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Commonwealth of Kentucky
SUPREME COURT OF KENTUCKY
Case No. 2022-SC-0515

ANTHEM KENTUCKY
MANAGED CARE PLAN, INC.

APPELLANT

v. **APPEAL FROM THE KENTUCKY COURT OF APPEALS
CASE NO. 2021-CA-0806, 0819, 0822, 0824, 0847, 0849, 0855**

KENTUCKY FINANCE AND
ADMINISTRATION CABINET, ET AL.

APPELLEES

**APPELLEE BRIEF OF THE
FINANCE AND ADMINISTRATION CABINET**

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INTRODUCTION

The Finance and Administration Cabinet responds to the appeal taken by Anthem Kentucky Managed Care Plan, Inc. (“Anthem”), from the Court of Appeal’s September 9, 2022, Opinion correctly reversing Franklin Circuit Court’s Order invalidating the 2020 RFP awards of Medicaid Managed Care contracts. The Opinion further vacated a temporary injunction that effectively granted Anthem a contract.

In its present appeal Anthem asserts only three issues, which even Franklin Circuit found were each individually insufficient to invalidate the award of a state contract. Anthem’s appeal should be denied as, whether taken together or separately, the errors it alleges are insufficient to show the 2020 RFP awards were arbitrary and capricious. Anthem’s allegations regarding the engagement of Emily Parento, were untimely, and it’s untimeliness notwithstanding, fail on their merits. Anthem’s arguments regarding evaluation team notes are neither supported by the evidence of record nor any requirement of Kentucky law that individual team member notes be retained. Finally, Anthem asserts its weakest argument, that vendors were vested with a presumptive right to oral presentations, despite the clear language in the RFP and Commonwealth law that gave notice that oral presentations, if any, were solely at the discretion of the Commonwealth.

Anthem’s arguments are without legal or factual support and should, accordingly, be rejected by this Court.

STATEMENT REGARDING ORAL ARGUMENTS

The issues raised on appeal may be adequately addressed by the parties’ briefs. Accordingly, the Finance and Administration Cabinet does not request oral argument in this matter but stands ready should this Court desire oral argument.

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COUNTERSTATEMENT OF THE CASE

The Finance and Administration Cabinet (“FAC” or “Finance”) does not accept Anthem’s Statement of the Case. This appeal arises from a 2020 Request for Proposal (“2020 RFP”) issued by FAC and the Cabinet for Health and Family Services’ (“CHFS”), Department for Medicaid Services (“DMS”), wherein FAC and DMS issued a solicitation for up to five healthcare companies to provide Managed Care Organization (“MCO”) services for Kentucky’s Medicaid Program. (TR Vol. I-II at 104-190)¹.

A similar RFP was issued in 2019 (“2019 RFP”). The 2019 RFP went through the entire bid process, and the winning bidders were announced on November 27, 2019. Ultimately, the 2019 RFP was canceled prior to the January 1, 2020 start date of the awarded contracts. (TR Vol. IX at 1235-1236). In response to the 2019 RFP, seven bidders submitted proposals: Anthem Kentucky Managed Care Plan, Inc. (“Anthem”), Passport Healthcare (“Passport”), Molina Healthcare of Kentucky, Inc. (“Molina”), UnitedHealthcare of Kentucky, LTD (“United”), Humana Health Plan, Inc. (“Humana”), Aetna, and WellCare Health Insurance of Kentucky (“WellCare”). (*Id.*). The 2019 RFP bid process selected WellCare, Aetna, Humana, United and Molina in that order for MCO contract awards, while incumbent MCOs Anthem and Passport were not selected. (*Id.*). As noted above, the 2019 RFP was canceled and rebid via posting of the 2020 RFP on January 10, 2020.

In preparing for its proposal in response to the 2020 RFP bid, Molina retained Emily Parento on January 30, 2020. (Parento Dep., p. 99; 15). Parento had previous experience

¹ The record was originally certified in Appeal No. 2021-CA-806 and contains Volumes I-XXXVIII. The references to the record refer to the record certified in Appeal No. 2021-CA-806 unless otherwise stated.

in the human services industry including experience with Kentucky's Medicaid program as a onetime employee of CHFS. (Parento Dep., p. 22; 20 – p. 23;13). She also served as a member of incoming Governor Andy Beshear's transition team in 2019. (Parento Dep., p. 27; 4-17). Specifically, Parento was the co-chair of the Cabinet for Health and Family Services transition team. (Parento Dep., p. 28; 3-4). As a member of the transition team, Parento described her duties as administrative in nature, consisting of gathering information from the outgoing administration and formulating a list of upcoming and ongoing issues for the incoming administration. (Parento Dep., p. 28; 6-9). Parento testified that in her position as a transition team member, the only information she received regarding the 2019 RFP were the names of the five winning bidders a few days before that information was made public. (Parento Dep., p. 64; 17-23, 196; 27 – p. 197; 14).

The same bidders who submitted bids in response to the 2019 RFP, submitted bids for the 2020 RFP. The 2020 RFP was evaluated using the same method and scored by the same group of DMS personnel and FAC buyer ("scoring team") as the 2019 RFP via consensus scoring. Consensus scoring is a process where the scoring team as a unified whole reaches a decision regarding the scoring and ultimate award of the contract. (Monroe Dep. p. 105:3-15). Consensus scoring is the typical format for scoring RFPs. (Monroe Dep. p. 37-40).

The 2020 RFP scoring resulted in a contract award to the *same five bidders* as the 2019 RFP. Anthem, after two bites at the apple, was yet again determined to be outside of the top five proposals. The awards were announced on May 29, 2020, with the awarded contracts to begin on January 1, 2021. (TR Vol. IX. at 1234).

On June 12, 2020, Anthem, now a disappointed bidder twice over, filed a protest

pursuant to KRS 45A.285 challenging the 2020 RFP awards. (TR Vol. I at 34-101). On June 26, 2020, Anthem filed a document entitled “First Supplement” to its protest adding an allegation that Molina contracted with Parento to advise on its 2020 RFP bid submission, alleging that Parento had access to “all the non-public files associated with the 2019 RFP”, resulting in an “unfair advantage” requiring a rebid. (TR Vol. I at 61-73). FAC denied Anthem’s protest via issuance of a written determination letter on August 14, 2020. (TR Vol. II at 191-206). In part of its denial, FAC found that Anthem’s supplemental protest regarding Parento was untimely. (TR Vol. II at 194). Additionally, FAC made factual determinations that the information of record did not “compel the disqualification of an Awardee as a result of a conflict of Interest” alleged by Anthem. *Id.*

On September 4, 2020, Anthem filed a complaint in Franklin Circuit appealing FAC’s denial of its protest and claiming that FAC’s award of contracts for MCO services within Kentucky’s Medicaid Program was unlawful, arbitrary, capricious, and unsupported by the procurement record. (TR Vol. I at 1-33). More specifically, Anthem alleged in its complaint that FAC failed:

- (1) to conduct oral bidder presentations when such presentations were likely to significantly impact the ultimate scoring;
- (2) to follow the terms of the RFP by not evaluating two required categories related to bidder reliability;
- (3) to disqualify another bidder, Molina Healthcare of Kentucky, Inc., after Molina gained access to material, non-public information related to the bidding process by retaining a consultant [Parento] with access to that information; and
- (4) to score the bidders’ Responses in a manner consistent with the RFP and Kentucky law.

(TR Vol. I at 2). Additionally, Anthem sought an order temporarily enjoining CHFS from “all activity with respect to implementing the contracts awarded under the RFP,” requiring CHFS and FAC to “include Anthem in all readiness activities” related to the contracts

awarded pursuant to the 2020 RFP and prohibiting “exclusion of Anthem Medicaid from such activities.” (TR Vol. I at 29). Anthem’s temporary injunction request was granted by the Franklin Circuit on October 23, 2020. (TR Vol. IX at 1234-1259). Specifically, Franklin Circuit granted injunctive relief requiring that Anthem be added as a sixth MCO while the merits of Anthem’s claims regarding the 2020 RFP were considered. (*Id.*). Anthem has remained in such position throughout the pendency of this action and subsequent appeals.

Franklin Circuit further ordered that Anthem be allowed to depose FAC buyer Amy Monroe, CR 30.02(6); representative of the scoring team, Stephanie Bates; and former transition team member Emily Parento. (TR Vol VI at 889). Following additional motions and crossclaims by various parties, as well as consolidation of a related lawsuit filed by Humana, the parties were directed to submit dispositive motions on any issues they believed were either purely questions of law or could be evaluated based on the limited discovery performed up to that point. (TR Vol. XIV at 1952).

On April 28, 2021, Franklin Circuit entered its Opinion and Order. (TR Vol. XXXVI at 5303-5337). Although Franklin Circuit admitted that none of the individual alleged irregularities in the 2020 RFP process on their own warranted a rebid, inexplicably it found that the 2020 RFP award process contained a sum of irregularities that caused its outcome to be sufficiently arbitrary and capricious as to undermine public confidence in the procurement process—contrary to the stated purpose of the Kentucky Model Procurement Code. (*Id.* at 5327-5328). With respect to Parento, Franklin Circuit disagreed with Anthem that Molina should be removed as an MCO for retaining Parento, but, without following any normal 11A process requirements, found that Parento violated the Executive

Branch Code of Ethics (“EBCE”) and in so doing a new appearance of impropriety standard for which no precedence could be found (*Id.* at 5321-5324). Franklin Circuit thereafter directed that the 2020 RFP be rebid and effectively awarded Appellant an MCO contract until such rebid could be completed. (*Id.* at 5335).

Franklin Circuit did not initially designate its April 28, 2021 Opinion and Order as final and subsequently entered an Order on May 3, 2021, allowing any party the opportunity to make any final motions to alter or otherwise amend Franklin Circuit court’s judgment. (TR Vol. XXXVI at 5339). On June 16, 2021, Franklin Circuit entered its final Order addressing any outstanding arguments, correcting factual errors, and affirming the substantive rulings made in its April 28, 2021 Opinion and Order. (TR Vol. XXXVIII at 5552-5564). In compliance with CR 54.02, Franklin Circuit’s June 16th Order incorporated by reference the April 28, 2021 Opinion and Order and designated the Orders final and appealable. (*Id.* at 5562). Molina filed its Notice of Appeal to the Court of Appeals on July 15, 2021 (*id.* at 5570), which was followed by several notices of cross-appeal.

Following full briefing by all the parties, the Court of Appeals heard oral arguments in this matter on August 18, 2022. On September 9, 2022, the Court of Appeals issued its Opinion (“Opinion”). Relevant to Anthem’s appeal to this Court, the Court of Appeals held that (1) Anthem’s allegations regarding scoring deficiencies in the RFP process were insufficient to rebut the presumption of correctness afforded to the agency under the Kentucky Model Procurement Code (Opinion, p. 19); (2) the appearance of impropriety standard Franklin Circuit applied to Parento’s involvement in the 2020 RFP was without support of the law (Opinion, p. 25); and (3) Parento bound herself to the EBCE. (Opinion,

p. 26). The Court of Appeals also held, however, that (4) Franklin Circuit was without jurisdiction to determine whether there was a violation of the EBCE (Opinion, p. 30), and (5) FAC correctly found that Anthem's June 26, 2020 supplemental protest was untimely. (Opinion, p. 33). The Court of Appeals ultimately concluded the 2020 RFP process was valid and reversed Franklin Circuit's order invalidating the RFP. (Opinion, p. 40). Thereafter, Anthem filed a motion for discretionary review, which this Court granted.

STANDARD OF REVIEW

As correctly identified by the Court of Appeals, summary judgment by a trial court is appropriate where there is "no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." CR 56.03. When considering a motion for summary judgment, the circuit court must view the record "in a light most favorable to the party opposing the motion ... and all doubts are to be resolved in his favor." *Isaacs v. Sentinel Insurance Company Limited*, 607 S.W.3d 678, 680-81 (Ky. 2020) (citation omitted). On appeal, decisions on motions for summary judgment are reviewed *de novo*. *Id.* at 681 (citation omitted).

Furthermore, when reviewing an agency decision, the circuit court must not reinterpret the merits of a claim, nor "substitute its judgment for that of the agency as to the weight of the evidence." *500 Associates, Inc. v. Natural Resources and Environmental Protection Cabinet*, 204 S.W.3d 121, 131 (Ky. App. 2006) (citations omitted). Circuit court review is limited to determining "if the findings of fact are supported by substantial evidence of probative value and whether or not the administrative agency has applied the correct rule of law to the facts so found." *Id.* (internal quotation marks and citation omitted). Substantial evidence is defined as that which "has sufficient probative value to induce

conviction in the minds of reasonable [persons].” *Id.* (citation omitted). A court must affirm an agency decision that is supported by substantial evidence even if it would have reached a different conclusion. *Id.* at 132 (citation omitted). The possibility of reaching two inconsistent conclusions based on the evidence does not preclude the administrative decision from being supported by substantial evidence. *Id.* at 131 (citation omitted).

Here, the granting of Discretionary Review arises from an appeal of an administrative decision. Accordingly, while issues of law are reviewed *de novo*, courts “afford deference to an administrative agency's interpretation of the statutes and regulations it is charged with implementing.” *Commonwealth, ex rel. Stumbo v. Kentucky Public Service Comm’n*, 243 S.W.3d 374, 380 (Ky. App. 2007) (citing *Board of Trustees of Judicial Form Ret. Sys. v. Attorney General of Commonwealth*, 132 S.W.3d 770, 787 (Ky. 2003); *Chevron, U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 843-45, 104 S. Ct. 2778, 2782-83, 81 L. Ed. 2d 694 (1984)).

ARGUMENT

When reviewing a protest of an award under the Kentucky Model Procurement Code (“KMPC”), emphasis must be given to the Code’s primary function: to benefit the public, rather than benefit or enrich the bidders. Consideration of advantages or disadvantages to bidders must be secondary to the general welfare of the public. *Ohio River Conversions, Inc. v. City of Owensboro*, 663 S.W.2d 759, 760 (Ky. App. 1984).

Review of a contract award under the KMPC is limited to assuring that an award decision was not arbitrary and capricious or contrary to law. *See e.g., Commonwealth v. Yamaha Motor Mfg. Corp.*, 237 S.W.3d 203, 206 (Ky. 2007); *Laboratory Corporation of Am. Holdings v. Rudolph*, 184 S.W.3d 68, 73 (Ky. 2005), *rehearing denied* (2006);

Pendleton Brothers Vending, Inc. v. Commonwealth, Finance and Admin. Cabinet, 758 S.W.2d 24, 25 (Ky. 1988). The KMPC does not require that an award be entirely free of errors to withstand challenge. The KMPC prohibits arbitrary awards but does not divest authorized state actors of their considerable discretion in making procurement decisions. *Laboratory Corp. of America Holdings v. Rudolph*, 184 S.W.3d 68, 75 (Ky. App. 2005); *see also Guardian Angel Staffing Agency, Inc. v. Commonwealth*, Nos. 2013-CA-000143-MR, 2013-CA-000150-MR, 2015 WL 3826343, *4 (Ky. App. Jun. 19, 2015).²³ The decision of any official, board, agent, or other person appointed by the Commonwealth concerning any controversy arising under, or in connection with, the solicitation or award of a contract is entitled to a presumption of correctness and may not be disturbed unless the decision was procured by fraud or the findings of fact by such official, board, agent or other person do not support the decision. KRS 45A.280. While this presumption is not conclusive, the KMPC and case law place the burden on the aggrieved bidder to present evidence of fraud or collusion such that the award of the contract is not factually supported. *Software Technology, Inc. v. Farris*, 2008-CA-001678-MR, 2010 WL 1253211, at *2 (Ky. App. Apr. 2, 2010).⁴⁵ Unpublished opinion attached as persuasive, not binding, authority per KY ST RCP Rule 76.28(4). Recognizing the primary function of the KMPC the Court of Justice has appropriately noted that, "...absent fraud or collusion, the courts will not interfere with power to accept or reject bids by a governmental agency." *Ohio River Conversions, Inc. v. City of Owensboro*, 663 S.W.2d 759, 761 (Ky. App. 1984).

² Unpublished opinion cited as persuasive, not binding, authority pursuant to RAP 41(A).

³ Pursuant to RAP 41(A), copy attached as Appendix A.

⁴ Unpublished opinion cited as persuasive, not binding, authority pursuant to RAP 41(A).

⁵ Copy attached as Appendix B.

I. No new exhaustion requirement was created by the Court of Appeals, but invalidation of a contract award for violation of the Executive Branch Code of Ethics (“EBCE”) requires a valid determination of a violation.

A. KRS Chapter 11A vests the Executive Branch Ethics Commission with the sole authority to find a violation of the EBCE.

KRS 11A.100 unambiguously grants the Executive Branch Ethics Commission (“Ethics Commission” or “Commission”) exclusive authority to determine if a violation of the Executive Branch Code of Ethics has occurred. Specifically, KRS 11A.100(3) provides that the Ethics Commission may issue a finding that the EBCE has been violated and take further appropriate action as provided for in the EBCE. Neither KRS 11A.100(3), nor any other portion of the EBCE, provides for another executive branch agency, nor any judicial branch body, to issue an initial finding of an EBCE violation, except in instances where an agency is directed by statute to adopt its own code of ethics, per KRS 11A.015. Subsequent to finding an EBCE violation, under KRS 11A.100(5) the Commission may refer the violation to the Attorney General for prosecution. Similarly, KRS 11A.080 provides that for violations involving a contract with state government, Finance “...**may** void any contract related to that case.” (KRS 11A.080(5); emphasis added). Contrary to Appellant’s position, neither KRS 11A.100(5) nor KRS 11A.080(5) authorizes the Attorney General or Finance to assume the authority of the Commission and issue a determination that the EBCE has been violated.

The Court of Appeals’ determination that the Ethics Commission is solely vested with the authority to determine a violation of the EBCE is consistent with the Commission’s duties and authority under KRS Chapter 11A. KRS 11A.070 grants the Commission the authority to employ its own employees, agents, and consultants to enforce the provisions of the EBCE, in addition to engaging outside professionals and making use

of the services and facilities of other state agencies. KRS 11A.080 outlines the procedures the Commission must follow in finding a violation, with 11A.080 and 11A.100 enumerating the actions the Commission may take upon finding a violation has occurred.

Under KRS 11A.110(3), the Commission must promulgate regulations to implement the EBCE, and the Commission fulfilled this requirement through the enactment of 9 KAR 1:010 through 1:070. Among other requirements, these regulations require that the Commission review of alleged ethics violations be initiated via a complaint signed under penalty of perjury, which must additionally fulfill a list of specific requirements pursuant to 9 KAR 1:015, Section 2. A complaint that fails to conform to the requirements of 9 KAR 1:015, Section 2 must be dismissed by the Commission. The EBCE comprehensively provides for the Ethics Commission to serve as the sole entity responsible for finding violations of the EBCE. KRS Chapter 11A provides the Ethics Commission with a framework for finding whether an EBCE violation has occurred, authority to employ investigators and other staff to perform investigations, and the power and responsibility to promulgate regulations to enact and clarify the requirements of EBCE. KRS Chapter 11A vests no other entity with the power to make a finding that the EBCE has been violated.

In finding that Emily Parento violated the EBCE, Franklin Circuit failed to provide any legal justification for usurping the Ethics Commission's authority, or any analysis to explain how its finding complied with the procedural requirements of the EBCE. Entirely absent from Franklin Circuit's EBCE violation finding is any analysis of whether a valid complaint has been submitted as prerequisite to consider whether a violation of the Ethics Code has, in fact, occurred. *See* 9 KAR 1:015, Section 2.

Even accepting, *arguendo*, that a valid complaint against Ms. Parento was

submitted, 9 KAR 1:015 and KRS 11A.080(1) next require that the Ethics Commission commence a preliminary investigation and forward a copy of the complaint to the person alleged to have violated the EBCE. Again, entirely absent from Franklin Circuit's finding that Emily Parento violated the EBCE is any discussion of how its finding fulfills these requirements. After receiving a complaint, the person alleged to have violated the EBCE is granted procedural rights, including the ability to request a meeting with the Commission's attorney and the complainant; the requirement that an initiating order be issued, per 9 KAR 1:030, Section 2, prior to an administrative proceeding to find a violation; and the right to an administrative proceeding requiring a clear and convincing standard of proof to find a violation, as required by KRS 11A.100(3). Nowhere does Franklin Circuit's underlying June 16, 2020 Opinion and Order explain how it was authorized to make a determination under the EBCE before finding that an EBCE violation was committed. Instead, Franklin Circuit skipped directly to consideration of whether the alleged violation substantiality influenced the contract award, which could only justify Finance voiding Molina's contract pursuant to KRS 11A.080(5) *if there were a determination of an EBCE violation by the Ethics Commission.*

Invocation of KRS 11A.080(5) requires a valid finding that a violation of the EBCE has occurred. Absent a valid finding of violation, as is the case here, KRS 11A.080(5) is a nullity. Moreover, even if the Commission determines that a violation of the EBCE has occurred, KRS 11A.080(5) vests the decision to void any contract solely in the discretion of Finance. Accordingly, Anthem's protest must be considered solely on the merits of KRS Chapter 45A and evidence in the record of whether the procurement process has been undermined pursuant to the provisions of the KMPC.

Like the trial court, Anthem has not produced evidence of a valid finding that Emily Parento violated the EBCE, which precludes cancellation of the award at issue under the authority of KRS 11A.080(5). The EBCE's procedural requirements are specific and mandatory. Anthem contradicts itself in its brief by implying that the Court may entirely ignore procedural and jurisdictional requirements of the EBCE, and then arguing the Court should construe the provisions of the Model Procurement Code in the strictest possible light, with no allowance for the exercise of reasonable discretion by state evaluation teams and purchasing officers. Whereas the KMPC grants purchasing officers and evaluation committees' significant discretion regarding the award of a state contract, the language of the EBCE nowhere empowers Franklin Circuit to make any initial determination that the EBCE has been violated.

B. The context and structure of the EBCE and KMPC reveal the General Assembly's intent to creating separate and distinct roles for the Ethics Commission and Finance in administering each.

Neither the EBCE nor the KMPC comingle the authority of the Ethics Commission and Finance to enforce the provisions of the EBCE and KMPC. Instead, the legislature explicitly spells out the authority of each agency. While a nexus exists where the Commission may forward findings of contract related EBCE violations to Finance for consideration of said findings' impact upon a state contract pursuant to 11A.080(5), no legal authority allows Finance to issue a finding that the EBCE has been violated, any more than the Ethics Commission vacate a KRS Chapter 45A contract award.

In discerning the purpose of statutes, “[t]he most logical and effective manner by which to determine the intent of the legislature is simply to analyze the plain meaning of the statutory language[.]” *Stephenson v. Woodward*, 182 S.W.3d 162, 169-70 (Ky. 2005).

While courts may not add words to a statute, *Hatchett v. City of Glasgow*, 340 S.W.2d 248, 251 (Ky. 1960), no single statute is to be read in isolation. Courts must “presume that the General Assembly intended for the statute to be construed as a whole, for all of its parts to have meaning, and for it to harmonize with related statutes.” *Shawnee Telecom Res., Inc. v. Brown*, 354 S.W.3d 542, 551 (Ky. 2011).

Anthem’s argument erroneously suggests that this Court should entirely disregard the procedural requirements of the EBCE. As previously noted, the EBCE unambiguously grants the Ethics Commission exclusive authority to determine whether a violation of the EBCE has occurred and establishes the mandatory procedural requirements to do so. Anthem’s brief fails to explain how Finance or Franklin Circuit may issue a finding of an EBCE violation that complies with the EBCE’s procedural requirements. It is impossible to reconcile Anthem’s argument without ignoring significant portions of the EBCE’s plain language. This Court should decline to do so, and instead give full effect to the language of the EBCE as enacted, affirming the Court of Appeals.

Had the Legislature wished to allow concurrent authority with the Ethics Commission and another entity to find a violation of the EBCE, it could have done so. This is in stark contrast to the Kentucky Open Records and Open Meetings acts. In disputes relating to open records and open meetings an individual can elect for enforcement either via the Office of the Attorney General, pursuant to KRS 61.846 and 61.880, or by filing suit in Circuit Court, through KRS 61.848 and 61.882. With respect to the EBCE, however, the legislature only granted the Ethics Commission the authority to find a violation. Similarly, in instances involving a contract dispute between an agency and vendor, the Finance Secretary may settle or determine the dispute pursuant to KRS 45A.230, subject

to the limitation in KRS 45A.235 that a party may advance the dispute to court if the Secretary fails to issue a decision within 120 days. No similar provision which would allow for a violation finding by an entity other than the Ethics Commission exists within the EBCE.

Within the scope of the KMPC, review of an award focuses on evidence showing that the award of a contract was not either arbitrary or capricious and was factually supported by the record. In reviewing a protest, the Finance Secretary reserves the discretion to uphold the award of a contract, even if evidence of non-material procedural errors is presented, so long as the award does not rise to the level of being arbitrary and capricious. Even if a violation of the EBCE occurs, the Code requires that, to vacate an award, a violation must have “substantially influenced” an agency action to serve as grounds for voiding, rescinding, or canceling the action. KRS 11A.100.

C. Even if a valid EBCE violation existed in the record, the record does not contain evidence sufficient to show that any action of Emily Parento substantially influenced the contract award or rendered it arbitrary and capricious or contrary to law.

Anthem fails to provide evidence that Emily Parento’s engagement with Molina rendered the contract award at issue arbitrary, capricious, or contrary to law. Subjective “belief” is not evidence and does not create an issue of material fact. *Humana of Kentucky, Inc. v. Seitz*, 796 S.W.2d 1, 3 (Ky. 1990). *See also Haugh v. City of Louisville*, 242 S.W.3d 683, 686 (Ky. App. 2007). An administrative determination should be “based on something other than speculation, supposition or surmise. The type of evidence that will support a reasonable inference must indicate the probable as distinguished from a possible cause. There must be sufficient proof to tilt the balance from possibility to probability.” *Huffman v. SS. Mary and Elizabeth Hosp.*, 475 S.W.2d 631, 633 (Ky.1972).

Based upon a conclusory assertion that Ms. Parento violated the EBCE, Anthem suggests that Finance is therefore required to set aside the MCO contract award. As explained above, there is no valid Ethics Commission finding that Ms. Parento violated the EBCE. The Ethics Commission, not Finance, is exclusively empowered to find that such a violation occurred. Finance may not artificially elevate and equate Anthem's allegations to the required finding of the Ethics Commission.

Finance's position is consistent with determinations issued by other state agencies when confronted with unsupported allegations. In *Estate of William E. McClelland v. Justice and Public Safety Cabinet*, 2016 WL 2903403 (KY PB),⁶ the Commonwealth of Kentucky Personnel Board reversed the dismissal of a Justice Cabinet employee after the employee was indicted on a felony charge and terminated pursuant to KRS 18A.132(1)i and 18A.146 ("felony conviction grounds for disciplinary action"). In defending the dismissal at the evidentiary hearing, the agency represented that the indictment of the employee indicated probable cause to believe that he committed a Class C felony. In reversing the agency dismissal, the Board held that indictment for a felony is insufficient to fulfill the requirements of KRS 18A.146. The Board cited this Court's holding in *Fletcher v. Graham*, 192 S. W. 3d 350 (Ky. 2006), finding that indictment is only the initiation of a criminal proceeding. Anthem's allegations do not nearly rise to the equivalent of an indictment, as in this case there is no evidence to show Anthem has ever validly initiated a complaint with the Ethics Commission that the Commission made a determination that the EBCE was violated, or that said hypothetical violation was a

⁶ Copy attached as Appendix C.

substantial influence, as required by KRS 11A.100(4). Anthem’s allegation therefore cannot be given the legal effect of a proper EBCE violation finding.

D. Anthem’s appeal relating to Emily Parento’s engagement with Molina was untimely.

In addition to the substantive deficiencies with Appellant’s EBCE arguments, Anthem’s allegations relating to Emily Parento were untimely, and thus not subject to review. KRS 45A.285(2) requires that a protest be filed within two calendar weeks after a protestor knows or should have known of the facts giving rise to the protest. Anthem did not challenge Parento’s retention by Molina within the requisite time frame, thereby waiving any such challenge.

As the Court of Appeals noted, Anthem first raised the issue of Emily Parento’s engagement with Molina and its potential effects on the MCO contract award in its Supplemental Protest dated June 26, 2020. First, Anthem knew or should have known of Emily Ms. Parento’s role in the gubernatorial transition in November 2019, when it was publicly announced. Second, Anthem knew or should have known of Parento’s retention as a Molina team member on May 29, 2020, when score sheets were made public. Accordingly, any allegation connected to Ms. Parento’s involvement with Molina’s bid should have been filed on or before June 12, 2020. See KRS 45A.285. By first filing concerns related to this issue on June 26, 2020, Anthem’s protest relating to Emily Parento was untimely. (Opinion p. 34).

II. Scoring Team Members’ Decisions to Discard Their Individual, Preliminary Notes Did Not Undermine, or Even Impact, the Integrity of the Consensus Scoring.

The MCO contract proposals for the 2020 RFP were evaluated via a consensus scoring method, whereby scoring was done via a consensus of the evaluation team as a

whole, rather than by averaging the scores of individual team members. (Monroe Dep. 105:3-15). Accordingly, individual team member preliminary notes were not relevant to the group scoring and did not need to be retained.

Pursuant to the Kentucky Open Records act, the Office of the Attorney General has previously found that working notes may be discarded when no longer needed, stating:

Not every paper in the office of a public agency is a public record subject to public inspection. Many papers are simply work papers which are exempted because they are preliminary drafts and notes. KRS 61.878(1)[(i)]. Yellow pads can be filled with outlines, notes, drafts and doodlings which are unceremoniously thrown in the wastebasket or which may in certain cases be kept in a desk drawer for future reference. Such preliminary drafts and notes and preliminary memoranda are part of the tools which a public employee or officer uses in hammering out official action within the function of his office. ***They are expressly exempted by the Open Records Law and may be destroyed or kept at will and are not subject to public inspection.***

Ky. Op. Atty. Gen. 97-ORD-183 (1997) (emphasis added).⁷

The notes of individual evaluation team members fit squarely within this characterization.

In addition, there is no evidence in the record to suggest that a team member's individual notes were seen by, or influenced, anyone other than the one who wrote them. Purchasing Officer Amy Monroe testified the notes at issue were individual scorers' working notes, made by the individuals themselves, used by those individual reviewers to help prepare them to participate in team discussions. (Monroe Dep. 162:2-163:13). Personal notes are solely for reference by individual scorers, separate and distinct from the official bid record. (*Id.* at 164:5-13). By contrast, comments of the evaluation team relating to the team's scores are maintained in the bid record. (*Id.* at 165:1-9). Thus, in addition to the preliminary nature of the notes, individual team member notes are not relevant to the

⁷ Copy attached as Appendix D.

consensus score or comments of the evaluation team as a whole. (*Id.* at 189:2-9).

Anthem provides no evidence that the notes at issue would somehow indicate that the contract award was arbitrary and capricious. Instead, Anthem provides mere speculation. Even assuming, *arguendo*, that individual team member preliminary notes varied in places from the final consensus score, such hypothetical evidence would tend only to prove that the consensus scoring process was functioning as intended, where the deliberations and discussions of the group as a whole yield a better final result than individual members reviewing proposals in isolation and averaging their respective scores. It is reasonable to expect that a consensus scoring team, operating as a unified whole to share and discuss their individual thoughts prior to completing a consensus scoresheet, may manifest a more complete understanding of the proposals at issue, as compared to notes individual team members may have jotted down on a notepad as a reminder to themselves of aspects of a bid to later discuss with the group as whole. Even if hypothetical individual notes revealed that group discussion of a proposal changed the mind of an individual scoring team member regarding aspects of that proposal, such evidence is more likely evidence of a well-functioning consensus scoring team than a revelation that the contract award was arbitrary, capricious, or contrary to law.

Not only does Anthem fail to provide any actual evidence that individual team member notes would have shown the contract award to be arbitrary, capricious, or contrary to law, it fails to provide a cogent argument regarding how individual team member preliminary notes would have made such a showing. Accordingly, its arguments must fail. This Court should affirm the Court of Appeals.

III. Oral Presentations Were Not Required by Either the KMPC or the Terms of the Solicitation.

The Court of Appeals correctly held that the Commonwealth was not required to hold oral presentations prior to awarding the contract. (Opinion, p. 22). As the Court of Appeals explained, the Commonwealth had sufficient MCO experience, and there was sufficient competition present to justify the award of contracts without oral presentations, per KRS 45A.085. (Opinion p. 21). The Court of Appeals further noted that 200 KAR 5:307, Section 5, provided that an award may be made with or without written or oral discussions, and that Section 70.1 of the RFP put offerors on notice that oral presentations would be at the discretion of the Commonwealth. *Id.* As explained in the Secretary's original August 14, 2020 protest determination, the RFP at issue at Section 70.1 ("Oral Demonstration/Presentation Evaluation, if required") stated, "The Commonwealth reserves the right not to require oral presentations if they do not affect the final rankings." Further, in response to a vendor question requesting clarification of RFP Section 70.1, the Commonwealth explicitly stated, "Oral Presentations may be held **at the Commonwealth's Discretion.**" (emphasis added).

To the extent that KRS 45A.085(7) states that "[w]ritten or oral discussions shall be conducted with all responsible offerors who submit proposals determined in writing to be reasonably susceptible of being selected for award," the term "discussions" has a separate and distinct meaning from the term "oral presentations". The KMPC contains no presumption that competitive negotiation awards include a presentation or demonstration prior to any award. Neither presentations nor demonstrations are referenced in statute, regulation, or FAC purchasing policies that relate to competitive negotiations. (*See* 45A.085, 200 KAR 5:307, and FAP 11-57-00).

In the context of the RFP, the written or oral discussions referenced in KRS 45A.085 relate to section 70.2, where the Commonwealth reserves the right to request a Best and Final Offer (BAFO) pursuant to FAP 111-57-00(3)(h). While the current version of FAP 111-57-00 contains no (h) subsection, FAP 111-57-00(4)(g) explains that, in reviewing evaluations and scores, OPS and the evaluation committee(s) “shall conduct negotiations and determine if "Best and Final Offers" are appropriate.” The FAP makes clear that “discussions” referenced in KRS 45A.085 are negotiations relating to a possible BAFO, rather than demonstrations. The FAP notes that OPS and a requesting agency may conduct negotiations after a BAFO. (*See* FAP 111-57-00(4)(g) (emphasis added)). Nothing in the RFP or KMPC indicates that the term discussions, as used in KRS 45A.085, refers to demonstrations rather than negotiations.

In enacting KRS 45A.085, the legislature elected to refer to written or oral discussions, rather than negotiations, to avoid confusion with the technical term for the solicitation type at issue in KRS 45A.085 - a “competitive negotiation”, which gives weight to other factors in addition to price in making a contract award, as opposed to a KRS 45A.080 “competitive sealed bidding” where price is the primary factor determining an award. Providing that “written or oral negotiations” be conducted could create confusion between two differing meanings of the term negotiation within the same statute. As such, Anthem has erroneously asserted that “written or oral discussions” referenced in KRS 45A.085(7) refers to oral presentations, rather than final negotiations with vendors selected for an award. Anthem’s assertion therefore does not support the position that an oral presentation was somehow required.

As previously noted, courts should interpret statutes in a way that aims to give full

effect to the statute's language. Anthem's interpretation of KRS 45A.085(7) renders its language meaningless. While Anthem focuses on arguing oral discussions are synonymous with the oral discussions mentioned in KRS 45A.085(7), it provides no logical explanation as to the meaning of "written discussions" in the appropriate context. Assuming that "oral discussions" means "oral presentations," as Anthem argues, then "written discussions" would also mean "written presentations," but such a usage would serve no logical purpose within the context of a 45A.085 Competitive Negotiation.

Bidders present their proposals in written form by submitting their proposals for evaluation, with the written proposals evaluated according to the scoring criteria established by the solicitation. Accepting Anthem's argument that the "written or oral discussions" referred to in KRS 45A.085(7) means "written or oral presentations" would make no sense, as it would create a requirement that the Commonwealth request written presentations from vendors on the merits of their proposals, entirely duplicating already submitted written proposals submitted by the vendors. It is unlikely that the legislature, in enacting KRS 45A.085, intended to include such a redundant process that has no clear benefit.

Interpreting KRS 45A.085(7) to indicate that negotiations, rather than presentations, be held serves a logical purpose and is consistent with other Kentucky procurement law requirements. Negotiations could be held with vendors reasonably susceptible to an award, such as those most highly evaluated by the scoring team, to confirm acceptance of mandatory state procurement terms, clarify contract administration details, negotiate contract boilerplate terms, and for similar purposes. In this context, discussions could be either in oral form or written, with the latter being more likely when

contractual terms are being discussed.

This interpretation, unlike Anthem’s position, directly aligns with FAP 111-57-00 (“Competitive Negotiations”), Finance’s written guidance on the process to award a competitively negotiated contract. FAP 111-57-00(4)(g) states:

g. Upon review of the evaluations and scores, OPS and the evaluation committee(s) shall conduct negotiations and determine if "Best and Final Offers" are appropriate. If used, the call for "Best and Final Offers" shall be sent in accordance with the RFP. **After the Best and Final Offers are received and re-evaluated with criteria included in the Best and Final Offer instructions, OPS and the requesting agency may conduct negotiations.** After successful negotiations are concluded, OPS shall award the Contract in accordance with the award methodology stated in the RFP.

(Emphasis added).

The RFP provisions concerning oral presentations make clear that they are held entirely at the Commonwealth’s discretion, with vendors having no vested right in or promise of them. The inclusion of oral discussion provisions in the RFP was entirely discretionary. Nothing in Kentucky procurement law requires that any and all solicitations include an opportunity for oral presentations. Indeed, such a requirement and its associated burdens would quickly grind the contract award process to a halt and directly undermine the General Assembly’s intent in enacting the KMPC.

CONCLUSION

For the reasons above, the Court should uphold the Court of Appeals’ decision to reverse Franklin Circuit’s order invalidating the 2020 RFP and vacate the temporary injunction which granted Anthem an MCO contract.

(Signature Page to Follow)

Respectfully submitted,

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WORD COUNT CERTIFICATE

Pursuant to RAP 31(G)(3), undersigned counsel certifies that this document complies with the word limit of RAP 31(G)(3)(a) because, excluding the parts of the document exempted by RAP 15(D) and RAP 31(G)(5), this document contains 6510 words.

/s/ **Brian C. Thomas**

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