IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION SEVEN

AMERIGROUP KANSAS, INC.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	
	)	
KANSAS DEPARTMENT OF ADMINISTRATION, and KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT, and KANSAS DEPARTMENT OF AGING AND DISABILITY SERVICES,	)	Case No. 2018CV559
	)	
Respondents,	)	
	)	
and	)	
	)	
AETNA BETTER HEALTH OF KANSAS, INC., UNITEDHEALTHCARE OF THE MIDWEST, INC., and SUNFLOWER STATE HEALTH PLAN, INC.,	)	
	)	
Intervenors.	)	
	)	
AMERIHEALTH CARITAS KANSAS, INC.,	)	
	)	

Petitioner,	)	
vs.	)	
KANSAS DEPARTMENT OF ADMINISTRATION, and KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT, and KANSAS DEPARTMENT OF AGING AND DISABILITY SERVICES,	)	
Respondents,	)	Case No. 18-CV-646
and	)	
AETNA BETTER HEALTH OF KANSAS, INC., UNITEDHEALTHCARE OF THE MIDWEST, INC., and SUNFLOWER STATE HEALTH PLAN, INC.,	)	
Intervenors.	)	

MEMORANDUM OPINION AND ENTRY OF JUDGMENT

NATURE OF THE CASE:

These cases involve separately filed challenges by each respective Petitioner, Amerigroup Kansas, Inc. (Amerigroup) and AmeriHealth Caritas Kansas, Inc. (AmeriHealth), to the bid procedures and contract awards made by the State of Kansas for the operation of

managed care health delivery systems for the Kansas Medicaid and the Children's Health Insurance Premiums (CHIP) programs beginning January 1, 2019, both of which federally authorized programs the State of Kansas has elected to participate in. *Harris v. McRae,* 448 U.S. 297, 65 L.Ed.2d 784 (1980); *Wilder v. Virginia Hosp. Assn.,* 496 U.S. 498 (1990); *Village Villa v. Kansas Health Policy Authority*; 296 Kan. 315 (2013). These federal programs establish their parameters and a deviation from them, at least for Medicaid, is subject to a waiver process subject to federal approval. Managed care requires a waiver (42 U.S.C. 1315; 42 U.S.C. 13969; 42 U.S.C. 13966-2). The two Petitioners were unsuccessful bidders and both separately allege the procedures leading to the contract awards to other bidders, UnitedHealth Care of the Midwest, Inc., Aetna Better Health of Kansas, Inc., and Sunflower State Health Plan, Inc., were either, or both, unauthorized in law or, by consequence, the bid process was, or became, so materially flawed as to arbitrarily or

unreasonably deny each the opportunity for fair consideration and success. Petitioner AmeriHealth additionally asserts specific instances of misevaluations of its proposal, including, in one comparative incidence, unequal treatment versus Aetna Better Health of Kansas, Inc. The winning bidders and consequent contract awardees are Intervenors herein without objection.

The underlying facts adopted by the Court, or as found by or modified by the Court, follow. Facts are numbered by the Court, but, if adopted, are referenced to their proponent with the source by noting either P for Petitioners or R for Respondents and followed by its proffered number from the proposed findings of fact in parenthesis ( ). Any modifications by the Court are in darkened type and omissions, *i.e.,* portions of a factual proffer not adopted, are shown in brackets [ ]. Other facts as may be adopted subsequent or referenced in explanation in this *Opinion* will likewise be displayed or adopted or rejected by reference only.

MATERIAL FACTS IN THE RECORD, AS DEVELOPED:

1(P1). On November 2, 2017, Respondent Kansas Department of Administration ("KDOA") issued Request for Proposal EVT0005464 KanCare 2.0 Medicaid & CHIP Capitated Managed Care (the "KanCare 2.0 RFP") on behalf of Respondent Kansas Department of Health and Environment ("KDHE") and Respondent Kansas Department of Aging and Disability Services ("KDADS") to solicit vendor bids for managed care services under a new KanCare program known as KanCare 2.0. KanCare 2.0 was intended to replace the State's current Medicaid managed care program, often referred to by the parties as "KanCare 1.0," which is scheduled to expire on December 31, 2018. (KDOA, KDHE, and KDADS are referred to individually by their acronyms and collectively as "Respondents" or the "Agencies.")

2(R2). The RFP sought qualified vendors to provide capitated managed health care services to approximately 400,000 members of the Kansas Medicaid Program and Child Health Insurance Program ("CHIP"). 07/19/18

Amerigroup Petition; 08/17/18 AmeriHealth Petition.

3(R3). Each challenged award was made as the result of a negotiated procurement pursuant to K.S.A. 75-37,102. Agency Record ("AR") Vol. 5, at 001404-001405 (RFP § 1.4); *see also* AR Vol. 5, at 001172 (RFP event description, stating RFP was issued pursuant to K.S.A. 75-37,102); AR Vol. 79, at 025381 (7/30/18 Diel Decision denying Amerigroup's protest, stating "[t]he bid event is governed by K.S.A 75-37,102), 025452 (8/16/18 Diel Decision denying AmeriHealth's protest, stating same). Negotiated procurements are expressly exempt from the requirements applicable to sealed competitive bidding process under K.S.A. 75-3738 through 75-3740a, and meetings held for negotiations are exempt from the Kansas Open Meetings Act. *See* K.S.A. 75-37,102(e). The negotiated procurement process is designed to allow bidders to develop and propose different approaches to fulfill the objectives and specifications set forth in the RFP, as more fully

described in the Bid Guidelines. *See* Amerigroup Trial Ex. 19, Kansas State Bid Guidelines; AR Vol. 5, at 001404-001406 (RFP § 1).

4(P2). The KanCare 2.0 RFP called for many **[ ]** changes to the current KanCare 1.0 program, including a work requirement, a lifetime cap on benefits for certain recipients, increased care coordination and case management, changes with respect to Community Service Coordination, mandatory and increased staffing requirements, and elevated oversight standards.

5(R4). In accordance with the statute governing negotiated procurements, the Director of Procurement and Contracts convened a procurement negotiating committee ("PNC") comprised of one designated representative from each of the relevant state agencies to negotiate contracts with qualified parties to provide managed health care services for the State's approximately 400,000 Medicaid beneficiaries. *See* K.S.A. 75-37,102(a), (b), (c).

6(R5). Petitioners and Intervenors received notice of the RFP and were invited to submit a formal response prior to the specified closing deadline. Before the bid submission deadline of January 5, 2018, potential bidders were invited to participate in several pre-bid conferences held by the PNC to obtain clarification regarding the RFP, encouraged to submit questions, and informed that failure to notify the RFP Event Contact of any conflicts or ambiguities in the RFP may result in any such items being resolved in the best interest of the State. AR Vol. 5, at 001404 (RFP § 1.4), 001664 (RFP § 6.6.C.1); *see also id.* at 001173 ("A pre-proposal conference will be held at 9:00Am CST, on November 20, 2017[.]"), 001032 ("A Mandatory Actuarial Teleconference for all prospective bidders to ask follow-up questions is scheduled for Friday, December 15, 2017 beginning at 9:00AM CST.").

7(R6). The RFP furnished detailed instructions to bidders regarding the contents of any proposal, including requirements to separately submit a sealed

technical proposal and a sealed cost proposal. AR Vol. 5, at 001408 (RFP § 2.1). Respondents responded to hundreds of vendor questions, and issued nine written amendments to the RFP by December 21, 2017. *See* AR Vol. 5, at 000826-001159 (RFP Amend. Nos. 1-9). Six bidders responded to the same RFP, including its nine amendments.

8(R7). The RFP notified all bidders that proposals would be evaluated by the PNC based on numerous factors without the assignment of weighted values, and that any awards would be made based on the best interests of the State as determined by the PNC. AR Vol. 5, at 001408 (RFP § 1.14). The RFP also notified all bidders that the PNC "reserves the right to accept or reject any or all proposals or part of a proposal; to waive any informalities or technicalities; clarify any ambiguities in proposals; modify any criteria in this RFP; and unless otherwise specified, to accept any item in a proposal." AR Vol. 5, at 001406 (RFP § 1.15). The RFP informed bidders that "[a]ward will be by line

item or group total, whichever is in the best interest of the State of Kansas." AR Vol. 5, at 001418 (RFP § 3.57).

9(R16). RFP § 5.1.1 identified "goals" of expanding service coordination; increasing employment and independent living supports for certain members; and providing service coordination for all youth in foster care. AR Vol. 5, at 001431-001432.

10(R17). RFP §§ 5.4.6 and 5.4.7 included a potential initiative that, if implemented, would require the managed care organizations to subcontract certain "community"-level Service Coordination activities to third-party Community Service Coordinators, as outlined in RFP Attachment L. *See* AR Vol. 5, at 001466-001470 (RFP § § 5.4.6, 5.4.7); AR Vol. 5, at 001343-001346 (RFP Attachment L, as originally issued); AR Vol. 5, at 000830-000833 (RFP Attachment L, as revised in Amendment 4).

11(R19). RFP § 5.19 contained five "Member Independence Initiatives": (1) "KanCare 2.0 Work

Requirement Initiative"; (2) "MediKan Employment Opportunity Initiative"; (3) "TransMed Employment Opportunity Initiative"; (4) "1915(i) or Other Employment Opportunity Program Initiatives"; and (5) "Member-Driven Health Care Initiatives." AR Vol. 5, at 001631-001638 (RFP § 5.19).

12(R20). The RFP advised offerors that the State was merely considering whether to implement these Member Independence Initiatives at some point in the future. The first two sentences of RFP § 5.19 state that "[t]he State *may* pursue the Member independence initiatives described below during the CONTRACT term," and that "[t]hese initiatives are subject to material modifications." AR Vol. 5, at 001631 (RFP § 5.19) (emphasis added).

13(R21). As to work requirements specifically, the RFP stated that "[t]he State is *considering* a work requirement for able-bodied adults in KanCare 2.0." AR Vol. 5, at 001631 (RFP § 5.19.1.1(A)) (emphasis added). The RFP instructed offerors simply to "[d]escribe any

relevant experience" with work requirements in their technical proposals. AR Vol. 5, at 001631 (RFP § 5.19.1.1(C)(1)-(2)).

14(R22). Following release of the RFP but prior to proposal submission, Respondents held a number of calls and meetings with offerors to discuss the RFP and address questions. *See, e.g.*, AR Vol. 4, at 000797-000801 (attendance sheet for November 20, 2017 in-person pre-bid conference); AR Vol. 1, at 000001-000002 (attendance sheet for December 15, 2017 mandatory actuarial teleconference); *see also* AR Vol. 79, at 025381, 025452.

15(R23). The RFP was amended nine times. AR Vol. 5, at 000826, 000828, 000829, 000834, 001030, 001031, 001032, 001081, 001147. In addition, Respondents conducted two rounds of formal, written questions and answers with offerors prior to proposal submission ("the Q&As") — one in November 2017 and the second in December 2017. *See* AR Vol. 5, at 001173 (requiring the first round of offeror questions to be submitted by

November 13, 2017); *id.* at 001030 (requiring the second round of offeror questions to be submitted by December 6, 2017); *see also* AR Vol. 79, at 025381, 025452.

16(R26). Consistent with Director Hamdorf's testimony, Respondents made several revisions to the RFP in November and December of 2017.

17(R27). In the November 2017 Q&As, Respondents emphasized that the RFP § 5.19 Member Independence Initiatives were still inchoate, and instructed offerors to address the RFP § 5.19 Member Independence Initiatives in their technical proposals, but to exclude them from their cost proposals:

Q. No.	**RFP Sec.**	**Question**	**RFP Page**	**Response**
November 2017 Q&As				
83	Section 5.19	The RFP documents indicate that a work requirement provision is being considered for CY 2019.	Page 210, Scope of Work	To ensure that all bids are on the same basis and given that the 1115 waiver including the work requirement is not yet approved,

Q. No.	RFP Sec.	Question	RFP Page	Response
		Should bidders consider this potential requirement in their bids? Or will submitted bids be adjusted for this provision if/when such requirements are implemented?		bidders should not incorporate the work requirement into their bids. The State's Actuary will incorporate the impact of the work requirement if/when it is approved.
208	Section 5.19.2	Does the State expect the bidders to include the MediKan program in Section 5.19.2 in the cost proposal?	Page 211, Scope of Work	The MediKan population should not be included in cost proposal at this time. If that population gets carved into KanCare 2.0, an adjustment will be made by the State's Actuary.
209	Section 5.19.3	Does the State expect the bidders	Page 214, Scope	The TransMed population should not be

Q. No.	RFP Sec.	Question	RFP Page	Response
		to include the TansMed [*sic*] program Section 5.19.3 in the cost proposal?	of Work	included in cost proposal at this time. If that population gets carved into KanCare 2.0, an adjustment will be made by the State's Actuary.
218	Section 5.19.1.1.A	Has the State's actuary incorporated any adjustments to the actuarial sound rate range to reflect potential changes in the population due to the work requirement?	Page 210, Scope of Work	Not at this time. To the extent that the 1115 Waiver is approved, the State's Actuary will incorporate the work requirement into the Final Actuarially Sound Rate Ranges. Bidders should not incorporate any adjustment for the work requirement.
220	Section 5.19.1.1.C	Will the State provide an estimate of the number	Page 210, Scope of	This can be further discussed in the future if/when

Q. No.	RFP Sec.	Question	RFP Page	Response
		of current Medicaid members, by rate cell, that would be found ineligible due to the work requirement?	Work	the work requirement is approved.
221	Section 5.19.1.1.D	Does the State expect bidders to incorporate the change into their cost proposals?	Page 210, Scope of Work	No.

UHC Trial Ex. 19 at B-6, B-14; *see also* AR Vol. 5 at 000888, 000906-000907, 000972, 000990-000991 (same).

18(R28). Following some confusion regarding Respondents' response to another one of the November Q&As (#189), Respondents confirmed again in the December Q&As that offerors should address the RFP § 5.19 Member Independence Initiatives in their

technical proposals, but exclude them from their cost proposals:

Q. No.	RFP Sec.	Question	RFP Page	Response
December 2017 Q&As				
3	Round 1 Q&A response #83	Round 1 Q&A response #189 appears to contradict the responses to #83 and #218. Please confirm that #83 and #218 are correct and that "bidders should not incorporate the work requirement into their bids."		The work requirement should be included in the Technical proposal per response to round one question 189. The work requirement should not be included in the cost proposal per responses to round one questions 83 and 218.
33	5.19.1.1	Responses to Round 1 Question #83 and Question #189 appear to give conflicting guidance to bidders regarding the Work	210	The work requirement should be included in the Technical proposal per response to round one

Q. No.	RFP Sec.	Question	RFP Page	Response
		Requirement. Can the state confirm that the response to #83 is correct and the plans should not make any adjustments or assumptions in their bids to account for the Work Requirement? Can the state confirm that any impact from the Work Requirement will be separately accounted for later by the state's actuary? Since the Work Requirement is still not completely defined, it would be difficult for MCO's to calculate an impact of these requirements.		question 189. The work requirement should not be included in the cost proposal per responses to round one questions 83 and 218.

Q. No.	RFP Sec.	Question	RFP Page	Response
54	Q&As #83 and #189	The response to Q&A #83 says that bidders should not incorporate the work requirement into their bids; however, Q&A #189 says that the bid should be prepared as if the work requirement is in place. Please confirm whether or not to incorporate the work requirement into the bid.	N/A	The work requirement should be included in the Technical proposal per response to round one question 189. The work requirement should not be included in the cost proposal per responses to round one questions 83 and 218.

UHC Trial Ex. 20, at C-1, C-3. C-5; *see also* AR Vol. 5, at 001082, 001089, 001094, 001101, 001109, 001113 (same).

19(R29). In both the November and December 2017 Q&As, Respondents also reiterated that the Community Service Coordination initiative in RFP §§ 5.4.6 and 5.4.7 and Attachment L was still in the planning

stages, and implementation — if any — would be shaped by the managed care organizations working with Respondents after award.

20(R30). For example, Respondents informed all offerors that "[p]rospective bidders are asked to propose their respective plans to implement the state's request for Community Service Coordination," AR Vol. 5, at 000969 (Nov. Q&As #62), but that "details for implementation of Community Service Coordination" had not yet been "finalized," AR Vol. 5, at 000996 (Nov. Q&As #254), and "[s]pecific roles within this process have yet to be determined," AR Vol. 5, at 000989 (Nov. Q&As #203).

21(R31). Respondents further alerted all offerors that, "[b]ecause the design of Service Coordination . . . will impart [*sic*] be determined by bidder's proposals and through stakeholder input prior to implementation, a definitive list of potential service coordinator providers is not possible." AR Vol. 5, at 001108 (Dec. Q&As #29).

22(R32). In Amendment 9, issued on December 21, 2017, Respondents instructed offerors not to include projected expenditures for Community Service Coordination in their proposed price. AR Vol. 5, at 001138, 001147.

23(R33). Respondents gave this direction by reference to RFP Attachment L, which outlined the activities that would be delegated to Community Service Coordinators if the initiative were implemented:

> The State is requesting that information surrounding the projected costs of Service Coordination, referenced in Attachment L, be included in the rate methodology letter as part of the cost proposal; however, the projected expenditures for these services should be EXCLUDED from the Statewide Blended Vendor Initial Capitation Rate PMPM [(per member per month)]. This is only applicable to the cost proposal, and does not impact any requirements under the technical proposal.

AR Vol. 5, at 001138.

24(R34). Thus, Respondents instructed all bidders not to include in their proposed price either (1) the

Community Service Coordination provisions in RFP § 5.4.7 and Attachment L; or (2) the work requirements and other initiatives in RFP § 5.19. *See* Findings of Fact *supra* ¶¶ 27-33; *see also* AR Vol. 79, at 025387 ("All the potential bidders were informed orally and in writing . . . on December 15, 2017 of programs not to be included in their proposals. These instructions were to not include programs referred to as MediKan initiative, TransMed initiative, Enhanced Care Coordination, work Requirements and no new eligibility requirements in their cost proposals as part of the response to the RFP. These changes would not have had an effect on the technical proposal requested from each potential bidder as part of the RFP."); AR Vol. 79, at 0254567 (same).

25(R35). On January 5, 2018, six offerors submitted proposals in response to the RFP. AR Vol. 63, at 021264 (01/05/18 list of responding offerors); *see also* AR Vol. 79, at 025381, 025452.

26(R36). In its proposal, Amerigroup stated that it followed the direction to exclude Community Service Coordination from its proposed price, and recognized that any contract awarded might not implement these elements until sometime after the execution of the initial contracts:

> Regarding the Community Service Coordinator structure and service delivery model, we have not included any additional cost for this structure in our rate proposal. . . . We would be happy to discuss this further collaboratively with KDHE and Optumas before 2019 rates are finalized, and as the conceptual model of community service coordination is operationalized, assuming we are awarded a contract for 2019.

AR Vol. 18, at 005876 (Amerigroup Rate Methodology Letter).

27(R37). AmeriHealth also followed that direction. Ms. Sherry testified that AmeriHealth did not include costs associated with Community Service Coordination in its proposed price. 09/05/18 Tr. at 212.

28(R38). Ms. Sherry's testimony further evidences that AmeriHealth addressed in its proposal its experience with both non-delegated and partially non-delegated (i.e., partially subcontracted) models of Service Coordination. 09/05/18 Tr. at 213-15.

29(R39). In early 2018, the Legislature introduced several bills addressing the KanCare program. House Bill 2507, House Bill 2591, and the as-introduced version of Senate Bill 300 would have required Respondents to negotiate for the "renewal" of the incumbent contracts. *See* HB 2507 § 1(c); HB 2591 § 1(b); SB 300 § 1(c) (Jan. 18, 2018).

30(R40). None of these bills ever passed. *See* http://www.kslegislature.org/li/b2017_18/measures/sb300/ (SB 300 "Died on General Orders"); http://www.kslegislature.org/li/b2017_18/measures/hb2507/ (HB 2507 "Died in Committee" on 5/4/18); http://www.kslegislature.org/li/b2017_18/measures/hb2591/ (HB 2591 "Died in Committee" on 5/4/18).

31(P8). Respondents were aware of the pending legislation and discussed the legislation's potential impact on the pending KanCare 2.0 RFP and the procurement process. For example, in a February 23, 2018 email, Medicaid Director Jon Hamdorf stated that if the legislation in essence took the procurement back to the specifications of the previous contract, KanCare 1.0: "It would require us to work with [KDOA] to cut the pieces out of the RFP which are new services or existing services to new populations. Then the bidders would have to have a chance to change their responses and bids." Amerigroup Ex. 1(d); Record Vol. 64 at 22220-23. When asked if Respondents could complete the review and then take out the parts that would not be allowed, Medicaid Director Hamdorf further stated: "We could, but the bidders would still need to have the opportunities to change their responses and financial bid." *Id*.

32(R44). On March 7, 2018, there was a face-to-face meeting with all bidders who had submitted a proposal

in response to the bid solicitation." AR Vol. 79, at 025387, 025457; *see also* AR Vol 6, at 001739 (03/07/18 offeror attendance sheet). "The purpose of this meeting was . . . to update all the bidders on the procurement process and to address questions which may have existed with the bidders regarding the Legislature's efforts to pass a separate piece of legislation regarding the bid event." AR Vol. 79, at 025382, 025453.; *see also* AR 020428 (03/02/18 Email from A. Waters).

33(R45). Respondents explained to all offerors, in advance of the meeting:

> We would like to meet in person to permit each vendor to hear the same information being put forward and have the same access. We understand that you may have questions regarding the current proposed legislation and how it could affect the procurement process and status of the KanCare RFP. We would like to provide an update of where we are in the evaluation process, and what we anticipate going forward in regards to the procurement process.

AR Vol 59, at 020428 (03/02/18 Email from A. Waters).

34(R47). “It was reinforced at this meeting [that] the procurement process would continue forward and would not change. This was done to keep everything consistent for all bidders who had responded to the bid solicitation.” AR Vol. 79, at 025387, 025457.

35(P9). KDOA Procurement Director Tracy Diel recognized the same requirement when, in a March 9, 2018 email, he stated:

> If the procurement is scaled back, the agency will determine what part of the procurement is to be scaled back or removed. The vendors will be notified of the changes in the specifications and asked to provide updated technical and cost proposal information to the Office of Procurement and Contracts. Providing this information will be done on a short turn-around. Once received the information will be re-evaluated as quickly as possible by the review teams.

Amerigroup Ex. 13; Record Vol. 76 at 24278-80 [ ].

36(P10). The vendors also recognized the need for a revised process in light of the potential legislative action, with Amerigroup communicating to Respondents in an April 12, 2018 email:

> 6. Is the State’s intent to mirror the legislative direction suggested in SB 300 and model the Demonstration waiver in place, and the MCO’s contractual requirements, as of

> 1/1/18? If so, the requirements to increase the frequency and modalities of member touch-points should be addressed; as well as other areas where the current RFP deviates significantly from the contractual and policy requirements in place in 1/1/18. Would the department be open to soliciting comments from the incumbent MCOs to identify these areas for further cost scrutiny?
>
> 7. Where the requirements for removal are cross referenced into other paragraphs within the technical proposal, should the MCO's consider and adjust the cost proposal for those areas as well, even if not directly referenced in your directive?

Amerigroup Ex. 29; Record Vol. at 21366–67.

37(P11). Additionally, Amerigroup's representative, Frank Clepper, and AmeriHealth Caritas' representative, Mary Pat Sherry, both provided unrebutted testimony that during meetings with Respondents before the awards were announced, they advised Respondents that if the legislation scaling back the services to be provided from the KanCare 2.0 program to the KanCare 1.0 program were enacted, the vendors would need to be provided an opportunity to submit revised technical and cost proposals to match the changed services to be awarded under the RFP.

38(P12). The opportunity to submit revised proposals as recognized by Medicaid Director Hamdorf and Procurement Director Diel is consistent with the Bid Guidelines for State of Kansas Agencies, which, at page 11 noted that allowing Revised Offers was "(e)specially important if clarification of the vendor's expectations/understanding of the project results in a change of costs." Amerigroup Ex. 19.

39(R48). "The technical reviews of all six (6) proposals submitted were completed by the [Procurement Negotiating Committee ("PNC")] and agency review teams on April 6, 2018." AR Vol. 79, at 025382, 025453. Then "the cost proposals for all six (6) proposals were released . . . to the PNC and agency review teams for evaluation." AR Vol. 79, at 025382, 025453.

40(R49). On April 10, 2018, Respondents emailed all offerors to request

> that each bidder remove the costs related to the following sections and resubmit in the original requested cost proposal format:

- *RFP Section Community Service Coordination: 5.4.7 and 5.4.8*
- *RFP Section Member Independence Initiatives: 5.19.3 (TransMed Employment Opportunity Initiative) and 5.19.6 (Member-Driven Health Care)*
- *RFP Section KanCare 2.0 Work Requirement: 5.19.1.1*
- *RFP Section MediKan Initiative: Section 5.19.2.1*

AR Vol. 60, at 020837-020838 (italics in original).

41(R50). Respondents invited all offerors to submit "[a]ny questions" regarding this request. *Id*. Respondents also invited all offerors to attend a conference call on Thursday, April 12 "to address questions and provide clarification regarding" the request for "revised cost proposal[s]." AR Vol. 60, at 020864.

42(R51). Both Amerigroup and AmeriHealth (among other offerors) submitted written questions and feedback in response to Respondents' email. AR Vol. 60, at 020839-020840 (4/12/18 Email from L. Fancy, with questions from Amerigroup);*id.* at 020848 (4/12/18 Email from J. Tincher-Mann, with questions from AmeriHealth).

43(R52). Amerigroup observed that “Amendment 9 of the RFP instructed bidders to not include costs related to Community Service Coordination in the Statewide Blended Vendor Initial Capitation Rate (SBVICR) PMPM.” AR Vol. 60, at 020839 (04/12/18 Email from L. Fancy to A. Waters).

44(R53). Amerigroup further observed that “Section 5.19.1.1 of the RFP is related to the Work Requirement. Per the original Cost Proposal directions, costs associated with the work requirement were not included in cost proposals given the unknowns about implementation.” AR Vol. 60, at 020840 (04/12/18 Email from L. Fancy to A. Waters).

45(R54). All six offerors participated in the April 12, 2018 telephone conference. AR Vol. 79, at 025382, 025453.

46(R55). After reviewing offerors’ feedback, Respondents determined that there was no need for the cost proposal revision requested on April 10 because “those costs for the programs being addressed by the

Legislature" already "were not included in the cost proposals submitted, as discussed previously" with offerors. AR Vol. 79, at 025387, 025457.

47(R56). Respondents therefore informed "all of the bidders [that] the evaluation of the proposals would continue based upon the proposals that had been submitted." AR Vol. 79, at 025387, 025457. Respondents communicated this to all offerors by email on April 13, 2018, stating:

> Based on the feedback from our discussion during the bidders call, and from further discussions with the administration, the State has decided to evaluate the RFP as initially released. With the uncertainty surrounding the budget due to school financing, some of the identified cost drivers may end up being implemented and it is too early to determine what will be in the final contract.
>
> Vendors will not need to provide a response to the email dated 4/10 asking for information on costs related to the bullet points listed in the email.
>
> AR Vol. 60, at 020873.

48(R57). No offeror submitted a revised cost proposal or objected to the approach set forth in the

April 13, 2018 email. AR 025382; AR 025387. No offeror had the opportunity to rebid. *See* 09/05/18 Tr. at 228.

49(R58). "The decision as to which vendors from whom to request presentations was not based solely on the number of positive or negative answers recorded on a sheet of paper by those reviewing the proposals," but instead "based upon a comprehensive review of the entire . . . proposal and then compared with the other proposals that had been submitted." AR Vol. 79, at 025457. For instance, "[m]any evaluation teams felt [AmeriHealth's] response for their particular section was poorly organized which made it difficult to evaluate the responses to the specific RFP requirements." AR Vol. 2, at 000763; *see also* Vol. 79, at AR 025457.

50(R59). As a result of that holistic evaluation, "[i]t was determined the other proposals received were better suited to address the issues and challenges facing the State of Kansas" than AmeriHealth's. AR

Vol. 79, at 025458. "[T]he consensus of the PNC and agency review teams . . . was to not bring AmeriHealth Caritas forward" for face-to-face presentations before the PNC. AR Vol. 79, at 025458.

51(R60). "Amerigroup appeared before the PNC and agency review teams on May 10, 2018." AR Vol. 79, at 025382.

52(R61). "On May 11, 2018, after completion of all the presentations by the four (4) remaining bidders, the PNC and agency review teams discussed the remaining bidders and their proposals." AR Vol. 79, at 025382.

53(R62). "KDHE and KDADS Leadership were unanimous in the decision to not continue bid award discussions with Amerigroup." AR Vol 2, at 000767. "Amerigroup was an emphatic no from everyone" on the PNC. AR Vol. 77, at 024789 (05/11/18 Email from A. Waters to T. Diel). The PNC therefore "determined that it was not in the best interest of the State to offer Amerigroup a contract." AR Vol. 79, at 025386.

54(R70). On May 4, 2018, the Kansas Legislature passed House Substitute for Senate Bill No. 109 (hereinafter, "SB 109"). *See* SB 109, *available at* http://www.kslegislature.org/li/b2017_18/measures/documents/sb109_enrolled.pdf.

55(R71). On May 15, 2018, the governor signed SB 109. *See* Message from the Governor Regarding House Substitute for Senate Bill 109 (approving SB 109), *available at* http://www.kslegislature.org/li/b2017_18/measures/documents/sb109_enrolled.pdf.

56(R63). RFP § 6.6.C.2 notified offerors that:

> After the CONTRACTOR(S) submits their proposals, the State Evaluation Committee will conduct an evaluation of all proposals received. . . . The result of this first round of proposal evaluations is the invitation of selected CONTRACTOR(S) to appear before the Procurement Negotiating Committee (PNC) and the State Evaluation Committee for negotiations, demonstrations, and/or Discovery Sessions. The exact nature of these demonstrations and/or sessions will be specified in the invitation.

> Appearance before the PNC is discussed in RFP Section 1.5.

AR Vol. 5, at 001664. RFP § 1.5 stated that:

> Any, all or no bidders may be required to appear before the PNC to explain the bidder's understanding and approach to the project and/or respond to questions from the PNC concerning the proposal; or, the PNC may award without conducting negotiations, based on the initial proposal. The PNC reserves the right to request information from bidders as needed. If information is requested, the PNC is not required to request the information of all bidders.
>
> Bidders selected to participate in negotiations may be given an opportunity to submit a revised technical and/or cost proposal/offer to the PNC, subject to a specified cut off time for submittal of revisions. . . .

AR Vol. 5, at 001405.

57(R64). "After all the technical proposal evaluations and cost proposal evaluations were completed, the PNC requested that four (4) vendors be brought in for face-to-face presentations and

discussion on May 10 and 11, 2018": Amerigroup, UnitedHealthcare, Sunflower and ABHK. AR Vol. 79, at 025382, 025453; *see also* AR Vol. 2, at 000767. "This decision eliminated two (2) bidders from further consideration": AmeriHealth and WellCare. AR Vol. 79, at 025382, 025453; *see also* AR Vol. 2, at 000767.

58(R65). "The decision as to which vendors from whom to request presentations was not based solely on the number of positive or negative answers recorded on a sheet of paper by those reviewing the proposals," but instead "based upon a comprehensive review of the entire . . . proposal and then compared with the other proposals that had been submitted." AR Vol. 79, at 025457. For instance, "[m]any evaluation teams felt [AmeriHealth's] response for their particular section was poorly organized which made it difficult to evaluate the responses to the specific RFP requirements." AR Vol. 2, at 000763; *see also* Vol. 79, at AR 025457.

59(R66). As a result of that holistic evaluation, "[i]t was determined the other proposals received were better suited to address the issues and challenges facing the State of Kansas" than AmeriHealth's. AR Vol. 79, at 025458. "[T]he consensus of the PNC and agency review teams . . . was to not bring AmeriHealth Caritas forward" for face-to-face presentations before the PNC. AR Vol. 79, at 025458.

60(R67). "Amerigroup appeared before the PNC and agency review teams on May 10, 2018." AR Vol. 79, at 025382.

61(R68). "On May 11, 2018, after completion of all the presentations by the four (4) remaining bidders, the PNC and agency review teams discussed the remaining bidders and their proposals." AR Vol. 79, at 025382.

62(R69). "KDHE and KDADS Leadership were unanimous in the decision to not continue bid award discussions with Amerigroup." AR Vol 2, at 000767. "Amerigroup was an emphatic no from everyone" on the PNC. AR Vol. 77, at 024789 (05/11/18 Email from A. Waters to T.

Diel). The PNC therefore "determined that it was not in the best interest of the State to offer Amerigroup a contract." AR Vol. 79, at 025386.

63(R81). On May 16, 2018, the PNC recommended that awards be made to UnitedHealthcare, Sunflower, and ABHK. AR Vol. 79, at 025382. 025453; *see also* AR Vol 2, at 000767-000768.

64(R82). Following enactment of Section 118, Respondents determined that the final text of the bill did not warrant any RFP amendment:

> The contracts that were awarded . . . were reviewed in consultation with the State agencies involved in utilizing these contracts. This review . . . found the contracts . . . are consistent with the RFP . . . and the requirements outlined in House Substitute for Senate Bill No. 109, Section 118. . . . The contract does not provide for implementation of new program features which are different than those available on January 1, 2018, when the new contract takes effect on January 1, 2019.

AR Vol. 79, at 025386; *see also* AR Vol. 79, at 025456 (same).

65(R83). The contracts with UnitedHealthcare,

Sunflower, and ABHK were awarded on June 18, 2018 and executed by the State on June 22, 2018. AR 025381. "[T]he contracts were posted to the Officer of Procurement and Contracts - Department of Administration (OPC) website and were available to the public on June 23, 2018." AR Vol. 79, at 025381, 025452. The contracts have a three-year base period and two one-year option periods. *See, e.g.*, AR Vol. 78, at 025320 (06/26/18 UnitedHealthcare Contract Addendum, clarifying that contract term is "three (3) years with the option to renew for two (2) additional twelve (12) month periods"); *see also* AR Vol. 79, at 025386, 025456.

66(R84). The contracts state that four of the RFP § 5.19 Member Independence Initiatives, including work requirements, "will not be implemented January 1, 2019," when the delivery of services begins under the contracts. *E.g.*, AR Vol. 1, at 000034 (UnitedHealthcare Contract § 2.7).

67(R85). The contracts also show that the potential use of Community Service Coordination remains in the planning stages, and will not be implemented on January 1, 2019. They state: "The State will develop the following strategies, no later than April 1, 2019, in collaboration with the CONTRACTOR[:] . . . Service Coordination Strategy[.]" *E.g.*, AR Vol. 1, at 000035 (UnitedHealthcare Contract § 2.11).

68. **The Court adopts Exhibit A, as attached to the brief of Intervenor Sunflower State Health Plan, Inc., as a fair, reasonable, and accurate rendition and timeline of events to this point in time. (Intervenor Sunflower State Health Plan, Inc.'s August 28, 2018 Combined Memorandum in Opposition to Amerigroup Kansas, Inc.'s Memorandum of Law in Support of Temporary and Permanent Injunction and AmeriHealth Caritas Kansas, Inc.'s Motion and Combined Memorandum in Support of a State of Agency Action and For Injunctive Relief.**

69(R72). Section 118 of the bill stated that Respondents shall not expend appropriated funds "to

submit or maintain to the United States centers for medicare and medicaid services [("CMS")] any request to administer or provide state medicaid services under the Kansas medical assistance program . . . in any manner that is substantially different than the manner in which state medicaid services . . . were provided on January 1, 2018." AR Vol. 78, at 025233 (SB 109, § 118).

70(R73). Section 118 identified only one specific "substantial difference": "imposing any new eligibility requirements or limitations to receive such services," like work requirements, "without express prior authorization by an act or appropriation act of the legislature." AR Vol. 78, at 025233 (SB 109, § 118).

71(R74). However, Section 118 permitted Respondents to prepare for work requirements, as long as Respondents did not actually "implement such requirements" unless the Legislature approved them. AR 025233 (SB 109, § 118). Section 118 stated that KDHE

"may negotiate with [CMS] . . . for the implementation of work requirements to receive state medicaid services, including submitting a waiver request to the United States centers for medicare and medicaid services, but shall not implement such requirements . . . without prior express authorization by an act or appropriation act of the legislature." *Id.*

72(R75). Section 118 also stated that KDHE and KDADS "may modify the manner in which state medicaid services were provided on January 1, 2018, by implementing" — among other things — "any policy that expands access to behavioral health services or services delivered through telehealth technology services." AR 025233 (SB 109, § 118).

73(R76). Section 118 applies only to fiscal years 2018 and 2019. AR 025233 (SB 109, § 118). Fiscal year 2019 ends on June 30, 2019. *See* K.S.A. 75-3002 ("The fiscal year in this state shall commence on the first day of July in each year, and close on the thirtieth day of June next succeeding.").

74(R24). **In explaining later to a legislative committee what the Respondent agencies had done and why,** Kansas Medicaid Director and Director of the KDHE Division of Health Care Finance Jon Hamdorf testified to the Bethell Joint Committee on Home & Community Based Services & KanCare Oversight that, after he "came into the role at the end of last year" — meaning late 2017 — he "heard three things" from the Legislature regarding the KanCare program:

> I heard, number one, we have potentially a new administration coming in next year. How can we make this procurement flexible so that whoever comes in, there is flexibilities to alter this program without locking them into five years, I felt we have done that.
>
> Both the contract, the 1115 waiver, as we are negotiating now with CMS as well as with the awarded bidders, are all for three years, with two one-year extensions. All of them can be terminated at any point in time. We can amend things, we can change things. So there is flexibility.
>
> Second thing I heard is this is going to be way too expensive. So in regard to that, all the different programs that were identified as cost

drivers have been moved out. Their implementation date would not be until 7/1/19 or later. This gives the legislature an opportunity to listen to all of these during the next session, and decide whether or not we are going to implement these. These would be things like service coordination; there would be things like work requirements, things like our MediKan initiatives, things like work opportunities to people with disabilities. I wanted to push all of those decisions out until you guys had a chance to listen to what the program would be like, and give your blessing. So we moved that [out].[1]

The third thing I heard is work requirements. And let's face it, I am just as happy as you that we are not implementing those 1/1 because we are not ready for it. Plus, we need to figure out what that's going to look like from the State. Who are we are going to impose these on, what's pliable to us and not. CMS needs to figure out what they want nationally when it comes to work requirements. And I think these are still things being discussed. But once again, that's something else that's not going live 1/1.

. . . .

So I guess my statement is, on this, . . . I felt that you did not want me to lock us into a long-term

[1] Amerigroup's transcription says "up," but the recorded testimony is "out."

> contract, you did not want me to implement expensive parts of the program, and you did not want me to do work requirements. All those things are done.

Amerigroup Trial Ex. **[ ] 49** at 7-11 (Excerpt of Aug. 20, 2018 Proceedings Before Robert G. (Bob) Bethell Joint Committee on Home & Community Based Services & KanCare Oversight).

75(R77). As noted in **[ ] no. 74 (r24)** above, Director Hamdorf testified that he understood that the Legislature did not want Respondents to proceed with work requirements or Community Service Coordination, so Respondents took steps to "push all of those decisions out until you guys had a chance to listen to what the program would be like, and give your blessing." Amerigroup Trial Ex. **[ ] 49** at 8.

76(R78). Director Hamdorf also testified: "The one thing I did not hear from anybody is, John [*sic*], we want you to do nothing. We want you to identify problems and not take any action." *Id*. at 9.

77(R79). Director Hamdorf testified:

> So I guess we can argue, nickel and dime in the courtrooms with the attorneys going back and forth, whether improving network adequacy is a violation of what your intentions were. I don't think those were your intentions.

Id. at 11. He also testified: "We have to implement CMS regulations that we are required to do. Well, guess what, that will change our program from 1/1. It's not exactly the same." *Id.* at 10.

78(R149). Amerigroup's protest **made June 29, 2018** raised only the following claims:

a. It alleged that Section 118 of SB 109 required Respondents "to implement a KanCare program reflective of the program as it existed on January 1, 2018," and prohibited any and all changes to that program not specifically authorized by Section 118. AR Vol. 79, at 025327. Amerigroup's protest identified only **two [ ]** "significant change**s** [ ]" that the RFP allegedly made to the KanCare program as it existed on January 1, 2018: "a work

requirement and lifetime cap on benefits for some recipients." AR Vol. 79, at 025326.

b. It alleged that the contracts awarded materially deviated from the terms of the RFP. AR Vol. 79, at 025329-025332.

c. It alleged that Respondents improperly did not issue a Notice of Award before executing the contracts. Vol. 79, at 025332-025333.

79(R150). On July 19, 2018, AmeriHealth filed an administrative protest. AR 025390-408. The protest cited several of the documents posted by KDOA on June 28, including ABHK's proposal and the evaluation. *See, e.g.*, AR Vol. 79, at 025403 (citing "Technical and Cost Evaluation, at 8"); *id.* at 025404 (describing a "review of the Aetna proposal").

80(R151). AmeriHealth's protest raised only the following claims:

a. It alleged that Section 118 "direct[ed] the agencies to implement a KanCare program reflective of the program as it existed on

January 1, 2018. . . .” AR Vol. 79, at 025393. AmeriHealth’s protest identified only **two [ ]** “significant change**s [ ]**” that the RFP allegedly made to the KanCare program as it existed on January 1, 2018: “a work requirement and lifetime cap on benefits for some recipients.” AR Vol. 79, at 025392.

b. It alleged that the contracts awarded materially deviated from the terms of the RFP. AR Vol. 79, at 025395-0253400.

c. It alleged errors in fours aspects of the evaluation of proposals: (1) Attachment H; (2) grievances and appeals; (3) service coordination; and (4) culturally competent care. AR Vol. 79, at 025401-025407.

81(P22). Following announcement of the contract awards, both Amerigroup and AmeriHealth Caritas timely filed protests with KDOA and argued, among other things, that Respondents’ actions to award the contracts were *ultra vires* because the actions were

contrary to the Omnibus Budget Law's requirements, and violated established procurement law. Amerigroup Ex. 1(g); Record Vol. 78 at 25240-308; Record Vol. 79 at 25390-413 (AmeriHealth Caritas Protest). The essence of these arguments was that both the Omnibus Budget Law and Kansas procurement law required Respondents to alter the KanCare 2.0 RFP, negotiate with the vendors regarding the revised RFP and afford the vendors the opportunity to submit revised technical and cost proposals for the altered services, and then evaluate the proposals and award the contracts on the basis of evaluation criteria for services that are not substantially different from the KanCare services provided as of January 1, 2018.

82(P23). The Amerigroup protest also challenged the Respondents' failure to comply with the RFP provisions, most notably their attempt to avoid a stay and evade meaningful review by executing the contracts *before* issuing the Notice of Intent to Award. Finally, the Amerigroup protest reserved the right to raise

additional arguments once Respondents provided documents related to the procurement sought via Amerigroup's then pending public records request. **None were ever subsequently advanced to Director Diehl.**

83(R152). Also on July 19, 2018, Amerigroup filed its Petition with this Court. 07/19/18 Amerigroup Petition. On July 24, 2018, Amerigroup filed a motion for a temporary restraining order and a temporary injunction. On July 30, 2018, Director Diel issued a decision denying the claims raised in Amerigroup's administrative protest. AR Vol. 79, at 025381-025388.

84(P24). The AmeriHealth Caritas protest also challenged the awarded contracts based on the fact that Section 2.2 of the contracts changed the goals of the procurement. Record Volume 79 at 25397-99. AmeriHealth Caritas also argued that Respondents, in an apparent effort to comply with Section 118, improperly attempted, but in fact failed, to remove from the awarded contracts the KanCare 2.0 RFP provisions as mandated by Section 118. Finally, AmeriHealth Caritas

challenged multiple aspects of Respondents' evaluation of its proposal, including the weakness the evaluators assessed for Data Collection and Reporting due to AmeriHealth Caritas' failure to include an attachment (known as Attachment H) that the RFP instructed offerors not to include in their proposals. *Id.* at 25401-02. Like Amerigroup, AmeriHealth Caritas reserved the right to assert additional grounds of protest or support for previously asserted grounds based on receipt, review, and analysis of documents. None were ever subsequently advanced before Director Diehl rendered his decision on the protest.

85(R155). On August 16, 2018, Director Diel issued a decision denying the claims raised in AmeriHealth's administrative protest. AR Vol. 79, at 025452-025459.

86(P25). Procurement Director Diel decided both protests, and denied any error by Respondents. In making these decisions, Procurement Director Diel was at least in part reviewing the propriety of his own

actions because as identified above **Petitioners'** (¶¶ 9, 12-13), he had previously been consulted regarding whether Respondents would be required (a) to revise the KanCare 2.0 RFP if the legislation scaled back the Medicaid program to KanCare 1.0, and (b) to provide the vendors an opportunity to submit revised technical and cost proposals. Both of these issues were central to the protests. In internal correspondence near the end of the procurement, Procurement Director Diel recognized the **arguable** impropriety of his reviewing the same actions that he had been involved in, admitting on May 31, 2018, that "my involvement should be limited in the event there is a protest." Amerigroup Ex. 16; Record Vol. 74 at 23880.

CONCLUSIONS OF LAW:

Each case comes to this Court for an appeal under the Kansas Judicial Review Act, K.S.A. 77-601 *et seq.* and each Petitioner filed its KJRA statutory grounds for relief in identical fashion:

> "Based on the limited records made available as of the date of this filing and on

> the facts more specifically alleged above, [Amerigroup/AmeriHealth] has identified the following grounds for relief under K.S.A. 77-621(c):
>
> (a) Respondents acted outside the bounds of the statutory authority conferred by the Kansas Legislature. K.S.A. 77-621(c)(2).
> (b) The Agency Action was executed under an erroneous interpretation or application of Kansas law. K.S.A. 77-621(c)(4).
> (c) Respondents engaged in an unlawful procedure or otherwise failed to follow prescribed procedure. K.S.A. 77-621(c)(5).
> (d) The Agency Action was based on a determination of fact not supported by substantial competent evidence. K.S.A. 77-621(c)(7).
> (e) The Agency Action is otherwise unreasonable, arbitrary, or capricious. K.S.A. 77-621(c)(8).”

Amerigroup’s *Verified Petition for Judicial Review*, p. 17; AmeriHealth’s *Verified Petition for Judicial Review*, pps. 18-19.

By a *Verified Supplemental Pleading Amending Verified Petition for Judicial Review* filed August 27, 2018 Amerigroup claimed an entitlement to review pursuant to K.S.A. 77-617 and for discovery and the

presentation of additional evidence pursuant to K.S.A. 77-619.

K.S.A. 77-617 provides:

> "A person may obtain judicial review of an issue that was not raised before the agency, only to the extent that:
>
> > (a) The agency did not have jurisdiction to grant an adequate remedy based on a determination of the issue;
> > (b) the agency action subject to judicial review is a rule and regulation and the person has not been a party in adjudicative proceedings which provided an adequate opportunity to raise the issue;
> > (c) the agency action subject to judicial review is an order and the person was not notified of the adjudicative proceeding; or
> > (d) the interests of justice would be served by judicial resolution of an issue arising from:
> >
> > > (1) A change in controlling law occurring after the agency action; or
> > > (2) agency action occurring or first reasonably knowable to the person after the person exhausted the last feasible opportunity for seeking relief from the agency."

K.S.A. 77-619 provides:

“(a) The court may receive evidence, in addition to that contained in the agency record for judicial review, only if it relates to the validity of the agency action at the time it was taken and is needed to decide disputed issues regarding:

(1) Improper constitution as a decision-making body; or improper motive or grounds for disqualification, of those taking the agency action; or
(2) unlawfulness of procedure or of decision-making process.

(b) The court may remand a matter to the agency, before final disposition of a petition for judicial review, with directions that the agency conduct fact-finding and other proceedings the court considers necessary and that the agency take such further action on the basis thereof as the court directs, if:

(1) The agency was required to base its action exclusively on a record of a type reasonably suitable for judicial review, but the agency failed to prepare or preserve an adequate record;

(2) the court finds that (A) new evidence has become available that relates to the validity of the agency action at the time it was taken, that one or more of the parties did not know and was under no duty to discover, or did not know and was under a duty to discover but could not reasonably have discovered until after the agency action, and (B) the interests of justice would be served by remand to the agency;

> (3) the agency improperly excluded or omitted evidence from the record; or
>
> (4) a relevant provision of law changed after the agency action and the court determines that the new provision may control the outcome."

Amerigroup's *Supplemental Verified Petition* claims related, first, to an allegation than the selection of Aetna Better Health of Kansas, Inc. as a winning bidder was aided and induced from an Aetna hire in July, 2017 of an individual whom Amerigroup alleged was involved in developing the request for proposal (RFP) for the 2019 managed care contracts to be awarded, hence, alleging improper Aetna insider insight into the bid selection standards or emphasis and a failure of agency oversight such as to constitute, it claims, a flawed agency decision making procedure reviewable as a new issue under K.S.A. 77-617(d)(2) and a basis for allowing additional evidence pursuant to K.S.A. 77-619(a)(1) or (2) in aid of claiming a violation of K.S.A. 77-621(c)(5). A second claim arising in that supplemental verified petition pleading was that Tracy

Diehl, the Department of Administration's Director of Procurement and Contracts, should have been conflicted out of deciding its bid protest, as he participated in determining the winning bidders.

Amerigroup requested discovery in order to take that Aetna employee's deposition, but it never came to fruition, which result the Court will discuss later. Additionally, Amerigroup asked to propound certain interrogatories and requests for production to the Respondent, Kansas Department of Administration, to which the Respondent consented, and, of which, the Court heard no further. Further, the Amerigroup Petitioner wished to take the deposition of Jon Hamdorf, the Director of Heath Care Finance, an employee of the Kansas Department of Health and Environment, the agency that oversees Medicaid for the State of Kansas. The need for his deposition was agreeably mooted by the Respondents' securing recordings of Mr. Hamdorf's oral testimony to the

legislature in 2018 regarding Amerigroup's subject of inquiry *in lieu*.

In all other regards no additional discovery was sought under the auspices of the authority of K.S.A. 77-617(d)(1) or (2) or K.S.A. 77-619(a)(1) or (2) and as interpreted in *Sierra Club v. Moser,* 298 Kan. 22, 36-39 (2013). Additionally, however, given the KJRA appeals were presented for merit review in the context of a hearing held on both Petitioners' applications for temporary and permanent injunctions, the Court found the admission of additional evidence beyond the certified agency records or as would otherwise be appropriate by virtue of K.S.A. 77-617(d)(1) or (2) or K.S.A. 77-619(a) or (b), would be admissible as going to the issue of the appropriateness of injunctive relief if Petitioners, or either of them, succeeded on the merits of their KJRA claims in whole or in part, particularly as such evidence would be directed to weighing harm to Petitioners versus the harm to Respondents, including Intervenors, or the public,

under the necessary factors to be considered for an entitlement to injunctive relief. *See Downtown Bar & Grill, LLC v. State,* 294 Kan. 188, 191 (2012).

Otherwise, because these cases gain foothold only by way of the *Kansas Judicial Review Act,* it is the agency record which establishes the sole basis for merit review, subject only as may be supplemented by such noted additional evidence. Thus, except as noted, the issues raised come before the Court for review only as questions of law, which would include therein any matters clearly identified as subject to judicial notice and of which the parties would be aware and which can be said to be inherently embedded in that agency record. Because the agency record consisted of 77 Volumes, consisting of over 25,000 pages, the Court has continually emphasized the need for specificity in citation to the record. Further, and thus to identify the issues and evidence believed of merit, much as would be the requirement in reviewing summary judgment motions, post hearing the parties were directed to file

proposed findings of fact so identified as well as conclusions of law. As such the Court considers either the omission of identified facts and their tie, if required, to the record or the omission of argument by a proponent as subject to a waiver of review.

The Court, in its analysis and rulings following under *Conclusions of Law* will first identify the challenge made by a particular Petitioner; its reviewability first determined from its individual bid protest, which ruling thereon by the Director of Procurement and Contracts, represents the culmination of the agency's administrative process; then from that beginning template of review, those issues prescribed by the specified petitions for review, including any identified as proper additional issues or otherwise remedy related; the Court's discussion or view of the efficacy of that challenge; and therein or thereafter may identify facts with particular relevance to that conclusion by reference either to Petitioner's jointly proposed findings of fact, those findings of fact

jointly proposed by the Respondents and Intervenors, or as otherwise identified by the Court from the agency record or other available proper source.

This review must begin with a reminder of the proscriptions on Court review under the Kansas Judicial Review Act. The Kansas Judicial Review Act (KJRA), K.S.A. 77-601 *et seq.*, controls the Court's review of agency actions. K.S.A. 77-621(c) limits the Courts authority to grant relief under a petition for review to certain enumerated situations, as follows:

> (c) The court shall grant relief only if it determines any one or more of the following:
>
> (1) The agency action, or the statute or rule and regulation on which the agency action is based, is unconstitutional on its face or as applied;
> (2) the agency has acted beyond the jurisdiction conferred by any provision of law;
> (3) the agency has not decided an issue requiring resolution;
> (4) the agency has erroneously interpreted or applied the law;
> (5) the agency has engaged in an unlawful procedure or has failed to follow prescribed procedure;
> (6) the persons taking the agency action were improperly constituted as a

> decision-making body or subject to disqualification;
> (7) the agency action is based on a determination of fact, made or implied by the agency, that is not supported to the appropriate standard of proof by evidence that is substantial when viewed in light of the record as a whole, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this act; or
> (8) the agency action is otherwise unreasonable, arbitrary or capricious.

An agency's interpretation or application of law is subject to de novo review by the Court. *Redd v. Kansas Truck Center*, 291 Kan. 176, 187, 239 P.3d 66, 75 (2010). A reviewing court has unlimited review over questions of law. *Villa v. Kansas Health Policy Auth.*, 296 Kan. 315, 323, 291 P.3d 1056 (2013). Moreover, "an agency's interpretation of a statute or regulation is not afforded any significant deference on judicial review." 296 Kan. at 323.

The Kansas Court of Appeals has stated that the tests under K.S.A. 77-621(c)(7) and (c)(8) "mean different things", specifically,

> A challenge under [K.S.A. 77-621(c)(8)] attacks the quality of the agency's reasoning.

> [Citations omitted.] Although review must give proper deference to the agency, its conclusion may be set aside—even if supported by substantial evidence—if based on faulty reasoning. A challenge under [K.S.A. 77-621(c)(7)] attacks the quality of the agency's fact-finding, and the agency's conclusion may be set aside if it is based on factual findings that are not supported by substantial evidence.

In re Protests of Oakhill Land Co., 46 Kan. App. 2d 1105, 1115, 269 P.3d 876 (2012).

"A rebuttable presumption of validity attaches to all actions of an administrative agency." *In re Tallgrass Prairie Holdings, LLC*, 50 Kan. App. 2d 635, 659, 333 P.3d 899 (2014). Under K.S.A. 77-621(a), the burden of proving the invalidity of an agency action rests with the party asserting invalidity. The Court's review of an agency action is not de novo, and the Court may not reevaluate evidence or substitute its own judgment for that of an administrative agency; it may only "consider all of the evidence—including evidence that detracts from an agency's factual findings—when [it assesses] whether the evidence is substantial enough to support those findings." *Herrera-Gallegos v.*

H&H Delivery Service, Inc., 42 Kan.App.2d 360, 363, 212 P.3d 239 (2009); see also *Coonce v. Garner*, 38 Kan. App. 2d 523, 531, 167 P.3d 801 (2007). In reviewing an administrative agency's action for substantial evidence, the Court is mindful that substantial evidence "is such evidence as a reasonable person might accept as being sufficient to support a conclusion." *Kotnour v. City of Overland Park*, 43 Kan. App. 2d 833, 837, 233 P.3d 299 (2010). However, when reviewing an agency decision, the Court should examine whether the evidence supporting the agency's decision has been so undermined by other evidence that it is insufficient to support the agency's decision. *Lake v. Jessee Trucking*, 49 Kan. App. 2d 820, 836, 316 P.3d 796 (2013).

A district court evaluates a claim that an agency has acted arbitrarily, capriciously, or otherwise unreasonably under a slightly different standard:

> An agency's decision is arbitrary and capricious if it "is so wide of the mark that its unreasonableness lies outside the realm of fair debate." Combined. [Citation omitted.] An agency's action is arbitrary and capricious if it is unreasonable,

> without foundation in fact, not supported by substantial evidence, or without adequate determining principles.

Denning v. Johnson Cty., Sheriff's Civil Serv. Bd., 46 Kan. App. 2d 688, 701, 266 P.3d 557 (2011) *aff'd sub nom. Denning v. Johnson Cty.*, 299 Kan. 1070, 329 P.3d 440 (2014).

Next the Court would emphasize three evidentiary head winds that Petitioners face here in challenging agency action. The first, as noted above, are restrictions on an issue's reviewability or the evidence available for review and the Court's consideration of it.

Second are the procedural requirements allowing for review, examples, as relevant here, being a necessity to raise an issue before the agency in order to preserve the issue and make it subject to Court review, which is a corollary of the principle of exhaustion of administrative remedies. *Kingsley v. Kansas Dept. of Revenue*, 288 Kan. 390, 410 (2009). Of course, the latter corollary component is secondary to actual

jurisdiction in the Court overall to review, which requires exhaustion generally. *See* K.S.A. 77-612; *Expert Environmental Control, Inc.* v. *Walker*, 13 Kan.App.2d 56, 58 (1988). Further, *see* Respondents' Proposed Conclusions of Law.

Third, under the KJRA the burden of proof is on the one challenging the agency. K.S.A. 77-621(a)(1). This burden arises in support of the presumption of validity that attaches to all agency actions. *Kan. Racing Mgmt., Inc. v. Kan. Racing Comm.*, 244 Kan. 343, 365 (1989). A corollary to this is a presumption that public officers, "great or small, will exercise their express and implied powers fairly and honestly" (*State, ex rel. Parker v. Kansas City*, 151 Kan. 2, 10 (1940)); are presumed to have done so "regularly and lawfully", that is, "rightfully done" (*Cahill-Swift Mfg. Co. v. Hayes*, 98 Kan. 269, 270 (1916)); and are operating "from good motives, and with the purpose and intention of obeying the law" (*Lewis v. City of South Hutchinson,* 162 Kan. 104, 120 (1946).

Here, as Petitioners each fundamentally challenge the Respondent agencies' compliance with Kansas law, two principles apply that primarily impact the position of Respondents and Intervenors. The first is that legislative enactments carry a strong presumption of constitutionality and that there is an obligation on the Court to construe a law as constitutional if it is reasonable to do so consistent with its legislative intent. *Brennan v. Kansas Insurance Guaranty Ass'n,* 293 Kan. 446, 450 (2011); *State, ex rel. v. Shanahan,* 178 Kan. 400, 403-404 (1955).

The second is that the legislature's power of the purse and its appropriation power is capable of exacting detail in some instances, without offending either the "logrolling" proscription of Art. 2, § 16 of the Kansas Constitution, where the invalidity must be "manifest" (*KPERS v. Reimer & Koger Assocs., Inc.*, 262 Kan. 635, 676 (1977)), or the Kansas Constitution's embedded principle of the separation of powers. (*Manhattan Bldgs., Inc. v. Hurley,* 231 Kan. 20 (1982)).

However, the power of the purse in the legislature has its limits. *See State ex rel. Stephen v. Carlin,* 230 Kan. 252 (1981); *Kansas Bldg. Industry Workers Comp. Fund v. State*, 302 Kan. 656 (2015).

A review of the respective *Verified Petitions*, Amerigroup's as amended, reflects a divergence in the basis for claims as between Petitioner Amerigroup and Petitioner AmeriHealth. This divergence, most probably, arises from each's respective exit point in the bidding process, as AmeriHealth earned no second phase "face to face" interview, while Amerigroup did. Petitioner Amerigroup's petition is keyed to the assertion that § 118 of Omnibus appropriation bill (House Substitute for SB109, L. 2018, ch. 109, § 118), which s*ection* spoke to the new KanCare contracts to be awarded, was not complied with, which necessarily must carry with it, if true, the inference that had the Respondent agencies complied with § 118, Amerigroup would have been able to advance a winning proposal. This is an argument co-existing with Amerigroup's

additional argument that the contracts awarded are subject to being set aside because the Respondents' failure to comply was an *ultra vires* act, that is, entering into contracts with the respective Intervenors they were *not empowered* to make. *Hecht v. City of Topeka,* 296 Kan. 505, 509 (2013). If so, inquiry into these contract's validity on any other basis is not required. *Genesis Health Club, Inc. v. City of Wichita,* 285 Kan. 1021, 1043 (2008). Absent from Amerigroup's *Verified Petition*, *as amended*, is any claim that it did not understand the bid terms or the bidding procedure it actually engaged in or that the evaluation of its bid in regard to the specific terms of the RFP bid upon was misevaluated, or that, as between bidders, it was unfairly disadvantaged, excepting only its claim Aetna was advantaged, and the State amiss in its oversight, in Aetna's hire of a certain employee. Petitioner AmeriHealth follows essentially the same pattern in regard to the lawfulness of the bid procedure and contracts awarded

in light of § 118 of the 2018 Omnibus appropriation bill. Petitioners' joint submission of proposed findings of fact at proposed facts No. 102 and No. 103 affirm this omission was intentional:

> "102. The issue before the Court, however, is not whether each vendor was treated the same. Rather, the issue before the Court is whether the Respondents' actions—whether the same for all vendors—complied with the Omnibus Budget law and Kansas procurement law. Respondents' violation of the Omnibus Budget Law and Kansas procurement law is not excused by Respondents treating all vendors the same in conjunction with the violations.
>
> 103. During his cross-examination, counsel for Aetna asked Ms. Sherry to concede that AmeriHealth Caritas had been given an opportunity to submit a proposal based on the same information possessed by other offerors. Tr. at 216:2-24. Although the vendors were provided similar information throughout the RFP process, Amerigroup's and AmeriHealth Caritas' claims are not focused on a purported unfairness associated with what was known on January 5, 2018, when vendors submitted their proposals. Instead, the claims center on Respondents' legal obligations months later, when Section 118 of the Omnibus Budget Law was enacted and its requirements were imposed on Respondents. Even if the procurement process leading up to submission of proposals had been 'fair' (with offerors treated 'the same' at that time), that does not resolve Respondents' problem resulting from the fact that the vendors prepared and negotiated proposals, were evaluated and contracts awarded for the wrong

> set of requirements, *i.e.*, for parts of the KanCare 2.0 RFP that could not be included in the contract. Thus, Respondents' purported equal treatment of vendors does not remedy its *ultra vires* contract awards. Further, the Court notes that Respondents did not treat all vendors equally because at the conclusion of the procurement, Respondents communicated only with the awardees regarding which portions of KanCare 2.0 RFP would remain in, and which portions would not remain in, the contracts to be awarded."

However, AmeriHealth additionally goes on to describe why its bid would have carried more weight had a new RFP been issued. See AmeriHealth's *Verified Petition* at ¶¶ pps. 26-27. However, AmeriHealth also specifically challenged the agency's evaluation of its bid proposal in several respects. *Id.*; ¶¶'s 37-49.

DID ANY PETITIONER FAIL TO PRESERVE ISSUES BASED ON ITS RESPECTIVE BID PROTEST?

Addressing Petitioners' respective challenges first requires an inquiry as to whether either Petitioner failed to appropriately and timely present an issue through any procedures available in the administrative process. *See Kingsley, supra,* 288 Kan. at 410. First, generally it must be considered that neither Petitioner

can assert, nor has either asserted, it was unfairly or unequally denied information about what was required by the RFP that was issued or altered or amended nor was either denied an opportunity to inquire about any provision if doubt had been had.

Second would be the breadth and specificity of the protest identified in the administrative procedure available for protest. The Court can fairly find only one mutual shortfall in sufficiency by each Petitioner's respective protest versus their *Verified Petitions*, including Amerigroup's *Supplemental Verified Petition,* and one additional one in Amerigroup's *Supplemental Verified Petition* in regard to its claim regarding Director Diehl's participation in the bid protest procedure. This latter will be discussed independently later.

The mutual issue raised by both Petitioners that appears to lack the *Kingsley* specificity necessary to preserve review (288 Kan. at 410) related to their general claim that KanCare 2.0 differs KanCare 1.0,

hence violates § 118 of House Sub. For SB 109. However, § 118 only identifies, in part, the prohibitory threshold for changes in KanCare 1.0 from KanCare 2.0 which are “substantially different”. Both Petitioners’ bid protests only identified two changes as “significant”, those being “a work requirement and lifetime cap on benefits for certain recipients”. *See* Fact No. 86 (Amerigroup) and Fact NO. 88 (AmeriHealth). The work requirement was not part of the RFP for the purpose of pricing, that is, it was excluded from costing while the latter would involve a matter of costs only, hence entirely removed, both prior to bid closing. Thus, Petitioners’ arguments attacking other differences, other than on a basis they were merely “different”, rather than “substantially different”, deprived Director Diehl of the opportunity to address why any other change, but those noted by Petitioners, were “not” “substantially different”. In its briefing and by affidavit of Amerigroup’s CEO, it attached a chart of differences between KanCare 2.0 from KanCare

l.0 and designating the “Requirement Variance” of many either stating or implying the significance of any change. *See* Amerigroup’s August 17, 2018 *Memorandum of Law in Support of Temporary and Permanent Injunctions* at Exhibit 11 attachment.

The significance of failing to raise this aspect of the issue claimed in the administrative proceeding is that the Respondents are denied the evidential opportunity to counter the Petitioners’ assertions of significance to the changes now so identified by Petitioners in this Court proceeding, leaving them only to stand on the presumption that public officials comply with the law. Given the fact that the provisions of the RFP are highly specialized and technical, this omission of the record to include competent agency evidential comment or discourse as to in what way or degree a provision operates or impacts program services, *e.g.*, a better way to deliver the same service, was otherwise a needed enhancement, or was a CMS required change. While for reasons later to

be discussed, the Court does not believe this issue has any ultimate legal consequence in this proceeding, it, nevertheless, constitutes a serious jurisdictional omission and, but for the Court's ultimate resolution of this issue, would stand as a disqualification for a consideration of this aspect of review or, at least, operate as a bar to the proffer of additional evidence by the Petitioners had it been sought on this issue.

PETITIONER' AMERIGROUP'S CLAIM DIRECTOR DIEHL SHOULD NOT HAVE HEARD ITS BID PROTEST AND BOTH PETITIONERS' CLAIM OF ERROR OR BIAS IN HIS DENIAL OF EACH'S REQUEST FOR A STAY:

As to Director Diehl's essentially reviewing the correctness of decisions he participated in, the Court believes this issue is not subject to review because it was never raised to him in the administrative bid protest procedure. No request was made to him to disqualify himself and unquestionably the fact he would be the individual addressing a protest, if any, was well known beforehand. Of this, simply no question can exist, as indicated by Respondents' Statement of Facts Nos. 111-114, which the Court will not recite, but

adopts by reference only. Accordingly, the claim cannot be based on belated agency action or knowledge gained subsequent, ostensibly to be offered by way of K.S.A. 77-617(d)(2) as the basis for review or – on the basis asserted – grounds for offering additional evidence under K.S.A. 77-619(a)(1) or (2) or for remand under § (b)2. Further, no request for additional evidence in this regard was advanced.

Further, in the absence of a statutory restriction, the mere fact, without more, that a public official involved with, or making a decision to be reviewed, has been uniformly held to not to violate *Due Process* or stand as grounds for disqualification. *Pork Motel, Corp.* v. *Kansas Dep't of Health & Env't,* 234 Kan. at 374, 383-84 (1983); *Doe v. State Dep't of Human Res.,* 277 Kan. 795, 807-08 (2007); *Musselman & Hall Contractors v. Kan. Dep't of Transportation,* 2004CV1391 (Sh. Co. Dist. Ct. 2005). *Further see* Respondents' Proposed Conclusions of Law at Nos. 101-104. Simply, bias cannot be presumed in a procedure principally

permitted to enable public officials to correct their, or their associates, own errors, just as a motion to alter or amend a judgment before its effects might be felt, is directed to the Court entering the judgment.

Further, the fact Director Diehl invoked the discretion he was allowed by ¶ 3 of the bid protest procedure to avoid a stay, which bid protest procedure would, otherwise, have invoked a built in delay, cannot, in light of the timelines faced, be faulted. He was in error if he thought that would disqualify the bid protest, but, here, that is harmless error, at most. It is clear Director Diehl took up the respective bid protests in their entirety and did not solely reject them on a question of timeliness. As such, no error occurred nor can it serve as an indicia of bias, notwithstanding any thought of impropriety it might otherwise engender. Just looking at the time consumed here in these expedited Court proceedings - and given the procedural necessity for timely open enrollment for 2019 medicaid services, much less

securing federal approvals - are demonstrative that the mere grant of a stay at the time in question, all other factors being equal, might alone have defeated the procurement altogether, particularly, to the benefit of the incumbent providers, one of which was Petitioner Amerigroup, and purely on a non-merit issue. Further, there is no evidential basis for a reasonable belief that the entry of a stay would have altered the PNC's decisions to whom to award final contracts.

Further, both Petitioners assert that the RFP specifications prevented the Respondent agencies from entering into the contracts before it issued a Notice of Intent to Award. This is an incorrect interpretation of RFP § 6.6(c)(4), which states that "[o]nce a Notice of Intent to Award has been issued the CONTRACTOR(S) shall execute the final CONTRACT". This is but a mandate to the contract awardee(s), not a prohibition on an earlier signing if so agreed. As noted, the bid protest procedure at its ¶ 3 further

accommodates this discretion by allowing the Director to avoid a stay.

Accordingly, the Court believes Respondents' Proposed Facts at Nos. 115-119, which the Court would adopt by reference rather than by recitation here, speak the truth of the matter. Further, the Court finds the Respondents' Proposed Conclusions of Law at Nos. 105-110 clearly support this conclusion reached.

AMERIGROUP'S CLAIMS OF IMPROPER INVOLVMENT OR OVERSIGHT IN THE BIDDING PROCESS:

Petitioner Amerigroup claims that a former employee of Mercer, which was a State - hired consulting company to aid it in preparing the 2.0 KanCare RFP, became an employee of Aetna in November 2017 for the express purpose of assisting with Aetna's bid. The facts advanced by Amerigroup are shown in Nos. 28-36 of its Proposed Findings, which reflect the employee left Mercer's service on July 5, 2017 and that documents made available reflect that he was, perhaps, engaged in assisting in developing the RFP provisions. Further, the State requires its employees so involved to sign

non-disclosure agreements as well as consultant companies such as Mercer. Mercer signed one on behalf of the company and its employees. The employees listed to be encompassed within it did not include Mr. Schafer (Respondents' Proposed Findings of Fact at No. 109). The inference therefore is that Mr. Schafer was not involved. Petitioner Amerigroup also asserts that many of the State's own employees did not sign such agreements (Amerigroup Proposed Fact No. 139). Mr. Schafer's connection to any State employees is unknown and which employees of the twelve separate teams that evaluated the proposals is not disclosed. Whether Mercer employees were involved in evaluating the bidders is not established. The Respondent agencies did not preserve these evaluation results. Nevertheless, who did what and when in regard to the RFP, or subsequent, is not of record from any perspective.

The salience of the above is that Petitioner Amerigroup sought discovery in the form of

interrogatories and the production of documents, which the Respondent agencies and Amerigroup worked out without Court involvement. Presumptively, though the actual evaluation documents were destroyed, it would seem possible for the personnel involved to be identified through the Respondent agencies. The Court has not been advised whether Amerigroup included a request to specifically identify the names of the evaluators. Similarly worked out was the deposition of Mr. Hamdorf, the Director of Health Care Finance of KDHE.

Amerigroup also sought to take the deposition of Mr. Schafer, which became an issue of contest, by the filing of motions to quash. Further Respondents produced an affidavit of a Mercer employee, Ms. Falls, who was the project leader on the RFP work. She declared Mr. Schafer's noninvolvement with a new, or revised, RFP beginning from and after June 22nd, the date he announced his leaving, though he had worked on an earlier version. The Court did not grant the

deposition, but did leave the matter open, including in light of the information provided to the parties by Ms. Falls' affidavit. The Court's August 28th hearing to confirm discovery issues left the question of proceeding with any deposition thought still necessary, as follows:

> "THE COURT: Yeah. Well, I'm gonna – Mr. Gay, I'm gonna stick with that and not permit it here at this time. If it sticks its head up someplace and I think it's gonna affect the proceedings, or may have, then, we'll just take a break and let you do your depo."

(12/28/18 Hearing: TR p. 23, l. 23- p. 24, l.2).

On August 30th, the Court sent counsel an e-mail which proposed that any needed depositions be noticed up during the scheduled principal hearing September 5-6, with the obligation of the entity connected to the proposed deponent responsible for having the deponent present. While the e-mail was not well edited, the intent was clear. No counsel ever responded to this e-mail, no deposition notice for this period was re-filed, nor during the hearing was any mention made of any lack of discovery, missing witness, document, *et*

al. The Court has filed this e-mail as part of the record.

The Court's conclusion here is, given the long chain of discovery evidently that would be needed to tie this one remote ex-employee of Mercer to some substantive mis-doing benefiting Aetna or prejudicing Amerigroup, that any such claim was simply abandoned or passed over. While the Court would agree with Amerigroup that this issue and evidence in support of it could be brought forth under K.S.A. 77-617(d)(2) and K.S.A. 77-619(a)(1), or though (b)(2), it simply was not pursued on the known facts. The idea that the bid process was corrupted somehow through Mr. Schafer's employment subsequent by Aetna or that he maintained some cozy relationship with one or more members of some twelve separate employee evaluation teams, which may or may not have included some friend of his from Mercer, then, in turn, Mr. Schafer had impressed some biased view on evaluation team members that then went on to bias the PNC itself, is so remote as to rest firmly in

the realm of grand conspiracy and speculation. Otherwise, how an individual working on an RFP, or some precursor of it, could skew a bid based on terms all bidders could read stands unexplained, if explainable at all. Further, to skew an unfinished RFP in favor of one bidder would require both psychic ability and an even grander theory of conspiracy.

Accordingly, and based on the record submitted (Petitioners' Proposed Findings of Fact Nos. 28-36 and Respondents' Proposed Findings of Fact Nos. 105-110), the Court finds no basis to assert, or maintain, any claim affecting the bidding process, and that the discovery of any further evidential basis therefore was waived and abandoned by the Petitioner Amerigroup.

AMERIHEALTH'S CHALLENGE REGARDING EVALUATION OF ITS BID:

AmeriHealth claims it was "misevaluated" in several respects and unfairly so in relation to one successful bidder – Aetna. The Court notes that none of the facts proffered by it in its jointly proposed findings of

fact with Amerigroup relate to this aspect of its claim and can be seen, therefore, as abandoned.

Notwithstanding, the Court finds these claims cannot be substantively sustained to upset the awards made. AmeriHealth points to the fact that it was criticized for not submitting an *Attachment H* relating to data reporting and collection, although the Respondents had – earlier in response to a bidder question – been told Attachment H need not be submitted. AmeriHealth's Verified Petition, at ¶¶'s 37-39. Further, it cited failures in evaluation regarding its understanding of the difference between the grievance and appeal processes in the RFP (*Id.,* ¶¶'s 40-41), asserting it had identified that its response was in reference to the RFP definitions for those processes themselves, hence, the agency – by citing no example – misunderstood it to the extent the downgrade was arbitrary; that its proposal in regard to RFP Section 5 regarding member handbooks was evaluated unreasonably, however, that particular cited incidence

cannot be found as a documented basis for criticism by the MRT evaluation team (AR 000763); that comparing the evaluation of AmeriHealth's proposal for service coordination with that of Aetna reflects partiality and unequal treatment by the Respondent agencies (*Id.*, ¶¶'s 43-48) in that Aetna was graded "yes" and AmeriHealth "no" in terms of adequacy or quality of response. (AR 000759, 762, 763); and finally that its proposal in regard to "culturally competent care" was systemically expansive, and not "narrowly tailored" as Respondent's found (AR: 000763), hence, either not read or arbitrarily ignored. (*Id.* ¶¶'s 46-48). AmeriHealth's conclusion is that the mis–evaluations - or the unequal standards applied – in the evaluation process denied AmeriHealth its ability to reach the "face to face" level of the competitive sealed bid proposals process, instead, as a result, it was excised altogether from further consideration.

As to the merits of AmeriHealth's bid protest in this regard, there unquestionably appears to be error

in the agency in negatively evaluating the lack of submission of Attachment H, which, given the Respondent agencies' answer to question 249, which advised it was not necessary to submit it at that point, was an error. Notwithstanding that disconnect on this particular evaluation issue, this error – in light of the same negative evaluation error evident in all the final four, except Aetna, diminishes any view it alone would be a distinguishing factor or that, more probably than not, would have put AmeriHealth in the final four. Thus, this error, at least standing alone, rightly falls in the "harmless error" exception of K.S.A. 77-621(e).

This is further established by Director's Diehl's response to AmeriHealth's bid protest in reference to the significance of counting and comparing the number of "yes" v. "no" in the evaluation tally referenced in the record earlier. Director Diel said:

> "AmeriHealth Caritas through its review of the evaluation documents, which have been made available online, cites a discrepancy in positive answers swaying the decision to

eliminate it from making presentations to the PNC and agency review teams. The decision as to which vendors from whom to request presentations was not based solely on the number of positive or negative answers recorded on a sheet of paper by those reviewing the proposals. It was based upon a comprehensive review of the entire AmeriHealth Caritas proposal and then compared with the other proposals that had been submitted. Multiple evaluation teams comprised of staff from the agencies with the expertise and knowledge to understand the programs involved and the level of services to be provided were responsible for reviewing the proposals submitted by the bidders. These review teams used their review of the information provided and knowledge of the RFP to make their evaluations.

The review articulated issues with AmeriHealth Caritas's proposal which identified the AmeriHealth Caritas proposal as poorly organized and this lack of organization made it difficult to evaluate the proposal submitted. It is the responsibility of the bidder to provide a proposal which is understood and can be evaluated on its own. It is not the responsibility of the State to take a proposal received from a bidder and seek out additional explanations from the bidder to clarify their proposal. AmeriHealth Caritas's proposal was compared against the other proposals received. It was determined the other proposals received were better suited to address the issues and challenges facing the State of Kansas."

AR at 005457-58.

On AmeriHealth's bid component claims, the Court adopts the facts as set out in ¶¶'s 120-131 of the Respondents' Proposed Findings of Fact:

87(R120). AmeriHealth **[ ]** challenges four aspects of the State's evaluation of proposals.

88(R121). Respondents evaluated the offerors' proposed grievance and appeals processes. AR Vol. 2, at 000759; *see also* AR Vol. 5, at 001574 (RFP § 5.11), at 001033-001080 (RFP Attachment D). AmeriHealth presented a six-page description of its grievance and appeal processes. AR Vol. 30, at 009190-009196. The awardees' descriptions were substantially longer. *See* AR Vol. 48, at 016588-016672 (UnitedHealthcare); AR Vol. 41, at 014204-014221 (Sunflower); AR Vol. 14, at 004591-004606 (ABHK).

89(R122). The State concluded that AmeriHealth "[f]ailed to understand the difference between a grievance and an appeal and did not describe policies and procedures for the grievance and appeals process." AR Vol. 2, at 000763. **The Court concludes the**

rendition by AmeriHealth was in fact declaratory, not explanatory (AR 009190-009196).

90(R123). Respondents also evaluated the offerors' ability to address requirements relating to service coordination. AR Vol. 2, at 000759; *see also* AR Vol. 5, at 001452-001487 (RFP § 5.4). ABHK provided a nearly-500-page description of service coordination. AR Vol. 10, at 003065-003559. The State evaluated ABHK's efforts and provided a "yes" rating for RFP § 5.4 — which covered service coordination. AR Vol. 2, at 000759.

91(R124). AmeriHealth alleges that ABHK's proposal "failed to address the relevant requirements in the discussion of Service Coordination [in RFP § 5.4]: B.6; C.11; C.12; E.2; and E.9." 08/17/2018 AmeriHealth Pet. ¶ 44.

92(R125). AmeriHealth also did not identify with specificity what RFP provisions this allegation refers to. For example, RFP § 5.4, which addresses Service Coordination, contains several subsections denominated

as “B.6,” but AmeriHealth does not specify which B.6 ABHK allegedly failed to address. AmeriHealth did not identify, either in its filings or at the evidentiary hearing, what substantive information was required but allegedly missing from ABHK’s proposal.

93(R126). Respondents evaluated the offerors’ ability to provide “culturally competent care” under RFP § 5.5. AR Vol. 2, at 000759; *see also* AR Vol. 5, at 001493-001495 (RFP § 5.5.4). AmeriHealth received a “yes” rating for Section 5.5. AR Vol. 2, at 000759. ABHK received a “no” rating for Section 5.5. *Id.*.

94(R127). Although the State gave ABHK an overall “no” rating for culturally competent care, it assessed a “Strength” in ABHK’s proposal for “[p]ropos[ing] that Spanish speaking member advisory committees would be hosted in different regions of the State.” AR Vol. 2, at 000761, 000763.

95(R128). AmeriHealth alleges that it should have received the same strength, but admits that it “did not

propose the same type of committee." 08/20/18 AmeriHealth Br. at 30.

96(R129). The RFP included an Attachment H, which related to Data Collection and Reporting under Section 5.16 of the RFP. AR Vol. 2, at 000759; *see also* AR Vol. 5, at 001601-001603 (RFP § 5.16); AR Vol. 5, at 001322-001332 (RFP Attachment H). Amerigroup, Sunflower, UnitedHealthcare, and AmeriHealth each received a weakness for not including Attachment H in their proposals. AR Vol. 2, at 000762-000766.

97(R130). Despite that omission, Amerigroup, Sunflower, and United Healthcare were all kept in the competition and brought in for face-to-face presentations and discussion with the PNC on May 10 and 11, 2018. AR Vol. 79, at 025382, 025453; *see also* AR Vol. 2, at 000767.

98(R131). AmeriHealth was eliminated from further consideration. AmeriHealth's proposal was "poorly organized and this lack of organization made it difficult to evaluate the proposal submitted." AR Vol.

79, at 025457; *see also* AR Vol. 2, at 000763. "It was determined the other proposals received were better suited to address the issues and challenges facing the State of Kansas." AR Vol. 79, at 025458.

99. Additionally, the Court independently reviewed AmeriHealth's technical bid proposals referenced. While from a layman's point of view the Court might not necessarily see them as confusing or as a hard read, however, its overall presentation was more declaratory than exampling such that determining and connecting what exactly it would do and how it would specifically do so made it less illuminating or discriminating, particularly in relation to Aetna's comparable technical bid proposals with which the Court reviewed and compared it, given AmeriHealth's assertion of unequal treatment.

Further, on this aspect of Petitioner AmeriHealth's challenge in regard to the evaluation of component parts of its bid, the evaluators hold a decided edge over the evaluated just simply by virtue of the

discretion imbued in the evaluators, presumptively competent in the subject matter evaluated and in judging what probably best served the Kansas Medicaid and CHIP programs' needs. Further, the presumption of validity attaching to agency determinations (*Kan. Racing Mgmt., Inc., supra* 244 Kan. at 365), the presumption of fair and honest fulfillment of public duties (*Lewis, supra,* 162 Kan. at 120), and a failure to establish any conclusion reached by the agencies as to any evaluated component, except in reference to attachment H, was "so wide of the mark" as to be arbitrary, capricious, or unreasonable leave no basis for the Court to intrude into the process, simply as a matter of proof. No additional evidence was sought.

Further, given the nature of this competitive sealed bid proposal procedure, as authorized by K.S.A. 75-37,102, which provides few, if any, inflexible standards for the exercise of discretion, such challenges as AmeriHealth raises here in seeking a review of comparative responses to isolated components

of a bid in order to demonstrate the impropriety of some individual decisions over others to a conclusion that they, but for, would be the winning bidder most likely could never succeed because it is too narrowly tailored to impeach a final decision preferring one bidder over another. *See FirstGuard Health Plan Kansas, Inc. v. Kansas Div. of Purchases,* 2006 WL3721326 (Sh. Co. Dist. Ct. Div. 12 (2006)); *Case-Bros. Co., Inc. v. City of Ottawa,* 226 Kan. 648, 651 (1979). The RFP, in fact, emphasizes as much:

> "'Although *no weighted value is assigned, consideration may focus toward but is not limited to*:
>
> - Cost. Bidders are not to inflate prices in the initial proposal as cost is a factor in determining who may receive an award or be invited to formal negotiations. The State reserves the right to award to the lowest responsive bid without conducting formal negotiations, if authorized by the PNC.
> - Adequacy and completeness of proposal
> - Bidder's understanding of the project
> - Compliance with the terms and conditions of the RFP
> - Experience in providing like services
> - Qualified staff
> - Methodology to accomplish tasks

- Response format as required by this RFP."

AR 001406: RFP § 1.14.

> The PNC "reserves the right to accept or reject any or all proposals or part of a proposal: to waive any informalities or technicalities; clarify any ambiguities in proposals: modify any criteria in this RFP: and unless otherwise specified, to accept any item in a proposal."

AR 001406: RFP § l.15.

Essentially, in the competitive sealed bid proposals process, at least in the initial phase, bidding success is greatly a matter of salesmanship, as represented in the form of draftsmanship, in convincing presumptively knowledgeable evaluators of the efficacy and value of their managed health services product. That the Court might believe one of these health service providers' products seems better than another is irrelevant. The Court is not in the position of a knowledgeable evaluator and no evidence presented upgrades its status nor effectively diminishes that of the Respondent agency evaluators.

Accordingly, the Court concludes, as a matter of proof, that any misevaluations claimed would not have

changed AmeriHealth's rank in the bidding process. We have no *City of Deerfield* facts here. *Richie Paving, Inc. v. City of Deerfield, Inc.*, 275 Kan. 631 (2003). The Court would adopt Respondents' Proposed Conclusions of Law at Nos. 37, 49, 51.

PETITIONERS' CLAIM THAT THE RESPONDENTS' FAILED TO RESPOND LAWFULLY TO PASSAGE OF § 118 OF HOUSE SUBSTITUTE FOR SB 109, HENCE, NEGATIVELY IMPACTING THE BID OF EACH AS WELL AS INVALIDATING THE CONTRACTS ENTERED INTO WITH THE INTERVENORS:

As the Court has previously noted, both Petitioners assert that the passage, and the signing into law, of House Substitute for SB109 (the Omnibus appropriation bill), now L. 2018, ch. 109, with its Section 118, was dishonored by the Respondent agencies and that, first, had the agencies altered the RFP, which each seems substantially to define as including the opportunity for new bids, each would have faired better, *i.e.,* been successful. And second, that by not doing so, the contracts entered into with the Intervenors are invalid. *See Petitioners' Proposed Findings of Fact at numbers 37-59*. First, inherently - and as indicated by

the scope of discretion given the competitive sealed proposals bidding by K.S.A. 75-37,102, by the case law noted, and without what one would have to describe as very strong and succinct evidence - the mere assertion of probable, or even reasonably possible, success can be seen to stand as no more than bare speculation, a "what if" argument.

Petitioner AmeriHealth asserts that one of its strong selling points rests in its delivery of co-ordinated care through its own personnel as evidenced by its work in similar capacities in other States. However, that model for coordination was still embraced in the KanCare letting here bid upon and included in the pricing. Further, the proposed change to coordinated care was not only contingent, but AmeriHealth also had experience with that contingent model of services delivery. The Court adopts, without further recitation, Respondents' *Proposed Findings of Fact ¶¶'s 95-104.*

Amerigroup obviously rests in part on its incumbency, particularly if no change at all for KanCare l.0 was the standard. It opined a decrease in costs in its bid in the neighborhood of 2 ½% after an approximate 1% increase – based on “experience”, not inflation - from its capitated costs under its existing contract if KanCare 2.0 was exactly the same as KanCare 1.0. However, no evidence advanced reflects other than that all bidders would still be relatively in the same shoes, that is, able to tout cost reductions and experience in which they, or their personnel or agents, possessed, such as to soundly distinguish between them. The same specifications of the RFP would apply for all bidders.

Further, the Court has found no sound evidence that anchors or materially quantifies how the altered RFP that was actually, ultimately let, and upon which each current bid was based, differed from what KanCare 1.0 was *in 2018* as distinguished from what it was five years ago when KanCare 1.0 was first initiated nor, for

that matter, what the Center for Medicare and Medicaid Services (CMS) may have mandated in the interim or may now deem needed for the acceptance of any approaching new waiver. As the Petitioners each acknowledge, changes occurred over the five year course of KanCare 1.0, and that changes are common for such service contracts, *i.e.*, Amerigroup's CEO's acknowledgement of "annual or semi-annual rate adjustment negotiations for the past six years". (TR 9/5/18 Hearing, p. 75) or AmeriHealth's counsel's concession that:

> not every provision in a contract has to be implemented in the very beginning. And you can implement it and you can fund things later. We're not arguing that that's — in and of itself, that is not an insane thing that happens. . . . [T]here are unpriced aspects of large procurements for various reasons. That does happen. It can happen, it[']s not necessarily a problem.

Certainly there is argument, but there is simply no material evidence, but declarative, literal description, to quantify any change as "significant" or "substantial", and upon which the Court could firmly rely to rebut the Respondent agencies' judgment that,

as between the terms of both the RFP let and the contracts entered into, there is no substantial difference from KanCare 1.0 *as it exists today in 2018*, or as required by the CMS, once the costing and implementation of the changes that all parties would agree would be materially substantive were removed from costs or proximate implementation. *See Material Facts of Record, supra,* at Nos. 40, 43-47. At the very best, if Mr. Clepper's affidavit and testimony were to be fully accepted, the KanCare let for beginning January 1, 2019 differs from the KanCare existing for 2018 - as measured in costs – only by 2 ½%. Arguably in money, given the total program cost, that cost increase is not to be ignored, but in terms of services to be provided 2 ½% additional hardly seems "substantially different", particularly if inflation were to be taken into account.

Further, given § 67(h) and § 117 of the Ominibus appropriation bill, which authorized, respectively, the provision and coordination of new services covering

first, behavior health and telemedicine, and then secondly, brain trauma injuries, the absence of evidence of the impact on associated costs for them, which Mr. Clepper's estimate of costs he admittedly did not consider, diminishes any material reliance on his cost projection. The Kan.Care 2.0 RFP included behavioral health and telehealth provisions. Whether, the expansion related to brain traumas was included or not was not brought to the attention of the Court. This latter also applies to § 68(c) (hospital reimbursement increases), § 68(h) home health, and § 68(j) (tobacco cessation). Accordingly, the Court adopts Respondents' proffered facts numbers Nos. 86-94 as its own without further recitation here. The Court would accept Mr. Clepper's testimony as additional evidence under K.S.A. 77-619(a)(2) limited solely to the issue of agency compliance with § 118 under K.S.A. 77-621(c)(4) or (5).

Notwithstanding the above, actually what Petitioners are each challenging here is the Respondent

agencies' decision to maintain the design of the RFP itself, claiming that continuing with the bid design itself was improper in its failure to remove provisions of the RFP beyond merely the costs and pricing for them, which the agencies did, but to also remove from the bid these provisions altogether in their entirety. Petitioners claim that, by leaving these contingently prospective program provisions in the RFP, they were evaluated, and, in some instances, even, in fact, downgraded, on the technical portion of the evaluation process on services that were only possibly or contingently to be implemented later. The Court accepts this as true, but the Petitioners' position here presumes that decision produced only negative consequences to them, that is, that necessarily the ability to perform on the balance of the RFP program provisions was wholly ignored in the evaluation process. Certainly, the very fact that all incumbent managed care providers under the current KanCare contracts made it past the first level of the

competitive sealed proposals bidding procedure - including Petitioner Amerigroup, which had the highest cost bid - attests to a fair inference that some substantial belief existed in the Respondent agencies of the present program competence of each incumbent, but that was only part of the bid equation. Similarly, as AmeriHealth argued, its forte rested in the exiting model of service delivery, and that provision remained as part of the bid specifications. The Court is sure each bidder would love to design any bid specifications to its own strong points. However, to be better in some areas, less so in others, was a hazard of the bid design, but that *was the bid design*.

Further, as noted, the provision of Medicaid services is not a static enterprise. It would seem that, where recipients are to be served, not by medical providers directly, that is, by a fee for services model, but rather through managed care providers who are charged with setting up not only oversight and coordination procedures, but a network of contracted

providers – all to be done in competitive setting and overseen by both federal and state agencies whose programs and funding resources inure from, and are maintained or provided by, political institutions – such providers should anticipate, if not risk, changes to their initial mission or program directives or the funding that enables them. Both Petitioners, as noted, acknowledge this. From the state government perspective, necessity exists to be able to adapt to a change in funding or mandate and, on the other hand, it would seem that the managed care companies need some fairly lengthy contractual timeline in order to absorb or spread out startup or systemic costs. Neither side of this contract equation, as the background of this case demonstrates, can turn on a dime or be bound by inflexibility when uncertainty happens to turn to reality, particularly, when the reality itself mandates a short timeline for response.

Given here then, while certainly question could be had generally about including potential performance

metrics for measuring the capacity of bidders to accommodate future program changes that are still the subject of discussion, it does not seem unreasonable or irrational in this particular provider setting to do so. That quality of service and the ability to adapt and still provide quality service provides a substantive reason for maintenance of a design of the RFP that hedges against reasonably potential changes and against the fact that the services bargained for are to be contractually provided necessarily over an extended period of time. Here, the State withdrew the costing requirement for bidders for any principally legislatively questioned, or yet to be authorized, programs, but left the description or likely parameters of potential changes for bidder response as to how they would best be accomplished and the potential provider's ability to do so. While it might seem that omitting binding costing estimates if implementation were to occur might be problematic and potentially not in the public interest should further negotiation be required

to set the price, that is a policy issue for the legislature. Otherwise, it seems clear that fair costing is subject to third party analysis (Optimus) and the terms of the contracts entered into by the State give wide latitude to State officials to cancel or exit from the contracts or no longer relevant portions thereof.

Accordingly, for the reasons noted, the Court would reject Petitioners' arguments claiming any prejudice in fact from the bidding process or the RFP's design and the manner in which the State evaluated bidders on the entirety of the bid proposal rather than simply on requirements intended, without doubt, to be implemented and acted upon forthwith. If the bid design was flawed or imperfect, but treated all bidders equally, its maintenance was a public policy question, not a basis for claim by Petitioners, much as the Petitioners' claims that the Respondent agencies' entry into contracts with the Intervenors, effective January 1, 2019, were *ultra vires*. Simply, the bid terms, however

derived, were the bid terms. Simply neither Petitioner has established that it has suffered a particularized injury occasioned from the bid terms, the bid design, or the basis for the evaluation of the bidders. Beyond that, each Petitioner maintains no particularized interest in the contracts let.

Accordingly, each Petitioner evidences the lack of proof of jurisdictional capacity, or common law standing, to make such challenges. *Sierra Club v. Moser, supra,* 298 Kan. at 22, 32-33, 36-39. Petitioners cannot advance an injury to the State or others. *Kansas Bar Ass'n v. Judges of the Third Judicial Dist.,* 270 Kan. 489, 492 (2000). Standing accorded under the Kansas Judicial Review Act is not enough. *Bd. of Cty. Comm'rs of Sumner Cty. v. Bremby,* 286 Kan. 745, 750 (2008).

It is further very clear that Petitioners were not arbitrarily, capriciously, or unreasonably, even unfairly, impacted - one way or another – by the legislature's enactment of House Substitute for SB109

and its § 118. The bid documents in the RFP were the same for each bidder. There is no sufficient proof the same parameters for evaluation of each bid were not applied. At best, Petitioners could merely gain a redo of the bidding or, perhaps, Petitioner Amerigroup a necessary extension of its current contract because of the, perhaps, necessity forced upon the State to maintain its Medicaid program, operating as it currently does for lack of time to reorder it, or otherwise the State of Kansas would default to a fee for service model for its Medicaid program, for which it says it is wholly unprepared. That is not particularized injury - actual or threatened. Neither can trace their loss of the bid to § 118. As such, Petitioners' challenges resting on § 118 of House Substitute for SB109, L. 2018, ch. 109 § 118 produces no cognizble injury from the bidding process related to § 118, but rather only the potential of gain or a second opportunity if the Respondent agencies were amiss in determining and exercising their

authority. These are simply not issues which either Petitioner has standing to call out for determination.

Notwithstanding the above, and certainly not withdrawing from the Court's view of the lack of Petitioners' standing, nevertheless, the elephant in the room is to what extent § 118 of the Ominibus appropriation bill (L. 2018 ch. 109, § 118) is a precise mandate and whether the Respondent agencies, however § 118 is construed, complied with it. The Court is reluctant to proceed on this issue because, if the Court is correct as to Petitioners' lack of standing, the Court is most likely without jurisdiction of the issue and it is, therefore, without meaning or merit in this case. Nevertheless, at the risk of proceeding to no binding end by the lack of jurisdiction, the issue is of such a focus, and fulcrum, for evidentiary proffer and legal argument and concern that it should be addressed, at least secondarily, such that the elephant in the room should be at least be left to feel at home or released to richer savannas rather than ignored or, worse,

stampeded toward some end unknown, including back to this Court.

The Petitioners, both Amerigroup in 2018CV559 and AmeriHealth in 2018CV646, claim the § 118 tenets proscribe the Agency Respondents from lawfully accomplishing the resultant awards to the Intervenors Aetna, UnitedHealth, and Sunflower, and hence, mandate either a rebidding or some other compliant solution, which Petitioners' claim was never sought, much less accomplished, by the Respondent agencies. As the Court has previously discussed, there is simply no material evidence proffered, as a matter of proof, that would permit the Court to find, by comparison or otherwise, that the provisions of the KanCare 2.0 RFP remaining after its alteration by the Respondent agencies, and as reflected in the specifications of the contracts awarded, do, in fact, violate § 118.

The legislature's authority in an appropriation bill derives from its power of the purse. In other words, non-compliance with an appropriation act yields an

inability in the particular agency from directing funds to the particular purpose subject of the appropriation. While defunding or underfunding some functions certainly could at some point involve separation of powers issues or otherwise enactment concerns under Art. 2 § 16 of the Kansas Constitution, the Court is of the view it does neither here, if properly construed.

First, § 118 is to be construed as presumptively constitutional. *Brennan v. Kansas Insurance Guaranty Ass'n, supra,* 293 Kan. at 450. Legislative intent, of course, guides its construction. *Id.* Clearly, the legislative intent underlying here is best dictated by its proscriptive expressions that no funds are to be made available:

> "to submit or maintain to the United State centers for Medicare or Medicaid services any request to administer or provide state Medicaid services under the Kansas medical assistance program using a capitated managed care delivery system *in any manner that is substantially different* than the manner in which state Medicaid services under the Kansas medical assistant program were provided on January 1, 2018, including, but not limited to; imposing any new eligibility requirements or limitations to receive such services, without express prior

authorization by an act or appropriation act of the legislature”

It thereafter proscribed entry into any contract for such services in violation without that express authority being granted.

Thereafter, come a series of provisions and exceptions:

First directing negotiations for contracts complying with this section, including altering the specific bid proposal here at issue, apparently intended as a means to accomplish the intended result of the legislation;

Limiting such contracts to three years; with two one year options;

Directing a waiver request to the Centers for Medicare and Medicaid (CMS) that permits such a compliant capitated managed care delivery system to extend for three years;

Permitting expansion of services to include behavioral health and telehealth as permitted under

identified statutes as long as no new eligibility requirements or limitations applied;

And a permissive directive permitting negotiation with federal officials regarding implementation of work requirements, but proscribing implementation, regardless of federal approval, without further legislative action, after providing a report thereof to the 2019 legislature.

All these latter provisos, where they are either proscriptive in nature or where they describe the particular use the funds are being provided for, can be - under the Kansas Constitution - within the proper scope of appropriation bills. *See Manhattan Bldgs., Inc. v. Hurley,* supra, 231 Kan. 20.

In examining § 118 further, the Court does not view the legislative language in regard to "alter" the outstanding RFP of the then - closed bidding (January 5, 2018) as a mandate to relet the bid under a revised RFP as Petitioners seem to suggest, but, at best, and after revision, negotiate with existing bidders, such

as to reach a contract compliant with the funding authorization. Negotiation is exactly what agency officials did here, but limited it only to those it deemed best qualified by technical merit. As previous amendments or directives by the agencies had removed costs and had either eliminated or postponed any prospective changes, until well into the 2019 legislative session, if ever, little, if anything, would be left necessary of negotiation. It cannot be said that the legislative intent was other than suggestive *of the means* to accomplish a desired end. As discussed previously, it cannot be said as a matter of evidence that end was not accomplished. Too, it should be recognized that the language relating to altering the RFP bid recognized the bidding had closed.

Further, the language used in reference to altering the bid came, by comparison, from an amendment to 2017 SB300, a bill which had been carried over from the 2017 session. That “alter” language in SB300 came by way of an amendment made on February 18, 2018. While SB 300,

as amended, never went beyond its Conference Committees' recommendation for its passage, as amended, nevertheless, that post-amendment language came unchanged into House Substitute for SB109 as § 118 late in SB 109's evolution. Too, SB 109's passage came after April 10, 2018. This was a date when the Respondent agency officials indicated to bidders they should withdraw any costing from their bids of certain major changes proposed for KanCare 2.0. (See Fact No. 40). However, this directive only confirmed what bidders had already been advised of earlier by agency directives before the January 5th bid closings in response to questions earlier, which apparently the agency officials had themselves overlooked. There can be no question, but that these costs had been removed before the bid closing. Thus, interpreting legislative intent from amended language in a bill that then had languished from 2017 to February 18, 2018 – the date of amendment - until appearing sometime shortly before May 4th - the date of passage of the Ominibus appropriation

bill - as speaking to agency action that yet needed to be done, rather than not fully recognizing what had already been done, may well presume too much, particularly when set against the apparent need for testimony as given on August 20, 2018. *See* Fact No. 74, *supra*.

Clearly, agency officials had already "altered" the RFP by withdrawal of recognized substantial changes to KanCare l.0 before the passage of the Omnibus appropriation bill with its § 118 and these withdrawals from the RFP were recognized in the signed contracts. *See, e.g.* Contract Award Sunflower State Health Plan at *2. Specifications* (AR 023557 – 023559). Petitioners' assertions that the goals reflected in the contracts do not reflect the RFP conveniently ignore the fact that the revisions made to the RFP, of which all bidders knew of, and appropriately reacted to, before bid closing, would necessarily alter the operational goals to be reflected in any subsequent contract and against which any contemporaneous compliance would then be

measured. Neither Petitioner has shown the inappropriateness of the characterization given to the goals as reflected in the awarded contracts.

Hence, the only question that could be remaining in reference to § 118 is whether KanCare 2.0 is "in any manner substantially different" from Medicaid services deliverable as of January l, 2018 by reason of a state authorized contract award. The Court would believe that the term "substantially different" must be interpreted somewhat on *ejusdem generis* principles, that is, by the character of the legislative exemplars used in reference to "substantially different", notwithstanding the "including, but not limited to" language preceding. These exemplars are "imposing any new eligibility requirements or limitations to receive such services". These two enunciated proscriptions also appear in the authorization for the delivery of behavior health and telehealth services in § 67(h) of the same bill (L. 2018, ch. 109 § 67(h)) in context as follows:

> "(h) During the fiscal year June 30, 2018, in addition to the other purposes, for which expenditures may be made by the department of health and environment – division of health care finance from moneys appropriated from the state general fund or from any special revenue fund or funds for fiscal year 2018 by chapter 104 of the 2017 Session Laws of Kansas, this or any other appropriation act of the 2018 regular session of the legislature, expenditures may be made by the above agency from such moneys to modify the manner in which state medical services under the Kansas medical assistant program were provided on January 1, 2018, by implementing: Any provision of K.S.A. 2017 Supp. 39-709h and 39-709i, and amendments thereto; any policy that expands access to behavioral health services or services delivered through telehealth technology services, *if such policy does not impose any new eligibility requirements or limitations to receive state medical services that were not in effect on January l, 2018*; and any other action approved by express prior authorization by an act or appropriation act of the legislature." (Emphasis added).

As such, the legislative concern, as expressed overall, can be seen as principally aimed at precluding changes that would substantially negatively affect either the eligibility for, the availability of, or the range of services in existence January l, 2018.

Even if, here, the Court is too generous in its evaluation of legislative intent for § 118, there is no

question but that in these proceedings, as was earlier discussed, there is no sufficient proof that compliance with § 118 was not had or that the contracts awarded and entered into did not reflect the legislature's desired end. This is true from any perspective from which § 118 could be construed.

Nevertheless, if, as the Court believes, neither the bidding nor the evaluation of the bids was affected by § 118, the Respondent agencies have ample authority to scale back their contracts and would not be required – so to speak – to throw the baby out with the bath water:

> "The public policy of a state is the law of that state as found in its constitution, its statutory enactments, and its judicial decisions. *McAllister v. Fair,* 72 Kan. 533, 540, 84 P. 112 (1906). Contracts in contravention of public policy are void and unenforceable. See *Hunter v. American Rentals,* 189 Kan. 615, 619, 371 P.2d 131 (1962). However, it is the duty of the courts to sustain the legality of contracts in whole or in part when possible. *Foltz v. Struxness,* 168 Kan. 714, Syl. ¶ 5, 215 P.2d 133 (1950). Courts are not to hold a entire contract void as contrary to statute unless the legislature so intended. See *Bemis v. Becker,* 1 Kan. 217, Syl. ¶ 9 (1862). When public policy touching on a

> particular subject has been declared by statute, courts may, under certain circumstances, void only those portions of an agreement which is in part a violation of the intent of the legislature and uphold the provisions in conformity with legislative intent. See *Miller v. Foulston, Siefkin, Powers & Eberhardt,* 246 Kan. 450, 462–63, 790 P.2d 404 (1990)."

Petty v. City of El Dorado, 375 Kan. 847, 849 (2001).

PETITIONERS' REQUESTED INJUNCTIVE REMEDIES:

The Court believes, given its adverse resolution on the merits of each of Petitioners' claims in regard to the KanCare 2.0 bid event or in the Respondent agencies award of contracts to the Intervenors, that it need not proceed further in assaying the propriety of the injunctive relief petitioners sought. *See Steffes v. City of Lawrence,* 284 Kan. 380, 394-395 (2007).

However, were the Court to do so, it would have to believe issuing injunctions would certainly be the most hazardous course to undertake. It cannot be overlooked that the timing of the bid event closing at the very beginning of a legislative session – and given that all that had transpired was being collaterally and actively

reviewed during the legislative session until its *sine die* and the emergence of House Substitute for SB109 at the very tail of the session - undoubtedly provoked in the Respondent agencies the necessary need to idle its progress in regard to culminating the bid event by issuing contracts. As a consequence, the timeline for implementation of KanCare 2.0 was undoubtedly delayed, while at the same time they were facing deadlines for managed care program enrollments and needed CMS approvals, the latter of which is discretionary, and the beginning of open enrollment was October 1st, 2018. There is absolutely no evidence to support any belief the delay was intentional and taken to insulate the Respondent agencies' judgment from any effective legal redress.

Accordingly, in the Court's view - all testimony considered and from all facts proffered - unquestionably the greatest risk of harm would be to the Kansas beneficiaries of the Medicaid and CHIP programs. To risk the loss to individuals in

legitimate need of Medicaid services due to program delay or confusion is a risk too great in itself. The issuance of an injunction would operate as a blunt instrument at any time within the timeline presented in this case. An injunction would additionally undercut the dedicated work of two other separate branches of government to an uncertain end.

Certainly, it cannot be said that Amerigroup suffers no harm by a lack of issuance of an injunction, as well as the Kansas citizens or others working for it in support of its services, but that risk may be said to arise when its continuance, or benefit, arises out of, and depends on the result of, a competitive bidding. Nevertheless, the harm to it, being an inherent risk in its business model, cannot reasonably compare with the public consequences of issuing an untimely injunction in these circumstances. The harm to AmeriHealth and Intervenors, particularly Aetna, rests in mostly economic terms represented by bidding expenses, expectancies aside. Intervenors, Sunflower

State Health Plan, Inc. and UnitedHealth Care of the Midwest, Inc., could potentially step into Amerigroup's present shoes. Nevertheless, it would be a wrongfully issued injunction that would cause harm that would likely be irreparable in that it would be too disruptive of important societal programs upon which many of the State's citizens depend. While the timeline that evolved was unfortunate, it, nevertheless, was the reality to be dealt with.

ENTRY OF JUDGMENT

Judgment is hereby entered for the Respondents and the Intervenors and against the Petitioners, as follows:

1. Petitioners, and each of them, have not met their respective burden of proving that either would be entitled to either a temporary or permanent injunction, and the motion of each for injunctive relief is therefore denied:

    a. Neither Petitioner has identified factual grounds for relief under K.S.A. 77-621(c) and thus each has not demonstrated likely or actual

success on the merits in their independently pled cases;

2. The Court's previous authorization of Amerigroup's request to participate in full readiness activities is withdrawn.

3. Judgment is hereby entered in 2018CV559 for the Respondents and Intervenors, and against the Petitioner, Amerigroup Kansas, Inc.

4. Judgment is hereby entered in 2018CV646 for the Respondents and Intervenors, and against the Petitioner, AmeriHealth Caritas Kansas, Inc.

5. Costs in each of 2018CV559 and 2018CV646 are taxed to the filing Petitioner.

This entry of judgment shall be effective when filed with the Clerk of this Court and no further journal entry is required.

IT IS SO ORDERED this 12th day of October, 2018.

Franklin R. Theis
Judge of the District Court
Division Seven