

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

SUPERIOR VISION SERVICES, INC.)	
)	
Petitioner,)	
)	Case No. 2015-CV-463
vs.)	
)	
KANSAS STATE EMPLOYEES)	
HEALTH CARE COMMISSION,)	
)	
KANSAS DEPARTMENT OF)	
ADMINISTRATION,)	
)	
KANSAS DEPARTMENT OF)	
HEALTH AND ENVIRONMENT,)	
)	
KANSAS STATE EMPLOYEES)	
HEALTH PLAN,)	
)	
Respondents,)	
)	
and)	
)	
SURENCY LIFE AND HEALTH INSURANCE)	
COMPANY,)	
)	
Intervening Respondent.)	

MEMORANDUM DECISION AND ORDER

The above captioned matter comes before the Court upon the Petition for Judicial Review, filed by Petitioner Superior Vision Services, Inc. (“Petitioner”) on May 20, 2015, and Petitioner’s First Amended Petition, filed on August 4, 2015. The Court has also considered Petitioner’s Brief in Support Judicial Review and Relief from Final Administrative Agency Action, filed on October 1, 2015; the Brief of Respondents Kansas State Employees Health Care Commission (“HCC”), Kansas Department of Administration (“KDA”), Kansas Department of Health and Environment

(“KDHE”), and Kansas State Employees Health Plan (“KSEHP”) (collectively, “Respondents”), filed on October 22, 2015; the Brief in Opposition to Petitioner’s Brief in Support of Judicial Review and Relief from Final Administrative Agency Action, filed by Intervening Respondent Surency Life and Health Insurance Company (“Surency”) on October 22, 2015; and Petitioner’s Reply Brief to the Briefs of both the Respondents and Surency, filed on October 29, 2015. The Court heard oral arguments on these matters on November 24, 2015, and the Petition for Judicial Review is now ripe for ruling. After due and careful consideration, the Court finds and concludes as follows:

NATURE OF THE CASE

This case arises as a challenge to the decision of Respondent HCC to award a contract to Surency in regard to vision insurance coverage for the State Employee Health Plan (“SEHP”) on April 20, 2015. The Petitioner—which had formerly been the sole provider of vision insurance coverage under the SEHP—raises several challenges to the Respondents’ actions in regard to the award of this contract, including:

1. A claim that HCC erroneously interpreted or applied the law, in violation of K.S.A. 77-621(c)(4), based on its failure to “comply with the mandatory requirements contained in” K.S.A. 75-6504 “relating to advertising for proposals and negotiating with parties submitting proposals.” Further, a claim that HCC “erroneously evaluated bids submitted pursuant to the Vision RFP using the ‘lowest responsible bidder’ standard, which expressly does not apply to procurements made under” K.S.A. 76-6504.
2. A claim that HCC engaged in unlawful procedure or failed to follow prescribed procedures, in violation of K.S.A. 77-621(c)(5), based on the same claimed actions noted above.
3. A claim that HCC was not constituted as a decision-making body and that some of its members were subject to disqualification due to conflicts of interest, in violation of K.S.A. 77-621(c)(6).

4. A claim that the HCC’s decision was not supported by appropriate evidence, in violation of K.S.A. 77-612(c)(7), because “The HCC . . . based its evaluation on inaccurate, incomplete, or misleading information and/or flawed assumptions relating to . . . network adequacy, cost/price realization, and capability standards and requirements” and because “the HCC . . . accepted a blanket offer of future substandard compliance when there was substantial countervailing evidence known or available to it indicating that even such substandard compliance was likely unattainable.”
5. A claim that the HCC’s decision was otherwise unreasonable, arbitrary, or capricious, in violation of K.S.A. 77-621(c)(8), based on the HCC’s alleged deviation “in a material way from the evaluation criteria set forth in its RFP and other solicitation documents and/or applied unstated criteria in the evaluation” and numerous other claimed failures.

The parties’ briefs expand these issues extensively. The Court will address the specifics of each argument below.

STATEMENT OF FACTS

In summarizing the essential facts of the case, the Court looks both to the Agency Record and to the documents attached to the Motion and Memorandum to Permit Additional Evidence Pursuant to K.S.A. 77-619(a), which were admitted into evidence on August 3, 2015 (the “Supplemental Agency Record”):

1. In November of 2014,¹ the State issued a request for proposal which solicited bids from firms in regard to the provision of vision coverage for the SEHP in plan years 2016, 2107,

¹ The Agency Record documents list the “Start Time” of the event as November 7, 2014, but also note that the bid was posted on November 12, 2014. Agency Record, at 2629, 2646. The parties variously list November 12 (Surency, Respondents) and November 17 (Petitioner) for the dates on which the RFP was issued. The HCC’s meeting minutes for April 20, 2015 claim that the Vision RFP was issued on November 17, 2014, as does a Memorandum written to the Health Care Commission by Mike Michael on, apparently, April 6, 2015 (although it is dated April 6, 2014). Agency Record, at 2623, 2626. Ultimately, however, it is clear that notice of the Vision RFP was published in the Kansas Register as of November 27, 2014. 33 Kan. Reg. 1203, 1207 (Nov. 27, 2014).

and 2018, beginning January 1, 2016 (the “Vision RFP”). Petitioner’s Brief, at 9; Agency Record, at 2629, 2646.

2. The Vision RFP was designated EVT-0003434, and extended until January 2, 2015. Agency Record, at 2629.

3. The Vision RFP provided, *inter alia*:

7. 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.

8. Competition: The purpose of this Request is to seek competition. The bidder shall advise Procurement and Contracts if any specification, language or other requirement inadvertently restricts or limits bidding to a single source. Notification shall be in writing and must be received by Procurement and Contracts no later than five (5) business days prior to the event closing date. The Director of Purchases reserves the right to waive minor deviations in the specifications which do not hinder the intent of this Request.

9. 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.

Agency Record, at 2636.

4. On December 8, 2014, the Kansas Department of Administration, acting on behalf of the Kansas Department of Health and Environment Amendment, Division of Health Policy Finance, issued an Amendment to the Vision RFP. Agency Record, at 2638–45.

5. The December 8, 2014 Amendment took the form of a list of questions and answers. It included the following language, among other provisions:

4. What is the State looking for in their vision program?

- a. Broad access and excellent customer service
5. What does the State like in their current vision plan(s)?
- a. Broad access and excellent customer service
6. What would the State like to see added or changed in their current vision plan(s)?
- a. The plan members like the current plans. We are open to learning about any new options that might enhance the coverage as long as the price is reasonable.
7. Are all proposing carriers to match the current benefit(s) offered (inclusive of a “basic” and “enhanced” option)?
- a. Yes – we must have the ability to compare ‘apples to apples’. Vendors are also free to submit alternate plan designs as long as our current designs are quoted.

Agency Record, at 2639.

- 6. The Agency Record contains an undated² series of Instructions and Exhibits that set out the requirements of the Vision RFP. Agency Record, at 2646–711.
- 7. The following provisions are included in the Instructions, among others:

1.1. Bid Event ID / Reference Number: EVT003434

Voluntary Fully Insured Vision Coverage

...

Contact With The State On This RFP: All contact including inquiries, written or verbal, shall be directed to the Procurement Officer only unless otherwise directed in this RFP.

² The copy of the Instructions contained in the Agency Record listed the following dates:

Bid posting	November 12, 2014
Initial Written Questions	December 2, 2014
First Addendum Posted	December 12, 2014
Bid closing	January 2, 2015

Agency Record, at 2646. Thus, it is unclear whether these Instructions were submitted with the initial Vision RFP or were included in the December 12, 2014 Addendum alluded to in the Instructions.

...

Vendors or bidders may not communicate or contact directly or indirectly (including any contact or other communication by third parties acting on behalf of a Vendor or bidder) any other State employee, agency or elected official of the State of Kansas regarding this RFP, except designated State members in attendance during:

- Negotiations
- Contract Signing
- Other times specified in this request

Violations of this provision will result in the immediate rejection of a Vendor's proposal.

1.2. Courtesy Bid -- Negotiated Procurement:

The Division of Purchases is processing this Request for Proposal (RFP) as a Courtesy Bid for the Kansas State Employees Health Care Commission (K.S.A. 75-6504). This RFP is not subject to the State of Kansas Statutes which govern the Division of Purchases.

Final evaluation and award will be made by the Kansas State Employees Health Care Commission.

1.3. Appearance Before Committee:

Any, all or no bidders may be required to appear before the review committee to explain the bidder's understanding and approach to the project and/or respond to questions from the Committee concerning the proposal. The Committee reserves the right to request information from bidders as needed. If information is requested, the committee is not required to request the information of all bidders.

Bidders selected to participate in negotiations may be given an opportunity to submit a revised technical and/or cost proposal/offer to the Committee, subject to the specified cut-off time for submittal of revisions. Meetings before the Committee are not subject to the Open Meetings Act. Bidders are prohibited from electronically recording these meetings. All information received prior to the cut-off time will be considered part of the bidder's revised offer.

No additional revisions shall be made after the specified cut off time unless requested by the Committee.

...

1.5. Preparation of Proposal:

Prices are to be entered in spaces provided on the cost proposal form if provided herein. Computations and totals shall be indicated where required. In case of error in computations or totals, the unit price shall govern. The Committee has the right to rely on any prices provided by bidders. The bidder shall be responsible for any mathematical errors. The Committee reserves the right to reject proposals which contain errors.

All copies of cost proposals shall be submitted in a separate sealed envelope or container separate from the technical proposal or confidential information. The outside shall be identified clearly as "Cost Proposal" or "Technical Proposal" or "Confidential Information" with the Bid Event ID / RFP number and closing date.

A proposal shall not be considered for award if the price in the proposal was not arrived at independently and without collusion, consultation, communication or agreement as to any matter related to price with any other bidder, competitor or public officer/employee.

Technical proposals shall contain a concise description of bidder's capabilities to satisfy the requirements of this RFP with emphasis on completeness and clarity of content. Repetition of terms and conditions of the RFP without additional clarification shall not be considered responsive.

...

1.10 Competition:

The purpose of this RFP is to seek competition. The bidder shall advise the Division of Purchases if any specification, language or other requirement inadvertently restricts or limits bidding to a single source. Notification shall be in writing and must be received by the Division of Purchases no later than five (5) business days prior to the bid closing date.

1.11. Evaluation of Proposals:

Award shall be made in the best interest of the State as determined by the Committee or their designees. Although no weighted value is assigned, consideration may focus toward but is not limited to:

- Cost. Bidders are not to inflate prices in the initial proposal as cost is a factor in determining who may receive an award or be invited to formal negotiations. The State reserves the right to award to the lowest responsive bid without conducting formal negotiations, if authorized by the Committee.
- Adequacy and completeness of proposal
- Bidder's understanding of the project
- Compliance with the terms and conditions of the RFP
- Experience in providing like services
- Qualified staff
- Methodology to accomplish tasks
- Response format as required by this RFP

1.12. Acceptance or Rejection:

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

Agency Record, at 2646–48.

8. In addition, Exhibit 1 to the Instructions in the Vision RFP contained the following

“General Requirement,” in addition to others:

Contractor must have a minimum of five years continuous experience providing equipment/services comparable in scope and complexity to those specified in this RFP and to groups of similar size to the SEHP.

Agency Record, at 2654.

9. Exhibit 1 also included various requirements based on a service provider’s ability to provide account management (section 1.2), member services (section 1.3), a website (1.4), claim administration (section 1.5), billing and payment (section 1.6), data, reporting, and integration (section 1.8), and clinical review and quality assurance (section 1.9). In

addition, Exhibit 1 outlined eligibility requirements (section 1.7) and required that the selected provider must grant the SEHP the right to audit it (section 1.10). Agency Record, at 2655–61.

10. Bidding under the Vision RFP ended on January 2, 2015. Six firms submitted qualified bids: the Petitioner, Surency, Aetna, MetLife, OptiCare, and VSP. Agency Record, at 2623.
11. As disclosed in its technical proposal, Surency is a wholly owned subsidiary of Delta Dental of Kansas. Agency Record, at 2160.
12. Surency’s technical proposal stated, in part, that:

Through Surency’s partnership with EyeMed Vision Care (“EyeMed”), Surency members have access to nearly 730 providers at 211 locations in Kansas and to one of the largest national networks in the country including more than 62,000 providers at approximately 21,000 provider locations. EyeMed’s corporate headquarters is centrally located in Mason, Ohio, a suburb of Cincinnati, where claim administrative functions are performed for Surency members. EyeMed employs more than 460 associates and will provide the claims administration and network management from one location in an efficient, effective and timely manner. EyeMed has partnered with a variety of state and municipal groups on their vision services, including the States of Tennessee, Delaware, Illinois, Iowa, Nebraska and Montana.

EyeMed is an integral part of the family of Luxottica corporations, a multi-billion dollar (revenue) company devoted solely to vision care. Luxottica is a fully integrated organization involved in the design, manufacture and distribution of quality frames; retail sale through its company-owned optical retailers such as LensCrafters, Target Optical, Sears Optical, JCPenney Optical and most Pearle Vision locations; and vision benefits. EyeMed also works closely with these brands on market research studies. This allows Surency to obtain and proactively react to data that will help the State of Kansas be more consumer-focused, including industry trends, new developments, international and domestic consumer data, retail buying trends, fashion preferences and market research/purchasing patterns. Using this data, Surency will be able to evaluate and alter plan offerings to meet these consumer needs. This is a competitive advantage for Surency and EyeMed, as no other vision care organization has easy access to this type of valuable information.

We believe that through this partnership the State of Kansas will receive best-in-class service and value on their vision plan. The State of Kansas will receive tremendous value from Surency's locally-based administration and account team as well as Surency's extensive knowledge of the State's systems, people, processes and procedures. This knowledge combined with Surency's expertise in third party administration, customer service, technology, rigorous financial management and reporting as well as EyeMed's expertise in network administration and vision claims processing will provide the State's vision plan with value unmatched in the industry. We believe that our combined expertise will provide the State of Kansas with the same excellent service and value that you have enjoyed with the dental plan.

Surency is licensed by the State of Kansas and its parent company Delta Dental provides dental administration services in addition to vision services through Surency. Our ancillary product offerings also include Surency Advantage Plus (FSA, DCFA, HSA and HRA administration) and COBRA administration. We are an organization completely focused on our customer's needs and have been fortunate to receive a number of awards for this dedication and our results. For example, one of the driving forces behind our continual evaluation and improvement process is our use of the Balanced Scorecard. The Balanced Scorecard has made it possible for our company to clearly define our strategy, communicate the strategy to our entire company, align our initiatives to the strategy and see breakthrough results as an outcome. With the Balanced Scorecard at the center of our management system, we can monitor short-term and long-term results from the perspective of customers and ensure that the entire organization is focused on what is most important to your group. We have been honored to be inducted into the Balanced Scorecard Hall of Fame, which publicly recognizes companies around the world that achieve breakthrough performance and service results.

In addition, our company received the Kansas Excellence Award (presented by the Kansas Center for Performance Excellence) which is the state's top honor awarded to organizations that have demonstrated the highest level of quality and organizational performance excellence. The Kansas Award for Excellence Program annually recognizes organizations from across the state that use [sic] the Malcolm Baldrige National Quality Criteria for Performance Excellence. Organizations are measured in the following seven areas: customer and market focus, leadership, strategic planning, measurement, analysis and knowledge management, human resources, process management and results.

...

We are an organization completely focused on the customer's needs. Our goal is to provide best-in-class customer service, account service, information technology, reporting and administration. Customer service, account service, EOB generation, ID Card/Benefit Descriptions production and mailing and web development and hosting are all managed in Kansas to afford groups and providers the advantages of working with people who live and work in the same community.

Claims processing is performed for Surency by EyeMed in Mason, Ohio, a suburb of Cincinnati. EyeMed employs more than 460 associates and will provide the claims processing from one location in an efficient, effective and timely manner. EyeMed has partnered with a variety of state and municipal groups on their vision services, including the States of Tennessee, Delaware, Illinois, Iowa, Nebraska and Montana.

...

All administrative services such as customer service, IT services and account services are performed in-house. Surency will be using EyeMed's claims processing system to process vision claims. EyeMed utilizes several means to ensure hassle-free administration, ease of use for members and a quick turnaround on claims payments, including extensive training and a rigorous audit program. For example, the EyeMed claims department is staffed with 52 associates (all located within the United States in Mason, OH), each with specific processing responsibilities and management oversight, to ensure a quick and accurate turnaround time on claim payments. EyeMed thoroughly trains all claims processors to handle all accounts, and supervisors, who have at least five years of experience, monitor processors and are responsible for billing, payment and extensive claim audits.

In addition, Delta Dental has hired Standard Register, based in Dayton, OH as a Business Associate partner to print and mail ID cards and Benefit Descriptions Standard Register will also provide statement processing services, which includes the printing and mailing of all check payments and Explanation of Benefits forms.

...

Agency Record, at 2160-62.

13. Moreover, the Surency proposal identified the following individuals as being “assigned responsibility to manage or service the SEHP account” and contained a brief biography of each:

- Amy Natalie – National Account Executive
- Jeanne Hughes – V.P. of Client Services
- Cory Wright – Senior Account Manager
- Keith Asplund – V.P. of Operations
- Bob Ebenkamp – V.P. of Information Technology
- Cassandra Moore – Customer Service Manager
- Bonnie Hoover – Supervisor, Group Administration
- Lisa Walker – Accountant, Finance Department
- Deloise Shipmon – EyeMed Implementation Manager
- Dr. John Lahr – EyeMed Medical Director

Agency Record, at 2163–64.

14. The Surency technical proposal further stated that:

Surency and EyeMed Vision Care provide service to thousands of large employers in the public and private sector, including 10 state government clients and over 400 public sector clients. Our clients have asked that this information remain confidential, and that you do not disclose it publically to protect the privacy of our clients. As such, list of our state groups are included in the Confidential Information binder that has been provided.

Agency Record, at 2168. The technical proposal further represented that “Together, Surency and our partner, EyeMed Vision Care provide managed vision care services to nearly 100 groups with over 25,000 covered lives. However, because client privacy is important to us, we are unable to provide a full listing of groups over 25,000 covered lives.”

Agency Record, at 2168. The proposal went on to provide a sample of five anonymous clients—apparently identified in an accompanying “Confidential Information” binder—who had more than 25,000 members each. Of these five clients, Surency and EyeMed had been providing vision coverage to four for at least five years. Agency Record, at 2168–69.

15. In its “References” section, the Surency proposal stated that “Surency offers vision care plans powered by EyeMed Vision Care. The references below attest to EyeMed’s experience with network management and vision claims processing, while the reference for Sprint can further attest to Surency’s account management expertise.” Agency Record, at 2113. The references included the State of Tennessee, the State of Delaware, and Sprint. Agency Record, at 2113.

16. Additionally, the Surency technical proposal represented that:

The Surency and EyeMed teams have extensive experience implementing and servicing large, national accounts with complex products and services, including the implementation of Sprint’s vision plan to Surency effective January 1, 2009. More importantly, the Surency team has worked with the State of Kansas for nearly twenty years to administer the dental plan. Our knowledge of the state’s business, systems, people, processes and procedures as a result of administering the state’s dental plan since 1996 will be invaluable in ensuring that the state receives the highest level of service and personal attention for their vision plan during implementation and beyond.

This knowledge combined with Surency’s expertise in third party administration, customer service, technology, rigorous financial management and reporting as well as Eyemed’s expertise in network administration and vision claims processing will provide the State’s vision plan with value unmatched in the industry. We believe that our combined expertise will provide the state with the same excellent service and value that you have enjoyed with the dental plan.

Our implementation team is designed to optimize service to clients. The team is led by Amy Natalie, National Account Executive with 23 years of experience, including the implementation and account management of the State’s dental plan and Sprint’s vision plan; Steve Peppes, Senior Sales Executive in our Leawood office with nine years of experience; Jeanne Hughes, V.P. of Client Services with 13 years of experience; Dean Newton, Managing Director & Executive V.P. in our Leawood office with 10 years of experience; Bob Ebenkamp, V.P. of Information Technologies in our Wichita Office with 25 years of experience; and Keith Asplund, V.P. of Operations in our Wichita office with 10 years of experience.

Agency Record, at 2170.

17. The Agency Record reflects that personnel from KDHE conducted negotiations with individuals representing the Petitioner, Surency, Metlife, and OptiCare. Agency Record, at 828, 832–33 (Metlife); 1427, 1577 (OptiCare); 1999, 2006 (the Petitioner); 2251, 2258 (Surency).
18. Personnel from EyeMed participated in the Surency negotiations. Agency Record at 2258.
19. The Agency Record reflects that the negotiation scripts for all four entities were essentially identical, with the exception of a few minor details. The script provided:

Negotiations

Date: [Date]

Vendor: [Vendor name]³⁴

Room: [Room number]

Electronic responses due: [Date]

Paper responses due: the following business day

Good Morning (afternoon). First of all, I would like to thank you for responding to our Request for Proposal EVT#0003434 for a Fully Insured Voluntary Vision Plan.

Let's take a moment to officially introduce ourselves:

State people

Vendor people

A sign-in sheet is being passed around. Each individual in attendance today must sign the sheet so that we have an official attendance record.

³ The Surency negotiation script lists the vendor name as "Delta Dental." Agency Record, at 2255.

⁴ Contrary to the assertion made in Petitioner's Statement of Facts paragraph 66, the Petitioner's negotiation script lists the vendor name as "OptiCare," not "Superior." The Court infers that, based on the date—February 20, 2015—and the date of the sign-in sheet used in the negotiations with the Petitioner's representatives, the script reproduced on pages 2002 through 2004 of the Agency Record was used in the negotiations with the Petitioner. Agency Record, at 2202.

Before we proceed I want to establish the protocol and format for today's meeting.

- This RFP was designed to generate proposals on behalf of the Health Care Commission (HCC).
 - This is a negotiated process – it allows both parties to explore issues and options
 - The entire scope of service requirements is on the table for discussion and negotiation.
 - This session should last approximately two hours and is designed to make sure that you understand our needs and that we understand your proposal.
 - By the end of the meeting we all will know what areas need further clarification and what items are subject to further negotiation.
 - At the end of the negotiating process all vendors will be notified of the Health Care Commission's decision to award the contract.
 - Has your legal staff reviewed your responses and agreed to their content? (if not they will need to as part of the meeting follow up requirements.)
 - If the HCC were to award a contract, who would sign the contract? (If that person is not present, how will your responses and commitments today be communicated to that person. Is there anyone in the room who has the authority to legally bind the company?)
 - All negotiations on the contract and language of the contract will occur during the negotiation process for this RFP. The SEHP will not negotiation the terms or conditions of the contract once an award has been made by the Health Care Commission (HCC). Once the HCC has selected the vendor(s), the SEHP attorney will prepare the contact and, we will expect the selected vendor to sign the contract and return it within 10 business days. Are there any questions regarding the preparing, content and negotiation of the contract?
-
- We will ask for your written and electronic response to the questions from today's session.
 - Your electronic will be due by close of business Wednesday, February 25, 2015, with written responses due no later than the following business day.
 - After all of our questions have been answered, you will have an opportunity to ask us questions.
-
- As Director of the State Employee Health Benefits Plan, Mike Michael is the chief negotiator for the State.⁵

⁵ In Surency's Negotiation script, this bullet point adds: "Since Mike cannot join us this morning, Jennifer is sitting in his place."

- Jennifer Flory, Senior Manager of Health Plan Operations will manage the contract.
- Melody Connell, a member of Jennifer’s team, will handle the day-to-day contract operation and vendor interface.
- I will facilitate today’s question and answer session but anyone in the room may have follow-up or clarifying questions.
- Who will facilitate the responses for your team today?

Do you have a brief opening statement (not to exceed 5-10 minutes) that you would like to make before we get started on the question session?

Ending the Session

I want to thank for your time and participation in this meeting. Based on the additional information I believe we all have a better understanding of the scope of services and your ability to provide them to the state.

Your written and electronic responses to the open issues from today’s session along with your Best and Final cost proposal are due:

- by close of business [date], with
- Written responses are due no later than the following business day.

We will be taking all of this information under consideration and the next step would be to arrive at a decision. The Health Care Commission will make the final determination of vendor. The next HCC meeting is scheduled for March 2, 2015.

We will be contacting you following the HCC meeting. This session is ended.

Agency Record, at 834–36 (Metlife script); 1431–33 (OptiCare script); 2002–04 (the Petitioner’s script); 2255–57 (Surency script).

20. On February 12, 2015, letters were sent to OptiCare, Metlife, Surency, and the Petitioner.

These letters discussed the nature of the facilitated negotiations in connection with the Vision RFP. The letters contained the following discussion of the “most important” elements the State was looking for in a Vision provider, as follows:

- Metlife: “The Vision Plan is a voluntary program for State of Kansas plan members, so the most important aspect is network access particularly in the rural areas of the State. If you wish to display anything, you will need to bring your own equipment.” (828)
- OptiCare: “The Vision Plan is a voluntary program for State of Kansas plan members, so the most important aspect is are [sic] network access particularly in the rural areas of the State. If you wish to display anything, you will need to bring your own equipment.” (1427)
- Superior: “The Vision Plan is a voluntary program for State of Kansas plan members, so the most important aspects are network access and cost. If you wish to display anything, you will need to bring your own equipment.” (1999)
- Surency: “The Vision Plan is a voluntary program for State of Kansas plan members, so the most important aspect is network access particularly in the rural areas of the State. If you wish to display anything, you will need to bring your own equipment.” (2251)

Agency Record, at 828, 1427, 1999, 2251. Thus, with the exception of a minor typographical error in the case of the OptiCare letter, the letters to Metlife, OptiCare, and Surency are identical in this respect. Only the letter sent to the Petitioner contained the additional focus on “cost” and omitted the specific focus on the “rural areas of the State.”

21. In the course of the negotiation process, the Petitioner offered revised options to their original proposal. Agency Record, at 1579–81. As the Petitioner’s Requested Additional Information for Voluntary Fully Insured Vision Coverage stated:

**Revised Plan Options
Requested by Mike Michael, Director, State Employee Health Plan**

Our original submission provided a 2% reduction to your current rates. Based on our meeting on Friday, February 20, we are offering for consideration two options. We believe both of these options will deliver additional value to the State of Kansas employees and retirees—and will

continue to drive increased vision plan participation (up 87% since 2003). Our rates are detailed beginning on Page 6 of this response, but a summary of the options is below.

Option 1 – Option 1 provides additional savings. The premium **rates are reduced** 1% from the original proposal for both the Basic and the Enhanced Plans. The benefits for both plans remain unchanged.

Option 2 – In Option 2, premium rates are the same as originally proposed for both the Basic and Enhanced Plans. Benefits for the Basic Plan remain unchanged, however, **we have enriched the Enhanced Plan** with a \$200 Laser Vision Correction benefit.

Since 2003, it has been our privilege to provide vision services to the employees of the State of Kansas, the Direct Bill retirees and employees of the non-state entities. We remain committed to being your superior partner in eye health care.

Agency Record, at 1581 (emphasis in original). The Petitioner’s representative’s use of the phrase “based on our meeting on Friday, February 20 . . .” in offering these revised options suggests that this offer was made pursuant to issues discussed at the negotiation. As with the other providers, however, no minutes of the actual meeting between the Petitioner and the Respondents’ negotiators exists.

22. On April 14, 2015, Aon Hewitt (“Aon”)—a consultant whose involvement in the matter was disclosed to the potential bidders in the December 8, 2014 Amendment to the Vision RFP, Agency Record at 2638–40—submitted an analysis of the various providers to Mike Michael (“the Aon Report”). Agency Record, at 2730–43.

23. In analyzing the financial aspects of the proposals, the Aon report concluded that:

Opticare, Surency, and VSP have provided the most aggressive and favorable rates for the 2016 plan year (with 3-year rate guarantees) with total annual premium between \$3.5 and \$3.6M. Out of the remaining bidding vendors (Superior, Aetna, and Metlife), Metlife provided the 4th best quote with total annual premium of approximately \$3.98M, 10-13% higher than Opticare, Surency, and VSP.

As the financial results are considered, it is important to be sure plan designs are consistent for each of the bidding vendors. Based on the supplemental information contained in the RFP files, Superior, Opticare, Surency and VSP matched the current plan designs for the RFP process. However, VSP's plan summaries did not detail the out-of-network benefits provided by their plans. In addition, Opticare and Surency did not explicitly provide plan design summaries in their RFP submissions, however, these vendors' quotes in the "Exhibit 2 – Cost Proposal" document indicate the rates provided in these exhibits reflect the current Basic and Enhanced plans offered by the State. Despite the State's RFP specifications stating the vendors were required to provide quotes based on the SEHP's current vision plan designs, Aetna and MetLife provided quotes based on plan designs that are slightly richer than the current plan designs. Aon did not estimate the value of these plan design differences in the attached RFP analysis. A comparison of the plan designs by carrier is contained in the attached file.

VSP provided quotes for two additional plan designs with slightly richer benefits than the current plan designs. Aon did not include these quotes in our analysis of the State's 2016 vision RFP.

Agency Record, at 2731. The charts attached to the Aon Report demonstrate that the Petitioner's proposal was the most expensive overall, coming in at more than \$98,000 more than the proposal submitted by Aetna, the next-highest. Agency Record, at 2733. The Petitioner's proposal was nearly \$629,000 more expensive than the proposal submitted by Surency. Agency Record, at 2733.

24. The proposal submitted by Surency was, ultimately, the second least expensive of those considered by Aon. Agency Record, at 2733.
25. According to the Aon Report, in the "All Services Combined" analysis, Surency had access to 488 care providers in Kansas, while the Petitioner had access to 569. On the other hand, Surency also had access to 206 materials merchants in Kansas, while the Petitioner had access to 133. Agency Record, at 2735–36. In Missouri, Surency had access to more care providers and materials merchants than the Petitioner. Agency Record, at 2735–36.

26. The Aon Report also contained the following discussion:

Geo-access Results

Aon analyzed the access members would have to care providers and materials merchants by evaluating the vendors' network data by geographic area as defined in the "Exhibit 8 – Regional Access Chart." Overall, it appears Opticare and VSP have the best access for care and materials in all geographic areas in Kansas. Note that MetLife uses VSP's network in the State of Kansas, so members would have the same access to care and materials if the State awarded MetLife or VSP the vision contract.

Access to Care Providers

It appears Opticare has the best access to care providers in geographic area 1, which contains about 50% of the State's membership. Based on the data in Opticare's Exhibit 8 – Regional Access Chart, Opticare has approximately 150 more care providers in geographic area 1 than VSP (approximately 40% more care providers). These two vendors have the best access to care in geographic area 1. The State may consider contacting Opticare to verify the care provider counts shown in Opticare's Exhibit 8 – Regional Access Chart.

In the second largest geographic area, area 5 with approximately 17% of the State's membership, VSP has the best access to care with approximately 100 more care providers than Opticare. These two vendors have the best access to care in geographic area 5.

Access to Materials Merchants

Similar to access to care providers, Opticare and VSP have the best access to materials merchants in all geographic areas. However, VSP has the best access to materials in geographic area 1 while Opticare has the best access to materials in geographic area 5.

Additional considerations

Aon did not evaluate or compare performance guarantees, implementation plans and charges, communication materials, and other documentation provided by the bidding vendors' RFP submissions. The State may choose to review other aspects of the vision RFP besides the financial and geo-access analysis provided by Aon in determining the best vendor to administer the SEHP's vision plan for 2016.

Conclusion

As Opticare and VSP seem to provide the most competitive bids from a financial and geo-access perspective, Aon recommends these two vendors be considered for any finalist meetings the State may hold for the 2016 vision RFP. If the State confirms Opticare's access to care providers detailed in Opticare's Exhibit 8 – Regional Access Chart is accurate, Aon would conclude Opticare has the best proposal when solely considering the financial and geo-access aspects of the vision RFP.

Agency Record, at 2731–32.

27. Mike Michael submitted a memorandum to the HCC on April 6, 2015. Agency Record, at 2626–28. In the memorandum, Mr. Michael wrote that:

In addition to the initial premium and three-year premium rate guarantee, the vendor's flexibility, capacity, claims processing ability, and ability to provide quality customer service were considered. The current vendor has the most robust network of providers. The vendor network being proposed is not as robust as the current network available but they do have 124 of the top 200 providers in the current network. The vendor has committed to enhancing their network by providing a guarantee of \$30,000 if they do not recruit at least 75 percent of the top 200 providers or providers representing 75 percent of the claim volume.

Staff Recommendation:

Based on the information gathered in bid responses and during negotiation meetings, staff recommends that Surency be awarded a three-year contract to provide the insured voluntary vision plan.

Agency Record, at 2626. However, according to negotiation documents submitted by

Surency, it appears that Surency's actual commitment was:

Surency recognizes that having a network in place that provides little to no disruption for the State's employees is a crucial component when considering making a vendor change. We are committed to this cause and are backing it up with a performance guarantee with \$75,000 at risk. We guarantee to recruit either 85% of the "Top 200" providers OR providers that represent 85% of the "Top 200" claim volume by August 1, 2015. This will ensure that by open enrollment all of the new network providers will be

reflected in the directories for the State's members to reference. The guarantee includes our Walmart and on-line contact solutions.

Agency Record, at 2011. Moreover, Surency's proposal "includes a \$35,000 implementation allowance to be used at the State's discretion, including staff time, third party expenses and fixed costs." Agency Record, at 2011.⁶

28. The charts attached to Mr. Michael's memorandum demonstrate that the Petitioner's premiums were the highest of the four providers the Respondents negotiated with, while Surency's were the second lowest. The difference between the two companies' proposals was just below \$629,000. Agency Records, at 2627.

29. The HCC voted on April 20, 2015, to award the Vision Contract to Surency. The vote was 5 in favor, none opposed. Agency Record, at 2623–24. The commissioners in attendance were: Jim Clark, J. Scott Day, Steve Dechant, Kenneth Selzer, and Heather Young. Agency Record, at 2623. The HCC decision of April 20, 2015, essentially quoted Mr. Michael's April 6 memorandum verbatim.

30. No HCC members ever engaged in direct negotiations with the vendors.

31. The Agency Record is devoid of any evidence to establish that, at the April 20, 2015 meeting, any member of the HCC disclosed a potential conflict. As pointed out by the Petitioner, the meeting minutes of the April 20 meeting "confirm that the HCC merely adopted the KDHE report without discussion or explanation." Petitioner's Brief, at 20; Agency Record, at 2623–24.

⁶ Surency's Brief refers to this discrepancy as a "typographical error," and avers that, subsequently, it has met the required 85% recruitment percentage. See Surency Brief, at 3, n. 3. The Respondents, likewise, treat the reference to 75%, instead of 85%, as an "error in the recommendation." Respondents' Brief, at 7–8.

32. Mr. Clark has, in the past, served as a financial expert on the Delta Dental of Kansas Audit Committee. At the March 2, 2015 HCC meeting to approve a dental contract with Delta Dental, Mr. Clark disclosed that he had previously served on the Audit Committee for Delta Dental, that his term ended in November of 2013, and that he had no conflict of interest. Supplemental Agency Record, Exhibit F, Exhibit G.

33. The HCC and Surency entered into the contract to provide vision coverage on May 18, 2015 (“the Vision Contract”). Agency Record, at 1–10.

34. On April 30, 2015, the Petitioner was advised of the HCC’s decision through a letter from the KDHE, which states, in part:

The HCC decision was based primarily on the price of the product available for our members and in no way expresses dissatisfaction with our relationship with your company. Please be assured that the SEHP will continue to provide very positive references should you ever need a reference from a former client.

Agency Record, at 1997.

STANDARD OF REVIEW

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

(c) The court shall grant relief only if it determines any one or more of the following:

- (1) The agency action, or the statute or rule and regulation on which the agency action is based, is unconstitutional on its face or as applied;
- (2) the agency has acted beyond the jurisdiction conferred by any provision of law;
- (3) the agency has not decided an issue requiring resolution;

- (4) the agency has erroneously interpreted or applied the law;
- (5) the agency has engaged in an unlawful procedure or has failed to follow prescribed procedure;
- (6) the persons taking the agency action were improperly constituted as a decision-making body or subject to disqualification;
- (7) the agency action is based on a determination of fact, made or implied by the agency, that is not supported to the appropriate standard of proof by evidence that is substantial when viewed in light of the record as a whole, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this act; or
- (8) the agency action is otherwise unreasonable, arbitrary or capricious.

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

A challenge under [K.S.A. 77-621(c)(8)] attacks the quality of the agency's reasoning. [Citations omitted.] Although review must give proper deference to the agency, its conclusion may be set aside—even if supported by substantial evidence—if based on faulty reasoning. A challenge under [K.S.A. 77-621(c)(7)] attacks the quality of the agency's fact-finding, and the agency's conclusion may be set aside if it is based on factual findings that are not supported by substantial evidence.

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

“A rebuttable presumption of validity attaches to all actions of an administrative agency.”

In re Tallgrass Prairie Holdings, LLC, 50 Kan. App. 2d 635, 659, 333 P.3d 899 (2014). Under K.S.A. 77-621(a), the burden of proving the invalidity of an agency action rests with the party asserting invalidity. The Court's review of an agency action is not de novo, and the Court may not reevaluate evidence or substitute its own judgment for that of an administrative agency; it may only “consider all of the evidence—including evidence that detracts from an agency's factual

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

When the adequacy of an agency’s findings is challenged, the Kansas Court of Appeals has offered the following analysis:

The decision of any administrative body should contain a finding of the pertinent facts on which it is based in order for the reviewing court to determine whether the decision reached is reasonable and lawful. [Citations omitted.] As expressed in appellate decisions,

“[i]t is a general rule of administrative law that an agency must make findings that support its decision, and those findings must be supported by substantial evidence. [Citation omitted.] The necessity for findings is to ‘facilitate judicial review, avoid judicial usurpation of administrative functions, assure more careful administrative consideration to protect against careless and arbitrary action, assist the parties in planning their cases for rehearing and judicial review, and keep such agencies within their jurisdiction as prescribed by the Legislature.’ [Citations omitted.]” [Citations omitted.]

“Lack of expressed findings of fact may not be supplied by implication, and, where they are required, courts will not search the record in order to ascertain whether there is evidence from which the ultimate findings could be made. . . .

“[A]n agency is not required to furnish detailed reasons for its decision; however, the decision must be sufficiently clear so that a court is not required to speculate as to its basis.” [Citations omitted.]

Despite these authorities insisting on a degree of clarity in agency factfinding and rationale, our courts have consistently affirmed agency determinations which are conceptually sound but lack some mathematical precision. Our appellate courts have consistently stated that to find a lack of substantial evidence to support the BOTA action, the decision must be so wide of the mark as to be outside the realm of fair debate. . . .

In re Protests of City of Hutchinson/Dillon Stores For Taxes Paid for 2001 & 2002 in Reno Cty., Kan., 42 Kan. App. 2d 881, 888–89, 221 P.3d 598 (2009). Alternatively:

An agency's decision is arbitrary and capricious if it is “is so wide of the mark that its unreasonableness lies outside the realm of fair debate.” [Citation omitted.] An agency's action is arbitrary and capricious if it is unreasonable, without foundation in fact, not supported by substantial evidence, or without adequate determining principles.

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

A reviewing court has unlimited review over questions of law. *Villa v. Kansas Health Policy Auth.*, 296 Kan. 315, 323, 291 P.3d 1056 (2013). Moreover, “an agency's interpretation of a statute or regulation is not afforded any significant deference on judicial review.” 296 Kan. at 323.

CONCLUSIONS OF LAW

The parties do not dispute the applicability of the KJRA to this case. The Petitioner’s Brief in Support distills its arguments into the following complaints, briefly summarized:

1. HCC cannot delegate authority to the KDHE to negotiate components of the SEHP. Brief in Support, at 25–26.

2. Even if HCC can delegate authority to the KDHE, neither the KDHE nor the HCC conducted the solicitation and negotiations for the at-issue contract appropriately, based on a non-exclusive list of claimed procedural shortcomings. Brief in Support, at 27–28.
3. The KDHE personnel involved in the process failed to create a sufficient record of the evaluation process. Brief in Support, at 28.
4. Surency did not meet the requirements that had been previously set forth in the Vision RFP because Surency did not have “at least five years of continuous experience providing services comparable in scope and complexity to those specified in the solicitation documents and with experience serving groups similar in size to the SEHP.” Brief in Support, at 30.
5. Surency improperly colluded with EyeMed in developing its bid for the contract. Brief in Support, at 30–31.
6. Surency was unclear about which member of the “Surency team” would administer each portion of the contract and, thus, substantial evidence does not support the HCC’s award. Brief in Support, at 32.
7. Jim Clark, the Secretary of Administration and chairman of the HCC, was subject to disqualification because he had a “close relationship” with Delta Dental, Surency’s parent company. A similar complaint is alluded to against Commissioner Day, although not expanded upon. Brief in Support, at 32–34.

8. Because the “contents of the agency record are manifestly insufficient,” the HCC’s award must be deemed unreasonable, arbitrary, and capricious.

The Respondents, in turn, argue that:

1. K.S.A. 75-7405(c)(7) “specifically directs KDHE to assume operational and purchasing responsibility for the HCC[,]” making the KDHE an appropriate entity to negotiate and make recommendations to the HCC regarding the SEHP.
2. Because the Petitioner “knew that members of the HCC were not conducting the negotiations themselves” and “did not raise this concern at any time during the course” of the negotiations, the Petitioner is estopped from raising said issue now.
3. The Vision RFP was a “courtesy bid” and “was not subject to statutes governing the Office of Procurement and Contracts . . . rather K.S.A. 75-6504(d) was applicable.”
4. The procedures used in awarding the contract “met all statutory requirements called for in K.S.A. 75-6504 and K.S.A. 75-7405(c).”
5. Surency met the requirements set forth in the Vision RFP.
6. The Surency proposal adequately set forth what portions of the contract it would perform and what portions EyeMed would perform, and the two companies’ joint participation in the proposal did not constitute improper collusion or collaboration.

7. The decision to award Surency the contract was based on substantial evidence, as required by K.S.A. 77-621(c)(7).
8. Mr. Clark had no business relationship with Surency, and he had already determined that he had no conflict of interest with Surency's parent company, Delta Dental, at a prior HCC meeting.
9. The recommendation and award of the contract are not "so wide off the mark that [they lie] outside the realm of fair debate"⁷ and, thus, are not arbitrary, capricious, or unreasonable.

Surency's Brief generally echoes the Respondents' arguments, although it focuses more attention on refuting the Petitioner's argument that K.S.A. 75-37,102 controls the HCC's process in awarding contracts.

As a preliminary matter, the Court first addresses the Respondents' argument that the Petitioner should be estopped, as a matter of law, from raising challenges to the result of the bidding process. The Petitioner argues, convincingly, that it was not aware of the complained-of defects in the negotiation and award process until after the Vision Contract was awarded to Surency. Taking this contention for granted for the purposes of this Memorandum Decision and Order, the Court will consider the Petitioner's arguments on their merits.

A. The Record Discloses No Jurisdictional Defect in the Award

⁷ The Court notes that different appellate cases alternatively use the phrase "wide of the mark" and "wide off the mark." Compare *In re Tax Appeal of Dillon Stores*, 42 Kan. App. 2d at 889 ("wide of the mark") with *Redline Exp., Inc. v. State Employment Sec. Bd. of Review*, 27 Kan. App. 2d 1067, 1069, 11 P.3d 85 (2000) ("wide off the mark").

The Petitioner’s first argument, couched in terms of “jurisdiction”, attempts to paint the Respondents’ actions as unlawful because the HCC has “exclusive authority to implement and administer the healthcare plans available to Kansas state employees under the SEHP” and, therefore, “When the HCC exercises its authority through contracts with private concerns, it is the HCC that must negotiate these contracts.” Petitioner’s Brief in Support, at 25. Because the HCC was never “involved in any aspect of vendor negotiations before the award was made” and “failed to perform its own evaluation of the competing proposals, even though solicitation documents specifically state that the final evaluation was to be made by the HCC[,]” the Petitioner argues, the HCC essentially abdicated its statutory duty. Petitioner’s Brief in Support, at 25–26. While acknowledging the existence of K.S.A. 75-7405(c)(7), the Petitioner argues that it is a “statute of general application and cannot be interpreted to abrogate or diminish the specific statutory functions and duties delegated to the HCC by the legislature in the specialized field of state employee healthcare benefits purchasing.” Petitioner’s Reply Brief, at 4.

K.S.A. 75-6504(b)—passed in 1984—provides:

The Kansas state employees health care commission is hereby authorized to negotiate and enter into contracts with qualified insurers, health maintenance organizations and other contracting parties for the purpose of establishing the state health care benefits program, including the acquisition of consulting and other services necessary therefor. The commission shall advertise for proposals, shall negotiate with not less than three firms or other parties submitting proposals, and shall select from among those submitting proposals the firm or other contracting party to contract with for the purpose of entering into contracts for services related to the state health care benefits program.

K.S.A. 75-7405(c)(7), meanwhile—which, when initially passed in 2005, referred to the “Kansas health policy authority”—states that, “The department of health and environment shall assume

operational and purchasing responsibility for: . . . (7) the state health care benefits program as provided in K.S.A. 75-6501 through 75-6523, and amendments thereto”

Reading these two statutes *in pari materia*—and mindful of the fact that K.S.A. 75-7405 was passed after K.S.A. 75-6504, with no contemporaneous modification to K.S.A. 75-6504 despite the explicit reference *to* that section in K.S.A. 75-7405(c)(7)—it is apparent that the Legislature intended that responsibility for the making of contracts related to the State Health Care Benefits Program was to be shared between the HCC and the KDHE. K.S.A. 76-7405(c)(7) essentially delegates operational control of the State Health Care Benefits Program—including the SEHP—to the KDHE, while leaving the HCC overall decision-making authority as to the selection of providers. In other words, the KDHE is responsible for the day-to-day administrative execution of the SEHP, while the HCC has the final say in choosing with which providers to contract.

In this case, the participation of KDHE personnel in the negotiation and procurement process was not a “jurisdictional” defect in the overall process. K.S.A. 75-6504 does, indeed, specify that “*The commission shall advertise for proposals, shall negotiate with not less than three firms or other parties submitting proposals, and shall select from among those submitting proposals the firm or other contracting party to contract with for the purpose of entering into contracts for services related to the state health care benefits program.*” While such language, in isolation, may appear to be read to require the HCC, *and no one else*, to take these steps, the Legislature has, in a subsequently-enacted statute, also delegated “operational and purchasing responsibility” for the State Health Care Benefits Program to the KDHE. Thus, it is not incongruous with the provisions of *both* K.S.A. 75-6504(b) and K.S.A. 75-7405(c)(7) that KDHE personnel should, on behalf of the HCC, provide services in connection with the advertisement for, negotiation with, and selection

of provider under the State Health Care Benefits Program—so long as the final decision on the selection of those providers remains with the HCC. To read the statutes more narrowly would unnecessarily and artificially confine both agencies and undermine the Legislature’s apparent aims, as set forth in K.S.A. 75-7404:

The department of health and environment shall develop and maintain a coordinated health policy agenda that combines **effective purchasing and administration of health care** with health promotion oriented public health strategies. The powers, duties and functions of the department of health and environment are intended to be exercised to improve the health of the people of Kansas by increasing the quality, efficiency and effectiveness of health services and public health programs.

(Emphasis added.)

Thus, the Court rejects the Petitioner’s complaint that the HCC did not discharge its statutory duties when KDHE personnel acted on its behalf in the advertising for the Vision RFP and negotiation with the various providers who submitted bids for the RFP. The KDHE and HCC share responsibility for various aspects of the State Health Care Benefits Program—the KDHE operational, the HCC decisional. Thus, no formal delegation of power from the HCC to the KDHE was necessary, and the KDHE’s actions in the ultimate service of the HCC appear to have been proper in light of the interplay between K.S.A. 75-6504(b) and K.S.A. 75-7405(c)(7), so long as the HCC made the final selection of provider. Because the record reflects that the HCC did, in fact, make the final selection, based on KDHE personnel’s recommendation, there appears to be no jurisdictional defect in the award of the Vision Contract.

B. K.S.A. 75-6504(b) Controlled the HCC’s Actions

The parties next dispute the specific statute that controlled the procedure that would govern the award of the Vision Contract in this case. The Petitioner argues that the requirements set forth

in K.S.A. 75-6504(b) essentially echo those in K.S.A. 75-37,102 and, thus, that the HCC's actions should be evaluated in light of the requirements set forth in K.S.A. 75-37,102. The Respondents and Surency, meanwhile, argues that K.S.A. 75-37,102 does not apply to the contract at issue in this case.

A comparison of the statutes demonstrates that their provisions are not identical. K.S.A. 75-37,102 provides:

(a) Upon request of the chief administrative officer of a state agency and subject to the approval of the secretary of administration, the director of purchases may convene a procurement negotiating committee to obtain services or technical products for the state agency.

(b) Each procurement negotiating committee shall be composed of: (1) The director of purchases, or a person designated by the director; (2) the chief administrative officer of the state agency desiring to make the procurement, or a person designated by the officer; and (3) the secretary of administration, or a person designated by the secretary or, if a procurement involves information technology or services, the executive chief information technology officer or a person designated by the executive chief information technology officer.

(c) The negotiating committee is authorized to negotiate for the procuring state agency contracts with qualified parties to provide services or technical products needed by the state agency.

(d) Prior to negotiating for the procurement, a notice to bidders first shall be published in the Kansas register. Upon receipt of bids or proposals, the committee may negotiate with one or more of the firms or certified businesses submitting bids or proposals and select from among those submitting such bids or proposals the party to contract with to provide the services or technical products. In selecting the party to contract with to provide services or technical products under this section, the committee shall consider whether such party is:

(1) A certified business or purchased goods or services from a qualified vendor on the list certified by the director of purchases pursuant to K.S.A. 75-3317 et seq., and amendments thereto; or

(2) a disabled veteran business:

(A) Doing business as a Kansas firm, corporation or individual; or

(B) maintaining offices or places of business in Kansas.

(e) Contracts entered into pursuant to this section shall not be subject to the provisions of K.S.A. 75-3738 through 75-3740a, and amendments thereto. Meetings to conduct negotiations pursuant to this section shall not be subject to the provisions of K.S.A. 75-4317 through 75-4320a, and amendments thereto. The director of purchases shall submit a report at least once in each calendar quarter to the legislative coordinating council and the chairpersons of the senate committee on ways and means and the house of representatives committee on appropriations of all contracts entered into pursuant to this section. In the event that the negotiating committee selects a bid which is not the lowest bid on a given contract, the directors report shall contain a rationale explaining why the lowest bidder was not awarded the contract.

(f) Nothing in this section shall be construed as requiring either negotiations pursuant to this section or bids pursuant to K.S.A. 75-3739, and amendments thereto, for the procurement of professional services or services for which, in the judgment of the director of purchases, meaningful specifications cannot be determined.

In contrast, the provisions of K.S.A. 75-6504(b) require only that:

. . . The commission shall advertise for proposals, shall negotiate with not less than three firms or other parties submitting proposals, and shall select from among those submitting proposals the firm or other contracting party to contract with for the purpose of entering into contracts for services related to the state health care benefits program.

The RFP documents in the Agency Record contain no reference to K.S.A. 75-37,102. Indeed, the instructions contained in the RFP explicitly stated that, while the RFP was to be a “negotiated procurement,” “The Division of Purchases is processing this Request for Proposal (RFP) as a Courtesy Bid for the Kansas State Employees Health Care Commission (K.S.A. 75-6504). This RFP is not subject to the State of Kansas Statutes which govern the Division of Purchases.” Agency Record, at 2646. While that same document contains references to a “review

committee,” that term was never defined—as pointed out by Surency’s Brief. But any ambiguity in the meaning of the phrase “review committee” does not necessitate the application of the procedural requirements of K.S.A. 75-37,102 when the RFP, itself, cites only K.S.A. 75-6504.

Thus, the Court is not persuaded that the requirements of K.S.A. 75-37,102 apply to the Vision RFP. The requirements contained in K.S.A. 75-6504(b) are not equivalent to those in K.S.A. 75-37,102, and when this Court reviews the contract award process, it does so in light of K.S.A. 75-6504(b)—not K.S.A. 75-37,102. Moreover, the RFP documents explicitly put the bidders on notice that K.S.A. 75-6504 was to be the operative statute. Petitioner’s arguments to the contrary are rejected and the Court, accordingly, does not evaluate the Respondents’ actions in light of the requirements set forth in K.S.A. 75-37,102.

C. The Procedure Under K.S.A. 75-6504(b) Was Adequate

The Petitioner argues that the HCC followed an unlawful procedure in awarding the Vision Contract even if K.S.A. 75-6504(b) and K.S.A. 75-7405(c) were the controlling statutes and even if the KDHE was authorized to conduct the negotiations on behalf of the HCC. The Petitioner specifically raises the following complaints to demonstrate that the “Vision RFP procurement process was materially flawed and procedurally deficient from beginning to end”:

- The instructions to the Vision RFP clearly contemplate the involvement of a review committee. There is no evidence such a committee was formally established. (AR002646)
- The Vision RFP contemplates that technical proposals and cost proposals would be submitted separately. This bifurcated process is designed to avoid undue prejudice and influence caused by price and cost concerns. There is no evidence the Vision RFP was administered under this process. (AR002647)

- There is no evidence the evaluators prepared a complete and adequate technical evaluation of the proposals or that the award recommendation prepared by the KDHE was fully documented.
- The negotiation scripts name Mike Michaels as “Chief Negotiator for the State,” yet nothing in the record indicates that the HCC ever formally delegated to Mr. Michaels—legally or illegally— authority to negotiate on its behalf. (AR 000834, 001431, 002002, 002255).
- Kansas agency procurement guidelines instruct that under the Negotiated Procurement process more is expected in the way of documenting the process and providing written justifications. For this Negotiated Procurement the supporting documentation is insufficient; in fact, it is non-existent. Guidelines, p. 9.
- The record indicates that discussions with the competing vendors were not evenhanded. Surency was provided an opportunity to engage in meaningful negotiations and allowed to offer material adjustments to the terms it had originally proposed. By all accounts, neither Superior nor the other vendors were afforded the same opportunity. (AR000834, 001431, 002002, 002255, 002010-002011).

Petitioner’s Brief, at 27–28. All of these alleged failures, the Petitioner contends, demonstrate that “At bottom, there were material, prejudicial failings in the States’ [sic] administration of the vision RFP which render the HCC’s award invalid.” Petitioner’s Brief, at 28.

The Court rejects these arguments. As discussed above, the SEHP was statutorily authorized to conduct negotiations and advise the HCC in its ultimate award of the Vision Contract, so its participation was in no way improper. The submission of separate technical and cost proposals *did* occur, as the Respondents point out, and as evidenced by the Vision RFP instruction requirement that

All copies of each section of the bid response shall be submitted in a separate sealed envelope(s) or container(s). The outside shall be identified clearly as "Cost Proposal" or "Technical Proposal" or “Confidential Information” with the Bid Event ID number and closing date.

Agency Record, at 2650. The SEHP review committee did evaluate bids, and prepared a recommendation to the HCC. Agency Record, at 2626–27. Moreover, because KDHE personnel were statutorily authorized to participate in these negotiations, as noted above, no formal delegation of authority to Mike Michael was required. Additionally, the Court disagrees that the “Bid Guidelines for State of Kansas Agencies” document—attached to the Petitioner’s Brief—was controlling; thus, the Respondents’ failure to follow these guidelines is immaterial, and cannot form the basis of a claim that inappropriate procedure was applied. Finally, the Agency Record clearly reflects both that Superior had the opportunity to negotiate terms and that Superior clearly offered “material adjustments” to the terms it originally proposed. Agency Record, at 1579–81.

Pursuant to K.S.A. 75-6504(b), the HCC—and, via K.S.A. 75-7405(c)(7), the KDHE—was required to “advertise for proposals,” “negotiate with not less than three firms or other parties submitting proposals,” and “select from among those . . . the firm or other contracting party to contract with . . .” The process followed by the HCC and KDHE comported with these statutory requirements and was, from the evidence in the record, fairly conducted. The Respondents were not required to follow the procedures pointed to by the Petitioner; accordingly, the Respondents’ failure to actually comport with those requirements does not render the process applied invalid. For these reasons, the Petitioner’s claims under K.S.A. 77-621(c)(5) are rejected.

D. The Decision to Award the Contract to Surency Was Supported By Substantial Evidence

The Petitioner raises a number of arguments which, generally, all claim that the HCC’s decision to award the Vision Contract to Surency was not supported by substantial evidence. Initially, the Petitioner complains that the “KDHE evaluators created no record of the evaluation

process, so there is no way to discern whether they conducted their evaluation in accordance with the specifications and requirements stated in the Vision RFP or on some other, unannounced set of criteria[,]” although the Petitioner does not expand on this complaint. Moreover, the Petitioner argues that Surency lacks the required “five years of continuous experience providing services comparable in scope and complexity to those specified in the solicitation documents and with experience serving groups similar in size to the SEHP.” Petitioner’s Brief, at 30. The Petitioner further claims that EyeMed’s performance history could not be considered in evaluating Surency’s bid because the solicitation documents prohibited “collusion, consultation, communication, or agreement as to any matter related to price with any other bidder, competitor, or public officer/employee.” Petitioner’s Brief, at 30. Finally, the Petitioner claims that Surency’s proposal fails to make clear which entities, as between EyeMed and Surency, would perform which portions of the Vision Contract, thus rendering the HCC’s decision to award the Vision Contract to Surency unsupported by substantial evidence.

The Court considers each argument in turn.

1. The Record Contains Substantial Evidence to Support the KDHE’s Recommendation

The Agency Record establishes that the recommendation of KDHE personnel to award the Vision Contract to Surency constituted the overriding factor in the HCC’s decision. Agency Record, at 2623–24; Supplemental Agency Record, Exhibit H (Commissioner Day’s representation that “I based my vote on the information given at last Commission meeting and the recommendation of the Staff.”). The Agency Record further establishes that KDHE personnel considered “the initial premium and three-year premium rate guarantee, the vendor’s flexibility, capacity, claims processing ability, and ability to provide quality customer service” in making the

recommendation to the HCC. Agency Record, at 2623–24, 2626. These factors are not inconsistent with those enumerated in the instructions to the Vision RFP, which included:

- Cost. Bidders are not to inflate prices in the initial proposal as cost is a factor in determining who may receive an award or be invited to formal negotiations. The State reserves the right to award to the lowest responsive bid without conducting formal negotiations, if authorized by the Committee.
- Adequacy and completeness of proposal
- Bidder's understanding of the project
- Compliance with the terms and conditions of the RFP
- Experience in providing like services
- Qualified staff
- Methodology to accomplish tasks
- Response format as required by this RFP

Agency Record, at 2648. Nor are they inconsistent with the general “Services Required” criteria set forth in the Vision RFP, which, as noted above, included various requirements based on a service provider’s ability to provide account management (section 1.2), member services (section 1.3), a website (1.4), claim administration (section 1.5), billing and payment (section 1.6), data, reporting, and integration (section 1.8), and clinical review and quality assurance (Section 1.9). Agency Record, at 2655–61. Moreover, the KDHE personnel attached a series of tables to their recommendation memorandum to the HCC for purposes of comparing the financial aspects of the various proposals. Agency Record, at 2627.

Thus, there is no indication that KDHE personnel considered some other, undisclosed set of criteria in making their recommendation. The cost of Surency’s proposal was significantly lower than that of the Petitioner’s, and while Surency’s network coverage appears to have been somewhat less than that of the Petitioner, Surency also made assurances—and, apparently, has now fulfilled those assurances—that it would bolster its network coverage significantly in order to perform the

Vision Contract. Accordingly, there was substantial evidence to support the KDHE's recommendation, while there is no evidence that the KDHE applied some other, undisclosed criteria in making its recommendation.

2. *The Agency Record Demonstrates That EyeMed and Surency Together Have a Five-Year History of Providing Services Comparable In Complexity and Scope*

The Petitioner next specifically complains that Surency does not meet the Vision RFP's requirement of at least five years of continuous experience providing services comparable in scope and complexity to those specified in the Vision RFP. As noted above, Surency's technical proposal represented that, "The Surency and EyeMed teams have extensive experience implementing and servicing large, national accounts with complex products and services, including the implementation of Sprint's vision plan to Surency effective January 1, 2009." Agency Record, at 2170. Thus, if the joint bid submitted by Surency and EyeMed was proper—as assessed in the next section of this Memorandum Decision and Order—then there was substantial evidence to demonstrate that Surency met the five-year requirement in the Vision RFP.

3. *EyeMed and Surency's Joint Participation Was Not Improper Under the Terms of the Vision RFP*

The Petitioner argues that, "To the extent EyeMed's performance history was submitted as evidence reasonably predictive of how the contractor 'team' identified in the Surency proposal will perform in the future, another mandatory requirement is implicated." Petitioner's Brief, at 30. As noted above, the accompanying instructions to the Vision RFP did provide that "A proposal shall not be considered for award if the price in the proposal was not arrived at independently and

without collusion, consultation, communication or agreement as to any matter related to price with any other bidder, competitor or public officer/employee.” Agency Record, at 2647.

The Respondents and Surency both point to the same two cases—*In re GSC, Inc.*, 453 B.R. 132, 154 (Bankr. S.D.N.Y. 2011) (quoting *In re Edwards*, 228 B.R. 552, 565 (Bankr. E.D.Pa. 1998)); *State ex rel. Waller Chems. v. McNutt*, 160 S.E.2d 170, 174 (1968)—for the proposition that joint bidding does not constitute “collusion” between two companies. While that be true, the terms of the Vision RFP are not limited to “collusion”: they also forbid “consultation, communication or agreement as to any matter related to price[.]” There is no question that EyeMed and Surency entered into an “agreement” or, at the very least, “communicated” as to the prices reflected in the joint bid. Thus, the only question is whether EyeMed and Surency constituted “competitors” or “bidders” within the meaning of the Vision RFP instructions.

Although EyeMed was invited to submit a bid, it ultimately did not—and, thus, cannot be deemed a “bidder” within the meaning of the Vision RFP instructions. Moreover, although EyeMed and Surency may, in some respects, be viewed as “competitors,” their joint participation in a similar contract for Sprint suggests that their relationship, at least in matters of this level of contractual complexity, is cooperative, not competitive. The two companies’ nearly seven year partnership in administering a similar contract for Sprint belies any accusations of price-fixing or improper manipulation, which appears to be the root purpose of the Vision RFP provision at issue. Moreover, as Surency’s technical proposal demonstrated, the two companies’ relationship is not limited to a single contract; they have partnered in several other instances, as well. Agency Record, at 2168–69. This undermines any argument that, for the purposes of a contract of this level of complexity, Surency and EyeMed were “competitors.”

In other words, Surency and EyeMed appear to have submitted their joint bid in good faith as partners, not as competitors—and to the State’s general benefit, since their proposed price was more than six hundred thousand dollars less than that offered by the Petitioner. Accordingly, the Court concludes that Surency and EyeMed were permitted to submit a joint bid under the Vision RFP and that the KDHE did not err in taking into account these two companies’ joint participation in a similar contract with Sprint.

4. *Surency’s Bid Adequately Specified Which Company Would Perform the Different Aspects of the Vision Contract.*

Finally, the Petitioner alleges that Surency’s proposal did not adequately detail which entity would perform which portions of the Vision Contract. Briefly stated, the Court rejects this contention. The Surency technical proposal contained in-depth discussion of which entity would perform the various aspects of the Vision Contract. See Statement of Fact #12, *supra*; Agency Record, at 2160–62. Without repeating the specifics of the technical proposal again, the Court finds that the Surency proposal established a sufficiently detailed proposal to enable the KDHE to evaluate Surency’s performance history in light of the tasks it would actually be performing in connection with the Vision Contract. Thus, for all the reasons set forth above, the Court finds that the Respondents’ decision was supported by substantial evidence.

E. Neither Mr. Clark Nor Mr. Day Had a Conflict of Interest

The Petitioners next claim that, under K.S.A. 77-621(c)(6), Mr. Clark, the chairman of the HCC, “was subject to disqualification due to an undisclosed though readily apparent conflict of interest.” Petitioner’s Brief, at 32–33. The Petitioner also argues that Mr. Day, another member of

the HCC, was also potentially conflicted because “Mr. Day’s insurance brokerage business included relationships with both Delta Dental and EyeMed.” Petitioner’s Brief, at 33.

The KJRA does not discuss under what circumstances a person taking an agency action would be “subject to disqualification.” From case law, however, it appears that the statute addressing disqualification at the administrative level is K.S.A. 77-514. See *Sunflower Racing, Inc. v. Bd. of Cty. Comm'rs of Wyandotte Cty.*, 256 Kan. 426, 435–37, 885 P.2d 1233 (1994) (analyzing a claim under K.S.A. 77-621(c)(6) by considering K.S.A. 77-514). Specifically, K.S.A. 77-514(b) states that, “Any person serving or designated to serve alone or with others as presiding officer is subject to disqualification for administrative bias, prejudice or interest.” With this in mind, it appears that K.S.A. 77-621(c)(6) contemplates relief under judicial review only in cases of *actual* bias, prejudice, or interest—not in situations where there is only the possibility for the public perception of bias.

This conclusion is bolstered by K.S.A. 46-233(a)(1), a state governmental ethics statute which provides that:

No state officer or employee shall in the capacity as such officer or employee be substantially involved in the preparation of or participate in the making of a contract with any person or business by which such officer or employee is employed or in whose business such officer or employee or any member of such officer's or employee's immediate family has a substantial interest and no such person or business shall enter into any contract where any state officer or employee, acting in such capacity, is a signatory to, has been substantially involved in the preparation of or is a participant in the making of such contract and is employed by such person or business or such officer or employee or any member of such officer's or employee's immediate family has a substantial interest in such person or business.

While K.S.A. 46-233(d)(1) renders this statute inapplicable to the contract at issue here—which was “let after competitive bidding has been advertised for by published notice”—it does provide

guidance for the Court’s assessment of whether an actual conflict of interest existed. Moreover, K.S.A. 46-233(e) incorporates the definition of “substantial interest” found in K.S.A. 46-229 “and any such interest held within the preceding 12 months of the act or event of participating in the preparation of making a contract.” K.S.A. 46-229 provides that:

“Substantial interest” means any of the following:

(a) If an individual or an individual's spouse, either individually or collectively, has owned within the preceding 12 months a legal or equitable interest exceeding \$5,000 or 5% of any business, whichever is less, the individual has a substantial interest in that business.

(b) If an individual or an individual's spouse, either individually or collectively, has received during the preceding calendar year compensation which is or will be required to be included as taxable income on federal income tax returns of the individual and spouse in an aggregate amount of \$2,000 from any business or combination of businesses, the individual has a substantial interest in that business or combination of businesses.

(c) If an individual or an individual's spouse, either individually or collectively, has received directly or indirectly in the preceding 12 months, gifts or honoraria having an aggregate value of \$500 or more from any person, the individual has a substantial interest in that person. If a gift is received for which the value is unknown, the individual shall be deemed to have a substantial interest in the donor. A substantial interest does not exist under this subsection by reason of: (1) A gift or bequest received as the result of the death of the donor; (2) a gift from a spouse, parent, grandparent, sibling, aunt or uncle; or (3) acting as a trustee of a trust for the benefit of another.

(d) If an individual or an individual's spouse holds the position of officer, director, associate, partner or proprietor of any business, the individual has a substantial interest in that business, irrespective of the amount of compensation received by the individual or individual's spouse.

(e) If an individual or an individual's spouse receives compensation which is a portion or percentage of each separate fee or commission paid to a business or combination of businesses, the individual has

a substantial interest in any client or customer who pays fees or commissions to the business or combination of businesses from which fees or commissions the individual or the individual's spouse, either individually or collectively, received an aggregate of \$2,000 or more in the preceding calendar year.

As used in this subsection, “client or customer” means a business or combination of businesses.

The Petitioner’s claim against Mr. Clark is easily resolved. Mr. Clark’s relationship with Delta Dental—Surency’s parent company—ended on November 7, 2013. Supplemental Agency Record, Exhibit G. The *earliest* date attributable to the initiation of the Vision RFP process was November 7, 2014, which was exactly 12 months after Mr. Clark’s relationship with Delta ended. However, as the Petitioner points out, “[T]he HCC was not meaningfully involved in evaluating the proposals or ‘negotiating’ with the Vision RFP offerors”; consequently, Mr. Clark’s only apparent involvement with the Vision Contract appears to have taken place on April 20, 2015, which was well beyond the 12-month limitation set forth in K.S.A. 46-233(e). Petitioner’s Brief, at 33.

Moreover, despite his prior relationship with Delta Dental, Mr. Clark had already disclosed his relationship in a previous HCC meeting and had determined, on the record, that no conflict existed. Supplemental Agency Record, Exhibit F. Having already made this determination on the record at the March 2, 2015 HCC meeting, there was no need for Mr. Clark to repeat it, subsequently, at the April 20, 2015 meeting. While it would, perhaps, have been a better practice to again disclose his previous relationship with Delta Dental, Mr. Clark’s failure to do so at the April 20, 2015 meeting did not render him subject to disqualification within the meaning of K.S.A. 77-621(c)(6).

The Petitioner also notes that Mr. Day had a “potential” conflict of interest because his “insurance brokerage business included relationships with Delta Dental and EyeMed.” Petitioner’s Brief, at 33, n.1. Exhibit I to the Supplemental Agency Record appears to bear the claim out, as admitted by the Respondents’ Brief. Exhibit H of the Supplemental Agency Record, however, reflects that Mr. Day did “sell vision insurance in the state of KS” and does “hold contracts with Aetna and VSP,” but is “not contracted with Surency, MetLife, OptiCare, or Superior Vision.” Supplemental Agency Record, Exhibit H.

Only the definition of “substantial interest” set forth in K.S.A. 46-229(e) could apply to the situation with Mr. Day. As a seller of insurance policies, it is unclear what his relationship with Delta Dental and EyeMed actually is—specifically, if he received more than \$2,000 in commissions from those two entities in the preceding year. However, neither Delta Dental nor EyeMed were parties to the actual contract; only Surency’s representatives and representatives from the State actually signed the contract. See Agency Record, at 1–10. Moreover, even if Mr. Day was found to have had a “substantial interest” in Surency—which the Court does not find—K.S.A. 46-233(a) would not be applicable, as noted, because the Vision Contract followed competitive bidding advertised by published notice.

Accordingly, the Court finds no conflict of interest that would have subjected either Mr. Clark or Mr. Day to disqualification. The Petitioner bears the burden of establishing that either commissioner was subject to disqualification; having failed to carry that burden, the Court rejects the Petitioner’s request for judicial review pursuant to K.S.A. 77-621(c)(6).

F. The Award Was Not Arbitrary, Capricious, and Unreasonable

Finally, the Petitioner argues that, because Surency offered neither the lowest bid nor the most comprehensive network of providers, the HCC acted arbitrarily, capriciously, and unreasonably in awarding Surency the Vision Contract. The Petitioner further complains that the HCC offered insufficient information to justify its decision.

These arguments have been addressed throughout the course of this Memorandum Decision and Order, and the Petitioner offers nothing new here that would alter the Court's consideration. The Respondents' decision was not so "wide of the mark" as to be deemed unreasonable, arbitrary, or capricious. No in-depth numerical scoring system was required to support the Respondents' decision, so long as that decision was supported by substantial evidence. This Court has concluded that Respondent's decision was supported by substantial evidence. While the Respondents' decision was "lack[ing] some mathematical precision[.]" to be sure, the Court finds that it was "conceptually sound" and, thus, not subject to reversal on the basis that it was unreasonable, arbitrary, or capricious. In light of the "considerable discretion" which, the Petitioner admits, the HCC had in negotiating and awarding contracts, the decision to award the Vision Contract to Surency was not unreasonable, arbitrary, or capricious.

CONCLUSION

For the reasons stated above, the Court DENIES the Petitioner's First Amended Petition for Judicial Review. The parties are to bear their own costs. 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.

IT IS SO ORDERED.

Dated this ____ day of December, 2015.

Hon. Larry D. Hendricks
District Judge

CERTIFICATE OF MAILING

I hereby certify that a copy of the above and foregoing **MEMORANDUM DECISION AND ORDER** was mailed, hand delivered, or placed in the pick-up bin this ____ day of December, 2015, to the following:

Thomas E. Wright
Trevor C. Wohlford
Julia Gilmore Gaughan
Morris, Laing, Evans, Brock & Kennedy, Chtd.
800 SW Jackson, Suite 1310
Topeka, Kansas 66612
Attorneys for Petitioner

Daniel J. Carroll
Philip R. Michael
Kansas Department of Administration
Office of Chief Counsel
1000 SW Jackson, Suite 500
Topeka, Kansas 66612

Cory Sheedy
Kansas Department of Health and Environment
Legal Services
1000 SW Jackson Street, Suite 560
Topeka, Kansas 66612
Attorneys for Respondents
Kansas Department of Administration
Kansas Department of Health and Environment
Kansas State Employees Health Plan

Toby Crouse
Foulston Siefkin LLP
32 Corporate Woods, Suite 600
9225 Indian Creek Parkway
Overland Park, Kansas 66210

John E. Schmidt III
Melissa J. Copeland
Schmidt & Copeland
1201 Main Street, Suite 1100
Columbia, South Carolina 29201
Attorneys for Intervening
Respondent Surency Life and
Health Insurance Company

Carol DeLong
Administrative Assistant