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CASE NUMBER: SN-2024-CV-000467  
PII COMPLIANT



**Court:** Shawnee County District Court  
**Case Number:** SN-2024-CV-000467  
**Case Title:** Aetna Better Health of Kansas Inc vs. Kansas Department of Administration, et al  
**Type:** ORD: Order Originated by Judge Memorandum Decision and Order

SO ORDERED,

A handwritten signature in black ink that reads 'Thomas G. Luedke'.

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/s/ Thomas G. Luedke, Honorable District Court Judge

**IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS  
THIRD JUDICIAL DISTRICT  
DIVISION SIX**

AETNA BETTER HEALTH OF KANSAS, INC.,	)	
	)	
Petitioner,	)	2024-CV-467
	)	
vs.	)	
	)	
KANSAS DEPARTMENT OF	)	
ADMINISTRATION; KANSAS DEPARTMENT	)	
OF HEALTH AND ENVIRONMENT and;	)	
KANSAS DEPARTMENT FOR AGING AND	)	
DISABILITY SERVICES	)	
	)	
Respondents.	)	

**MEMORANDUM DECISION AND ORDER**

The above captioned matter comes before the Court upon the petition of Aetna Better Health of Kansas, Inc.’s (Aetna) for judicial review.

**NATURE OF THE CASE**

In January of 2024, the Respondents (State) published a Request for Proposal (RFP) seeking bids from Managed Care Organizations (MCOs) to administer its KanCare health insurance program. The State sought to enter into contracts with three MCO’s. The Petitioner, Aetna, submitted a bid and engaged in the bidding process. The culmination of that process resulted in Aetna being edged out for the third and final contract by Community Health Plan of Kansas, Inc., d/b/a Healthy Blue (Healthy Blue). Aetna seeks judicial review of the State’s decision denying it a contract, alleging improprieties in the bidding process. In addition to the agencies named in Aetna’s petition, the winning bidders, Healthy Blue, Sunflower State Health

Plan, Inc., (Sunflower), and United Health Care of the Midwest, Inc., (United), intervened in the case to protect their interests.

## **STATEMENT OF FACTS<sup>1</sup>**

### **I. KanCare**

1. KanCare is the State of Kansas’s “Medicaid program and Children’s Health Insurance Program (CHIP).” AR 0000070, RFP § 1.

2. The services the State provides through KanCare include “physical health services, Behavioral Health Services, and Long-Term Services and Supports (LTSS), including nursing facility (NF) care and Home- and Community-Based Services (HCBS).” *Id.*

3. Persons eligible to participate in KanCare include “(1) parents, pregnant women, and children; (2) persons with disabilities . . . ; and (3) the aged (65 and older).” “AR 000074-000075, RFP § 1.3.D.

4. “As of August 2023, the total Medicaid/CHIP covered population for calendar year 2023 was approximately 520,200. This includes approximately 320,000 children, 79,000 parents and pregnant women, 59,000 individuals with disabilities, and 54,000 individuals 65 and older.” *Id.*

5. The State administers KanCare through “two State agencies: the Kansas Department of Health and Environment (KDHE) and the Kansas Department for Aging and Disability Services (KDADS),” who “closely collaborate with the Kansas Department of Children and Families (DCF), the agency responsible for the delivery of social services and the provision

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<sup>1</sup> The facts contained herein were either submitted jointly by the parties as agreed upon, or derived by the Court from the administrative record as identified by the parties or the intervenors.

of care to vulnerable children and families, including foster care services.” AR 0000073, RFP § 1.2.

6. In KanCare, the State “has determined that delivering services under a Managed Care model and continuing to contract with multiple MCO CONTRACTORS will result in the provision of high quality, integrated, well-coordinated, and cost-effective services to improve the health outcomes of the populations currently covered by Medicaid and CHIP in Kansas.” AR 000071, RFP § 1.

7. The State’s managed-care program operates “under State Plan and Waiver authority as specified in Sections 1932(a), 1115, 1915(b), and 1915(c) of the Social Security Act.” AR 000076, RFP § 1.3.H.

8. KanCare MCO contracts are thus “subject to the review and approval of [the federal Centers for Medicare and Medicaid Services].” AR 000112, RFP § 6.D.

9. The State’s current contracts with MCO contractors expire on December 31, 2024. AR 000080, RFP § 3.1.

10. Contracts awarded under the KanCare 3.0 procurement take effect on January 1, 2025. AR 000081, RFP § 3.1.

## **II. The RFP**

11. The Kansas Department of Administration (DOA) published the KanCare Medicaid & CHIP Capitated Managed Care Request for Proposal on October 2, 2023 (RFP). AR000065, RFP.

12. Section 1.1 of the RFP listed the State’s “Vision and Goals” for the RFP. AR 000071-0000073. They included:

- a. Improve Member experience and satisfaction;
- b. Improve health outcomes by providing holistic care to Members that is integrated, evidence-based, and well-coordinated, and that recognizes the impact of Social Determinants of Health (SDOH);
- c. Reduce health care disparities;
- d. Expand Provider network and direct care workforce capacity and all skill sets;
- e. Improve Provider experience and encourage Provider participation in Medicaid;
- f. Increase the use of cost-effective strategies to improve health outcomes and the service delivery system; and
- g. Leverage data to promote continuous quality improvement to achieve the goals of the KanCare program.

*Id.*

13. The RFP said “[t]he State expects selected CONTRACTOR(S) to provide the expertise, experience, innovative strategies, methods of approach, and capabilities necessary to advance the KanCare vision and goals.” AR 000073, RFP § 1.1.H.

14. Section 2.1 of the RFP stated that “[t]he purpose of this RFP is to solicit competitive proposals from bidders that have the experience, capabilities, and methods of approach to successfully perform the scope of work and meet the requirements described in this RFP.” AR 000077.

15. Section 3 of the RFP set forth the “Procurement Events.” AR 000080. They included:

PROCUREMENT SCHEDULE		
	EVENT	DATE
1	State releases RFP	October 2, 2023
2	Pre-bid conference and actuarial pre-bid conference	October 16, 2023  Pre-bid conference 9:00 a.m. to 10:00 a.m. CT  Actuarial pre-bid conference 10:30 a.m. to 12:00 p.m. CT; reconvene from 1:00 p.m. to 4:00 p.m. CT
3	Deadline for submitting written questions requesting clarifications	October 23, 2023
4	State will post an amendment with bidder questions and agency answers	November 28, 2023
5	Proposal submission deadline	January 4, 2024 by 2 p.m. CT
6	Evaluation of bids conducted by State	January 5, 2024 to March 21, 2024
7	In-person negotiations with selected bidders	TBD
8	CONTRACT award	April 12, 2024
9	Bid protest period	April 15, 2024 to May 17, 2024
10	Readiness review period	End of bid protest to December 31, 2024
11	KanCare 2.0 MCO contracts expire	December 31, 2024
12	New CONTRACT(S) take effect – services rendered under new CONTRACT(S)	January 1, 2025

AR 000080-000081, RFP § 3.1.

16. The procurement schedule was “subject to change at the State’s sole discretion.”

*Id.*

17. Section 3.2.6 of the RFP said “[t]his is a negotiated procurement pursuant to K.S.A. 75-37,102.” AR 000083, RFP § 3.2.6.A. “Final evaluation and award will be made by the Procurement Negotiating Committee (PNC)[.]” *Id.*

18. The RFP also said:

Based upon the evaluation of proposals, bidders may be asked by the State to participate in negotiations leading to a revised offer. 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 bidder's initial proposal. The PNC reserves the right to request information from bidders as needed. If information is requested from a particular bidder, the PNC is not required to request the same information of all bidders. Meetings before the PNC are not subject to the Open Meetings Act. Bidders are prohibited from electronically recording these meetings.

AR 000084, RFP § 3.2.6.B.

19. Section 3.2.8 provided for a "Bid Protest Period" of "thirty (30) Calendar Days after the date of the CONTRACT award." AR 000084, RFP § 3.2.8.

20. In Section 3.3.1, the State reserved "the right to accept or reject any or all proposals or part of a proposal, to waive any formalities or technicalities; clarify any ambiguities in proposals, modify any criteria in this RFP, and unless otherwise specified, to accept any item in a proposal."

21. Section 4 of the RFP governed "Proposal Submission Requirements." AR 000088, RFP § 4. A "[f]ailure of the bidder to conform to these requirements may, at the State's sole discretion, result in the disqualification of the proposal." *Id.* The State "reserve[d] the right to waive minor irregularities that would not provide the bidder(s) an advantage as compared to other bidders." *Id.*

22. Section 4.3.H governed bidders' "Responses to Technical Questions." AR 000093, RFP § 4.H. That section included seven topic areas and a list of 37 technical questions for bidders to answer. *See* AR 000093-000104, RFP § 4.H.

23. Section 4.5 of the RFP established “Cost Proposal Submission Requirements.” AR 000105. That section required bidders to “submit a single, statewide blended bidder initial capitation rate per member per month (PMPM) rate to reflect the proposed business model of that bidder.” *Id.*, RFP § 4.5.C.

24. Section 5 of the RFP established a three-phase “Evaluation Process”:

- a. Phase 1: Review of Mandatory Requirements
- b. Phase 2: Review of Technical Proposals
- c. Phase 3: Review of Cost Proposals.

AR 000107, RFP § 5.

25. In Phase 1 the “State will review proposals to determine whether the proposals meet mandatory requirements.” AR 000107, RFP § 5.1.A.

26. Section 5.2 described the State’s Phase 2 “Review of Technical Proposal.” AR 000107.

27. The RFP said bidders’ technical proposals “will be evaluated by evaluation committees.” AR 000107, RFP § 5.2.A. “The evaluation committees are comprised of State employees appointed by the [PNC] to evaluate and rate the technical proposals submitted in response to the RFP.” *Id.*

28. The RFP also said “[s]ubject matter experts may be used by the evaluation committees to review responses to specific parts of the technical proposal and provide feedback for the evaluation committees’ consideration, but will not evaluate or rate technical proposals.” AR 000108, RFP § 5.2.A.

29. “The evaluation of the response to each question will focus on one (1) or more of the following evaluation criteria: the bidder’s method of approach, experience, and capability.”

AR 000108, RFP § 5.2.B.

30. Under Section 5.2.C, “[t]he evaluation committees will evaluate the response to each technical question using the evaluation criteria to assign a rating,” ranging “from one (1) to five (5),” and “document the strengths and weaknesses of the responses.” AR 000108, RFP

§ 5.2.C.

31. The bidders’ “total technical proposal score will be the sum of the points given to each of the bidder’s responses to the scored technical questions.” AR 000108, RFP § 5.2.D.

32. The RFP then disclosed “[t]he maximum number of points available for each of the technical questions[.]” AR 000108-000109, RFP § 5.2.E.

33. After the committees evaluated bidders’ technical proposals, “[a] technical evaluation report, summarizing the scores strengths, and weaknesses of the bidder’s responses to the technical questions, will be shared with the PNC.” AR 000109, RFP § 5.2.F. Then, “the PNC will select proposals that will advance to Phase 3, the review of cost proposals.” *Id.*

34. Section 5.3 said that in Phase 3, “[t]he cost proposals from bidders selected by the State to advance to Phase 3 will be reviewed.” AR 000110, RFP § 5.3.A.

35. The RFP said the review of the bidders’ cost proposals would include:

- a. “[I]ndividual meetings with each bidder and require the bidder to substantiate the bidder’s initial capitation rate development methodology, explain the bidder’s prospective business model, and allow the State and its actuary to request clarification on any component of the rate development methodology and/or the bidder’s prospective business model.” AR 000109-000110, RFP § 5.3.B;

- b. “The State’s actuary will calculate a blended statewide State initial actuarially sound capitation rate range to cover all populations, services, and regions in accordance with generally accepted actuarial principles . . .” AR 000110, RFP § 5.3.C.
  - c. “In consultation with the State’s actuary, the State will determine the Offer Point within the rate range that it will offer to bidders after the bid submission.” AR 000110, RFP § 5.3.D.
  - d. “Bidders that submit a statewide blended capitation rate above the State initial actuarially sound capitation rate may be given the opportunity to resubmit should the State decide to request Best and Final Offers (BFO).” AR 000110, RFP § 5.3.E.
36. Section 6 of the RFP governed the State’s “Selection” of bidders. It said:
- a. The [PNC] will review the cost proposals in concert with the evaluation of technical proposals.
  - b. This is a negotiated procurement pursuant to K.S.A. 75-37,102. Bidders may be asked by the State to participate in negotiations as described in Section 3.2.6, Negotiation with Selected Bidders. Final evaluation and award recommendations will be made by the PNC.
  - c. The State intends to contract with three (3) MCOs (CONTRACTORS). CONTRACT awards will be based upon the best interests of the State of Kansas.
  - d. This CONTRACT is subject to the review and approval of CMS.

AR 000112, RFP § 6.

37. The RFP contains a conflict of interest provision, which provides:

The CONTRACTOR shall not knowingly employ, during the period of this CONTRACT or any extensions to it, any professional personnel who are also in the employ of the State and providing services involving this CONTRACT or services similar in nature to the scope of this CONTRACT to the State. Furthermore, the CONTRACTOR shall not knowingly employ, during the period of this CONTRACT or any extensions to it, any state employee who has participated in the making of this CONTRACT until at least two years after his/her termination of employment with the State.

AR000320, RFP § 8.27.

38. The RFP, AR000063, includes a provision requiring bidders to attest that they have no “substantial conflict of interest,” and allowing the State discretion to “waive any informalities or technicalities”:

2. Conflict of Interest: With the submission of a response for this bidding event, you certify that you do not have any substantial conflict of interest sufficient to influence the bidding process of this event. A conflict of substantial interest is one which a reasonable person would think would compromise the opening bidding process.

6. Acceptance or Rejection: The State reserves the right to accept or reject any or all bid responses or part of a response; to waive any informalities or technicalities; clarify any ambiguities in responses; modify any criteria in this Event; and unless otherwise specified, to accept any item in a response.

39. Section 5.1 of the RFP, AR000107, similarly reserved to the State the right to waive “minor irregularities that would not provide the bidder(s) an advantage as compared to other bidders,” including with respect to the conflict-of-interest provision.

### **III. Bidder Submission and Proposal Evaluation**

40. Seven bidders responded to the RFP:
- a. Aetna Better Health of Kansas, Inc. (Aetna);
  - b. CareSource;
  - c. United Healthcare of the Midwest, Inc. (United);
  - d. Molina Healthcare of Kansas, Inc.;
  - e. UCare of Kansas, Inc.;
  - f. Sunflower State Health Plan, Inc (Sunflower); and
  - g. Healthy Blue.

AR 002951, Responding Bidder List.

41. “All seven (7) bidders met the mandatory requirements and all bidders’ proposals were advanced to Phase 2, the review of technical proposals.” AR 013391, Technical Review.

42. In Phase 2, the State convened four evaluation committees to evaluate the bidders’ responses to the RFP’s technical questions. See AR 002582-002585, Staff Assignment Sheets.

43. The Staff Assignment Sheet identified the roles of “Evaluators,” “Alternate Evaluators,” and “Subject Matter Experts (SMEs).” AR 002581, Staff Assignment Sheets.

44. Each team had five evaluators, two or more alternate evaluators, and one or more subject-matter experts. AR 002582-002585, Staff Assignment Sheets.

45. On January 11, 2024, each evaluator attended a training session. AR 002586-002632, Evaluator Training Slides.

46. The training slides said the Phase 2 evaluations would take place in two parts. First, the evaluators’ “[i]ndependent review and rating of bidders’ technical proposal and exhibits.” AR 002599, Evaluator Training Slides. Second, the evaluators would participate in “[c]onsensus review and rating of bidders’ technical proposal and exhibits.” *Id.*

47. In the independent-review stage of Phase 2, the training slides said evaluators were to “[i]ndependently evaluate and rate the response to each question using the response considerations in the evaluation guide and the rating scale/definitions,” and to “[e]valuate each response against the RFP.” AR 002604, Evaluator Training.

48. In the consensus-review stage of Phase 2, the training slides said evaluators were to “reach[] consensus on the rating for each question,” and “agree on what information to include in the consensus evaluation guide to support the rating.” AR 002620, Evaluator Training. “The

goal is for the evaluation team to agree that the rating is sound and consistent with the evaluation process guidelines.” AR 002618. “Only the evaluation guides completed during the consensus reviews will be the ‘official’ documentation of the ratings and supporting notes.” AR 002608, Evaluator Training.

49. The evaluator training slides said that evaluators were not to: (1) “read, review, or consider content that you are instructed not to consider . . .” (2) “leave evaluation materials in plain view or accessible to any other person”; (3) “print evaluation materials other than as directed”; or (4) “bring evaluation materials to public areas.” AR 002606, Evaluator Training.

50. On January 12, 2024, a Mercer representative sent an email to state employees with the subject “Independent Evaluation Guides Copy Instructions.” AR 015468, Ault Email of Jan. 12, 2024.

51. The email requested that the State employees “print/copy” five documents; “track and document” various “information on a tracking sheet”; “[c]onfirm that you have completed the destruction of the returned evaluation packets and the date of destruction of the respective packets”; and gave dates for “Printing and Preparation,” “Packet Pickup,” “Packet Drop-off,” and “Packet Destruction,” AR 015468-105469.

52. Each evaluator signed a confidentiality agreement. See AR 002633-2732, Confidentiality Agreements.

53. The consensus reviews included a numeric score for each bidder’s response to each question and reasoning that the evaluators gave to support that score. See, e.g., AR 012372, Aetna Consensus Review (scoring Aetna a “3” on technical question 1 and stating strengths and weaknesses of the response).

54. The evaluation committees completed their consensus reviews at the end of February 2024. AR 015467, Johnson Email of March 1, 2024.

55. The consensus reviews consisted of more than 1,000 pages of documentation. AR 012370-013385, Consensus Reviews.

56. On March 7, 2024, state employee Ramona Snyder sent an email stating: “Evaluation documents for KDHE have been delivered and destroyed as of today, 3/7/24.” AR 015464-015465, Snyder Email of Mar. 7, 2024.

57. Mercer responded: “Wonderful! Thank you for the update and we appreciate your work on this crucial part of the project.” AR 015464, Johnson Email of Mar. 7, 2024.

58. On March 27, 2024, the State produced a “Technical Evaluation Report and Procurement Negotiating Committee’s Request for Cost Proposals.” AR 013386, Technical Report.

59. Section I of the Technical Report summarized the background of the RFP and the State’s vision and goals for the procurement. AR 013388-013390.

60. The State’s summary said “[t]he consulting firm Mercer Government Human Services Consulting (Mercer) . . . provided support to the State throughout the KanCare procurement, including the evaluation process to facilitate and document the consensus evaluation process.” AR 013390.

61. “Mercer’s supportive role in the evaluation process did not include the evaluation of the bidders’ proposals,” and “Mercer did not review or have access to any of the bidders’ proposals.” *Id.*

62. In an August 2023 meeting with Mercer, the State said that “[t]he scores, in and of themselves, are not determinative of selection.” AR 000005, August 23 Meeting Notes. “The PNC will consider the scores and summary of strengths and weaknesses to determine which bidders will be asked to participate in the negotiation process,” and “[t]here was agreement with this approach.” AR 012370- 013385, Consensus Reviews.

63. Section II of the Technical Report reviewed the “KanCare RFP Evaluation of Technical Proposals.” AR 013391, Technical Report. The Technical Report said that “[a]s specified in RFP Section 5.2.B, the evaluation of the response to each RFP technical question focused on” one (1) or more of the bidder’s (1) “method of approach”; (2) “experience” and (3) “capability.” AR 013392.

64. Section II of the Technical Report gave the “Rating Scale” and “Scoring Methodology” that the evaluators used. *Id.* The rating scale ranged “from one (1), the lowest, to five (5), the highest, to rate the response to each RFP technical question.” *Id.* “The maximum available points and the consensus rating assigned to a particular question determine the points given for that response, as follows”:

Rating of 5 = 100% of available points for the question.

Rating of 4 = 75% of available points for the question.

Rating of 3 = 50% of available points for the question.

Rating of 2 = 25% of available points for the question.

Rating of 1 = 0% of available points for the question.

*Id.*

65. “A bidder’s total score for its responses to RFP technical questions was the sum of the points given to each of the bidder’s responses to questions. The maximum possible technical proposal score for this RFP was 1,000 points.” AR 013392.

66. Section III of the Technical Review gave the results of the committees' evaluations.

The overall scoring result of the technical review was:

Rank	Offeror Name	Score
1	Sunflower	729.25
2	UnitedHealthCare	683.25
3	Aetna	522.00
4	Healthy Blue	522.00
5	CareSource	504.50
6	Molina	397.50
7	UCare	308.75

AR 013395.

67. The scoring result of the technical reviews by topic area was:

Topic Area	Sunflower	United Health Care	Aetna	Healthy Blue	Care Source	Molina	UCare	Total Available Points
Experience and Qualifications	69.25	59.50	54.50	59.50	49.50	23.75	23.75	95.00
Member Experience	60.00	60.00	41.25	47.50	46.25	33.75	20.00	80.00
Integrated, Whole Person Care	107.50	118.75	93.75	73.75	73.75	80.00	60.00	160.00
Utilization Management and Services	93.75	76.25	68.75	77.50	65.00	52.50	30.00	120.00
Quality Assurance	75.00	75.00	75.00	51.25	57.50	60.00	36.25	120.00
Provider Network	98.75	90.00	80.00	102.50	48.75	56.25	77.50	145.00
Case Scenarios	225.00	203.75	108.75	110.00	163.75	91.25	61.25	280.00
<b>Total Available Points</b>								<b>1,000.00</b>

*Id.*

68. Section III of the Technical Review summarized the “Ratings of Responses” of each bidder:

Bidder	Number of Responses by Consensus Rating				
	5	4	3	2	1
Sunflower	7	18	11	0	0
UnitedHealthCare	4	20	11	1	0
Aetna	0	12	15	8	1
Healthy Blue	0	11	18	7	0
CareSource	2	9	14	11	0
Molina	0	3	17	13	3
UCare	0	1	7	27	1

AR 013396.

69. The Technical Review next gave “Examples of Technical Proposal Strengths and Weaknesses” for each bidder. AR 013396.

70. Section IV of the Technical Report concluded: “the PNC requests OPC to release the cost proposals for Sunflower, United Healthcare, Aetna, Healthy Blue and CareSource Health Plan.” AR 013406.

71. The PNC reviewed and made notes about the bidders’ technical proposals. See AR 013411-013478, PNC Notes & Additional Questions.

72. One member wrote of Healthy Blue: “stood out – creating provider network.” AR 013438, PNC Notes.

73. A handwritten note says of Healthy Blue: “Multiple non-compliance in larger Medicaid states,” “Lack detail on workforce development,” “crisis system / language etc. deficiencies,” among other concerns. AR 013441, PNC Notes.

74. The same note says of Aetna: “‘already an MCO’ – not a lot of work into . . . what they would do for the future.” *Id.*

75. Another note said of Healthy Blue: “a little disappointed; existing network focus on largest metro area Topeka/KC area[.]” AR 013434.

76. One note compared Healthy Blue’s and Aetna’s compliance: “Healthy Blue non-compliance – nothing alarming (non-issue)”; “Aetna unresolved issues for long periods of time.” AR 013439.

77. Another note says of Aetna:

- a. “Corrective actions – unresolved + multiple”
- b. “Weaknesses on partnerships”
- c. “Min accept – provider directory”
- d. “Min accept NEMT/Special needs”
- e. “Lack of detail LTSS”
- f. “Min acceptable Dental”
- g. “Weak on recruiting Medicaid Provider”

AR 013442.

78. Another note says of Aetna: “Disappointed w/ response.” AR 013453, PNC Notes.

79. Another note says of Healthy Blue: “Didn’t understand present-day Model.” AR 013433, PNC Notes.

80. Another note says of Healthy Blue: “Concerned with Most of the HCBS responses.” AR 013434, PNC Notes.

81. Another note about Healthy Blue states: “discouraging to see lack of initiative,” “min. amt of research (vs. using phraseology).” AR 013436, PNC Notes.

82. On May 8, 2024, the State published a “Technical Review and Recommendation for Award.” AR 013480, Award Recommendation.

83. Section V of the Award Recommendation began: “In accordance with RFP Section 6, a negotiated procurement pursuant to K.S.A. 75-37,102, selection and award of the KanCare MCOs must be based upon the best interests of the State of Kansas.” *Id.*

84. On May 10, 2024, the State countersigned contracts with Healthy Blue, United, and Sunflower. AR 015279, Hendrixson Email of May 10, 2024.

#### **IV. Aetna’s Protest**

85. Aetna protested the State’s contract awards on June 5, 2024. AR 014668, Aetna Bid Protest Letter.

86. Aetna’s protest raised the following relevant issues:

- **Unstated Evaluation Criteria:** The agencies involved in the contract award process wrongfully employed unstated evaluation criteria during the ex post facto tiebreaking procedure. These criteria were developed after bids were already opened and scored, undermining the integrity of the process.
- **Cherry-Picked and Irrational Tiebreaking Criteria:** The utilization of cherry-picked irrational tiebreaking criteria raises suspicions of a pre-determined conclusion. Such arbitrary and capricious decision-making undermines the trust that bidders place in the system.
- **Failure to Disqualify Bidder:** [Healthy Blue] was not disqualified despite its failure to disclose its prior underwhelming performance in a previous KanCare contract. [Healthy Blue’s] predecessor inexplicably abandoned Medicaid beneficiaries in Kansas, leaving millions of dollars in unpaid claims. This omission should have raised red flags during the evaluation process.

- **Conflict of Interest:** An offeror’s parent company’s hiring of former State employees, including the former director of KDHE, creates an impermissible conflict of interest. Their involvement and notable appearance of impropriety in developing the RFP and guiding HB to prevail in an unprecedented and inequitable tiebreaking procedure compromises the integrity of the entire process
- **Objective Scoring Errors:** Premised on the scant information provided to date, the Agency committed numerous objective scoring errors during proposal evaluation. These anomalies unfairly impacted Aetna’s score and ultimately led to the inequitable tiebreak. Absent these scoring anomalies, Aetna would have received a higher score under the stated criteria and avoided the necessity for a tie-break.

AR 014669, Aetna Bid Protest Letter.

87. DOA denied Aetna’s protest on July 3, 2024. AR 015172, DOA Bid Protest Denial.
88. DOA’s bid-protest denial first described the KanCare 3.0 procurement process:
  - a. “[T]he RFP permitted questions to be submitted to OPC prior to the bid closing date” of October 23, 2023, AR 015172-015173;
  - b. “The questions and answers were posted online on the OPC website as Amendment 2 to the RFP on November 28, 2023,” AR 015173;
  - c. “The procurement process involved a scheduled face-to-face mandatory pre-bid conference on October 16,” where “[a]ll seven (7) vendors who submitted bids were present,” *id.*;
  - d. “After the bid event had closed the sealed competitive proposals had been received, the State began reviewing all of the proposals,” *id.*
  - e. “All bidders met the mandatory requirements,” *id.*;
  - f. “There were four (4) evaluation committees established for reviewing and evaluating the competitive sealed proposals received in response to the KanCare RFP,” *id.*;
  - g. “A training session for all the evaluators on the agency evaluation teams was held on January 11, 2024,” *id.*;
  - h. “All individuals involved in the evaluation process signed a Non-Disclosure– Conflict of Interest Agreement stating that they would

ensure the confidentiality of the process . . .” *id.*;

- i. “The State used a consensus review process to evaluate and rate all of the questions posed to the vendors and included in their sealed competitive proposals,” *id.*;
- j. “The first part involved an independent review by members of the evaluation committees,” where “evaluators independently read, evaluated and rated the responses to their assigned technical questions,” *id.*;
- k. “From February 12 February 28, 2024 each evaluation committee participated in a consensus review” that “focused on one or more of the following criteria: the bidder’s method of approach, experience, and capacity,” *id.*;
- l. “The result of the review was one consensus rating per technical question based upon the review of all members of the evaluation committee,” *id.*;
- m. “The consensus rating was then applied to the point valuation available for the question” and “contained a narrative of the strengths and weaknesses of each bidder agreed upon by the evaluation committee,” *id.*;
- n. “The technical reviews of all seven (7) competitive sealed proposals received were completed by the PNC and agency review teams on March 27, 2024,” AR 015174;
- o. “The cost proposals were provided by OPC,” and “[a]s part of this review, United Healthcare, Sunflower, Aetna, CareSource and Healthy Blue were sent questions on April 2, 2024,” *id.*;
- p. “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 discussions,” *id.*; and
- q. “On May 8, 2024, after completion of all the meetings with the four (4) remaining bidders, the PNC’s award recommendation was made by the PNC,” *id.*

89. In response to Aetna’s protest that the PNC used unstated or otherwise cherry-picked criteria, DOA said:

- r. “The scores of each of the different competitive proposals received were only part of the evaluation process used by the PNC and the evaluation committees in making its evaluations and award recommendations,” AR 015175;
- s. “Aetna focuses on their score as though it by itself is the sole basis upon which the PNC made its decision in awarding the KanCare contracts,” *id.*;
- t. “The focus Aetna has placed on the score it received fails to recognize all the other information gathered, evaluated and reviewed by the evaluation committees and the PNC through the entire procurement process,” *id.*;
- u. “Aetna is viewing its tie score with Healthy Blue as the last step in the review process of the sealed competitive proposals, it was not,” *id.*;
- v. “[T]his bid event is a negotiated procurement pursuant to K.S.A. 75-37,102. A negotiated procurement involves competitive sealed proposals and provides the State more flexibility than other types of procurements utilized,” *id.*;
- w. “Negotiations with bidders are permitted and proposals from the bidders may be augmented based upon discussions and negotiations with bidders This could mean deviating from the specifications in the original posted bid documents,” *id.*;
- x. DOA cited “Kansas Attorney General’s Opinion 93-28,” and said “[u]nder competitive sealed proposals, the quality of competing products or services may be compared and trade-offs made between price and quality,” AR 015175-015176; and
- y. “It is with this understanding of how a negotiated procurement operates, the PNC used the score Aetna received from the review by the evaluation committees and all the other information gathered throughout the procurement process to evaluate [] Aetna and all of the other different proposals.” AR015176.

90. In response to Aetna’s protest over Healthy Blue’s employment of former State employees, DOA said:

- z. “K.S.A. 46-233 is the State’s government ethics law which places a requirement on a state employee to not seek employment with a vendor with whom the State employee has been substantially involved in the

making of a contract for a period of two (2) years,” AR 015177;

- aa. With respect to Sarah Fertig, DOA said “[s]he notified KDHE in mid-August 2023 she was leaving KDHE and accepting a position with BCBSK. Once she informed KDHE of her decision to leave, she was not permitted to have any further involvement in developing the KanCare RFP or permitted to be involved in the procurement process for KanCare,” *id.*;
- bb. “Public information available at the time Ms. Fertig left KDHE indicated Ms. Fertig’s position with BCBSK would not have any connection with the KanCare procurement,” *id.*;
- cc. “Aetna provides no evidence Ms. Fertig has engaged in any actions in her new employment which are inconsistent with what was previously stated by BCBSK,” *id.*;
- dd. “The State’s governmental ethics laws are specific to the individual. . . . They do not require a State contract to be declared invalid or should not be awarded to a specific vendor due to an individual leaving employment with the State of Kansas and going to work for a vendor who becomes a state contractor,” *id.*; and
- ee. “[A]fter the bid event closed on January 4, 2024, it was till another four (4) months where Ms. Fertig had no involvement in the review or evaluation of any bid proposal submitted to the State,” AR 015178; and
- ff. “There has been no evidence presented which indicates Ms. Fertig did anything with the KanCare bid event once she accepted the position with BCBSK,” *id.*

91. In response to Aetna’s argument that Healthy Blue should have been disqualified, DOA said:

- gg. “Healthy Blue, which was the entity that submitted the competitive sealed proposal in response to the bid solicitation, did not have Medicaid Managed Care experience in the State of Kansas in the previous five (5) years. Therefore, there was no prior contract experience to report,” AR 015179;
- hh. “In reviewing the technical proposal received as part of Healthy Blue’s proposal, the information provided in answering the State’s questions did not hide anything from the State’s review and evaluation,” *id.*; and

- ii. “The review conducted of Healthy Blue’s competitive sealed proposal provided sufficient information to the State to understand the relationship of the entities involved in the Healthy Blue proposal.” *Id.*

92. In response to Aetna’s argument that the evaluation committees made specific scoring errors, DOA said:

- jj. “As part of the procurement process each vendor was evaluated on their technical proposal, cost proposal, and other information gathered through the process to determine the strengths and weaknesses of the bids reviewed,” AR 015180;
- kk. “A list of examples of Aetna’s strengths and weaknesses are set forth in the PNC award recommendation,” *id.*;
- ll. “Aetna spends a portion of their protest pointing to individual scores on specific questions. However, Aetna spends little time addressing the weaknesses of their competitive proposal. These weaknesses were a part of the decision not to award them a contract,” *id.*;
- mm. “Aetna’s argument in support of this protest seeks to substitute their view of their bid, for that of the evaluation teams and the PNC, to arrive at a calculation which leads to an increase in their score,” *id.*; and
- nn. “All information available to the PNC was reviewed in making decisions, including the expertise, experience, innovative strategies, methods of approach, and capabilities of each bidder necessary to advance the State’s vision and goals for KanCare,” *id.*

93. DOA’s denial concluded:

“The State of Kansas followed the negotiated procurement process permitted by state statute. The awarding of a contract to United Healthcare, Sunflower and Healthy Blue in bid event #0009267 is supported by the facts. The contracts awarded are consistent with the RFP,” and “[t]he contracts awarded were done based upon the best interests of the State and those awards are supported by the information gathered throughout the process of evaluating the competitive sealed proposals submitted by the different bidders.” AR 015184.

## **V. Healthy Blue**

94. Healthy Blue submitted its response to the RFP on January 4, 2024.

95. Amerigroup Kansas, Inc. was an MCO provider under the KanCare 1.0 program. Amerigroup is a related corporate entity to Healthy Blue. Amerigroup's contract under KanCare 1.0 ended on December 31, 2018.

96. The State was aware of the relationship between Healthy Blue and Amerigroup. The State asked Healthy Blue about the affiliation during the oral-presentation stage of the procurement. State Stay Resp. Ex. 11, at 2, 9–10; AR013466.

97. Sarah Fertig, former Kansas State Medicaid Director, is an employee of BlueCross BlueShield of Kansas ("BCBS Kansas"). Baier Aff. ¶ 14.<sup>3</sup>

98. Ms. Fertig does not work for Healthy Blue. Baier Aff. ¶ 14.

99. BCBS Kansas owns 5% of Healthy Blue's shares. Baier Aff. ¶ 15.

100. When BCBS Kansas hired Ms. Fertig, Healthy Blue took steps to ensure she would not participate in preparing Healthy Blue's proposal for a KanCare 3.0 contract, have any contact regarding Medicaid with those individuals preparing Healthy Blue's proposal, nor have access to the system housing proposal information. Baier Aff. ¶ 16.

101. While preparing its proposal, Healthy Blue set up a dedicated SharePoint site to house all procurement-related documents and closely limited and tracked who could access those documents, including Healthy Blue's draft submission, to ensure only authorized persons reviewed the document. Before being granted access to the SharePoint site, every user was required to execute a user agreement acknowledging that, once hired by BCBS Kansas, Ms. Fertig would not be involved with, and would be firewalled off from, Medicaid or the RFP. Users also attested that they would not share or discuss any such information with Ms. Fertig. Baier Aff. ¶ 18.

102. Ms. Fertig did not have access to the SharePoint site, Healthy Blue's draft submission, or any communications regarding Healthy Blue's proposal. Baier Aff. ¶ 18.

103. Ms. Fertig did not participate in preparing Healthy Blue’s proposal. Baier Aff. ¶ 17.

104. Healthy Blue did not seek Ms. Fertig’s input, consult with her, or otherwise seek or permit her involvement in preparing the proposal. Baier Aff. ¶ 17.

105. Healthy Blue did not refer to Ms. Fertig in its proposal. Baier Aff. ¶ 17.

### **STANDARDS OF REVIEW**

Under the KJRA, the party challenging an agency order has the burden of showing the district court that the agency’s order is invalid. K.S.A. 77-621(a)(1). The statutory subsections under K.S.A. 77-621(c), which the Petitioner argues it is entitled to relief include:

- (4) the agency has erroneously interpreted or applied the law; . . .
- (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.

“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). 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). Generally, an agency ruling within its area of expertise is entitled to some deference. *Hanson v. Kansas Corp. Comm’n*, 313 Kan. 752, 763, 490 P.3d 1216, 1224 (2021). Any such deference, however, must be employed cautiously so as not to transgress the standard of review required by K.S.A. 77-621.

Under K.S.A. 77-621(c)(7), when an agency makes a determination based on fact, a reviewing court may reverse the agency's decision only when it considers the whole record and finds the agency's determination is not supported by substantial competent evidence. *Munck v. Kansas Pub. Emps. Ret. Sys.*, 35 Kan. App. 2d 311, 314-15, 130 P.3d 117 (2006). 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), *rev. denied* 293 Kan. 1107 (2012). The evidence must be reviewed in the light most favorable to the prevailing party. *Saylor v. Westar Energy, Inc.*, 292 Kan. 610, 614, 256 P.3d 828 (2011). The Court may not reevaluate the evidence or engage in de novo review in a judicial review action; 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 Serv., Inc.*, 42 Kan. App. 2d 360, 363, 212 P.3d 239 (2009).

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

The district court must presume the agency's findings valid. It may not set aside an agency order merely because the district court would have reached a different conclusion if it had been the trier of fact. The district court may set aside the agency's finding when the finding is not supported by substantial competent evidence. In making the determinations, due account shall be taken by the district court of the rule of harmless error, and an agency's action may be set aside by the court if it is otherwise unreasonable, arbitrary, or capricious. We have defined unreasonable action as action taken without regard to the benefit or harm to all interested parties. An agency's action is arbitrary and capricious if it is unreasonable or without foundation in fact. *Sunflower Racing, Inc. v. Bd of Cnty. Comm'rs of Wyandotte Cnty.*, 256 Kan. 426, 431, 885 P.2d 1233 (1994).

### **ANALYSIS**

The Court is cognizant of several principles it must keep in mind when reviewing the issues in this case. The first is that these contracts were awarded on a negotiated procurement basis

pursuant to K.S.A. 75-37,102. These contract awards were to be based on the best interests of the State. As the title suggests, the process of negotiated procurement requires judgment and discretion. This judgment and discretion is exercised to determine the best interests of the State of Kansas. This is not strictly a mathematical equation, nor is it required to be.

The second guiding principle is the nature of the judicial review process. As the name implies, it is a “review” process. Agency decisions are reviewed for adherence to law, process errors, evidentiary support, and abuse of discretion. A court is not at liberty to exercise its own judgment but is restricted to reviewing the agency’s judgment and/or compliance with the statutes.

#### **A. Final Agency Action**

As the term “judicial review” implies, there must be something to review. The parties differ on which agency action should be reviewed; the PNC recommendation or the bid protest denial. A court is confined to reviewing only final agency action. “‘Final agency action’ means the whole or part of any agency action other than nonfinal agency action.” K.S.A. 77-607(b)(1). “‘Nonfinal agency action’ means the whole or a part of an agency determination, investigation, proceeding, hearing, conference or other process that the agency intends or is reasonably believed to intend to be preliminary, preparatory, procedural or intermediate with regard to subsequent agency action of that agency or another agency.” K.S.A. 77-607(b)(2).

Aetna argues that “The State’s issuance of the contract awards was its final agency action while the Protest Denial was merely its final order addressing Aetna’s protest of that agency action.” (Aetna Reply, p. 3). Both terms, final agency action and final order, have the specter of finality. Aetna’s characterization that Director Herman’s protest denial is “merely” a final order reduces his action to a ministerial function. At oral argument it was conceded that Director

Herman had the authority to accept or reject the PNC “recommendation” in whole or in part. In other words, he was not a “rubber stamp” for the PNC recommendation.

Additionally, Aetna argues that it was required to file its bid protest with Director Herman to exhaust its administrative remedies as a prelude to filing its petition for judicial review. Again, the plain language of the term suggests that some remedial action can be taken by Director Herman in response to Aetna’s bid protest. If Director Herman’s action on Aetna’s bid protest was a mere formality, it would not only provide an inadequate remedy but would result in a failure of remedy altogether. Exhaustion of administrative remedies is not required where any potential remedy is inadequate to address the problem at issue. *Kansas Bldg. Indus. Workers Comp. Fund v. State*, 49 Kan. App. 2d 354, 380, 310 P.3d 404, 420 (2013), *aff’d*, 302 Kan. 656, 359 P.3d 33 (2015). Exhaustion is only required if a real remedy can result.

Another obvious indication that the PNC decision was not final agency action was the title of its report: “Technical Review and Recommendation for Award.” Webster’s Online Dictionary defines the word “recommend” as presenting something worthy of acceptance or to suggest a course of action. A recommendation, by its own terms, is not final action.

Based on these considerations the Court finds that the final agency action is Director Herman’s bid protest denial. Therefore, it is Director Herman’s decision that must be reviewed in relation to the requirements for relief under the KJRA.

#### **B. Tie-breaking analysis**

The first issue raised by Aetna involves an alleged tie breaking procedure, or lack thereof, and the associated flaws. In the Court’s view this misperceives the process. The Technical Review and Recommendations for Award published by the PNC on May 8, 2024, mentions that:

“Sunflower and United were the top bidders; the cumulative scores of Aetna and Healthy Blue were tied.” (AR, p. 13501). It then mentions: “Although Aetna’s and Healthy Blue’s cumulative scores were tied, there were important differences. In the seven (7) major topic areas, Healthy Blue scored higher than Aetna in five (5) of the seven (7) areas that were being evaluated.” (Id.). Aetna seizes on the word “tied” to mean that Aetna and Healthy Blue were tied for third place in the overall bidding. It is undoubtedly true that Aetna and Health Blue had the same cumulative score in the Technical Review phase. In that sense they were tied. However, as the PNC and Director Herman point out, there were important differences in the components of that cumulative score. These differences could reasonably be used to determine the best candidate for a contract award. And they were.

The fact of the matter is that the process consisted of three phases: (1) Review of Mandatory Requirements, (2) Review of Technical Proposals, and (3) Review of Cost Proposals. All seven bidders passed through the mandatory requirement phase.

The technical proposal phase consisted of seven topic areas. The point total for each Topic area was based on answers to questions related to the respective Topic Areas. There were 37 questions in total. These were distributed through the Topic Areas. Each question was assigned point except question 18, which was not scored. A perfect score on all 36 questions would total 1,000 points. The following question numbers and point values were assigned to the respective Topic Areas and are listed in descending order of weight according to point value:

Questions 27-36: Case Scenarios (280 available points);

Questions 7-11: Integrated Whole Person Care (160 available points);

Questions 22-26: Provider Network (145 available points);

Questions 19-21: Quality Assurance (120 available points);

Questions 12-18: Utilization Management and Services (120 available points);

Questions 1-3: Experience and Qualifications (95 available points);

Questions 4-6: Member Experience (80 available points).

(AR, pp. 108-109).

Individual questions also received a specific point value. (Id.). The total technical score was based on the total points received for each Topic Area. The score for each Topic Area was based on total points received from the questions in that specific Topic Area. Bidders that passed the technical proposal phase advanced to the cost proposal phase.

Two things stand out here. The first is that the final scores of Aetna and Healthy Blue in the Technical Phase were equal (“tied”). The second is that the components of those final scores were not equal and varied from Topic Area to Topic Area

After passing the technical proposal phase, both Aetna and Healthy Blue had the same overall number score of 522 points. (AR, p. 13489). However, simply because the cumulative scores were the same, it does not mean the products were equal. This was only the tip of the iceberg. “Significant differences” existed below the surface. The technical score was just one score made up of seven Topic Areas, which were in turn, made up of 37 questions. Healthy Blue outscored Aetna in five of the seven areas. So, although they were tied in overall points, Healthy Blue had greater consistency. Additionally, Healthy Blue scored higher in over 70% of the Topic Areas.

Aetna insists that it was not sufficiently credited for the weight of the Topic Areas in which it bettered Healthy Blue. The Topic Area with the most available points was considered the most

important, and so on down the list of Topic Areas. Aetna focuses on the comparison of the Integrated Whole Person Care Topic Area, in which it surpassed Healthy Blue by a score of 93.75 to 73.75. (Id.). Although Aetna mostly limited its reference to Integrated Whole Person Care, the six remaining Topic Areas were ranked in importance by virtue of their total available points. The importance ascribed to each of the topic areas is a matter of the agency's professional judgment and discretion. While the Court may differ in opinion with the relative importance of respective Topic Areas, the Court is not at liberty to substitute its judgment for the professional judgment of the agency officials, who oversaw what was billed to be the largest contract in state history.

The very fact that the scores of Aetna and Healthy Blue were so close suggests deference to the judgment and expertise of state officials involved in managing the bidding process. The implication of these scores can be evaluated in different ways. It is sufficient to say that there was an abundance of information to compare and contrast, to determine which bidder suited the best interests of the State of Kansas. The Court's only role here is to determine whether the State's method of evaluation resulted in an unlawful procedure, failing to follow prescribe procedure, or was otherwise unreasonable, arbitrary or capricious. See K.S.A. 77-621(c)(5), (8). The State's method of evaluating these scores was well within the scope of its expertise and discretion. The standards for this evaluation were set forth in the RFP. The way the review was conducted should have been no surprised to any of the bidders.

Aetna contends its tie argument was corroborated by the fact that the two highest scorers in the Technical Phase (Sunflower and United) were recommended for contracts. From this it concludes that the Technical Phase was, as a practical matter, the only dispositive consideration. In this regard the Court would note that at the conclusion of the technical phase Sunflower received

729.25 points and United received 638.25 points. Both Aetna and Healthy Blue came in third with scores of 522 each. Sunflower and United were far and away the leaders. If the point totals were any reflection of competence, it is not surprising that Sunflower and United were recommended for contracts. However, they were not recommended for contracts based on these scores alone. Like Aetna and Healthy Blue, they were passed on to Phase Three, the Review of Cost Proposal evaluation. The Technical Proposal Phase was completed on March 27, 2024. The contracts were not awarded until May 7, 2024. Sunflower and United were not recommended for contracts until the entire process had been completed. Aetna's argument would have more merit if Sunflower and United were awarded contracts immediately after the technical scoring, without being subject to the final phase. However, this did not occur.

### **C. Unstated evaluation criteria**

Aetna next argues the PNC used unstated evaluation criteria in determining the contract award between itself and Healthy Blue. The closest Aetna came to identifying the “unstated, unannounced, unpublished and undisclosed tie-breaking criteria,” (Aetna Brief p. 10), was a reference to the “...the State focusing solely on the technical evaluation scoring.” (Id. p. 18). The Court concludes this means that focusing solely on the technical evaluation scoring was “unstated, unannounced, unpublished and undisclosed.” Both the PNC and Director Herman contradicted the predicate that the contract awards were based solely on the technical scores. The PNC stated:

The State established that the scores, strengths and weaknesses of the bidders' responses to RFP technical questions were to be considered by the PNC, but would not, in and of themselves, be determinative of the PNC's recommendations to advance proposals to Phase 3 – Review of Cost Proposals nor be determinative of the PNC's recommendation of KanCare MCOs selected for award. In accordance with RFP Section 6, as a negotiated procurement pursuant to K.S.A. 75- 37,102, selection and award of KanCare MCOs must be based upon the best interests of the State of Kansas.

(AR, pp. 13392-13394).

Director Herman observed:

The scores of each of the different competitive sealed proposals received were only one part of the evaluation process used by the PNC and the evaluation committees in making its evaluations and award recommendations. Aetna focuses on their score as though it by itself is the sole basis upon which the PNC made its decision in awarding the KanCare contracts. The focus Aetna has placed on the score it received fails to recognize all the other information gathered, evaluated and reviewed by the evaluation committees and the PNC through the entire procurement process. Aetna is viewing its tie score with Healthy Blue as the last step in the review process of the sealed competitive proposals, it was not.

(AR, p. 15175).

Of course, it is easy to say that information, other than technical scores, was considered in evaluating the bids, but another matter to show it was actually done. First, it would be nonsensical to go through a four-month process of gathering information related to bids, only to consider a small portion of the information to the total disregard of the rest. The Technical Review Phase ended on March 27, 2024, with the consensus calculation of the technical scores. The process then continued for over a month as the Contract Proposal Phase played out. Furthermore, as stated in the RFP, the Contract Proposal Phase was not just fluff. (AR, pp. 109-111). Second, the administrative record in this case consisted of approximately 35,000 pages, a fraction of which was devoted to the evaluation of technical scores. It is unrealistic to believe that all the information, except the technical scores, served no purpose. Third, the RFP clearly advised the bidders that: “The Procurement and Negotiating Committee (PNC) will review the cost proposals in concert with the evaluation of the technical proposals.” (AR, p. 42). Fourth, there is a rebuttable

presumption that the agency acted fairly, reasonably, and impartially. *Southwest Kansas Royalty Owners Ass'n v. State Corp. Comm'n of State of Kan.*, 244 Kan. 157, 165 (1989).

Director Herman attested that:

[T]he PNC used the score Aetna received from the review by the evaluation committees and all the other information gathered throughout the procurement process to evaluate the Aetna and all of the other different proposals. This information included but was not limited to the cost proposals of the different vendors, the answers to the questions provided by the vendors and discussions with the vendor about their proposal ... When viewed all together the PNC determined United Healthcare, Sunflower and Healthy Blue presented the best proposals, which met the best interests of the State.

(AR, p. 176).

It is true that little ink is devoted in either the PNC recommendation, or the Director Herman's bid denial, in analyzing the impact of the Cost Proposal Review Phase. That doesn't mean that it did not occur. It may be due more to Aetna's framing of the issues in the bid protest, rather than a lack of the relevance of the Cost Proposal Review Phase to the process.

Aetna devotes much repetition to the characterization of the information considered by the PNC as unidentified and unstated. At oral argument the Court sought to identify the unstated, unannounced, unpublished and undisclosed elements considered by the PNC. This was of obvious importance in determining the State's fidelity to the bid process. Aetna's response directed the Court to the emphasis and weight placed by the PNC on the Topic Area of Provider Network. This was a topic in which Healthy Blue bested Aetna by 22.50 points. Aetna maintains the State's emphasis on the Provider Network Topic Area imbued this Topic Area with an importance and weight that eclipsed, other, more heavily weighted, Topic Areas

The Court does not believe the PNC's consideration of the importance of the Provider Network Topic Area usurped the weight of the other Topic Areas, and in particular, the Topic Areas in which Aetna outscored Healthy Blue. Aetna simply wishes to focus on the categories in which its scores exceeded Healthy Blue, and make them determinative. Such a course is not within the purview of either Aetna, or the Court.

As already discussed, it is true that Aetna outscored Healthy Blue in Integrated Whole Person Care. This Topic Area was second on the point value scale. Provider Network was third. However, Healthy Blue scored higher, albeit not by much, on the Case Scenario Topic Area, the most heavily weighted. Out of the top three weighted categories Healthy Blue scored more points in two of them. It is also not insignificant that the review of the cost proposals resulted in a "Statewide Blended Rate" bid for Aetna of \$913.13, while Healthy Blues was less at \$891.98. (AR, p. 13479).

Far from being unstated, unannounced, unpublished and undisclosed the technical evaluation scoring was clearly identified. The Topic Areas were identified. The number of questions for each Topic Area was identified. The number of possible points available for each Topic Area was identified. The scoring method was identified. It is hard to see what area of the technical evaluation was not identified in the RFP. Furthermore, contrary to Aetna's insistence, the Court does not view this as a tie breaking process. The ultimate score was a product of its parts. Based on the final scores the State re-examined those parts to determine which bidder it believed was best suited to perform the contract. This was accomplished by returning to the Topic Areas and assessing the individual component scores for each Topic Area. It was not something the State made up as it went along. The information considered by the PNC existed in published

form and was available for the PNC to access, review and evaluate if necessary. The result of the cumulative score in the Technical Review made it necessary. The idea that these components were unstated or unidentified is simply not borne out by the RFP.

Aetna states: “The PNC began its tie-breaking analysis by employing a simplistic numerical comparison of the number of topic areas and consensus ratings where one offeror rated higher than the other.” (Aetna Brief, p. 20). Although Aetna chides the PNC for engaging in a simplistic numerical comparison, it embarks on the same course: “[Healthy Blue] trailed Aetna by a full 20 points on ‘Integrated, Whole Person Care,’ and 23.75 points on ‘Quality Assurance.’” (Id. p. 22); “Aetna’s proposal is within a mere 9 points of [Healthy Blue] on 4 of the 5 topic areas where HB scored higher than Aetna,” (Id.); Healthy Blue had “alarmingly lower scores on two of the seven topic areas.” (Id). In this regard, Aetna essentially engages in the same simplistic numerical comparison as the PNC, albeit with a different outcome.

Aetna argues here that the criteria used to determine the contract award between itself and Healthy Blue, even if it wasn’t “impermissible, unstated, and unannounced,” was arbitrary and capricious in its selection of the data to be compared. In support of this argument, it makes a couple of allegations: (1) data to be compared was “cherry picked” to favor Healthy Blue and (2) the PNC disregarded information favorable to Aetna. The fact that the data can be used to support different conclusions only confirms the notion that this was a close discretionary call. A case could be made for either Aetna or Healthy Blue to receive the third contract award. In the final analysis, however, this decision, absent any impropriety identified in K.S.A. 77-621(c), was appropriately left to the State.

It is unnecessary to get into the weeds on the finer points of scoring and weighing. The Court is required to determine whether “the agency has engaged in an unlawful procedure or has failed to follow prescribed procedure” (K.S.A.77-621(c)[5]); whether “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” (K.S.A.77-621(c)[7]); or whether “the agency action is otherwise unreasonable, arbitrary or capricious” (K.S.A.77-621(c)[8]). Aetna’s lack of specificity in this regard is problematic for the Court. Aetna’s conclusory statements are symptomatic of this problem. The following is a good example:

Here, the State violated these fundamental principles by failing to engage in a transparent, open, and fair evaluation by positing that its decision was in the best interests of Kansans. This is not merely a technical error; it is a consequential deviation from the RFP because the evaluation is inconsistent, unfair, and contrary to the expectations whereby it had a material effect on the selection process. The redesigned process of selection harms applicants like Aetna who submitted applications specifically tailored to and relying upon the RFP’s criteria.

(Aetna Brief, p. 24). The Court does not believe the re-examination of the Topic Areas lacked transparency, was unfair, or was a consequential deviation from the RFP, or that it was inconsistent, and contrary to expectations. There is no explanation for why or how this re-examination or re-evaluation, in light of the identical cumulative point total, was inconsistent with the RFP. It was all information that had been collected pursuant to the RFP. It was simply a review of that material.

The issue of making award considerations a moving target is relevant. Aetna cites an example of this. Secretary Stanek’s email wherein she initially proposed to consider which bidder

(Aetna or Healthy Blue) received one more “very good rating” (rating of 4). When it turned out this factor actually favored Aetna, it was allegedly dropped from consideration, (Aetna received one more very good rating (4) than Healthy Blue). (AR, p. 15480). The conclusion that this factor was dropped from consideration because it favored Aetna is not ineluctable. As noted in the State’s brief, there is abundant evidence in the record of the comparisons of the strengths and weaknesses between Aetna and Healthy Blue. (State’s Brief, p. 11). The conclusion that this data point was “no longer relevant” is unsupported by the record. (Aetna Brief, pp. 22-23). The process remained, and continued to be, a comparison of multiple factors, not just one.

After reviewing the pertinent information in the administrative record, the Court concludes that the process by which the State determined the third contract award was grounded in the RFP and was not unreasonable, arbitrary or capricious. Furthermore, the procedure followed by the State in determining the third contract awardee was not unlawful and followed prescribed procedure. The decision by Director Herman to deny the bid appeal by Aetna was supported by substantial evidence, both in the administrative record and his memorandum denying the appeal. It was not unreasonable, arbitrary or capricious.

**D. Post-Hoc Rationalization.**

Aetna next alleges Director Herman engaged in post hoc rationalization of the PNC’s decision to deny a contract award for Aetna. Aetna argues that Director Herman, rather than confining the award rationale to the considerations stated by the PNC, expanded that consideration to all information developed during the bid process, (“The new rationale abandons the rationale set forth in the PNC’s Award Recommendation.” (Aetna Brief, p. 25)). On the one hand Aetna argues that Director Herman’s “new rationale inexplicably abandons the analysis and rationale set

forth in the PNC's Award Recommendation." While on the other hand it argues that "Director Herman cites only to the PNC's process and rationale, not his own." (Aetna Brief, p. 25). At any rate, the gist of Aetna's argument appears to be that Director Herman was required to restrict consideration of Aetna's bid protest to the rationale cited by the PNC in denying Aetna the third contract award.

Post hoc rationalization implicates a species of arbitrariness. It requires that any rationale for agency action exist and be referenced at the time the agency takes that action. *Depart. of Homeland Sec., et al. v. Regents of the Univ. of California, et al.*, 591 U.S. 1, 23, 140 S.Ct. 1891 (2020); *Shepherd v. Davies*, 14 Kan. App. 2d 333, 337, 789 P.2d 1190, 1193 (1990).

As previously addressed, it would be senseless to devote several months to a bidding process, collect a large amount of information related to the capabilities of the bidders, and then ignore a good portion of that information as if it did not exist. There is no reason in the law or common sense that would limit Director Herman's consideration of the relevant portions of the bid process in making his decision. "[E]xhaustion of administrative remedies serves a valuable purpose because it (1) provides agencies an opportunity to apply their expertise to correct their own errors; (2) makes judicial review easier by permitting parties and agencies to develop the facts in an administrative proceeding; and (3) promotes judicial economy by avoiding needless repetition of factfinding and perhaps by avoiding the necessity of any judicial involvement at all." *Platt v. Kansas State Univ.*, 337 P.3d 73 (Kan. Ct. App. 2014), *aff'd*, 305 Kan. 122, 379 P.3d 362 (2016)

Nor should consideration of this information have surprised Aetna. The PNC's Technical Review and Recommendation for Award, issued May 8, 2024, advises:

The State established that the scores, strengths and weaknesses of the bidders' responses to RFP technical questions were to be considered by the PNC, but would not, in and of themselves be determinative of the PNC's recommendations to advance proposals to Phase 3 – Review of Cost Proposals nor be determinative of the PNC's recommendation of KanCare MCOs selected for award. In accordance with RFP Section 6, as a negotiated procurement pursuant to K.S.A. 75-37,102, selection and award of KanCare MCOs must be based upon the best interests of the State of Kansas.

(AR, pp. 13486-13487). It would unquestionably be in the best interest of the State of Kansas if award recommendations of the PNC were derived from all relevant information available through the bid process.

It was no mystery that the contract award decision would be based on more than just the technical scores. While Sunflower and United were obvious choices for contract awards due to their strong performance in the Technical Review, even they were not awarded a contract until the process was completed. The scores on the Technical Review determined which bidders would pass on to Phase 3, Review of Cost Proposals. They did not conclusively determine which bidders would receive contract awards.

The PNC addressed the specific issues raised by Aetna in the bid protest. As noted above, the PNC referenced the fact that the technical scores were not, in and of themselves, determinative of contract awards. Director Herman simply reiterated this with somewhat more elaboration. It is true that Director Herman did not go into any depth regarding information outside the Technical Proposals, however, this was unnecessary given that the objections in Aetna's bid protest focused on the technical scoring.

Additionally, context is important. Aetna's post hoc rationale argument is confined to the internal administrative process. It is not the case here that the administrative agency attempted to

revise its rationale during the judicial review process. In other words, the agency did not advocate a rationale to the court that they did not previously use to support their administrative decision. Any alleged additional supporting rationale here was made completely within the administrative process and not amended during the judicial review process. The question is whether Director Herman's review of Aetna's bid protest should be straight-jacketed by the PNC rationale. An agency should be free to completely explain its action within the context of the administrative process. Once that process is completed, however, its rationale is determined for purposes of judicial review.

Consistent with the rationale cited by the State and the Intervenors, the Court does not believe Director Herman engaged in any impermissible post hoc rationale in considering the bid protest of Aetna. Consequently, Director Herman did not act unreasonably, arbitrarily or capriciously in denying Aetna's bid protest.

**E. The State Wrongfully Ignored Healthy Blue's Prior Amerigroup Experience.**

Aetna also argues that the State failed to consider, or did not consider to Aetna's advantage, Healthy Blue's past five-year Medicaid Managed Care experience. The RFP requires bidders to disclose this information. Failure to do so could, at the State's discretion, result in disqualification of the bidder. Aetna argues that Healthy Blue failed to make this disclosure, and, as a result, should have been disqualified.

Healthy Blue's duty to disclose was triggered, as Aetna argues, by Blue Cross Blue Shield of Kansas City, Inc., ("BCBS KC") acquisition, after June of 2021, of a minority ownership interest in Amerigroup, Inc. This occurred through a somewhat convoluted process not particularly relevant here. The upshot is that Amerigroup previously held a KanCare contract that expired in

2018. Amerigroup had a significantly negative experience in the performance of this contract. Prior to the acquisition of the minority position by BCBS KC, Amerigroup changed its name to Community Care Health Plan of Kansas, Inc. d/b/a Healthy Blue. Healthy Blue was, in essence, Amerigroup with a new name and a new minority shareholder.

Aetna maintains that Healthy Blue was required to disclose its prior past 5-year Medicaid program experience even though its contract expired on December 31, 2018, and was not renewed. The RFP required this disclosure. However, it also provided that any failure to disclose would not necessarily result in disqualification of the proposal. The decision of whether to disqualify on that basis was left to the sole discretion of the State. (AR, p. 88). Although disclosure was required, disqualification was not. Director Herman addressed this issue, concluding that the five-year look back period required for reporting had expired. As noted above, Amerigroup's previous Medicaid experience ended on December 31, 2018. Healthy Blue submitted its proposal in January of 2024. This was outside the 5-year period.

In its brief on the merits, Aetna does not challenge Director Herman's conclusion that the look-back period had expired. It contends, however, that: "In the interest of fairness and the mandatory requirements of the RFP, this material deficiency from the request for proposal requires the bid be disqualified." (Aetna Brief, p. 33). Aetna essentially makes the argument that equity requires Healthy Blue be disqualified. It further argues that the failure to disqualify Healthy Blue in compliance with the RFP was arbitrary and failed to follow procedure.

In addressing these arguments, Director Herman indicated that the State was well advised of the relationship between Healthy Blue and Amerigroup. Nothing was hidden from the State's review and evaluation. The two operative facts in considering this issue are, 1) disclosure was not

required because of the expiration of the five-year lookback period, and 2) the State was informed of the relationship between Healthy Blue and Amerigroup. This was sufficient information for the State to exercise its discretion. As stated in the RFP, it was in the State's sole discretion whether to disqualify Healthy Blue. It was not unreasonable, arbitrary or capricious for Director Herman to conclude that the lack of disclosure did not disqualify Healthy Blue.

**F. The State Ignored a Blatant Conflict of Interest.**

Aetna also complains the State ignored a clear case of a conflict of interest. Sarah Fertig was a former State Medicaid Director for Kansas. She is now the Director of Government Relations for BCBSKS. BCBSKS owns a 5% interest in Healthy Blue. (AR at 005720). As State Medicaid Director Ms. Fertig was substantially involved in the RFP process. Ms. Fertig announced in mid-August 2023 she was leaving her position with the State of Kansas to obtain employment with BCBSKS. After her announcement, the State precluded her from having any further association with the KanCare RFP. Ms. Fertig's position with BCBSKS did not involve the KanCare RFP. BCBSKS also prevented her from any association with Healthy Blue and the RFP process.

Director Herman reasoned that since Ms. Fertig was disassociated with KanCare contract after her employment announcement, and since her position at BCBS did not involve the KanCare RFP, there was no reason to invalidate the result of the previous five-month bidding process. Additionally, at the time Ms. Fertig announced her employment at BCBSKS in August of 2023, Healthy Blue was not a bidder. The bids did not open until January 2024. Therefore, Ms. Fertig was not involved in reviewing bids on behalf of the State.

Director Herman also found Aetna's appearance of impropriety argument, without more, did not justify invalidating the contract award for Healthy Blue. As an initial matter, Director Herman noted that any prohibition of a state employee seeking employment with a vendor who becomes a state contractor, is only directed to the former employee and not the vendor contract. Furthermore, after Ms. Fertig left state employment there is no evidence that her employment with BCBSKS had any relationship to Healthy Blue and the bid process.

In support of its argument that the State's contract award to Healthy Blue should be disqualified Aetna cites *NKF Eng'g, Inc. v. United States*, 805 F.2d 372, 375 (Fed. Cir. 1986). In *NKF*, the federal agency involved in making the contract award disqualified the winning bidder, *NKF*, due to the appearance of impropriety. Prior to issuing the contract award, a high-level agency employee, who had access to bid information was hired by *NKF*. In response to the agency's request for a re-bid, *NKF* lowered its bid price 33%. None of the competitors lowered their bid prices more than 19%. The agency official involved in the bidding had never seen a bid reduced by 33%. The Claims Court enjoined the agency from awarding the contract to anyone but *NKF*. The injunction was based on the agency's lack of authority to reject a bid based on the appearance of impropriety. The agency appealed. The Federal Circuit Court of Appeals reversed the injunction of the Claims Court and upheld the agency's action in denying *NKF* the contract based on an appearance of impropriety.

In the Court's view, the relevance of *NKF* is more related to the Claims Court's review of the agency's decision. The appeals court found that: "Under the facts at issue here, we cannot say that the agency's conclusion, that there was an appearance of impropriety, was unreasonable or irrational." *NKF Eng'g, Inc.*, 805 F.2d at 376. The appeals court concluded by holding: "The CO's

[Contracting Officer's] decision to disqualify NKF because of an appearance of impropriety was not irrational, arbitrary or capricious. Consequently, the Claims Court order overturning that decision was erroneous and is vacated." *NKF Eng'g, Inc.*, 805 F.2d at 378.

Director Herman concluded that any appearance of impropriety did not justify invalidating the contract. Director Herman based his decision on the following facts:

1. "Once she [Ms. Fertig] informed KDHE of her decision to leave, she was not permitted to have any further involvement in developing the KanCare RFP or permitted to be involved in the procurement process for KanCare."
2. "BCBSK has indicated this original comment indicating Ms. Fertig's responsibilities at BCBK would not be involved in KanCare ... Aetna provides no evidence Ms. Fertig has engaged in any actions in her new employment which are inconsistent with what was previously stated by BCBSK."
3. There is no standard under the State of Kansas government ethics that requires the invalidation of a contract based upon the appearance of impropriety "due to an individual leaving employment with the State of Kansas and going to work for a vendor who becomes a state contractor."
4. "[A]t the time Ms. Fertig accepted her position with BCBSK Healthy Blue was not a bidder."
5. "The KanCare procurement was still being developed and had not been posted when Ms. Fertig was offered employment by BCBSK. At that point Healthy Blue was not a bidder. Ms. Fertig was no longer employed by the State and involved with KanCare by the time the bid solicitation was posted by OPC. She had left State employment at least three (3) months before any competitive sealed proposals were submitted to the State in response to the bid solicitation and she had no opportunity to be involved in any review or evaluation of those proposals. Ms. Fertig was not subject to any Non-Disclosure – Conflict of Interest Agreement at the time she left employment with the State, because there was no bid solicitation posted."

AR, pp. 15177-15179.

The Court cannot find that this rationale was unreasonable, arbitrary or capricious, that it was not supported by substantial evidence, or that it was the result of an unlawful procedure or a failure to follow a prescribed procedure.

**G. The State Committed Objective Errors in its Scoring Evaluation.**

Aetna argues that, but for objective scoring errors, its technical score would have surpassed Healthy Blue. It, therefore, would have received the third contract award outright. Aetna assumes that because Sunflower and United had superior technical scores, and were awarded contracts, the determination of a contract award was based on the technical scores alone. As it relates to Sunflower and United, their technical scores were such that they significantly outdistanced the nearest competitors. This provided them a decided advantage going into the final process, but it does not justify the conclusion that all contract awards were based exclusively on technical scores. Had the process ceased, and the awards been made after completion of the technical scoring, Aetna's argument may have some merit. Because it did not, Aetna's argument springs from a faulty premise.

As noted above, the technical scoring phase of the bid process was completed on March 27, 2023. From March 27, 2024, to May 8, 2024, the PNC considered the cost proposals of the bidders and held meetings with the remaining bidders, Sunflower, United, Aetna and Healthy Blue. Only after this process had been completed did the PNC make its recommendation for contract awards on May 8, 2024. So, the factual predicate that Aetna sets forth that the PNC "relied entirely on the technical evaluation scores for its award recommendation" is not supported by the record. (Aetna Brief, p. 36). Similarly, a marginally higher technical score would not inevitably have resulted in a contract award for Aetna, unless the entire remaining process is disregarded. Aetna

does not, and really cannot, show that, but for its alleged scoring errors and discrepancies, it would have been awarded a contract. To the extent Aetna has shown there were any scoring errors, they are harmless. K.S.A. 77-621(e). Furthermore, the scoring of the answers to the questions is highly technical. The Court is reluctant, and for the most part unable, to substitute its untutored judgment for that of the scoring officials. Nothing in Director Herman's consideration of this issue was unreasonable, arbitrary or capricious.

Aetna also argues that the destruction of the evaluation documents creates an inference that the destroyed documents might have contained evidence of further scoring errors benefitting Aetna. However, any alleged additional errors in scoring that might favor Aetna must rise to a level such that it would disrupt the consensus scoring. Variations in individual scoring would be unlikely to seriously infect the result of the consensus. Also, as noted by Director Herman, Aetna essentially disregarded its weakness documented by the PNC recommendation.

Furthermore, the objective of the Technical Phase was to pass on to the Cost Analysis Phase. The score Aetna received in the Technical Phase allowed it to pass on. The only way that Aetna could receive any relief from the destroyed documents would be if they could establish that the margin in the technical scoring between the Aetna and Healthy Blue substantially favored Aetna to the extent that it would have changed the consensus scoring. Other than a possible inference from the destruction of the notes themselves, there is no evidence to suggest the consensus would have been favorably altered in Aetna's behalf. This is somewhat analogous to the destruction of juror notes after a verdict. See PIK 101.11.

In assessing this issue Director Herman concluded:

Aetna's argument in support of this protest seeks to substitute their view of their bid, for that of the evaluation teams and PNC, to arrive at a calculation

which leads to an increase in their score. Based upon this view Aetna then uses their view to propel them to a higher score, with the belief this is all they need to be awarded a contract. But again, the score alone is not determinative of which vendors were awarded a KanCare contract. All information available to the PNC was reviewed in making decisions, including the expertise, experience, innovative strategies, methods of approach, and capabilities of each bidder necessary to advance the State's vision and goals for KanCare.

AR, p. 15180.

Once again, the Court cannot find that Director Herman's rationale was unreasonable, arbitrary or capricious, that it was not supported by substantial evidence, or that it was the result of an unlawful procedure or a failure to follow a prescribed procedure.

#### **CONCLUSION**

Based on the foregoing the Court **DENIES** Aetna's Petition for Judicial Review. This Memorandum Decision and Order shall constitute the Court's entry of judgment when filed with the Clerk of this Court. No further journal entry is required.

*This Order is effective on the date and time shown on the electronic file stamp.*

**IT IS SO ORDERED.**

**HON. THOMAS LUEDKE  
DISTRICT COURT JUDGE**

## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the above document was filed electronically, and placed in the U.S. mail if needed on the date stamped on the *Memorandum Decision and Order*, providing notice to the following:

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**Hannah R. Wittman** - *Attorney for Petitioner*  
**Marc J. Kessler** - *Attorney for Petitioner*  
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*/s/ KJ Taylor*  
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