To: Lower Florida Keys Hospital District Fact-Finding Committee

From: Dirk Smits, B.C.S.
Jimmie B. Hicks, Jr., Esq.

Re: Lower Florida Keys Hospital District and Key West HMA, Inc.

Date: May 19, 2025

FINAL MEMORANDUM

This is a fact-finding endeavor and no votes, rankings or other Sunshine Law meeting requirements under Chapter 286 apply.

Introduction:

This Final Memorandum will address the current contractual arrangement for the lease and operation of the Lower Keys Medical Center, formerly known as the Florida Keys Memorial Hospital (Hospital), the relationships of the relevant parties, and the potential options available to the Lower Florida Keys Hospital District (LFKHD) regarding the same.

Documents Reviewed:

In preparing this memorandum, we have reviewed a substantial number of documents, including but not limited to:

1. Definitive Agreement between LFKHD and Key West HMA, Inc. (HMA) (1999);
2. Definitive Agreement between Kennedy Drive Investors, Ltd. (KDI) and (HMA) (1999);
3. Lease Agreement, and two subsequent amendments thereto, between LFKHD and HMA (1999);
4. Agreement for Indigent Care between LFKHD and HMA (1999);
5. Certain related documents executed contemporaneously with the Definitive Agreements, and any amendments thereto;
6. Numerous documents provided to us, and various on-line articles;
7. Public licensing records of the Florida Agency for Health Care Administration (FAHCA);
8. Enabling Authority of LFKHD;
9. Covering deed for the Hospital real property;

10. Legal Opinion of Holland & Knight issued to LFKHD, dated December 12, 2016;
11. Relevant statutory provisions;
12. Lease Consolidation Agreement, dated December 8, 1989, Leases executed pursuant thereto for both hospitals, and other related documents executed contemporaneously therewith, whereby the operations of both hospitals were combined under one entity - The Lower Florida Keys Health System, Inc. (System);
13. Certificate of Agreement of Limited Partnership of KDI;
14. Articles of Incorporation and Bylaws of the System; and,
15. Selected annual corporate filings for System, HMA, and HMA's majority owner CHS/Community Health Systems, Inc. (CHS).

We have been unable to obtain copies of any agreements or documents between KDI and HMA and/or CHS from the May 1999 transactions and subsequent thereto, other than their original Definitive Agreement. We submitted a public record request to LFKHD for these documents, but were notified that no such documents are, or have been, in its possession.

In a further attempt to obtain documents from KDI, HMA and/or CHS, we submitted a request directly to CHS. CHS has declined to provide any relevant documents. Also, although HMA/CHS are operating the dePoo Hospital, they are exempt from the Sunshine and public records laws pursuant to Section 395.3036, Fla. Stat.

We have been able to obtain copies of relevant documents from the December 1989 "consolidation" transactions, as all such documents included the District thereby making them public records.

Facts Established:

Effective as of May 1, 1999, LFKHD entered into a series of agreements with HMA, and Health Management Associates, Inc. as guarantor of HMA. These agreements included a Definitive Agreement between the parties, a Lease Agreement which has been amended twice (collectively, the Lease Agreement), and an Agreement for Indigent Care. The purpose of this transaction was for LFKHD to contract with HMA to lease, operate and manage the Hospital, replacing the System in such capacity. Similar agreements were simultaneously entered into by HMA and KDI for the dePoo Hospital. Once in place, these transactions removed the System from operating either hospital.

The Definitive Agreement and Lease Agreement, among other things, leased the Hospital to HMA, transferred certain assets from LFKHD to HMA, established the types of medical services to be provided, and established other conditional services to be provided related to a primary care clinic and indigent care. The agreements provide for a Governing Board, the membership of which is appointed by various parties including LFKHD; but this Board's role is limited to advisory and medical staff credentialling and disciplining matters. These agreements, however, contained no

minimal standards in relation to operations or management; nor did LFKHD retain any power of control or review over operations or management.

In 2016 LFKHD sought and obtained a legal opinion, primarily addressing whether the above referenced transaction and documents were statutorily authorized, whether LFKHD had any options to exert influence over HMA activities, and whether the Lease Agreement could be terminated early without financial risk to LFKHD. In a letter dated December 12, 2016, Holland & Knight issued an opinion that the transaction and documents were statutorily authorized, that LFKHD could not exert any unilateral control over HMA activities, and that terminating the Lease Agreement would result in financial risk.

The LFKHD-HMA agreements currently terminate on April 30, 2029. It is believed the KDI-HMA agreements also terminate on that same date; however, although we have reviewed the Definitive Agreement between those parties, we have not been able to review copies of any other agreements or any potential amendments to any of them, as those documents are not public records.

Relationship Between the Parties:

As a preliminary matter, clarification is in order as there appears to be some confusion over which parties are relevant to your various considerations.

In our review, we noticed that "CHS" has often been referred to as the current operator of the Hospital and the lessee under the Lease Agreement due to its acquisition of HMA. Although CHS purchased the majority ownership of HMA after May 1, 1999, HMA continues to exist as a legal entity and is still the party in question for all agreements, not CHS. In fact, the FAHCA licenses are currently in the name of HMA. Note that CHS subsequently changed its name, and is now "CHS/Community Health Systems, Inc." Also note that HMA subsequently converted its legal status to a limited liability company, and is now Key West HMA, LLC.

Therefore, HMA is still the party to the Definitive Agreement, the lessee under the Lease Agreement, the operator of the hospitals, the party to the Agreement for Indigent Care, and the holder of all relevant licenses from FAHCA.

A second matter of clarification to assist your considerations relates to KDI. We have observed many references to KDI having a "veto" over LFKMD's future decisions and courses of action upon termination of the Lease Agreement. We have identified no such express power in any of the documents we have reviewed. Rather, we believe this is an attempt to articulate the implicit understanding that the best path forward would require a coordinated and joint approach with dePoo Hospital, and therefore with KDI. And further, that operating the Hospital separate and apart from dePoo Hospital would have substantial negative implications. But, again, KDI has no "veto" power.

Options:

Based upon the information currently before us, we have identified the following potential options for your consideration:

1. Terminate the Lease Agreement Prior to the End of the Lease Term.

Terminating the Lease Agreement early would result in substantial financial risk. It would also likely cause disruption, confusion and uncertainty as to the delivery of health care to the community, given the uncertainty associated with such an action, and the likelihood of prolonged litigation. For this option, please note:

- The Lease Agreement has no performance standards, minimum service levels, control over fees and costs, or any other contractual requirements or limitations other than the types of health care services to be provided, and the conditional services to be provided related to a primary care clinic and indigent care. To our knowledge, there has been no assertion that HMA has failed to fulfil these obligations in accordance with the agreements.
- The Lease Agreement may only be terminated early due to a material breach, after a period to "cure" the breach. But as there are no specific standards imposed upon HMA, and no allegations of non-performance of its contractual obligations, it is unlikely a cause of action could successfully be asserted, as there is no quantifiable breach of any term.
- The prevailing party in any litigation is to be awarded attorneys' fees under the agreements.
- Upon declaring an early termination, regardless of eventual success, there would need to be a capable entity willing and able to step in and operate the Hospital against this uncertain background.
- LFKHD would initially have to operate the Hospital directly, unless an early termination notice is provided sufficiently in advance of the termination date to allow time for compliance with all legal requirements to lease the Hospital and assign its operations to a new party.
- All required FAHCA licenses are currently in the name of HMA.
- dePoo Hospital would be "separated" from the overall health system, which would have substantial implications including a loss in efficiency of operations, impacts to the overall health care delivery to the community, and a potential impact to revenues.

2. Renegotiate the Lease with HMA Prior to Termination.

The Lease Agreement could be renegotiated, but only with HMA's consent. This would avoid most of the issues under Option 1 and could potentially result in proactively addressing quantifiable standards of operations and management going forward. Further, it might allow for the District to contractually be provided with more information regarding dePoo Hospital operations, but only if agreed by HMA.

This option would negate any potential benefits of seeking out other entities to operate the Hospital. And unless this action was coordinated and tied-in with amending the KDI-HMA agreements, dePoo Hospital could be separated from the overall health system for some period, as the comprehensive approach would otherwise be lost without a coordinated set of agreements relating to both hospitals.

3. Continue Under the Current Agreements, and Issue RFPs/ITNs at an Appropriate Time.

LFKHD could utilize Requests for Proposals or Invitations to Negotiate to obtain a new operator and lessee at the end of the Lease Agreement. This option provides no financial or legal risk, and minimizes any potential disruption to the delivery of health care to the community due to an early termination. However, this option requires the situation to continue as-is until April 30, 2029.

It would allow for a clean slate – all new agreements, this time with identified standards of performance and other on-going future contractual requirements. Finally, competitive or negotiated bids may result in more favorable terms than renegotiations. The health care industry has substantially changed in the last 30 years, and market conditions are fundamentally different.

This option requires adherence to a lengthy and detailed process. It will require substantial advance planning and actions. And as stated before, unless coordinated with KDI, the comprehensive approach to health care for the community could be impacted.

Included in Appendix I is a short description and summary of the processes for RFPs and ITNs. The leasing requirements under Chapter 155.40, Fla. Stat. for District hospitals also apply in conjunction with RFPs and ITNs.

4. Continue Under the Current Agreements, and then Solicit Offers and Enter a Public Private Partnership (P3) at an Appropriate Time.

This option is fundamentally similar to Option Number 3. P3's are expressly allowed for both operational activities and leases where a public purpose is involved generally, and for medical care facilities specifically. § 255.065(1)(i)(1), Fla. Stat.

A P3 structure is more often used when there is construction, major renovation and/or financing associated with the private party's role. Hence, if there are considerations for major renovations and improvements at the time of the new lease term, this option might prove better than traditional RFPs and ITNs.

Included in Appendix I is a short description and summary of the process for P3s. The leasing requirements under Chapter 155.40, Fla. Stat. for District Hospitals also apply in conjunction with P3s.

5. Sell the Hospital.

Upon completing a very detailed and lengthy process, and obtaining required approvals, LFKHD could potentially sell the Hospital to a for-profit or not-for-profit entity, in accordance with § 155.40(16), Fla. Stat. Any future oversight or control going forward would be eliminated, except for whatever contractual provisions on this point could be obtained in the transaction. Also, if a district hospital is sold, Florida law provides that "any and all special district tax authority associated with the hospital subject to the sale shall cease on the effective date of the closing date of the sale." § 155.40(15), Fla. Stat. Disposition of the net proceeds of the sale must be divided equally between a health care economic development trust fund under the control of the county commission, and funding for the delivery of indigent care to hospitals within the district. § 155.40(16), Fla. Stat.

Finally, the original deed from the City of Key West contains a reversionary clause that requires LFKHD to use the property "as a site for hospital purposes". While directly operating or leasing the property for hospital purposes satisfies this requirement, an actual transfer, even for hospital purposes, could trigger a potential reversion of the Hospital real property to the City of Key West.

6. Self-Operate the Hospital.

LFKHD could allow the Lease Agreement to continue until its termination date and thereafter operate the hospital directly. This would require a substantial change and expansion to the basic structure, staffing and operations of LFKHD. The complexity associated with operating a hospital is substantial and highly specialized. This option would possibly conflict with the Legislature's preference for hospitals to be leased or sold to third parties, when doing so would be more beneficial to taxpayers from a better cost, efficiency and quality outcome. § 155.40(5), Fla. Stat.

Conclusion:

We have endeavored to provide you with an exhaustive list of options based upon the information provided to us. The options identified herein are extensive and varied; each with a detailed and lengthy process for implementation, more so than can be set forth in this memorandum. Naturally, each option carries respective benefits and drawbacks as identified.

There are three underlying points relating to each option which should be emphasized. First, any approach that is not coordinated with KDI will likely result in a less favorable overall outcome in terms of expenses, revenues, efficiencies and the overall health services to the community. Second, each option will require substantial advance planning, analysis and preparation with a multi-month timeline. Consequently, any decision will need to be made well in advance of April 30, 2029. Third, KDI as a private entity is not subject to state Sunshine laws, public records laws or

procurement laws. Hence, an approach that is not jointly conducted could give KDI strategic, financial and legal advantages over the LFKHD in the future operations of the Hospital.

Finally, whichever option the District pursues from above, it should require the successful "bidder" to provide all legal and transactional assurances and relevant third-party opinions necessary to fully protect, indemnify and hold the District harmless from any and all liability associated with the same, and to further ensure that all applicable laws, rules, regulations and required approvals are fully complied with.

We trust that this memorandum assists the Fact-Finding Committee in the furtherance of its goals and mission. As this is a vitally important and complex issue, please advise as to how we may be of further assistance.

Appendix I

General Overview of Procurement Options

Requests for Proposal (RFP):

Requests for Proposals (RFPs) may be utilized if the District determines, in writing and the reasons why, it is not practicable for it to define the specific *scope of work*, but that it can define the *scope of services*. § 287.057(1)(b)(1), Fla. Stat.

The RFP must include: a statement describing the contractual services sought; the relative importance of price and other evaluation criteria; and if renewals are contemplated. § 287.057(1)(b)(2), Fla. Stat.

The criteria used for evaluating a proposal must include, but are not limited to: price, which must be specified in the proposal; if renewals are contemplated, the price for each year for which the contract may be renewed; consideration of the total cost for each year of the contract, including any renewals; and consideration of the bidder's prior relevant experience. § 287.057(1)(b)(3), Fla. Stat.

The District must award the contract to the responsible and responsive bidder whose proposal is determined in writing to be the most advantageous to the state, taking into consideration the price and other criteria set forth in the request for proposals. § 287.057(1)(b)(4), Fla. Stat.

Invitations to Negotiate (ITNs):

Invitation to Negotiate (ITNs) are a "solicitation used by an agency which is intended to determine the best method for achieving a specific goal or solving a particular problem and identifies one or more responsive vendors with which the agency may negotiate in order to receive the best value." § 287.057(1)(c), Fla. Stat. Here, "best value" means the highest overall value "based on factors that include, but are not limited to, price, quality, design and workmanship." § 287.012(4), Fla. Stat.

ITNs may be utilized when the District determines, in writing and in advance, that an RFP is not practicable. They are more often utilized in more complex or/or sophisticated matters than would be appropriate for an RFP. Specifically:

> "2. The invitation to negotiate must describe the questions being explored, the facts being sought, and the specific goals or problems that are the subject of the solicitation.
>
> 3. The criteria that will be used for determining the acceptability of the reply and guiding the selection of the vendors with which the agency will negotiate must be specified. The evaluation criteria must include consideration of prior relevant experience of the vendor.

4. The agency shall evaluate replies against all evaluation criteria set forth in the invitation to negotiate in order to establish a competitive range of replies reasonably susceptible of award. The agency may select one or more vendors within the competitive range with which to commence negotiations. After negotiations are conducted, the agency shall award the contract to the responsible and responsive vendor that the agency determines will provide the best value to the state, based on the selection criteria.

5. The contract file for a vendor selected through an invitation to negotiate must contain a short plain statement that explains the basis for the selection of the vendor and that sets forth the vendor's deliverables and price, pursuant to the contract, along with an explanation of how these deliverables and price provide the best value to the state." § 287.057(1)(c)(2-5), Fla. Stat.

Public Private Partnership (P3):

The District" may receive unsolicited proposals or may solicit proposals for operation of [the Hospital] and may thereafter enter into a comprehensive agreement with a private entity" for its operations. § 255.065(3), Fla. Stat. The initial process will vary based on whether the District desires to accept an unsolicited proposal, seek additional proposals upon receipt of an unsolicited proposal, or unilaterally seeks solicited proposals from the beginning.

Upon completion of the evaluation and selection of a proposal but before approving a comprehensive plan, the District must determine, among other things, the proposed project is in the public's best interest (or previously so determined if an unsolicited offer), and has adequate safeguards, § 255.065(3)(f), Fla. Stat. There are additional project approval requirements, and project qualification and process requirements. § 255.065(4) and (5), Fla. Stat.

Before operating the Hospital, the parties enter into a comprehensive agreement. Such an agreement must provide for: delivery of bonds, letters of credit or similar security in connection with the operations of the Hospital; review and approval of any designs for the project, monitoring by the District of the maintenance practices to be performed by the private entity to ensure that the project is properly maintained; periodic filing by the private entity of the appropriate financial statements that pertain to the project; procedures that govern the rights and responsibilities of the Hospital and the private entity in the course of the operation of the Hospital, or in the event of the termination or a material default by the private entity. § 255.065(9), Fla. Stat.