

Transcript Prepared by Clerk of the Legislature Transcribers Office
Health and Human Services and LR29 Committees June 18, 2021
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ARCH: Well, good morning and welcome to today's briefings to the Health and Human Services Committee and the LR29 committee. My name is John Arch, I represent the 14th Legislative District in Sarpy County, and I serve as Chair of the HHS Committee and the LR29 committee. Members of the Health and Human Services Committee are sitting to my left and members of the LR29 committee are sitting to my right. I'd like to invite the members of both committees to introduce themselves starting on my right with Senator McKinney.

McKINNEY: Good morning, Senator Terrell McKinney, I represent District 11: north Omaha.

CLEMENTS: I'm Robert Clements from Elmwood and I represent District 2: Cass County and parts of Sarpy and Otoe.

M. HANSEN: Matt Hansen, District 26 in northeast Lincoln.

KOLTERMAN: Mark Kolterman, District 24: Seward, York and Polk Counties.

WILLIAMS: Matt Williams from Gothenburg, Legislative District 36: Dawson, Custer and the north portion of Buffalo Counties.

WALZ: Lynne Walz, Legislative District 15: all of Dodge County.

MURMAN: Hello, I'm Senator Dave Murman from District 38, and I represent seven counties to the east, south and west of Kearney and Hastings.

DAY: Good morning, I'm Senator Jen Day, and I represent Legislative District 49, which is northwestern Sarpy County.

ARCH: Some of the committee members are attending today's briefings virtually, either by watching the livestream on Nebraska Public Media or by calling in or both. We may have some on the phone. At this time, I don't believe there's any on the conference line. No, we're hearing music, so nobody has called in yet. I want to thank the testifiers, staff and members of the committees for attending today, particularly given that this is now a newly recognized federal and state holiday, Juneteenth National Independence Day. And we developed our work plan many weeks ago and scheduled this hearing before we knew the federal and state governments would be formally observing the Juneteenth holiday on this day. Thank you for your understanding. We appreciate you all being here, which respects the schedules of our presenters and allows the committees to stay on schedule to complete their work.

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Assisting the committee today is our committee counsel, and they'll be sitting at the back table here, Paul Henderson and T.J. O'Neill, as well as our committee clerk, Geri Williams, and my legislative assistant, Lisa Johns. In addition to committee staff, we have outside counsel attending the briefings today. Marnie Jensen is seated with the committee staff. The other member of our outside counsel team, Tom Kenny, will be briefing the committee this afternoon. I want to provide just a little bit of introduction to Marnie and Tom. Marnie Jensen is a partner at the Omaha office of Husch Blackwell and most recently served as managing partner. She has an extensive background in complex litigation and discovery in a variety of industries and settings. She will be assisting us with legal process issues. Tom Kenny is a litigation partner at Kutak Rock in Omaha, where he leads the firm's state and local bid protest team. Tom has extensive experience and knowledge of the procurement process in Nebraska and procurement law in general. Tom has a very thorough understanding of many of the facts and issues we're grappling with stemming from his representation of PromiseShip in its protest of the award to Saint Francis Ministries and subsequent litigation. As part of the protest process, Tom gathered a tremendous amount of factual information that he has shared with the committee. Tom and Marnie will aid the committees as we request their assistance, and their complementary expertise in investigation. Management and procurement are going to be extremely helpful to us. Chuck, we have Senator Cavanaugh on hold.

CHUCK HUBKA: I don't know, it should just automatically-- it did with us--

WALZ: The music stopped.

CHUCK HUBKA: --when we dialed in with the, with the passcode that we got.

ARCH: OK. All right, perhaps someone can give her a call and see. A quick review of the LR29 process will be as follows. Phase one, what I would call phase one, is really the question of what do we know? June 18 and July 9 briefings, I think, will help us with an understanding of that. We have much material that's available to the, to the senators. And so we continue to gather documentation, we continue to ask the question of what do we, what do we presently know. Phase two will be what additional information do we need? And that's going to take the form of surveys, requests for additional information from Saint Francis and the state and perhaps other key stakeholders. And phase three then will be the development of our conclusions and recommendations. I know that we come to this committee with varying

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degrees of the knowledge of the subject matter, so I have set aside two days for briefings on the issues. Today, we will, we will be attempting to gain a better understanding of the procurement process in general and the Saint Francis Ministries procurement process specifically. My goal for both of these briefing sessions is to not only gain specific knowledge of the Saint Francis procurement process and current contractual performance as it relates to quality, but also to gain a contextual understanding. I believe that it is important to answer the question of whether or not we are experiencing a single event with Saint Francis Ministries and the contract or whether there is a system issue we could discover if we looked at history and context. So I've asked our presenters to assist us with understanding the context of the Saint Francis contract as well. Today's testimony is by invitation only. First up this morning, we are going to hear from Senator Kathy Campbell on the state's history with child welfare privatization and her work on the LR37 committee back in 2011. Following Senator Campbell, we'll hear from Senator Kolterman and his legislative assistant, Tyler Mahood, regarding the work they have done looking into the state's procurement process. And I anticipate we'll break for lunch right around noon today. And at 1:30, our work will resume with a briefing from Tom Kenny regarding the PromiseShip protest of the Eastern Service Area contract award to Saint Francis Ministries and the subsequent lawsuit against the state and Saint Francis. Because he has the historical knowledge of the history of procurement over the last decade, he also will be able to assist us in gaining a contextual understanding. Finally, I'll remind the committee members and anyone else in the room to please silence your cell phones. I would also ask the senators to hold their questions to the end of each presentation. For those senators on the phone, if we can assist senators to get on the phone, please text me, let me know when you have a question and I will call on you. With that, we will begin today's briefings with Senator Kathy Campbell. Senator Campbell was elected to the Legislature in 2008 and represented the 25th District here in Lincoln until she was term-limited at the beginning of 2017. She served as Chair of the Health and Human Services Committee from 2011 until the end of her term. During her tenure, she was the author of a report as a result of LR37. This was the beginning of the privatization of child welfare in Nebraska, and she can give us the historical background of this effort. With that, welcome, Senator Campbell.

KATHY CAMPBELL: Thank you, Senator Arch and Mr. Chairman and senators of the Health and Human Services Committee and the Select Committee, for the record. And I'm not sure you're still doing this, but I will

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start. I am Kathy Campbell, K-a-t-h-y C-a-m-p-b-e-l-l. So often when I opened on bills on the floor of the legislature, I would begin with a quote. So today I'm going to begin with a quote often ascribed to Yogi Berra, esteemed catcher of the New York Yankees: It's deja vu all over again. Ten years ago, LR37 consumed hours of research and interviews from the HHS Committee, as well as our partners to examine the child welfare reform initiative referred to as Families Matter. While the LR37 scope was different, there are issues that mirror what you are addressing. As Senator Arch emphasized to me, what the committee will be reviewing is not new, but another chapter in child welfare services in Nebraska. Chapter one of LR37 traces the evolution of child welfare nationally and in Nebraska, and an excellent compilation by Kathy Bigsby Moore. Child welfare services have had a very long history of connection with private entities. Through the 1800s and the early 1990s, philanthropic agencies often took in abused children and notable charitable organizations here in Nebraska were established during that period: Child Saving Institute in 1892, Nebraska Children's Home Society in 1893 and Boys Town in 1917. During the Great Depression, the federal government stepped in with Aid to Dependent Children, ADC, which were grants to the states. This program was established through the Social Security Act of 1935. Nebraska opted into the program the same year, and in the ensuing years there really was no comprehensive, coordinated effort to address child safety. Nationally and in Nebraska, awareness of the effects of child abuse became prominent in the 1970s. Nebraska changed its reporting law in 1977, mandating every citizen in the state is responsible to report suspected child abuse and neglect. Of note, the responsibility for social service programs was transferred from the counties to the state in 1983. From the 70s through the 2000s, Nebraska convened task forces and commissions, introduced legislation and enacted statutes pertaining to child welfare. In 2007, DHHS undertook a privatization initiative to reform the child welfare system through a privatized lead agency model. The proposal was, in great part, a response to the growing number of children in out-of-home care, or what a lot of people call foster care. At one point, Nebraska was number one, and how we'd like to be number one in certain things. This was not good. We were number one in the nation with the most children--

_____: --has joined the conference.

KATHY CAMPBELL: --in out-of-home care. The object of the reform was to, quote, flip the pyramid, to reverse the percentages and eventually serve 70 percent of children in their homes and 30 percent in out-of-home care. The child welfare system encompassed three components: case management, service coordination and service

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delivery. At that point, the state had responsibility for case management and service coordination, but contracted with private entities for service delivery. However, the structure of the reform initiative would differ. Number one, DHHS would move from 115 contracts with private entities throughout the state to give services to contracts with 6 lead agencies. So we went from 115 to 6. Number two, the state would retain case management. Number three, the lead agencies would provide service coordination but also could deliver services. The lead agencies--

_____: The caller--

M. CAVANAUGH: Machaela Cavanaugh.

_____: --has joined the conference.

KATHY CAMPBELL: The lead agencies had the responsibility to contract with private entities, sorry, for service delivery. And number four, the initiative would use existing resources. No new dollars were requested. It was understood that the lead agencies may have to infuse their own dollars to cover costs. All but one of the six did, and the one who did not was the only for-profit agency of the six. A more detailed time line of events is in LR37 chapter two at the big book next to Senator Arch, compiled by the Legislative Performance Audit staff.

_____: The caller--

SANDERS: Rita Sanders.

_____: --has left the conference.

KATHY CAMPBELL: Significant events. And I'm going to go through the, the most significant of the reform effort to give you some idea of the build up to what led to LR37. July 2009, six lead agencies signed an implementation contract, which was sort of like an intent to start getting ready. And they were the Alliance for Children and Family Services; Boys and Girls Home; CEDARS Youth Services; Nebraska Family Collaborative, NFC, which later became PromiseShip; KVC Behavioral Health, Nebraska; and Visinet, which was the for-profit agency. In October of 2009, the Alliance for Children and Family Services pulled out even before the final contract, indicating the contract is \$1 million less than expected. November 2009, the remaining five lead agencies signed the final contracts. April 2010, CEDARS withdraws, having lost \$5.5 million over 20 months from contracts for in-home and out-of-home care and preparation and transition to be a lead agency.

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Six days later, on April the 8th of 2010, Visinet filed for bankruptcy. The subcontractors working with Visinet collectively were owed \$1.4 million for the services they provided. September 2010, by mutual agreement between DHHS and Boys and Girls Home, the lead agency contract was terminated. October 2010, and now we are down to just two lead agencies, DHHS distributed \$6.3 million to the two remaining lead agencies. December 2010, DAS approved the plan to transfer major case management responsibilities to the lead agencies. Nebraska law requires DAS approval if replacing state workers with employees of private entities. Lead agencies argued that they could not control the costs unless they had the responsibility for case management. Essentially, the state is now supporting two systems: case management by the lead agencies, and some aspects of case management were retained by the department. So you had two parallel systems operating. January 2011, DHHS announced the plan to distribute an additional \$19 million to the lead agencies over the next nine months. Providers, judges, advocates, service delivery agencies, foster and bio parents, attorneys were clamoring for the Legislature to do something. The system of child welfare was in chaos. And that is not just a wild statement. It was. January the 14th-- January 14, 2011, was the introduction of LR37 by the HHS Committee to review, investigate and assess the effect of the Child Welfare Reform Initiative implemented by DHHS and adopted this resolution by the Legislature in February on a 43 to 0 vote. December 15 of 2011, one year later-- not quite one year later, the final LR37 report was released, and in February of 2012, KVC withdrew as a lead agency. They wanted more money. Only NFC or PromiseShip as it-- remained as a lead agency. In February of 2012, the same month, 77 DHS FTEs were eliminated, which essentially dismantled the former infrastructure that we had in the state for child welfare. From February through November, the HHS Committee undertook a wide array of research, interviews, correspondence, briefings, surveys and public hearings. We traveled the state. Michelle Chaffee, legal counsel to the HHS Committee, authored the final report. And I want to acknowledge, and I realize it takes a little time here, to acknowledge the partners because there was no way the committee could do all of this work by itself, as Senator Arch has, Arch has explained to all of you as he's also bringing in other people. But our partners were the legislative divisions of Fiscal, Performance Audit, the Ombudsman and Research. Then we partnered with the Auditor of Public Accounts Mike Foley and his staff, the Supreme Court and the Court Improvement Project, the Foster Care Review Board, Applesseed, Voices for Children, NCSL who came in to testify on one of the hearings, DHHS, KVC and NFC. This comprehensive approach formed the basis for our findings and recommendations. Eighteen

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recommendations were the basis of five bills introduced in January of 2012. And I want to mention two significant portions of those bills. And, and I, I'm sure you can take a look at what was encompassed in all of them. But one was the creation of the inspector general of child welfare, which I know many of you are familiar with. And you would say, why is this very significant? Because the committee felt that with term limits, that when we were gone and all of you are going to be gone, someone is watching out for the children and paying attention to child welfare and reporting to the Legislature. And in fact, at that point, our inspector general of child welfare was the only inspector general that was housed in a legislature. So significant point. The second is probably important to all of you is that one of the bills prohibited reinstating lead agencies in the service areas in the state except to set forth a pilot continuing the lead agency model in the Eastern Service Area, which now you are dealing with. The five bills passed all rounds of debate with not one negative vote and were signed into law by the Governor. I want to make some observations on the reform initiative, which we gathered as we worked through LR37. There was no involvement of the Legislature or Judicial Branches of government. There was no comprehensive collaborative strategy plan for child welfare reform. Privatization did not save money. There was a 27 percent increase in child welfare costs between 2009 and 2011. Research indicates that privatization efforts work best when intense monitoring and oversight is provided by the state. It is not enough to just pay attention to the contract process. It is important to ensure the staff who are overseeing the entities and the contracts has the expertise to diligently monitor and evaluate financial data, as well as evaluation of programs services to meet the needs of children. One of the most interesting interviews that Michelle Chaffee and I had was with two staff members from DHHS who came over, and it was their job to monitor and put forth the financial analysis and structure of the lead agencies. And the staff members kind of chuckled and said, you know, it's really strange that two English majors are doing this work. We have no idea. We go to the financial people involved in the two lead agencies and say, what should we be asking you? That's a poor way to track. There was no readiness assessment of agencies bidding on the lead agency contracts to review financial stability, management experience and staff expertise. We had looked at a model that Florida had, and this was 10 years ago, so I have no idea, but there's probably other states. But Florida had an assessment, a pre-bid assessment, which was extremely thorough to ensure that anybody that bid on a lead agency had the wherewithal to do it. And I know that Senator McCollister read the testimony given before the Exec Board, I think, Senator McCollister

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also raised that question in that session. Contracts with lead agencies were not conducted through the usual DAS procedures, which will be interesting when you go to Senator Kolterman's presentation. But we did change that. We changed it so that over, what, \$25 million had to go through, but it kind of stopped there. So my guess is, is that's one area you're all going to take a look at. There was no cost analysis of the existing child welfare system done prior to the reform effort to ascertain what was the cost basis. In other words, was the state adequately funding the system to begin with? And a lot of advocates would tell you that it was not. And therefore, the lead agencies went into this and into a system that was not going to be adequately funded. Case manager turnover was increasing at an alarming rate, and I know that you all are paying attention to that, too. Children had two, three, four or more case managers in a year. The Foster Care Review Board reported from national research with one case manager children achieve permanency in 74.5 percent of the cases. With two or more, it drops to 17 percent. And with six or more case managers in a year, it drops to 0.1 percent. In the first six months of 2011, 21 percent of Nebraska children had four or more case managers. What do you think their chances were of having permanency? Lead agency subcontractors, and those are private entities that the lead agencies contracted with, were not receiving payments in a timely manner or not at all. Subcontractors in the central and western part of the state depleted their resources and some went out of business, leaving a scarcity of services, which I believe we are still suffering from. And the question then became what was the liability of the state to reimburse those subcontractors? And that might be an interesting discussion for you all, with Senator Lathrop, because he headed the claims portion for the Legislature, and we did cover many of the claims from those agencies. But I would say in the central and western part of the state, it was a travesty to see many, many long-term small agencies in these communities go bankrupt or just leave. Lead agencies had to serve more children than anticipated, anticipated at higher levels of care in some areas, which drove a tremendous amount of cost. Foster parents were not adequately compensated. They were buying all kinds of things out of their own money. And we did address that in a very long study by Senator Dubas. The lead agency contracts were global contracts, which means they were lump sum contracts. You got X number of millions of dollars and you served all the kids we sent you. No eject, no reject, you served them at whatever cost. So the lead agencies who had been private contractors, obviously, before went from fee-based to risk-based contracts. And the question always was, should the contracts have been based on a case rate structure? Now, eventually the department and PromiseShip, I think, worked through

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that. I don't know whether they ever came to a case rate, something you might want to take a look at. But it was very hard on the lead agencies because they had to cover the costs no matter what. They only got so much money to deal with that. Lead agency contracts were amended with more and more dollars added. The reform initiative kept evolving without a stop to analyze why the costs kept increasing. And that was really what you heard from people all across the state. Stop. Stop this initiative and take a look at what you're doing. Do you have a time to evaluate it? Was there a conflict of interest when a lead agency controlled all three components of that system? They did the case management, they did the case coordination. In some cases, they delivered the service. And the question was posed, are they referring cases to their own delivery system to obtain the costs for that? But most importantly, was the reform creating the permanency needed by children? Did we know where they were and how they were doing? When children are taken out of the home, the state has the responsibility for their protection and their safety. It cannot, it cannot contract that responsibility away, ever. One of the most noted child advocates in our country's history was Grace Abbott, chief of the United States Children's Bureau in the 1930s, and many think chief architect of the AVC program, which I talked about, started in 1935. And the best part of Grace Abbott was that she was a Grand Island, Nebraska native. And she said, "Justice for all children is the high ideal in a democracy." I, I want to thank all of you for the commitment that you are making to the task ahead. And with that, we'll take some questions, I assume.

ARCH: Thank you, thank you. Thank you very much for being here. Really appreciate your time. I believe that Senator Cavanaugh has joined us as well and we welcome, we welcome her. I would now open it up to questions from the senators. Senator Day.

DAY: Thank you, Chairman Arch. And thank you, Senator Campbell, for being here. You provide a wealth of background information that I think is really relevant, especially and helpful for us that are new to the situation. Is there any way that we could get a copy of your testimony?

KATHY CAMPBELL: Sure.

DAY: OK.

KATHY CAMPBELL: I talked with one of the legal counsels and I have made, I made some corrections, typos when I typed things this morning. So I will send a final copy of Senator Arch for you all to have a copy.

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DAY: Thank you so much.

ARCH: Great, other questions? Senator Clements.

CLEMENTS: Thank you, Chairman Arch. Thank you, Senator Campbell. On the privatization efforts back in 2011, was that targeted for the Douglas, Sarpy County area or was it, they talking about statewide?

KATHY CAMPBELL: It was statewide, sir. The six lead agencies were distributed across the state. Boys and Girls Home basically had the center part of the state as a lead agency. The Alliance for Children and Families also had Boys-- sorry, Boys and Girls had western and sort of a northern tier of Nebraska. It was the Alliance, and I don't know if the Alliance is still working or not, but they were-- came out of the Grand Island area and they had the center part of the state. CEDARS was in Lincoln. NMC, PromiseShip was primarily in the Eastern Service Area. KVC Behavioral Health Care, Nebraska was in Lincoln as well as had some cases in Omaha. And Visinet was in Lincoln. So the lead agency model went border to border.

CLEMENTS: But then it didn't last very long, right?

KATHY CAMPBELL: No, if you look at the dates as I read through them, I mean, it's just like one month and then the next one leaves, and then the next one. So, no, it did not. And in all honesty, Senator, it primarily had to do, they couldn't sustain the cost. I mean, you look at CEDARS losing \$5.5 million over that period of five months. You just can't, as a private agency, you can't sustain that. Now, they all put in some of their own dollars except for one, the for-public-- or for-profit. They all put in money and had to infuse their dollars. But of course, in the end, the KVC, and KVC was out of Kansas, actually, they finally just said we put in so much money, we want more money. And, and at that point, I think the Governor felt that Nebraska had put in what it could and so KVC said, we're leaving.

CLEMENTS: And then you mentioned HHS and laid off like 43 FTEs?

KATHY CAMPBELL: 77.

CLEMENTS: Seventy-seven, OK, and they were in the child welfare department?

KATHY CAMPBELL: Yes.

CLEMENTS: The reason for that was privatization or what was the--

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KATHY CAMPBELL: Yes.

CLEMENTS: --justification?

KATHY CAMPBELL: Yes, because at that point they were transitioning all of the case management that had been done at the state, DHHS. They were transferring those to the lead agencies. And so we lost. What is really interesting, I think for you, and this is just an observation from my perspective, is we saw the infrastructure of child welfare when the state had the case manager before the lead agencies. We had that infrastructure. By the time we got into 2012, that infrastructure had pretty much been depleted. And now what you looked at, I think, with the contract going from PromiseShip to Saint Francis, it's you looked at, at another sort of what you would call dismantling of an infrastructure, and all interesting questions for you as a group of senators, I would guess.

CLEMENTS: Thank you, Senator.

KATHY CAMPBELL: Thank you.

ARCH: Senator Kolterman.

KOLTERMAN: Thank you, Senator Arch. Senator Campbell, welcome back.

KATHY CAMPBELL: Thank you.

KOLTERMAN: I remember-- I was not involved here, but we had contracted with a DHHS and we'd set up an office in Seward to handle child welfare. And I remember when that took place. When KVC came in, they just kind of did their own thing and set up another office in town and then they closed down the office. Do you remember when, when we eventually took all of that back, did we have to go back then and rebuild all that infrastructure and hire a lot of those people back into the system? Because obviously we went back to state control of the whole state other than the Eastern Service center. How did we, how did you function at restructuring all of that?

KATHY CAMPBELL: You know, the department, to their credit, and I have to say that when we had LR37 and when we got to the five bills in the Legislature, we, we had real concerns that the department could take it back. But to the department's credit, and I saw this primarily in Lincoln, Senator, they really did a yeoman's job of coming back. And my guess is they started hiring former people back, because you've got to think about some of the people who had worked for the state went to work for a lead agency. I mean, the lead agency didn't bring in all

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new people, they hired some. So then they went back to, you know, working for the state. So it wasn't as if you had two separate groups of people. And I would guess that's how they rebuilt it, Senator Kolterman. But they did a better job than many of us in the Legislature thought they would do.

KOLTERMAN: Senator, you made an interesting observation in that we're going through the same process somewhat today since the idea that PromiseShip is now dissolved itself and dissipated, so to speak, and KVC-- or not KVC, but Saint Francis hired some of them. But now it's my understanding that Saint Francis is going through the process of losing some of those people. Your opening remarks were right on, it's deja, deja vu. I mean, here we are again, right back where we started.

KATHY CAMPBELL: And it's not, you know, I made the comment earlier to the director of the Foster Care Review Offices here that child welfare is never easy. I mean, you know, it's never like you're going to get to a perfect point where everybody in the state is happy and so forth. I mean, because you're working with people and you're also working with families and children. But to get into a situation where the entire system was imploding and no one was happy and everyone just felt it was chaos, that was a daunting situation for the state and particularly for the children and families.

KOLTERMAN: Senator, do you remember when you left, do you feel that the fees that were being paid out to the providers, the actual foster parents, were those up-to-date and, and in line with where they should have been at the time that you left the Legislature?

KATHY CAMPBELL: Yes. And too a lot of credit goes there to the former Senator Dubas, and she convened a task force. And the task, that task force also worked with the Children's Commission. And they did a lot of study in terms of what should be adequate compensation to foster parents. So at that point, we felt really good about it. I don't know if anyone has done a follow up. I don't know if the Children's Commission did or not.

KOLTERMAN: OK.

KATHY CAMPBELL: But that's a good, that's a good question. But we, we did attack that. I mean, we had public hearings. We were in Scottsbluff, Norfolk, I think we did Grand Island, Lincoln and Omaha. And the horror stories from foster parents of what they were expected to cover in cost was just, you just wondered how we even had any foster parents in the state. I mean, their dedication was a shining

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example of what, how Nebraskans care about each other and about the kids. But we did, we did tackle that problem, yes.

KOLTERMAN: Thanks for being here.

KATHY CAMPBELL: Thanks.

ARCH: Other questions? Senator Williams.

WILLIAMS: Thank you, Chairman Arch. And thank you, Senator Campbell, for your continued commitment. You talked about a little bit of the switch from going to fee-based to risk-based reimbursement for the lead agencies. Timing-wise, and you may have said this, but did that happen during this time when we shifted to total privatization?

KATHY CAMPBELL: Yes. The lead agencies basically they signed a contract for X number of dollars, and that was it.

WILLIAMS: And in, in your analysis also, the, the financial analysis that went into making those decisions may have been lacking on both sides at that point.

KATHY CAMPBELL: Yes.

WILLIAMS: Also, I wanted to be sure with one other thing, the decision to go to privatization that way did not have legislative input or the input of the judicial system, correct?

KATHY CAMPBELL: That is correct.

WILLIAMS: Thank you.

ARCH: Other questions? Senator Walz.

WALZ: Thank you. Thank you for being here today. I, I just want to piggyback on Senator Williams' question regarding fee-based, fee-based and risk-based contracts. Can you give us, tell us what the difference is?

KATHY CAMPBELL: Well, in a fee-based situation for the private agency, the contractors, what they were used to, with the 115, they were paid so much money for, for their staff to obtain the services for children. And it was pretty much, Senator Walz, it was pretty much laid out by, you know, you got so much money for this service of helping a child and a family. You got so much money. And the state had indicated all that. So you got paid based on sort of a table, a

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schedule of them. But when you went to a lead agency, and I have to say as a disclosure, part of that time that CEDARS was involved, I worked at CEDARS. But I was the vice president for the foundation and was not involved in the program part. But CEDARS then went from-- to a lump sum, and you got X number of children. And what you got was oftentimes more children in that system than you had anticipated. But you still had the same amount of money in a lump sum. That's it. And to the credit of lead agencies, you know, putting in their own money to try to make it go, I think the state intended for the lead agency lump sum amount to basically cover the services of the children. And the lead agencies were supposed to cover the costs of staffing, roughly. I'm giving you a rough idea. Well, they just couldn't do it. And the other thing is, is you have to keep in mind, and it's not a negative, but a judge makes the final decision in terms of removal of a child and in many cases what that child should have in services. If the child needs counseling or the child needs particular services that a judge determines, you provide that service at whatever cost it is. And the lead agencies just got to the point where they couldn't do it. But if you never did a cost analysis at the beginning and you never had good people, talented with expertise monitoring what was happening, you could begin to see the end result. I mean, there just wasn't enough money there to do it. And my guess is, is that corners might have been cut at some point from a staffing situation to try to cover that cost because the caseloads kept building and building and building, and the number of case managers.

WALZ: And I just want to make sure I'm getting this correct.

KATHY CAMPBELL: Sure.

WALZ: So the state was paying the lead agency for the services of the children. The lead agency was paying for the staff.

KATHY CAMPBELL: That's, that was the, that was the-- at the very beginning when they studied this, Senator Walz, that was sort of the intent of how they thought it would operate, is that the state's money in that global contract would cover those services. But the agency would probably have to cover a lot of the staffing. And that's you know, I'm not saying that's well thought out at all. And in a lot of our research of privatization efforts across the country, they didn't save money. I mean, you have to keep infusing the dollars, whether you were infusing them from a donor perspective, you know, going to your donors and saying, please help us. We are, you know, losing money. Or you're going back to the public budgets and saying, give us more money. And you can imagine how alarming it was. I can still remember

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being parked outside the Capitol on a Friday afternoon when I heard that they were going to infuse another \$19 million into this and calling and talking to the Chairman of the Appropriations Committee and saying, you will not believe this. The other issue for the Appropriations Committee, and I did not mention, but for the Appropriations Committee, child welfare services was grouped in a budget program with a lot of other programs of DHHS. And so we said, no, time out. We're going to separate out child welfare so that we can monitor it from a budget standpoint. And I know that Liz Hruska is on your agenda to do a presentation. So I have not gone into the financial part because she's far better than I am at that. But I think she can answer a lot of those questions for you.

ARCH: Thank you. Did you have another question?

WALZ: I just have--

ARCH: You look like you have another one.

WALZ: I'm sorry.

ARCH: That's OK.

WALZ: Just real quick. Oh, what was it? Can you explain the, the contract process? You were saying that, you know, they would, they would receive money for the services for the children. Was it so many children? Was it, I mean, how did that work? How did they continue to get more children? Did they continue to get more money? Tell me about how that worked.

KATHY CAMPBELL: Because, Senator Walz, the same thing in terms of the cost basis on did they really do a good analysis of what it was costing? There was some thought that the numbers of children that they anticipated for a lead agency under the contract was not accurate either. In other words, they didn't really have a good number.

WALZ: OK.

KATHY CAMPBELL: And so therefore when the lead agency stepped in, they went, are you kidding me? There's a lot more people here.

WALZ: OK.

KATHY CAMPBELL: I'm sorry, I should have made that more clear.

WALZ: No, that's-- thank you very much.

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KATHY CAMPBELL: OK,

ARCH: Thank you. Senator Cavanaugh, you've indicated that you have a question. You please, please ask the question.

M. CAVANAUGH: Yes. Thank you, Senator Arch. Thank you, Senator Campbell, for being here today and sharing your wealth of expertise. One thing I was hoping you could touch on was at the time that the child welfare was brought back into house of DHHS, could you elaborate on the background of why the Eastern Service Area remain privatized?

KATHY CAMPBELL: Would you--

ARCH: Sure. She, she asked the question of when, when the rest of the state went back to the state overseeing case management, why did the Eastern Service Area get carved out and stay privatized?

KATHY CAMPBELL: It remained, in, in the legislation, we called it a pilot project. There are probably several reasons, Senator Cavanaugh, why it did. One of them was, and I've alluded to it, is that we had some concern that the department could not pick up for the second largest area of Lincoln and the surrounding and the Eastern Service Area. You're talking the vast majority of children in the child welfare system are between Omaha and Lincoln. Obviously, those are the population centers. So we had some concern that they could do it, in all honesty. And the other was that there was a-- what would I say? I think there was a strong belief and a commitment, without question, from Boys Town and some of the other providers in Omaha that they really wanted to continue under the privatization. They, they felt that they could do it. And you realize people went into the privatization of child welfare across the country. If you read the national, you know, research at that time, was people felt that private agencies could be more nimble, they could be more innovative. I suppose that question is out-- still out. You know, I want to mention one other thing for the, to sort of get to the conclusion here. We did a lot of reading--

_____: The caller--

M. CAVANAUGH: Machaela Cavanaugh.

_____: --has left the conference.

KATHY CAMPBELL: We did a lot of reading in research areas, there's no doubt about it. And we came upon this one article, and I tried to find the top-- I tried to find the title of it and I could not. And so I'm

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not sure where that long bibliography. But it went through a checklist. It went through a checklist of what you should do if you're going to privatize child welfare. And we said, you know, Nebraska must not have studied this very well because we did absolutely every one of them wrong. So you have to say that, you know, they believed in what they were doing. Certainly DHS and the leadership of it, they believed that this was an answer for Nebraska. The problem is, in my estimation, they rushed into it, they didn't do their research, and they didn't bring on the kind of staff that could monitor it.

ARCH: I just have a couple of comments that I would like to make. One is for the, for the committee's understanding, the statute that she has referenced regarding the pilot project is 68-1212. That is the statute that we operate under today for the Eastern Service Area. The department may contract with a lead agency for a case management lead agency model pilot project in the department's Eastern Service Area as designated pursuant to section such and such. So that is, that's our current statute, that's what we operate under. We have gone approximately 10 years as a pilot project in the Eastern, in the Eastern Service Area. The other thing I would, the other thing I would mention is, first of all, your LR study, LR37, is outstanding. I mean, I, I have read it, reread it. As a matter of fact, when we, when we looked at how do we, how do we accomplish our charge here as, as this LR committee, we used that as an, as an example, including some of the surveys, the survey questions that you had. We will repeat some of those survey questions as well, trying to get some longitudinal perspective on and see if things have, have changed in the perspective of providers or key stakeholders as well. So thank you for your, for your, your hard work on that. Other, other questions? We have, we have a few more minutes. Senator Kinney-- McKinney.

McKINNEY: Thank you, Senator Arch. And thank you, Senator Campbell. My first question, kind of off what Senator Arch was just stating about the pilot, and I remember kind of-- this my first session, but going through the session and hearing people talk about pilot programs, they usually don't go past five years. So in my opinion, this is a failed pilot project. So when do you think it should end and we should start the process of taking back the Eastern Service Area?

KATHY CAMPBELL: I think that's really what your committee needs to look at and answer, Senator. I'm not trying to be evasive, but there's been a lot of reiterations of that, that pilot. I think that the department in good faith worked with PromiseShip to try to resolve some of the issues. I read former CEO Kerry Winterer's comments when he testified before the Exec Board, and I think they really did try to

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work through that. So eventually, my guess is in their minds' eye, they maybe had gone past a pilot. But as Senator Arch has described, that's what you legally have to-- that's the framework. So I think your committee, you know, that's an interesting question that you may want to take a look at.

McKINNEY: Another question. When you were talking about the judges suggesting different services, if the judges are suggesting services and-- basically if the judges are suggesting services, why do we even have privatization if, in my opinion, the judges have a more, more of a role in the process. And it seems like, from what you stated, the Legislature and the judicial system don't have a lot of authority to have any oversight on this decision to privatize.

KATHY CAMPBELL: The, the judicial system and the Legislature certainly has over, oversight responsibility and authority. There's no question about that. What, what my point was, is that they had no input into that privatization effort.

McKINNEY: OK.

KATHY CAMPBELL: No one ever waltzed in and said, well, Senator Kolterman, what do you think about should we do this? And a lot of areas across the country where they have privatized, Senator, sitting at the table was the judicial system and the legislature. And we did move to that. And I don't know whether it's still going on, Senator Arch, but there was for a long period of time, there were monthly meetings or every other month.

ARCH: Those are continuing.

KATHY CAMPBELL: And between the three--

ARCH: I participate, I participate in those.

KATHY CAMPBELL: Yes, the three branches. And that came about as a suggestion that, hey, all three branches need to be at the table. So, Senator, that's really all three have responsibilities here.

McKINNEY: OK. I-- how were they able to move forward without the input initially?

KATHY CAMPBELL: Well, they just did it. Because the department and the, and certainly the Executive Branch has the responsibility to carry out, it's just like any other agency in state government or code agency, it's their responsibility to carry out what is laid out in the

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statute. So I think they just said we're moving ahead, we believe in this, and they did.

McKINNEY: OK, thank you.

ARCH: Senator Murman.

MURMAN: Yeah, thank, thank you very much for your valuable input. You mentioned in between 2009 and 2012, a lot of states went to more privatization in foster care.

KATHY CAMPBELL: They tried to.

MURMAN: Since that time, have-- you have a, you know, you researched a lot, so I'm sure you have some idea. Since that time, have most states moved away or most, many states still use private, private foster care or how has it happened since then?

KATHY CAMPBELL: You know, Senator, that's a really good question. I don't think you could ever use-- say that most of the states did it or did not, but there certainly was more than a handful that did privatization. And they maybe did different parts of it as privatized. That would be an excellent question, and we had great help from NCSL, who did the research for us in terms of what other states were doing in privatization. So, Senator, it's, it's a good question and it might be worth saying to NCSL can you do-- can you give us some idea?

MURMAN: Thank you. Just one other question. You mentioned the 19 million in the 2012 time frame was transferred to foster care. Was that in the HHS budget at that time? Because you mentioned that was kind of a surprise, I guess, for the Appropriations Committee, or was that a different appropriation or how did that happen?

KATHY CAMPBELL: The 19, the 19 million-- and, and I want you to hold that question to make sure you ask that of Liz Hruzka, but my understanding is that because child welfare was in this rather large program budget with lots of other programs, the department was able to move around dollars to cover that. And, and that's where the senators we said, no, we want to track that. You know, Senator, if you looked at the five bills and what's in them, I mean, we tried every way possible by reports and so forth to nail down the department so that we as the Legislature had a better picture of how it was operating and what was being spent. So excellent question.

MURMAN: OK, thank you. I'll follow up.

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KATHY CAMPBELL: Yeah, I'd keep that question because I bet you Liz is sitting here. She'll probably be ready to answer that for you.

MURMAN: Thank you.

ARCH: Thank you. Other questions? I just have one follow-up question. We talked a lot about 2011, 2012, but that wasn't the end of your work. You, you continued through your tenure to work on this issue of child welfare. I know that there were several studies that were done regarding the continuation of privatization. Should we continue it, shouldn't we continue it? And, and some of those reached a mixed conclusion, I guess, is what I would say after reading those reports. And but so I guess, I guess just for the committee's understanding, this didn't end in 2011, 2012. As you Chaired the HHS committee, you were involved throughout that period of time. Anything else from that extended period of time, up to 2017 that you'd like to share with us?

KATHY CAMPBELL: You know, Senator, that's a good point. I did, I did not go beyond that. The Hornby Zeller report comes to mind that we had them do to say how is it going? And basically, you know, they didn't find that the services were more innovative or better in the pilot compared with the other service areas. And the thing about the Hornby Zeller report to us was, you know, which option should we pick? Should we stay with privatization? Should we take it away or should we kind of do a hybrid of it? I think the HHS committee at that point, we were disappointed because we were looking for a more definitive picture. And in many of the studies, we really didn't get a definitive picture.

ARCH: OK, thank you, I, just for your information and for the other members, we did, we did advance a bill this year to, to do a follow up to the Hornby Zeller study. So, so that, I think the last study was 2014 and now we've got pretty much a full 10 years. So we have asked them to, to update that study, because I think that that's, that's the larger question that, that we are going to address directly in this LR29 study. But that's the larger question about privatization, about innovation, how to-- you mentioned earlier how to, how to have innovation as part of the system, that we could try better ways to care for children as well in that, in that process. So with that, that work will, will continue as well.

KATHY CAMPBELL: OK.

ARCH: Any, any other questions? Seeing, none, thank you very much. This is--

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KATHY CAMPBELL: If you have follow-up questions, let me know.

ARCH: We will.

KATHY CAMPBELL: I'd be glad to. It was, it was an interesting trek through history for me, thinking that 10 years ago, this very time period I was spending my entire life in this building or on the road. So I appreciate being asked to come back. Thank you.

ARCH: Thank you. Thank you. And with that, we thank again Senator Campbell. And our next briefing this morning before the lunch hour is we've asked Senator Kolterman to talk about his work on procurement on contracting and the, the work that he's done over, I believe, approximately three years. And there is a, there is a bill that he has introduced. He's going to discuss a little bit about that as well. Again, this is, this, this is an attempt to provide all of us with a context. We have before us a contract with Saint Francis. We will be talking specifically, especially this afternoon, about the contract process, the procurement process that was followed to, to, to have the contract with Saint Francis Ministries. But we, we want to provide context as well a little bit, a little bit broader on simply procurement and where we are in our statutes as, as it relates to procurement. So with that, Senator Kolterman, welcome and thank you for being willing to brief the committee today.

KOLTERMAN: Thank you, Senate Arch and committee. Thanks for listening. I'm going to give you a warning that this is going to be somewhat boring at times because it's, it's not a very interesting topic until you get into a situation like we have today where it becomes apparently clear that our procurement system is not set up properly. The way we're going to do this this morning, Tyler has done a deep dive into the procurement process in my office. And so I've asked Tyler to give you a presentation on the process itself. It's a lot of boilerplate, and yet it's important that you follow along. We've provided each one of you with a procurement booklet, and we think that will be helpful. But Tyler is going to walk through the process and then I'm going to talk a little bit about LB61, which is a bill that we introduced this past year. It's the second iteration of the bill that was presented two years ago. And then we'll open it up to questions. But I just wanted to give you that caveat. We appreciate the opportunity to talk about this, and it has become abundantly clear the procurement process is extremely important to this whole system. Thank you.

ARCH: Thank you.

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TYLER MAHOOD: All right, bear with me, because it is a little, like Senator Kolterman said, It is a little dry. Good morning, my name is Tyler Mahood, M-a-h-o-o-d, and I'm Senator Kolterman's legislative aide. I want to thank you for the invitation to present to you today on the state's procurement process. Senator Kolterman noted that we became interested in the state's procurement process in 2019 when Senator Kolterman first introduced LB21, which was a bill that would provide formal protest procedures for certain state contracts, which was the continuation of the work that Senator Paul Schumacher began in 2013 after he introduced LB814, which was the result of him reading the article titled Caveat Vendor: The Case for Repairing Nebraska's Contract Procurement Process, which I have handed out to you today for your review. And if you have any specific questions about that article, as you know, Mr. Kenny will be here this afternoon. And I ask that you reserve those questions about the article for him. But as I said, I'm here today to speak to you on how Nebraska's procurement process, as it applies to contracts such as the one this committee is tasked at reviewing. So I will leave my comments to the process that must be followed when the state makes a purchase for non-emergency services, and I won't get into the purchases for goods and commodities because they follow a different process. There are numerous statutes that address procurement, but right now I want to highlight Sections 73-501 through 73-510, which I've also handed out. These sections were enacted to provide for a standardized, open and fair process for the selection of contractual services using performance-based contracting methods to the maximum extent practicable and to create an accurate reporting of expended funds for contractual services. And the processes, as laid out in these statutes which will promote, should promote a standardized method for selection for state contracts for services, assuring a fair assessment of qualifications and the capabilities for project completion and provides for an accountable, efficient reporting method of expenditures for these services. I want to highlight Nebraska Revised Statute 73-504. While there are certain exemptions provided in 73-501, 73-504 Section (1) says that, "All state agencies shall comply with the review and competitive process-- competitive bidding process provided in this section for contracts for service. Unless otherwise exempt, no state agency shall expend funds for contracts for services without complying with this section." When you get into the second clause, "All proposed state agency contracts for services" bid-- or "for services in excess of fifty thousand dollars shall be bid in the manner prescribed by the division procurement manual or by a process approved by the Director of Administrative Services. Bidding may be performed at the state agency level or by the division" of administrative-- or by the Department of

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Administrative Services. So DAS has the right to bid out if they want to or if an agency wants them to, or and the individual department does have the right to it out as well. They just have to follow the process as outlined in the manual. So in the case of Saint Francis or the Saint Francis contract, DHHS worked with DAS to do the procurement. But there is nothing in the statute that prevents DHHS from doing this procurement themselves. So there is, there is work between both agencies on this one. But like I said, any state agency may request that the division conduct the competitive bidding process for them. Now for services that are less than or equal to fifty thousand dollars, the decision can be made at the agency level. But for services that are greater than fifty thousand dollars, any deviation from the traditional bidding requirements, such as a sole source contract of such a unique nature that the contractor is-- that was selected is clearly and justifiably the only practicable source to provide the services based upon the uniqueness of the service or the sole availability at the location required, the contract must be reviewed and approved by the Department of Administrative Services State Purchasing Bureau. Now, I said that. Out-- and now I'd like to walk you through a basic procurement as outlined by the manual. So you can follow along with me, I'm just going to give you an overview of that. I summarized 50--some pages for you. And as you may assume, the procurement process begins when the agency or agencies identifies a need. After identifying the need, the manual recommends that the agency determines whether or not there is an existing contract that can be used to fill the need either by searching the state purchasing website, they can look at another state's contract with similar services, contracts procured by the University of Nebraska or other cooperative contracts. So they don't have to start from square one, they'll just basically, my understanding, they'll basically incorporate the other contracts and fit it into Nebraska's needs. Now, after the decision that a new contract is needed, the agency reviews its priorities and will select and schedule their procurement time lines that are aligned with those priorities and budget constraints. Once this, once this is complete, the director of any given agencies will then identify a team of stakeholders who will provide expertise in the separate manner which will purchase and who will participate in the many stages of the procurement, such as defining the project and requirements, the development of the solicitation and the evaluation of the responses. Following the creation of this team, the team will then be tasked with developing the strategy plan for each individual procurement, which makes-- making decisions for the execution and management of the procurement. Among the items that the manual recommends should be discussed is the project scope and

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specifications, the method of the procurement, the schedule for the procurement, the cost, any alternatives and to identify critical business requirements. Among these requirements should include what are the key functions needed services must meet? What factors will impact this purchase? What is the estimated and/or approved budget? How must the services be provided? What key approvals are needed? And who must provide this approval? What issues, and what issues arose with previous procurements and how can they be addressed? Following the completion of this strategy plan, the team then should begin to research the market, which includes studying available sources of information to find available services. According to the manual, the level of effort put into market research should then compare with the size and complexity of the procurement. And as we all know, market research is important because it provides important information such as the market size, the ability to determine available competition and which products and services are actually available. This research should then be conducted before developing the specifications of the proposal and before the soliciting bids. And in doing this, the manual recommends that the team should identify a minimum of three goals, identify, identify the state's buying policy, advertise on the State Purchasing Bureau website and to conduct a spend analysis. Now in order to complete the market research plan, the team should understand the, the department's goals, work with the subject matter experts or consultants to review the current processes and structures with recommendations on any changes needed to be successful. They should conduct a risk analysis to, to determine imp-- implications [SIC] if the project does not move forward, a financial analysis to determine the availability of funds and to determine any limitations within the market. In conducting market research, typical sources of information are: requests for information, previous acquisition history, trade or professional associations, any technical professionals, online research and by contacting other states for their experience. Now, following the researching the market, it is then recommended that the purchasing agency, whomever that is, publish a draft request for a proposal which would allow potential bidders to provide comments, express concerns or provide additional information needed to the state. And then the manual also says that by doing this, the draft RFP could allow vendors to identify potential problems entering, and this may reduce the number of protests received after an RFP is evaluated and awarded. And then in developing the RFP itself, it is important to finalize the specifications and the statement of work. The specification is defined as any description of the physical or functional characteristics or the nature of a good or service. The specifications are to determine and control the minimum quality level

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of the product, the suitability of the product or services for the job, the method of evaluation used to making an award and determining the best value proposal. In developing these specifications, the manual says that the following characteristics should be met. It should be simple, clear, accurate, competitive and flexible with the end product being specific, measurable, achievable, realistic and timely. The scope of work should contain the following information: background on the procurement, objectives, tasks, deliverables, schedule and department responsibilities. Now it is permissible for outside contractors to participate in the developing of a solicitation, but those outside contractors are then prohibited from bidding on that contract. After this, it is important to develop an evaluation strategy that consists of what the agency deems necessary, which obviously includes cost. The evaluation criteria is tailored to each individual procurement, and the agency has broad discretion on the nature, the weighing of scores and the type of evaluation criteria used in each contract. There are-- however, there are two types of mandatory requirements required, which includes that the bid to be responsive and by failing to meet-- sorry, just a second-- which includes requirements that are necessary for the bid to be responsive. By failing to meet these requirements that are laid out, the manual says the bid will be rejected and not evaluated. The second mandatory requirement is that the bidder must meet to demonstrate during the evaluation process that the bidder is legally or otherwise authorized or capable of performing the work sought. During this process, the purchasing agency may request bid bonds, performance bonds and/or payment bonds from the bidders. A bid bond protects the state against the failure or refusal of a bidder to honor their bid. This bid-- no, this bond is then to help defray the cost of the agents-- the cost the agency would incur or any increase in prices caused by not honoring the bid. A performance bond ensures the timely performance of a contract upon default by a bidder. And then a payment bond will ensure payments of any subcontractors. During the valuation process for services, these phases are broken down into the following categories: evaluation of the mandatory requirements, evaluation of the proposal in relation to the RFP requirements, ranking of the scorings, any clarifications, and then what is known as the best and final offer, and then any other process deemed necessary as required by law. And then when possible, the evaluation teams should identify all evaluation factors and their relative importance to the RFP development. These factors are individually tailored to each RFP, but they should all, they should all be clear, relative, differentiating, nondiscriminatory, realistic, measurable, economical and justifiable. Now how much each category is weighted for scoring for a service will

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show the importance of each of the evaluation criteria to the agency. And these weighing factors can be and are completely subject to each procurement. Now prior to the actual writing of the RFP, the agency must determine whether the bids will be evaluated by the team or by the evaluation committee. If it goes by an evaluation committee, there are two types. There is the technical evaluation committee, which is recommended to have at least five members of-- with the appropriate expertise, but the number of members could be changed based upon the size and complexity, complexity of each RFP. Then there is the cost evaluation committee, and that is typically recommended to be two members. One of the members would complete the cost proposal calculations by following the formula laid out in the RFP, whereas the other member will simply verify that cost calculation. Now members of both committees are also required to sign and will submit a declaration concerning conflict of interest and confidential information. And the private consultants that I mentioned earlier may also serve on these committees. Now when you get into the solicitation process, it's pretty straightforward. After the completing the statement of work, which I discussed, the agency would include this information in a solicitation document known as the RFP. The RFP, when presented, should include general information such as the intendant procurement, any important facts about the need the state faces, the procurement schedule and other administrative information, a description of the services to be purchased, information on how a bidder should structure a bid, along with information on where to submit the bid and the required forms that are needed, that needed to be completed by the bidder, which would include the base proposal, cost project-- projections, staffing needs, the bidder's prior performance on similar contracts, any prior contract termination, suspension debarments, etcetera, and any additional informational reference documents and the state's required terms and conditions. So there's a lot of information in these packets that go out. Now after the RFP is approved, the RFP must be advertised through public notice on the material website, the state [INAUDIBLE] website. The notice must include a brief description on the services required, where and when the RFP will be available, the deadline and any other appropriate information. The RFP is then required to be published for at least 15 calendar days before the posting-- for at least 15 days between the posting date and the date set for receipt and opening of bids. Now depending on the discretion of the agency, a pre-bid conference may be held to explain the procurement requirements to a bidder and to allow a bidder to ask questions. Responses to these questions are not binding on the state unless they are answered in writing and posted to the State Purchasing Bureau website. However, during the procurement,

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bidders may also be provided an opportunity to submit written questions concerning the RFP. After this period addition-- if a bidder has additional questions, they may contact the state's buyer, but the state reserves the right to consider additional questions and provide written responses. Now the buy-- the state's buyer will work with the respective agency to make sure all questions are answered as well as possible and will publish an addendum to the RFP posting on the State Purchasing Bureau website. So basically saying a bidder has a question, they'll send it to DAS, who's purchasing it. DAS employees would then work with, say the Department of Transportation, the Department of Health and Human Services, to come up with the right answer for, for those questions and then going back to DAS to be published. And then that way anybody can see it. All bids then must be received by either the State Purchasing Bureau or the individual agency by the date and hour required. And then any late bid will not be accepted, regardless of cause. Once the bid is received, the documents are to be date and time stamped, but not opened. These documents are then secured in a location until the bid opening. And when the bids are then opened, the team and the least one public-- or one witness publicly opens all bids. Now for services, the buyer will read the name of the organization or individuals who submitted a bid. However, if a bidder realizes a mistake has been made, a bidder may correct the mistake prior to opening of the bid by giving written notice to the purchasing agency. Changes after the bid opening are only acceptable if the changes are made to correct a minor error that does not affect term, price, quantity, quality, delivery or other contractual conditions. And this policy is laid out to prevent bidders from claiming a mistake to gain a competitive advantage after a bid is opened. While anyone in the public may attend a bid opening, the bids themselves will not be available for public viewing until the posting of the intent to award. This public post and then the public posting, when it gets to that point, will have all the confidential and proprietary, proprietary information withheld. But if it's required per the Public Records Act, the bidder will be notified and the documents will be published. After the bids are opened, they are reviewed to ensure that they are signed by the bidder, and then any other documents at this point design-- designated to be proprietary or confidential will be removed. But at this point, the bids should also be checked for compliance with the mandatory requirements of the RFP. After the bids are opened, they're distributed to the evaluation team for evaluation, whether or not that's the previous team or the technical committees. Now, prior to the scoring of bids, the people scoring the bids may be-- may have the ability to meet to discuss the evaluation process and discuss how points are assigned based upon the

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evaluation criteria. Evaluators may request clarifications of an RFP or a better response to the RFP from the state's buyer. And then this clarification is provided to all evaluators so everybody has the exact same information. Clarifications do allow the state to remove confusion regarding a vendor response for the purpose of evaluation and has to happen prior to scoring. It is very clear that a bidder cannot change the substance of the bid and cannot alter the cost to the state during this time. The information provided by a bidder for this purpose of clarifications, if the state relies on it for the scoring, it is binding, it is binding. Now, depending on the procurement and the complexity, this evaluation committee may request oral presentations and/or demonstrations. Questions that may be asked at this interview may be provided to the bidder, and the state may request that the bidder respond to the questions in writing. Now the state may also decide to do reference checks on the bidder, and the state has the right to disqualify bidders simply based upon these references. Now I mentioned earlier the best and final offer, which is the function of lowering the cost. At this point, the non-- if the state pursues this option, the non-cost portions of a bid may not be altered. Now the awarding of the bid after scoring shall be made to the lowest responsible and responsive bidder whose bid meets the requirements and criteria set forth in the RFP. If bids received are of an identical price, meet all the same requirements and after all the applications of any applicable preference established by statute does not result in a clear award, this award may be made in any permissible manner that will resolve the tied bid, such as the best and final offer example or including in statute the drawing of lots. Contracts may, like I said, contracts may only be awarded to a responsive and responsible bidder. In order for a bid to be responsive, it must comply with the solicitation in all material respects and contain no defects. An unresponsive bid that does not comply with the mandatory terms of the RFP and-- a material defect is one that affects term, price, quality, quantity or delivery terms. These defects may not be corrected after the opening of the bid. A responsive bidder relates to the capability of the bidder to perform the work the state is seeking and may include the ability to secure bonding, obtain insurance or hire staff. If the bid submitted indicates that the bidder is not responsible, the bidder will be given the opportunity to demonstrate their responsibility. Now the manual cites Nebraska Revised Statute 81-161 on how the evaluators are to consider responsibility. And that may, according to the statute, that may include the following. A, the ability and capacity and skill of the bidder to perform the contract required. B, the character, integrity, reputation, judgment, experience and efficiency of the

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bidder. C, whether the bidder can perform the contract within the time specified. D, the quality of the performance of previous contracts. E, the previous and existing compliance by the bidder with laws relating to the contract. However, if you look at the statute that is cited in the manual, it says all purchases leases or contracts which by law are required to be based on competitive bids, shall be made to the lowest responsible bidder, taking into consideration the best interests of the state, the quality or performance of the personal property proposed to be supplied, its conformity with specifications, the purpose for which required, and times of delivery. In determining the lowest responsible bidder, in addition to price, the following elements shall be given consideration. Lists what is cited in the manual, among other items, and I have provided you a copy of that statute. After the scoring of the proposal, the team would then begin work on the final evaluation document. The final evaluation document lists all the categories of which the bidder will be scored on and the respective category of points for each cat-- each section, and then the points received for each category. I printed you off a draft copy of this form for your records. It's pretty simple. But once the final-- this document is completed, the document, the individual evaluator worksheets and the recommendation for award will be submitted to the individual in charge of the purchasing for the service for the state to allow for that individual to verify all the information prior to the public notice of the intent to award. Once this document is verified, the intent to award final evaluation document and then all received bids are then posted on the State Purchasing Bureau website for public consumption. After this, the next step is the contract finalization stage. If a bidder took any exception to the terms or conditions, the buyer would then work with the bidder and DAS general counsel to reach terms acceptable to both parties. But these negotiations cannot increase the cost to the state, nor can it material, materially alter the RFP specifications or brought in the RFP beyond original intent and scope. The bidder awarded a contract must also be registered and in good standing with the Nebraska Secretary of State and must submit a letter or certificate of good standing dated within 90 days of the award. If the bidder is an individual or sole proprietorship, the bidder must also complete the U.S. citizenship attestation form and should submit this prior to the RFP, or with the RFP response. Now the manual says that if a performance bond was required by the RFP, the selected contractor would then select the bond at this time with a current complaint certificate of insurance must be received by the State Purchasing Bureau before the bidder may begin performance, and the bidder may not begin work until the contract is executed and all required documents

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have been accepted. Now if the state is unable to finalize the terms and conditions of a contract through the negotiation process, the state then reserves the right to reject the bid, to withdraw the intent to award and to award to another bidder, or to reject all proposals. Now for service contracts that have a value in excess of \$15 million, a proof of need analysis is required per state law. The proof of need analysis is a review of all the factors the state agency must consider as a matter of law when an agency expects the cost to exceed \$15 million. I provided you the proof of need analysis guide that will explain better than I will be able to. But once this analysis is certified, the agency may enter into the contract, but the agency then must also file the proposed contract, the proof of need analysis and the proof of certification with the Legislative Fiscal Office. However, companies and individuals who have not been selected for the award do have the option to protest the, the decision. So the procurement process isn't necessarily complete at this point. Any bidder who seeks to protest the award must submit a protest within 10 business days of the posting of the intent to award and must be specific enough for DAS to understand the error that has been alleged and the relief that is being sought. The material division administrator will attempt to issue a written decision within 10 business days. If the bidder is then not satisfied with that decision, the protester can then request a meeting with the material division director and the division of-- the director of the Division of Administrative Services or his or her designee within 10 days of the previous decision. At this point, a final written decision will be sent to the bidder. Now, the protesters may have, they do have the option to protest directly to the material division administrator and the Director of Administrative Services at the exact same time. Now, if a protest is sustained, the state may resolve the protest by canceling the RFP, rebidding the RFP, amending the RFP by taking reasonable corrective action to remedy errors in process, to ratify the award if there is no prejudice to the other bidders or to even terminate the contract if it has been executed with or without an alternate award. The manual does say that if a, the receipt of a protest does not prohibit the execution of the contract, but the decision to execute the contract while a protest is pending should only be made after the discussion with the State Purchasing Bureau, the respective agency and legal counsel. Now an example of an RFP being canceled occurred in 2016. 2016, an RFP to provide child welfare serv-- child welfare services in the Eastern Service Area was conducted. The state received two bids, one from PromiseShip/ Nebraska's Family Collaborative and one from Magellan. And PromiseShip was selected as the winner of the contract. Magellan, who was not

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selected, protested the award. Following the protests, DAS and DHHS canceled this procurement, and then DHHS then entered into a two-year emergency contract with PromiseShip to continue providing services in the ESA worth approximately \$143 million. Now I would also like to discuss a couple of procurements that were protested unsuccessfully and then had the contracts terminated for nonperformance, which cost the state millions of dollars. For example, in 2007, DAS selected an Arizona company to perform a complex long-term Medicaid management information systems contract valued at more than \$50 million per year. In this case, DAS chose a company with fewer than 100 employees over the company known as ACS State Healthcare, which was a company that had more than 20,000 employees and had a solid record in numerous states providing the same service. ACS protested the decision by arguing there was an organizational conflict of interest that should have disqualified the winning bidder, the procurement process itself was arbitrary, and the winning bidder was not responsible to perform the contract. DAS then subsequently rejected this protest. Less than two years later, Nebraska terminated the contract for nonperformance after paying the company more than \$7 million in taxpayer money while getting nothing in return for the state. The next example that I want to highlight is the \$84 million eligibility and enrollment systems contract that was canceled in 2018 after the state spent more than \$6 million in tax dollars, \$6 million, and also received nothing in return. The state also received additional funds from the federal government to assist in the financing of this project. So by the time the project was canceled, an additional \$54 million in federal tax dollars were wasted. This contract, awarded initially to a company known as Wipro, was terminated after the former director of Medicaid and long-term care, Matthew Van Patton, ordered a review of the project. In 2014, after Wipro was-- after Wipro was awarded the contract, another bidder filed a protest arguing that Wipro had deliberately underbid the contract and misrepresented its experience. DAS also denied this protest. Currently, there is ongoing litigation between Wipro and the state of Nebraska, but I find it to be a little ironic that in the state's counterclaim to the Wipro lawsuit, the state is now taking language from the original protest that Wipro deliberately underbid the contract and misrepresented its experience in prior contracts. Even though the state lost \$6 million in state tax dollars alone by, by itself before the contract was canceled, this failed procurement continues to cost the state tax dollars, since the lawsuit against the state and the counterclaim against Wipro has not been completed. Should Wipro's lawsuit be successful, taxpayers of Nebraska could lose an additional \$30 million in damages, plus legal fees associated with this case. I've given you a lot of information

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today and I'm open to questions. Senator Kolterman is going to follow me to discuss LB61, but I'll try to answer any questions that I can. But like I said, Mr. Kenny, who is following me this afternoon, is an expert when it comes to procurement policies as well, so he might be better equipped to answer questions that I don't know the answer to. Now I will hand it off to Senator Kolterman.

KOLTERMAN: Thank you, Tyler. Well, as I indicated, as we've done a lot of research in this arena, it's somewhat-- there's a lot of information that goes through the procurement process. But what happened, the reason I got involved with this was Paul Schu-- Senator Paul Schumacher from Columbus had carried a bill, and then he termed out and he asked me if I would carry a bill. And so two years ago, I had LB21 and went before the Government Committee, and I worked with the same people that he had worked with. And one of those is Mr. Kenny, who you will see today, this afternoon. But I'm really concerned-- the part that concerned me was the appeals process through all of this and the fact that there really isn't a really good appeals process. The idea that you have 10 days to appeal it to DAS in house in their materials division, or you can request a meeting with the director of DAS. That's really the appeals process that's in place. So what we did was LB61 was, is, is intended to create a defined protest procedure under the Administrative Procedures Act for any contract for services awarded by any state agency. And we have an excess of \$10 million. Now my original bill, LB21, was set at \$5 million. We had it at \$5 million thinking that's a pretty sizable contract that anybody could be awarded, but we couldn't get that out of committee two years ago. And so this year we didn't change the bill other than we did raise it up to \$10 million, thinking maybe the administration would say OK on these super large contracts, that's OK. So what, when we think about this going forward in the procurement process, we're open to ideas. I've had people say to me anything over \$50,000 on that, some sort of an appeals process. Maybe this is too formal for that. But what I'm going to talk about now is what, the only recommendation that we are going to make. Currently, Nebraska law does not provide an express right of judicial review of any agency [INAUDIBLE]. And so, as Tyler noted, the current appeal process is a very limited and it only allows a disappointed vendor to write a protest letter and meet with DAS, Department of Administrative Services. While both the director of DAS and the Nebraska Attorney General have contended that protesting bidders do not have a right to judicial review regardless of the size of the contract, over half of all states in the United States federal government provide for a judicial review of procurement decisions. I believe the number is 33. So 33 of the states do provide for an

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oversight by judicial review. Without this appeals process, this is-- this is probably the most important aspect of what we're trying to convey here. Without an appeals process which includes judicial review, many companies could be and are dissuaded from investing in Nebraska. I passed out, I think, did we pass out the information that I have? It's the second sheet, he's passing it out now. I want you to, I want you to go back and look at the second page of this handout. One of the reasons that I got really interested in this is when we go out for bids on these large contracts, the state of Nebraska, when I'm talking about we, I'm talking about the state of Nebraska. When we go out for bids on these large contracts, and if you're talking about a contract over \$10 million or \$5 million, \$5 million is a lot of money to me, yeah. So when we start doing that, I believe it's important that the bidders, the people that are going to bid on these contracts know full well that they're going to have an appeals process in place and they're not going to get "good-old-boyed". They're going to have an appeals process that they can rely on and it's not going to be handled in house. Otherwise, if we don't have this in place, I'm going to tell you something, we're going to start losing bidders. And we've already given you several examples of what's happened. And I think that these large companies, which you see there, they're household names, every day, are going to quit bidding in the state of Nebraska because it costs a lot of money to put together a \$50 to \$100 million bid. That just doesn't happen overnight with the process that we're going through. So under LB61, the bill that we presented, if the Department of Administrative Services receives a form of protest, the department will be required to provide a notice and hold a hearing for the contested case-- pursuant to the Administrative Procedure Act within 60 days after receipt of the protest by the department. After the hearing, the department will issue its final decision and any party in the case may then appeal that final decision, as laid out in the APA. Thus, under LB61, the only way for a disappointed bidder to obtain judicial review will be to appeal to the department's final decision to the Lancaster County Court as set forth in the APA. Now under LB61, we have limited this policy to affect those contracts that are greater than \$10 million, because we're talking about these large, substantial contracts to our state. As you know, we're all human beings, and I have concerns that the current protest policy fails to account for the potential that DAS sometimes makes mistakes and fails to allow applicable laws, official guidance, agency rules or even the requirements of the RFP. As I said, I've provided you information on companies that have actually come in in support of LB61. I believe, and I think that after this is all said and done with the LR29 committee, you'll also agree that it's critical that we reform parts

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of our current procurement system to show the vendors that do want to bid that we-- they're going to get treated fairly in this process. You will hear this afternoon from Tom Kenny. He's going to talk specifically about where this process failed us, probably, in the, in the Saint Francis bid letting, Saint Francis versus PromiseShip. I'm not going to steal a lot of that thunder, although we've done a deep dive into that as well. But I will tell you this, this is important stuff. I mean, we're, we're looking-- I mean, I can't tell you the number of dollars we've already wasted, taxpayer dollars. And dollars are still on the table, we don't know where it's all going to end up. But just a simple process review would be very helpful through the court system, judicial review. So with that, we'll try and answer any specific questions you might have. But if it deals with the PromiseShip, Saint Francis, I'd like you to hold those questions for Tom Kenny this afternoon, because he's, he's actually gotten involved in that quite extensively. So with that.

TYLER MAHOOD: I do have, if you would entertain me real quick, I missed something that I would like to clarify. So the manual and the law does say that this manual is not binding on the agency. The director has the discretion to change the process as he sees fit. Now, I believe it was the Aetna case following MCOs, Heritage Health decision, that there was a deviation from the manual. The companies that bid didn't know that there was a deviation of the manual because a section was rescored. So in that case, the Director of Administrative Services, I believe, signed an affidavit saying after the fact that he approved of the way the process occurred. So based upon that, if there is [INAUDIBLE] like that, the director can come back retroactively saying I approve it. So I just wanted to throw that out real quick. But yeah, and on page 6 of the manual in Section 73-504 (2) the manual may be deviated from the discretion of the Director of Administrative Services. But like I said, it's not necessarily public that they do it or in what circumstances they do deviate from it.

ARCH: Thank you. I might make a comment before we open for questions, because I think your last point here is particularly instructive. So what you were, what you were educating us on was, was a guidance document.

TYLER MAHOOD: Correct.

ARCH: And a guidance document is defined in 84-901, it shall mean "any statement developed by an agency which lacks the force of law but provides information or direction of general application to the public

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to interpret or implement statutes or such agency's rules or regulations." It's a guidance document. It's not rules and regs, it's a guidance document. Which then goes to your other point of 73-504 (2), which talks about "All proposed state agency contracts for services in excess of fifty thousand dollars shall be bid in the manner prescribed by the division procurement manual", this document, "or a process approved by the Director of Administrative Services. So I think one of the, one of the issues we have before us as, as committee, as committees, is this issue of prescriptive, flexible, right? Where is that line of how prescriptive do we get into statute? You must, you shall? And yet allowing flexibility within, with administration because we can't be prescriptive on every contract and every detail of it. So there have-- so that, I think, is what we as committees are going to have to wrestle with, because as we will hear this afternoon, the issues specific to the Saint Francis Ministries procurement process wrestled exactly with that issue.

TYLER MAHOOD: Yes. No, I, I, I do realize that there are a lot of confusion when it comes to this. But like I said, the Statute 73-504 does say that it should be prescribed by the manual. So--

ARCH: Or.

TYLER MAHOOD: --or just--

ARCH: Or.

TYLER MAHOOD: Or, yeah. So I've taken a lot of time trying to figure that out and the outside company, they probably have a lot as used too. And if they don't know that it's being deviated from, I, I have questions myself as to how transparent that procurement actually is. And is the process fair?

ARCH: This is an issue we'll have to look into further.

TYLER MAHOOD: Yeah.

ARCH: So with that, I'll open to questions. Senator Day.

DAY: Thank you, Chairman Arch. And thank you too, for being here today and all of the work that you've done. Again, this is pretty dense stuff, but it's also extremely important for us to understand the situation that we're in right now. So I just want to ask first, where is LB61 in the bill process? It that, you said you introduced--

KOLTERMAN: It's in committee. Stalled in committee.

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DAY: Still sitting in committee, OK. And then also, so we see the evaluation criteria, corporate overview, technical approach and cost proposal. Those are flexible in terms of how they're weighted. So who determines how each piece is weighted? Do, do you know that or--

TYLER MAHOOD: That would be at the discretion of the agency.

DAY: OK, so the department.

KOLTERMAN: DAS.

DAY: DHHS. So they can weigh each one of those pieces differently--

KOLTERMAN: Well, I think it's done by the DAS and DHHS--

DAY: DAS, OK.

KOLTERMAN: --in combination--

DAY: OK.

KOLTERMAN: --at the present time.

DAY: OK, so they can weigh costs more heavily than technical approach and corporate overview, if they want to.

TYLER MAHOOD: Yes.

DAY: OK. And the other question, and you touched on this just a second ago, but I just want to clarify, is the department required by law to accept the lowest responsible bidder out-- regardless of any other outside factors?

TYLER MAHOOD: Traditionally, I don't know if they're required by law, they can go-- if the bid is just so low that it doesn't look to be responsive or responsible, they don't have to go with the lowest bid. But I would say traditionally they do.

DAY: OK, so but it's, it's not like in statute that like here, I mean, like this, this is the, you know, they through the evaluation process and based on the criteria that was used, this is the bidder that we see the most fit to be awarded.

KOLTERMAN: Senator, I believe that that's a good that--

DAY: OK.

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KOLTERMAN: --Tom Kenny can answer a lot better than we can.

DAY: OK.

KOLTERMAN: Because he's, he's, he knows the legal aspect of that better than we do.

DAY: Sure.

KOLTERMAN: But I don't believe we have to take the low bid, but at the same time, I'll let him answer that question.

DAY: OK, OK. Thank you both.

ARCH: Thank you. Other questions? Senator Williams.

WILLIAMS: Thank you, Chairman Arch. And thank, Tyler, for all your work on this, and Senator Kolterman. Am I correct in my quick analysis of this, that if they were to follow the prescribed procedures, and I know they can vary from that, there is no prescribed judicial review. In fact, the only potential review goes back to the exact people that made the criteria, bid the situation, and then reviewed all the applicants and have already made their decision.

TYLER MAHOOD: OK.

KOLTERMAN: Yeah, you're absolutely correct, Senator. There's nothing in our statute, there's nothing in the compliance manual, procedures manual that requires judicial review. Nothing. Absolutely nothing. And so, in fact, they've even argued that that's, when there has been request for judicial review, they've argued that it's, it's not appropriate because of the bidding process, the way it's set up. And so when they've used that against us because we don't have judicial review.

WILLIAMS: But even if there were other forms of review, the current form of review goes right back to the same people--

KOLTERMAN: It's only in house.

WILLIAMS: --that have already looked at the situation.

KOLTERMAN: And--

WILLIAMS: Nobody else that may have financial expertise, nobody that would have industry expertise.

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KOLTERMAN: When I met with the director of DAS in my office before I presented LB61 the second time, I asked them for their input. And how do you want us to change this to make it appealing to the administration and to you? And I had the director of DAS and an individual named Doug Carlson in my office, and I asked them, rather than just this in-house-- how do you, how do you do this? Jason Jackson told me, we-- I look at it. If I can't make a decision on it, I give it to Doug Carlson, who is sitting right next to us. It's all done in house, in their department. There is no outside counsel that's brought in to review it. There's no legal opinions given. It's just all done inside. And I contend if we're looking at a hundred million dollars, I mean, we're going to go to, we're going to go to our managed care people in a few years and bid that again, that's \$100 million-plus annually. We've had the state health insurance issue come up. We went from Blue Cross to Aetna, from Aetna, whatever. Those are huge dollars. You've already heard about the Wipro thing, where we've put out millions of dollars and we've got nothing in return. Those things are happening on a regular basis. When we asked them how many bids were over \$10 million, they told us a 100. Well, that's all the bids. How many a year? We're, we're figuring out that there's somewhere in the neighborhood of about six bids a year that go over the \$10 million threshold. But the point is, it's, it's a lot of money for one department to handle all internally and not have any oversight. So that's why the bill is being presented the way it is, and by the way, the bill was patterned after Iowa. Iowa has had this judicial review. We, we looked at Missouri, Iowa, Colorado, surrounding states, and our bill is patterned pretty much after what they're doing.

TYLER MAHOOD: Senator Day, I wanted to follow up on your question. 81-161, it does say that-- I said it earlier, but the competitive bid shall be made to the lowest responsible bidder. And then it gives you a list of what determines a responsible bidder. So if the state does make the decision that they are a responsible bidder, the lowest bidder will get it.

DAY: OK.

KOLTERMAN: But the question is whether they're a responsible bidder.

DAY: Right.

TYLER MAHOOD: Yes, because that is quite subjective.

DAY: Right. Thank you.

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ARCH: Other questions? Thank you very much. I would just add one other thing. One of the, one of the challenges that this committee has in front of us as it relates to the procurement process is a determination of do we need to address improvements in the process? Is there, is there something in our system that as we, as we look at the Saint Francis bid, and you've even indicated other bids, and I know, I know Tom Kenny's going to address some of that in context as well this afternoon. Are there, are there things that need to be improved in the process or do we have an adequate process that perhaps wasn't followed, that was not followed well? And then this flexibility and, and, and standardization is, is going to be at the heart of that. So it's, this has been very helpful to kind of help set the stage for some of the questions that we'll have to deal with. Thank, thank you for, for doing this today. Oh, I'm sorry, Senator Clements.

CLEMENTS: Thank you, Mr. Chairman. And thank you, Senator Kolterman, for the presentation. Really, I just wanted to comment that, you know, it does seem that an appeal process for the really large contracts is appropriate. Then I was looking at the state budget and I wanted to get on the record that child welfare aid in our current budget is \$178 million for the first fiscal year, \$181 million in the second fiscal year. And so we're way over the \$10 million threshold and there are a lot of taxpayer dollars involved here. And so I think it is good to be looking at this situation. Didn't really have a question, just had a comment. Thank you.

ARCH: Thank you. Well, seeing no other questions, thank you very much. And with that, we're going to break for lunch and we will resume at 1:30. Thank you.

[BREAK]

ARCH: Well, good afternoon to the committee members, to those in attendance, and we will begin, reconvene for our briefing today. This afternoon we have one presenter, and Tom Kenny is-- is going to be talking to us about procurement. As I mentioned this morning, when we-- when we gathered, that Tom and Marnie Jensen are the two outside counsels that we have retained to assist the committee. Tom, in particular, was of great interest to us because of his background, specifically in the area of procurement and-- and he has brought that to us as well as he'll be telling you more about it, his involvement in the challenge to the Saint Francis Ministries bid, a tremendous amount of document review. And those-- those documents are also available to us. So that has given us a great jumpstart on-- on

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gathering the facts. So with that, I'll turn it over to Tom and welcome and thank you for being part of the team here.

THOMAS KENNY: Well, thank you, Mr. Chairman, members of the committee. Thank you for the opportunity to speak today. I'm an attorney in private practice in Omaha at the Kutak Rock firm. And I've handled a number of bid protests around the country, including many, most of those in Nebraska, including the protests concerning the child welfare contract in which we represented the PromiseShip organization, which had held that contract, versions of the contract since about 2010. And I'm here to provide some, at the senator's request, to provide some background and context to the committee's consideration of child welfare procurement and procurement generally, based on my experience as an advocate usually for the bidders in contested protest processes. I'd like to provide facts in the legal issues that arose in the Saint Francis protest and my comments are my own observations. I'm an advocate by training. I'm going to try not to be an advocate here and be as objective as I can. If I slip out of that, someone let me know. Senator Kolterman and his staff provided a nice overview, I thought, this morning of the process in general. And as-- as you all heard, it's a complicated process. There's a lot of moving parts to it. Just a couple of points, as by way of overview of Nebraska's procurement process. As Senator indicated, we require competitive bidding of service contracts over \$50,000. And that's intended to provide a fair process for bidders and a fair process for the state and to provide the best value for the state. By providing an open, fair playing field, we intend to get the best bidders at the best price and do that through a good old-fashioned competition. And there are various procurement methods that Tyler Mahood touched on. Generally, those that I've been involved in are an RFP, a request for proposal, which will, along with the vendor's manual, kind of set the ground rules for a procurement. It's really-- I heard some discussion about whether that's a guidance document or binding. That's an open legal question in my mind. The state has recently attached a document onto the cover sheet to the document that says "guidance document." That doesn't make it a guidance document. That's a legal determination that a court has not made. A guidance document under our statutes would be one that does not affect the private rights of citizens. And I would argue that a vendor's manual such as ours does. But-- so I just wanted to note that for the record, that it is labeled as a guidance document, meaning that it's not binding on the state, but I think that's an open legal question. In the process, we've heard prior testimony about the RFP at-- in response to which written proposals are made. And I wanted to just note in the process that in the con-- the type of contracts

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that we've talked about, bidders spent a lot of time and a lot of money putting together a proposal. It's a big investment of their staff. It's a big investment of their money. I was involved in the managed care procurement a few years ago here. Those were over a thousand pages long and they cost, you know, hundreds of thousands of dollars to prepare. And so companies deciding where to invest their-- their dollars really think about what does the playing field look like before we're going to make that kind of investment. So there's an RFP process. Written proposals are submitted. There's various steps along the way. Orals competition is one that Tyler mentioned this morning. That is and that was something that was used in the Saint Francis procurement where the state calls in bidders separately, asks them questions, try to really decide who is the better bidder, allows, you know, free questions to be asked that are outside of the four corners of the proposal. The evaluation process is also a complicated process. But generally, in my experience, there will be in the Medicaid arena DHHS, there will be teams that are formed generally by DHHS and DAS will form teams of evaluators who will be responsible for following certain criteria and evaluation forms. And they will score the proposal and they'll come up with a calculation and a recommended winner. The intent to award is kind of last, well, is one of the last steps where the state posts on the website intend to award. We intend to award the contract to x bidder. That triggers then a ten-day clock, as you heard this morning, for a protest. So if there's an unsuccessful bidder, there is an opportunity to submit a protest. And in Nebraska, what that means and there's a grievance procedure that is included in the vendor's manual. The grievance procedure is also referenced in the RFP. And that will say you get ten days to write a letter to the Materiel Division. If you're not satisfied with the answer, you have ten days to then go to the director of DAS and that's the end of the process. So you're a company coming in to Nebraska, you invest millions of dollars in submitting a proposal, you get to write a letter, and you get to have a meeting. And that's the end of the process. And that's unlike that type of contrast that with, as Senator Kolterman mentioned, with most states in the United States and with the federal government, the process does not stop there. The process stops with a judicial review process. So some of the protest examples that have-- that were discussed this morning, I just wanted to touch on again. And we were-- I was involved in three of the four of these protests representing the protester. The first was the MMIS contract. That was back in 2008. That was a \$50 million a year contract that was awarded to a very small company. And on behalf of ACS State Healthcare, we-- we protested that award on grounds primarily there was a conflict of interest, but also that the bidder was not

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responsible. And that is a statutory term in Nebraska. We heard discussion of 81-161, which requires the state to award a contract to the lowest responsible bidder. That's a defined term. We argued that this company with 100 employees couldn't perform the MMIS. The MMIS is a computer system that runs all the back-office computer processing for the Medicaid system. It's a huge system. By the way, it's still-- that was 2007. We've still not procured MMIS. But that was protested, went to litigation for two years, ended up settling really with no resolution. And we-- and that contract, as Tyler mentioned this morning, was ultimately terminated. They hadn't performed any of the services. They didn't know what they were doing. And there was testimony before the Government Committee this year by Kerry Winterer, who was HHS CEO at the time, and he came in and first thing, one of his first jobs was to figure out what they were doing. And he-- he was-- he terminated them. And after spending \$8 million of our tax money, plus two years of litigation costs for the state. Heritage Health is another very significant, it's the largest procurement I'm aware of for their managed care contract, that is a \$750 million a year contract or it was in 2016. I don't know what it will be when it comes out. It's a very, very significant contract. That was-- there was a protest. We represented Aetna in that proceeding. That involved a lot of the same issues as to whether the state was required to follow the vendor's manual. They said they were not. They said they had discretion to make the decisions they wanted to, that the vendor's manual only applied to the vendors, not to them. That resulted in federal court litigation as well. The child welfare contract, we'll talk about it in a lot of detail. That was a \$300 million contract approximately over five years. The Wipro contract, I call it Wipro, it's a Medicaid eligibility contract that has been in the news somewhat. So that-- that was referred to as a \$60 million mistake by the Omaha World-Herald. We were not involved, are not involved in that case, but I have followed it. You know, when the-- when the paper says it's a \$60 million mistake, that's really an understatement. This was a contract that we're-- is in litigation currently. It was protested back in 2014. And the protesters back in 2014 argued that the bidder, that the successful bidder underbid the contract and misrepresented his experience. That was the protest ground. The protest was dismissed out of hand by DAS back in 2014. So we flash forward to today there is ongoing litigation, because the state terminated the contractor finding that they were not-- not performing properly. And the litigation now, the state's arguments, their primary arguments are that they underbid the contract and they lied about their experience. So those two issues that are currently being litigated for the last two years and the state is expending money on legal fees. That was

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raised in a protest seven years ago. One would wonder if we had a judicial review process in 2014, whether we would have a Wipro in the papers today. And so-- and I think it's interesting, too, coming back to the PromiseShip protest. Those are two of the arguments that PromiseShip made and that DAS dismissed, in other words, that the winning bidder in the child welfare contract misrepresented its experience and underbid the contract. So those two issues are-- were very prevalent in the-- in the child welfare contract. I'd like to just run through a timeline that I think has been handed out and talked in some more detail about the child welfare case management protest. As I mentioned, PromiseShip was the incumbent contractor. Saint Francis Ministries of Kansas was the only other bidder in that. And in this procurement, the RFP was released in January 2019. Bids were submitted in April 2019. I noted on the timeline The Stephens Group issued a report in May, and that is after the bids were submitted, but The Stephens Group is interesting. The Stephens Group is-- was a reputable organization hired by the state to look into privatization, which as then you heard from Senator Campbell this morning, has been a big issue in Nebraska for many years. They looked at all facets of the privatization of child welfare services and among other-- and they assisted the state in the procurement. And they also looked at the costs. They looked at what are the costs that are being-- currently being expended in-- in Nebraska, both by DHS employees and by the privatized contractor PromiseShip. And they were-- they were roughly equivalent. And they didn't measure it on an annual basis; they measured on a per-case basis. But they found that-- that, in fact, PromiseShip, I believe, was a little bit lower than the state's cost when the state administers child welfare services. So that report is issued. It was issued after the bid so it was not relied on really by any of the bidders. I think that was one of the reasons that they-- they didn't want to have it become an issue in the procurement itself and-- and how the bidders were preparing their proposals. There-- in May, there was an orals competition invitation letter that I mentioned here, because that comes up later in the protest. So we talk about orals competition. That is where the state wants-- it's provided for in the RFP and the state has the opportunity to invite the bidders in, invite them in separately and says, here's what we want to talk about. And-- and it will-- the letter specifies seven or eight different areas that the state wants to cover with each of the bidders. And-- and they did that. Not one of the issues on that letter or that was discussed in the orals competition was cost, whether Saint Francis' proposal was realistic in that it was 40 percent less than PromiseShip, but we'll come back to that. May 24, 2019, is something we didn't know about at the time until we got into

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the protest, but what happened was they-- the DAS is scoring the proposals. They are calculating. They identify that they-- they're planning to award the contract to Saint Francis. DHS commissions a report from their media staff, pulls 100-- approximately 100 pages of articles, all about Saint Francis' performance in the state of Kansas. And it is-- that-- that's a document that we've provided to the committee. It's 100 pages of newspaper articles and it's-- it's a horror show. It is about children sleeping in corporate offices. I remember one of the stories. The-- the auditor in Kansas found that 764 kids slept in the corporate offices of Saint Francis within a six-month period, and there's story after story after story, legislative audits being conducted. So all of this material was not provided to the evaluators who were scoring the proposals, but it was reviewed by senior officials at DHS. A few days later, the state issues its intent to, having read this media report, not asked any questions of anyone, not asked any questions of Saint Francis about the media reports, they issue their intent to award to Saint Francis. Then PromiseShip filed its protest. They mentioned with-- there were a number of areas that were raised in our protest. The three primary ones was, number one, it was an illegal proposal. It was illegal because they provided-- they proposed that we will have a target caseload of 25:1; our statute says a maximum of 17:1. We said that's illegal. The second ground of protest: that there were undisclosed performance failures, so these issues in this media report and other instances of failures to perform their contract in Kansas were not disclosed to the state of Nebraska. We argued that that was a basis for invalidating their award. Third: the history in Kansas that Saint Francis had of underbidding the Kansas contract, so we-- we provided the state a document that showed that in-- within a ten-year period, they had come back eight times for amendments to get more money because they couldn't perform at the cost that they had bid at. We provided all of that in our protests. Those are the three main arguments. When we submitted our protest, and this touches on something that Tyler mentioned earlier, that in the vendors' manual itself, filing a protest does not automatically prohibit the state from signing a contract with the winning bidder, so we said-- we asked them to do it. We wrote them a letter and said, would you please hold off on make-- on signing any contract until our protest has been resolved? We never did receive a response to that letter. June 21, so week after our protest, we found this out after the-- after the fact. We didn't know these communications-- we had-- PromiseShip didn't know these communications were going on. After they got our protest, and focusing on the case man-- the caseload ratio, DHS sent an email to Tom Blythe of Saint Francis, asking for a clarifying response, asking

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that Saint Francis clarify what it meant when it said our target caseload was 25:1. A few days later, DHS requested a-- I say a secret clarification meeting with Saint Francis. I say it's secret because it's not public, unlike all of the other events in the procurement where they post, we post what we're doing, they're posting everything that they're doing, they're posting amendments, they're posting responses. They didn't-- they didn't advise, certainly, PromiseShip that they were having a clarification meeting. So that's on the 25th they asked for a meeting in Lincoln, said, you-- you get to Lincoln tomorrow from Kansas for a meeting. So on the 25th, they did have the-- conduct the meeting. And we've done some discovery into what occurred at that meeting. The meeting is held. Strangely, we get a letter by snail mail. You know, all of our communications had been email with DHS, but on July 1 a-- a letter lands on my desk saying, well, we need ten more days to-- to respond to your protest. Fourth of July weekend is coming up. But on July 3, we get two things. We learn that they've dismissed our protest and, secondly, that they've signed a contract with Saint Francis. And so they-- so immediately after that-- and during this process, we're making FOIA requests to DAS, DHHS, to the state of Kansas. There's no discovery process in-- in our current proc-- protest process. You-- ordinarily in the litigation process, for those of you who are involved in litigation, you can do document requests that must be responded to; you can do written interrogatories; you can do depositions. There's no discovery process in our current system, so you have to go by FOIA. So you sub-- and you pay for it and you submit FOIA requests and when the agency wants to respond, they-- they will respond. You don't have a court supervising that process, so you can't ever really be sure what you're getting. But that's-- that's the best you can do because we don't have that built into our system. So all-- ever since the award, we've been asking for documents from various agencies. We then request a protest meeting because we're entitled to one under our grievance procedure. We-- we think, well, we're not certain how effective this is going to be because they've already made their decision. They've signed a binding contract before we've had our meeting. We never hear a response to that. July 15, we file-- PromiseShip files suit and we seek a temporary injunction, and the temporary injunction is to freeze the status quo. And for those of you who've been involved in litigation, an injunction asks the court, basically says to the court, we know that this is not a trial yet, we-- we want our trial; it might not be for a year, but today there are some urgent matters that need to be attended to and we want you to freeze the status quo until we can have our day in court. And so what we asked the court there was to suspend any performance of the contract until we can have the court

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determine whether it was properly procured and-- and to please stop any transfers of cases from PromiseShip to Saint Francis, because the-- the process of transferring a case from one caseworker to another, one company to another, is-- is very disruptive and it's harmful ultimately to the children. So we said, please stop this until you can really look at it, we can have a court and a jury potentially decide whether this is a fair process. So that's what PromiseShip was seeking through the litigation process, because they-- they-- they did not get where they-- what they wanted through the protest process. So-- and-- and we won't go through all of these specifics. The department very aggressively defended and the reason I note of this, July 21, DAS files a motion to dismiss, arguing that PromiseShip doesn't have standing to be in court and that the-- and that the state is immune. And one of my partners refers to that as litigating about litigating, so it's-- we're not talking about the substance of whether this was an illegal proposal. We're talking about whether-- and-- and DAS is arguing you don't have the right to be here, you don't have the right to be in court, you don't have standing to be here, and we're immune. So that's what their motion was about. They-- and it said nothing about the merits. They said, you-- you shouldn't be here, Nebraska does not allow judicial review and, Judge, you should dismiss this-- this case. There's a hearing on the motion for temporary injunction, some other things that are going on, so in the middle of the-- the litigation process, we don't have a decision out of the court. We learn that DHS has directed that the case transfers from-- from PromiseShip to Saint Francis be expedited. It's supposed to happen January 1. We saw some emails, and there was later something on the website: We want to get this done by October 1. And so that creates a huge furor with our client. Saint Francis is not ready to accept the cases, but the state is pushing to expedite the process. And so that happens, or we learn about-- the email is August 26, so right in the middle of litigation. We're saying stop the transfers. We learn that the state is expediting it and-- and paying the contractor extra money to-- to-- to expedite, so paying Saint Francis. August 30-- well, we learn that Matt Wallen was leaving the Department [SIC] of Families and Children on September 5, so we took his deposition on the 30th. We'll-- we'll go through some of his testimony. He leaves the department shortly after that. And as we're getting more and more concerned about the DHS order to expedite and start transferring cases on October 1, we file a motion for expedited discovery and trial. We ask the court to allow us to conduct discovery of-- not only of DHS and DAS, but also Saint Francis. We have a hearing. Saint Francis-- we have-- so September 10 is our hearing on a temporary injunction. That's where evidence is offered. Affidavit testimony is offered on

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behalf of-- of all parties. At the same-- on the same day, Saint Francis files another motion to dismiss and Saint Francis moves to stay all discovery, asks the court, don't let them do any discovery, we-- we don't think we should be in this case, we think it should be dismissed. The court never granted that motion, but Saint Francis in this process never provided any discovery. They wouldn't agree to a deposition date. They never provided any documents at all during the protest process. So that-- that's a big question mark in terms of this committee's work, I think, is that there was no discovery conducted, no facts that were found as to Saint Francis' role in-- in any of these issues. October 10, we take a deposition of Bo Botelho from DHHS. And then on October 15, the order-- there's-- order comes out of Judge McManaman, who's a district court judge here, Lancaster County, and he does two things. He denies our temporary injunction and he denies the state's motion to dismiss. So it's important to note here that the-- the-- the court rejected the state's arguments and decided he was not going to dismiss the case, that PromiseShip, had it survived, would have had its day in court months or, you know, longer down the road, but-- so he-- he denied their motion to dismiss, but he also denied our motion for temporary injunction. But it didn't-- it didn't end the case. So the case, if-- had PromiseShip survived, could have-- could have gone on and-- and there would have been further facts developed and-- and a decision made on the full record would have been made. He didn't-- he-- so a couple of issues in the injunction process. There's something called irreparable harm. So when you go in and you ask for a temporary injunction, you're asking the judge really to make an extraordinary step. You're asking him to decide this right now. We're only two weeks into your courtroom. We have no discovery. We had some discovery. We have very little information. We'd like-- we have enough information that we'd like you to freeze the process until we can have a trial. So it's a-- it's a very high burden. It's very hard to get. Norm-- normally, you know, you-- a court's going to wait until the end of the trial process and have a jury make a decision at the end of all of the-- all of the evidence that's come in, so you're asking to do something extraordinary. You have a high burden. You have to show irreparable harm. He-- the judge agreed we did show irreparable harm, that there would have been harm to the taxpayers-- Kathy Bigsby Moore was a coplaintiff along with the PromiseShip, and she was a taxpayer plaintiff-- and that there would have been irreparable harm. But he said, you haven't convinced me that you're likely to succeed on the merits if we go to trial. And-- and so that was his decision. He said, you may convince me down the road, but you haven't yet. And he's aware that we hadn't done discovery, didn't have the information, but we

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felt we had no choice but to try to get that injunction in place even though we didn't have really the evidence we needed, all of the evidence we needed, because these cases were transferring. And so that was a decision. And after that, PromiseShip faced the decision of whether to-- should we-- should we see this through to the end until the trial or what should we do? They had an impossible decision to make because the case-- the state was moving all of the cases to Saint Francis. And PromiseShip knew and was very interested, very concerned about the welfare of the children, knew that when you-- once you transfer a child, that causes harm to that child. It-- it damages their outcomes and how they're likely to get through the child welfare system. So as these cases were transferring and they learn from this judge's order that-- that that transfer was going to go forward and then we would have a trial after that; if we won, they'd have to transfer all of those cases-- all those children back, and so they decided we're not going to put the kids through this and they decided to suspend the case. And so that was the end of that-- that-- that litigation. It ended by a settlement and then a dismissal. So just a couple of-- just to go through a few of the issues, and I-- I'd like to talk about the-- really the primary issues that were raised in the protest. So PromiseShip argued in its protest that Saint Francis dramatically underbid the contract. Their proposed cost was 40 percent less than what PromiseShip had performed it for, for the prior years, 40 percent before the 2017 bids. Now keep in mind, in 2017, as Tyler Mahood talked about earlier, there was a procurement for the same contract. PromiseShip bid and a national company called Magellan Health Care did. Their bids were within a million or two of each other. And so those were-- that-- that's kind of a data point, so that's what a national company did, that's what PromiseShip did, and the Saint Francis bid was 40 percent less than those bids. The Stephens report identified, as I mentioned to you, it-- so this-- these-- this is kind of evidence relating to their underbidding. Stephens report said, here's what our costs are, here's what PromiseShip's costs are. Saint Francis was, again, 40 percent below what the state's own cost when it uses a state employee to provide the service. We talk about the caseload ratios and that's a separate legal issue. You know, our argument there was that this is an illegal proposal. You-- you don't-- you are not meeting the-- the letter of the law that says 25 to-- or 17:1. But it also impacts cost because if you have a 25:1-- if you have 25:1 ratio, 25 kids for 1 worker, you need a lot less workers than if you have 17 for 1. So it-- it dramatically impacted their cost. The illegality helped their bid be lower than it would have been otherwise. So in the-- another area which cost was-- that we argued in the litigation, so-- and that is

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the evaluation and the scoring of the cost proposal. So when-- when you're back in the evaluation process, you see-- the state sees that PromiseShip has bid just about what it's bid every year for the last ten years, they see this company-- out-of-state company come in and bid 40 percent less. During that evaluation process, there was no subject matter expert for the state that looked at cost. There was an administrative person from DAS that's not familiar with child welfare, didn't know anything about child welfare, looked at the numbers on the proposals and took those numbers, plugged it into the formula that is in the RFP, and awarded a winner. During the orals competition, as I mentioned, there was an opportunity there. The state then had both bids and opportunity to ask the bidders about cost and ask, how can you do this for 40 percent less? Have you, you know, invented the, you know, some-- some magic formula to do this much less than the state does it, much less than PromiseShip does it? And DA-- DAS, in the protest process, claimed that they used that orals process to investigate the bidders' costs. But in our limited discovery through the Bo Botelho deposition, Matt Wallen deposition, our review of the orals invitation letter, there's no evidence that anybody talked about the-- the underbidding in-- in that orals opportunity. They had an opportunity to talk about it. They had an opportunity to explore how they could perform, whether they could perform at that cost, and they didn't use it. Again, and to the cost issue, we argued that there is a history of underbidding here, and this is demons-- this is-- our-- we argued that Saint Francis underbid the contract by 40 percent and they did it intentionally, and we argued that we have a perfect example of how that has happened over the last ten years in Kansas, and we presented that information to the state. That was not considered by the state in the protest. They decided it was irrelevant how they had performed under a similar contract in the state of Kansas and they didn't consider it. Some other cost issues that are-- I-- I view as protective measures that those who had designed the vendors' manual and the RFPs had built into the process, but they weren't followed here, so let me just tick through some of those. Performance bond is-- was required of both bidders. PromiseShip provided it; Saint Francis didn't. Financial statements-- audited financial statements were to have been required by both bidders. PromiseShip complied with that requirement; Saint Francis did not. The bidders were required to submit a certificate of good standing. PromiseShip complied with that; Saint Francis did not. There is a-- something called a cost-reasonableness determination in the RFP, and-- and that is a-- it's an interesting provision that says, if for any reason that the state believes that there's a deviation in cost or has questions of cost, they have the ability-- there's a specific provision that lets

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them determine the cost reasonableness of-- of a bid. But that was not used. Nobody talked about it with Saint Francis. They ignored the-- so this is a tool. These are all tools that have been built into the process that were not used. In-- in-- specific to child welfare contracting, there is something called a readiness assessment that is required by Statute 68-1212. And that statute says that prior to the operational start date, the private contractor, DHS, will conduct operational and financial readiness review of the contractor; it will issue a letter of findings and will terminate the contractor if it does not demonstrate ready-- evidence of readiness. There is no evidence that this was ever conducted, either that the assessment was completed-- in fact, there's evidence that it was not completed. There was deposition evidence that the readiness assessment was not completed, yet the cases were transferring to Saint Francis. There is-- the RFP required that a letter of findings be issued by DHHS after it completed the readiness assessment. They never provided that, at least during the protests. I don't know if today-- if either of those have ever been done. And the state's arguments as to why-- why did you not use the tools that were available to you, especially when you have a red flag such as a 40 percent deviation in cost, they essentially argued that we had the discretion to make this decision and we trusted the bidder; the bidder said it could-- that it could perform at that cost and we trust the bidder. Second point were the ratios. We don't need to spend a lot of time on that. But again, Saint Francis' proposal, in our view, was illegal. It said, we propose a 25:1 ratio. Statute says 17-- 17:1. I don't--- I do a lot of protests. I don't see any that are that egregiously obvious and unlawful. It-- it was. Now, as I mentioned to you in going through the timeline, there were some clarifications. There were these clarification letters, clarification meetings. Now the state will say that we didn't clarify anything, yet if you look at-- the proposal says 25:1. The amendment to the contract that came after the clarification meetings says 17:1, so somehow the proposals of 25:1 changed in the contract to 17:1. I don't know how that's not a change, but maybe that's something that can be further explored. Interestingly, as well, Saint Francis, between the time of their proposal and the time that we raised this issue, they added 30 additional employees to perform this work. The state also said that wasn't a change. And we also had the-- the-- their-- Saint Francis had a similar child welfare case management contract in the state of Kansas, and Kansas does not have a ratio requirement like ours of 17:1 and their average ratios in Kansas were well over 30 and sometimes up to 50. So we pointed all of this out, but the state argued in its defense that these were negotiations with Saint Francis, we had the right to negotiate with them. This was not a

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change. They argued it was not a clarification. Clarification, as Tyler mentioned, is a term of art in the-- in the manual. It says you can't do a clarification after the bids have been submitted. So the-- it-- the witnesses from DHS, when testi-- they said this was not a clarification. Their letter to Saint Francis said, we'd like to have a clarification meeting, quote unquote. The-- the agenda for the meeting said clarification meeting. Multiple emails said we-- we need to have a clarification of your quote. Now their testimony was, we didn't have the clarification. Moving on to the performance issue, again, this is something that we've-- we've touched on. Our argument was that they omitted material information, information that was material to the state of Nebraska. They said, we-- we're a great child welfare contractor, in so many words; said, we have a good performance history, yet they did not disclose any of the materials we've talked about with the children sleeping in the offices. They didn't-- they didn't disclose their multiple amendments to their contracts asking for money. And, you know, the-- and the state knew about all of this. The state knew about it not [INAUDIBLE] because it wasn't in their proposal. They only put glowing, positive information in the proposal. The state, for some reason, decided we need to-- we need to look into this company because we don't know anything about them or we don't know much about them. So they get 100 pages of just horrible news stories and they don't ask them a single question. They don't ask-- try to clarify, ask is there any substance. I realize they're me-- you know, media stories, may or may not be accurate, but when you have-- and legislative audit reports, many-- three or four legislative audit reports that were looking at the performance, not one question was asked of the bidder. The only questions that were asked were to-- to clarify the ratio. So if we-- if we have time, we could run through the deposition, then I have a couple of kind of unanswered questions, Senator, if that would work from your standpoint.

ARCH: I-- I'd like to pause here, before we start with the briefing on the depositions, and see if there's questions from the senators.

THOMAS KENNY: OK.

ARCH: And then-- and then we can-- we can go further. Are there-- are there any questions? Senator Day.

DAY: Thank you, Chairman Arch. I'm just going to go ahead and ask a couple of questions now. Whether they should be asked now or later, I'm not sure, but-- so when you were talking about it's obvious that Saint Francis underbid the contract, and then in terms of the evaluating criteria, it appears that the low bid was the primary

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reason for them being awarded the contract, do we know if there was any information that was provided to Saint Francis about what the bid for PromiseShip was, or was that based on previous bids, other public information from previous years?

THOMAS KENNY: Senator, I'm not aware of them knowing what PromiseShip's bid was--

DAY: OK.

THOMAS KENNY: --in advance. And you're-- you're right that the-- that PromiseShip outscored Saint Francis in every technical category of-- I mean, quality, every technical category in the proposal was scored in favor of PromiseShip. But because of the cost differential, that was the difference.

DAY: OK.

THOMAS KENNY: And it's significant. And so when you-- you-- you look at the scoring from-- they break it into a number of categories. PromiseShip wins every category except for cost.

DAY: OK. And then when you said the original bid was based on a ratio of 25:1 and then they went back and changed that to be in alignment with state statute, they didn't-- there was no point where they were forced to reassess the cost at that point or they didn't have to reassess the cost or that's not a part of the process because there's no one else overseeing the process or--

THOMAS KENNY: That's a-- it's a very good question and in-- among the-- in-- in the FOIA responses we got from the state, the state said Bo Botelho asked Tom Blythe of Saint Francis to clarify and that we-- you need to meet the ratios. Tom Blythe writes back and says, well, we will, but we need another \$15 million. And so Bo writes back, says, well, if you change your bid, that will in-- if you change your cost proposal, that will invalidate the bid. So Saint Francis knew that by changing the ratio, it was going to increase their cost, and they sought to get more money from the state and the state said no.

DAY: OK, OK. And so-- and then just to get a general understanding of the process, so DAS and DHHS are the ones that determine the evaluation criteria or-- or how the evaluation criteria, in terms of the RFP, is weighted within the process? Is that correct?

THOMAS KENNY: That-- that's correct. That's correct.

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DAY: OK. And they're also the ones that award the contract. They-- they're-- they're the ones that are determining who is the lowest responsible bidder or will be awarded, correct? They also determine that. Yes?

THOMAS KENNY: Well, the-- that's also an excellent question. So it can be done either way in the-- it could either-- DHS runs its own procurements on occasion.

DAY: OK.

THOMAS KENNY: Sometimes I think of it as them hiring. They're not hiring, but sometimes they will ask DAS to manage the procurement. So in this case, they work together and D-- DHHS will-- they know the program. They'll put in the criteria that are important and what are the services going to be. But then they hand it over to DAS and DAS manages it. So DAS sends out the RFP. DAS will organize all of the pieces, get the evaluation, the scoring people together. They will do all of that and they will make the ultimate award decision and they make the ultimate protest decision, even though this is really a con-- this is a DHHS contract that they kind of assigned it to DAS to handle the procurement.

DAY: OK. OK, so DAS determines the criteria. They decide who, in conjunction with DHHS, decide who will be awarded the contract. And then if there's any protests to that, DAS is the one that then dismisses the protest. If--

THOMAS KENNY: Yes.

DAY: And so I guess what I'm asking is if we were to implement something like LB61 into the process in terms of judicial overview, where does that put that in this process? So we're eliminating or-- or maybe removing some of the responsibility involved where it seems maybe there could be a conflict of-- of interest there with one agency making all of those decisions without any oversight from-- from anyone else. Where would that judicial oversight fit into that process?

THOMAS KENNY: Well, on LB61, the judicial oversight would come over the final decision, so the--

DAY: OK.

THOMAS KENNY: --not-- not in the process of running the procurement, except, you know, if you have judicial review at the end. So after there's a protest to the agency, agency says, no, we reject your

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protest, then there's an opportunity to go to an administrative law judge within the-- within the DHHS, have that person decide-- after doing discovery depositions, documents in a very compressed time frame, 30 days, 60 days, ALJ, administrative law judge, decides, and then if it's-- still a further appeal to go to the district court and then that's it.

DAY: OK.

THOMAS KENNY: So it would come at the very end. But I think that by-- that that ALJ will be reviewing the conduct and the practices of DAS and DHHS and you will build up a body of precedent, say, well, OK, the manual, it's either guiding-- guidance or it's binding on everyone.

DAY: OK.

THOMAS KENNY: You'll develop--

DAY: Sure.

THOMAS KENNY: The ALJ will develop precedent for that. And it's-- it would just-- LB61 would just bring this within our Administrative Procedure Act. So I like to think about it, if you're a Medicaid beneficiary and you're denied benefits, so you have a walker and Medicaid says, no, you can't have a walker anymore, we're-- we're taking that off our list, you have a right-- you have the right to go to a-- you have the right to judicial review. You have a right to go to an ALJ and say, that was not fair, I'm entitled to this, I need it. And-- and if the ALJ says, no, you don't get it, then you can-- you can go to a district court judge. That's exactly what this would do, would be put that same kind of minimal oversight that currently exists for many, many programs within the state of Nebraska.

DAY: OK.

THOMAS KENNY: So this is nothing new--

DAY: OK, wonderful. Thank you so much.

THOMAS KENNY: --if that answers your question.

Speaker 5: Yes, it does. Thank you, Mr. Kenny.

ARCH: Senator Kolterman.

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KOLTERMAN: Thank you, Senator Arch. Tom, I have a question, or mostly a clarification. In the particular case we're talking about with PromiseShip and Saint Francis and-- and the process that Senator Day just alluded to, would it be fair to assume that, since Bo Botelho had-- had been the director of Administrative Services on a temporary basis, I believe, and then he moved to Department of Health and Human Services, would they have relied on that expertise in DHHS a little bit more because of his previous arrangement with DAS or-- or is that just-- just happenstance, so to speak? Because as I-- as I-- as I look at this situation, obviously, I don't see where DAS has got the expertise to-- to know the intricacies of DHHS. But Bo Botelho, now at DHHS, would have a little more expertise there. Is that an accurate portrayal of what we're looking at here or am I completely off base?

THOMAS KENNY: I-- I think that's an excellent insight, Senator. I-- I know that Mr. Botelho was the director of the Materiel Division within DAS and then he was the director of DAS.

KOLTERMAN: OK.

THOMAS KENNY: And of the four protests we've talked about today, during three of them, he was the decision maker for DAS, so he knows that process.

KOLTERMAN: OK.

THOMAS KENNY: And so would people naturally-- and he's a lawyer. Would people naturally rely on him as having expertise, really both-- on both sides? I think absolutely. I don't believe I asked him that question in his deposition, but I think that's what is-- exactly what's going on. He's got expertise on both sides.

KOLTERMAN: OK, I-- just a point of clarification. Thank you.

ARCH: Senator Clements.

CLEMENTS: Thank you, Mr. Chairman. Thank you, Mr. Kenny. Regarding the 40 percent ratio, did you say that Saint Francis was 40 percent below PromiseShip's current bid or a prior bid?

THOMAS KENNY: Well, Senator, it's really both, because PromiseShip's bid was in 20-- well, in 2017, they bid and-- and-- and you'll recall that in-- and I'm not sure if this came out. So in 2017 there was a bid. It was PromiseShip versus Magellan. Magellan protested and instead of res-- instead of resolving that protest, DHS just withdrew the RFP, said, OK, we're not going to-- we're not going to decide this

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protest, we're going to just cancel the RFP, and then we're going to just award it to PromiseShip on an emergency basis. So they did that for two years. And that, I believe, was about \$68 million a year. Actually, it was-- I know it was \$143 million for two years, so it was 71.5 per year was what the 2017 amount was. And so what we're saying is that PromiseShip's bid in 2019 in the-- in the protest we're talking about was approximately 40 percent-- or Saint Francis was 40 percent less than that bid, which was equivalent. I-- I believe it was \$68 million a year, maybe 68 to 70, and Saint Francis was 40 percent below that.

CLEMENTS: OK. Yeah, that was-- next question was going to be with the dollar amounts were, but I think that covers it.

THOMAS KENNY: OK.

CLEMENTS: Thank you.

ARCH: Come back to you. Senator Murman.

MURMAN: Thank you, Senator Arch. And thanks for your testimony. At the end of the procurement timeline there, the dismissal and settlement, you talked quite a bit about reasons the judge gave for the dismissal. Could you tell us what the settlement was?

THOMAS KENNY: I believe it's a public document, Senator. So the dismissal, that was a voluntary dismissal, so the-- what the judge said in October is, I'm not going to dismiss the case, but I'm not going to grant your injunction. So after that, then the parties talked to each other and PromiseShip said, we want to voluntarily dismiss this case, so that-- by agreement we di-- want to dismiss the case. In the settlement, I believe, had-- I'd have to get it for you. I could-- you know, that's a public document, but basically it said we'll settle our case, and I believe the state provided some additional funding so that PromiseShip could continue to provide support and kind of wind down its affairs for the next six months and-- and help the new contractor get going. And I just don't recall the other details to that, Senator.

MURMAN: OK, the-- the amount is not public or you--

THOMAS KENNY: I don't-- I believe it is. I just don't recall it.

MURMAN: OK, thank you.

ARCH: Senator Williams.

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WILLIAMS: Thank you, Chairman Arch, and thank you, Mr. Kenny. I think you've worked in procurement in many states, not just Nebraska. You work in states that have judicial review. Could you walk us through what would have happened and how this case would have been different if there had been judicial review, in-- in your judgment, how that would be, not necessarily the outcome, but what the process is of that?

THOMAS KENNY: Yes, I'd be-- I'd be happy to do--

WILLIAMS: That's the-- that's the piece I'm looking at--

I'd be happy to--

--and maybe the timeline that would follow.

THOMAS KENNY: I was going to say we certainly would have prevailed, but--

WILLIAMS: Well, we know that.

THOMAS KENNY: So the-- the process would have been different. And I do a lot of protest work in the state of Iowa. And it's Medi-- most of it is Medicaid related, so-- and had-- had we been using those pro-- and this is not-- is not specific to Iowa. A lot of states follow the same type of process. There's one-- so in Iowa, if you file a protest, it stays execution of the contract. So-- so if I protest, you don't have to worry about, well, while we're waiting for an answer, they're going to go sign the contract with the other person. We're going to get a fair hearing administratively. So you'd have a process for-- you make your protest and then you have an opportunity to go to-- an administrative law judge will handle the process, so they-- they will-- it'll be like a minicourt and you have 60 days. You-- you can exchange document requests with the state, so we'd like, you know, these ten categories of documents, and with the winning bidder, we'd like these documents from you and we'd like to arrange for two or three depositions so that we can interpret the documents. After that-- after that written discovery and-- and depositions are done, then you have a hearing before the administrative law judge and you make your case and say, here's-- here's what we-- and it's very compressed. You know, people are-- administrations complain this is going to go on for years. No. If-- if it's like most states, you have the 30, 60 days to do all-- to do everything that you would ordinarily do in two or three years in court. So you-- you do your discovery. You present your case. The judge will-- the administrative law judge, who will-- is an

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employee of the Department of Human Services in Iowa, so it's not like foreign territory for the department. They're getting, you know, one of their own employees, who is a lawyer and an ALJ, make a decision and he or she will make that decision. And then you have one more bite of the apple. If-- if that decision still goes against you, you can go to the district court and the-- the district court is sitting as a court of appeals. So what that means is your trial is before the ALJ, so in terms of facts and witnesses and documents, all of that, it's before the ALJ. If you want another bite, you go to the district court. But that's an appeals court, meaning there's no more discovery, there's no more witnesses, there's no trial. The-- the district court looks at what the agency did. The district court looks back and says, OK, we see all of the evidence, you're not going to get any more evidence, there's no more depositions, no more evidence, we're going to look at what the agency did and then we're going to make a decision of whether he-- he or she made the right decision. And that's it. So-- so that's how this would have differed. For one, we would have had complete information from the state, which we did not have in this case. We had some information and only two witnesses. What-- we would have had full information on the state. We had zero information from Saint Francis except what we got from the state of Kansas when they were investigating them in various ways. But we had no discovery from Kansas, so that'd be a major difference in the case if it were-- if we had judicial review in place. And we'd be able to, you know, understand what-- what their responses were to that.

WILLIAMS: Does Iowa have a similar process to Nebraska on the front end that there is a-- what I'll call an internal appeal process that you would go to DA-- DAS or something and get an initial review--

THOMAS KENNY: Yes.

WILLIAMS: --before you go administratively--

THOMAS KENNY: Yes, yes.

WILLIAMS: --or judicially? Excuse me. And then again, just so we're all understanding, that timeframe for judicial review is a compressed timeframe of 30 to 60 days to--

THOMAS KENNY: Yeah.

WILLIAMS: --to go through that entire process.

THOMAS KENNY: Yes.

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WILLIAMS: OK. Thank you.

ARCH: Senator Kolterman.

KOLTERMAN: Thank you. So-- so, Mr. Kenny, you go through that process, and you've done that in other states. If you don't get the outcome that you want, you don't-- it doesn't go your way, there's no more appeals. It's over with. Is that correct?

THOMAS KENNY: If you get to the district court and--

KOLTERMAN: --and they don't-- they don't rule in your favor, they stay with the--

THOMAS KENNY: Theoretically, Senator, you could still appeal.

KOLTERMAN: OK.

THOMAS KENNY: Now the-- the one thing that I-- I would keep in mind, and I think the body should keep in mind, is that unsuccessful bidders, like any of these companies or-- they don't like protests, they don't like spending money on lawyers, so they're only going to invest money if they feel that they have a good shot of winning, if they feel that they have evidence that there was bias or a conflict of interest or underbidding. So they're only going to invest the money in the first part of the protest if they think they can win. And that-- and that's-- the same thing is true at each other stage, so if-- if they lose af-- after writing the-- losing the first protest, do they want to go through depositions, discovery, administrative hearing? They're not going to do that unless they think they can win. And each time you lose, your chances are less because if you get to the point where the district court has reviewed all of the facts that are in the case and there's not going to be any more facts coming into the case, the district court says you lose, most clients are not going to-- most companies are not going to throw good money after bad. Now that's not a legal answer; that-- that's a practical answer that they are-- they're only going to spend money on an appeal if they think they have a chance. And if they lost at the administrative level and they've lost in the district court, chances are they're not going to go further, although they could. The other thing to keep in mind is that these companies, these tech companies and other healthcare, they-- they don't want-- you all in our states are all their customers, so that's-- that's a big reason they don't like to file protests in the first place, is because they don't want to antagonize, you know, significant customers, so there's some kind of practical reasons. But

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the legal answer is, if they were unsuccessful at the district court, they could get one more shot at-- at an appeal to the Iowa Supreme Court.

KOLTERMAN: And then a follow-up question, if-- and you might not have the answer to this, but you probably have more experience than I do. In our state, obviously, there aren't that many contracts over \$10 million. But obviously we've been talking today, all day long, really, about some large contracts, you know, your-- your managed care contracts, your-- your medical information-type of contracts where you're-- where you're qualifying people, the Wipro type of situations. We're hearing about the ones that have failed and that have not worked today. How-- do you know-- do you have a handle on-- I guess what I'm asking is, does the process work for most of the things that we're doing? And are we really just fo-- should we just be focusing on these main contract-- these large contracts, or should-- or how-- you know, how low should we take this? Because you know as well as I do, we had \$5 million, we thought, well, let's raise it to 10 simply because there aren't that many and at least it stopped some of the bleeding. You-- you get where I'm coming from? Can you talk a little bit about that?

THOMAS KENNY: Yeah, I-- I would agree, Senator, that-- that these are the big contracts we're talking about, where, to my mind, you know, one of the opposition, as you know, from the administration, has been it's going to cost us, you know, some additional FTEs to administer this judicial review process, so I don't have a good answer for you as to whether it's working for smaller contracts or not, you know, or whether the number should be five or ten or something below five. I've-- I have heard from healthcare providers in the child welfare system and-- and healthcare generally think that that number is too high, that their contracts are \$1 or \$2 million, they think that number is too high. So I-- I don't-- but I don't have the numbers, Senator, to tell you--

KOLTERMAN: OK.

THOMAS KENNY: --what the overall picture looks like.

KOLTERMAN: What does the state of Iowa, as an example-- is there-- is there a level that they start this judicial review at?

THOMAS KENNY: No, I don't believe so.

KOLTERMAN: They don't have anything?

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THOMAS KENNY: I don't believe they do.

KOLTERMAN: OK, and I-- I--

THOMAS KENNY: I don't believe they have-- just-- just as we don't have any limit on a Medicaid beneficiary's right to challenge a denial of their-- of his or her walker, you know, it's-- it is-- if you're denied that benefit, you can go this process, but-- so I don't believe there is any minimum threshold in Iowa or in most states.

KOLTERMAN: OK, thank you.

ARCH: I have-- I have a question. We've spent quite a bit of time today talking about the appeal and the process of appeal, which, of course, is-- is at the back end, right? After somebody believes that a poor decision has been made, that you appeal. I want to go into the process itself, and-- and you made an interesting statement in your-- in your remarks, and that is that they have tools built in but not used, was what you said. So we have in our statute, I'm assuming, a lot of "may," they-- you may do this, you may-- I-- I think-- I think there's-- I think that even applies to reasonable costs. You may-- the RFP, you may ask and-- ask questions and determine whether it's reasonable cost, but not shall, which-- which I guess leads me, you know, to-- instead of only talking about the appeal process but the process itself of decision making, I-- I use the term, and I'm sure it's a legal term and I'm using it incorrectly, but due diligence, right? I mean, is there an obligation to perform due diligence or something similar or a legal-- legal standard that, that we need to take a look at statutes that say "may" and in some cases actually say you-- you-- you shall. I-- you know, we hate going down in deep into-- into process and saying those kinds of things, but it seems along the way, if there were tools built in but not used, some of those tools would have been helpful. I guess I'll leave it at that and ask for any comments.

THOMAS KENNY: Well, I-- Senator, I think that's a-- that's a very, very good question. I think that, you know, you're right that there-- it's-- "shall" is used and-- and, for example, in the-- we talked about the 81-161 that says the state shall award to the lowest responsible bidder.

ARCH: Right.

THOMAS KENNY: So-- but-- but responsible is subject to the state's discretion, what is responsible. There's some factors that the state

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will argue we have-- we have a lot of wiggle room there. We talked about this readiness assessment that was-- became a very big issue in the Saint Francis matter. The readiness assessment, the statute does have a "shall" and it says that the state shall conduct a readiness assessment of the lead contractor before the operational start date. So there you have a "shall," but it was ignored. To your question, this-- and in this case, it comes to my mind where you-- and I think Senator Day kind of touched on this, is who's doing what in the procurement process. So in this procurement, it's a DHHS contract that is being procured by DAS. So DAS is doing the evaluation; they're doing the scoring; they're going through the proposals; they're using criteria that DHS said-- provides and says, here's what's important, here's how you weight it. But DAS is doing all of that work, so DAS finishes its work and says, here-- here's who the winner is, according to our calculations. They share that with DHHS. DHHS looks at that, says, hmm, who's this Saint Francis? Let's do a 100-page media report. Nothing required them to do that, but they did it. So then, to my question, the legal duty is, what is the duty? So you didn't-- the-- and in the RFP process, the state did not-- the state asked bidders to disclose contract terminations. Saint Francis didn't have a contract termination, so they didn't disclose anything negative. But in terms of the-- the state's duty, so we have this information now about prior underbidding that we've gotten ourselves. We haven't got it from the bidder; we've gotten it-- and we have all of this information that we have reviewed. And what do we do with it? You know, when we-- in the deposition process, we asked that question and said, well, they've already-- DAS already made the decision. We were just kind of looking to see who they were. But-- but they-- you know, what are-- what is the duty of Dannette Smith, what is the duty of Bo Botelho, Matt Wallen, when they have at least a suspicion from 100 pages of media articles that puts them on inquiry notice to do due diligence? It would to me seem reasonable to say, when you have that kind of-- you have information suggesting that there were performance problems, that you-- you investigate it. And I don't believe we got into, you know, the-- the law on what are the duties of those particular people in that particular case, but I think that our taxpayers would-- would, I think, expect to-- them to act as a reasonable person would: Here's all of this information. Why don't we-- why don't we ask and see if it's-- if there's anything to it? But I don't know, on-- on the answer to your question, if there is a law or anything on the books that really defines what the duty should have been in that case. But to my mind, that is something where we-- and not only did we have the media reports, then we had this thing about not meeting the-- the statutory ratios. So what are the duties upon having that information and

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saying, well, it-- this is a DAS, they're doing the procurement, we're not going to-- we're not going to mess with it?

ARCH: Yeah, because we've-- we've talked about discretion-- discretion in the process of being available. And-- and-- and that's-- I mean, that-- that needs to be part of the process or it needs to be some discretion. So this is-- that's-- that's-- that's helpful. It-- it's an issue that-- that we have to-- that we have to wrestle with as-- as two committees, so. OK, Senator Williams, yes.

WILLIAMS: A follow-up on that, Senator Arch, and thank you. There-- there are those areas of-- of looking at some of those things that are judgmental in nature and the person doesn't have the background experience in looking at those. But I'm also troubled by a couple of other things that you pointed out, that one of the bidders provided the required performance bond and the other bidder didn't; one bidder provided the audited financial statements and the other bidder didn't; and they didn't receive any penalty or something for that. You have any comment about that, Tom?

THOMAS KENNY: Well, Senator, I-- I--

WILLIAMS: Those aren't judgmental kind of things.

THOMAS KENNY: No.

WILLIAMS: You-- you either have that or you don't.

THOMAS KENNY: That's right, and I-- I-- I don't recall how those factors were scored, so that would come down to, you know, when they're scoring the proposals. I don't know that we ever got the criteria, but it-- it-- there-- there should-- you should get points for meeting different terms. And I don't know if the scoring criteria included any benefit for complying with the proposal or, you know, we-- we argued that that made them not a responsible bidder and-- and nonresponsive so the-- it's a little tricky. You know, responsible is the statute that we talked about, integrity, background, performance. That's a responsible bidder. A responsive bidder is one who responds to all of the mandatory requirements of the RFP. So the bond was a mandatory requirement of the RFP that Saint Francis did not provide, so we argued that that made them not a responsive bidder and that was-- that argument was rejected.

WILLIAMS: Yeah.

ARCH: Senator Murman.

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MURMAN: Thank you. Just a little follow-up on the same line of questioning. Tyler Mahood in his testimony this morning said something about a bid bond. Is that the same thing as a performance bond? You said Saint Francis-- Francis had a-- or, excuse me, PromiseShip had a performance bond and Saint Francis didn't. Is a bid bond the same thing or is that two different things?

THOMAS KENNY: Senator, I-- I'm not 100 percent sure. I believe the perform-- the bid bond just covers their-- their bid, that they are-- that they're not going to withdraw their bid prior to the scoring. I-- I believe it covers something different than the performance bond. I'm not-- I'm not sure about the specifics.

MURMAN: OK, thank you.

THOMAS KENNY: I can look that up if-- if you'd like me get you an answer [INAUDIBLE]

ARCH: Senator Kolterman.

KOLTERMAN: Yeah, along those same lines, what-- when you get into situations that we're in, like right now, and from the time-- could-- could it-- how much-- how much emphasis is put on-- or how much behind the scenes goes on the time-- between the time that you get the bid, you open both bids, you have a pretty good idea which direction you're going to go, and how much flexibility happens after that? So as an example, if-- if DHHS discovers that, because of this 100-page document, that they're bleeding red, would that have an influence over them requesting or not requesting a performance bond that's going to cost them more money? That's a question that I have. The other thing that I have-- I-- I wonder about is you in-- and you've been involved with this, but you indicated that DAS made the decision or DAS is the one that stopped the appeals process, so to speak. But the decision was actually made at DHHS because, as we-- when we heard-- I sit on Appropriations. They came in and asked for a bunch more money and we had Dannette Smith in my-- in our-- just like you're sitting there. And I just asked her who made the final decision. She said, I did. She made the decision to go with Promise-- to go with Saint Francis. And so that-- that's troubling because, you're right, who's-- who's-- who's involved here? Is it DAS or is it HHS or where does the buck stop? And that's kind of what I was trying to get at. I mean, we're-- again, we're talking hundreds of millions of dollars here, and that's-- that's taxpayer dollars. That's money you and I are sending in to take care of these kids. And the bottom line is the kids are the

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ones that are getting hurt out of all this. Let's not fo-- let's not lose focus of that.

THOMAS KENNY: Well, and I agree with you, Senator. And I think, you know, on the bond question, that was due the day that the proposals were due. So I think the-- the state, if it had noticed that, I don't know that it did, but if the state noticed that, well, we've got a performance bond from PromiseShip but not-- they could have disqualified them right then and-- and, in my mind, should have. It's a-- it's a required provision of the proposal and they didn't meet it, and there's a purpose to it, as you know. That's to-- it's protect the state in case they don't perform or something unexpected happens and they, you know, they need more money or something. They-- they've got a performance bond in place. And, you know, those don't come for free either. So the other bidder in this case did provide it and did spend the money to get performance bond and, you know, didn't-- but didn't receive the contract. So I-- I agree with you. And in terms of the decision making, from-- from what we see in-- on the outside, was that the protest letters were signed by DAS, and in our depositions they said, yeah, DAS-- DAS made the decision, so-- and I-- I'm not-- I'm interested to hear that-- what the discussion was with the CEO, because what-- what they told us and what their letter says, it was a decision maker at DAS.

KOLTERMAN: But you-- you bring a good point also. Whether or not you get the bid or not, the bidder has to provide-- the bidder is put some money up front to get that bond.

THOMAS KENNY: Um-hum.

KOLTERMAN: They aren't cheap. They're not free, by any means, especially when you're talking hundreds of millions of dollars, so--

ARCH: OK, thank--

KOLTERMAN: --again, it goes back to the importance of the whole process.

ARCH: Thank you. We stopped you in the middle of presentation. I know that we have some additional material that you'd like to talk about, and so you can certainly proceed.

THOMAS KENNY: Thank you, Senator. One-- we've touched on a lot of these points, so I will do it quickly, just some-- some highlights from the deposition. So the first one that we took was Matt Wallen, the director of Division of Children and Families. And he left the

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agency right after the protest, so the protest was an-- ongoing when he left in September 2019. His-- and this is to Senator Kolterman's point. So his overall testimony, position as to decision making, was that DAS, not DHHS, conducted the procurement, scored the proposals, and made the award decision. And I found it interesting that in his testimony he said DAS handled the procurement, but it was DHHS that handled this clarification discussion. So while DAS is scoring the proposals, you know, posting the intent to award, answering the protest letters, DHS is saying, oh, well, it looks like their protest-- their proposal is illegal, we better go clarify. So while DAS is saying to us that this is our decision, we know from the discovery and the emails that DHS said we got to fix this ratio problem. And so-- so I-- that-- and that came up in-- in this deposition. And with regard to the performance bond, Mr. Wallen did not know if it was required or if it was provided, and he-- same with insurance, same with certificate of good standing, so those protective tools, and-- and this is by far the largest contract in his division, but he didn't know if any of those were obtained. There was testimony regarding the vendors' manual and this clarification process. And Mr. Wallen, he was not familiar with the manual or the RFP provisions in any detail. He said that's DAS's job. He agreed with the idea that the RFP contains the ground rules for the procurement. He agreed that the relevant data points in deciding, you know, whether the Saint Francis proposal was reasonable or raised red flags were the following. He said these are all data points. He said, we don't know the industry standard cost for this contract. We don't-- either on an annual basis, on a per-day bas-- basis, a per-child ba-- we don't know. He said, we don't know what the industry standards are, but if-- he did agree that what he would look at are these relevant data points. So the 2017, there were two bids, one from PromiseShip, one from Magellan, so that's a relevant data point in deciding whether Saint Francis' bid was reasonable. The Stephens report looked at all of our costs for case welfare management in the state, and they came up with a per-day amount, and so that's a-- that's a data point. But he did not have an industry standard and he did not-- was not in any way involved in reviewing the costs submitted by either of the bidders. And he had really no explanation for that. He said that DAS was running the procurement and that was their job, not mine. He had no explanation for why a cost-reasonableness determination was not done. He did not attend the orals presentation that we talked about where initially DAS in their proposal-- or in their protest response said, well, we-- we investigated the cost fully in the orals presentations. Well-- so this is Mr. Wallen's division, largest contract. He didn't attend the orals with-- interviews with the bidders. He got no feedback from them. And

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he agreed, when I showed him the invitation letter, that, yeah, this doesn't include costs. So costs were not-- that opportunity to kind of ask questions about the bidders, cost was not taken advantage of, according to Mr. Wallen. He agreed with the idea that the caseworker ratios in the statute are important and-- and they're important to how-- how children progress, and it's very important that we maintain those. He did not agree that they were changed. And we went around and around about how the proposal said 25:1, their final contract said 17:1, and his testimony was that's not a change. He was not familiar with the Kansas performance history of Saint Francis or their contract amendments where they had coming back for more money every year. He did not review the Kansas legislative audit reports. There were three or four of them that we provided, and he said that he didn't believe they were either credible or relevant. Mr. Botelho's testimony, and this is summarizing about six or seven hours into maybe a minute or two because we've been through many of these items, he said the performance bond was not obtained from Saint Francis. And when I asked him-- and there were some emails going back and forth within DHS. There was-- I'm blanking on her name, but there was a-- an employee within DHS said this is a big contract, shouldn't we get a performance bond at-- a question to Mr. Botelho by email. And when I asked him about it, he said, well, that's privileged. And I said, well, what do you mean? And he said, well, that's attorney-client privilege, I can't answer that question. So he never answered that question. He-- he-- Mr. Botelho took the position that he-- because he's a lawyer, he is counsel to DHHS and he's also COO. So in my world, you know, you can be a general counsel and you can have other business activities. When you're acting as a lawyer, your-- your advice is privileged. When you're acting as a business person, it's not. And so we went around on this for a while and he said, I can't answer that question, it's-- it's privileged information as to why we didn't require a performance bond. There was an instruction given to the evaluators in this process. One of the evaluators said, you know, I've heard some-- I've heard some bad things about Saint Francis, can we-- can we go research this on Google? And there was an instruction given by Mr. Botelho: No, you can't look outside of the four corners of the proposal. We-- we asked some questions about that because I had some questions about that from both in the Heritage Health protest and in another protest we haven't talked about involving the dental managed care contract we were involved in. In both of those cases, they were decided because DAS went outside the proposals for information to support the protest. So I said, well, now I know you were involved in because you wrote both of these letters where you looked outside of the-- the proposals. He said, well, we gave the instruction, I think it's a reasonable

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instruction, and that's how they were instructed. So in this particular-- so here you have the case, Senator, to your point, should evaluators or their superiors be allowed to look outside the four corners of the document that the bidders provide to the state or-- or are they restricted to that? And it-- there might be a different answer. I'm veering off the deposition here. There might be a different answer, depending on who's asking. If it's an evaluator who's given criteria, it might be a lower level person who's got a lot of expertise in the--- you know, the-- the practice of child welfare case management but doesn't have as much, you know, policy responsibility within the agen-- maybe it makes sense to say to that evaluator, we give you the criteria, you look at the proposal, you know, analyzing the criteria we give you. But does that also-- is that also a good rule for a senior official of state government to say, I'm not going to look outside the proposal or should we just have to-- we have to rely entirely on what they tell us? So that-- that-- that-- that came up because there-- there was some evidence here where an evaluator said, I know something bad, negative I read about Saint Francis, can I look at it, and they were told-- they were told no. We-- we discussed the Wipro case a little bit during the Botelho deposition in the context of his view of underbidding, and his testimony was, yes, underbidding is improper if it's in-- if it's intentional, so if-- if the bidder knows that it can't perform at a particular cost, that that's improper. And if they know that by underbidding they're trying to undercut the competition, they get the state to start depending on them and then they come back for more money, he said that would be clearly improper. And we-- we talked about this in the context of the state claiming that in the Wipro case, it was intentionally underbid. He did not intend-- attend the orals presentations either, got no feedback from them. There was no substantive review of the cost proposals. He confirmed that there was no investigation relating to the media review that we talked about, the 100-page media review and he asked no questions of the bidder about that. He denied that there was a clarification of the caseworker ratio. He said a clarification would be improper, even-- as we've talked about, even though all of their correspondence said, look, we're having a clarification meeting. That is a term in the manual that is improper. He-- Mr. Botelho admitted that the case transfers were ordered prior to the completion of the readiness assessment. So the statute says before you transfer the case to the new contractor, you have to complete this readiness assessment. He admitted that they were ordered prior to the completion of the readiness assessment. And when he was asked why they expedited the process and when he was asked why there was no readiness assessment, he claimed that that was

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attorney-client privilege, he couldn't tell me. So, and just to recap, for both of them, there was no substantive-- substantive review of the bidders' cost by anyone within the state of Nebraska, as far as I know-- as far as we learned from this litigation. There was no due diligence into Saint Francis' performance. There was no questions of the bidder as to their performance or prior underbidding or anything other than the ratios which were clarified. And-- and we-- we got claims of privilege-- can't tell you as to why we didn't require a performance bond or why the readiness assessment was not completed.

ARCH: Could I-- could I ask you to repeat those three things, please? I find that stunning.

THOMAS KENNY: OK. There was no substantive-- substantive review of the bidders' cost proposals. I think that's one. There was no due diligence conducted as to Saint per-- Saint Francis' performance in Kansas. And there were no questions of the bidder, other than with respect to the ratios, about underbidding, performance, kids sleeping in their offices.

ARCH: Thank you.

THOMAS KENNY: I had some-- I have a-- I could probably go on for a while yet, but I have some unanswered questions I thought I would just raise with the committee, and then if anyone has questions, I'd be happy to cover those. And these are-- these are kind of-- this is really coming from this case and some others. Privilege claims, attorney-client privilege claims: DHS shielded from scrutiny many of its decisions; will it be transparent in the future? Second, RFP boilerplate: Should it be updated? So I've seen the same boilerplate for the last 14 years and there's-- there's protests that are-- you know, relate to the RFP and what they do in preparing these is they'll have the same boilerplate, same terms and conditions, and then they'll modify the section that has to do with the particular services that are being sought. So should the boilerplate be updated? Vendors' manual: Is it really a guidance document under our statutes? Now DAS says it is. They put a label on; it says guidance document. But our Administrative Procedure Act says that if an agency pronouncement affects private rights, then it needs to be promulgated as a rule or regulation. So that's a question. What are the limits of the agency's discretion? Are there any limits? That's more of a rhetorical question, but what are the limits of their discretion? So you're sitting on a stack of amendments that suggest underbidding; you're sitting on a stack of media reports suggesting poor performance. What is the agency's discretion at that point to-- the state-- there would

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be various decisions made by the state after the RFP that I'll just kind of go through. Why did DHS not substantively evaluate costs when the bid was 40 percent below industry standard or use any of the financial protection tools in the RFP to ensure that this contractor could perform at the cost that it proposed? Why did DHS not seek clarification from the bidder about performance issues raised in its own media review? Why did it not seek clarification about the evidence of underbidding in Kansas? Why did it allow the contractor to, quote, clarify its 25:1 target ratio after the bidding had closed? Why has DHS still not obtained compliance with those caseworker ratios? I-- I listened to the January briefing by Dannette Smith, like they're at 51 percent compliance. Why are they not in compliance? It's been two years. And what remedies does the state have against the contractor and what remedies do the children have who are being misserved? Does noncompliance with-- with our statutes jeopardize federal funding for this contracted service? I don't know the answer to that. Why did DHS ex-- expedite case transitions right before the injunction hearing? Was-- was that a contracting decision, was that a decision made on behalf of the children, or was that litigation strategy? We don't know. Why did the-- why did DHS transfer cases before it completed the readiness assessment as required by statute? Did DHS ever complete this readiness assessment? Did it ever complete the findings letter that was required in the RFP two years ago? Should senior state officials rely entirely on a bidder's representations? Many questions surround Saint Francis' role in this because, as-- as we mentioned, there was no discovery. They-- they wouldn't provide us any documents. They wouldn't provide anyone to sit for a deposition. So what was their role? What did they know at the time? Did they do it on purpose? Did they intentionally underbid this contract? Don't know. Did they do an internal cost analysis saying here's what it's going to cost to perform up in Nebraska, here's what it costs in Nebraska? They have-- or not saying we can never do it at this cost, let's-- let's do it anyway, and we go back, mark-- I don't know. So that's a-- that's a question. That's a key question, I think, is, what did they know? Did they know about the caseload, caseworker ratios at the time that they did 25:1? Did they even know about our statute? Did it accurately describe its contract history? What are the state's connections to Saint Francis? We've seen articles about Chicago Cubs tickets. Are there any improper connections we don't know about? What is the status of invest-- of investigations in the state of Kansas of Saint Francis. We've heard about terminated executives, investigated executives. What are the status of those investigations and what-- what can they tell us? Do they have any information that is relevant to this body as to what happened in Nebraska? Is there any overlap? There-- there is a

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class action that was filed against the state of Kansas that we did discovery into. It was brought on behalf of all the children, child welfare population in Kansas against the state of Kansas. That case has been settled. But the question is, are we at risk? Is the state of Nebraska at risk because of 51 percent compliance with the caseworker ratios? I don't know. Again, what is the impact on our federal cost share from any of this? And-- and I don't have the answer to that. It's not something that we had-- had to look at. Those are some of the questions that-- that we have, and I'm sure there's many more.

ARCH: Thank you. Questions? Senator Walz.

WALZ: Thank you. I just want to clarify. Was the 17:1 caseworker ratio a requirement stated in the RFP?

THOMAS KENNY: It's a very good question, Senator. It-- and I'm going to answer it this way. I-- I-- there was a reference that said you have to comply with state statutes. That was in the RFP. There was a Q&A, so in the Q&A process, so that is a formal part of the procurement available to the bidders where you can write in a question and get an answer, and it's an official answer and it's binding on all the bidders. It's a very formalized part of the process. There was a question asking if that statute applied and there was-- the answer said, yes, it does apply. So that was-- and we don't know for certain who asked that question, but we know there were only two bidders. And I know PromiseShip didn't ask the question. So somebody asked that question, got an answer, and so I don't believe that 17:1 was in-- in that language specifically in the RFP. There was language that said you must comply with all state statutes and it mentioned the statute, not the 17:1 but the statute, in the RFP. And it was in the Q&A that's binding on the bidders.

WALZ: All right, thank you.

ARCH: Other questions? Seeing none, thank you. Thank you very much. It's been very thorough and-- and you left us with good questions.

THOMAS KENNY: Well, thank you, Senator. Thank you for the opportunity.

ARCH: I just have a couple of comments to the two committees before we-- before we close for the day. We have sent out survey questions to you for any comments, if you have any. Be sure and get them back to us as quickly as possible. We want to finalize those and begin circulating the survey questions July 1. Our next meeting together will be in person, here in this room, on July 9, where we'll have Liz

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Hruska come and brief us on the contract and fiscal-- the fiscal issues, the over-- overview of that. And we will also have the HHS, OIG, and FCRO executive directors come and talk to us about quality and the oversight process that's in place for quality right now. So with that, thank you very much for your attendance today, and this will end the briefing for the day. Thank you.