16 – p. 689, l. 16)
4. Randall D. Loggins, Chief Financial Officer, PruittHealth (adverse). Mr. Loggins has a bachelor's degree from the University of Georgia, and a Master of Business Administration degree with a concentration in finance from Emory University. Mr. Loggins has been employed by PruittHealth since October 2019, and prior to that, was in banking. In total, he has 16 years of professional experience in banking and finance. (Loggins, Vol. 2, p. 365, l. 7-9; p. 373, l. 9 – p. 376, l. 1; PruittHealth Ex. 304)

For the Agency:

1. Meredith D. Swartz
2. Captain Jane E. Campbell

For PruittHealth:

1. Randall D. Loggins
2. Tyler L. Arnold, Chief Development Officer, PruittHealth. Mr. Arnold graduated from the United States Military Academy at West Point in 2000. Following graduation from West Point, Mr. Arnold served in the Army as a second lieutenant and was later promoted to the rank of Captain. He also obtained a Master of Arts in Leadership degree from Webster University while in the Army. Following his discharge from the Army in 2005, Mr. Arnold obtained a law degree from the University of South Carolina in 2008. He later obtained both a Master of Business Administration degree and a Master of Health Administration degree from Georgia State University in 2019. He is licensed to practice law in Georgia, South Carolina, and Florida. Mr. Arnold is also a licensed nursing home administrator in Georgia. He has been employed by PruittHealth since 2016 and has served as its Chief Development Officer since 2019. (Arnold, Vol. 4, p. 1031, l. 1 - p. 1036, l. 2; Jt. Ex. 70, CV of Tyler Arnold)
3. David B. Holmes, Vice President of Business Development, Liberty (adverse). Mr. Holmes has a bachelor's degree and a Master of Business Administration degree from East Carolina University. He has been employed by Liberty since October 2018. (Holmes, Vol. 4, p. 921, l. 18 - p. 922, l. 1; p. 1004, l. 3-8; Jt. Ex. 35, p. 106)

EXHIBITS ADMITTED INTO EVIDENCE

The following exhibits were admitted into evidence:

Joint Exhibits (“Jt. Ex.”):

3. Request for Proposal 13-DOA 154035146 dated 5 April 2021
4. Vendor Question and Answers Chart (Addendum 1 to RFP)
6. Bid Opening Tabulation dated 10 May 2021
8. Meredith Swartz's Memorandum to Evaluation Team dated 10 May 2021
9. Evaluation Matrix
10. Respondent's Written Discovery Responses to Petitioner's First Set of Discovery
12. Respondent-Intervenor's Attachment 5 to RFP Proposal as submitted
14. No Date- Draft Recommendation of Award
16. Recommendation of Award, signed by Jane Campbell and dated 5 July 2021
17. Protest Denial Letter dated 29 October 2021

18. NC Health News Article dated 20 November 2021
19. Memorandum from Terry Westbrook to Veterans Affairs Commission dated 17 November 2020
20. Jane Campbell's Browser History
22. Caring.com reviews of Liberty Healthcare Services
23. NursingHomeSite.com page: PruittHealth-Raleigh facility
24. NursingHomeSite.com page: PruittHealth – Farmville facility
25. About page for NursingHomeSite.com
26. Disclaimer page for NursingHomeSite.com
27. NursingHomeSite.com page: PruittHealth – High Point
28. Complaint: *Estate of Maria Louise Stamp v. Everest Long Term Care, et al.*
35. Liberty's Proposal
39. Petitioner's Document Production
- 40A. CMS Star Ratings Data for April 2021
- 40B. CMS Star Ratings Data for May 2021
41. Liberty's Woodlands facility webpage
52. Email thread between Timothy Walsh and DHHS dated 7 March 2022
55. 2020 Forsyth G-11954-20 Conditional approval (PruittHealth-High Point facility)
56. 2020 Forsyth G-11954-20 Required state agency findings (PruittHealth-High Point facility)
58. Demonstrative Chart: CMS Star Ratings: PruittHealth v. Liberty Facilities
59. PruittHealth Letter to CMS Regarding High Point Closure dated 22 March 2021
62. Email from Stephanie Fisher to Meredith Swartz dated 26 May 2021
64. PruittHealth Proposal (without attachments)
67. Respondent-Intervenor's Attachment 5 to RFP Response as intended (PRUITTHEALTH0000128-CONFIDENTIAL)
68. Notification of Award sent to PruittHealth dated 24 August 2021
70. PruittHealth Proposal, including all attachments (except for the financials)
72. Jane Campbell Deposition Transcript
77. David Holmes Deposition Transcript

Exhibits Admitted by Liberty ("Liberty Ex.")

100. Nursing Home Site.com page: PruittHealth-Black Mountain
101. Nursing Home Site.com page: PruittHealth-Fayetteville
102. Nursing Home Site.com page: PruittHealth-Kinston
103. Nursing Home Site.com page: PruittHealth-Salisbury
104. Nursing Home Site.com page: PruittHealth-Carolina Point
105. Nursing Home Site.com page: PruittHealth-Durham
106. Nursing Home Site.com page: PruittHealth-Elkin
107. Nursing Home Site.com page: PruittHealth-Neuse
108. Nursing Home Site.com page: PruittHealth-Rockingham
109. Nursing Home Site.com page: PruittHealth-Sea Level
110. Nursing Home Site.com page: PruittHealth-Town Center
111. Nursing Home Site.com page: PruittHealth-Trent
112. Nursing Home Site.com page: PruittHealth-Union Pointe
113. Demonstrative Chart: Comparing Pruitt v. Liberty using "Jane's Math"

114. Demonstrative Chart: Comparing PruittHealth Ratings on Medicare.gov and NursingHomeSite.com
116. Demonstrative Chart: Summary
118. Medicare.gov PruittHealth-Fayetteville CMS Star Ratings a/o 29 August 2022
122. Vendor Reference Check: Liberty (KA Real Estate)
123. Vendor Reference Check: Liberty (Appalachian Regional Healthcare)
126. Vendor Reference Check: PruittHealth 1 (Georgia Department of Veterans Services)
127. Vendor Reference Check: PruittHealth 2 (Christian City)
128. Principle's Proposal with attachments
129. Unredacted Liberty Proposal Attachment 9 (Financials) – CONFIDENTIAL [Admitted Under Seal]

Exhibits Admitted by the Agency (“Agency Ex.”)

201. Administrative Review Sheet
202. North Carolina Veterans Affairs Commission Minutes dated 23 June 2021

Exhibits Admitted by PruittHealth (“PruittHealth Ex.”)

302. N.C. Gen. Stat. § 143-135.9
303. N.C. Gen. Stat. § 143-52
304. C.V. of Randall Loggins
306. CMS Star Ratings Data for March 2021
307. Email from Stephanie Fisher to Meredith Swartz dated 27 May 2021 containing Revised Financial Spreadsheet
309. Respondent-Intervenor's Audited and Unaudited Financial Statements which were attached to RFP Proposal – CONFIDENTIAL [Admitted Under Seal]
311. North Carolina Instructions to Vendors Version Date: September 2020
313. Emails from Timothy J. Walsh to Meredith Swartz dated 5 April 2021
316. Demonstrative Exhibit: Map of the State of North Carolina showing the locations of each of the North Carolina State Veterans Homes and their respective bed counts, including Kernersville and Raleigh which are scheduled to open during the period covered by the RFP
317. Liquidity Definition, Black's Law Dictionary (11th ed. 2019)
318. Cash Flow Definition, Black's Law Dictionary (11th ed. 2019)
319. Vendor Conference Call Document
320. Demonstrative Exhibit: Tyler Arnold's Explanation of Contract Payment Structure
321. Demonstrative Exhibit: Additional Math Comparing Numbers of 1- and 2-star Facilities and 4- and 5-star Facilities on Exhibit 58

STIPULATED FACTS

In a Joint Prehearing Order, the parties stipulated and agreed to the following undisputed facts:

1. On 5 April 2021, the Department of Administration, Office of Fiscal Management – Purchasing Section, issued RFP # 13-DOA154085146, Operation and Management of Licensed Nursing Facilities.

2. The RFP stated that it was a *best value procurement*, which would be conducted under N.C. Gen. Stat. § 143-52 and the evaluation criteria stated in the RFP. (Jt. Ex. 3, § 3, p. 8)

3. This procurement was also governed by N.C. Gen. Stat. § 143B-1295.

4. Three bids were received in response to the RFP: one from incumbent bidder PruittHealth, one from Liberty, and one from Principle Long Term Care, Inc. (“Principle”).

5. The Evaluation Committee for the bids consisted of four members of the North Carolina Veterans Affairs Commission: Jane Campbell, Larry Pendry, John Scherer, and Lovay Wallace-Singleton.

6. Liberty timely filed its Petition for Contested Case Hearing at OAH.

7. The parties entered into a Revised Joint Stipulation as to the Accuracy of Financial Spreadsheet with regard to PruittHealth, the terms of which are expressly incorporated herein by reference. It was filed on 8 July 2022.

STIPULATED CONCLUSIONS

In their Joint Prehearing Order, the Parties agreed and stipulated to the following Conclusions of Law:

1. All parties are properly before the OAH which has jurisdiction over the parties and subject matter.

2. All parties have been correctly designated and there is no question as to joinder.

3. The parties are unaware of any additional party seeking to intervene in this proceeding.

4. Each jointly identified exhibit is genuine and no objections were to be made as to authenticity, though the parties reserved the right to raise other objections as applicable.

BASED UPON careful consideration of the entire record; having weighed all the evidence and assessing the credibility of each witness by considering appropriate factors for judging credibility including, demeanor, interests, biases, and prejudices; the opportunity to see, hear, know, and remember; reasonableness; and consistency with all other believable evidence; the Undersigned makes the following:

FINDINGS OF FACT

Parties

1. Petitioner Liberty is an affiliate of Liberty Healthcare Group, LLC, which is in the business of providing long term care services, including skilled nursing, assisted living, independent living, continuing care retirement communities (“CCRC”), home health, hospice, pharmacies, a health care management company, and an HMO I-SNP health plan company which

is a Medicare insurance plan. (Jt. Ex. 35, § 4.5.3.1, pp. 12-13; Walsh, Vol. 1, p. 130, l. 6-19) Liberty is based in Wilmington, North Carolina. (Walsh, Vol. 1, p. 131, l. 3-6) As of the time of its response to the RFP, Liberty had 37 nursing homes in North Carolina and South Carolina, eight assisted living facilities, two senior living communities, six CCRCs, 29 home health and hospice locations, two pharmacies, an I-SNP plan, and a healthcare management facility. (Walsh, Vol. 1, p. 130, l. 20 - p. 131, l. 2)

2. Respondent Agency is an agency of the State of North Carolina. According to its website, the Agency serves as the business manager for North Carolina state government. The Agency oversees government operations such as building construction, purchasing, and contracting for goods and services, maintaining facilities and grounds, managing state vehicles, acquiring and disposing of real property, and operating services such as courier mail delivery and the sale of surplus property. *See*, <https://ncadmin.nc.gov/>. The Agency, on behalf of NCDMVA, sought proposals from experienced and qualified entities desiring to manage, administer and operate the NCSVH. (Jt. Ex. 3, § 1.0, p. 4)

3. Respondent-Intervenor PruittHealth is an affiliate of United Health Services, Inc., and is in the business of providing long term care services, including skilled nursing, assisted living, independent living, home health, hospice, adult day care, pharmacies, a rehabilitation services company, a healthcare management services company, a nutritional services company, a clinical services company, a medical supply company, care management offices, and a construction management company. (Jt. Ex. 70, § 4.5.3.1.A.) PruittHealth is the incumbent for the contract to operate and manage the NCSVH. (Jt. Ex. 70, § 4.5.3.1.B.) Since 1996, PruittHealth has also managed a State Veterans Home in Georgia, the Georgia War Veterans Home, located in Milledgeville, Georgia. (Arnold, Vol. 4, p. 1041, l. 17 - p. 1042, l. 8)

North Carolina State Veterans Homes

4. N.C. Gen. Stat. § 143B-1291 provides:

The State of North Carolina shall construct, maintain, and operate veterans homes for the aged and infirm veterans resident in this State under the administrative authority and control of the Department of Military and Veterans Affairs. There is vested in the Department any and all powers and authority that may be necessary to enable it to establish and operate the homes and to issue rules necessary to operate the homes in compliance with applicable State and federal statutes and regulations.

N.C. Gen. Stat. § 143B-1291. These NCSVH are skilled nursing facilities (a/k/a nursing homes) intended to serve veterans.

5. As of April 2021, there were four NCSVH in operation: Fayetteville, a 150-bed facility that has been in operation since March 1995; Salisbury, a 99-bed facility that has been in operation since November 1998; Black Mountain, a 100-bed facility that has been in operation since October 2012; and Kinston, a 100-bed facility that has been in operation since March 2013. (Jt. Ex. 3, § 1.0, p. 4; PruittHealth Ex. 316)

6. A fifth NCSVH has been constructed in Kernersville and is scheduled to open as soon as its Certificate of Occupancy is received. The Kernersville facility will consist of 120 beds. (Jt. Ex. 3, § 1.0, p. 4; PruittHealth Ex. 316; Arnold, Vol. 4, p. 1044, l. 8 - p. 1045, l. 2)

7. A sixth NCSVH is to be constructed in Raleigh and is projected to open in Fiscal Year 2024, which is during the term of the contract awarded under the RFP in this contested case. (Jt. Ex. 3, § 1.0, pp. 4-5; PruittHealth Ex. 316; Arnold, Vol. 4, p. 1045, l. 3-4)

8. The State of North Carolina owns the NCSVH. (Arnold, Vol. 4, p. 1039, l. 20-24; p. 1046, l. 9-13)

9. N.C. Gen. Stat. § 143B-1298(a) sets forth the eligibility requirements for admission to an NCSVH, including that the veteran shall have served in the active Armed Forces, have been discharged honorably, be disabled, and have resided in the State of North Carolina for two years immediately prior to the date of application.

10. In addition, certain non-veterans such as a spouse, widow, widower, or parent of a veteran, may occupy up to 25% of the total beds in an NCSVH. N.C. Gen. Stat. § 143B-1298(c).

11. Employees at the NCSVH are employed by the vendor that manages them. Thus, the employees who work at the four NCSVH are PruittHealth employees. (Arnold, Vol. 4, p. 1047, l. 25 - p. 1048, l. 7)

12. There are approximately 700 PruittHealth employees across the four existing NCSVH. (Arnold, Vol. 4, p. 1049, l. 17 – p. 1050, l. 5)

Relevant Procurement Statutes

13. The State of North Carolina contracts with a third-party vendor for the operation and management of the NCSVH. N.C. Gen. Stat. § 143B-1295 vests authority in the NCVAC to select and recommend for award, a contract with a vendor whose proposal it deems most advantageous to the veterans and State. (Jt. Ex. 3, § 1.0, p. 4)

14. N.C. Gen. Stat. § 143B-1295 titled “Contracted Operation of Homes” specifically governs the procurement at issue in this contested case:

The Veterans’ Affairs Commission may contract with persons or other nongovernmental entities to operate each State veterans home. Contracts for the procurement of services to manage, administer, and operate any State veterans home shall be awarded on a competitive basis through the solicitation of proposals and through the procedures established by statute and the Division of Purchase and Contract. A contract may be awarded to the vendor whose proposal is most advantageous to the State, taking into consideration cost, program suitability, management plan, excellence of program design, key personnel, corporate or company resources, financial condition of the vendor, experience and past performance, and any other qualities deemed necessary by the Veterans’ Affairs Commission and set out in the solicitation for proposals. Any

contract awarded under this section shall not exceed five years in length. *The Veterans' Affairs Commission is not required to select or recommend the vendor offering the lowest cost proposal but shall select or recommend the vendor who, in the opinion of the Commission, offers the proposal most advantageous to the veterans and the State of North Carolina.*

N.C. Gen. Stat. § 143B-1295 (emphasis added). The phrase “most advantageous” is not defined.

15. Section 3.1 of the RFP expressly acknowledges that N.C. Gen. Stat. § 143B-1295 governs the procurement. (Jt. Ex. 3, § 3.1, p. 8)

16. Section 3.1 of the RFP sets forth the Method of Award and states:

BEST VALUE EVALUATION METHOD: ‘Best Value’ procurement methods will be used in the selection of award and are authorized by N.C.G.S. §§ 143-135.9 and N.C.G.S. 143-52. A Best Value procurement is the selection of a contractor based on a determination of which proposal offers the best trade-off between price and performance, where quality is considered an integral performance factor. The intent of ‘Best Value’ procurement is to enable Vendors to offer and the Agency to select the most appropriate solution to meet the business objective defined in the solicitation and to keep all parties focused on the desired outcome of a procurement.

(Jt. Ex. 3, § 3.1, p. 8)

17. Section 3.1 of the RFP references N.C. Gen. Stat. § 143-135.9, entitled “Best Value Procurements.” (Jt. Ex. 3, § 3.1, p. 8) It provides in relevant part:

a. Definitions.--The following definitions apply in this section:

(1) Best Value procurement. – The selection of a contractor based on a determination of which proposal offers the best trade-off between price and performance, where quality is considered an integral performance factor. The award decision is made based on multiple factors, including: total cost of ownership, meaning the cost of acquiring, operating, maintaining, and supporting a product or service over its projected lifetime; the evaluated technical merit of the vendor's proposal; the vendor's past performance; and the evaluated probability of performing the requirements stated in the solicitation on time, with high quality, and in a manner that accomplishes the stated business objectives and maintains industry standards compliance.

* *

- b. Intent. – The intent of Best Value procurement is to enable contractors to offer and the agency to select the most appropriate solution to meet the business objectives defined in the solicitation and to keep all parties focused on the desired outcome of a procurement.

N.C. Gen. Stat. § 143-135.9.

18. Section 3.1 of the RFP also references N.C. Gen. Stat. § 143-52. (Jt. Ex. 3, § 3.1, p. 8) It provides in relevant part:

Except as otherwise provided under this Article, contracts for the purchase of goods and services shall be based on competitive bids and suitable means authorized by the Secretary as provided in G.S. 143-49. The acceptance of bid(s) most advantageous to the State shall be determined upon consideration of the following criteria: prices offered; best value, as the term is defined in G.S. 143-135.9(a)(1); the quality of the articles offered; the general reputation and performance capabilities of the bidders; the substantial conformity with the specifications and other conditions set forth in the request for bids; the suitability of the articles for the intended use; the personal or related services needed; the transportation charges; the date or dates of delivery and performance; and such other factor(s) deemed pertinent or peculiar to the purchase in question, which if controlling shall be made a matter of record....

N.C. Gen. Stat. § 143-52.

Preparation for the 2021 Procurement

19. In her current role as a Purchasing Officer for NCDOA, Meredith Swartz oversees all procurement responsibilities for NCDOA and all its divisions. Ms. Swartz trains all employees in NCDOA's divisions who work on procurement and has four employees who report to her. (Swartz, Vol. 3, p. 583, l. 12 - p. 584, l. 9)

20. Ms. Swartz's office also serves as the purchasing office for several other agencies, including NCDMVA. (Swartz, Vol. 3, p. 583, l. 4-24; p. 585, l. 1-5)

21. Ms. Swartz collaborated with NCDMVA to draft the RFP for the NCSVH. (Swartz, Vol. 3, p. 588, l. 8-21)

The Request for Proposals

22. On 5 April 2021, the Agency issued RFP No. 13-DOA154085146 for the operation and management of the NCSVH.² (Jt. Ex. 3) The RFP was posted electronically on the State’s Interactive Purchasing System (“IPS”). (Swartz, Vol. 2, p. 509, l. 5-9) IPS is the State of North Carolina’s free, electronic system for Vendors to view and search for bid opportunities. *See*, <https://www.ips.state.nc.us/IPS/Default.aspx>.

23. The RFP contains six separate sections and four attachments. Section 1.0 describes the purpose and background of the RFP; Section 2.0 contains general information, including the RFP schedule and a list of definitions, acronyms, and abbreviations; Section 3.0 describes the method of award and the proposal evaluation process; Section 4.0 contains the RFP’s requirements; Section 5.0 describes the scope of work the selected vendor would be required to perform; and Section 6.0 describes the contract administration. The four attachments, labeled A-D, are the pricing attachments (Attachment A); instructions to vendors (Attachment B); North Carolina General Contract Terms and Conditions (Attachment C); and Veteran Home Reference Documents (Attachment D). (Jt. Ex. 3)

24. Section 3.4 of the RFP lists the Evaluation Criteria. This section states in part “[v]endors response to The Technical Approach (Section 4.5.3.1-4.5.3.4), and ATTACHMENT A: Pricing of this RFP will be used in evaluating the criteria below.” (Jt. Ex. § 3.4, p. 10)

25. The “Technical Approach” section of Section 3.4 identifies five major criteria with several sub-criteria following:

1. Experience (Section 4.5.3.1)
 - A. Vendor’s experience in community long-term care and the ownership and/or management of a skilled nursing care facility. Experience managing any State or federal healthcare facility.
 - B. Vendor’s history of contracting for management of skilled nursing care facilities.
 - C. Experience with Medicaid/Medicare/ Private Insurance/VA Disability Compensation
 - D. Past Performance
2. Organization Profile (Section 4.5.3.2)
 - A. Program suitability
 - B. Excellence in program design
 - C. Corporate or company resources
 - D. Management plan

² There was a prior RFP in 2014 for NCSVH (the “2014 RFP”). PruittHealth and another company not a party to these proceedings were bidders. PruittHealth won the RFP. The 2014 RFP is not at issue here. (Walsh, Vol. 1, p. 132, l. 3-9; Swartz, Vol. 3, p. 585, l. 22 - p. 586, l. 1)

3. Staffing Plan (Section 4.5.3.3)
 - A. Vendor’s proposed execution and staffing plan
 - B. Experience of key personnel
4. Financial stability (Section 4.5.3.4)
 - A. The Vendor’s financial stability, resources, and ability to support a project of this size.
5. Total Cost (Attachment A: Pricing Form)
 - A. Vendor shall propose its percentage of net revenues (gross revenues less contractual) for management fees, excluding performance bond.

(Jt. Ex. 3, § 3.4, pp. 10-11)

26. Neither the applicable procurement statutes nor the RFP requires the Agency to assign any particular weight to any factor or group of factors. (Walsh, Vol. 2, p. 301, l. 7-24)

27. Rather, the Agency is required to consider the statutory criteria and exercise its judgment to determine which proposal is the most advantageous to the Veterans and the State of North Carolina. As the RFP expressly states:

Award of a Contract to one Vendor does not mean that the other proposals lacked merit, but that, *all factors considered*, the selected proposal was deemed most advantageous and represented the best value to the State.

(Jt. Ex. 3, § 3.3, p. 10) (emphasis added).

The RFP does not define the term “most advantageous.”

28. Section 4.5 of the RFP sets forth the information requested from vendors by which the Agency would evaluate each vendor’s proposal. (Jt. Ex. 3, § 4.5, pp. 14-17)

29. Section 4.5.2, titled “Minimum Requirements,” states in part: “[t]he procurement process shall be limited to Healthcare Management entities that meet the minimum requirements below. Vendor shall submit with its proposal a response to each of the requirements including any documentation necessary to show compliance. A Vendor’s proposal shall be rejected if it fails to comply, demonstrate and/or satisfy any of these requirements.” Then follows a list of 11 separate minimum requirements. (Jt. Ex. 3, § 4.5.2, pp. 14-15)

30. Section 4.5.3, titled “Technical Approach,” identifies information requested from vendors with respect to the Technical Approach criteria set forth in Section 3.4. Most of the five criteria under “Technical Approach” have multiple requirements within them. For example, Section 4.5.3.1., Experience, had nine separate requirements; Section 4.5.3.2, Organization Profile, had 11 separate requirements; Section 4.5.3.3, Staffing Plan, had three major requirements,

with sub-requirements under each of these; and Section 4.5.3.4, Financial Stability, contained two major requirements. (Jt. Ex. 3, §§ 4.5.3.1-4.5.3.4, pp. 15-17)

31. Within these sections are extensive financial requirements. These are found in Section 4.5.2.H. (Minimum Requirements) and Section 4.5.3.4. A. and B. (Financial Stability). (Jt. Ex. 3, § 4.5.3.2.H., p. 15, and § 4.5.3.4. A. and B., pp. 16-17)

32. Section 4.5.2.H. states:

The projected cost per month on four (4) facilities is \$4 million. Based on history after receipt of the invoice on the 15th of the following month, the Contracting Agency has 30 days for review and approve for payment. It generally takes up to 30 days for the payment process. Thus, at least \$12 million cash flow must be available by the Vendor. NOTE: The addition of another NCSVH may increase the cash flow by at least \$3 million that must also be available by the Vendor, if required.

(Jt. Ex. 3, § 4.5.2.H., p. 15) (capitalization in original)

33. Section 4.5.3.2 is entitled “Organizational Profile.” This section consists of 11 subparts, one of which states “[d]escribe the Vendor’s ability to achieve and maintain JCAHO accreditation.” The acronym JCAHO is defined in the Definitions section of the RFP as “Joint Commission on Accreditation of Healthcare Organizations.” (Jt. Ex. 3, § 2.10, p. 7; § 4.5.3.2.D., p. 16)³

34. Section 4.5.3.4. is entitled “Financial Stability.” It states in part:

Each Vendor shall submit the following financial documentation as an attachment to its Proposal: Financial information, statements and/or documents submitted with a proposal shall be evaluated to determine: whether the Vendor has sufficient ability to perform the contract; whether the Vendor is able to meet its short term obligations, debts, liabilities, payroll, and expenses; whether Vendor has provided complete, reliable and accurate financial information regarding its business operation; whether the Vendor is financially solvent; *and whether Vendor has sufficient cash flow and/or available financing from a financial institution to perform the proposed contract for 60 days without receiving payment from the Contracting Agency.* Financial information of non-public entities may be marked as confidential in accordance with paragraph 14 of **ATTACHMENT B: INSTRUCTIONS TO VENDORS.**

³ According to its website, The Joint Commission (formerly known as The Joint Commission on Accreditation of Healthcare Organizations) offers accreditation to healthcare facilities, including skilled nursing facilities. “Accreditation demonstrates your commitment to the compliance of rigorous standards and helps strengthen your organization’s delivery of care.” See, <https://www.jointcommission.org/what-we-offer/>.

(Jt. Ex. 3, § 4.5.3.4, pp. 16-17) (emphasis added, capitalization in original)

35. Section 4.5.3.4. contains subparts A. and B. Subpart A states in part:

A. Provide financial statements audited by an independent certified public accountant (CPA), as well as consolidated statements for holding companies and affiliates with opinions, if applicable, for the last three (3) years of the business entity that would have fiduciary responsibility for this proposed contract.... If audited financial statements have not been prepared for the current fiscal year or have not been prepared in the six months preceding the issuance date of this RFP, Vendor shall provide its internally prepared financial statements from the most recent audited financial statements through June 2020. Vendor must indicate the ability to maintain \$9 million dollars excess cash flow for the NCSVHs.

(Jt. Ex. 3, § 4.5.3.4.A., p. 17)

36. Subsection B states:

B. Demonstrate the organization's financial status with information such as balance sheets, income statement of changes in financial position, annual reports, and any other statement or documents that attest to your organization's strength and ability to continually fulfill the contractual obligation as managers. Include financial statements, including notes, auditor's report, and summary of significant accounting policies prepared by an independent CPA.

(Jt. Ex. 3, § 4.5.3.4.B., p. 17)

37. As permitted by Section 4.5.3.4, Liberty and PruittHealth submitted the required financial information as confidential documents. (Jt. Ex. 35, p. 9; Jt. Ex. 70, cover letter) Consequently, these documents are filed under seal in this proceeding. (Liberty Ex. 129; PruittHealth Ex. 309) (both exhibits filed under seal).

38. Section 3.6, entitled "Interpretation of Terms and Phrases" states:

This Request for Proposal serves two functions: (1) to advise potential Vendors of the parameters of the solution being sought by the Department; and (2) to provide (together with other specified documents) the terms of the contract resulting from this procurement. As such, all terms in the Request for Proposal shall be enforceable as contract terms in accordance with the General Contract Terms and Conditions. The use of phrases such as 'shall,' 'must,' and 'requirements' are intended to create enforceable contract conditions. In determining whether proposals should be evaluated or rejected, the Department will take into consideration the degree to which Vendors have proposed or failed to propose

solutions that will satisfy the Department's needs as described in the Request for Proposal. Except as specifically stated in the Request for Proposal, no one requirement shall automatically disqualify a Vendor from consideration. However, failure to comply with any single requirement may result in the Department exercising its discretion to reject a proposal in its entirety.

(Jt. Ex. 3, § 3.6, p. 11) Section 3.6 of the RFP is therefore consistent with N.C. Gen. Stat. § 143B-52, *supra*.

39. Section 5.0 of the RFP delineates the scope of work under the RFP. The RFP seeks a "turnkey" management solution whereby the selected vendor would be responsible for all aspects of operating and managing the NCSVH. This encompasses everything from providing care to the Veterans, to ordering food and supplies, and to maintaining the facilities. (Jt. Ex. 3, § 5.0, pp. 18-25; Arnold, Vol. 4, p. 1046, l. 14-22)

40. The RFP describes two types of compensation to the operator of the NCSVH for the services it performs. The first type of compensation is 100% reimbursement for qualified expenses incurred by the vendor operating the NCSVH. (Jt. Ex. 3, § 4.2, pp. 11-12) The second type of compensation is a management fee based on a percentage of net revenue. (Jt. Ex. 3, § 4.2, p. 12; Attachment A, p. 27)

41. Vendors were free to propose any percentage of net revenue they wished; the RFP did not stipulate what the percentage should be, and it did not require the vendors to state the dollar amount of the management fee. (Jt. Ex. 3, § 4.2, p. 12; Attachment A, p. 27; Walsh, Vol. 2, p. 301, l. 25 - p. 302, l. 9; Arnold, Vol. 4, p. 1111, l. 8-10)

42. As Ms. Swartz testified, the RFP does not require the Agency to determine an exact dollar amount to conduct its analysis of Total Cost. Rather, "[t]hey only had to provide that percentage." (Swartz, Vol. 3, p. 591, l. 19 - p. 592, l. 8; *see* p. 575, l. 5-11)

43. As Mr. Arnold of PruittHealth explained, net revenue can vary from year to year because of "[c]ensus, a pandemic, all kinds of things." (Arnold, Vol. 4, p. 1111, l. 11-16)

44. As explained in Section 4.2 of the RFP, the state would not reimburse for salaries and related expenses of certain management employees, *i.e.*, the Facility Administrator, the Regional Vice President, the Regional Finance Manager, the Regional Director, and the Regional Admissions Coordinator (the "Regional Support Team"). (Jt. Ex. 3, § 4.2, p. 12; Arnold. Vol. 4, p. 1092, l. 3-20)

45. Prior to the 2021 RFP, the State reimbursed the vendor for these salaries and related expenses. Effective with the Award, the selected vendor would be responsible for the salaries and related expenses of the Regional Support Team. (Holmes, Vol. 4, p. 967, l. 8-12; Arnold, Vol. 4, p. 1096, l. 10-22; p. 1110, l. 7-14; Swartz, Vol. 3, p. 589, l. 25 - p. 591, l. 7)

46. In addition to the Minimum Requirements in Section 4.5.2. and Technical Approach in Section 4.5.3., the RFP contained many other requirements, such as insurance requirements and references. (Jt. Ex. 3, §§ 4.4 and 4.7, pp. 13, 17)

Activity After the RFP Was Published

47. Vendors had numerous opportunities to ask questions and seek clarification from the Agency about the contents of the RFP and how they were to respond. (Swartz, Vol. 3, p. 607, l. 3-9; p. 610, l. 3-13)

48. One of those opportunities was a virtual pre-proposal conference that the Agency held for vendors on 15 April 2021. Representatives for both Liberty and PruittHealth attended the pre-proposal conference. (PruittHealth Ex. 319; Swartz, Vol. 3, p. 607, l. 3-20)

49. Vendors also had the opportunity to submit questions in writing. The Agency responded to these questions in writing. (Jt. Ex. 4; Swartz, Vol. 3, p. 610, l. 3-25)

50. NCDOA issued an Addendum 2, changing the submission deadline from 6 May 2021 to 10 May 2021. The RFP was reposted as Request for Proposal # 13-DOA154085146R to allow Vendors to submit proposals using NCBIDS, a feature of IPS. (Jt. Ex. 3, § 2.2, p. 5; Ex. 3, Addendum 2; Swartz, Vol. 2, p. 504, l. 12-23; Vol. 3, p. 611, l. 1-22)

51. On 10 May 2021 at 2 pm, Ms. Swartz opened the vendors' bids in response to the RFP. Three bidders responded to the RFP: Liberty, PruittHealth, and Principle. For the management fee, Liberty proposed 8.15% of net revenue; PruittHealth proposed 10% of net revenue; and Principle proposed 7.5% of net revenue. (Jt. Ex. 6)

Liberty's Response to the RFP

52. Liberty learned about the NCSVH and the upcoming RFP long before the RFP was posted on IPS on 5 April 2021, when David Holmes, Liberty's Vice President of Business Development, read about an upcoming RFP for the NCSVH on Facebook. (Holmes, Vol. 4, p. 922, l. 18-24; p. 925, l. 14-20)

53. Liberty had not applied for the NCSVH contract prior to the 2021 RFP process. It was also Liberty's first time participating in a public procurement. (Walsh, Vol. 1, p. 225, l. 13 - p. 226, l. 1; Holmes, Vol. 4, p. 923, l. 14-21)

54. As of the time of the RFP, Liberty operated 36 skilled nursing facilities in North Carolina and one skilled nursing facility in South Carolina. (Jt. Ex. 35, p. 68)

55. Liberty has never operated a State Veterans Home in any state. (Walsh, Vol. 1, p. 229, l. 8-11; Vol. 2, p. 320, l. 10-12; Holmes, Vol. 4, p. 922, l. 22-24)

56. Liberty decided to pursue the contract and appointed Mr. Walsh and Mr. Holmes to lead Liberty's response to the RFP. (Holmes, Vol. 4, p. 931, l. 11-13) Neither had experience with public procurement prior to the 2021 RFP for the NCSVH. (Walsh, Vol. 1, p. 229, l. 3-7; p. 249, l. 22-24; Holmes, Vol. 4, p. 922, 10-21)

57. In January 2021, Mr. Walsh reached out directly to Ms. Swartz to inquire as to when the RFP would be posted. Ms. Swartz gave Mr. Walsh information about the public website at which the RFP would be posted and about how to register to receive automatic notification when the RFP was posted. She also offered to notify him directly when the RFP was posted. Mr. Walsh

followed up again with Ms. Swartz in early April 2021, and Ms. Swartz again told Mr. Walsh she would notify him directly when the RFP was posted. On the day the RFP was issued, 5 April 2021, Ms. Swartz notified Mr. Walsh that the RFP for the NCSVH had been issued. (PruittHealth Ex. 313; Walsh, Vol. 1, p. 230, l. 5 - p. 236, l. 22; Swartz, Vol. 3, p. 601, l. 16 – p. 606, l. 6; Holmes, Vol. 4, p. 925, l. 25 - p. 927, l. 11)

58. No rule or regulation required Ms. Swartz to notify Mr. Walsh directly. (Walsh, Vol. 1, p. 233, l. 17-23; Holmes, Vol. 4, p. 927, l. 11-20)

59. Eight Liberty employees participated in the virtual pre-proposal conference. (Walsh, Vol. 1, p. 237, l. 22 – p. 240, l. 3; Swartz, Vol. 3, p. 609, l. 12-19; Holmes, Vol. 4, p. 928, l. 7 - p. 929, l. 13; PruittHealth Ex. 319)

60. Although Liberty had the opportunity to ask any questions it wanted during this call, it did not ask any questions. (Walsh, Vol. 1, p. 240, l. 8-10; Holmes, Vol. 4, p. 930, l. 13-23)

61. With respect to the opportunity to submit written questions to the Agency, Mr. Walsh specifically recalled that Liberty asked questions 2, 4, 18, and 19 on the list of questions, and possibly others. (Jt. Ex. 4; Walsh, Vol. 1, p. 240, l. 23 - p. 242, l. 10)

62. Although questions 18 and 19 on Jt. Ex. 4 were not answered, Liberty was nevertheless able to submit what it believed was a complete RFP response. (Jt. Ex. 4; Walsh, Vol. 1, p. 243, l. 2-10)

63. Liberty's Question 2 asked if the Agency could provide an opportunity to conduct an on-site visit of the four NCSVH. The State declined to do so because of the COVID-19 pandemic but provided links for a virtual tour of each facility. Mr. Walsh did not know whether anyone from Liberty accessed those links. (Jt. Ex. 4; Walsh Vol. 1, p. 243, l. 11 - p. 244, l. 6)

64. Regarding CMS Star Ratings, Liberty also asked:

Can you clarify what this subsection means by 'the number of times receiving CMS Star Ratings'?

NCDOA responded:

We are interested in the number of individual facilities that you manage or own that have received a four or higher star rating from CMS is [sic] the last five years, and the current CMS star rating for each facility you own or manage.

(Walsh, Vol. 1, p. 139, l. 5-16; Jt. Ex. 4, p. 1)

65. Both Mr. Walsh and Mr. Holmes testified that they found Ms. Swartz to be extremely helpful and responsive to their inquiries. Ms. Swartz materially and substantially answered Liberty's questions. They had no difficulty getting information from the State in order to respond to the RFP. (Walsh, Vol. 1, p. 230, l. 1-4; p. 233, l. 21-25; p. 235, l. 24 - p. 236, l. 4; 15-22; Holmes, Vol. 4, p. 930, l. 24 - p. 931, l. 3)

66. Liberty submitted its proposal on 7 May 2021. Liberty did not encounter any problems when submitting its bid. (Holmes, Vol. 4., p. 936, l. 14-19; Walsh, Vol. 1, p. 137, l. 13 - p. 138, l. 7)

67. To answer the question about CMS Star Ratings, Liberty compiled its March 2021 CMS Star Ratings from medicare.gov. (Walsh, Vol. 1, p. 142, l. 17-18; p. 145, l. 17 - p. 146, l. 1; Jt. Ex. 35, p. 68)

68. CMS Star Ratings can change as often as monthly. (Walsh, Vol. 1, p. 146, l. 5-16; Vol. 2, p. 276, l. 19-22)

69. As page 68 of Liberty's RFP response shows, Liberty's CMS Star Ratings range from one star to five stars. Five stars is the best and one star is the worst. (Walsh, Vol. 1, p. 143, l. 3-7; Jt. Ex. 35, p. 68)

70. Liberty's proposal showed that none of its facilities were accredited by JCAHO, although Liberty expressed willingness to seek Joint Commission accreditations. (Jt. Ex. 35, pp. 30-31; Jt. Ex. 9; Jt. Ex. 16, p. 3⁴; Walsh, Vol. 2, p. 259, l. 14-21)

71. On page 20 of its RFP response, Liberty discusses one of its skilled nursing facilities, Woodlands Nursing and Rehabilitation Center ("Woodlands") in Fayetteville, North Carolina. This facility has a Community Nursing Home Contract with the U.S. Department of Veterans Affairs. Woodlands is licensed for 80 beds, and at the time of the RFP submission, Woodlands was serving 25 veterans. At the time the RFP was submitted, less than one-third of the beds at Woodlands were occupied by Veterans. (Jt. Ex. 35, p. 20; Walsh, Vol. 1, p. 250, l. 9-19; Holmes, Vol. 4, p. 987, l. 20-24)

72. At the time of the RFP submission, 229 of Liberty's 3,662 beds were occupied by veterans; less than 10%. (Jt. Ex. 35, p. 29; p. 68; Walsh, Vol. 1, p. 252, l. 3-14)

73. Other than a memorial wall, Mr. Walsh was unable to identify any special programs or services for Veterans. Liberty's RFP submission does not identify any special programs or services for Veterans. (Walsh, Vol. 1, p. 252, l. 15 – p. 253, l. 7; Jt. Ex. 35, pp. 20-21) Mr. Holmes was not able to identify any special programs or services for Veterans at the Woodlands facility. (Holmes, Vol. 4, p. 990, l. 7-13)

74. At the time the RFP was submitted, Woodlands had a three-star rating from CMS. (Jt. Ex. 35, p. 68; Holmes, Vol. 4, p. 1001, l. 14-19)

75. Liberty's discussion of Woodlands on pages 20-21 of its RFP response is the only veterans experience that Liberty identifies in its RFP response. (Holmes, Vol. 4, p. 1001, l. 1-4)

76. Page 20 of Liberty's RFP response contains a bullet point list of characteristics of Veterans residing at Woodlands. Mr. Walsh testified that he has no clinical experience and could

⁴ Jt. Ex. 16, the Recommendation of Award Memorandum, does not have page numbers. For purposes of this Final Decision, the pages were counted beginning with the first page. The document has a total of eight pages.

not say whether these characteristics are found in non-veterans residing in other Liberty facilities. (Jt. Ex. 35, p. 20; Walsh, Vol. 2, p. 261, l. 4-12)

77. Liberty disclosed in its proposal that it employed 66 Veterans but did not identify whether any of the 66 Veterans would be involved with the NCSVH if the Agency awarded the contract to Liberty. (Jt. Ex. 35, p. 20; Walsh, Vol. 2, p. 262, l. 2-18)

78. Page 85 of Liberty's RFP response identifies Roxanne Thompson as being over the NCSVH if the Agency awarded the contract to Liberty. (Jt. Ex. 35, p. 85)

79. Mr. Walsh testified that he is not aware whether Ms. Thompson has visited any of the NCSVH and does not know of any specific experience Ms. Thompson has with State Veterans Homes. Liberty's RFP response does not address Ms. Thompson's experience caring for Veterans. (Walsh, Vol. 2, p. 263, l. 24 - p. 264, l. 18)

80. Similarly, Mr. Holmes testified that he does not know Ms. Thompson to be a Veteran and does not know whether she has any experience working with Veterans. Mr. Holmes agreed that Ms. Thompson contributed only five of the 430 hours committed by Liberty personnel to their RFP response, despite Ms. Thompson's designation as the person who would be responsible for the NCSVH if Liberty was awarded the contract. (Holmes, Vol. 4, p. 935, l. 16 - p. 936, l. 13)

81. Ms. Thompson does not report to the owners of Liberty, Mr. Ronnie McNeill and Mr. Sandy McNeill. (Walsh, Vol. 2, p. 264, l. 19-25)

82. Liberty did not identify any of the administrators for the NCSVH in their proposal and did not disclose any of the members of the Regional Support Team that would support the NCSVH. (Walsh, Vol. 2, p. 265, l. 21 - p. 266, l. 6)

83. Mr. Walsh understood that a Regional Support Team was required and the expense for such would not be reimbursed by the State of North Carolina under the 2021 RFP. (Walsh, Vol. 2, p. 266, l. 7-24)

84. Mr. Walsh admitted that all the staff who work at the NCSVH are PruittHealth employees, and that these staff members would not be required to work for Liberty if it were awarded the contract. (Walsh, Vol. 2, p. 266, l. 25 - p. 267, l. 13)

85. Mr. Walsh admitted that PruittHealth employees may not transition to Liberty if it were awarded the contract. He also acknowledged that Liberty is aware of labor shortages in the skilled nursing industry. (Walsh, Vol. 2, p. 267, l. 24 - p. 268, l. 13)

86. One of the reasons Liberty closed its facility in Hyde County, Cross Creek Health Care, in 2021 was due to lack of staff. (Walsh, Vol. 2, p. 268, l. 11 - p. 269, l. 3)

87. At the time of Liberty's RFP submission, none of Liberty's facilities had a patient population that was comprised exclusively of Veterans. (Walsh, Vol. 2, p. 269, l. 4-9)

88. Liberty's RFP response did not identify a team of people who particularly focus on programs or services for Veterans who reside at Liberty facilities. (Walsh, Vol. 2, p. 270, l. 4-9)

89. At the time it submitted its proposed management fee of 8.15% of net revenue, Liberty had the benefit of knowing that PruittHealth, was proposing 9.25%. (Walsh, Vol. 2, p. 292, l. 3-9)

90. Mr. Walsh admitted that Liberty's proposed management fee was not based on any actual experience Liberty had with veterans homes. (Walsh, Vol. 2, p. 293, l. 4-11).

PruittHealth's Response to the RFP

91. The cover letter to PruittHealth's RFP refers to United Health Services, Inc. (Jt. Ex. 70, cover letter) United Health Services, Inc. is the parent holding company that controls and owns PruittHealth in its entirety. (Jt. Ex. 70, Organizational Charts; Loggins, Vol. 2, p. 379, l. 8-15; Arnold, Vol. 2, p. 1065, l. 8 - p. 1066, l. 13)

92. Tyler Arnold, PruittHealth's Chief Development Officer, led the team who responded to PruittHealth's RFP response. (Arnold, Vol. 4, p. 1067, l. 4 - p. 1068, l. 16)

93. Mr. Arnold is a combat Veteran who received a Bronze Star for his service in the Army. (Jt. Ex. 70, Tyler Arnold CV; Arnold, Vol. 4, p. 1028, l. 10-23; p. 1030, l. 8 – p. 1034, l. 9; *see also* Jt. Ex. 16, p. 7 (Recommendation of Award states: "The Vendor also highlighted a combat Veteran on the management team. It is clear that Pruitt has the current personnel and management performing tasks and management under this contract."))

94. Mr. Arnold's responsibilities include serving as Area Vice President of PruittHealth's Veterans Services Region, which includes the four existing NCSVH and the Georgia War Veterans Home in Milledgeville, Georgia. The administrators of these Veterans Homes report directly to Mr. Arnold. Mr. Arnold also serves as the point of contact for the Department of Veterans Services in Georgia and the NCDMVA. (Jt. Ex. 70, Tyler Arnold CV; Arnold Vol 4, p. 1036, l. 5-15; Jt. Ex. 9; Jt. Ex. 16, p. 7)

95. As a member of PruittHealth's Executive Leadership Team, Mr. Arnold reports directly to the Chairman and Chief Executive Officer of PruittHealth, Neil Pruitt. (Arnold, Vol. 4, p. 1037, l. 23-25; Jt. Ex. 70, Attachment 4) The Evaluation Team noted this fact in its Evaluation Matrix and Recommendation of Award memo. (Jt. Ex. 9; Jt. Ex. 16, p. 7) ("The Vendor's key personal [sic] includes Chief Development Officer who serves as Area VP for Veterans Services Regions and reports directly to CEO.")

96. Mr. Arnold testified about The Joint Commission, a non-profit organization that is "an extra seal, extra acknowledgement of health and standards that are met [at] that particular facility." To be accredited by The Joint Commission, the skilled nursing facility must undergo a very challenging survey of several different components, including the care it provides. (Arnold, Vol. 4, p. 1055, l. 3-16; p. 1056, l. 2-15)

97. Seeking Joint Commission accreditation for the NCSVH was PruittHealth's idea, so PruittHealth asked the State of North Carolina for permission to obtain Joint Commission accreditation for the NCSVH. Since then, the State has made Joint Commission accreditation a requirement for the NCSVH. (Arnold, Vol. 4, p. 1055, l. 17 - p. 1056, l. 1; Jt. Ex. 3, § 4.5.3.1.D., p. 15).

98. Even though Joint Commission accreditation is not required for nursing homes in North Carolina, other than for the NCSVH, nothing prevents a private facility operator from seeking accreditation. (Arnold, Vol. 4, p. 1056, l. 24 - p. 1057, l. 9)

99. Mr. Arnold testified that if there was a choice between a Joint Commission accredited facility and one that is not, he would choose the accredited facility:

Because they've done above and beyond what's required and gotten the additional survey and analysis of how they act. It is just another nonpartisan third-party coming in and assessing how that facility operates.

... the JCAHO accreditation is that extra seal of quality that we'll subject ourselves in a way for improvement to ensure we're providing the best quality care that we can.

(Arnold, Vol. 4, p. 1057, l. 11-15; p. 1074, l. 2-6)

100. At the time of its RFP submission, nearly 25 of PruittHealth's other facilities were Joint Commission accredited, and PruittHealth was in the process of seeking accreditations for all its other skilled nursing facilities. (Arnold, Vol. 4, p. 1057, l. 16-24)

101. PruittHealth answered all the questions of the RFP. PruittHealth did not decline to answer any questions or provide any requested documentation. (Arnold, Vol. 4, p. 1066, l. 18 - p. 1067, l. 3)

102. In its response to the Technical Approach section of the RFP, PruittHealth described that all four NCSVH are accredited by The Joint Commission, and 23 of PruittHealth's other nursing homes are also accredited by the Joint Commission. PruittHealth is in the process of obtaining accreditations for all its nursing homes that are not currently accredited. (Arnold, Vol. 4, p. 1073, l. 9 - p. 1074, l. 6; Jt. Ex. 70, § 4.5.3, Technical Approach)

103. In the Technical Approach, Experience section of its proposal, PruittHealth described that neither the Vendor nor the Organization has closed any skilled nursing facilities or related homes due to survey issues. (Arnold, Vol. 4, p. 1074, l. 22 - p. 1075, l. 3; Jt. Ex. 70, § 4.5.3.1, Technical Approach-Experience, Section H)

104. Mr. Arnold testified that in response to the Technical Approach, Experience, Section C portion of the RFP, PruittHealth referred to its Attachment 5. (Arnold, Vol. 4, p. 1075, l. 7 - p. 1076, l. 4; Jt. Ex. 70, § 4.5.3.1.C.)

105. Mr. Arnold testified that Joint Exhibit 67 is the document PruittHealth intended to submit as Attachment 5 to its proposal. Joint Exhibit 67 was created between 1 May 2021 and 10 May 2021 by Ms. Annette Salisbury and contained April 2021 CMS Star Ratings data which Ms. Salisbury obtained from CMS.gov. All the information reported on Joint Exhibit 67 is accurate. (Arnold, Vol. 4, p. 1076, l. 5 - p. 1077, l. 22; Jt. Ex. 67)

106. Mr. Arnold testified that only a portion of Joint Exhibit 67 was submitted with PruittHealth's RFP response due to a clerical error. Though PruittHealth intended to submit its Attachment 5 in full, a portion of its columns and rows were cut off when the Excel version of the

document was converted to PDF. PruittHealth did not have the option to upload the Excel version. (Arnold, Vol. 4, p. 1079, l. 4 - p. 1081, l. 4)

107. Mr. Arnold testified that at the time he submitted the RFP response on 10 May 2021, he thought that Attachment 5 was complete. He did not learn that there was a problem with the spreadsheet until Liberty's bid protest. (Arnold, Vol. 4, p. 1081, l. 9-19)

108. PruittHealth answered all the questions in Section 4.5.3.2 of the RFP. (Arnold, Vol. 4, p. 1089, l. 7-10; Jt. Ex. 70, Section 4.5.3.2, Organizational Profile) Notably, Mr. Arnold highlighted as stated in its RFP response that PruittHealth admits 70 percent or higher VA disability rated residents. Mr. Arnold testified that PruittHealth does not receive compensation when caring for these residents. (Arnold, Vol. 4, p. 1090, l. 3-17; Jt. Ex. 70, § 4.5.3.2(C), Organizational Profile)

109. In response to Section 4.5.3.3 of the RFP, Staffing Plan, PruittHealth identified its Regional Support Team and provided short biographies for each member as Attachment 11. Mr. Arnold testified that he was the leader of the Regional Support Team. (Arnold, Vol. 4, p. 1091, l. 24 - p. 1093, l. 3; Jt. Ex. 70, § 4.5.3.3, Staffing Plan; *see also* Jt. Ex. 9 and Jt. Ex. 16, pp. 7-8)

110. Mr. Arnold testified that since 1 December 2021, PruittHealth has paid all salaries and expenses associated with the Regional Support Team. Prior to that date, those expenses were passed along to the State. This was the result of a change in the new contract. (Arnold, Vol. 4, p. 1093, l. 4-19)

111. Regarding Section 4.5.3.4. of the RFP, Financial Stability, Mr. Arnold testified that PruittHealth advances funds and pays expenses while the contract is in place, including both direct care for the veterans as well as maintenance of the facilities. (Arnold, Vol. 4, p. 1094, l. 2-24)

112. PruittHealth does not receive interest while awaiting reimbursement. (Arnold, Vol. 4, p. 1095, l. 3-5)

113. Mr. Arnold testified that PruittHealth has never had any problems advancing these costs during its incumbency. (Arnold, Vol. 4, p. 1109, l. 11-20)

114. PruittHealth responded to Section 4.3.5. of the RFP, Statement of Legal Action, and provided a complete list of past and pending legal actions as Attachment 12 to its proposal. (Arnold, Vol. 4, p. 1095, l. 6-14; Jt. Ex. 70, § 4.3.5., Statement of Legal Action)

115. PruittHealth proposed to charge 10% of net revenues for its management fee. This increase from the current contracted amount of 9.25% was to account for the Regional Support Team salaries and expenses that were previously directly reimbursed as well as the anticipated ramp-up costs and expenses associated with opening two new locations in Kernersville and Raleigh. This was based on PruittHealth's experience opening the NCSVH in Kinston and Black Mountain. (Arnold, Vol. 4, p. 1095, l. 15 - p. 1096, l. 22; Jt. Ex. 70, Pricing)

116. Mr. Arnold testified that PruittHealth anticipated increased expenses from opening two new homes and the proposed percentage of net revenues cannot be changed during the five-year contract term even if costs unexpectedly increase. (Arnold, Vol. 4, p. 1096, l. 23 - p. 1097, l. 21)

117. Mr. Arnold testified that PruittHealth wanted to keep serving the NCSVH because it is a “distinct honor.” He believed that PruittHealth was the best and well-suited to serve the Veterans. (Arnold, Vol. 4, p. 1144, l. 24 - p. 1145, l. 6)

Principle’s Proposal

118. Principle is not a party to these proceedings and did not testify at the contested case hearing. For the sake of completeness, however, and because some witnesses testified about Principle, the Tribunal will briefly address Principle’s proposal. (Liberty Ex. 128)

119. Principle was founded in 1980 and as of the time of the RFP, managed 37 facilities in North Carolina, two facilities in Virginia, and eight facilities in Kentucky. Despite being in business for more than forty years, Principle highlighted only its experience over the preceding three and half years. Principle stated that it had undergone reorganization with all new senior leadership in 2017. (Jt. Ex. 16, p. 4; Liberty Ex. 128, p. 6 and Ex. 2)

120. The RFP required vendors to provide three years of audited financial statements, and if audited financial statements were not prepared for the current fiscal year or were not prepared in the six months preceding the issuance of the RFP [*i.e.*, October 5, 2020], vendors were required to provide internally prepared financial statements from the most recent audited financial statements through June 2020. (Jt. Ex. 3, § 4.5.3.4.A., pp. 16-17)

121. Principle only provided two years of financial information, and further requested the Agency to review only three and half years of documentation. These two issues caused the Evaluation Team to eliminate Principle from the final consideration following the technical evaluation. (Jt. Ex. 16, pp. 3-4; p. 8; Liberty Ex. 128, pp. 6, 12; Campbell, Vol. 3, p. 750, l. 18 - p. 751, l. 9; p. 776, l. 3-6; Swartz, Vol. 3, p. 645, l. 11-14)

Preparing for the Review Process

122. Ms. Swartz provided administrative assistance to the Evaluation Team that was tasked with reviewing the proposals and selecting the winning bidder. Ms. Swartz attended all meetings of the Evaluation Team. Her role was to provide procedural guidance to the Evaluation Team and serve as the “scribe,” *i.e.*, the person who documented the Evaluation Team’s discussions and decision. (Jt. Ex. 9; Swartz, Vol. 2, p. 442, l. 16-17; p. 445, l. 2-5; Campbell, Vol. 3, p. 720, l. 5-13; p. 793, l. 19)

123. After she opened the vendors’ bids, Ms. Swartz checked each vendor’s response to see if each had supplied an answer to each question asked in the RFP. The purpose was not to evaluate the substance of a vendor’s response; rather, the purpose was to determine whether an answer had been supplied at all. All vendors were determined to have answered the questions asked in the RFP and to have met such initial, minimum requirement. (Jt. Ex. 6; Jt. Ex. 9; Swartz, Vol. 2, p. 436, l. 1 - p. 437, l. 19)

124. Ms. Swartz wrote a memorandum to the Evaluation Team dated 10 May 2021 (the “Memorandum”). (Jt. Ex. 8; Swartz, Vol. 2, p. 435, l. 19 - p. 436, l. 5)

125. Enclosed with the Memorandum were the three vendors' responses to the RFP. The Memorandum described in detail how the evaluation process would work. The Memorandum states in part:

As an Evaluation Team Member, please review all the of the documents included in this Evaluation Package and associated with this procurement. Please review each of the Vendor proposals in preparation for the Evaluation Team Meetings starting the week of May 17, 2021. Each Vendor has submitted a response to the following categories that the team will use in evaluation (See RFP Section 4.5 Proposed Requirements): Minimum Requirements, Experience, Organization Profile, Staffing Plan, Financial Stability, and Statement of Legal Action. The group, as a consensus, will evaluate in accordance with the Evaluation Criteria listed in the RFP Section 3.4 evaluation Criteria. The Vendor's Financial Stability will be evaluated by a Certified Public Accountant (CPA) with the State. Included in this Evaluation Package is a copy of the Evaluation Form the team will be using to document strengths and weaknesses of each proposal. You may use this as a guide as you complete your individual review, however Purchasing will document for the group to be included in the procurement file.

(Jt. Ex. 8, p. 1; Swartz, Vol. 2, p. 438, l. 5-12)

126. The Memorandum further states:

The Method of Award used in this procurement, as stated in the RFP is the 'Best Value' Method. The intent of 'Best Value' procurement is to enable Vendors to offer and the Agency to select the most appropriate solution to meet the business objectives defined in the solicitation and to keep all parties focused on the desired outcome of a procurement.

A ranking method of source selection will be utilized in this procurement using evaluation criteria in Section 3.4 to allow the State to award this RFP to the Vendor(s) providing the Best Value and recognizing that Best Value may result in award other than the lowest price or highest technically qualified offer. By using this method, the overall ranking may be adjusted up or down when considered with, or traded-off against other non-price factors.

At the completion of the evaluation process, the team will decide as a group on the Recommendation for Award. A narrative will be written, and by consensus of the evaluating committee, explaining

the strengths and weaknesses of each proposal and why the recommended awardee(s) provides the best value to the State.

(Jt. Ex. 8, p. 1)

127. The second page of the Memorandum contains six bullet points under the bold-faced, all capitals heading **IMPORTANT**. These bullet points warn the Evaluation Team, *inter alia*, that the evaluation packet is confidential; and that vendor participation in the RFP is prohibited. (Jt. Ex. 8, p. 2)

128. The Memorandum does not address internet research and does not state or imply that members of the Evaluation Team could or would not perform internet research. (Jt. Ex. 8)

129. Ms. Swartz testified that she did not advise the Evaluation Team that internet research is prohibited because internet research is not prohibited. There is no statute, administrative code provision, or RFP provision that prohibits evaluators from researching information outside of vendors' proposals. (Swartz, Vol. 2, p. 543, l. 7-21; Vol. 3, p. 623, l. 11-17)

130. If Ms. Swartz believed looking up CMS Star Ratings was inappropriate, Ms. Swartz had the authority to do something about it. (Swartz, Vol. 2, p. 543, l. 3-6)

The Evaluation Team

131. The NCVAC is a nonpartisan board appointed by the governor based on U.S. congressional districts. The NCVAC meets quarterly and one of its primary responsibilities is to oversee the NCSVH, including the selection of the vendor to manage the homes. (Campbell, Vol. 3, p. 788, l. 5-12; p. 790, l. 17-23)

132. The NCVAC appointed four of its members to evaluate vendors' responses to the RFP and prepare a recommendation for the Award to the full NCVAC. The Evaluation Team was comprised of four Veterans with a combined 88 years of service to our Nation: Jane Campbell, John Scherer, Lovay Wallace-Singleton, and Larry Pendry. (Jt. Ex. 16, p. 2)

133. Ms. Wallace-Singleton is a retired and enlisted Navy air traffic controller; John Scherer is an officer in the Army's Judge Advocate General ("JAG") Corps; and Larry Pendry is career enlisted in the Army. (Campbell, Vol. 3, p. 792, l. 22 - p. 793, l. 2)

134. The NCVAC prioritized having members on the Evaluation Team who had visited a NCSVH. All members of the Evaluation Team had visited at least one NCSVH. (Campbell, Vol. 3, p. 789, l. 6-10; p. 790, l. 1-7)

135. The first informational meeting with the Evaluation Team and Ms. Swartz was held on 13 May 2021. (Campbell, Vol. 3, p. 695, l. 23 - p. 696, l. 1)

136. Thereafter, the Evaluation Team met nine times over the course of six days to review the vendors' proposals and prepare the Recommendation of Award:

5/18/21: 8 AM-10 AM and 10 AM-12 PM

5/19/21: 1PM-3PM and 3 PM-5 PM

5/20/21: 8 AM-11 AM and 3 PM-5 PM
5/26/21: 8 AM -10 AM
5/28/21: 9:30 AM-11:30 AM
6/2/21: 2:30 PM-4:30 PM

(Jt. Ex. 10, p. 5)

137. All meetings were conducted remotely on Microsoft Teams. All members of the Evaluation Team were required to be in attendance for the full evaluation sessions. The meetings were not recorded, and no minutes were kept. (Jt. Ex. 10, p. 5; Campbell, Vol. 3, p. 776, l. 13-18; p. 793, l. 16-18)

138. Each member of the Evaluation Team took the responsibilities of this procurement seriously and was engaged in the process. (Swartz, Vol. 3, p. 616, l. 14-25; p. 649, l. 3-23; Campbell, Vol. 3, p. 799, l. 8-22)

139. Speaking about the Evaluation Team, Ms. Swartz testified:

They all made the statement that they had all visited a home ... one of our North Carolina veterans homes --- and were all veterans and potentially could one day be a resident in one of these homes.

So they did take it very seriously on who they were selecting for this contract and wanted to make sure to do it right for the veterans.

(Swartz, Vol. 3, p. 649, l. 3-14)

140. Ms. Swartz told the Evaluation Team to “do your homework.” All members read the proposals before attending the first meeting and were thoroughly prepared to discuss the proposals with the group. (Swartz, Vol. 3, p. 616, l. 14-25; Campbell, Vol. 3, p. 797, l. 1-18; p. 799, l. 8-22)

141. It was important to be thorough in this procurement because the Evaluation Team was tasked with “doing the work for our State Veterans Homes which are the [residences] and care facilities for our most vulnerable veterans in the final years, months, and days of their lives.” (Campbell, Vol. 4, p. 876, l. 11-22)

142. All members of the Evaluation Team contributed to the process and participated equally. No member of the Evaluation Team pressured another member. (Swartz, Vol. 3, p. 622, l. 18 - p. 623, l. 10)

143. The robust conversations the Evaluation Team had reflected the high level of effort, time, and deliberative attention that each member of the Evaluation team put forth prior to coming into the sessions. (Campbell, Vol. 3, p. 799, l. 23 - p. 800, l. 3; Swartz, Vol. 3, p. 616, l. 14-25)

144. Each member of the Evaluation Team “brought out the highlights, strengths, ... [and] weaknesses that they read within [the] documents” in a “very deliberative and thorough process.” (Campbell, Vol. 3, p. 808, l. 19 - p. 809, l. 4)

145. No member of the Evaluation Team was biased in favor of PruittHealth or any other vendor. (Swartz, Vol. 3, p. 578, l. 24 - p. 579, l. 13; p. 649, l. 24 - p. 650, l. 2; Campbell, Vol. 4, p. 875, l. 18 - p. 876, l. 6)

The Evaluation Matrix

146. The Evaluation Team reviewed the proposals methodically. They began by reviewing each proposal individually, with one proposal considered on each of the first three meeting days. The Evaluation Team reviewed the proposals in the following order: Liberty, Principle, and PruittHealth. (Swartz, Vol. 2, p. 444, l. 5-20 Vol. 3, p. 616, l. 8-25; Campbell, Vol. 3, p. 696, l. 19-24; p. 698, l. 8-21)

147. As the Evaluation Team reviewed each proposal, Ms. Swartz populated an Excel spreadsheet as an Evaluation Matrix to document the strengths and weaknesses identified by the Evaluation Team's discussions. (Jt. Ex. 9; Swartz, Vol. 2, p. 445, l. 2-11; p. 549, l. 12-20)

148. The topics addressed in the Evaluation Matrix match the topics in the NCSVH procurement statute, N.C. Gen. Stat. § 143B-1295. (Compare Jt. Ex. 9 with N.C. Gen. Stat. § 143B-1295; Walsh, Vol. 2, p. 309, l. 14-17)

149. The Evaluation Matrix is structured so the Evaluation Team can easily compare the vendors to one another across each evaluation criterion. (Swartz, Vol. 3, p. 619, l. 2-24)

150. In reviewing each proposal, the Evaluation Team discussed each criterion in the order it was presented on the Evaluation Matrix. (Swartz, Vol. 2, p. 525, l. 9 - p. 526, l. 4; p. 550, l. 2-18)

151. The top row of the Evaluation Matrix stated that each vendor met the Minimum Requirements in Section 4.5.2 of the RFP. With respect to Principle, however, the Evaluation Matrix noted: "Vendor only provided two years of financials." (Jt. Ex. 9)

152. The Evaluation Matrix next compared the strengths and weaknesses of the bidders with respect to the following sections of the RFP and their respective subparts: 4.5.3.1. - 4.5.3.3, 4.5.3.5, and Cost. (Jt. Ex. 9)

153. Ms. Swartz testified that strengths and weaknesses were identified for each vendor on the Evaluation Matrix. The Evaluation Matrix shows that the Evaluation Team's review of the vendors' proposals was even-handed and did not favor or disfavor any one vendor. (Swartz, Vol. 3, p. 619, l. 25 - p. 622, l. 7)

154. Regarding Section 4.5.3.1 "Experience General Notes" the Evaluation Matrix states with respect to Liberty: "Vendors Facilities have ratings from 1 star to 5 star, could not find if there was a common theme that was receiving the 1 star." Regarding PruittHealth, the Evaluation Matrix states: "Current incumbent with solid record of performance." (Jt. Ex. 9)

155. The next category under Experience is "Vendor's experience in community long-term care and the ownership and/or management of a skilled nursing facility. Experience managing any State or Federal healthcare facility." Regarding Liberty, seven strengths are noted. Among Liberty's weaknesses were "[l]imited experience and details of the scope of care for Veterans ...

[and n]ot much detail on their Veteran patients services – only details for the Fayetteville facility.” For PruittHealth, six strengths are noted, with one weakness: “Large company with operations split over 5 states.” (Jt. Ex. 9)

156. Under “Vendor’s History of contracting for management of skilled nursing care facilities,” the Evaluation Team noted three strengths for Liberty and one weakness: “unclear of the role of the other 6 Liberty companies in this contract.” For Pruitt, five strengths and no weaknesses were noted. One of the strengths was “[d]uring COVID our homes had adequate PPE supply.” (Jt. Ex. 9)

157. Under “Experience with Medicaid/Medicare/Private Insurance/VA Disability Compensation,” the Evaluation Team noted two strengths for Liberty and one weakness: “Only have limited patient experience with VA Disability Compensation 229 vets of those 91% are VA7s.” With respect to PruittHealth, two strengths and no weaknesses are noted. (Jt. Ex. 9)

158. Under “Past Performance,” the Evaluation Team noted two strengths for Liberty, and three weaknesses, including “no facilities accredited by JCAHO.” For PruittHealth, the Evaluation Team noted three strengths, including that the NCSVH have CMS Star Ratings three star or higher; that all NCSVH are JCAHO accredited, and that all of the NCSVH had received awards from the American Healthcare Association or US News. Two weaknesses were noted: “Winston-Salem private facility closed, but in research no alarming ratings or findings. 3 Star rating assessed to Salisbury home during renovations.” (Jt. Ex. 9)

159. Under Section 4.5.3.2., “Organizational Profile General Notes,” the Evaluation Team noted for Liberty that “[v]endor proposes to transition some management over to NCSVH but will be using existing staff.” (Jt. Ex. 9)

160. Further, under Section 4.5.3.2.A., “Program Suitability,” the Evaluation Team noted two strengths for Liberty, and two weaknesses, including “[f]acilities range top to bottom in ratings” and “[n]o JCAHO facilities.” For PruittHealth, the Evaluation Matrix notes three strengths and no weaknesses. The strengths state:

- *Chief Development Officer services as Area VP for Veterans Services Regions and reports directly to the CEO
- * Branched off specific area of company for NC Veteran Homes – Provides more program focus.
- * Current incumbent operating at high level with ratings and all NCSVH have JCAHO accreditations.

(Jt. Ex. 9)

161. Under “Excellence in Program Design,” the Evaluation Matrix notes four strengths for Liberty and no weaknesses. For PruittHealth, the Evaluation Matrix notes seven strengths, and one weakness. (Jt. Ex. 9)

162. Under “Corporate or company Resources,” the Evaluation Matrix notes three strengths and one weakness for Liberty. The weakness states “[w]ould want assurances resources/staff coming from 5 star facilities.” For PruittHealth, the Evaluation Matrix notes three strengths and no weaknesses. (Jt. Ex. 9)

163. Under “Management Plan,” the Evaluation Matrix notes four strengths and one weakness for Liberty, with the weakness identified as “[c]onsistency not well defined in disaster recovery across Vendor’s different types of facilities between CCRC and Skilled.” (Jt. Ex. 9)

164. For PruittHealth, the Evaluation Matrix notes six strengths and no weaknesses under Management Plan. Among the strengths that were noted for PruittHealth: “[d]isaster recovery plan includes working with State and Federal entities to ensure compliance including direct information from NCDHHS. Quickly developed policies at the onset of COVID Pandemic. During COVID creation of emergency operation center ... Supply Chain management proven reliable during Covid. Implemented new policies and procedures based on lessons learned during COVID.” (Jt. Ex. 9)

165. Under Section 4.5.3.3, “Staffing Plan General Notes,” the Evaluation Matrix notes that Liberty “[l]aid out clear staffing proposal from organization down to staffing.” Further, with respect to Section 4.5.3.3.A., “[v]endor’s proposed execution and staffing plan,” the Evaluation Matrix notes two strengths and one weakness for Liberty. The weakness was “[n]ot clear if low ratings are associated with staffing challenges.” For PruittHealth the Evaluation Matrix notes seven strengths and one weakness. The weakness was “breakdown of hours and staff was somewhat confusing to the panel.” (Jt. Ex. 9)

166. Under “Experience of Key Personnel,” the Evaluation Matrix notes three strengths and one weakness for Liberty. The weakness was “[s]upervisors have not been named, not sure if taking from existing facilities or will hold open interviews – if coming from other Liberty Facilities would only want high rated facilities.” For PruittHealth, three strengths and no weaknesses were noted. Among PruittHealth’s strengths were “Chief Development Officer serves as Area VP for Veteran Services Regions and reports directly to CEO. Have current personnel and management performing tasks and management under this contract. Highlight combat Veteran on management team.” (Jt. Ex. 9)

167. Under the next section, Section 4.5.3.5, “Statement of Legal Action,” the Evaluation Matrix notes with respect to Liberty, “[n]o recent problematic suits.” For PruittHealth, the Evaluation Matrix notes “none listed or we know of for NCSVH.” (Jt. Ex. 9)

168. The next section of the Evaluation Matrix lists the vendors’ proposed management fee. Liberty proposed 8.15% of net revenue, Principle proposed 7.5% of net revenue, and PruittHealth proposed 10% of net revenue. (Jt. Ex. 9)

169. Next was the cost analysis. Regarding Liberty, the Evaluation Matrix states:

*Liberty provides a lower rate, however, during the technical evaluation the cost of service is associated with the level of care and is reflected in the ratings of the facilities the Vendor currently manages.

*Of the 36 facilities in NC Vendor Liberty manages in NC, only one (1) is 5-star; nine (9) are 4-star; nine (9) are 3-star; nine (9) are two (2) star; and six (6) are 1-star facilities. Two of the Vendor’s facilities are new and/or pending their CMS evaluations. These

rating reflect that 44% of their facilities are 1 and 2-star facilities while only 29% have earned the top 4 and 5-star ratings.

(Jt. Ex. 9)

170. For PruittHealth, the Evaluation Matrix states:

*Made note that increase to percentage from current contract at 9.25% is to accommodate for opening of 2 additional homes.

*Pruitt brings the strongest Technical Evaluation and has proved under the current contract that they provide an excellent program.

*1.85% differential in cost is the difference between experience, excellence in program design, management plan, and key personnel that Pruitt proposes.

*10% still allows for 90% to be added to the trust fund.

*Of the 15 facilities (this includes the 4 operational NCSVHs) that Pruitt manages in North Carolina, four (4) are 5-star; four (4) are 4-star; two (2) are 3-star; two (2) are 2-star; and three (3) are 1-star rated facilities. In comparison, 53% of this Vendor's facilities are 4 and 5-star rated and 33% are 1 and 2-star facilities.

(Jt. Ex. 9)

171. The Evaluation Matrix also notes for both Liberty and PruittHealth that "Reference Checks came back positive remarks." (Jt. Ex. 9)

172. The last item on the Evaluation Matrix is a note with an asterisk stating: "Financials to be evaluated by CPA." (Jt. Ex. 9)

173. The Evaluation Team identified as a weakness that no Liberty facility was accredited by The Joint Commission. (Jt. Ex. 9; Jt. Ex. 35, pp. 30-31; Walsh, Vol. 2, p. 276, l. 14-18; p. 282, l. 16-25)

174. During his testimony, Mr. Walsh acknowledged the various strengths and weaknesses the Evaluation Team discerned in its review of all the proposals, including Liberty's. Mr. Walsh did not dispute any of the weaknesses that the Evaluation Team discerned about Liberty's proposal. (Walsh, Vol. 2, p. 280, l. 3 - p. 294, l. 17; Jt. Ex. 9)

175. The Evaluation Team noted that one of PruittHealth's strengths was the fact that a combat Veteran serves on its management team. Mr. Walsh was not aware of any combat Veteran serving on Liberty's management team. (Jt. Ex. 9; Walsh, Vol. 2, p. 290, l. 12-24)

176. Each member of the Evaluation Team participated in the discussions about what would be put on the Evaluation Matrix, and each actively contributed. (Swartz, Vol. 2, p. 526, l. 5-11)

177. As the Evaluation Team moved through the evaluations, Ms. Swartz would read all the comments in the Evaluation Matrix back to the team and specifically ask whether anyone had

anything to add, whether everyone agreed, and whether any wording needed to be changed. (Swartz, Vol. 2, p. 526, l. 25 - p. 527, l. 7; Vol. 4, p. 617, l. 18 – p. 628, l. 6)

178. The Evaluation Matrix reflects the consensus view of the Evaluation Team. (Campbell, Vol. 3, p. 699, l. 1-9; p. 777, l. 7-16; Jt. Ex. 9; Swartz, Vol. 2, p. 526, 21-24)

Stephanie Fisher's Spreadsheet

179. Stephanie B. Fisher, CPA, is the Certified Public Accountant who evaluated the vendors' financials, as referenced in the Evaluation Matrix. (Jt. Ex. 9; Jt. Ex. 16, p. 7; PruittHealth Ex. 307)

180. Ms. Fisher prepared a spreadsheet which reported financial information contained in the vendors' financial statements. (PruittHealth Ex. 307)

181. Captain Campbell testified that financial stability was evaluated as part of the cost analysis. (Campbell, Vol. 3, p. 815, l. 13-16)

182. In their analysis of financial stability, the Evaluation Team received Ms. Fisher's spreadsheet. At that time, they had already ranked the proposals based on the evaluation criteria. The spreadsheet reflected that a CPA had determined the vendors met the minimum requirements, and the Evaluation Team was looking to see if there was anything that "jumped off the page" that would inform their opinion as to best value. (Campbell, Vol. 3, p. 816, l. 11 - p. 817, l. 3; Swartz, Vol. 2; p. 439, l. 9-25)

183. Financial stability favored neither Liberty nor PruittHealth. (Campbell, Vol. 3, p. 817, l. 12-14)

184. Captain Campbell testified that during her time as a member of the NCVAC, she never received any information that PruittHealth was unable to meet its financial obligations in operating the NCSVH. (Campbell, Vol. 3, p. 819, l. 6-11)

The Recommendation of Award Memo

185. On 5 July 2021, the Evaluation Team completed a Recommendation of Award memo (the "Award Memo"), addressed to Ms. Swartz and signed by Captain Campbell. (Jt. Ex. 16, p. 1)

186. The Award Memo cross references the Evaluation Matrix. (Jt. Ex. 16, p. 2; Jt. Ex. 9)

187. For each of the three vendors, the Evaluation Team conducted a technical evaluation, which reviewed whether vendors complied with the minimum requirements; vendors' experience; vendors' organizational profile; their staffing plans; and statement of legal action. This section of the memorandum was taken basically from the Evaluation Matrix and put into narrative form. (Jt. Ex. 16, pp. 2-7; Swartz., Vol. 3, p. 624, l. 17-23)

188. Regarding PruittHealth's past performance, the Award Memo states:

The overall past performance of Pruitt is highly favorable. There are no existing G or higher incident reports in NCSVH. In addition to being CMS 3-star or higher rated, All NCSVH facilities are JCAHO accredited. The 3-star rating was assessed to the Salisbury NCSVH during renovations. Pruitt has received multiple awards for the NCSVH facilities[.]

(Jt. Ex. 16, p. 6)

189. Regarding the financial stability analysis, the Award Memo states:

The Vendor's Financial Stability was analyzed by a Certified Public Accountant (CPA) with [the] Department of Administration, Stephanie Fisher (See Financial Stmt Information.xlsx). The information presented here comes from audited financial statements submitted by the Vendors using common financial ratios. The financial assessment shows all 3 Vendors have the financial stability and meet the cash flow requirements outlined in the RFP. However, it is noted that Principle only provided statement[s] for 2019 and 2020.

(Jt. Ex. 16, p. 7)

190. The Award Memo next provides the conclusion of the technical evaluation. The Award Memo states:

The evaluation team contacted each of the Vendor's reference[s] and received response[s] for 2 individuals for each Vendor. All reference responses for all vendors were positive. At the completion of the technical evaluation the team ranked the vendors as follows:

1. Pruitt
2. Liberty
3. Principle

(Jt. Ex. 16, p. 7)

191. The Award Memo then describes the Cost Analysis:

As stated in the RFP, Vendors were to propose the cost to manage the NC State Veterans Homes at a percentage (%) of net revenues (gross revenues less contractual) for management fees, excluding performance bond. The Vendors proposed the following percentages:

Liberty Long Term Care Management Services, LLC - 8.15%
Principal Long Term Care, Inc. - 7.5%

PruittHealth Veteran Services - North Carolina, Inc. - 10%

(Jt. Ex. 16, p. 7)

192. The Award Memorandum further states:

Cost analysis and evaluation is based on N.C.G.S. § 143B-1295. The Veterans' Affairs Commission is not required to select or recommend the vendor offering the lowest cost proposal but shall select or recommend the vendor who, in the opinion of the Commission, offers the proposal most advantageous to the veterans and the State of North Carolina.

(Jt. Ex. 16, p. 7)

193. After eliminating Principle from final consideration due to only providing two years of financial information and its request that the evaluators consider only three and a half years of documentation, the Award Memorandum compared Liberty and PruittHealth:

Liberty provides a lower rate, however during the technical evaluation the cost of service is associated with the level of care and is reflected in the ratings of the facilities the vendor currently manages. Of the 36 facilities Liberty manages in NC, only one (1) is 5-star, nine (9) are 4-star, nine (9) are 3-star, nine (9) are 2-star, and six (6) are 1-star facilities. Two of the Vendor's facilities are new and/or pending their CMS evaluations. These ratings reflect that 44% of their facilities are 1 and 2-star facilities, while only 29% have earned the top 4 and 5-star ratings.

(Jt. Ex. 16, p. 8)

194. This passage accurately reflects the CMS Star Ratings reported by Liberty for its facilities on page 68 of its RFP response. (Jt. Ex. 35, p. 68)

195. Turning to PruittHealth, the Award Memorandum states:

Of the 15 facilities (this includes the four operational NCSVHs) that Pruitt it manages in North Carolina: four (4) are 5-star, four (4) are 4-star, two (2) are 3-star, two (2) are 2-star, and three (3) are 1-star rated facilities. In comparison, 53% of this Vendor's facilities are 4 and 5-star rated and 33% are 1 and 2-star facilities.

Pruitt also noted that [its] increase to percentage from current contract at 9.25% is to accommodate for opening of 2 additional homes. *Pruitt brings the strongest Technical Evaluation and has*

proved under the current contract that they provide an excellent program. As the CMS Star Ratings highlighted above note, the 1.85% differential in cost between Liberty and Pruitt is the difference between experience, excellence in program design, management plan, and key personnel that Pruitt proposes.

10% of net revenues still allows for 90% to be added to the trust fund which allows for the planning and construction of future homes for North Carolina's Veterans.

(Jt. Ex. 16, p. 8) (emphasis added)

196. Captain Campbell testified that the Evaluation Team's conclusion that PruittHealth brought the "strongest technical evaluation" was based upon the Evaluation Team's review of everything in the Evaluation Matrix and the strengths and weaknesses therein. (Campbell, Vol. 3, p. 780, l. 19-24; Jt. Ex. 16, p. 8).

197. As more fully discussed later in this Final Decision, the CMS Star Ratings that the Award Memo references do not match the CMS Star Ratings that PruittHealth intended to submit with its proposal. (Jt. Ex. 67)

198. The Award Memo also addresses the decision to consider only the CMS Star Ratings of the vendors' North Carolina facilities:

NOTE: While the CMS ratings utilize a national standard, the annual inspections are conducted by state evaluation teams. For this reason, the evaluation team focused on the CMS ratings for facilities operated in the state of North Carolina.

(Jt. Ex. 16, p. 8)

199. Captain Campbell testified that the Evaluation Team included the note about CMS ratings utilizing a national standard in the Award Memo because they wanted to be transparent in their thought process behind what they did. (Campbell, Vol. 3, p. 784, l. 7 - p. 785, l. 1)

200. During its examination of Ms. Swartz and in its closing argument, Liberty posed the question of what happens if a bidder had no North Carolina facilities and therefore, no North Carolina CMS Star Ratings. (Swartz, Vol. 2, p. 467, l. 22 - p. 468, l. 2; 19-23; Tr., Vol. 5, p. 1286, l. 1. 18-22). Ms. Swartz acknowledged that in such a situation, the Evaluation Team would have to have done something differently. (Swartz, Vol. 2, p. 468, l. 24 - p. 469, l. 1)

201. As Ms. Swartz testified, that situation did not occur here because all three vendors have facilities in North Carolina. (Swartz, Vol. 2, p. 468, l. 4-5)

202. The Award Memo concludes with a Recommendation of Award:

Based upon the complete technical evaluation and the cost analysis, the Evaluation Team recommends the contract be awarded

to PruittHealth Veteran Services. This Vendor has the overall best final evaluation and provides the best value to the State and the Veterans who are residents of the NCSVHs.

(Jt. Ex. 16, p. 8) (emphasis added)

203. While CMS Star Ratings were part of the Technical Evaluation, they were not the only or dispositive portion of the Technical Evaluation. As reflected on pages 15-17 of the RFP, the complete Technical Evaluation included five main factors (Experience, Organization Profile, Staffing Plan, Financial Stability, and Statement of Legal Action), most of which have had multiple subparts. (Jt. Ex. 3, pp. 15-17; *see also* Walsh, Vol. 2, p. 310, l. 20 – p. 312, l. 6)

204. CMS Star Ratings are referenced under Section 4.5.3.1, Experience, which has nine subparts. (Jt. Ex. 3, p. 15)

205. The subpart of the RFP that mentions CMS Star Ratings, Section 4.5.3.1.C., also addresses other topics. (Jt. Ex. 3, p. 15; Walsh, Vol. 2, p. 312, l. 7-16)

206. At trial, Mr. Walsh acknowledged that the Award Memo talks about more than simply CMS Star Ratings. (Walsh, Vol. 2, p. 310, l. 5-8)

207. At trial, Ms. Swartz detailed numerous strengths and weaknesses for vendors described in the Award Memorandum that do not relate to CMS Star Ratings, such as (1) experience in and details of the scope of care for veterans, (2) role of vendors' respective affiliates, (3) experience with VA disability compensation, (4) JCAHO accreditation, (4) staffing proposals, (5) management proposals, (6) disaster recovery plans, (7) G-tags and incident reports, and (8) mechanisms for ensuring regulatory compliance. (Swartz, Vol. 3, p. 625, l. 1 – p. 629, l. 22)

208. The Evaluation Team understood that if the contract were awarded to PruittHealth, more funds would be paid to the vendor than the other two bidders. This did not concern the Evaluation Team because this was part of the "offset" between the "higher cost and the benefit to our State's veterans." (Campbell, Vol. 4, p. 872, l. 2-14)

209. The Evaluation Team was not required to determine the recommendation of award based on a specific formula. Instead, it was determined from the weight of the collective information gleaned from the proposals balanced against the strengths and weaknesses for the items in the RFP. (Campbell, Vol. 3, p. 801, l. 23 - p. 802, l. 12)

210. The Evaluation Team determined that Liberty had "limited experience and details of the scope of care for veterans" because they did not see anything beyond information related to one facility [the Woodlands in Fayetteville]. (Campbell, Vol. 3, p. 810, l. 25 - p. 811, l. 8)

211. The Evaluation Team also expected there to be more detail in Liberty's RFP response regarding the support provided to veterans at existing facilities. (Campbell, Vol. 3, p. 811, l. 18 - p. 812, l. 3)

212. The Evaluation Team recognized differences in the scope of care for Veterans as compared to non-Veterans. (Campbell, Vol. 3, p. 811, l. 9-17)

213. The Evaluation Team believed that PruittHealth’s operation within the existing NCSVH reflected the type of care they believed was a strength. (Campbell, Vol. 3, p. 812, l. 4-15)

214. Captain Campbell testified that PruittHealth’s American Health Care Association (“AHCA”) quality awards and U.S. News Best Nursing Home Awards were significant data points. (Campbell, Vol. 3, p. 812, l. 16-23)

215. The Evaluation Team noted the difference between JCAHO accreditation and CMS Star Ratings, noting that while CMS is required, JCAHO is voluntary and a “make yourself better” kind of process. The Evaluation Team was “struck by” PruittHealth “going above and beyond” and aspiring JCAHO accreditations in all their facilities, not just the NCSVH. (Campbell, Vol. 3, p. 813, l. 2-21)

216. Through consideration of strengths and weaknesses, the Evaluation Team ultimately concluded that PruittHealth’s experience was stronger than Liberty’s. (Campbell, Vol. 3, p. 814, l. 18-22)

The Process Following the Evaluation Team’s Meetings

217. The Evaluation Team’s last meeting was on 2 June 2021. (Jt. Ex. 10, p. 5; Swartz, Vol. 3, p. 569, l. 7-9)

218. The review process did not end with the Evaluation Team’s final meeting. Ms. Swartz explained that because this was a NCVAC procurement,

[T]he VAC had to hold a meeting and actually vote to move forward with the recommendation from the team. So they were presented with the findings, and then the VAC in closed session took a vote to move forward with the recommendation.

(Swartz, Vol. 3, p. 569, l. 14-19)

219. The NCVAC met virtually on 23 June 2021 to vote on the recommendation. As reflected in the minutes of the meeting, Ms. Swartz attended, as did Captain Campbell and the other members of the Evaluation Team, Mr. Scherer, Mr. Pendry, and Ms. Wallace-Singleton. Other NCVAC members were also present, along with NCDMVA Chief Deputy Secretary (“CDS”) Martin D. Falls. A quorum was present, and the vote took place in closed session. (Agency Ex. 202, p. 2)

220. During the closed session meeting, Captain Campbell and Ms. Swartz explained the process that the Evaluation Team followed. Captain Campbell summed up the recommendation, with its fiscal particulars and justification. (Agency Ex. 202, p. 2)

221. The minutes state:

Commissioner John Scherer, Commissioner Larry Pendry (via chat box and read aloud by Chairwoman Campbell), and Commissioner Lovay Wallace-Singleton each expressed the commitment, diligence, and care given by the Sub-committee in the evaluation of

the submitted proposals resulting in their recommendation to the VAC.

(Agency Ex. 202, p. 2)

222. Ms. Swartz explained the next steps in the procurement process as the recommendation would then move forward through North Carolina state government. (Agency Ex 202, p. 3)

223. The minutes also reflect:

Chairwoman Campbell passed the floor to CDS Falls for comments. He acknowledged again the hard work involved by the Subcommittee.... *Chairwoman Campbell mentioned how the response to COVID was a consideration in their evaluation process.*

A motion to move forward with the recommendation was made by Commissioner Smith with the second given by Commissioner Pat Smathers. Commissioner Smith gave a history of the selection process for the Homes and advised of the necessity for this information to remain private. The floor was opened for any additional discussion before the vote. Commissioner Townsend called for the vote. Chairwoman Campbell then called each Commissioner by name for their vote. A unanimous vote was given to move forward. Ms. Swartz will have all signed paperwork and the packet submitted by the end of this week.

(Agency Ex. 202, p. 2) (emphasis added)

224. At trial, Ms. Swartz explained the multiple steps that were taken to review and approve the Recommendation of Award. After the NCVAC approved the Recommendation of Award, the entire procurement file (including vendor proposals) was sent to statewide procurement for review and approval by a procurement manager. (Swartz, Vol. 3, p. 575, l. 12 - p. 576, l. 7)

225. Next, the entire procurement file was sent to the Deputy State Procurement Officer over sourcing and to Legal, who each reviewed and approved the Recommendation of Award. Finally, the entire procurement file was sent to David O'Neal, the State Procurement Officer, for his seal of approval and to certify the award. (Swartz, Vol. 3, p. 576, l. 8-15)

226. Secretary of NCDMVA, Walter E. Gaskin, signed the Award letter. (Swartz, Vol. 3, p. 576, l. 16-24; Jt. Ex. 68)

227. In total, from the date of the first Evaluation Team meeting (18 May 2021) to the announcement of Award (24 August 2021), the process took a little over three months. (Jt. Ex. 10, p. 5; Jt. Ex. 68)

228. Ms. Swartz explained that during those three months, the State Procurement Office was "reviewing how the entire procurement process took place, [to] make sure that there's no pitfalls.... They're looking ... to make sure everything's justified and that it's defensible ... [a]nd

to make sure we followed the process and it's all documented." (Swartz, Vol. 3, p. 576, l. 25 - p. 577, l. 15)

229. The role of NCDOA's legal department is/was "to make sure that the vendors didn't take any exceptions to terms and conditions and to make sure it's a legally binding contract once it's executed and that the procurement process was also followed." (Swartz, Vol. 3, p. 577, l. 25 – p. 578, l. 6)

230. If the State Procurement Office finds an error, it can deny the award, but the most common action is that the State Procurement Officer requests that the issue be fixed, or that additional information be provided. (Swartz, Vol. 3, p. 578, l. 7-15)

231. That did not happen here; the only additional item the State Procurement Office requested was a letter from NCDOA that stated the Award amount. (Swartz, Vol. 3, p. 578, l. 16-23)

232. The Award to PruittHealth was issued by Secretary Gaskin on 24 August 2021. PruittHealth did not have any advance notice prior to 24 August 2021 that it had won the Award. (Jt. Ex. 68; Arnold, Vol. 4, p. 1111, l. 17 - p. 1112, l. 15)

233. Significant time (106 days) elapsed between the time the vendors were required to submit their responses to the RFP (10 May 2021) and the day the award was announced (24 August 2021).

The Procurement File

234. Ms. Swartz testified that the procurement file contained all documentation from the procurement, including the Recommendation of Award memo, the Evaluation Matrix, the blank RFP, all vendor responses and tabulation, the questions and answers, and all addenda. Ms. Swartz believed that it was important for the procurement file to be accurate. (Swartz, Vol. 3, p. 575, l. 12 - p. 576, l. 1; p. 608, l. 6-18)

235. Ms. Swartz testified regarding procurement rule 01 N.C.A.C. 05B.1903. She agreed that subsection C of the rule requires that: "After award of contract all material in the file, except confidential information, shall be open and interested parties during normal office hours may be hand copied or copies shall be furnished in accordance with the Public Records Act." (Swartz, Vol. 3, p. 673, l. 14 - p. 674, l. 15)

236. Ms. Swartz agreed that all contents of a procurement file which are not confidential can be provided pursuant to public records requests. (Swartz, Vol. 3, p. 674, l. 17-19)

237. Mr. Walsh testified that Liberty requested the procurement file and received it shortly before Liberty's protest letter was due. (Walsh, Vol. 1, p. 151, l. 22 - p. 152, l. 9)

238. Ms. Swartz testified regarding procurement rule 01 N.C.A.C. 05B.0309. She agreed that subsection C of the rule requires that "Evaluation scoring sheets, and other materials utilized to determine the ranking or assessment of the [Responsive Offers] shall be retained in the agency procurement file." (Swartz, Vol. 3, p. 669, l. 18 - p. 670, l. 4)

239. The primary information obtained from the internet searches conducted during the procurement were the CMS Star Ratings for PruittHealth’s facilities. These ratings are included in the Evaluation Matrix and Recommendation of Award, which are part of the procurement file. (Jt. Ex. 9, p. 3; Jt. Ex. 16, p. 8)

240. Regarding internet research Captain Campbell undertook, she testified that such was due diligence, which she described as “[d]oing all that you can to do the best that you can.” (Campbell, Vol. 4, p. 861, 1-10)

Liberty’s Contentions: Distinguished

241. Mr. Walsh understood that the NCSVH RFP was a “best value” procurement, not a “lowest responsible bidder” procurement. (Walsh, Vol. 2, p. 270, l. 14-18; p. 272, l. 17-20)

242. Even though Liberty disagrees with the Agency’s decision, Liberty does not contend that the members of the Evaluation Team were incapable of evaluating the RFP responses. (Walsh, Vol. 2, p. 272, l. 21 - p. 273, l. 1)

243. Liberty does not contend that the NCVAC was incapable of forming an opinion about which proposal was most advantageous to the Veterans and the State. (Walsh, Vol. 2, p. 273, l. 2-8)

244. Liberty does not contend that Ms. Swartz was not capable of discharging her responsibilities in relation to this procurement. Mr. Walsh acknowledged that Ms. Swartz knows more than he does about state procurement. (Walsh, Vol. 2, p. 273, l. 9-17)

245. Mr. Walsh agreed that the members of the Evaluation Team in fact reviewed Liberty’s RFP response. (Walsh, Vol. 2, p. 274, l. 1-4)

246. Liberty does not contend that David O’Neal, the State Purchasing Officer, or Secretary Walter Gaskin of NCDMVA were incapable of discharging their duties in relation to this procurement. (Walsh, Vol. 2, p. 274, l. 5-11; l. 15-20; Holmes, Vol. 4, p. 937, l. 16 - p. 938, l. 3)

247. Liberty does not contend that Ms. Swartz, the Evaluation Team, Mr. O’Neal or NCDMVA Secretary Walter Gaskin were biased for or against any of the bidders. (Walsh, Vol. 2, p. 273, l. 18-25; p. 274, l. 12-14; l. 21-24; Holmes, Vol. 4, p. 937, l. 11-15; l. 19-24)

248. If Liberty had won the Award, Liberty would have accepted it. (Walsh, Vol. 2, p. 276, l. 10-13)

Liberty’s Contentions: CMS Star Ratings

249. The procurement statute prompting this RFP, N.C. Gen. Stat. § 143B-1295, as well as the RFP itself, required evaluators to consider a host of factors. (Jt. Ex. 3, pp. 8, 10, 14-18 and

Sections 3.4 and 4.0) The RFP contained dozens of questions and requests for information, and each applicant provided extensive responses to the RFP.⁵

250. One question, under the heading “Experience,” asked vendors to provide:

A list of all skilled nursing facilities assisted living facilities, personal care facilities, or other health care facilities, providing services to primarily elderly individuals, that the organization has operated in the last five (5) years. For each facility, include name, address, phone number, *number of times receiving CMS Star Ratings*, number of awards from AHCA⁶, Facility Administrator, and number of beds in the facility.

(Jt. Ex. 3, § 4.5.3.1.C., p. 15) (emphasis added).

251. Section 2.10 of the RFP contains a list of definitions. Among these is a definition for “Five-Star Rating”:

The five-star rating system is comprised of three components: 1. Health inspections; 2. Staffing; 3. Quality Measures. These three ratings are combined to calculate an overall rating by CMS.

(Jt. Ex. 3, § 2.10.D., p. 7)

252. The Centers for Medicare and Medicaid Services (“CMS”) is a federal agency that is part of the Department of Health and Human Services (“HHS”). Among other activities, CMS directs the Medicare program, and in partnership with the states, it oversees the Medicaid program. With respect to Star Ratings, CMS’s website states:

CMS created the Five-Star Quality Rating System to help consumers, their families, and caregivers compare nursing homes more easily and to help identify areas about which you may want to ask questions. The Nursing Home Care Compare web site features a quality rating system that gives each nursing home a rating of between 1 and 5 stars. Nursing homes with 5 stars are considered to have much above average quality and nursing homes with 1 star are considered to have quality much below average. There is one Overall 5-star rating for each nursing home, and separate ratings for health inspections, staffing and quality measures.

Caution: No rating system can address all of the important considerations that go into a decision about which nursing home may be best for a particular person. Examples include the extent to

⁵ For example, Liberty’s RFP response was over 300 pages long. *See* Jt. Ex. 35. PruittHealth’s RFP response was over 700 pages long. *See* Jt. Ex. 70 and PruittHealth Ex. 309 (under seal)

⁶ AHCA stands for the American Health Care Association.

which specialty care is provided (such as specialized rehabilitation or dementia care) or how easy it will be for family members to visit. Visits can improve both the residents' quality of life and quality of care, it may be better to select a nursing home that is very close over one that may be, rated higher but far away. Consumers should therefore use the Web site together with other sources of information for the nursing homes (including a visit to the nursing home) and State or local organizations (such as local advocacy groups and the State Ombudsman program).

Five-Star Quality Rating System, CMS.gov, <https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/CertificationandCompliance/FSQRS>).

253. CMS Star Ratings is the central issue in Liberty's contested case. Liberty makes several arguments about CMS Star Ratings. First, Liberty asserts that PruittHealth should have been disqualified for not submitting its CMS Star Ratings with its proposal. Second, Liberty asserts that the Evaluation Team should not have performed internet research to obtain PruittHealth's CMS Star Ratings. Third, Liberty asserts that the internet research the Evaluation Team performed was flawed, as it relied on outdated and incomplete information from a non-government website, nursinghomesite.com. Finally, Liberty maintains that CMS Star Ratings were the only basis for the Evaluation Team's recommendation of PruittHealth, instead of Liberty, for the Award.

254. CMS updates the Star Ratings as often as monthly and maintains an online archive of past Star Ratings. (Jt. Ex. 40A and 40B; PruittHealth Ex. 306; Walsh, Vol. 1, p. 146, l. 5-6)

255. Current and past Star Ratings are available online, and anyone with internet access can review CMS Star Ratings. At trial, Liberty agreed that CMS is the definitive source for Star Ratings. Mr. Walsh agreed that information that comes from the CMS archive is accurate. (Walsh, Vol. 2, p. 277, l. 20-22)

256. Mr. Walsh downloaded the CMS Archives contained in Jt. Ex. 40A and 40B. (Walsh, Vol. 2, p. 277, l. 23 - p. 278, l. 2) Jt. Ex. 40A is the April 2021 Excel Spreadsheet of CMS Star Ratings Archival Data. Jt. Ex 40B is the May 2021 Excel Spreadsheet of CMS Star Ratings Archival Data.

257. Although CMS Star Ratings were among several factors identified in the RFP pertaining to quality, they were not the predominant factor for assessing the proposal in its entirety. Rather, CMS Star Ratings was but one of multiple indicators identified by Section 4.5.3.1.C., which in turn, was one of nine factors used to assess a proposal's "Experience," which, in turn, was one of five overall selection criteria. (Jt. Ex. 3, p. 10, § 3.4 and p. 15, § 4.5)

258. Consistent with this framework, the Evaluation Team considered several quality indicators such as JCAHO accreditation, awards from the AHCA, alongside CMS Star Ratings and other factors. (Jt. Ex. 9; Jt. Ex. 16, p. 6, listing AHCA awards given to the NCSVH)

259. Those quality indicators were then one part of the evaluators' comprehensive consideration of Experience factors which, in turn, were one component of the RFP's five governing factors. *See, e.g.*, Jt. Ex. 3 and Jt. Ex. 9. The Evaluation Team's Recommendation of

Award to PruittHealth made clear that it was “[b]ased upon the *complete* technical evaluation and the cost analysis.... [PruittHealth] has the overall best final evaluation and provides the best value to the State and the Veterans who are residents of the NCSVHs.” (Jt. Ex. 16, p. 8) (emphasis added)

260. At trial, Captain Campbell testified:

We incorporated and evaluated, included [the CMS Star Ratings] as the one component of the evaluation ... we used them in the process, but it was one element of that evaluation process.”

(Campbell, Vol. 3, p. 807, l. 3-11).

261. Captain Campbell testified that the CMS Star Ratings were “additive to an already exhaustive and thorough evaluation process,” (Jt. Ex. 72, p. 67, l. 2-4, and as “the last bullet of all these after we looked at, you know, the other information that we’ve provided.” (Jt. Ex. 72, p. 105, l. 5-7)

262. Further, the Evaluation Team’s Recommendation of Award uses language which confirms that the CMS Star Ratings were merely corroborative of other components of the evaluation. For example, the Recommendation of Award stated that Liberty’s lower cost of service was associated with its level of care which was “reflected in” the CMS Star Ratings and that the differential in cost between Liberty and Pruitt was “the difference between experience, excellence in program design, management plan, and key personnel that Pruitt proposes” which the Evaluation Team said was “note[d]” in the CMS Star Ratings. (Jt. Ex. 16, p. 8)

263. Thus, the Evaluation Team’s approach to CMS Star Ratings is consistent with the caution CMS placed on its own website: no one rating system can address all important considerations that go into the selection of a nursing home. *See Five-Star Quality Rating System*, CMS.gov, *supra*; *see also*, Jt. Ex. 16, p. 8 (“Pruitt brings the strongest Technical Evaluation and has proved under the current contract that they provide an excellent program.”); Jt. Ex. 19, p. 1 (Deputy Director, Department of Military and Veterans Affairs, notes that “[t]he quality of services provided by Pruitt Healthcare has consistently and continually met or exceeded standards of care prescribed by the North Carolina Department of Health and Human Services” and further praises PruittHealth’s quality of care during the pandemic as “outstanding.”)

264. Captain Campbell looked up PruittHealth’s CMS Star Ratings on the internet. According to her browser history, on 19 May 2021, Captain Campbell looked at nursinghomesite.com to obtain PruittHealth’s CMS Star Ratings. (Campbell, Vol. 3, p. 699; l. 10-16; p. 735, l. 11-16; Jt. Ex. 20)

265. Captain Campbell testified that CMS Star Ratings were not identified as an evaluation criterion in the RFP. She explained: “[w]e looked at them [CMS Star Ratings] as a potential way to have a direct comparison....” (Campbell, Vol. 3, p. 803, l. 12-15)

266. At no time did Ms. Swartz advise the Evaluation Team that it would be inappropriate to do internet research on each vendor. (Campbell, Vol. 3, p. 804, l. 17-20)

267. Captain Campbell acknowledged that the CMS Star Ratings she obtained for PruittHealth were not consistent with the ratings from the CMS website. (Campbell, Vol. 3, p. 805, l. 2-6)

268. Captain Campbell testified that she was aware that the CMS Star Ratings available at medicare.gov would be the most reliable. (Campbell, Vol. 3, p. 806, l. 19 - p. 807, l. 2)

269. The credible evidence and most reasonable interpretation of how Captain Campbell ended up on the wrong site is human error; she made a mistake.

270. According to Captain Campbell, the CMS Star Ratings were one element of the evaluation process. They were not more or less important than any other evaluation criteria or factors. (Campbell, Vol. 3, p. 807, l. 3-17)

271. The evidentiary record contains little evidence that CMS Star Ratings were a dispositive factor in the Evaluation Team's decision. Indeed, the credible evidence demonstrates it was additive and corroborative.

272. Captain Campbell was significantly credible in her testimony. Any contrary suggestion by Liberty due to alleged lack of memory or in contradictions are reasonably explained by imperfect human memory regarding an involved and complex evaluation process, the passage of time, and simply not initially realizing she had wandered to an incompetent website for CMS Star Ratings.

273. Attachment 5 of the PruittHealth RFP proposal, which was to include PruittHealth's CMS Star Ratings, was originally developed as an Excel spreadsheet. (Jt. Ex. 67) When that spreadsheet was converted to .pdf format for submission with the RFP proposal, portions of the spreadsheet were inadvertently omitted, including PruittHealth's CMS Star Ratings. This was simply a clerical mishap and not an intentional omission by PruittHealth. (Arnold, Vol. 4, p. 1079, l. 7-20; Swartz; Vol. 3, p. 635, l. 6-10)

274. Liberty presented no evidence to the contrary and did not contradict Mr. Arnold's testimony.

275. The answer that PruittHealth provided in response to the question about CMS Star Ratings states that the list in Attachment 5 "provides all the additional details and information requested in Section 4.5.3.1(C)." (Jt. Ex. 70, § 4.5.3.1.C.) Thus, the record reflects that PruittHealth clearly intended to supply the CMS Star Ratings and would have done so but for a clerical mishap. Liberty presented no evidence to the contrary.

276. Mr. Walsh was able to confirm that what PruittHealth intended to submit as Attachment 5 matched the CMS archive, and that those ratings were accurate. (Walsh, Vol. 2, p. 279, l. 11-18)

277. Notably, the Recommendation of Award memo correctly states that the four existing NCSVH were rated three stars or higher. As reflected in Jt. Ex. 67, in April 2021, NCSVH Black Mountain and NCSVH Fayetteville were rated five stars; NCSVH Kinston was rated four stars; and NCSVH Salisbury was rated three stars. (*Compare* Jt. Ex. 16, p. 6 with Jt. Ex. 67)

Liberty's Contentions: PruittHealth High Point

278. Liberty has asserted that one PruittHealth skilled nursing facility, PruittHealth High Point, was not included in the CMS Star Ratings that Ms. Campbell reviewed on nursinghomesite.com. (*See* Walsh, Vol. 1, p. 186, l. 6-18)

279. PruittHealth listed PruittHealth High Point in its Attachment 5 that was submitted with its proposal. (Jt. Ex. 12) In the attachment, PruittHealth High Point was listed as closed. This was acknowledged by the Evaluation Team in the Recommendation of Award memorandum, where it was referenced as “one closing of private facility in Winston-Salem [sic].” (Jt. Ex. 16, p. 6; *see also* Swartz, Vol. 3, p. 664, l. 19 – p. 665, l. 4).

280. Liberty asserts that PruittHealth High Point’s CMS Star Ratings should have been evaluated because the facility was licensed and certified in May 2021. (Walsh, Vol. 2, p. 351, l. 14-18) This facility was rated one star by CMS. (*Id.*; *see also* Jt. Ex. 27)

281. Tyler Arnold, PruittHealth’s Chief Development Officer, testified that during the COVID-19 pandemic, PruittHealth approached the State of North Carolina about making PruittHealth High Point a “COVID-only” skilled nursing facility, meaning it would accept patients with COVID-19 from other nursing homes and hospitals, since these patients were very difficult to place. The State of North Carolina accepted PruittHealth’s offer, and PruittHealth High Point operated as a COVID-19 only facility from approximately March 2020 until the last patient was discharged on 13 March 2021. Thereafter, PruittHealth High Point closed. (Arnold, Vol 4, p. 1082, l. 1 - p. 1083, l. 3)

282. PruittHealth notified CMS on 11 March 2021 that it planned to discharge or transfer all residents from PruittHealth High Point by 13 March 2021. (Jt. Ex. 59)

283. Mr. Arnold testified that all residents at PruittHealth High Point were discharged or transferred on 13 March 2021, and no residents were admitted to PruittHealth High Point after 13 March 2021. Mr. Arnold knows this based on first-hand knowledge because he was on site at PruittHealth High Point in April 2021, and no residents were on site. (Arnold, Vol. 4, p. 1083, l. 9-20; p. 1085, l. 8 - p. 1086, l. 4)

284. PruittHealth High Point was rated one star in March and April 2021. Mr. Arnold attributed PruittHealth High Point’s one star rating to the fact that it had no patients or staff for half of the month of March and the full month of April. (Arnold, Vol. 4, p. 1135, l. 5-15)

285. Liberty did not dispute Mr. Arnold’s testimony about PruittHealth High Point.

286. At trial, Mr. Walsh admitted that he has no first-hand knowledge of PruittHealth High Point. He has never visited the facility and has never talked to anyone involved in operating the facility. Mr. Walsh agreed that PruittHealth knows more about PruittHealth High Point than Mr. Walsh does. (Walsh, Vol. 2, p. 314, l. 1-13)

287. No Liberty facility was operated as a COVID-only facility. (Walsh, Vol. 2, p. 316, l. 3-5)

288. PruittHealth High Point filed a certificate of need application with the North Carolina Department of Health and Human Services Division of Health Service Regulation, Healthcare Planning and Certificate of Need Section (the “CON Section”), to replace and relocate the facility due to its age. The CON Section approved this application. (Jt. Ex. 55; Jt. Ex. 56) The CON Section’s findings on this application refer to PruittHealth High Point being designated as a “COVID-19 NF [nursing facility].” (Jt. Ex. 56, p. 4)

289. Liberty has also replaced and relocated facilities. (Walsh, Vol. 2, p. 316, l. 12-18)

290. PruittHealth originally intended to replace and relocate PruittHealth High Point to Clemmons, North Carolina. PruittHealth’s plans changed when it subsequently located a suitable property in Winston-Salem, North Carolina. (Jt. Ex. 56, p. 1; Jt. Ex. 57; Arnold, Vol. 4, p. 1086, l. 13-23; p. 1087, l. 3 - p. 1088, l. 5)

291. On 3 March 2022, Mr. Walsh contacted Beverly Speroff, Assistant Section Chief of the Nursing Home Licensure and Certification Section, by email to find out when PruittHealth High Point ceased its operations. Ms. Speroff responded by email that the facility was terminated from Medicare/Medicaid on 21 May 2021. According to Ms. Speroff, 21 May 2021 “is when they no longer operated as a certified facility.” (Jt. Ex. 52) (Walsh, Vol. 1, p. 186, l. 14-24; p. 187, l. 8-10)

292. Ms. Speroff’s email does not state when the last patient was discharged from PruittHealth High Point, and Liberty offered no evidence to contradict Mr. Arnold’s testimony that the last patient was discharged from PruittHealth High Point on 13 March 2021. (Jt. Ex. 52)

293. When asked at trial whether he had independent knowledge of when patients left PruittHealth High Point, Mr. Walsh testified: “I just know what I asked Ms. Speroff.” (Walsh, Vol. 1, p. 187, l. 23 - p. 188, l. 2)

294. Liberty does not take issue with the fact that PruittHealth closed PruittHealth High Point. (Walsh, Vol. 2, p. 351, l. 9-13)

295. In 2021 Liberty also closed one of its facilities, Cross Creek in Hyde County, North Carolina, due to staffing and financial challenges. (Walsh, Vol. 2, p. 268, l. 14-23; p. 314, l. 14-23)

296. Based on Liberty’s experience with Cross Creek, Mr. Walsh understands that residents must be given ample notice before a facility officially closes. Mr. Walsh had no reason to think that PruittHealth did not follow all state rules and regulations when it closed PruittHealth High Point. (Walsh, Vol. 2, p. 315, l. 3-23)

297. Liberty does not assert that the State of North Carolina forced PruittHealth to close PruittHealth High Point. (Walsh, Vol. 2, p. 317, l. 17-20)

298. Mr. Walsh acknowledged that at the time it submitted its RFP response, Liberty also had 1- and 2-star facilities in its portfolio. (Walsh, Vol. 2, p. 318, l. 5-9; Jt. Ex. 35, p. 68) According to the Award Memo, 44% of Liberty’s facilities were rated 1- and 2-stars. (Jt. Ex. 16, p. 8)

Liberty's Contentions: PruittHealth's Proposed Management Fee

299. PruittHealth's management fee for managing four NCSVH under the 2014 contract was 9.25% of net revenue. (Jt. Ex. 70, Pricing Attachment; Arnold, Vol. 4, p. 1096, l. 10-22)

300. In its response to the 2021 RFP, PruittHealth proposed to increase its management fee to 10% of net revenue for two reasons: 1) expenses for the Regional Support Team would no longer be reimbursed; and 2) anticipated ramp-up costs due to opening two new NCSVH in Kernersville and Raleigh. (Jt. Ex. 70, Pricing Attachment; Arnold, Vol. 4, p. 1096, l. 10-22; p. 1110, l. 7-14)

301. Liberty asserted that "economies of scale" should lower not raise management fees due to opening two new NCSVH. (Walsh, Vol. 1, p. 147, l. 8 - p. 148, l. 20; Holmes, Vol. 4, p. 967, l. 18 - p. 968, l. 4)

302. Mr. Holmes testified in favor of Liberty's "economies of scales" argument, citing Liberty's experience in acquiring existing, operating facilities, "common sense," and "industry knowledge." (Holmes, Vol. 4, p. 967, l. 18 - p. 968, l. 25)

303. At trial, Mr. Walsh characterized PruittHealth's proposed management fee of 10% of net revenue as an "obscure" number, meaning it was an "outlier" and higher when compared to Principle's proposed management fee of 7.5% of net revenue and Liberty's proposed management fee of 8.15% of net revenue. (Walsh, Vol. 1, p. 149, l. 8-24; Vol. 2, p. 319, l. 3-23)

304. Mr. Walsh acknowledged, however, that vendors were not supposed to charge the same or similar numbers, and that based on his seven years of experience at Liberty, Liberty has had to pay more for goods and services, including salaries. Liberty has also increased its prices over time. (Walsh, Vol. 2, p. 318, l. 14 - p. 319, l. 2)

305. Mr. Walsh and Mr. Holmes both acknowledged that Liberty has no direct experience operating a Veterans' home. (Walsh, p. 319, l. 24 - p. 320, l. 12; Holmes, Vol. 4, p. 922, l. 22-24)

306. Mr. Holmes testified that Liberty has never opened a new State Veterans Home. (Holmes, Vol. 4, p. 967, l. 5-7)

307. Liberty had not done any calculations of what the management fee should be for four NCSVH instead of six NCSVH. (Holmes, Vol. 4, p. 967, l. 18 - p. 969, l. 6)

308. Mr. Holmes also acknowledged that there would be startup costs associated with opening new homes and that the new homes would not be immediately full. (Holmes, Vol. 4, p. 969, l. 7-23)

309. Mr. Holmes acknowledged there may be times that the operator is staffing for a full facility but is not yet generating revenue for a full facility. (Holmes, Vol. 4, p. 970, l. 17-21)

310. Mr. Holmes had not looked at occupancy rates for the NCSVH. (Holmes, Vol. 4, p. 971, l. 4-11)

311. Mr. Holmes could not identify any exhibits that supported Liberty's arguments about economies of scale. (Holmes, Vol. 4, p. 971, l. 18-24)

312. In addition to being the current operator of the four NCSVH, PruittHealth opened two of the four NCSVH (Kinston and Black Mountain) and thus has direct experience with start-up expenses for new NCSVH. (Arnold, Vol. 4, p. 1045, l. 6-13; p.1096, l. 20-22)

313. Mr. Arnold testified it took time for both Kinston and Black Mountain to build a patient population:

By law, we can't just fill it up. We have to admit and then licensure comes to ensure that you're meeting proper standards, like a sample population. And then the VA comes down and has to certify you. So there is both VA inspections and then state licensure inspections.

(Arnold, Vol. 4, p. 1045, l. 14-23)

314. Mr. Arnold disagreed with Liberty's assertion about economies of scale due to opening two new NCSVH:

It doesn't play out like that....

There are increased expenses, and as we said, there are expenses that you incur when you're opening the new homes. ... [R]ight now, we've paid for an administrator for a year [at Kernersville] with no reimbursement with no means of getting new revenue.

Further, that 10 percent, it is one bite at the apple. After, if this gets accepted and costs go up and anything happens, you're stuck at that 10 percent.

(Arnold, Vol. 4, p. 1097, l. 9-18)

315. Over the five-year term of the contract, the RFP does not allow an increase in management fees. (Arnold, Vol. 4, p. 1097, l. 19-21; p. 1098, l. 13-16) According to the RFP: "Management Fees shall be the percentage offered in this RFP. No additional fees will be permitted." (Jt. Ex. 3, § 4.2, p. 12)

316. Using the Regional Support Team as an example, Mr. Arnold explained that since the 2021 RFP no longer provides for reimbursement of their expenses, if health insurance costs for the Regional Support Team go up during the five-year term of the contract, PruittHealth would pay for those expenses through the management fee. (Arnold, Vol. 4, p. 1098, l. 9-12)

317. Using PruittHealth Illustrative Exhibit 320, Mr. Arnold explained how payment works under the NCSVH contract:

... [T]here are two buckets to which you can get paid. The first bucket is the reimbursement that we have been talking about. The second bucket is the management fee....

So there's been much talk about the 58 million dollars annually or the 290 million over five years. These two numbers [reimbursement

and management fee] added together must be less than or equal to the 58 million.

(Arnold, Vol. 4, p. 1099, l. 11-15; p. 1100, l. 3-7)

318. Although Mr. Holmes testified, he understood how the management fee and reimbursement components of the contract work, his testimony indicated that he did not have a full understanding of how these components work. (Holmes, Vol. 4, p. 966, l. 1 - p. 967, l. 4)

319. The maximum amount the State will pay the vendor over the five-year contract, inclusive of reimbursable expenses and management fee, is \$290 million. (Arnold, Vol. 4, p. 1106, l. 3-15; Jt. Ex. 68)

320. Although he understood the NCSVH contract has both a reimbursement component and a management fee component, Liberty's witness, Mr. Walsh, testified that he did not know that \$290 million was the most that the State of North Carolina would pay for both reimbursable expenses and the management fee. (Walsh, Vol. 2, p. 302, l. 18 - p. 303, l. 9)

321. The Award letter states that the total contract value is not to exceed \$290 million. (Jt. Ex. 68)

322. Using the example of PruittHealth buying a washing machine for one of the NCSVH, Mr. Arnold explained how the reimbursement component works:

The State reviews it [the invoice], ensures they gave authority, and pays us back. Now, there is no interest on that. There is no nothing. Over the last three years, Your Honor, PruittHealth in effect has fronted ... an interest free loan for the State for 30, 60, 90 days to the tune of 40 to 42 million a year in operating the four veterans homes.

So that 40 to 42 million ... eats up that 58 [million] that is allowed to be paid to us as PruittHealth. Therefore, there is no management fee on this amount.

(Arnold, Vol. 4, p. 1100, l. 16 - p. 1101, l. 2)

323. Mr. Arnold then explained how the management fee component works:

The State of North Carolina or the DMVA is [the] authorized payee for these payors. We are an authorized agent for the State, and on behalf of the State we bill for the services we provide.

So I care for Mr. Smith for a month, we bill Medicaid. Medicaid receives our bills, our services provided. The State or the payor source then pays that money to the State of North Carolina.

Based upon this bill amount ... we create an invoice to the State that is 10 percent ... of the bill ... [the] State of North Carolina reviews

it and then pays that money back. And so that creates the management fee.

(Arnold, Vol. 4, p. 1101, l. 4-19)

324. Money that is left over after the reimbursable expenses and the management fee are paid to the vendor then goes into the North Carolina State Veterans Home Trust. Those funds are used to do major maintenance and for the construction of new facilities. (Campbell, Vol. 3, p. 781, l. 16 - p. 782, l. 13; Arnold, Vol. 4, p. 1101, l. 20 – p. 1102, l. 1; Jt. Ex. 16, p. 8)

325. Mr. Arnold also explained that quarterly, PruittHealth and the State conduct a reconciliation process in which PruittHealth may have to refund money to the State for claims that payors denied. (Arnold, Vol. 4, p. 1104, l. 12 - p. 1106, l. 2)

326. Over the course of 20 years, PruittHealth has not had any problems funding the expenses of the NCSVH while awaiting payment from the State. (Arnold, Vol. 4, p. 1109, l. 17-20)

327. Liberty did not present any evidence to contradict Mr. Arnold's testimony on this point.

328. Regarding supposed economies of scale and all attenuate arguments, the Tribunal found the testimony/evidence presented for PruittHealth more credible than that for Liberty.

Liberty's Contentions: PruittHealth's Response to the RFP's Cash Flow Provision

329. Liberty has also asserted that PruittHealth failed to meet the cash flow provision in Section 4.5.2.H. of the RFP and should have been disqualified as a result. Section 4.5.2.H. states:

The projected cost per month on four (4) facilities is \$4 million. Based on history after receipt of the invoice on the 15th of the following month, the Contracting Agency has 30 days for review and approve for payment. It generally takes up to 30 days for the payment process. Thus, at least \$12 million cash flow must be available by the Vendor. NOTE: The addition of another NCSVH may increase the cash flow by at least \$3 million that must also be available by the Vendor, if required.

(Jt. Ex. 3, § 4.5.2.H., p. 15)

330. Section 4.5.2.H. does not require the vendor to demonstrate it met the cash flow provision for three years in the past. (Walsh, Vol. 2, p. 296, l. 18-21; Jt. Ex. 3, § 4.5.2.H., p. 15; Loggins, Vol. 2, p. 389, l. 10-14; Swartz, Vol. 3, p. 642, l. 17-24)

331. Section 4.5.3.4. of the RFP also discusses cash flow. This section says, in relevant part, that financial information will be evaluated to determine "whether vendor has sufficient cash flow and/or available financing from a financial institution to perform the proposed contract for 60 days without receiving payment from the Contracting Agency." Subsection A of Section 4.5.3.4. further states "[v]endor must indicate the ability to maintain \$9 million dollars excess cash flow for the NCSVHs." (Jt. Ex. 3, § 4.5.3.4., pp. 16-17)

332. Neither Section 4.5.2.H. nor Section 4.5.3.4 required vendors to demonstrate their financial status as of the day they submitted their responses to the RFP. (Jt. Ex. 3, § 4.5.2.H., p. 15; § 4.5.3.4., pp. 16-17; Loggins, Vol. 2, p. 396, l. 18 - p. 397, l. 1)

333. As described elsewhere in this Final Decision, the vendor is responsible for paying all the expenses for the NCSVH, including staff salaries and benefits. While most of these expenses will be reimbursed by the State (*See* Jt. Ex. 3, § 4.2, p. 12) the vendor must be able to “float” those expenses until it is reimbursed. (Loggins, Vol. 2, p. 383, l. 16-23)

334. As the RFP makes clear, the State will not reimburse the vendor for the salaries and benefits of the Regional Support Team. (Jt. Ex. 3, § 4.2, p. 12)

335. Tyler Arnold, PruittHealth’s Chief Development Officer, estimated that PruittHealth’s annual expenses associated with operating four NCSVH are between \$40 million-\$42 million. (Arnold, Vol. 4, p. 1100, l. 9-25)

336. The vendor is not permitted to charge the State of North Carolina interest. (Jt. Ex. 3, § 4.5.2.F., p. 15; *see also*, § 5.3.1.D., p. 24; Loggins, Vol. 2, p. 384, l. 2-4; Arnold, Vol. 4, p. 1095, l. 3-5)

337. In essence, the vendor acts as an interest-free bank to the State of North Carolina while awaiting payment. (Loggins, Vol. 2, p. 383, l. 16 - p. 384, l. 1; Arnold, Vol. 4, p. 1107, l. 21-25)

338. As Chief Financial Officer, Mr. Loggins manages PruittHealth’s finance department, which includes treasury, cash management, and reimbursement activities, among other duties. Mr. Loggins reports directly to PruittHealth’s Chairman and CEO, Neil Pruitt. (Loggins, Vol. 2, p. 375, l. 2-8; p. 376, l. 2-6; PruittHealth Ex. 304)

339. With respect to PruittHealth’s response to the RFP, Mr. Loggins was consulted on the finances and cash flow related questions in the RFP. (Loggins, Vol. 2, p. 379, l. 23 - p. 380, l. 2)

340. Mr. Loggins testified that while it does not happen frequently, there have been several occasions where the State has taken longer than 60 days to reimburse PruittHealth for expenses incurred operating the NCSVH. The longest delay Mr. Loggins could recall was 87 days. (Loggins, Vol. 2, p. 384, l. 5-18)

341. Mr. Loggins testified that there have been no issues whatsoever regarding PruittHealth’s operation of the NCSVH while awaiting payment from the State. (Loggins, Vol. 2, p. 384, l. 14-20; *see also* Arnold, Vol. 4, p. 1109, l. 17-20)

342. In response to RFP Section 4.5.2.H., PruittHealth stated:

The Vendor read and understands Section 4.5.2(H.) of the RFP regarding projected cost per month and required cash flow. The Vendor, through its approved affiliates, maintains cash flow and liquidity well in excess of \$15,000,000.00. Further, the Vendor has demonstrated through its past operations of the four Veterans

facilities that it is able to fund all expenses until payment is received. Copies of the Organization's three most recent audited financial statements, as well as interim statements, are available in Attachments 3A-3D. We request that Attachments 3A-3D be kept confidential.

(Jt. Ex. 70, § 4.5.2.H.)

343. Mr. Loggins testified that based on his knowledge of PruittHealth's financial statements, his review of PruittHealth's historical financials, and PruittHealth's current operations of the NCSVH, this answer is accurate. As PruittHealth's CFO, it is Mr. Loggins' job to know these things. (Loggins, Vol. 2, p. 385, l. 2-11)

344. The definition section of the RFP, Section 2.10, does not contain a definition for the term "cash flow." (Jt. Ex. 3, § 2.10, pp. 7-8; Swartz, Vol. 3, p. 637, l. 1-3; Loggins, Vol. 2, p. 380, l. 20 - p. 381, l. 2) There is no other section of the RFP that defines the term "cash flow." (Swartz, Vol. 3, p. 640, l. 18-25; Loggins, Vol. 2, p. 385, l. 24 - p. 386, l. 3; Walsh, Vol. 2, p. 323, l. 17-19)

345. As a former banker and current CFO, Mr. Loggins testified that he understands the term "cash flow" to mean "the ins and outs of cash at a point in time." Cash flow can vary from day to day. (Loggins, Vol. 2, p. 386, l. 4-10)

346. Mr. Loggins described Ms. Fisher's reference to cash flow on the spreadsheet she prepared as a "snapshot in time," meaning that the figure represented cash flow on a particular day. (Loggins, Vol. 2, p. 370, l. 14-24; p. 371, l. 3-9; p. 386, l. 11-20)

347. Both Mr. Walsh and Mr. Holmes admitted that the RFP did not limit how a vendor could define cash flow. (Walsh, Vol. 2, p. 323, l. 24 - p. 324, l. 1; Holmes, Vol. 4, p. 973, l. 21-24)

348. Both Mr. Walsh and Mr. Holmes admitted that they were not aware of any statute or rule applicable to this procurement that defines cash flow. (Walsh, Vol. 2, p. 323, l. 20-23; Holmes, Vol. 4, p. 973, l. 18-20)

349. Mr. Walsh and Mr. Holmes testified they are not aware of any statute or rule applicable to this procurement that limited the number of ways a vendor could demonstrate that it meets the cash flow requirements. (Walsh, Vol. 2, p. 325, l. 4-8; Holmes, Vol. 4, p. 973, 21-24)

350. Mr. Holmes admitted that Liberty's own proposal does not define cash flow. (Holmes, Vol. 4, p. 973, l. 25 - p. 974, l. 2)

351. Liberty's main contention about cash flow centers on PruittHealth's use of the word "liquidity" in its answer to Section 4.5.2.H. In a brief filed in this matter on 9 September 2022, Liberty asserted: "Thus, it appeared Pruitt intentionally worded this response [to 4.5.2.H.] to avoid scrutiny but did not in fact meet the RFP response." *See*, Petitioner's Response to Pruitt's Motion *in Limine*, p. 6.

352. Mr. Holmes admitted that Liberty's response to the cash flow component Section 4.5.3.4 fails to use the term "cash flow" and instead uses the terms "cash amounts," but denied that

Liberty's failure to use the term "cash flow" was an effort to obfuscate Liberty's response. (Holmes, Vol. 4, p. 979, l. 4-18; p. 986, l. 4-22)

353. Additionally, Mr. Holmes admitted that Liberty's response to the cash flow component of Section 4.5.3.4 references Liberty's relationship with banks and access to financing. (Holmes, Vol. 4, p. 980, l. 10 - p. 981, l. 22)

354. Mr. Holmes also admitted that part of Liberty's response to Section 4.5.3.4 directs the Agency's attention to components of its financial records that include financing and debt rather than to just its "cash flow statement." (Holmes, Vol. 4., p. 982, l. 7 - p. 984, l. 25)

355. At trial, Mr. Loggins denied Liberty's assertion about cash flow. (Loggins, Vol. 2, p. 385, l. 12-23) He further testified that there was no intent to be evasive or to make PruittHealth's cash flow look bigger or better than it really is. (Loggins, Vol. 2, p. 388, l. 24 - p. 389, l. 9)

356. At trial, Liberty questioned Mr. Loggins about the word "liquidity" in PruittHealth's response to Section 4.5.2.H. Mr. Loggins stated that while he did not write the response himself, it made perfect sense that the word "liquidity" would be paired with the term "cash flow" because "the two terms are pretty much related." (Loggins, Vol. 2, p. 367, l. 24 - p. 368, l. 4)

357. Mr. Loggins defines "liquidity" as "access to cash, simply." Examples of liquidity are: "[c]ash on hand, marketable securities, credit lines, or debt instruments that can be accessed and converted to cash among other things." (Loggins, Vol. 2, p. 387, l. 17-25)

358. "Liquidity" as used in PruittHealth's response to RFP Section 4.5.2.H. would include sources readily convertible to cash within the 60 days that the State said would be the expected payment timeframe. (Loggins, Vol. 2, p. 425, l. 19 - p. 426, l. 1)

359. "Available financing," which is the term used on the bottom of page 16 of the RFP with respect to cash flow, is another example of liquidity. (Jt. Ex. 3, § 4.5.3.4, p. 16; Loggins, Vol. 2, p. 388, l. 1-3; *see also*, Loggins, Vol. 2 p. 408, l. 7-13) ("Available financing" "ties back to liquidity and access to cash, maintain relationships with banks and have loans and lines of credit that we could access, if needed.")

360. Mr. Loggins explained his understanding of why PruittHealth included the reference to "liquidity" in its answer to Section 4.5.2.H. of the RFP:

Well, again, liquidity is an extension of cash flow as access to cash, so it makes perfect sense to me that the two are tied together, almost synonymous terms in my opinion.

(Loggins, Vol. 2, p. 388, l. 4-14)

361. Liquidity is relevant to the purpose of Section 4.5.2.H. because "[w]e'd have all forms of cash and cash flow available to us to support the homes while we waited repayment of our invoices." (Loggins, Vol. 2, p. 388, l. 15-23)

362. The RFP does not:

- Specify the number of years in the past for which the vendor had to demonstrate a specified cash flow;
- Specify how the vendor was to demonstrate it could meet the cash flow requirements;
- Limit the number of ways in which a vendor could demonstrate the cash flow requirements; or
- Limit how the vendor might interpret the term cash flow or what the vendor could include in the elements of its cash flow.

(Swartz, Vol. 3, p. 641, l. 14-25; p. 642, l. 17-24; Loggins, Vol. 2, p. 389, l. 10 - p. 390, l. 6)

363. No vendor asked any clarifying question relating to the definition of cash flow, what information was to be provided to demonstrate cash flow, what sources of funding constitute part of cash flow, or the length of time it needed to demonstrate a specific amount of cash flow. (Swartz, Vol. 3, p. 642, l. 25 - p. 643, l. 20)

364. Mr. Loggins testified that PruittHealth demonstrated that it met the cash flow requirements of the RFP in four ways: first, PruittHealth’s answer to Section 4.5.2.H. plainly stated that it met the cash flow requirements; second, PruittHealth supplied its financial statements, showing that it is a billion dollar plus company based on revenue, with monthly cash flow of about \$90 million; third, PruittHealth’s Earnings Before Interest, Taxes, Depreciation, and Amortization (“EBITDA”) shows net free cash flow greater than \$60 million; and fourth, PruittHealth is managing NCSVH without issue. (Loggins, Vol. 2, p. 390, l. 7-20)

365. PruittHealth’s fiscal year is July 1 to June 30. (Loggins, Vol. 2, p. 397, l. 2-4)

366. PruittHealth Ex. 309 consists of PruittHealth’s audited financials for the fiscal years ending 30 June 2018, 30 June 2019 and 30 June 2020, and six months of unaudited financials for the year ending 31 December 2020. PruittHealth Ex. 309 is under seal. Therefore, testimony about Ex. 309 is marked Confidential.

*[Findings of Fact 365 to 374 Contain Sealed, Confidential Information]*⁷

BEGIN CONFIDENTIAL

367. REDACTED

368. REDACTED

369. REDACTED

370. REDACTED

⁷ These proposed findings of fact and conclusions of law are filed under seal.

- 371. REDACTED
- 372. REDACTED
- 373. REDACTED
- 374. REDACTED
- 375. REDACTED
- 376. REDACTED

END CONFIDENTIAL

377. Financial stability is also addressed in response to PruittHealth’s response to RFP Section 4.5.3.1.A (“Experience”). Under the heading “Financial Stability,” PruittHealth’s answer states in part:

PruittHealth Veterans [sic] Services, North Carolina, Inc. is the ideal candidate to operate the NCDMVA facilities because it is part of a financially stable operation with a quality first philosophy.

Our Organization is and has been financially stable for many years.... For the most recent audited fiscal year, annual revenues from operations were approximately \$1.1B.... The Organization has an excellent relationship with financial institutions and has developed a line of credit to ensure smooth and consistent flow of cash unaffected by third party payment issues or short term third-party reimbursement shortfalls. Institutions such as Capital One, Synovus, Truist and the Department of Housing and Urban Developments [sic] have all demonstrated their faith in our Organization as lenders through recent transactions.

(Jt. Ex. 70, § 4.5.3.1.A)

378. Mr. Loggins reviewed this answer and testified that it is accurate based on his knowledge of the company’s finances and review of its historical financial statements. (Loggins, Vol. 2, p. 406, l. 7 – p. 407, l. 6)

379. Mr. Loggins also reviewed PruittHealth’s answers to subsections A. and B. of Section 4.5.3.4., entitled Financial Stability. In response to subsection A., PruittHealth wrote:

The Vendor read and understands Section 4.5.3.4(A) of the RFP. The Vendor, through its approved affiliates, maintains cash flow and liquidity well in excess of \$15,000,000.00. Further, the Vendor has demonstrated through its past operation of the four Veterans facilities that it is able to fund all expenses until payment is received. Copies of the Organization’s three most recent audited financial statements, as well as interim statements, are available in

Attachments 3A-3D. We request that Attachments 3A-3D be kept confidential.

(Jt. Ex. 70, § 4.5.3.4.A).

380. In response to subsection B, PruittHealth wrote:

The Vendor read and understands Section 4.5.3.4(B.) of the RFP. The Vendor has demonstrated through its past operation of the four Veterans facilities that it is able to fund all expenses until payment is received. A copy of the Organization's most recent audited financial statements is available in Attachment 3C, and the most recent interim statements is available in Attachment 3D. We request that Attachments 3C and 3D be kept confidential.

(Jt. Ex. 70, § 4.5.3.4.B.)

381. Mr. Loggins testified that PruittHealth's answers to subsections A. and B. of Section 4.5.3.4 are accurate. (Loggins, Vol. 2, p. 407, l. 7-19)

382. Liberty's response to RFP Section 4.5.3.4, subpart B, also referred to its relationship with various financial institutions such as Wells Fargo, BB&T, SunTrust, Truist, First Citizens, and the Department of Housing and Urban Development. Liberty provided this information to demonstrate its financial stability. Liberty has loans or lines of credit with these financial institutions that it can call upon if needed. (Jt. Ex. 35, p. 57; Walsh, Vol. 2, p. 326, l. 22 - p. 328, l. 1)

383. PruittHealth provided all the financial information that was requested by the State in the RFP. (Loggins, Vol. 2, p. 408, l. 20-23; Swartz, Vol. 3, p. 647, l. 3-9)

384. Mr. Loggins testified that he believed that PruittHealth demonstrated through a variety of ways that it satisfied the cash flow requirements of the RFP, and it continues to operate the NCSVH with no issues whatsoever. (Loggins, Vol. 2, p. 410, l. 11-19)

385. As PruittHealth's Chief Financial Officer, Mr. Loggins has no concerns whatsoever about PruittHealth's ability to meet the cash flow requirements of the RFP. PruittHealth demonstrated on paper that it satisfied these requirements, and it also manages the NCSVH every day without issue. (Loggins, Vol. 2, p. 410, l. 20-25; p. 411, l. 1-3)

386. As a Chief Financial Officer and former banker, Mr. Loggins testified that it is relevant to consider the totality of a vendor's financial resources in determining whether it can meet the cash flow requirements. Taking a single number on a page does not represent comprehensively the financial activity at any given period. (Loggins, Vol. 2, p. 411, l. 4-15)

387. PruittHealth supplied all the information that was requested, and the State determined that PruittHealth satisfied the cash flow requirements stated in the RFP. (Loggins, Vol. 2, p. 411, l. 16-20; Swartz, Vol. 3, p. 647, l. 3-9)

388. Mr. Loggins strongly and credibly disagreed with Liberty's assertion that PruittHealth did not meet the cash flow requirements of the RFP. PruittHealth demonstrated in

multiple ways through its financial statements and its continued operation of the NCSVH without issue that it meets the cash flow requirements. (Loggins, Vol. 2, p. 411, l. 21 - p. 412, l. 5)

389. Black's Law Dictionary supports that "cash flow" can include "liquidity" consistent with how Mr. Loggins, a Chief Financial Officer and former banker, understands these terms. (PruittHealth Ex. 317 and 318; Loggins, Vol. 2, p. 412, l. 6 - p. 413, l. 1)

390. Ms. Fisher's spreadsheet accurately shows PruittHealth's audited financials. (PruittHealth Ex. 307; Loggins, Vol. 2, p. 413, l. 2-9)

391. Ms. Fisher's spreadsheet did not, however, include PruittHealth's interim financial statements for the period ending December 31, 2020. (PruittHealth Ex. 307; Loggins, Vol. 2, p. 413, l. 10-14)

392. To Mr. Loggins' knowledge, PruittHealth has never had cash flow problems with respect to the NCSVH. As Chief Financial Officer of PruittHealth, Mr. Loggins would be aware if there had been such problems. (Loggins, Vol. 2, p. 413, l. 15-21)

393. Regarding approximately \$60 million that PruittHealth received in 2020 as part of the CARES Act and which is identified as a liability on PruittHealth's financial statements, Mr. Loggins testified that those funds are not repaid all at once; they are repaid over time. (PruittHealth Ex. 307; Loggins, Vol. 2, p. 418, l. 19 - p. 419, l. 19)

CONCLUSIONS OF LAW

General Principles and Applicable Law

1. To the extent that the Findings contain Conclusions, or Conclusions are Findings, they should be so considered regardless of labeling. *Charlotte v. Heath*, 226 N.C. 750, 755, 440 S.E.2d 600, 604 (1946); *Peters v. Pennington*, 210 N.C. App. 1, 15, 707 S.E.2d 724, 735 (2011).

2. All parties have been correctly designated and there is no question as to joinder.

3. Liberty timely filed its Petition for Contested Case Hearing pursuant to N.C. Gen. Stat. § 150B-23(f).

4. PruittHealth did not petition for contested case hearing or otherwise challenge any aspect of the Agency's decision in this matter.

5. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter of this action.

6. The parties received proper notice of the hearing in this matter as required by N.C. Gen. Stat. § 150B-23.

7. The ALJ "need not make findings as to every fact which arises from the evidence and need only find those facts which are material to the settlement of the dispute." *Brewington v. N.C. Dep't of Public Safety, State Bureau of Investigation*, 254 N.C. App. 1, 23, 802 S.E.2d 115, 131 (2017) (internal citation omitted).

8. The subject matter of this contested case is the Agency decision to issue the Award to PruittHealth. N.C. Gen. Stat. § 150B-23(a) provides for administrative review of an Agency decision in state procurement matters. *Professional Food Servs. Mgmt, Inc. v. N.C. Dep't of Admin.*, 109 N.C. App. 265, 266, 426 S.E.2d 447, 449 (1993); *see also Britthaven, Inc. v. N.C. Dep't of Human Res.*, 118 N.C. App. 379, 382, 455 S.E.2d 455, 459, *disc. rev. denied*, 341 N.C. 418, 461 S.E.2d 754 (1995) (“The subject matter of a contested case hearing by the ALJ is an agency decision.”).

9. Liberty, as the Petitioner in this contested case hearing, bears the burden of showing by a preponderance of the evidence that the Agency substantially prejudiced its rights, and that the Agency also acted outside its authority or jurisdiction, acted erroneously, used improper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule, when the Agency issued the Award to PruittHealth. N.C. Gen. Stat. §§ 150B-23(a) and 25.1(a); *Britthaven, supra*.

10. The “preponderance of the evidence” standard requires more than simply “some evidence” or “any evidence.” It requires Petitioner to prove its case by the greater weight of the evidence. *See, e.g., Cincinnati Butchers Supply Co. v. Conoly*, 204 N.C. 677, 169 S.E. 415, 417 (1933); *Wyatt v. Queen City Coach Co.*, 229 N.C. 340, 342, 49 S.E. 650, 652 (1948).

11. “There is a presumption that “an administrative agency has properly performed its official duties.” *E. Carolina Internal Med., P.A.*, 211 N.C. App. at 411, 710 S.E.2d at 255 (*quoting In re Cmty. Ass'n*, 300 N.C. 267, 280, 266 S.E.2d 645, 654 (1980)).

12. Per N.C. Gen. Stat. § 150B-34(a), the Undersigned shall give “due regard to the demonstrated knowledge and expertise of the agency with respect to facts and inferences within the specialized knowledge of the agency.”

13. North Carolina affords deference to an administrative agency’s appropriate interpretation of a statute it administers. *Frye Reg’l Med. Ctr., Inc v. Hunt*, 350 N.C. 39, 45, 510 S.E.2d 159, 163 (1999) (“The interpretation of a statute given by the agency charged with carrying it out is entitled to great weight.”) (citation omitted); *Carpenter v. N.C. Dep’t of Hum. Res.*, 107 N.C. App. 278, 279-80, 419 S.E.2d 582, 584 (1992) (requiring deference “so long as the agency’s interpretation is reasonable and based on a permissible construction of the statute”), *disc rev. improvidently granted*, 333 N.C. 533, 427 S.E.3d 874 (1993).

14. Further, “deference must be given to the agency’s decision where it chooses between two reasonable alternatives,” and “[i]t would be improper for this Court to substitute our judgment for the Agency’s decision where there is substantial evidence in the record to support its findings.” *Craven Reg’l Med. Auth. v. N.C. Dep’t of Health & Human Sers.*, 176 N.C. App. 46, 59, 625 S.E.2d 837, 845 (2006).

15. In consideration of agency discretion, the reviewing court should factor whether that discretion is exercised in good faith and in accordance with the law. *Lewis v. N.C. Dep’t of Hum. Res.*, 92 N.C. App. 737, 740, 375 S.E.2d 712, 714 (1989).

16. The statutes and regulations at issue here appear reasonably specific and avoid the vagaries sometimes seen which leads to improper agency action disguised as discretionary decision making. Further, the discretion herein exercised appears by every indication to be an intended, long-standing, and appropriate delegation of legislative authority. Likewise, overreach

is unimplicated; indeed, no significant question regarding statutory or regulatory interpretation was raised. *Cf.*, *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1944), and, *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984); *West Virginia v. EPA*, — U.S. —, 142 S. Ct. 2587, 2608, 213 L.Ed.2d 896 (2022); *Nat'l Fed'n of Indep. Bus. v. Occupational Safety & Health Admin.*, — U.S. —, 142 S. Ct. 661, 665, 211 L.Ed.2d 448 (2022).

The Procurement Statutes at Issue

17. The key procurement statute in this proceeding, N.C. Gen. Stat. § 143B-1295, emphasizes agency discretion. It provides:

The Veterans' Affairs Commission may contract with persons or other nongovernmental entities to operate each State veterans home. Contracts for the procurement of services to manage, administer, and operate any State veterans home shall be awarded on a competitive basis through the solicitation of proposals and through the procedures established by statute and the Division of Purchase and Contract. A contract may be awarded to the vendor whose proposal is most advantageous to the State, taking into consideration cost, program suitability, management plan, excellence of program design, key personnel, corporate or company resources, financial condition of the vendor, experience and past performance, and ***any other qualities deemed necessary by the Veterans' Affairs Commission and set out in the solicitation for proposals.*** Any contract awarded under this section shall not exceed five years in length. ***The Veterans' Affairs Commission is not required to select or recommend the vendor offering the lowest cost proposal but shall select or recommend the vendor who, in the opinion of the Commission, offers the proposal most advantageous to the veterans and the State of North Carolina.***

N.C. Gen. Stat. § 143B-1295 (emphasis added).

18. N.C. Gen. Stat. § 143B-1295 does not define the phrase “most advantageous.” The statute does not state or imply the Agency is to assign weights to any factor or is required to treat one factor as more important than another. Rather, the statute requires the Agency to use its discretion.

19. Similarly, the other procurement statutes involved here, N.C. Gen. Stat. §§ 143-135.9 and 143-52, also require the Agency to exercise its discretion.

20. N.C. Gen. Stat. § 135.9 provides:

(a) Definitions.--The following definitions apply in this section:

(1) Best Value procurement.--The selection of a contractor based on a determination of which proposal offers the best trade-off between

price and performance, where quality is considered an integral performance factor. The award decision is made based on multiple factors, including: total cost of ownership, meaning the cost of acquiring, operating, maintaining, and supporting a product or service over its projected lifetime; the evaluated technical merit of the vendor's proposal; the vendor's past performance; and the evaluated probability of performing the requirements stated in the solicitation on time, with high quality, and in a manner that accomplishes the stated business objectives and maintains industry standards compliance.

* * *

(b) Intent.--The intent of Best Value procurement is to enable contractors to offer and the agency to select the most appropriate solution to meet the business objectives defined in the solicitation and to keep all parties focused on the desired outcome of a procurement.

N.C. Gen. Stat. § 143-135.9. This statute does not require the Agency to apply numerical weights to any of the referenced factors; rather, the Agency is expected to consider an array of factors and use its judgment and discretion to arrive at a determination.

21. N.C. Gen. Stat. § 143-52 provides in relevant part:

(a) ... Except as otherwise provided under this Article, contracts for the purchase of goods and services shall be based on competitive bids and suitable means authorized by the Secretary as provided in G.S. 143-49. The acceptance of bid(s) most advantageous to the State shall be determined upon consideration of the following criteria: prices offered; best value, as the term is defined in G.S. 143-135.9(a)(1); the quality of the articles offered; the general reputation and performance capabilities of the bidders; the substantial conformity with the specifications and other conditions set forth in the request for bids; the suitability of the articles for the intended use; the personal or related services needed; the transportation charges; the date or dates of delivery and performance; and such other factor(s) deemed pertinent or peculiar to the purchase in question, which if controlling shall be made a matter of record....

N.C. Gen. Stat. § 143-52. Like the other statutes, N.C. Gen. Stat. § 143-52 does not assign weights to any factor.

22. By their very nature, competitive best value procurement decisions involve a broad array of considerations and the exercise of a substantial degree of discretion by the decision makers. Notably, none of the statutes described above dictates how much weight the Agency must accord to any given factor; nor do these statutes define the terms “most appropriate” or “most

advantageous.” Thus, the Agency is necessarily entrusted to make a subjective determination of which proposal best meets those criteria based on a review of all pertinent factors. *See*, N.C. Gen. Stat. § 143-135.9 (describing “best value” as a “trade off”); N.C. Gen. Stat. § 143B-1295 (NCVAC shall “select or recommend the vendor who, *in the opinion of the Commission*, offers the proposal most advantageous to the veterans and the State of North Carolina.”) (emphasis added).

23. The decision regarding “Best Value” in a competitive procurement does not require a concrete determination of actual cost, especially in a context like this where the management fee is determined by actual net revenue, which, in turn, cannot be known in advance. As Ms. Swartz testified “[t]hey [the vendors] only had to provide that percentage.” (Swartz, Vol. 3, pg. 591, l. 19 - pg. 592, l. 8; *see also* Jt. Ex. 3, § 4.2, p. 12 (“[t]he management fee will be provided as a percentage payment for service ...”))

24. No statute required any calculation or comparison of actual costs, directly or by inference.

Substantial Prejudice to Liberty’s Rights

25. Agency error, and/or arbitrary or capricious conduct, alone or in combination is insufficient; substantial prejudice must also be shown. *Surgical Care Affiliates, LLC v. NC DHHS, Div. of Health Service Regulation, Certificate of Need Section*, 235 NC App 620, 628, 762 SE2d 468, 473-4 (2014) (citations omitted) (scrutinizing N.C. Gen. Stat. § 150B-23(a)).

26. Substantial prejudice is an independent element of a contested case and Liberty must establish such here by a preponderance of the evidence. N.C. Gen. Stat. § 150B-29(a)); *Britthaven, supra* at 382, 455 S.E.2d at 459.

27. When evidence demonstrates that an Agency did not properly apply its own rules, materiality necessitates such failures “*actually* caused sufficient harm to the petitioner.” *Surgical Care Affiliates, supra* at 628, 762 SE2d 468, 474.

28. Of course, it is the sufficiency of harm in the context of an RFP that is the debate.

29. The one North Carolina case addressing substantial prejudice in a bid protest is *Professional Food Servs., supra* at 265, 426 S.E.2d 447. There, the Court held that the agency’s decision to exclude a bid that substantially conformed to the RFP requirements “must be reversed because it has prejudiced the substantial rights of [petitioner] in that it is unsupported by substantial evidence.” *Id.* at 270, 426 S.E.2d at 451. The case was remanded so that the petitioner’s bid could “be considered to determine whether it meets the requirement of being the lowest and best bid most advantageous to the State.” *Id.* Notably, Petitioner was not required to show it would have prevailed.

30. In a licensure context, our Supreme Court states Petitioner “has the right to require an administrative agency to follow its own rules if its failure to do so would result in a substantial chance that there would be a different result....” *Farlow v. N.C. State Bd. of Chiropractic Examiners*, 76 N.C. App. 202, 208, 332 S.E.2d 696, 700, *disc. rev. denied*, 314 N.C. 664, 336 S.E.2d 621 (1985). Such encourages fair and consistent treatment. *Id.* “[S]ufficiency of the procedures employed must be evaluated in light of the parties, the subject matter, and the

circumstances involved." *Farber v. NC Psychology Bd.*, 153 NC App 1, 11, 569 SE2d 287, 295 (2002) (quoting, *Presnell v. Pell*, 298 NC 715, 723, 260 SE2d 611, 616 (1979)).

31. Looking outside of North Carolina, federal bid protest cases consistently hold that a petitioner demonstrate substantial prejudice by showing that it had a "reasonable likelihood" or "substantial chance" of receiving the contract had there been no error.

32. Considering the fairness and propriety of a "but for" standard in the context of bid protests, the Federal Circuit holds that "[t]o establish prejudice, a protester is not required to show that but for the alleged error, the protester would have been awarded the contract." *Data Gen. Corp. v. Johnson*, 78 F.3d 1556, 1562 (Fed. Cir. 1996). To do so would put agency decisions effectively beyond any judicial oversight: "Such a rule would make it virtually impossible for a protester ever to prevail, no matter how egregious the error in the procurement process. On the other hand, a showing of a mere possibility that the protester would have received the contract but for the error is inadequate to show prejudice. If that were sufficient, the requirement of prejudice would be virtually eliminated. The proper standard lies between these polarities." *Id.* (citing *In re Management HealthCare Prods. & Servs.*, B-251503.2, 93-2 Comptroller Gen.'s Procurement Decisions (Federal Publications Inc.) ¶ 320, at 4 (Dec. 15, 1993); *In re Manekin Corp.*, B-249040, 92-2 Comptroller Gen.'s Procurement Decisions (Federal Publications Inc.) ¶ 250, at 5 (Oct. 19, 1992)).

33. Accordingly, "the appropriate standard is that ... had it not been for the alleged error in the procurement process, there was a *reasonable likelihood* that the protester would have been awarded the contract." *Id.* (*emphasis added*). *See also, Alfa Laval Separation, Inc. v. United States*, 175 F.3d 1365, 1367 (Fed. Cir. 1999) ("To establish prejudice, a protester is not required to show that but for the alleged error, the protester would have been awarded the contract. Rather, the protester must show that there was a *substantial chance* it would have received the contract award but for that error." (internal citations and quotation marks omitted; *emphasis added*)); *Bannum, Inc. v. United States*, 404 F.3d 1346, 1358 (Fed. Cir. 2005) (citing *Alfa Laval* and noting the standard for substantial prejudice in a bid protest is "more lenient than showing actual causation, that is, showing that but for the errors Bannum would have won the contract").

34. PruittHealth has consistently argued the stricter *causation* approach to determining substantial prejudice; *to wit*, 'but for' the error, Petitioner would have prevailed. They generally rely on Certificate of Need ("CON") caselaw. *See, eg., Bio-Med. App. of N.C. Inc. v. N.C. Dep't of Health & Human Servs.*, 282 N.C. App. 413, 417, 871 S.E.2d 555, 559 (2022) (addressing CON challenge - mere competitive loss is insufficient prejudice under N.C. Gen. Stat. § 150B-29(a)).

35. The Tribunal notes CON cases are particularly fraught with intervenor competitors that, perhaps motivated with the possibility of nuisance value settlement, often have difficulty proving sufficient prejudice beyond conjecture of competitive disadvantage. *Bio-Med* and CON cases generally, are distinguishable from RFP matters. *Id.*

36. Finally, as to this point: In the absence of mandate, we decide on considerations of "policy, fairness and common sense." *Peace v. Employment Sec. Comm'n of N. Carolina*, 349 N.C. 315, 328, 507 S.E.2d 272, 281 (1998).

37. For all the forgoing reasons, the Tribunal concludes: The substantial prejudice requirement of N.C. Gen. Stat. § 150B-29(a) in the context of an RFP, is met when the evidence demonstrates that were it not for the subject error(s) in the procurement process, there was a reasonable likelihood or substantial chance that the protester would have prevailed.

Agency Error/Arbitrariness or Capriciousness

The Procurement File

38. Liberty asserted that the Agency erred by not retaining materials that were viewed, considered, and relied upon by the Evaluation Team in the procurement file, including Captain Campbell's browser history and other data the Evaluation Team considered during their review of the proposals, including the caring.com website. (Tr. Vol. 5, p. 1242, l. 1 - p. 1243, l. 5).

39. All materials that were utilized by the Evaluation Team to determine the ranking or assessment of the Responsive Offers were included in the procurement file. (Swartz, Vol. 3, p. 575, l. 12 - p. 576, l. 1; p. 608, l. 6-18)

40. The relevant materials the Evaluation Team considered were from internet research re CMS Star Ratings for PruittHealth's facilities. These ratings were included in the Evaluation Matrix and Recommendation of Award, which are part of the procurement file. (Jt. Ex. 9, p. 3; Jt. Ex. 16, p. 8)

41. In a perfect world, the source from which Captain Campbell pulled the added CMS ratings would have been more apparent from the procurement file. Indeed, it would have saved significant angst, time, and expense in discovery, presentation, and argument. Nonetheless, truth eventually was revealed primarily due to dogged efforts of Petitioner's counsel and was considered as hereinafter set forth. As such, at least as to the substantive elements of this case, there is no actionable prejudice.

42. Further, the Agency substantially satisfied the requirements of 01 N.C.A.C. 05B.0309. The omission of other internet research from the procurement file was, at most, harmless error as it did not in fact substantially prejudice Liberty's rights in this RFP appeal. *Professional Food Servs., supra.* at 270, 426 S.E.2d at 451. Likewise, there was substantial evidence of compliance with the aforementioned code and the Tribunal will defer to Agency choices of what to include in the file. *Id; Frye Reg'l Med. Ctr., supra; Carpenter, supra; Craven, supra.*

43. Finally, the Tribunal cannot reasonably rule that something so typically innocuous and potentially private as the browser history of a team evaluator should be represented in a procurement file.

CMS Star Ratings: Disqualification

44. Liberty asserted that the Agency should have disqualified PruittHealth for not including its CMS Star Ratings in its proposal. (Tr. Vol. 1, p. 69, l. 3-7)

45. Section 3.6 of the RFP provides:

Except as specifically stated in the Request for Proposal, no one requirement shall automatically disqualify a Vendor from consideration. However, failure to comply with any single requirement **may** result in the Department exercising its discretion to reject a proposal in its entirety.

(Jt. Ex. 3, § 3.6, p. 11) (emphasis added)

46. The RFP does not state that a vendor shall be automatically disqualified for failing to submit its CMS Star Ratings.

47. The Agency requested CMS Star Ratings as part of RFP Section 4.5.3.1. (Jt. Ex. 3, § 4.5.3.1, p. 15) They were not requested as part of Section 4.5.2, Minimum Requirements, which states that “[a] Vendor’s proposal shall be rejected if it fails to comply, demonstrate and/or satisfy any of these requirements.” (Jt. Ex. 3, § 4.5.2, p. 14)

48. Accordingly, Compliance with this portion of the RFP was wholly within Agency discretion. (Jt. Ex. 3, § 3.6, p. 11)

49. All parties agree that the CMS archive contains the actual, accurate CMS Star Ratings for PruittHealth and Liberty. (Jt. Ex. 40A; Jt. Ex. 40B; PruittHealth Ex. 306; Walsh, Vol. 2, p. 277, l. 4-22)

50. Mr. Walsh admitted that he did not know of any statute or rule that required the evaluators to disqualify PruittHealth from this procurement. (Walsh, Vol. 2, p. 306, l. 14-17)

51. N.C. Gen. Stat. § 143-52 requires that bids demonstrate “substantial conformity with the specifications and other conditions set forth in the request for bids.” N.C. Gen. Stat. § 143-52. Thus, perfect conformity is not required. As the Court of Appeals held in *Professional Food Servs.*, *supra*. at 268-69, 426 S.E.2d at 450, “[i]n the context of public contract bidding, a ‘responsive’ bid is one which conforms substantially with the terms of the request for bids.”

52. In *Professional Food Servs.*, plaintiff’s proposal for snack bar items at the North Carolina School of Science and Mathematics in Durham was rejected as nonresponsive because its pricing for salad and iced tea was not presented in the manner requested by the RFP. Plaintiff appealed and prevailed because its bid substantially conformed to the RFP. *Id.* at 270, 426 S.E.2d at 450-51.

53. Similarly, PruittHealth’s response substantially conformed to the RFP. It reasonably answered every question in the RFP, including Section 4.5.3.1.C., which addressed CMS Star Ratings. (Jt. Ex. 3, § 4.5.3.1.C., p. 15; Jt. Ex. 70)

54. In its response to Section 4.5.3.1.C., PruittHealth stated:

The Vendor provided a list of skilled care nursing facilities (SNF), assisted living facilities, personal care facilities, or other health care facilities, providing services to primarily elderly individuals, that the Organization has operated in the last five (5) years at Attachment 5.

Further, the list provides *all* the additional details and information requested in Section 4.5.3.1(C.).

Jt. Ex. 70, § 4.5.3.1.C. (emphasis added). This language shows PruittHealth intended a complete Attachment 5.

55. As the uncontroverted evidence showed, a PruittHealth employee made a clerical pdf conversion error resulting in an incomplete Attachment 5. (Jt. Ex. 12) The Attachment 5 that PruittHealth intended for submission was complete. (Jt. Ex. 67; *see also* Arnold, Vol. 4, p. 1079, l. 7-16)

56. Per Section 3.6 of the RFP, which is consistent with the concept of "substantial compliance," the determination of whether a bid is qualified is made upon consideration of the extent to which the bid or proposal conforms to the requirements of the contract as expressed in the solicitation. Providing CMS Star Ratings is not part of the scope of work of this contract under Section 5.0 of the RFP. PruittHealth's inadvertent failure to provide its own CMS Star Ratings is not intrinsic to the performance required under this contract; thus, PruittHealth's proposal substantially conforms to the requirements of the contract despite the absence of those CMS Star Ratings.

57. PruittHealth's response otherwise substantially conformed to the requirements of the RFP. The Agency did not act outside its authority, act erroneously, act arbitrarily or capriciously, use improper procedure, or fail to act as required by law or rule by not disqualifying PruittHealth for failing to submit a complete Attachment 5.

58. Liberty failed to carry its burden of proof on this issue.

CMS Star Ratings: Internet Research

59. Liberty contends that the Agency erred in two ways with respect to internet research: first, the Agency should not have engaged in internet research at all; and second, in performing internet research, the Agency consulted an inappropriate website for PruittHealth's CMS Star Ratings instead of the authoritative source, the website for the Centers for Medicare & Medicaid Services.

60. Regarding the first issue, there is no statute, administrative code provision or RFP provision that prohibits evaluators from researching information outside of vendors' proposals. (Swartz, Vol. 2, p. 543, l. 7-21; Vol. 3, p. 623, l. 11-17)

61. Again, if Ms. Swartz believed looking up CMS Star Ratings was inappropriate, Ms. Swartz had the authority to do something about it. (Swartz, Vol. 2, p. 543, l. 3-6; *see also*, Jt. Ex. 8)

62. As Ms. Swartz credibly testified, CMS Star Ratings are "public record. The ratings happened. They are there. They are public records, so anybody can look them up." (Swartz, Vol. 2., p. 542, l. 19 - p. 543, l. 6) In sum, evaluators of an RFP are legally permitted, and indeed often appropriately motivated to further but reasonably research bidders in their efforts of due diligence.

63. The Agency did not act outside its authority, act erroneously, act arbitrarily or capriciously, use improper procedure, or fail to act as required by law or rule by performing internet research.

64. Liberty failed to carry its burden of proof on this issue.

65. Regarding the second issue, all parties agree that cms.gov is the authoritative source for CMS Star Ratings. It was abundantly clear Captain Campbell significantly utilized an outdated and misleading website, nursinghomesite.com to obtain PruittHealth's CMS Star Ratings. This was obviously error. Indeed, on paper it borders on arbitrary or capricious. *State ex rel. Com'r of Ins. v. North Carolina Rate Bureau*, 300 N.C. 381, 420, 269 S.E.2d 547, 573 (2017) (unfairness, uncaredful consideration, or flawed reasoning should not be apparent).

66. The Tribunal acknowledges:

[T]he “arbitrary or capricious” standard is a difficult one to meet. Administrative decisions may be reversed as such only when an agency acts “patently in bad faith,” or “whimsical” in the sense that “they indicate a lack of fair and careful consideration” or “fail to indicate ‘any course of reasoning and the exercise of judgment’....” *Comm'r of Ins. v. Rate Bureau*, 300 NC [381] at 420, 269 SE2d [547] at 573 [(1980)] (citations omitted).

ACT-UP Triangle v. Commission for Health Servs., 345 NC 699, 707, 483 SE2d 388, 393 (reciting *Lewis, supra* (citation omitted)).

67. On this, the credibility and character of Captain Campbell will prevail. A 26-year Navy veteran, with a master's degree in national security strategy from the National War College, there was literally zero bad faith or whimsy about her. (Campbell, Vol. 3, p. 687, l. 16 – p. 689, l. 16) The Tribunal was impressed with the captain's demeanor and dedication to proper purpose, which was no less to the veterans of this state than it is to the country. Here, the Tribunal cannot reasonably conclude the actions of Captain Campbell arbitrary or capricious. To do so would be superfluous anyway, as her actions were nonetheless error.

68. The issue then is whether it was material error; specifically, as heretofore concluded, if not for this error, was there a reasonable likelihood or substantial chance that Liberty would have been awarded the contract?

69. PruittHealth posits several points in contrast. First, substantial evidence in the record shows that CMS Star Ratings were not the sole basis for the Agency's decision to issue the Award to PruittHealth. The ratings were but one of many factors in the award. Rather, as Jt. Ex. 9 and 16 show, a multiplicity of factors were considered. (Jt. Ex. 9; Jt. Ex. 16)

70. Captain Campbell specifically testified that it was but one of many variables. (Campbell, Vol. 3, p. 807, l. 3-11).

71. Second, the CMS Star Ratings obtained from cms.gov show that in the time frame of March-April 2021, PruittHealth's average CMS ratings in North Carolina were still higher than Liberty's as demonstrated in Jt. Ex. 58:

Figure 1. CMS Star Ratings: Pruitt NC Facilities (March 2021) vs. Liberty NC Facilities (March 2021)

	Pruitt CMS Star Ratings for NC (3/21)	Liberty CMS Star Ratings for NC (3/21)
Average	2.94	2.71
5-Star	4	1
4-Star	3	9
3-Star	3	9
2-Star	4	9
1-Star	4	6

Figure 2. CMS Star Ratings: Pruitt NC Facilities (April 2021) vs. Liberty NC Facilities (March 2021)

	Pruitt CMS Star Ratings for NC (4/21)	Liberty CMS Star Ratings for NC (3/21)
Average	2.78	2.71
5-Star	3	1
4-Star	3	9
3-Star	4	9
2-Star	3	9
1-Star	5	6

Figure 3. CMS Star Ratings: Pruitt NC Facilities (April 2021) vs. Liberty NC Facilities (April 2021)

	Pruitt CMS Star Ratings for NC (4/21)	Liberty CMS Star Ratings for NC (4/21)
Average	2.78	2.68
5-Star	3	1
4-Star	3	9
3-Star	4	8
2-Star	3	10
1-Star	5	6

Source: "Nursing Homes Including Rehab Services Data Archive," The Center for Medicare and Medicaid Services, available at <https://data.cms.gov/provider-data/archived-data/nursinghomes>.



72. Third, during the March-April 2021 time frame, PruittHealth had a higher percentage of 4- and 5-star rated homes in North Carolina than Liberty. This is demonstrated by PruittHealth Ex. 321:

EX. 321

Figure 1. CMS Star Ratings: Pruitt NC Facilities (March 2021) vs. Liberty NC Facilities (March 2021)

	Pruitt CMS Star Ratings for NC (3/21)	Liberty CMS Star Ratings for NC (3/21)
Average	2.94	2.71
5-Star	4	1
4-Star	3	9
3-Star	3	9
2-Star	4	9
1-Star	4	6

$4+5 \text{ stars} = 7$
 $7/18 = 38.8\%$
 $1+2 \text{ stars} = 8$
 $8/18 = 44.4\%$

$4+5 \text{ stars} = 10$
 $10/34 = 29.4\%$
 $1+2 \text{ stars} = 15$
 $15/34 = 44.1\%$

18 34

Figure 2. CMS Star Ratings: Pruitt NC Facilities (April 2021) vs. Liberty NC Facilities (March 2021)

	Pruitt CMS Star Ratings for NC (4/21)	Liberty CMS Star Ratings for NC (3/21)
Average	2.78	2.71
5-Star	3	1
4-Star	3	9
3-Star	4	9
2-Star	3	9
1-Star	5	6

$4+5 = 6$
 $6/18 = 33.3\%$
 $1+2 = 8/18 = 44.4\%$

$4+5 \text{ stars} = 10$
 $10/34 = 29.4\%$
 $1+2 \text{ stars} = 15$
 $15/34 = 44.1\%$

18 34

Figure 3. CMS Star Ratings: Pruitt NC Facilities (April 2021) vs. Liberty NC Facilities (April 2021)

	Pruitt CMS Star Ratings for NC (4/21)	Liberty CMS Star Ratings for NC (4/21)
Average	2.78	2.68
5-Star	3	1
4-Star	3	9
3-Star	4	8
2-Star	3	10
1-Star	5	6

$4+5 \text{ stars} = 6$
 $6/18 = 33.3\%$
 $1+2 \text{ stars} = 8$
 $8/18 = 44.4\%$

$4+5 \text{ stars} = 10$
 $10/34 = 29.4\%$
 $1+2 \text{ stars} = 16$
 47%

18 34

Source: "Nursing Homes Including Rehab Services Data Archive," The Center for Medicare and Medicaid Services, available at <https://data.cms.gov/provider-data/archive-08-dms/nursinghomes>.

EXHIBIT
321

73. When PruittHealth's April ratings are compared to Liberty's March ratings, PruittHealth had a slightly higher percentage of 1- and 2-star homes than Liberty, as reflected in Figure 2 in PruittHealth Ex. 321; however, the difference is negligible at three tenths of one percent (44.4% v. 44.1%).

74. Liberty did not challenge the accuracy of the information set forth on Jt. Ex. 58 or PruittHealth Ex. 321.

75. Fourth, as discussed above, no rule or statute required the Evaluation Team to give any specific weight to any one factor.

76. To the Tribunal, the most persuasive point on this topic is the wording from the following summary excerpt in the award:

Pruitt brings the strongest Technical Evaluation and has proved under the current contract that they provide an excellent program. As the CMS Star Ratings highlighted above note, the 1.85% differential in cost between Liberty and Pruitt is the difference between experience, excellence in program design, management plan, and key personnel that Pruitt proposes.

(Jt. Ex. 16, p. 8) (emphasis added)

77. The most reasonable, credible interpretation of this statement is that the Agency found confirmation with the CMS Star Ratings, as opposed to independent, substantive indicia of superiority. Combined with Captain Campbell's testimony that such was "additive" necessitates a conclusion of immateriality.

78. Considering all credible evidence and argument on this issue, to include PruittHealth's four factors but perhaps even more so that CMS Star Ratings were not a determinative factor in this procurement but used in corroboration, the Tribunal declines to invalidate the Award because Captain Campbell mistakenly used nursinghomesite.com data.

79. Outside of the APA, mistake and error appear synonymous; but in administrative proceedings, substantial prejudice is inextricably tied to error. When Petitioner fails either, Petitioner fails in toto. N.C. Gen. Stat. § 150B-23(a).

80. Immaterial blunder is harmless error. *Id.*

81. In sum, Liberty failed to prove Captain Campbell's error mattered.

CMS Star Ratings: All Facilities v. North Carolina Facilities Only

82. Liberty's argument here is premised on disagreements with judgments the Evaluation Team made on various metrics. For example, Liberty asserts that the Evaluation Team should have considered CMS Star Ratings for each vendor's facilities, regardless of where they are located.

83. The Evaluation Team only considered each vendor's North Carolina facilities and did not include facilities outside of the state. The Evaluation Team did not make this decision without explanation. (*See*, Jt. Ex. 16, p. 8.) Liberty, however, concludes that this was improper, and that the Evaluation Team should have considered all facilities for each vendor.

84. The Evaluation Team provided a coherent and reasonable explanation for its exercise of discretion. (*See*, Jt. Ex. 16, p. 8) (“NOTE: While the CMS ratings utilize a national standard, the annual inspections are conducted by state evaluation teams. For this reason, the Evaluation Team focused on the CMS ratings for facilities operated in the State of North Carolina.”).

85. Liberty questioned what would happen in a hypothetical situation in which a bidder did not have North Carolina facilities. (Tr., Vol. 5, p. 1286, l. 1. 18-22) “[J]udicial resources should be focused on problems which are real and present rather than dissipated ..., hypothetical [,] or remote questions [.]” *Crumpler v. Thornburg*, 92 N.C. App. 719, 722, 375 S.E.2d 708, 710 (1989) (citation omitted). Further, “courts will not entertain or proceed with a cause merely to determine abstract propositions of law.” *In re Peoples*, 296 N.C. 109, 147, 250 S.E.2d 890, 912 (1978). As our Supreme Court has held, it is not a proper function of courts “to give advisory opinions, or to answer moot questions, or to maintain a legal bureau for those who may chance to be interested, for the time being, in the pursuit of some academic matter.” *Adams v. N.C. Dept. of Natural and Economic Res.*, 295 N.C. 683, 704, 249 S.E.2d 402, 414 (1978) (citation omitted).

86. The Agency did not act outside its authority, act erroneously, act arbitrarily or capriciously, use improper procedure, or fail to act as required by law or rule in its determination to consider only CMS Star Ratings in North Carolina.

87. Liberty failed to carry its burden of proof on this issue.

CMS Star Ratings: Inclusion of the NCSVH

88. Liberty also argues that the Evaluation Team should have performed two analyses of CMS Star Ratings: one with the NCSVH, and another without. (Liberty Ex. 116; Walsh, Vol. 1, p. 199, l. 21-25; p. 201, l. 10-13; p. 204, l. 12-17)

89. Liberty asserts that including the NCSVH unfairly skews the analysis, as the NCSVH receive additional funding. In Liberty's opinion, the NCSVH should have been excluded from the analysis of CMS Star Ratings. (Walsh, Vol. 1, p. 202, l. 14 - p. 203, l. 9)

90. Liberty presented no evidence about the amount, if any, of alleged additional funding or its purported effect. Concluding that the Agency erred by including the NCSVH would defy not only the deference owed, but also the very terms of N.C. Gen. Stat. § 143B-1295 which expressly requires consideration of a vendor's experience and past performance. *See, e.g., Latecore, Int'l, Inc. v. U.S. Dep't of Navy*, 19 F.3d 1342, 1356 (11th Cir. 1994) (stating that under 5 U.S.C.A. § 706(b), the federal analog to N.C. Gen. Stat. 150B-23(a), when the challenged action is a procurement, courts should ask “whether the contracting agency provided a coherent and reasonable explanation of its exercise of discretion”).

91. At trial, Mr. Walsh acknowledged that the subject matter of the RFP was the NCSVH; the RFP did not preclude the evaluators from considering the NCSVH in its evaluation

of CMS Star Ratings; and it did not require the evaluators to do two types of comparisons, one where the NCSVH are included and another where they are not included. (Walsh, Vol. 2, p. 307, l. 15 - p. 308, l. 2)

92. Moreover, including the NCSVH was pertinent to the consideration of past experience. The Recommendation of Award Memo stated:

The overall past performance of Pruitt is highly favorable. There are no existing G or higher incident reports in NCSVH. In addition to being CMS 3-star or higher rated, All NCSVH facilities as JCAHO accredited. The 3-star rating was assessed to the Salisbury NCSVH during renovations. Pruitt has received multiple awards for the NCSVH facilities[.]

(Jt. Ex. 16, p. 6)

93. The Agency did not act outside its authority, act erroneously, act arbitrarily or capriciously, use improper procedure, or fail to act as required by law or rule by including the NCSVH in its analysis of CMS Star Ratings and by not doing two separate analyses of CMS Star Ratings, one with the NCSVH and one without.

94. Liberty failed to carry its burden of proof on this issue.

CMS Star Ratings: May 2021 v. Other Time Periods

95. Liberty's Exhibit 116 compares Liberty's March 2021 CMS Star Ratings with PruittHealth's May 2021 CMS Star Ratings. (Liberty Ex. 116; Walsh, Vol. 1, p. 199, l. 21-25; Tr. Vol. 5, p. 1277, l. 1-10).

96. The proposed use of May 2021 CMS Star Ratings is arbitrary and inappropriate; it unnecessarily doubles the temporal distance between the scores used for PruittHealth and Liberty's March 2021 scores (thus decreasing the meaningfulness of the comparison) and does not reflect either the scores that PruittHealth intended to submit or those that were available at the time the submissions were made. Fairness and consistency suggest that the more logical comparison for Liberty's March 2021 scores (which it submitted) are PruittHealth's April 2021 scores, which it intended to submit, or even its March 2021 scores, to match Liberty's. (Jt. Ex. 58) In reality, Liberty's use of PruittHealth's May 2021 scores is simply a means of fixing the numbers to its advantage, as PruittHealth's scores dipped slightly between April and May 2021.

97. The Agency did not act outside its authority, act erroneously, act arbitrarily or capriciously, use improper procedure, or fail to act as required by law or rule by not utilizing May 2021 CMS Star Ratings.

98. Liberty failed to carry its burden of proof on this issue.

CMS Star Ratings: PruittHealth High Point

99. Liberty asserts that the Agency erred by not including PruittHealth High Point's CMS Star Ratings because the facility was licensed and operational in May 2021. The facility was rated 1-star. (Walsh, Vol. 2, p. 351, l. 14-18; Jt. Ex. 27).

100. Jt. Ex. 58, which compares PruittHealth and Liberty's CMS Star Ratings in North Carolina for the period March-April 2021 includes PruittHealth High Point, which was rated 1-star in March and April 2021. This exhibit shows, as an average, that PruittHealth's CMS Star Ratings in North Carolina were better than Liberty's. PruittHealth's average CMS Star Rating for March 2021 was 2.94, compared to Liberty's average for March 2021 of 2.71. In April 2021, PruittHealth's average CMS Star Rating was 2.78 compared to Liberty's April 2021 average rating of 2.68. When Liberty's March 2021 ratings are compared to PruittHealth's April 2021 ratings, Liberty's average was 2.71 compared to PruittHealth's average of 2.78. (Jt. Ex. 58)

101. PruittHealth Ex. 321, which compares PruittHealth and Liberty's CMS Star Ratings in North Carolina for the period March-April 2021 includes PruittHealth High Point, which was rated 1-star in March and April 2021. This exhibit shows, as percentage of 1- and 2-star facilities, and 4- and 5-star facilities, that PruittHealth had more 4- and 5-star rated homes than Liberty did. Regarding 1- and 2-star rated homes, PruittHealth's percentage was nearly identical to Liberty's when March and April 2021 are compared (44.4% v. 44.1%). When March 2021 is compared to April 2021, PruittHealth's percentage of 1- and 2-star homes was lower than Liberty's (44.4% v. 47%). (PruittHealth Ex. 321)

102. Because neither the statute nor the RFP specify how the Agency was to factor CMS Star Ratings into its decision making process, and evidence in the record shows that CMS Star Ratings were not a dispositive factor in this procurement, the Agency's failure to include the CMS Star Rating for PruittHealth High Point does not constitute acting outside its authority, acting erroneously, acting arbitrarily or capriciously, using improper procedure, or failing to act as required by law or rule.

103. Further, including the actual CMS Star Rating for PruittHealth High Point would not have made a material difference in the data the Agency used to compare the vendors. The omission of PruittHealth High Point's CMS Star Rating was, at most, harmless error and did not substantially prejudice Liberty's rights.

104. Liberty failed to carry its burden of proof on this issue.

Cash Flow

105. Liberty asserts that PruittHealth failed to meet the cash flow requirement set forth in the RFP because PruittHealth included the words "and liquidity" next to the words "cash flow" in response to Section 4.5.2.H. (Walsh, Vol. 2, p. 324, l. 6-25) On this basis, Liberty argues that PruittHealth's proposal should have been rejected. (Walsh, Vol. 1, p. 207, l. 3-9)

106. Liberty's cash flow concerns are based on the information shown on Stephanie Fisher's spreadsheet (PruittHealth Ex. 307); they are not based on any detailed review of PruittHealth's financial statements. (Walsh, Vol. 2, p. 323, l. 5-13)

107. No statute, administrative rule, or provision within the RFP defines cash flow, nor does the RFP prescribe or limit the ways in which a vendor could demonstrate that it meets cash flow requirements. (Walsh, Vol. 2, p. 323, l. 17 - p. 325, l. 8; Holmes, Vol. 4, p. 973, l. 1-24)

108. Section 4.5.3.4 of the RFP refers to "cash flow and/or available financing," indicating that there could be more than one way to meet the cash flow provision, such as through available financing. Financing is a form of liquidity. (Loggins, Vol. 2, p. 388, l. 1-3; *see also* Loggins, Vol. 2 p. 408, l. 7-13) ("Available financing ... ties back to liquidity and access to cash, maintain relationships with banks and have loans and lines of credit that we could access if needed.").

109. Liberty defines "cash flow" as "[a] snapshot of the company's current money on hand" or "cash on hand." (Holmes, Vol. 4, p. 1012, l. 16 - p. 1013, l. 2) This is a reasonable interpretation of the term "cash flow." Perhaps, it is even the more conventional interpretation. *See, Gaston Cnty. Dyeing Mach. Co. v. Northfield Ins. Co.*, 351 N.C. 293, 299-300, 524 S.E.2d 558, 563 (2000) (terms are given their meaning unless context clearly indicates otherwise).

110. PruittHealth contends that "cash flow" can incorporate factors beyond just "cash on hand." For example, Mr. Loggins explained how PruittHealth satisfied the cash flow requirements in other ways, such as through revenue, which converts to cash and its EBITDA. (Loggins, Vol. 2, p. 411, l. 21 - p. 412, l. 5)

111. Mr. Loggins also explained that PruittHealth could substantially increase its cash on hand by suspending its discretionary investment activities at any time. (PruittHealth Ex. 309; Loggins, Vol. 2, p. 400, l. 19 - p. 401, l. 6) (Ex. 309 is filed under seal)

112. Moreover, PruittHealth's actual experience operating the NCSVH, including during the time of the RFP, demonstrates it has the cash flow necessary to operate the NCSVH. Mr. Loggins, who has direct knowledge of PruittHealth's finances and its involvement with NCSVH, testified that there have been no issues whatsoever regarding PruittHealth's ability to support the NCSVH. (Loggins, Vol. 2, p. 384, l. 14-20; p. 410, l. 11-19; *see also*, Arnold, Vol. 4, p. 1109, l. 17-20) (testifying that over the course of 20 years operating NCSVH, PruittHealth has never had problems funding operations of NCSVH while awaiting payment).

113. Definitionally, "cashflow" can include liquidity. (PruittHealth Ex. 317 and 318; Loggins, Vol. 2, p. 412, l. 6 - p. 413, l. 1)

114. The cash flow requirement in Section 4.5.2.H. and the "cash flow and/or available financing" requirement in Section 4.5.3.4 of the RFP seek an answer to the same question: whether the vendor has the financial means to continue operating the NCSVH while awaiting payment from the State. It could be illogical to exclude consideration of available financing in Section 4.5.2.H. while expressly including consideration of available financing in Section 4.5.3.4.

115. Particularly in light of the reference to "cash flow and/or available financing" in the RFP, PruittHealth's interpretation could also be a reasonable interpretation of the term "cash flow."

116. Arguably here at least, some ambiguity exists regarding the exact meaning of “cashflow” in the RFP.

117. The Agency’s decision to award the contract to PruittHealth demonstrates its conclusions that PruittHealth’s interpretation of the term “cash flow” was reasonable and that PruittHealth met the requirement.

118. The Agency specifically concluded that each vendor met the minimum requirements, which included cash flow, and that each vendor demonstrated sufficient financial stability, which incorporates cash flow. (Jt. Ex. 9, p. 1; Jt. Ex. 16, p. 7; *see also* Swartz, Vol. 3, p. 647, l. 3-9) (testifying that PruittHealth had met the cash flow requirements of the RFP)

119. As previously and generally concluded, such determinations of the Agency are entitled to deference. *Frye Reg’l Med. Ctr., supra; Carpenter, supra; Craven, supra.*

120. Liberty presented no evidence to counter Mr. Loggins’ testimony or otherwise show why PruittHealth’s multiple ways of demonstrating cash flow were inadequate or unreasonable under the terms of the RFP. Liberty also presented no evidence challenging PruittHealth’s audited or interim financials.

121. Both bidders discussed their relationships with financial institutions in their respective responses to the provision of the RFP concerning cash flow, specifically Section 4.5.3.4. (Jt. Ex. 70, § 4.5.3.1.A.; Jt. Ex. 35, p. 57; Walsh, Vol. 2, p. 327, l. 8 - p. 328, l. 1)

122. Additionally, the RFP should be construed in its totality. *See, e.g., Marcoin, Inc. v. McDaniel*, 70 N.C. App. 498, 504, 320 S.E.2d 892, 897 (1984) (A basic principle of contract construction is consideration of the entirety of the document and giving effect to each provision whenever possible).

123. Even considering cash alone, Ms. Fisher’s spreadsheet shows that PruittHealth satisfied cash flow requirements in FY 2020. (PruittHealth Ex. 307) Liberty’s suggestion that the vendor needed to meet the cash flow requirement for the three preceding years is not supported by the express language of the RFP. (Walsh, Vol. 2, p. 296, l. 18-21; Arnold, Vol. 4, p. 1071, l. 6-17)

124. Similarly, Liberty’s suggestion that PruittHealth needed to meet a cash flow requirement on the day its RFP response was submitted is not supported by the express language of the RFP. Liberty itself did not demonstrate that it met the cash flow requirement on the day it submitted its response. (Loggins, Vol. 2, p. 368, l. 18 - p. 369, l. 2; PruittHealth Ex. 307)

125. The Agency did not act outside its authority, act erroneously, act arbitrarily or capriciously, use improper procedure, or fail to act as required by law or rule in its determination that PruittHealth satisfied the cash flow requirements.

126. Liberty failed to carry its burden of proof on this issue.

127. Accordingly, the Agency’s interpretation of the term “cash flow” and whether PruittHealth’s response to the RFP satisfied any “cash flow” requirement should not and will not be disturbed. There was no basis for rejecting PruittHealth’s proposal.

Comparison of Price on Dollars

128. Liberty asserts that the Agency should have compared Liberty and PruittHealth regarding the actual cost in dollars of their respective proposals. According to Liberty, the State would have saved over a million dollars a year by awarding the NCSVH contract to Liberty. (Walsh, Vol. 1, p. 148, l. 2-10)

129. The RFP required the bidders to express their management fee as a percentage of net revenue, which is how both Liberty and PruittHealth answered the question. (Jt. Ex. 3, Attachment A, p. 27; Jt. Ex. 35, p. 303; Jt. Ex. 70, Response to Attachment A)

130. Vendors were asked only to provide a percentage of net revenue for their comparative management fees. The Tribunal can only conclude it unreasonable to require the Agency to compare actual costs between vendors as that would require significant speculation and complication, to include at least sales forecasts (which arguably could favor incumbency).

131. No statute, administrative rule, or provision in the RFP required the evaluators to calculate a difference in dollars as between PruittHealth and Liberty. (Walsh, Vol. 2, p. 304, l. 7-11)

132. Further, as noted previously, this was a best value procurement, not a lowest responsible bidder procurement. The Agency is not required to choose the lowest bidder. Rather, the Agency has discretion to select the proposal it believes is the “most advantageous to the veterans and the State of North Carolina.” N.C. Gen. Stat. § 143B-1295.

133. The Agency did not act outside its authority, act erroneously, act arbitrarily or capriciously, use improper procedure, or fail to act as required by law or rule by not comparing Liberty and PruittHealth regarding actual cost in dollars of their respective proposals.

134. Again, such Agency choices are entitled to deference. *Frye Reg’l Med. Ctr., supra*; *Carpenter, supra*; *Craven, supra*.

135. Liberty failed to carry its burden of proof on this issue.

Conclusion

136. Having considered the testimony of the witnesses, the documentary exhibits, and the arguments of counsel, the Undersigned finds and concludes that the Agency’s decision to issue the Award to PruittHealth is not subject to upset. Though Liberty proved some error, specifically the Agency’s use of incompetent website data, Liberty failed to prove that or any error material.

137. Substantial evidence supports the determinations as heretofore concluded, and the ruling hereinafter specified. N.C. Gen. Stat. § 150B-51(b)(5), and (c); *see also, Sharpe-Johnson v N.C. Dep’t of Pub. Instruction*, 280 N.C.App. 74, 80-1, 867 S.E.2d 188, 192 (2021); *and, Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938) (defining substantial evidence as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion”).

138. The OAH is an agent arm of the executive branch of state government “under Article III, Sec 11 of the Constitution and, in accordance with Article IV, Sec.3....” N.C. Gen. Stat. § 7A-750. As such, the undersigned Executive or Administrative Law Judge is entitled to significant deference from the General Courts of Justice. *Burton v. City of Reidsville*, 243 N.C. 405, 407-08, 90 S.E. 2d 700, 702-03 (1956) (“[T]he courts were not created or vested with authority to act as supervisory agencies to control and direct the action of executive and administrative agencies or officials. So long as officers act in good faith and in accord with the law, the courts are powerless to act -- and rightly so.”); *State ex rel. Comm’r of Ins. v. N.C. Rate Bureau*, 300 N.C. 381, 403-04, 269 S.E.2d 547, 563-64 (1980). The courts review the OAH de novo, but it is a deferential de novo standard that applies. *Cf.* N.C. Gen. Stat. § 150B-51, and, *State ex rel. Comm’r of Ins., supra*.

FINAL DECISION

WHEREFORE, based on the foregoing Findings of Fact and Conclusions of Law, Petitioner failed to prove that Respondent exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by rule or law, and that Petitioner was substantially prejudiced thereby. The Award of RFP 13-DOA154035146 to PruittHealth is **AFFIRMED**.

NOTICE OF APPEAL

This is a Final Decision issued under the authority of N.C. Gen. Stat. § 150B-34.

Under the provisions of North Carolina General Statute § 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of the county where the person aggrieved by the administrative decision resides, or in the case of a person residing outside the State, the county where the contested case which resulted in the final decision was filed. **The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge’s Final Decision.** In conformity with the Office of Administrative Hearings’ rule, 26 N.C. Admin. Code 03.0102, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, **this Final Decision was served on the parties as indicated by the Certificate of Service attached to this Final Decision.** N.C. Gen. Stat. § 150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. § 150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

IT IS SO ORDERED.

This the 13th day of January, 2023.



The Honorable Jonathan S. Dills
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 13th day of January, 2023.



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