SUPREME COURT OF KENTUCKY
CASE NO. 2022-SC-0515
Electronically Filed

ANTHEM KENTUCKY MANAGED CARE PLAN, INC. — APPELLANT

v.

MOLINA HEALTHCARE OF KENTUCKY, INC., ET AL. — APPELLEES

APPEAL FROM KENTUCKY COURT OF APPEALS
Case Nos. 2021-CA-0806, 0819, 0822, 0824, 0847, 0849 & 0855

REPLY BRIEF OF APPELLANT ANTHEM KENTUCKY MANAGED CARE PLAN, INC.

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Certificate of Service on following page

CERTIFICATE OF SERVICE
PURSUANT TO KENTUCKY RULE OF APPELLATE PROCEDURE 30(B)

The undersigned certifies that a true and accurate copy of APPELLANT ANTHEM KENTUCKY MANAGED CARE PLAN, INC.'S REPLY BRIEF was served upon each of the following via U.S. mail, postage prepaid, this 5th day of September, 2023: i) Marc J. Kessler, Hahn Loesser & Parks LLP, 65 East State Street, Columbus, OH 43215; F. Ryan Keith, 9900 Corporate Campus Dr., Suite 1000, Louisville, KY 40223; Robert J. Fogerty, Hahn Loesser & Parks LLP, 2200 Public Square, Suite 2800, Cleveland, OH 44114; Michael P. Abate and Casey L. Hinkle, Kaplan Johnson Abate & Bird LLP, 710 W. Main St., 4th Floor, Louisville, KY 40202; David Tachau, Dustin E. Meek, and Katherine Lacy Crosby, 101 South Fifth Street, Suite 3600, PNC Tower, Louisville, KY 40202-3120; Mitchel Denham and Kayla Campbell, Dressman Benzinger LaVelle PSC, 2100 Waterfront Plaza, 321 W. Main St., Louisville, KY 40202; David V. Kramer, Mark Guilfoyle, and Danyel Rickman, Dressman Benzinger LaVelle PSC, 207 Thomas Moore Pkwy, Crestview Hills, KY 41017; Christopher G. Caldwell, Caldwell LLP, 6250 Hollywood Blvd., Suite 11M, Los Angeles, CA 90028; Mark W. Leach, The Mark W. Leach Law Firm, PLLC, 145 Pennsylvania Ave., Louisville, KY 40206; Christopher A. DeLong and Alex Hontos, Dorsey & Whitney LLP, 50 South Sixth Street, Suite 1500, Minneapolis, MN 55402-1498; Sarah Charles Wright, Bryan H. Beauman, and Kevin G. Henry, Sturgill, Turner, Barker & Moloney, PLLC, 333 West Vine Street, Suite 1500, Lexington, KY 40507; Brian P. Waagner and Steven A. Neeley, Husch Blackwell, LLP, 750 17th Street, NW, Suite 900, Washington, D.C. 20006; Adam Loomans, 1405 E. Bywater Ln., Milwaukee, WI 53217; Wesley W. Duke, Jessica Williamson, Blake Vogt, 275 E. Main Street, 5W-B, Frankfort, KY 40621; Brian C. Thomas, Cary Bishop, and Wm. Robert Long, Jr., 702 Capitol Ave., Room 392, Frankfort, KY 40601; ii) Honorable Phillip J. Shepherd, Chief Circuit Judge, Franklin Circuit Court, Franklin County Courthouse, 222 St. Clair Street, Frankfort, KY 40601; iii) Amy Feldman, Franklin Circuit Court Clerk, 221 St. Clair Street, Frankfort, KY 40601; iv) Kate Morgan, Kentucky Court of Appeals Clerk, 360 Democrat Drive, Frankfort, KY 40601.

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TABLE OF POINTS AND AUTHORITIES

INTRODUCTION

The Court of Appeals' September 9, 2022, Opinion created an unworkable exhaustion requirement that has no support in the text, structure, or purpose of either the Kentucky Model Procurement Code (KMPC) or the Executive Branch Code of Ethics (EBCE). It also excused multiple undisputed violations of the KMPC by the Finance and Administration Cabinet (FAC) during the procurement, including the scoring team's destruction of notes they were required to maintain and the FAC's entirely undocumented, and therefore arbitrary and capricious, failure to hold oral presentations.

The Cabinet for Health and Family Services (CHFS), the FAC, and the four other Medicaid Managed Care Organizations (MCOs) who bid under the 2020 Request for Proposal offer no persuasive justifications for the Court of Appeals' novel exhaustion requirement or for excusing the FAC's efforts to undermine the procurement. Indeed, the six briefs filed in response to Anthem's brief only occasionally address Anthem's arguments directly. Instead, they largely misconstrue those arguments, knock down straw men, and engage in non sequiturs. To the extent they do address the merits, their arguments fail. This Court should reverse the Court of Appeals and uphold the decision of the Franklin Circuit Court that a new procurement for MCO contracts must take place.

ARGUMENT

I. This Court Should Reverse the Court of Appeals' Holding that Anthem Failed to Exhaust Administrative Remedies.

A. The Court of Appeals' Exhaustion Requirement is Contrary to the KMPC's Text, Structure, and Purpose.

The Court of Appeals' Opinion held that a disappointed bidder who protests a procurement decision because one of the winning bidders employed a former Executive Branch official in violation of the Kentucky Model Procurement Code, the operative request for proposal (RFP), and the Executive Branch Code of Ethics, may not do so unless it first exhausts administrative remedies before the Executive Branch Ethics Commission (Commission). Under the Opinion, in order to ground its bid protest on such conduct, the disappointed bidder must file a complaint with the Commission against the former official personally, and the Ethics Commission must render a final decision, within the KMPC's strict 14-day deadline for submitting bid protests. KRS § 45A.285(1). What this means in practice is that no bidder will ever be able to predicate a protest on another bidder's unethical and unlawful employment of a former government official.

As Anthem explained in its opening merits brief, there is no textual, structural, or policy basis in either the KMPC or the EBCE for the Court of Appeals' new exhaustion requirement. The KMPC vests in the FAC sole "authority to determine protests and other controversies of actual or prospective bidders or offerors in connection with the solicitation or selection of an award of a contract," KRS § 45A.285(1), and the FAC's decision "shall be final and conclusive," *id*. § 45A.285(4). That broad authority capaciously encompasses a protest, like Anthem's here, that

challenges a *bidder's* conduct in unlawfully hiring a former official, but does not seek to subject the former official personally to fines, reprimands, or other sanctions under the EBCE. Anthem Br. 19–21. Because the former official is not herself at risk of liability, such a protest does not fall within the Commission's narrower authority to determine whether a public servant or official should be sanctioned or censured for violating the EBCE. *See* KRS § 11A.080. The overall structure of both the KMPC, which is prospectively focused on resolving bid protests with dispatch, and the EBCE, which properly affords greater procedural protections to officials who personally face sanction or even referral for criminal prosecution for previous acts, confirm this interpretation. Anthem Br. 21–25. Given the absence of any textual or structural support for the Court of Appeals' exhaustion requirement, there is no reason to impose a rule that will effectively prevent a disappointed bidder from ever raising in a bid protest another bidder's unlawful hiring of a former official. Anthem Br. 26–27.

Instead of directly engaging with these arguments, the six appellee briefs by two government agencies and four MCOs instead wander down a series of cul-de-sacs and digressions. CHFS and United argue at length over the general tenet of Kentucky law requiring the exhaustion of administrative remedies. CHFS Br. 13; United Br. 6–8 (similar). Agreed; Anthem takes no issue with the doctrine of administrative exhaustion in general. The relevant question, rather, is before which agency Anthem must have exhausted its administrative remedies. Anthem properly exhausted its administrative remedies before the FAC, seeking the relief directly related to the contract award Anthem sought to invalidate. *Kentucky Ret. Sys. v. Lewis*, 163 S.W.3d 1, 3 (Ky. 2005), *as modified on denial of reh'g* (June 16, 2005) (explaining that

exhaustion-of-remedies doctrine "mandates judicial deference until after exhaustion of all viable remedies before the agency vested with primary jurisdiction over the matter" (internal quotation marks omitted)); *Preston v. Meigs*, 464 S.W.2d 271, 274 (Ky. 1971) (primary jurisdiction refers to the "'agency charged with primary responsibility for governmental supervision or control of the particular industry or activity involved'" (quoting *Port of Boston Marine Terminal v. Rederiaktiebolaget, Transatlantic*, 400 U.S. 62, 68 (1970))). Anthem filed a bid protest with the FAC under the KMPC seeking a rebid on the grounds that Molina's employment of Ms. Parento violated the 2020 RFP, which required each bidder to provide "[a] sworn statement pursuant to KRS 11A.040 that *the vendor* has not knowingly violated any provisions of the Executive Branch Code of Ethics." (Tr. Vol. I at 130 (emphasis added).) Anthem's protest and request for relief falls squarely within the FAC's broad and exclusive authority under the KMPC to resolve "protests and other controversies . . . in connection with" bids. KRS § 45A.285.

The CHFS, the FAC, and the MCOs contend, however, that Anthem was required to first file an ethics complaint before the Commission because that "is the entity empowered by statute to determine whether a violation of the EBCE occurred"—regardless of the context in which that question arises. CHFS Br. 12; FAC Br. 13; *see also* United Br. 6–10. They claim that Anthem asks this Court to "entirely disregard the procedural requirements of the EBCE and KRS Chapter 11A," CHFS Br. 12–13; FAC Br. 9–13 (same), and repeatedly assert that only the Commission can "determine if a violation of the [EBCE] has occurred," FAC Br. 9, CHFS Br. 12 (similar). But the Commission's authority—and thus its primary jurisdiction for administrative

exhaustion purposes—is narrower and more specific than what Appellees suggest. The Commission is empowered to investigate and sanction "alleged violation[s] of *this chapter*," KRS § 11A.080 (emphasis added), and *this chapter* (i.e., the EBCE) sets forth *both* the substantive standards of conduct governing public servants and officers in the Commonwealth, *and* the penalties officials face for breaching those standards, which include confidential or public reprimand, an order to cease and desist, a monetary fine, a recommendation that the official be removed or suspended, or a referral to the Attorney General for criminal prosecution, KRS §§ 11A.080(4)(a), 11A.100(3), 11A.100(5). The CHFS, the FAC, and the MCOs elide the critical distinction between Anthem's protest, which challenged Molina's conduct as a bidder, and a complaint directed at Ms. Parento personally, which could expose her to personal sanctions for her conduct.[1]

The FAC and the MCOs wrap themselves in the due process rights of officials accused of misconduct, but this is a feint. FAC Br. 10; Molina Br. 15–16; United 9–10.

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[1] United claims that Anthem "recites the statutory frameworks for the FAC's resolution of bid protests and the Ethics Commission's handling of potential violations of the EBCE—but then does not identify any conflicting text." United Br. 9. United does not make a relevant argument, however. Anthem's point is not that there is a head-on textual conflict between the KMPC and the EBCE, but that these two statutory schemes have different purposes and are directed towards different issues: The KMPC creates a brisk and efficient process for resolving bid protests, subject to strict deadlines and without the full panoply of administrative procedures, whereas the Commission's review of complaints against officials affords additional process, reflecting the personal liability—fines, reprimands, removal from office, or criminal referrals—that officials subject to ethics complaints may face. The incompatibility arises because the Court of Appeals' Opinion tries to shoehorn a protest under the KMPC that is directed at another bidder's conduct into the administrative process designed for complaints personally against public servants and officials under the EBCE. *See* Anthem Br. 21–25.

Anthem agrees that Ms. Parento cannot personally be fined or otherwise sanctioned unless a person files a formal complaint against her before the Commission (or the Commission initiates an investigation on its own), KRS § 11A.080(1)(a), and she receives the appropriate administrative process, KRS § 11A.100(1). But Anthem is not seeking sanctions against Ms. Parento. That Anthem's protest of Molina's conduct as a bidder involves a subsidiary question of whether Molina's employment of Ms. Parento constituted a conflict of interest does not bring Anthem's protest within the Commission's limited authority to determine whether Ms. Parento should be sanctioned for violating the EBCE. And because Ms. Parento's procedural due process rights simply are not implicated here, the FAC's lengthy digression assailing the Franklin Circuit Court for not analyzing whether the EBCE's procedures were followed (which the FAC did not raise in the Circuit Court) is a *non sequitur*. FAC Br. 10–12.

As Anthem explained in its opening brief, the Court of Appeals' holding will render it practically impossible for a disappointed bidder to protest another bidder's unethical hiring of a former government official. Anthem Br. 26–27. That is so because a disappointed bidder cannot plausibly pursue a complaint with the Commission all the way through to final decision while still complying with the KMPC's requirement to submit any protest within 14 days of the date it knew or should have known of the grounds for the protest. KRS § 45A.385(2).

Not one of the six briefs filed on the other side satisfactorily resolves this problem created by the Court of Appeals' decision. The CHFS tries to do so by noting that the Commission's "preliminary investigation into the validity of the complaint is

required within 10 days of the Ethics Commission meeting." CHFS Br. 13. But that is not what the EBCE says. It says that "[t]he preliminary investigation *shall begin* not later than ten (10) days *after* the *next* commission meeting *following* the receipt of the sworn complaint." KRS § 11A.080(1)(b) (emphasis added). Even then, of course, there is no requirement that the Commission make any ruling within any particular amount of time. The notion that this somehow fixes the impossible situation the Court of Appeals has created is fanciful.

The CHFS and the FAC concede that the Commission does not have "the authority to resolve bid protests." CHFS Br. 12; FAC Br. 12 (similar). Nevertheless, they and the MCOs insist that the Court of Appeals' decision does not effectively immunize bidders who unlawfully hire former officials from bid protest because, if the Commission determines that an ethics violation occurred in connection with a state contract, the FAC "may void any contract related to that case." KRS § 11A.080(5); CHFS Br. 17–18; FAC Br. 12; Humana Br. 12; Molina Br. 18–19; United Br. 9. As Anthem previously explained, however, that provision presupposes that the Commonwealth has already entered into a contract, whereas protests under the KMPC occur *prior* to contract execution and implementation. Anthem Br. 25. More importantly, by the time that the Commission reaches a final decision—months or maybe years later, *see* Anthem Br. 27 & n.13—the FAC may have strong incentives against invalidating contracts that have long-since been implemented, even if the same ethical violation presented in a bid protest timely submitted under the KMPC would justify a rebid. Simply put, KRS § 11A.080(5) is not a substitute for prompt review through a bid protest.

The cases cited by the CHFS, the FAC, and the MCOs do not counter Anthem's arguments. In *Exec. Branch Ethics Comm'n v. Stephens*, 92 S.W.3d 69, 71–73 (Ky. 2002), this Court held that a former official who was the target of an Ethics Commission investigation failed to exhaust administrative remedies when he sought declaratory and injunctive relief in Circuit Court barring the Commission's administrative review before that review had concluded. This Court similarly held in *Ky. Exec. Branch Ethics Comm'n v. Atkinson*, 339 S.W.3d 472, 474, 476 (Ky. 2010), that current and former property valuation administrators under investigation by the Commission for engaging in nepotism could not challenge the investigation in Circuit Court until the administrative proceedings had concluded. The critical difference between those cases and this one—a difference the FAC, the CHFS, and the MCOs consistently fail to recognize—is that Anthem is not seeking to make Ms. Parento the target of Ethics Committee complaint or hold her personally liable under the EBCE. *Stephens* and *Atkinson* are thus simply inapposite.

B. Anthem Timely Protested Molina's Hiring of Parento.

Seizing on dicta within the Court of Appeals' decision, the CHFS, FAC, and MCOs argue that regardless of whether the Court of Appeals' exhaustion ruling is correct, Anthem's appeal must fail because it did not timely protest Molina's hiring of Ms. Parento. Appellees, as well as the Court of Appeals, are simply incorrect.

Anthem timely submitted its bid protest. Under the KMPC, "[a] protest or notice of other controversy must be filed within two (2) calendar weeks after such aggrieved person knows or should have known of the facts giving rise thereto." KRS § 45A.285(2). The KMPC's implementing regulations provide that, "[f]or protests

based upon alleged improprieties in the award of a contract, the facts giving rise to the protest shall be presumed to have been known to the protestor on the date the notice of award of contract was posted." 200 KAR 5:380 § 1(1)(b). However, this "presumption may be overcome by showing that the facts giving rise to the protest were not and should not have been known to the protestor on the [presumed] date." *Id*. § 1(2). The FAC announced the results of the 2020 RFP on May 29, 2020. (TR. Vol. I at 34–60.) Anthem immediately submitted requests to the FAC under the Open Records Act, KRS § 61.870, seeking all bidders' RFP responses and all documents related to the FAC's consideration thereof. (TR. Vol. I at 17–18, 36.) Those requests were still pending when Anthem filed its protest on June 12, 2020. (TR. Vol. XXXVI at 5305.) Once the FAC produced documents responsive to Anthem's requests, Anthem supplemented its protest to raise, among other errors, Molina's employment of Ms. Parento. (TR. Vol. I at 62–64, 130.) Anthem filed its supplemental protest on June 26, 2020, within two weeks of the FAC's production of Molina's RFP response. (TR. Vol. I at 61–79.)

The Franklin Circuit Court did not address the timeliness of Anthem's arguments over Parento's conduct to the FAC—mainly because no party complained about it in the summary judgment briefs to the trial court—and no party raised the issue in briefing to the Court of Appeals.[2] Nevertheless, the Court of Appeals'

[2] While CHFS may have argued Anthem should have exhausted its administrative remedies at the Commission in its brief to the Court of Appeals, COA Op. n. 13, neither CHFS nor any other party argued that Anthem did not otherwise timely raise Ms. Parento's misconduct in its bid protest to the FAC before the Court of Appeals.

conclusion that Anthem did not timely protest Molina's employment of Ms. Parento was clearly erroneous. The Court of Appeals contended that Ms. Parento's "involvement with Molina's 2020 RFP was made public when the scoring sheets *and responses* were made available on May 29, 2020," including that "[t]he executive summary of Molina's proposal references its retention of Parento to assist in implementation of the managed care program." (COA Op. 33 & n.15.) But the FAC did not make Molina's RFP response available to Anthem until *after* Anthem timely filed its initial protest on June 12, 2020. (R. Vol. I at 34–60.) And Anthem was not and could not reasonably have been expected to be aware, until reviewing Molina's RFP response, of the facts supporting its claim that "Molina should have been disqualified as a bidder . . . because it elected to employ Ms. Emily Parento as a consultant." (R. Vol. I at 61–64.)[3]

II. The Scoring Team's Deliberate Destruction of Their Notes Rebuts the Presumption of Correctness.

The KMPC, its implementing regulations, and the 2020 RFP itself imposed on the scoring team the obligation to maintain all written documentation produced during the procurement, including their notes. 200 KAR 5:307 § 5(4); (Monroe Ex. 17). Nevertheless, the FAC's buyer Amy Monroe testified that she instructed scoring

[3] Humana argues Anthem should have preemptively addressed this counterargument (i.e., that even if the FAC could have addressed Ms. Parento's misconduct, the argument was not timely raised) in its petition for discretionary review to this Court. Humana Br. 10. But this, too, is wrong. The Court of Appeals' primary holding—and the central issue in this appeal—was that the FAC had no jurisdiction whatsoever to consider Anthem's arguments about Parento's violation of the EBCE. Anthem need not have gone further to address the Court of Appeals' clearly erroneous dicta on an issue the trial court never addressed to begin with.

team members to throw away their notes because otherwise the notes would be subject to the Open Records Act and discoverable in litigation. (Monroe Dep. 162:16–164:13.) The Franklin Circuit Court properly recognized that Ms. Monroe's instruction "casts doubt on the integrity of the RFP process, and diminishes public confidence in the procurement process in contravention of" the KMPC, (TR. Vol. XXXVI at 5332), and even the Court of Appeals conceded that it was improper, (COA Op. 24–25). The scoring team's destruction of their notes violated the terms of the RFP and the KMPC, and accordingly a rebid is required. *Commonwealth v. Yamaha Motor Mfg. Corp. of Am.*, 237 S.W.3d 203, 206 (Ky. 2006) ("[A]n award or decision must not be arbitrary and capricious or contrary to law, and this includes a decision or award made in violation of the KMPC.").

In an effort to excuse the FAC's deliberate destruction of evidence, the CHFS and the FAC cite an Office of the Attorney General opinion observing, in the context of a request to produce a list of lost and abandoned property from the Kentucky State Fair, that preliminary notes are generally not covered under the Open Records Act and may be destroyed. Ky. Op. Att'y Gen. 97-ORD-183, 1997 WL 809177 (1997) (Appendix C to CHFS Br.). First, OAG opinions are not binding on this or any other Kentucky court. *Dep't of Kentucky State Police v. Trageser*, 600 S.W.3d 749, 753 (Ky. App. 2020). Second, and more importantly, the FAC's *own regulation* required that "[a]ll evaluation documentation, scoring, and summary conclusions shall be in writing, and made a part of the file records for the procurement." 200 KAR 5:307 § 5(4); *see also Centre Coll. v. Trzop*, 127 S.W.3d 562, 566 (Ky. 2003), *as modified* (Jan. 30, 2004), *as modified on denial of reh'g* (Mar. 18, 2004) ("In Kentucky, administrative

regulations do have the force and effect of law when they have been duly promulgated and are consistent with the enabling legislation."). Furthermore, the FAC required each member of the scoring team to "[k]eep all documentation secure indefinitely, this includes your proposals *and any notes*." (Monroe Ex. 17 (emphasis added).) Even if the general principle articulated in that OAG opinion were accurate, it must yield to the more specific and stringent obligations that the KMPC, its regulations, and the 2020 RFP imposed on the scoring team.

Like the Court of Appeals, the FAC faults Anthem for being unable to prove that anything in the destroyed notes would have undermined the award. FAC Br. 17–18; (COA Op. 24–25.) But it should not be Anthem's burden to prove the contents of evidence that the FAC destroyed—especially because, as Ms. Monroe testified, she told the scoring team to dispose of their notes because "anything that they keep after the award of the solicitation is subject to open records and any litigation which may arise." (Monroe Dep. 163:5–13); *Welsh v. United States*, 844 F.2d 1239, 1246–47 (6th Cir. 1988) (destruction of evidence results in a "burden-shifting presumption" against the spoliator). The FAC has never shown that the destroyed notes would *not* have affected Anthem's protest, notwithstanding its rank speculation before this Court that any "hypothetical evidence" in the notes "would tend only to prove that the consensus scoring process was functioning as intended." FAC Br. 18. A presumption of

correctness is just that—a presumption. It must yield to the FAC's deliberate undermining of the procurement process.[4]

III. The Scoring Team's Failure to Document its Decision Not to Hold Oral Presentations Violated the KMPC and the 2020 RFP.

The KMPC requires 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." KRS § 45A.085(7) (emphasis added). The only relevant exception to this command applies "[w]here it can be *clearly demonstrated and documented* . . . that acceptance of initial offer without discussion would result in fair and reasonable best value procurement." *Id*. § 45A.085(7)(c) (emphasis added). There is no dispute that the FAC did not hold oral presentations, that it did not discuss internally whether to do so, and that it did not create any contemporaneous "documentation of any kind of the decision not to pursue oral

[4] Aetna disputes Anthem's comparison of the FAC's conduct here to spoliation, calling spoliation a mere "evidentiary consideration only" to be addressed through "evidentiary rules and 'missing evidence' instructions.'" Aetna Br. 19–20 (quoting *Monsanto Co. v. Reed*, 950 S.W.2d 811 (Ky. 1997)). This criticism is off-base because, of course, this case has yet to be tried, but when it is, Anthem may well request such an instruction. Likewise, Aetna's claim that spoliation would not apply because the notes were destroyed in the regular course of business and before the FAC contemplated litigation is flatly contradicted by Ms. Monroe's admission that she instructed the team to destroy their notes *precisely because* they would otherwise be discoverable in litigation or under the Open Records Act, and because they were destroyed in contravention of the KMPC's own requirements and the FAC's own regulations. (Monroe Dep. 162:16–164:13.) United, meanwhile, misconstrues Anthem's comparison of the FAC's conduct to spoliation as a request for spoliation sanctions, which it then says was not preserved or justified. United Br. 13–14. But that too misses the point: The issue is not one of sanctions but whether the FAC is still entitled to the presumption of correctness when it deliberately fails to preserve evidence specifically to avoid production in litigation. (Monroe Dep. 163:5–13).

presentations." (Monroe Dep. 61:4–25, 63:4–25, 77:14–79:3; Bates Dep. 109:10–23); Anthem Br. 32–33.

As with exhaustion, the CHFS and the FAC largely do not respond to Anthem's argument that the scoring team violated the KMPC and acted arbitrarily and capriciously by failing to clearly demonstrate and document, in the administrative record and contemporaneously with its decision, why oral presentations were unnecessary. Instead, they emphasize that the 2020 RFP provided that "oral presentations would be [held] at the *discretion* of the Commonwealth." CHFS Br. 22 (emphasis in original); FAC Br. 19 (similar). But Anthem has not argued that oral presentations were absolutely required. Anthem's argument, rather, is that the KMPC obligates the FAC to document a reasoned basis not to hold oral presentations at the time it makes that decision.[5] That is consistent with black-letter principles of administrative law, under which "judicial review of agency action is limited to 'the grounds that the agency invoked *when it took the action*.'" *Dep't of Homeland Sec. v. Regents of Univ. of Calif.*, --- U.S. ---, 140 S. Ct. 1891, 1907 (2020) (emphasis added) (quoting *Michigan v. EPA*, 576 U.S. 743, 758 (2015)); 2 Am. Jur. 2d Administrative Law § 476. Thus, attempts to backfill the FAC's failure to document with various reasons

[5] Wrongly characterizing Anthem as arguing that oral presentations are required as a matter of law, Humana and United argue that Anthem should have protested when the 2020 RFP was released because it indicated that oral presentations might not be held, and therefore that this issue is not preserved. Humana Br. 14–15 (citing 200 KAR 5:380 § 1(1)(a)); United Br. 15–16. Since that is not Anthem's argument, their preservation argument is irrelevant and meritless.

it *might* have decided oral presentations were not necessary miss the mark entirely. *See, e.g.*, United Br. 16.

As Anthem explained, Ms. Monroe's post-hoc and conclusory assertion in her deposition that oral presentations were not needed is both entirely unsupported by the administrative record and highly suspect given that up to 200 points were available for oral presentations, which, as the Franklin Circuit Court explained, "certainly could have changed a bidder's position in the final ranking." (TR. Vol. IX at 1249–50.)[6]

CONCLUSION

For the reasons discussed above and in Anthem's opening brief, this Court should reverse the Court of Appeals' decision and affirm the Franklin Circuit Court's opinion requiring the FAC to re-bid the Medicaid MCO contracts awarded through the 2020 RFP.

[6] The FAC claims for the first time here that the KMPC's requirement to hold "oral discussions" means something different than the "oral presentations" provided for in the 2020 RFP. FAC Br. 19. Specifically, the FAC claims that the oral discussions that the KMPC mandates refers, "[i]n the context of the RFP," to the FAC's "right to request a Best and Final Offer (BAFO)," identified at Section 70.2 of the 2020 RFP, and thereafter to conduct "negotiations relating to a possible BAFO, rather than demonstrations." FAC Br. 20. That cannot be right. Section 70.2 does not mention oral discussions, demonstrations, presentations, negotiations, or anything else. The "negotiations" to which the FAC refers comes from its own manual of policies. FAC Br. 20 (quoting FAP 111-57-00(4)(g)). If the General Assembly intended in the KMPC to require FAC to hold "negotiations," it would have said that instead of "oral discussions."

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WORD COUNT CERTIFICATION

This Reply Brief complies with the word limit imposed in RAP 31(G)(3)(b) because the Introduction, Argument, and Conclusion, including all headings and footnotes, contain 4,391 words as calculated by Microsoft Word. This total complies with Kentucky Rule of Appellate Procedure 31(G)(3)(b)'s word limitations because six Appellees filed briefs in response to Anthem's appeal.

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