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## AGENDA COVER MEMO

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AGENDA DATE: November 8, 2006

TO: Board of County Commissioners

FROM: Trina Laidlaw, Assistant County Counsel

DEPARTMENT: Office of Legal Counsel

TITLE: DISCUSSION/IN THE MATTER OF REPORT AND DISCUSSION OF STATE-COUNTY CONTRACTS, INCLUDING OREGON DEPARTMENT OF HUMAN SERVICES CONTRACTS

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### I. MOTION

None needed.

### II. AGENDA SUMMARY

The purpose of this item is to:

1. Provide a report on the status of statewide negotiations with Oregon Department of Human Services (DHS) regarding problematic provisions in DHS/County agreements. The parties have reached a stopping point, with the likelihood of continuing discussions in the future;
2. Review and seek the Board's guidance on the optional "safe harbor" provision in the 49th Amendment to the DHS Financial Assistance Agreement. The County Administrator likely has the authority to approve and execute this Amendment because it changes language only;
3. Provide an overview of a Memorandum of Understanding AOC proposes to execute with DHS covering contract provisions in county/DHS agreements; and
4. Review status of other state agency agreements with the County and Protest Letters.

### III. BACKGROUND

## **A. Board Action and Other History**

In 2001, Lane County was invited to join a work group sponsored by the state Department of Human Services (DHS) to address contract concerns expressed by counties, including Lane County. Concerns included constitutional debt limit and local budget law requirements, sufficient ability to terminate, unnecessarily unilateral provisions favoring DHS, use and confidentiality of records, and obligations of a county to its subcontractors. The work group included DHS staff, county program staff from across the state, Assistant Attorney Generals (AGs), and several Assistant County Counsels. For the first year and a half, there were a few changes made on issues of concern to counties.

In the winter of 2003, a new group of DHS staff became involved including higher level administrators and the Governor's Office. Additional negotiations produced some additional progress. DHS agreed to provide some additional reciprocity in termination provisions, to reciprocal provisions covering records created through the Agreement, and to more reasonable subcontractor provisions.

In June 2005, the County executed the 2005-07 Intergovernmental Agreements with DHS for Financing of Community Mental Health, Developmental Disability and Addiction Services and Public Health. The concerns which counties had with those agreements included:

1. Unilateral arbitration as the means to resolve a claim by DHS that a county owed money, but a refusal to allow a county to arbitrate any defense to that claim or to resolve a claim by a county that DHS owed it money.
2. Constitutional debt limit and budget law requirements being triggered by broad contractual remedies for DHS.
3. Unnecessarily unilateral provisions and lack of reciprocity, including in default, termination.
4. A lack of responsibility by DHS for its actions, specifically for directions and rules it may require a county to follow which may cause the county to violate the law.
5. DHS not taking responsibility for ambiguities in the agreement as the drafter.

By 2005, several of the counties, including Lane and Multnomah became interested in pursuing legislative action to resolve significant issues still

remaining with DHS and with other state agency contracts. HB 3303 was introduced to address these issues:

1. For multi-year contracts or contracts which span two fiscal years, there must be a provision allowing either party to terminate the contract with 30 days notice due to a non-appropriations decision.
2. Establishing reciprocal rights, where the contract includes only a unilateral right on indemnification and the right to collect money owed by the other party.
3. The constitutional debt limit problem in allowing a state agency to offset moneys owed by a county by withholding future payments the state agency owes on any other contract, present or future.
4. Any contract ambiguity must be construed against the party responsible for drafting the contract.
5. Liability for actions of employees, officers, and agencies is limited to that allowed by law and not beyond.
6. Each party maintains rights to common law rights and defenses, as applicable.

HB 3303 passed the House, but failed to pass the Senate.

Contract negotiations with DHS began again in approximately August of 2005 and have continued since.

#### **B. Policy Issues**

Any policy issues raised by this agenda item would likely be in the section covering the Memorandum of Understanding (MOU) proposed by AOC to be executed with DHS. However, because this is not an agreement to be executed by Lane County, the policy discussion will likely take place in the AOC arena.

#### **C. Board Goals**

The Lane County Strategic Plan uses several guiding principles which apply, including accountability, integrity, stewardship and teamwork. Strategic Goals include to "...[p]rovide efficient and effective financial and administrative support and systems to direct-service departments" and to pursue intergovernmental revenue. A function of the Office of Legal Counsel is to serve as the primary legal advisor to the Board of County Commissioners and upon request, may advise County officers on legal questions that may arise. Participation on the DHS contract work group along with other counties promotes

teamwork and partnership with that state agency, a major funding source, and assists with good stewardship of public funds and appropriate accountability. We have been able to identify and resolve legal issues in contract provisions at a statewide level potentially saving money used in contract-by-contract negotiation.

**D. Financial and/or Resource Considerations**

This is an informational item which seeks to keep the Board of County Commissioners apprised of statewide efforts.

**E. Analysis**

The counties have been successful in obtaining modifications to many of the provisions they requested in DHS agreements, with one provision called "safe harbor" optional for counties because a resolution could not be reached.

Amendment #49 to the DHS Financial Assistance Agreement for Mental Health, Developmental Disability and Addiction Services (FAA Agreement) represents the culmination of much hard work, and includes modifications consistent with HB 3303 or addressing other objections to the 2005-07 Agreement:

1. An agreement by DHS that a county may seek judicial enforcement of the agreement. (Without this, DHS may have raised an immunity defense).
2. More reciprocity by DHS in consent to jurisdiction, agreement to comply with all state and local laws, warranties, default.
3. Success in getting DHS to delete a provision which said that ambiguities in contract language would not be construed against DHS as the drafter. We obtained a modification which would allow a county to argue that ambiguities should be construed against DHS as the drafter.
4. Better protection for counties against constitutional debt limit issues by broadening the scope to cover more actions and remedies of DHS. (While not the best, the modifications provide counties the ability to argue they have acted consistently with the Oregon Constitution. This addresses issues in HB 3303).
5. Lengthens the time a county has to repay an underexpenditure or overexpenditure and misexpenditure from 60 to 90 days.
6. Deletion of specific and unilateral arbitration procedures, but general allowance of dispute resolution including arbitration if AG and County approves. (Eliminates the restrictions placed on arbitration in

favor of DHS. If a party wishes to arbitrate, the parties will have to agree to the scope in the future making the provision more even handed, consistent with HB 3303.)

7. A new right of a county to dispute the amount of funds paid by DHS, including non-binding discussions between the parties' administrators, other dispute resolution. (While the process and extent of the right to collect funds owed is not reciprocal, this is a recognition that a county has some right to collect from DHS).

8. A resolution of dispute provision stating either party may request use alternative dispute resolution, but preserving each parties rights to bring legal action. (This is reciprocal consistent with HB 3303).

There are a few issues which probably have not been adequately addressed including additional reciprocity and a better recognition by DHS that it should take responsibility for its actions, specifically for directions and rules it may require a county to follow which may cause the county to violate the law. In a cover note for Amendment #49, DHS explained that a "plateau" in the negotiations had been reached and that they were as close as they could get for the time being. DHS also stated it would continue to discuss/negotiate contract language through a contracts work group. One provision they were referring to was the "safe harbor" provision.

### Safe Harbor

DHS is giving the counties the option to delete "safe harbor" which has two parts: 1) a county relies on a DHS writing that violates federal law, and 2) a county relies on a DHS rule that violates federal law. We request the Board's guidance on whether to delete this provision.

The "DHS writing" portion has over a page of exceptions. It is an example of the exceptions swallowing the general rule. The "DHS writing" portion says, in effect: If a county violates federal law in making an expenditure, the county does not have to repay DHS if it relied on a DHS writing, except if the writing was contrary to clearly established law, and if the law is "gray" (later interpreted to be a violation by court or federal agency) DHS will negotiate with the county instead of demanding full repayment. So, a county is not able to avoid full repayment where a DHS writing clearly violates federal law or where the law is unclear and later interpreted to be a violation when the expenditure when made. That doesn't leave a circumstance in which a county would get a "safe harbor."

The most a county is getting from the "DHS writing" portion is an agreement by DHS to negotiate in a "gray area", and in order to receive that a county probably has to give up or lose something. While there is value to requiring DHS to negotiate, there are already other provisions which require the

parties' administrators to have non-binding discussions, and the discretion to use other dispute resolution. What the county probably loses is its ability to fully assert common law defenses it may have, including that it reasonably relied on a DHS writing or rule. There are very specific procedures in the "safe harbor" requiring only a limited number of designated DHS officials to sign writings, and requiring a county to make a request in writing listing all facts, applicable contract provisions and all applicable law that may apply. These specific procedures probably don't exist in common law. Their presence in the contract probably undermines a county's ability to argue what it is otherwise entitled to argue under common law.

The "DHS rule" portion has fewer exceptions. There is an exception that the DHS rule can not authorize an expenditure that the Agreement prohibits. If the DHS rule clearly violated federal law, a county probably does not have to repay DHS. However, if the law is gray, the most a county gets is DHS agreeing to negotiate. On balance, even though the "DHS rule" portion needs work, a county probably gets a value of a partial "safe harbor" under limited circumstances when it relies on a DHS rule.

I am recommending that Lane County delete the "safe harbor" provision at this time, but continue to work with DHS on a resolution. The reason is that we may gain a limited "safe harbor" (no obligation to repay) where a Department rule clearly violates the law, but this is probably not likely. It is questionable whether we gain much from a requirement that DHS negotiate with a county. It is likely that the County may lose its ability to raise otherwise available common law defenses in order to obtain these gains. The harm appears to outweigh the gains.

### Memorandum of Understanding

For your information, there is also a Memorandum of Understanding (MOU) which AOC may recommend it execute covering goals for provisions in contracts between individual counties and DHS. See attached. The MOU provides that DHS will, and AOC will encourage counties to endeavor to enter into intergovernmental agreements that include reciprocity, including in termination, agreement amendments, and ownership of intellectual property; provide impartial dispute resolution; and 2 year agreements with appropriate budget and constitutional law conditions for counties.

The two parties to the MOU are AOC and DHS, and there are expressly no other third party beneficiaries.

A provision was recently added to the MOU, stating that the parties agree the MOU is not legally enforceable, but rather an aspirational document. It acknowledges that the 2005-07 DHS agreements may not have moved far enough to meet the goals of the MOU and that work will continue.

Since Lane County is not being asked to execute this MOU and any discussion will likely take place in the AOC arena, some policy questions may be worth asking at AOC:

1. What should be the role of AOC with respect to contracts being executed between individual counties and DHS?
2. If the MOU is not legally enforceable, why is it being executed as opposed to some other form of memorializing goals?
3. How does the MOU affect an individual county's ability to negotiate contracts with state agencies?
4. The MOU says that DHS and AOC are the only parties to the MOU and there are no other third party beneficiaries. What if an individual county has a contract dispute in the future - it may want to point to certain provisions in the MOU and DHS may want to point to others. Shouldn't counties be recognized beneficiaries and be able to use the MOU?
5. If there is a dispute between a county and DHS over a provision in the MOU, what is AOC's role?

#### Other State Agency Contracts and Protest Letters

While a great deal of work has been done on the DHS Financial Assistance Agreement, and implicitly other DHS agreements, there has been little statewide effort to address the same and other county concerns with other state agency contracts. There are constitutional debt limit issues, the potential of a county being required to "backfill" with other general fund monies if state funding in a contract is reduced or laws change, lack of a satisfactory ability to terminate, overall lack of reciprocity, and little recognition by state agencies that they should be responsible for their own actions and not require such broad county liability. Issues such as these are still primarily being negotiated on a contract-by-contract, county-by-county basis with some occasional coordination. Issues addressed by HB 3303 are still problems in other state agency contracts such as those with the Oregon Commission on Children and Families, Oregon Criminal Justice Commission, Oregon Department of Economic Development, Oregon Youth Authority, Oregon Department of Recreation, among others.

At one time, AOC's Gordon Fultz mentioned the possibility of assisting in the formation of a group representing other state agencies and counties to address the counties' contract concerns. It is uncertain whether this is still a possibility.

The DOJ attorney most recently involved in negotiations with DHS has agreed to provide a list of the issues raised by counties in the past year and a

revision mode DHS agreement showing the resolution to DOJ attorneys who advise other state agencies. Assistant county counsels, including Lane's, have requested the opportunity to recommend additions/modifications to the list.

It would be helpful to continue to attempt to resolve issues on a statewide basis. In the meantime, we have developed a "protest letter" with some standard provisions to send to state agencies on a contract-by-contract basis. An example is attached. When a state agency refuses to consider making changes or there is time pressure to proceed, sending these letters creates a written record of the objection and may provide the ability to argue our position.

**VI. ATTACHMENTS**

- A. Memorandum of Understanding
- B. Sample protest letter



## Memorandum of Understanding

This Memorandum of Understanding (MOU) is between the Oregon Department of Human Services (DHS), and the Association of Oregon Counties (AOC). The purpose of this MOU is to jointly recognize principles that should guide the intergovernmental partnership between DHS and Counties in the delivery of human services in Oregon.

### I. General Principles.

- A. DHS and Counties play crucial roles in assuring cost-effective service delivery. County Boards of Commissioners, in their roles as the overseers of the local delivery of human services and as Public and Mental Health Authorities, have a significant interest in assuring that such services are provided on an adequate and prompt basis to the greatest possible number of County residents needing such services, given limited funding and other resources. DHS is responsible for promoting, coordinating and overseeing the statewide delivery of such services, and has a shared interest in assuring that such services are provided on an adequate and prompt basis to the greatest possible number of Oregon residents needing such services, given limited funding and other resources.
- B. DHS and Counties have an important role in assuring accountability. DHS and the Counties are responsible to and accountable for their actions to the citizens of both the County and the State. In addition, federal programs that provide federal funding and the Oregon Legislature expect and demand increased accountability by both, including use of agreements that more clearly define what is expected of each and oversight in part through audit processes. County Boards of Commissioners are elected, sworn and audited and thus, accountable to their constituencies.
- C. In providing services to the constituents, in working to comply with and administer federal, state and county laws, and provisions of intergovernmental agreements, and in providing key services in conjunction with state programs there are both shared risks and risks that are individual to the actions of DHS and Counties. Equitable risk and liability allocation, where appropriate and where consistent with statutory and constitutional constraints, is a principle both DHS and Counties agree is crucial to the successful delivery of human services in Oregon.
- D. DHS and AOC recognize that a particular meaning of the word "partnership" should be substantively reflected in DHS/County agreements reciprocally. It means, in this context: "close cooperation between the parties with both having specified rights and responsibilities and a common mission (serving the human services needs of the people of the state of Oregon)."

## II. Underlying Assumptions

- A. DHS should endeavor to keep AOC and Counties informed and involved in policy and program development, decisions and implementation including early notice and involvement in major policy or budget developments. Likewise, AOC should encourage Counties to keep DHS informed and involved in policy and program development, decisions and implementation on a timely basis.
- B. DHS will, and AOC will encourage Counties to, endeavor to enter into intergovernmental agreements that:
  - 1. Outline the work and services to be performed by each Party to the agreement;
  - 2. Set forth that if funding is reduced, the work and services expected to be performed with that funding will be reduced commensurately (in equal measure);
  - 3. Provide an impartial dispute resolution process for disagreements regarding issues arising from the Agreements;
  - 4. Given the nature of the work and services to be performed by the State and Counties, incorporate provisions, including, but not limited to those relating to termination and amendment of the intergovernmental agreement and ownership of intellectual property, that are mutual, reciprocal and equitable;
  - 5. To the extent feasible, DHS and the Counties should attempt to agree upon and implement reasonable service delivery standards, performance outcomes and measurements of success;
  - 6. Recognize the need for counties to implement State policy, rules and guidelines related to program delivery. DHS will endeavor to provide adequate interpretation of program requirements and appropriate protection to counties that implement such policies, rules and guidelines; and
  - 7. Recognize the roles of each partner and necessary policy and budget support to provide effective and efficient services.
- C. While the State and Counties have their own contracts with providers of goods and services and their own costs of administration, where appropriate and to the extent that money is available to provide cost of living adjustments to providers and for program administration, DHS will attempt to share that money on an equitable basis with the Counties, who in turn will attempt to share that money on an equitable basis with the providers.
- D. Wherever practical, biennial intergovernmental agreements, with appropriate budget and constitutional law conditions, should be considered by DHS and the Counties,

instead of annual agreements, to promote longer range planning of provision of services.

- E. To the extent feasible, given the respective responsibilities for delivery of adequate and prompt services to the greatest number of citizens in an efficient and cost effective manner, DHS and the Counties should attempt to provide appropriate and reciprocal intergovernmental agreement provisions.
- F. DHS and AOC shall establish a working arrangement to continuously improve the partnership between DHS and the counties.

### III. No Third Party Beneficiaries

DHS and AOC are the only parties to this MOU. Nothing in this MOU gives, is intended to give, or shall be construed to give or provide any benefit or right, whether directly, indirectly or otherwise, to third persons.

### III. Status of this MOU

DHS and AOC understand and agree that this Memorandum of Understanding is not legally enforceable, but is rather an aspirational document setting forth goals and principles. The parties acknowledge that existing agreements between DHS and Counties, including the agreement proposed for 2005-2007, represent a very substantial effort by the parties in the negotiations, and though the parties may or may not agree whether the 2005-2007 agreement moves far enough toward achieving the goals and principles herein, work will continue to achieve those goals and principles through the County Contracts Workgroup created by AOC and DHS. This MOU is intended to assist the parties in working toward a real public policy partnership in serving the human services needs of the people of the State of Oregon.

Association of Oregon Counties

Oregon Department of Human Services

\_\_\_\_\_  
By Ben Boswell, President

\_\_\_\_\_  
By Bruce Goldberg, M.D., Director

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Date

\_\_\_\_\_  
Date

Approved as to Form

Reviewed

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AOC Legal Counsel

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Assistant Attorney General

GENL8055

PROTEST LETTER FOR AGREEMENTS WITH DEBT LIMITATIONS ISSUES

(Date)

(Name and Address)

RE: (Title of Agreement)

Dear (Name of state employee) :

We are enclosing the executed grant agreement and this letter memorializing our understanding. In executing this agreement, and all future agreements with your agency, it is Lane County's understanding that all of the terms will be construed by both parties as in compliance with applicable law, including legal limitations in Article XI, Section 10 of the Oregon Constitution and the Oregon Tort Claims Act. It is our understanding that this Agreement will not cause or require Lane County to violate any law. The County does not waive any defense, process or remedy in law or equity.

Thank you for your cooperation.

Very truly yours,

(Authorized County Signature)

(First and second sentences may be reworded to state expressly that Lane County is executing the contract under protest.)