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**AGENDA MEMO
Supplemental**

AGENDA DATE: June 14, 2005

TO: Board of County Commissioners

FROM: Trina Laidlaw, Assistant County Counsel

AGENDA TITLE: **IN THE MATTER OF AUTHORIZING THE COUNTY ADMINISTRATOR TO SIGN AN INTERGOVERNMENTAL AGREEMENT WITH THE OREGON DEPARTMENT OF HUMAN SERVICES IN THE AMOUNT OF \$397,368 TO FUND ALCOHOL & DRUG OUTREACH WORKERS PROGRAM. (DEPARTMENT OF HEALTH & HUMAN SERVICES)(34)**

In considering this agenda item, I wanted to provide you with additional explanation about an e-mail you received from Gordon Fultz yesterday, June 13. He mentioned that there would be further negotiations on county/DHS agreements. That meeting will be taking place this afternoon at 2:30 p.m., and will involve the new interim DHS Director, Brian Johnston; DOJ; Governor's Office representatives; Gordon Fultz; and a number of county legislative information officers, including Tony Bieda. The following issues are expected to be discussed at this meeting:

1. All items agreed upon by counties and DHS in preliminary discussions over the last year, including current discussions, would be in all DHS contracts. (We have requested that this be expanded to include all items agreed upon over the last nearly 4 years.)

2. DHS contracts have included a requirement that if county (or subcontractor) misexpends funds, the county agrees that DHS may offset this debt by withholding future payments from any current or other future contract between the county and DHS, indefinitely into the future. When it withholds funds from a contract, DHS is unwilling to agree that the county can reduce the level of service by a corresponding amount. This is probably a violation of the county's constitutional debt limitation.

There will be discussion that the county needs to be able to reduce the amount of future service commensurate with the amount the state withholds to pay itself for a debt. If the state doesn't give the county money to do the work, then the county is not obligated to do the work.

3. DHS contracts require the county to bear full financial risk for a misexpenditure, even when DHS causes the misexpenditure. There will be discussion that the term "county misexpenditure" should exclude when a county relies on an Oregon Administrative Rule, or a written directive or approval from DHS, or when the expenditure is made consistent with a plan submitted and approved by DHS.

4. Certain DHS contracts require the county to assume civil and criminal liability for acts of agents (non-county employees) which is probably beyond that which the law provides. For example, the County Administrator has been required to certify

acceptance of criminal liability for a Medicaid billing agent's conduct, even when the county has no knowledge of the agent's conduct, and the crime requires actual knowledge. There will be discussion about limiting county liability to that liability provided by the law, and not beyond.

5. DHS contracts contain unilateral provisions based on common law principles which apply equally to counties. For example, common law requires each party to use good faith and fair dealing, yet the County is required to unilaterally cooperate with DHS in any contract account settlement process. (Accounting reconciliation process involving events at the end of contract which need to be reconciled in order to complete the contract - typically small amounts involved). There will be discussion about reciprocity in contract provisions when common law principles apply equally.

6. DHS contracts provide a separate process for it to recover funds owed by counties, but counties are not provided a process to recover monies DHS owes. The discussion will include reciprocity.

7. DHS requires counties to agree that this general legal rule **does not** apply: Ambiguities in contract language are construed against the party drafting the contract. State agencies, without exception, draft the agreements. The policy behind the rule is that if one party is in a stronger bargaining position and takes control of drafting the contract provisions, that party should be responsible for any confusion or errors they create. The discussion will include DHS accepting this responsibility for its actions.

8. There will be discussion about the parties' need to agree to an ongoing process to discuss/resolve contract issues after the Legislative Session.

Many of the above issues are included in HB 3303, and this bill is broader to cover other state agency/county contracts, not just DHS contracts. To the extent the discussion includes HB 3303, we have requested that state agencies follow the provisions of HB 3303 with respect to contracts where both the state and counties are essential partners in delivering services to the citizens of the state and that there be some timely process for appeal if there is material variance.

DHS Contract for \$397,368 to Fund Alcohol and Drug Outreach Workers

The legal concerns raised concerning this contract included several ambiguities and language which DHS agreed to modify, but failed to do so, in this contract. (HB 3303 states: An ambiguity in a contract must be construed against the party responsible for drafting the contract.)

1. DHS previously required the counties to agree that any "work product" created or possessed by counties in contracts belonged to DHS. DHS used the term "work product" broadly to include any document created by a county, other than client files. This was sufficiently broad to include every public record which a county creates or possesses using DHS funds, and meant that the county probably could not respond to its own public records requests. After discussion, DHS agreed that it was intending to include only intellectual property, that a county should continue to own any intellectual property it created, but would provide DHS a license to use it. This was acceptable.

The DHS contract covered by this agenda item includes both the old "work product" language and the intellectual property language. The contract states DHS will

have a license to use any county intellectual property. It also states that the county has an obligation to deliver all of DHS's property, including "work product" on contract termination, and "work product" is ambiguously described as "all documents, research, objects or other tangible things needed to complete a work product." This could conflict with the intellectual property provision which states intellectual property belongs to the county and without a definition, there is a risk this could unreasonably include county public records and client files of any subcontractor. We would likely need to pass along the same language to a subcontractor. The county could reasonably argue that DHS really intended only intellectual property, and there is probably no intellectual property to be created from this contract or subcontract, in any event.

2. There is a reciprocal right to terminate the contract on 30 days notice, for any or no reason. But, the county can terminate for non-appropriations on 45 days notice. If the county may terminate on 30 days notice for any reason, shouldn't that include for non-appropriations? This point is ambiguous, but probably not a major issue because we could probably give 45 days notice of termination due to non-appropriations.

3. DHS added a new provision to this contract: "The parties agree and acknowledge that the rule of construction that ambiguities in a written agreement are to be construed against the party preparing or drafting the agreement shall not be applicable to the interpretation of this Agreement." So, the county would receive no benefit from the general common law rule in considering the ambiguous language in 1. and 2. above.

In conclusion, while it is not fair for DHS to create these ambiguous contract provisions and not take the responsibility for doing so, I believe the County has good arguments for arguing construction of contract language in its interests as stated above.