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March 25, 2022

ATTORNEY GENERAL OPINION NO. 2022- 5

The Honorable Christina Haswood
State Representative, 10th District
State Capitol, Room 54-A
Topeka, Kansas 66612

The Honorable Heather Meyer
State Representative, 29th District
State Capitol, Room 54-S
Topeka, Kansas 66612

The Honorable Kathy Wolfe Moore
State Representative, 36th District
State Capitol, Room 47-S
Topeka, Kansas 66612

The Honorable Susan Ruiz
State Representative, 23rd District
State Capitol, Room 173-W
Topeka, Kansas 66612

Re: Constitution of the State of Kansas—Legislative—Legislative Power

Constitution of the State of Kansas—Legislative—Appropriations

Mentally Ill, Incapacitated and Dependent Persons; Social Welfare—Social Welfare—Powers and Duties of Secretary for Children and Families; Community Work Experience Programs; Disbursal of Property Including Food Stamps; Division of Services for the Blind; Children and Youth Service Program; Medical Care for Needy Persons; Payment Schedules for Health Care Providers; Centralized Payment of Welfare Expenditures

Mentally Ill, Incapacitated and Dependent Persons; Social Welfare—Social Welfare— Implementation of Managed Care System to Provide Medicaid Services; Contracts; Areas of State Selected for Implementation; Waivers; Managed Care Implementation Committee; Reports; Managed Care Project at University Of Kansas Medical Center Terminated

Synopsis: The Kansas Legislature has broad authority to establish and alter appropriation and procurement processes for state agencies. 2022 Substitute House Bill 2463 delays the onset of a new MCO procurement cycle and extends the existing KanCare system by one year, which could potentially

expose the state to litigation related to challenges to the procurement process. Cited herein: K.S.A. 2021 Supp. 75-3738–3744; K.S.A. 2021 Supp. 39-7,112; Kan. Const., Art. 2 § 1; Kan. Const., Art. 2 § 16; Kan. Const., Art. 2 § 24; 2022 Substitute House Bill 2463; 42 U.S.C. § 1315; 42 U.S.C. § 1396; 42 C.F.R. pts. 430–56; 42 CFR § 431.412; 42 C.F.R. § 431.420; 42 C.F.R. § 438.806.

* * *

Dear Representatives Haswood, Meyer, Wolfe Moore, and Ruiz:

In your respective official capacities, you request our opinion on whether it is lawful for the Legislature to alter the procurement process and extend contracts for specific companies and whether such action exposes the state of Kansas to potential litigation. You raise this question against the backdrop of the introduction of 2022 Substitute House Bill 2463, which would extend the current KanCare system and which you assert is intended “to block the procurement process and give [the current] three [Managed Care Organizations] special treatment and eliminate all competition.”

As presented, the question broadly inquires into the Legislature’s power to change the statutory procurement process. Within the context of your letter, however, it appears that your inquiry could be also be specific to the Legislature’s power to alter the particular procurement process for KanCare contracts with the Managed Care Organizations (“MCO”) in the state. We will first evaluate the Legislature’s general powers to modify the procurement process. Later, we will address the scope of that power with respect to KanCare and MCO contracts.

Background

Sub. HB 2463 has four subsections related to procurement actions under KanCare, the state Medicaid program. Section 1(c) provides instructions to the Secretary of Health and Environment (“Secretary”), who “shall negotiate and take actions necessary to extend contracts with managed care organizations, as existing on the effective date of this act, for the administration and provision of benefits under the medical assistance program through December 31, 2024.” Section 1(d) also instructs the Secretary to “submit to the United States centers for medicare and medicaid services any approval request necessary to implement this section.”¹

Section 1(e) provides a safety valve, declaring that Sub. HB 2463 does not preclude any state agency from taking actions required by an act or appropriation of the legislature, federal law, or the Centers for Medicare and Medicaid (“CMS”).

¹ We confine this Opinion to an analysis of applicable state law and authority. We express no opinion on the application of federal law but note that any change in state procedure would need to conform with applicable federal requirements, if any, as contemplated by Section 1(d).

Under Section 1(f), a state agency may approach the Legislative Coordinating Council (“LCC”) while the Legislature is not in session to make a substantive or material change to KanCare prior to January 1, 2025, and the LCC may approve such a change. When it was originally introduced, Sub. HB 2463 sought to extend KanCare and the current MCO contracts by two years, but it was amended before being passed out by committee to shorten the extension to one year. Sections 1(e) and (f) were also added in the amendment.

Medicaid is a joint federal-state program designed to assist needy individuals and families “whose income and resources are insufficient to meet the costs of necessary medical services.”² States opt into the program, but once a state chooses to participate, it must comply with the requirements of Title XIX of the Social Security Act³ and with regulations promulgated by the Secretary of the United States Department of Health and Human Services.⁴

In establishing the statutory framework for KanCare, the Kansas Legislature passed, *inter alia*, K.S.A. 2021 Supp. 39–7,112(a), which provides as follows:

“Subject to applicable federal guidelines and regulations, the provisions of appropriations acts and the provisions of this section, the secretary of social and rehabilitation services shall, consistent with guidelines developed by the managed care implementation committee established under subsection (d), negotiate and enter into contracts with one or more service providers to implement a managed care system in accordance with this section to provide medicaid services for Kansas medicaid-eligible residents which may utilize capitation and other reimbursement methodologies. No contract entered into under this section shall be subject to the competitive bid requirements of K.S.A. 75–3739, and amendments thereto.”

Pursuant to this statute, the state signed contracts with three MCOs in 2012 to provide services under KanCare. These contracts were set to expire in 2016, a year earlier than the initial KanCare model. The state extended the MCO contracts for one year without a competitive bid process.⁵

² 42 U.S.C. § 1396.

³ 42 U.S.C. § 1396 et seq.

⁴ 42 C.F.R. pts. 430–56.

⁵ In addition to state control through legislation, regulation, and rulemaking, KanCare is subject to federal regulation and oversight. Federal regulations govern many aspects of KanCare, including administrative matters such as extending the Section 1115 demonstration, procuring MCO contracts, and extending MCO contracts. “A request to extend an existing demonstration under sections 1115(a), (e), and (f) of the Act will be considered only if it is submitted at least 12 months prior to the expiration date of the demonstration when requesting an extension under section 1115(e) of the Act or 6 months prior to the expiration date of the demonstration when requesting an extension under section 1115(a) or (f) of the Act.” 42 CFR § 431.412(c). Federal regulations further state that “Approval of a new demonstration or a demonstration extension will generally be prospective only and Federal Financial Participation . . . will not be available for changes to the demonstration that have not been approved by CMS.” 42 CFR § 431.412(d). CMS regulations require approval prior to extending MCO contracts over a certain value and establish that federal funds will not be paid under MCO contracts extended without CMS approval. 42 C.F.R. § 438.806(b), (c). These regulations do not forbid the state from extending its Medicaid program without prior approval, but they do establish

While developing the application for a five-year renewal of the Section 1115 demonstration waiver, the state launched a Request for Proposal (“RFP”) process for the three MCO contracts. Five companies submitted proposals and talked with state agencies, and ultimately three were chosen, with Aetna replacing AmeriGroup as one of the three MCOs. AmeriGroup and one other losing bidder unsuccessfully sued the state to overturn the RFP decision. CMS approved those contracts in conjunction with approving the Section 1115 extension request, initiating KanCare 2.0.

In determining the legality of the proposed legislative procurement action in Sub. HB 2463, we follow the rules of statutory interpretation and construction.

[T]he interpretation of statutes and administrative regulations presents questions of law subject to de novo review. In this endeavor, [the courts] must give effect to the intent expressed by the plain language of the text. This means [the courts] give common words their ordinary meanings, without adding to or subtracting from the text as it appears. [The courts] only resort to textual construction when the language is ambiguous.⁶

Legislative Power Over the Procurement Process

Article 2 of the Kansas Constitution vests the legislative power of the state government in the House of Representatives and the Senate.⁷ This vested power includes authority over appropriations.⁸ Under this authority, the Kansas Legislature has established procurement authority for numerous state agencies.

Further, the Kansas Legislature has delegated procurement authority to the Department of Administration and other state bodies in numerous bills. Statutes throughout K.S.A. 2021 Supp. 75-3738–3744 identify procurement procedures and authority for the Department of Administration. In recent years, the Legislature has revised procurement statutes to give potential preference to certain businesses, such as those owned by disabled veterans and paper product suppliers that use the most recycled materials.⁹ There is neither a constitutional nor a statutory mandate that all contracts with the state go through a competitive bid process, and the Legislature, as the appropriating authority for the state, has the constitutional power to determine how state funds are allocated and spent.

While the Kansas Legislature has provided procurement authority to numerous agencies, it has not shed its ultimate power over appropriations and the spending of state funds.

possible consequences for such a course of action, up to and including complete withholding of federal funding participation. If the U.S. Secretary of Health and Human Services “determines that the State has materially failed to comply with the terms of the demonstration project,” the state Medicaid Section 1115 demonstration could be terminated in whole or in part. 42 C.F.R. § 431.420(d)(1).

⁶ *Central Kansas Med. Center v. Hatesohl*, 308 Kan. 992, 1002 (2018) (internal citations omitted).

⁷ Kan. Const., Art. 2 § 1.

⁸ Kan. Const., Art. 2 § 24.

⁹ K.S.A. 2021 Supp. 75-3740.

Carrying out or developing procurement practices is an inherently administrative act to implement a legislative mandate; thus, issuing a legislative change or addition to prior statutory direction is well within the Legislature's power. Article 2, Sec. 24, of the Kansas constitution requires that the Legislature exercise its power over the expenditure of money "by law." Therefore, the constitutional limitations on the Legislature's ability to alter or amend its previous enactments regarding appropriations or procurement are the constitutional requirements for enacting law.

Construing your question broadly, the Legislature may lawfully alter the procurement process for a state agency through new legislation. This includes modifying, delaying, or eliminating the competitive bid process and directing the Secretary in its management of the KanCare system.

Potential Legal Challenges

You further inquired whether a legislative enactment changing the procurement process as contemplated by House Bill 2463 "exposes the state of Kansas being potential litigation?" (sic). While the procurement provisions of Sub. HB 2463 are within the legal authority of the legislature to alter or amend state law, they may still expose the state to litigation. This has happened in the past; for example, as noted above, a former MCO and another unsuccessful bidder previously sued the state when they failed to secure a KanCare 2.0 MCO contract.

Conclusion

The Kansas Legislature broadly has the power under the state constitution to establish and alter procurement and appropriations processes for governmental entities. The procedure by which the Legislature does so is enactment of law. The procurement actions proposed under Sections 1(c)-(f) of Sub. HB 2463, if enacted into law, would be within the ambit of this broad constitutional power. It is beyond the scope of this Opinion to speculate whether the federal government or any potential litigants would accept that enactment or would seek to challenge it.

Sincerely,

Derek Schmidt
Kansas Attorney General

Robert C. Hutchison
Assistant Attorney General