

State-Local Contracts Workgroup

Final Report

November 3, 2010

Introduction

In 2007, the Oregon Supreme Court articulated the law relating to governmental liability for acts of agents and employees (*Clarke v. OHSU*, 343 OR 581). In 2009, the Oregon Legislative Assembly passed legislation substantially changing the provisions of the Oregon Tort Claims Act. Among other things, that legislation established different liability limits for state government than it did for local government. In addition, the Oregon Supreme Court and Oregon Court of Appeals recently issued opinions clarifying the liability of public bodies for the acts of independent contractors. With these developments in mind, a number of state and local government representatives saw a need to convene an informal group to seek agreement on what contract language to recommend to their governmental bodies that would provide for the rational allocation of risk among state government, local government and the organizations with which they contract. In January, 2010, a preliminary discussion was held among representatives of the state Departments of Justice (DOJ) and Administrative Services (DAS), City County Insurance Services (CIS) and Association of Oregon Counties (AOC). That was followed by a broader outreach to affected state and local governmental parties to become part of a workgroup to address the liability and risk issues.

Work Group Membership and Meetings

On April 8, 2010, the State-Local Contracts Workgroup was formed and its first meeting was held. Members of the workgroup are: Teresa Boes, Sue Praegitzer and Deborah Bogart (DAS); Stephanie Smythe and Leonard Williamson (DOJ); Kate Wood, Harry Auerbach and Ronda Hollis (City of Portland); Marc Anderson and Patrick Henry (Multnomah County); Carolina Marquette and Jean Straight (Oregon Youth Authority); Sara Stevenson (Washington County); Marc Kardell and Trina Laidlaw (Lane County); Debora Leopold Hutchins (Tri-Met); Lorena Wise (Oregon Department of Energy); Berri Leslie (Oregon Department of Consumer and Business Services); Stella Transue (Oregon Department of Human Services); Mark Rauch and Bob Kahl (CIS); Dwayne Kroening and Ed McGlone (Clackamas County); Ron Bennett (Oregon Department of Transportation); David Rix (Willis of Oregon, Inc.); Janine Belleque (Oregon Marine Board); Chad Jacobs (League of Oregon Cities); and Paul Snider and Michael Eliason (AOC).

At the meeting of April 8, the group formed two subcommittees: the Indemnification/Risk Subcommittee, Chaired by Teresa Boes and Co-Chaired by Marc Anderson; and the Legal Advisory Subcommittee, Chaired by Harry Auerbach and Co-Chaired by Stephanie Smythe. Paul Snider chaired the full workgroup. The Subcommittees met as necessary between meetings of the full group. The full group met two more times – on June 2nd and July 14th.

Workgroup Recommendations

The specific recommendations are set forth in Exhibit “A”. They are summarized briefly below.

The Contribution, Alternative Dispute Resolution, Indemnification by Subcontractors Provisions.

These provisions were collectively described by the work group as the 95% solution in recognition that, although the work group recommends it for broad use in many different types of contracts, there will be rare occasions where the circumstances warrant a somewhat different approach. This piece was unanimously approved by those in attendance at the July 14 meeting, but somewhat modified in response to concerns that were later raised. This portion has three separate components:

1. **Contribution.** This approach is recommended in lieu of indemnification when the parties are both governmental entities. If a party is sued, that party must notify the other party and provide it with copies of the claim and related documents. Each party then has listed rights to proceed. In the event of joint liability, each party has certain responsibilities to contribute to expenses and damages according to the relative fault attributable to that party. A process for making that determination is identified. The contribution of each party is capped as provided by Oregon law to the same extent as it would be if that party had sole liability.
2. **Alternative Dispute Resolution.** Provides that the parties should attempt in good faith to resolve any dispute arising from the agreement.
3. **Indemnification by Subcontractors.** This provision requires non-governmental subcontractors which are hired by the local government party to indemnify the state.

The Indemnification by Subcontractors Provisions. These provisions were developed further after the July 14 meeting in accordance with direction from the group. They were refined through email exchanges and brief discussions among the interested parties. They set forth the types and amounts of insurance to be provided by non-governmental subcontractors. Some types are to be required in all contracts, some are to be required in only certain forms of contracts, and some are discretionary with the agency as to whether to require them or not.

Exhibit A

Contribution

If any third party makes any claim or brings any action, suit or proceeding alleging a tort as now or hereafter defined in ORS 30.260 ("Third Party Claim") against a party (the "Notified Party") with respect to which the other party ("Other Party") may have liability, the Notified Party must promptly notify the Other Party in writing of the Third Party Claim and deliver to the Other Party a copy of the claim, process, and all legal pleadings with respect to the Third Party Claim. Either party is entitled to participate in the defense of a Third Party Claim, and to defend a Third Party Claim with counsel of its own choosing. Receipt by the Other Party of the notice and copies required in this paragraph and meaningful opportunity for the Other Party to participate in the investigation, defense and settlement of the Third Party Claim with counsel of its own choosing are conditions precedent to the Other Party's liability with respect to the Third Party Claim.

With respect to a Third Party Claim for which the State is jointly liable with the County (or would be if joined in the Third Party Claim), the State shall contribute to the amount of expenses (including attorneys' fees), judgments, fines and amounts paid in settlement actually and reasonably incurred and paid or payable by the County in such proportion as is appropriate to reflect the relative fault of the State on the one hand and of the County on the other hand in connection with the events which resulted in such expenses, judgments, fines or settlement amounts, as well as any other relevant equitable considerations. The relative fault of the State on the one hand and of the County on the other hand shall be determined by reference to, among other things, the parties' relative intent, knowledge, access to information and opportunity to correct or prevent the circumstances resulting in such expenses, judgments, fines or settlement amounts. The State's contribution amount in any instance is capped to the same extent it would have been capped under Oregon law if the State had sole liability in the proceeding.

With respect to a Third Party Claim for which the County is jointly liable with the State (or would be if joined in the Third Party Claim), the County shall contribute to the amount of expenses (including attorneys' fees), judgments, fines and amounts paid in settlement actually and reasonably incurred and paid or payable by the State in such proportion as is appropriate to reflect the relative fault of the County on the one hand and of the State on the other hand in connection with the events which resulted in such expenses, judgments, fines or settlement amounts, as well as any other relevant equitable considerations. The relative fault of the County on the one hand and of the State on the other hand shall be determined by reference to, among other things, the parties' relative intent, knowledge, access to information and opportunity to correct or prevent the circumstances resulting in such expenses, judgments, fines or settlement amounts. The County's contribution amount in any instance is capped to the same extent it would have been capped under Oregon law if it had sole liability in the proceeding.

Alternative Dispute Resolution

The parties should attempt in good faith to resolve any dispute arising out of this agreement. This may be done at any management level, including at a level higher than persons directly responsible for administration of the agreement. In addition, the parties may agree to utilize a jointly selected mediator or arbitrator (for non-binding arbitration) to resolve the dispute short of litigation.

Indemnification by Subcontractors

County shall take all reasonable steps to cause its contractor(s) that are not units of local government as defined in ORS 190.003, if any, to indemnify, defend, save and hold harmless the State of Oregon and its officers, employees and agents ("Indemnatee") from and against any and all claims, actions, liabilities, damages, losses, or expenses (including attorneys' fees) arising from a tort (as now or hereafter defined in ORS 30.260) caused, or alleged to be caused, in whole or in part, by the negligent or willful acts or omissions of County's contractor or any of the officers, agents, employees or subcontractors of the contractor ("Claims"). It is the specific intention of the parties that the Indemnatee shall, in all instances, except for Claims arising solely from the negligent or willful acts or omissions of the Indemnatee, be indemnified by the contractor from and against any and all Claims.

Subcontractor Insurance Requirements

GENERAL.

County shall require its first tier contractor(s) that are not units of local government as defined in ORS 190.003, if any, to: i) obtain insurance specified under TYPES AND AMOUNTS and meeting the requirements under ADDITIONAL INSURED, "TAIL" COVERAGE, NOTICE OF CANCELLATION OR CHANGE, and CERTIFICATES OF INSURANCE before the contractors perform under contracts between County and the contractors (the "Subcontracts"), and ii) maintain the insurance in full force throughout the duration of the Subcontracts. The insurance must be provided by insurance companies or entities that are authorized to transact the business of insurance and issue coverage in the State of Oregon and that are acceptable to Agency. County shall not authorize contractors to begin work under the Subcontracts until the insurance is in full force. Thereafter, County shall monitor continued compliance with the insurance requirements on an annual or more frequent basis. County shall incorporate appropriate provisions in the Subcontracts permitting it to enforce contractor compliance with the insurance requirements and shall take all reasonable steps to enforce such compliance. Examples of "reasonable steps" include issuing stop work orders (or the equivalent) until the insurance is in full force or terminating the Subcontracts as permitted by the Subcontracts, or pursuing legal action to enforce the insurance requirements. In no event shall County permit a contractor to work under a Subcontract when the County is aware that the contractor is not in compliance with the insurance requirements. As used in this section, a "first tier" contractor is a contractor with which the county directly enters into a contract. It does not include a subcontractor with which the contractor enters into a contract.

TYPES AND AMOUNTS.

[(Agency must check boxes for ii, iii, & iv as to which insurance is required or not and in what amount.)]

- i. WORKERS COMPENSATION. Insurance in compliance with ORS 656.017, which requires all employers that employ subject workers, as defined in ORS 656.027, to provide workers' compensation coverage for those workers, unless they meet the requirement for an exemption

under ORS 656.126(2). Employers Liability insurance with coverage limits of not less than \$500,000 must be included.

ii. PROFESSIONAL LIABILITY

☐ Required by Agency ☐ Not required by Agency.

Professional Liability Insurance covering any damages caused by an error, omission or negligent act related to the services to be provided under the Subcontract, with limits not less than the following, as determined by the Agency:

☐ \$4,000,000 [for contracts ending on or before July 1, 2013. For contracts ending after that date, Agency to contact DAS Risk Management for the appropriate amount] per occurrence (for all claimants for claims arising out of a single accident or occurrence).

OR

☐ \$(Agency to enter amount) per occurrence (for all claimants for claims arising out of a single accident or occurrence).

iii. COMMERCIAL GENERAL LIABILITY.

☐ Required by Agency ☐ Not required by Agency.

Commercial General Liability Insurance covering bodily injury, death, and property damage in a form and with coverages that are satisfactory to the Agency. This insurance shall include personal injury liability, products and completed operations. Coverage shall be written on an occurrence form basis, with not less than the following amounts as determined by the Agency:

Bodily Injury, Death and Property Damage:

☐ \$4,000,000 [for contracts ending on or before July 1, 2013. For contracts ending after that date, Agency to contact DAS Risk Management for the appropriate amount] per occurrence (for all claimants for claims arising out of a single accident or occurrence).

OR

☐ \$(Agency to enter amount) per occurrence (for all claimants for claims arising out of a single accident or occurrence).

iv. AUTOMOBILE LIABILITY INSURANCE.

☐ Required by Agency ☐ Not required by Agency.

Automobile Liability Insurance covering all owned, non-owned and hired vehicles. This coverage may be written in combination with the Commercial General Liability Insurance (with separate limits for “Commercial General Liability” and “Automobile Liability”). Automobile Liability Insurance must be in not less than the following amounts as determined by the Agency:

Bodily Injury, Death and Property Damage:

☐ \$4,000,000 [for contracts ending on or before July 1, 2013. For contracts ending after that date, Agency to contact DAS Risk Management for the appropriate amount] per occurrence (for all claimants for claims arising out of a single accident or occurrence).

OR

☐ \$(Agency to enter amount) per occurrence (for all claimants for claims arising out of a single accident or occurrence).

[Optional for Auto Liability if Contractor is transporting any commodity that could cause environmental damage, ranging from fuel oil to radioactive materials:

AUTOMOBILE LIABILITY. Automobile Liability Insurance, including MCS-90 endorsement, with a combined single limit of no less than \$ [If applicable, contact DAS Risk Management] or equal to the U.S. Department of Transportation requirements, whichever is greater. The policy shall insure against bodily injury, property damage, or environmental damage arising out of the use (including loading, transporting and unloading) by or on behalf of Contractor, its agents and employees of owned, non-owned or hired vehicles.]

[Optional – use the following provision below if there is a possibility of sudden or accidental pollution:

v. POLLUTION LIABILITY.

☐ Required by Agency ☐ Not required by Agency.

Pollution Liability Insurance covering the contractor’s liability for bodily injury, property damage and environmental damage resulting from either sudden or gradual accidental pollution and related cleanup costs incurred by the contractor, all arising out of the goods delivered or services (including transportation risk) performed under the Subcontract. Combined single limit per occurrence shall not be less than \$ [If applicable, contact DAS Risk Management]. Annual aggregate limit shall not be less than \$ [If applicable, contact DAS Risk Management].

[Note: If applicable, contact DAS Risk Management] Other type of coverage may be available if, different coverage is advisable to address the risks associated with the purchase of services under this contract. Consider whether any of the following insurance coverages may be necessary: Garagekeepers’ Legal Liability, Aircraft Liability, Aircraft/Aerial Application Liability, Marine

Protection and Indemnity, Employee Dishonesty and (when applicable) Money and Securities, Inland Marine Insurance.]

ADDITIONAL INSURED. The Commercial General Liability insurance and Automobile Liability insurance must include the State of Oregon, its officers, employees and agents as Additional Insureds but only with respect to the contractor's activities to be performed under the Subcontract. Coverage must be primary and non-contributory with any other insurance and self-insurance.

"TAIL" COVERAGE. If any of the required insurance policies is on a "claims made" basis, such as professional liability insurance, the contractor shall maintain either "tail" coverage or continuous "claims made" liability coverage, provided the effective date of the continuous "claims made" coverage is on or before the effective date of the Subcontract, for a minimum of 24 months following the later of : (i) the contractor's completion and County 's acceptance of all Services required under the Subcontract or, (ii) the expiration of all warranty periods provided under the Subcontract. Notwithstanding the foregoing 24-month requirement, if the contractor elects to maintain "tail" coverage and if the maximum time period "tail" coverage reasonably available in the marketplace is less than the 24-month period described above, then the contractor may request and Agency may grant approval of the maximum "tail " coverage period reasonably available in the marketplace. If Agency approval is granted, the contractor shall maintain "tail" coverage for the maximum time period that "tail" coverage is reasonably available in the marketplace.

D. NOTICE OF CANCELLATION OR CHANGE. The contractor or its insurer must provide 30 days' written notice to County before cancellation of, material change to, potential exhaustion of aggregate limits of, or non-renewal of the required insurance coverage(s).

E.CERTIFICATE(S) OF INSURANCE. County shall obtain from the contractor a certificate(s) of insurance for all required insurance before the contractor performs under the Subcontract. The certificate(s) or an attached endorsement must specify: i) all entities and individuals who are endorsed on the policy as Additional Insured and ii) for insurance on a "claims made" basis, the extended reporting period applicable to "tail" or continuous "claims made" coverage.