

Chapter 10

Contract Research

“After 40-plus years of working with at-risk youth, it's difficult for me . . . and this is a personal basis; I'm expressing my board's opinion. We're very upset about youth and families not getting the services they need. We were some of those 83 beds that disappeared, okay? It is difficult for me to trust a system that says they have the best interests of the youth and family at heart, when it really comes down to the dollar. And we hear that over and over. But it's time to seriously look at this thing, because it is out of control; it's unmanageable. “

~ Subcontractor from Western Service Area

Legislative Performance Audit Report: (Relevant Excerpts regarding Contracting)

Contracting Process

Recommendation: The LPA Committee will work with the Health and Human Services and the Government, Military and Veterans Affairs committees to propose and/or support legislation requiring agencies to work with the Department of Administrative Services in the letting of personal services contracts to ensure adequate accountability and sound contracting practices.

Recommendation: The LPA Committee will work with the Health and Human Services Committee to propose legislation establishing a moratorium on adding any additional DHHS service area to any new or existing lead agency contract to provide services in the child welfare system and juvenile justice system and for wards of the state pursuant to the child welfare reform initiative known as Families Matter.

Legislative Performance Explanation The LPA Committee believes that process used by CFS administrators to contract for child welfare and juvenile services was inadequate in significant ways. In particular, the absence of a written analysis of the potential costs (through a cost-benefit or similar analysis) and the inadequacy of the assessments of the ability of potential providers to provide the necessary services and maintain financial viability were of concern. The LPA Committee believes that statutory changes are needed to prohibit any state agency from entering into contracts that may present a high risk of service disruption and expose the state to high financial liability because of lack of adequate analysis and documentation.

DHHS Contract Oversight

Recommendation: The Legislative Performance Audit Committee will work with the HHS Services and Government committees to propose or support legislation to require a written cost-benefit or similar analysis, or an opinion by a financial expert, of the potential financial implications of personal services contracts valued at \$25 million or more.

Legislative Performance Audit Explanation: State government should have a protection in place to keep a state agency from being able to enter into substantial personal services contracts without conducting or obtaining a detailed analysis of the potential financial implications.

Nebraska Auditor of Public Accounts Audit (Summary of Relevant Excerpts)

Boys and Girls Home Contracts Not Settled in a Timely Manner:

BGH had separate service contracts for the Western, Central, and Northern service areas. The original contract amount for these three areas totaled \$2,900,759 monthly – or a total of \$8,702,277 covering July through September 2010. Through amendments, those payments were increased to a total of \$14,957,548, an increase of \$6,255,271 or 72% for the 2011 contract period.

The actual total costs of services for the 2011 contract period cannot be determined because, as of August 19, 2011, DHHS had not settled the service contracts with BGH. Payments to BGH for July 1, 2010, through March 31, 2011, were \$13,792,704.

In addition to settling with BGH for the remainder of the contract amount, there are also BGH subcontractors who are still owed in excess of \$3.6 million for their services. To date, DHHS has not settled any of its three service contracts with BGH, despite the fact that eleven months have passed since those contracts were terminated. A balance of \$1,364,551 remains due to BGH on those contracts, assuming the agreed-upon services were provided prior to September 30, 2010. DHHS has a box of BGH claims totaling \$4,478,367 that have not yet been entered into NFOCUS. BGH subcontractors have still not been paid. As of March 31, 2011, per the listing provided by DHHS, subcontractors were owed a total of \$3,684,657 for services performed prior to September 30, 2010.

DHHS Response to APA : DHHS has worked diligently to resolve remaining Boys and Girls Home, Inc (BGH) contract issues since BGH ceased performance under the contract, with the primary objective of ensuring that BGH subcontractors receive payment to the maximum extent possible for services provided to children and families. DHHS has been in communication with approximately 85 BGH subcontractors to confirm the amounts payable and advise them of the status of negotiations. Because DHHS lacks legal authority to unilaterally distribute the remaining funds available under the contract directly to BGH subcontractors, and because the amounts owed by BGH to its subcontractors exceeds the amount of contract funds available, distribution of contract funds to the subcontractors cannot occur absent an agreement among DHHS, BGH and BGH subcontractors. Recently DHHS provided a draft settlement agreement to BGH and its subcontractors for review and comment. DHHS remains committed to achieving a satisfactory resolution of these issues.

With respect to the increase in compensation to Boys and Girls Home for July, August, and September 2010, it is important to note that there was a corresponding decrease in compensation for October 2010 through June 2011 of \$6,410,376.81.

APA response: The inability of DHHS to provide documentation supporting the decision to front load the service contracts indicates a lack of prudence on the part of that agency given that two contractors had already terminated, DHHS had not performed any financial monitoring, and issues regarding BGH. The decision by DHHS to front load these contracts resulted in taxpayers footing the bill for an additional \$6,255,271.

A lack of oversight on the part of DHHS, including a failure by that agency to enforce the contractual requirement that lead contractors pay subcontractors within 45 days of rendering service, is a major reason that subcontractors are owed more than the total amount remaining on the BGH contracts and have not been paid for services dating as far back as November 2009.

Competitive Bidding Requirements:

We questioned whether the service coordination and delivery contracts legitimately fall within the § 73-507(2)(e) exemption from the statutory bidding requirements for service contracts. Neb. Rev. Stat. § 73-504 (Reissue 2009) requires that State agencies follow established competitive bidding procedures when entering into contracts for services. That statute provides, in relevant part:

“(1) All state agencies shall comply with the review and competitive bidding processes provided in this section for contracts for services. Unless otherwise exempt, no state agency shall expend funds for contracts for services without complying with this section; (2) All proposed state agency contracts for services in excess of fifty thousand dollars shall be bid in the manner prescribed by the materiel division procurement manual or a process approved by the Director of Administrative Services. Bidding may be performed at the state agency level or by the materiel division. Any state agency may request that the materiel division conduct the competitive bidding process[.]”

Neb. Rev. Stat. § 73-507 (Reissue 2009) offers various exceptions to the above bidding requirements. Specifically, subsection (2)(e) excepts:

“Contracts with direct providers of medical, behavioral, or developmental health services, child care, or child welfare services to an individual[.]”

The implementation contracts, which totaled \$7 million, provided funding to hire and train staff and purchase equipment for the program. The service coordination and delivery contracts, which originally totaled \$149,515,887 for fiscal year 2010-11, have been amended seven times through January 2011. Amendment 5 increased both the services provided and the amount paid by \$6 million. Adding even more services, Amendment 7 increased the cost of the contracts by another \$19 million. As of August 16, 2011, the total amount awarded thus far for the service coordination and delivery contracts during fiscal years 2010-14 is \$423,837,856.

Our review of the service coordination and delivery contracts revealed that the actual service delivery is often subcontracted out by the contractors – meaning that the subcontractors and foster families, as opposed to the contractors themselves, serve as the true direct providers of the services to individuals. Based upon the RFQ responses received, DHHS was aware that the contractors would need to subcontract with foster parents and other providers rather than directly provide most services themselves. That being the case, we questioned whether those service coordination and delivery contracts legitimately fall within the § 73-507(2)(e) exemption from the statutory bidding requirements for service contracts.

In excess of \$100 million of public funds have already been spent on the service contracts for fiscal year 2010-11, and hundreds of millions more are likely to follow. Regardless of whether those service provider agreements actually fall within either of the relevant exceptions found under § 73-507, we believe that contracts of such magnitude should be publicly bid as a matter of course.

Sound governmental accounting practices require that contracts involving the expenditure of millions of dollars in public funds be let for bid to ensure the fair and reasonable expenditure of those funds, as well as to make certain that the State receives the best services for the lowest possible price. Also, pursuant to Amendment 7 to the service contracts, which was adopted in December of 2010, the service providers have also taken on case management functions. According to

DHHS’ meeting notes with contractors on April 7, 2010, “case management” means:

“[A] a collaborative process of assessment, planning, facilitation and advocacy for options and services to meet individual’s health needs through communication and available resources to promote quality cost-effective outcomes.”

Allowing the providers themselves to oversee the management of the cases that they handle gives rise to a potential conflict of interest – offering the opportunity, if not an actual incentive, for them to base decisions regarding the provision of services more upon cost criteria than upon the best interests of the recipients. Such a situation threatens not only to undermine the effectiveness of performance under the service contracts but also to prove harmful to the welfare of those receiving the

services. To avoid these potential consequences, DHHS should discontinue the practice of allowing service providers to also assume case management functions. Instead, DHHS should segregate these responsibilities by bidding out the case management functions to neutral oversight providers capable of making objective determinations when assessing the quality and cost effectiveness of the services offered.

DHHS Response to APA: DHHS disagrees with the APA's assessment of the competitive bidding requirements. Although DHHS had legal authority to award these contracts without any competitive process, it elected to issue a Request for Qualifications, thereby allowing all interested bidders to compete for a contract. This process was very public, and many organizations competed for the contracts, both individually and in groups. DHHS used the information gathered during the RFQ process to determine which organizations were awarded a contract. Because the Lead Contractors are equally responsible for services provided by the Lead Contractor itself and services provided by a subcontractor, the identity of the actual provider of the service is irrelevant to the applicability of statutory competitive bidding requirements. All of the services provided under the contract are child welfare services provided directly to individuals. As required by state law, DHHS retained final decision making authority under the contracts regarding case plans submitted to the court. Case plans not consistent with a child's best interests are returned by DHHS to the Lead Contractors for revision. In addition, because all case plans require court approval prior to implementation, they receive thorough scrutiny from County Attorneys, Guardians ad Litem, Parent and Juvenile attorneys, Court Appointed Special Advocates, the Foster Care Review Board, and the Juvenile and Appellate Courts, just as DHHS case plans are scrutinized in areas of the state where Lead Contractors are not in place.

APA Response: Whether a lead contractor that subcontracts with another provider, as well as possibly contracting further with a foster parent, qualifies as a "direct provider of . . . services to an individual" under Neb. Rev. Stat. § 73-507 (Reissue 2009) for purposes of being exempt from competitive bidding requirements, or is merely a non-exempt service coordinator, may ultimately prove a matter of statutory interpretation for the Attorney General to decide. Nonetheless, DHHS chose to use its own staff to handle the contract process, rather than taking advantage of the experience of the Department of Administrative Services-Materiel Division (DAS).

In a letter to DAS regarding the transfer of case management to the lead contractors, DHHS states:

"Currently CFS operates on a ratio of approximately 20 cases per CFS Specialist . . . Under reform the new role of CFS would be to provide oversight to [KVC, NFC] case managers and maintain final decision making related to court recommendations as required by law. This new oversight position will oversee a ratio of one to 80 cases. It is anticipated that caseloads may increase over time to 120 cases based on review of implementation." We believe the oversight that could be provided with a ratio of 1 to 80 or 1 to 120 cases would be negligible.

Furthermore, DHHS states that all of the services provided under the contracts are child welfare services provided directly to individuals. However case management is not a direct service to individuals. The letter by DHHS to DAS noted above pertains to compliance with Neb. Rev. Stat. §§ 73-301 through 73-306 (Reissue 2009). Regardless, per Neb. Rev. Stat. § 73-301 (Reissue 2009):

"The Director of Administrative Services shall review and approve or disapprove any contract for personal services between a private entity and any state agency . . . if, on

the effective date of the contract, the personal services are performed by permanent state employees of the agency and will be replaced by services performed by the private entity. The contract shall be subject to the public bidding procedures established in sections 81-145 to 81-162 except in emergencies approved by the Governor.”

Lack of Support for Determination of Initial Service Contract Amounts:

DHHS did not consider Program 345 Juvenile Community-Based services and child support collections in determination of funding available to lead contractors. Also, the amount excluded for detention was not reasonable. For the fiscal year ended June 30, 2009, prior to the implementation of any of the lead provider service contracts, DHHS spent \$107,753,602 on providing child welfare services. However, when determining the amount needed for the lead contractors to perform those same services in 2010, DHHS arrived at a figure of only \$105,809,752 annually. As a result of DHHS' calculations, the fees provided under the service contracts were based upon the curious assumption that the lead contractors could perform comparable child welfare services at a cost of \$1,943,850 less per annum than the amount DHHS had expended for those same services the previous year.

DHHS response to APA- DHHS concurs with the APA's finding in regard to funding in recognition of child support collections used to support the cost of child welfare services. DHHS disagrees with any inference that there was not supportive documentation to determine the initial contract amounts or that the process to determine contract amounts was not done in good faith.

As mentioned in the report, Program 345 funds and a portion of Program 347 Funds were not available for contracts. The reason for this is that DHHS and the contractors agreed that DHHS would maintain responsibility for the costs of detention, the DHHS' Interagency Agreement with the Administrative Office of Probation (CFS/AOP Pilot) and the Youth Links Contract. The amount of funds excluded from contracts and retained by DHHS to cover these costs was a reasonable and necessary amount based on historical expenditures by DHHS for detention services and the other two identified contracts.

Contract Transition Percentages Were Not Met:

Under eight of the nine service contracts, the lead contractors did not meet their required contractual percentages for transitioning service coordination and service delivery for families. The accumulated shortages ranged from 1% to 18%. Because fiscal year 2010 contract amounts were based on the transition percentages, DHHS incurred additional costs coordinating and delivering services for which the lead contractors were already being paid.

DHHS response to APA: DHHS concurs with the APA's finding that "contracted organization assignment" dates in N-FOCUS were not always correct. The experience with these contractors will be taken into account in developing procedures in the future to further reduce the likelihood of such errors. DHHS respectfully disagrees with the APA's assessment of the transition process. DHHS was aware of and involved in the adjustments to the transition plans. The transition plans were developed as monthly targets toward full transition of all cases by April 1. As the transition took place, Lead Contractors and DHHS staff experienced challenges in a number of areas including staff hiring and training, new cases coming into the system and the logistics of transferring case information. Adjustments to the plans were agreed to by DHHS and individual contractors in order to have as smooth a transition as possible for the children. The error is in not having amended the contracts to reflect the agreed upon adjustments. Even with the adjustments to transition plans, DHHS was able to meet its obligations within its budget.

Background Information on Service Contracts

Prepared by Government, Military and Veterans Affairs Committee Staff

Introduction:

The purpose of this white paper is to review the process for a state agency to enter into a contract for services and to evaluate whether the Department of Health and Human services followed that process as outlined in statute.

As background, DHHS initiated the Families Matter reform in 2009 by entering into contracts with private providers of child welfare services. The first contracts were to carry out the implementation stage of the reform. The second round of contracts were the service coordination and delivery contracts. These contracts have been amended several times, including an amendment for a private provider to take over case management duties. None of these contracts were competitively bid because DHHS determined the contracts were exempted from that requirement under Neb. Rev. Stat. 73-507 (2) (e).

LB 626, passed in 2003 and codified in Neb. Rev. Stats 73-501 through 509, outlines how state agencies may enter into contracts for services. As provided in LB 626, now found at Neb. Rev. Stat. 73-501, the purpose of the legislation is to “establish a standardized, open, and fair process for selection of contractual services and to create an accurate reporting of expended funds for contractual services. This process shall promote a standardized method of selection for state contracts for services, assuring a fair assessment of qualifications and capabilities for project completion. There shall also be an accountable, efficient reporting method of expenditures for these services.”

Before LB 626, an executive order was issued in December 2002 dealing with service contracts. (Executive Order No. 02-03). The Executive Order outlined how state agencies would contract for services. Included in the Order were requirements that all agencies process and document all contracts through the state accounting system, Nebraska Information System (NIS). Unless otherwise exempted, all agency directors were required to assure that each service contract and personal service contract in excess of \$25,000 be competitively bid at the agency level in the manner prescribed by the DAS Materiel Division. If the contract was over \$50,000, the agency directors were required to have each service contract and personal service contract pre-reviewed by DAS Materiel Division and competitively bid at the agency level. Contracts that were exempted from these requirements included “medical provider or practitioner agreements for participation in the Medicaid program or child welfare program administered by HHSS.”

As LB 626 was first introduced, it followed many of the same provisions as the Executive Order including processing and documenting all contracts for services through NIS, and competitive bidding requirements for contracts over \$25,000. The original LB 626 did not include an exemption for child welfare providers. The bill was amended on Select File to include a list of exemptions, including an exemption for contracts with providers of child welfare services. There is a more thorough discussion on the history of this exemption later in the memo.

Although the statutes include provisions for exempting certain contracts from competitive bidding, the statutes also outline certain requirements for **all** service contracts. Those requirements are outlined in more detail below.

The information used in this memo is based on testimony before the Health and Human Services Committee of the Legislature and the Auditor's report on the Family Matters contracts. This information may not be complete and therefore, some of the analyses below may require additional information.

1. Documenting Service Contracts

Neb. Rev. Stat. 73-503 requires all state agencies to process and document all contracts for services through the state accounting system, referred to as NIS. This is required even if the contract is exempt from the competitive bidding portion of the law. The law requires all state agencies to enter the information on new contracts for services and amendments to existing contracts for services through the state accounting system.

The purpose of this provision is to ensure all service contracts are documented, even by entities that are excluded from most other sections regarding service contracts.

There has been little information brought forward as to whether the Family Matters contracts were entered into the NIS system or whether the amendments to these contracts were entered into the system as required by law.

2. State agency directors' duties

According to Neb. Rev. Stat. 73-505, state agency directors are responsible for maintaining accurate documentation of the process used for selection of all contracts for services and for ensuring and documenting that services required under the contract are being performed in compliance with the terms of the contract for services. The law further states that documentation will be kept with each contract for services.

The Auditor's report states "there appears to be no documentation supporting the various contract amendments that have given rise to ballooning service costs—such as the total \$6 million contractual increase for NFC and KVC, per Amendment 5, and a further \$19 million in overall service contract increases for those same two providers, per Amendment 7." Page 3, Auditor's Report. Additional information may be required to determine if accurate documentation of the contracts was maintained.

3. Requirements for State Agency Contracts for Services

Neb. Rev. Stat. 73-506 requires that state agency contracts for services meet certain requirements including that state agencies may not structure contracts for services to avoid any of the requirements in the contract for services statutes.

Some may argue DHHS structured its contract to avoid the competitive bidding statutes, specifically as it relates to the case management amendment. According to the Auditor's report, the decision to move case management services from DHHS to a private entity was done by amendment to a current contract.

If it can be determined that case management does not involve providing a direct service to an individual, it can be argued that a separate contract for case management should have been procured through the competitive bidding statutes since it would not fall under the child welfare exemption.

4. History of Child Welfare Exception

As mentioned above, DHHS claims the Families Matter contracts did not need to go through the competitive bidding statutes because they were exempt under Neb. Rev. Stat. 73-507 (2)(e) which provides that exceptions to the competitive bidding provisions may be granted for “contracts with direct providers of medical, behavioral, or developmental health services, child care, or child welfare services to an individual.”

The original LB 626, as well as the committee amendment, did not include an exemption for contracts for child welfare services. The Executive Order 02-03 provided an exemption for “**medical provider or practitioner agreements for participation in the Medicaid program or child welfare program administered by HHSS.**”

LB 626 was amended on Select File to include an exemption for child welfare contracts. AM1421, adopted on Select File, provided that exemptions may be provided for “**contracts with direct providers of medical or child care procured for individual public assistance clients or any other client-based service identified by the materiel division.**” One reason given for the need for an exemption for these types of contracts included was that federal law governs Medicaid provider agreements and prohibits competition. Therefore, competitive bidding would not be appropriate. Similarly, child welfare provider agreements between DHHS and medical providers who give services to wards of the state and their families involve standardized rates for core services. AM1421 was adopted on April 25, 2003.

After AM1421 was adopted, a series of meetings were held regarding the child welfare exemption. On April 25th a meeting was held to discuss an amendment proposed by the Governor’s Policy Research Office. PRO proposed the following amendment: “**contracts with direct providers of medical or child welfare services procured for individuals; ~~care procured for individual public assistance clients or any other client-based service identified by the materiel division~~**” There were three reasons provided for this amendment.

1. “child welfare” term needs to be included in order to cover services procured for individual state wards. State wards are not “public assistant clients”;
2. “child care” has a specific statutory meaning (i.e. daycare) but does not cover state wards in residential care; and
3. “or any other client-based service identified by the materiel division” is deleted because a) the term is more broad than intended because it opens up the exemption to many other program contracts like Meals on Wheels, chore services in homes of clients, developmental disability services etc and b) DAS would have difficulty identifying “other client-based services” and c) DAS claims there would be a cost added to the bill because of its involvement in construing this exemption.

PRO additionally writes that their amendment “tightens the text” so that the exemption only applies to DHHS contracts “that are entered into to provide for direct care for individual state wards or people qualifying under already-established statutory criteria in the specified DHHS programs.”

On April 26th, another meeting was held to discuss a different amendment proposed by the lobbyists for the Development Disability regions/providers, private behavioral health providers and the hospitals. Their amendment provided: **Contracts with direct providers of medical, behavioral, or developmental health services, child care, or child welfare services to an individual**

client-based service identified by the materiel division.

On May 1, AM1671 was adopted to LB 626. The language of that amendment is the current language in statute: **contracts with direct providers of medical, behavioral, or developmental health services, child care, or child welfare services to an individual.”**

Language requiring the service to be identified by the materiel division was deleted, I assume, based on the information provided by PRO that it would add cost to bill and would be difficult for DAS to determine.

When reviewing the transformation of this language, it appears the language become narrower in some aspects with the ensuring amendments. In the Executive Order, the language is broad to include “medical provider or practitioner agreements for participation in the Medicaid program or child welfare program administered by HHSS.” Arguably, this exception would include contracts such as Families Matters because they are child welfare programs administered by DHHS. But later versions of the amendment appear to narrow the focus of the amendment to require the contracts be for direct services for individuals. (See PRO amendment and AM1671.) Even the PRO office at the time argued for elimination of the phrase “or any other client-based service identified by the materiel division” because the term is broader than intended and it opens up the exemption to other programs. The interpretation of Neb. Rev. Stat. 73-507(2)(e) raises questions about its intent and more information may be needed.

On a related issue, more information may be needed to determine whether the decision to contract for case management should have been bid separately from the original contract. If the case management contract was bid separately, similar questions as those raised above would surface. For example, does case management fall under the “contract with direct providers for child welfare services to an individual” exception? Another issue is whether this amendment to the original contract was entered into the NIS system as required by Neb. Rev. Stat. 73-503.

Finally, there are questions about the implementation contract. According to the Auditor’s report, the implementation contract provided funding to hire and train staff and purchase equipment for the program. The same questions arise as noted above: Was this contract entered into the NIS system as required by Neb. Rev. Stat. 73-503? Did the implementation contract fall under the exception of a contract providing child welfare services to an individual?

5. Additional Statutes on Service Contracts: Neb. Rev. Stat. 73-301 to 306

The intent of Neb. Rev. Stat. 73-301 through 73-307 is to require DAS to review and approve or disapprove contracts for personal services between the state and a private entity if the personal services are performed by permanent state employees on the effective date of the contract and will be replaced by services performed by the private entity. These additional statutes may apply to the case-management services contract entered into between DHHS and private contractors. Under those contracts, case management functions were transferred from DHHS employees to private contractors and state employee jobs were lost.

It is my understanding that Senator Health Mello requested an Attorney General’s opinion on this issue. The Attorney General opines that DHHS appropriately followed these statutes when contracting for the case management services. DHHS did not follow these statutes when contracting for the “service coordination functions” but again, the AG opined that since state employee jobs were not lost, these sections of statute do not apply.

**OVERVIEW OF ISSUES RELATED TO DHHS SERVICE DELIVERY AND
COORDINATION CONTRACTS WITH BOYS AND GIRLS HOME, INC.**

Prepared for the Health and Human Services Committee

September 7, 2011

INTRODUCTION

The purpose of this overview is to provide the Committee with information regarding unresolved issues surrounding the three contracts between DHHS and Boys and Girls Home, Inc. (BGH), for child welfare and juvenile services entered into in November 2009 and terminated in February 2011. This overview will first set forth a timeline of events, followed by a discussion of the legal reasons preventing DHHS from making payment to the subcontractors. Finally, this overview will provide an update on the status of settlement negotiations.

TIMELINE OF EVENTS

For purposes of this timeline, events prior to the execution of the service delivery and service coordination contracts will be omitted. The contracts were entered into in November 2009, and were subsequently amended four times. In September 2010 DHHS was informed by BGH that it could not continue to perform its obligations under the contracts. The parties verbally agreed that BGH would continue providing services under the contracts until October 15, 2010, and that a written termination agreement would be executed based on the verbal agreement. Notwithstanding the verbal agreement, BGH stopped performing at the end of September 2010, and declined to sign a document commemorating the parties' verbal agreement.

The following is a table containing a summary of dates and relevant events for the purposes of this overview:

11/09	DHHS enters into Service Delivery and Service Coordination contracts with BGH for the Central, Northern, and Western Service Areas. The contracts are subsequently amended in January 2010, February 2010, and twice in July 2010.
09/10	DHHS and BGH verbally agree to a mutual termination of the contracts, effective October 15, 2010. Implicit in the agreement is an understanding that a written agreement to that effect will be prepared and signed. BGH represents to DHHS that it will pay subcontractors for services provided through 9/30/2010.
09/30/10	Contrary to the parties' verbal understanding, BGH ceases performance under the contracts, after September 30, 2010.
02/22/11	After attempting unsuccessfully for more than four months to negotiate the terms of a contract termination agreement, DHHS abandons those efforts and provides BGH with a written Notice of Termination for cause, taking immediate effect.

LEGAL ISSUES REGARDING PAYMENT TO SUBCONTRACTORS

DHHS Authority

DHHS is a statutory agency, and its authority, including spending authority, is limited to that which is expressly granted in statute or necessarily implied to carry out expressed powers. See *Big John's Billiards, Inc. v. Balka*, 254 Neb. 528. DHHS has reviewed several legal

theories, outlined briefly herein, under which subcontractors might receive payment directly from the State and has concluded that DHHS has no legal authority to make such payments, and any such payments would therefore be an improper expenditure of public funds.

Subcontractors as Third Party Beneficiary

DHHS has considered whether DHHS could distribute remaining contract funds directly to the subcontractors without BGH's consent, under the theory that the subcontractors are "third party beneficiaries" of the contracts. BGH subcontractors have suggested that they are third party beneficiaries because the contracts require BGH to pay the subcontractors within 45 days. However, Article XXI of the Nebraska Constitution prohibits DHHS from extending the credit of the state by guaranteeing payment to subcontractors. See *Haman v. Marsh*, 237 Neb. 699 (1991). In addition, the Nebraska Supreme Court and courts in other jurisdictions have found that third parties may not enforce specific provisions in a government contract absent express language to that effect. In *re School District v. Thomas*, 51 Neb. 740 (1897).

Assignment of Subcontractor Claims

Some subcontractors have proposed that DHHS pay the subcontractors, take an assignment of their claims, and exercise a right of setoff against sums payable to BGH. However, because DHHS lacks statutory authority to accept an assignment, it has no legal authority to do so. In addition, accepting such an assignment would violate Article XXI of the Nebraska Constitution, which prohibits the granting or extending the state's credit to, or otherwise acting as a surety or guarantor for a private enterprise. See *Haman v. Marsh*, 237 Neb. 699 (1991).

SETTLEMENT NEGOTIATIONS

After BGH stopped performing, DHHS suspended payments to BGH under the contracts. Although DHHS has no authority to pay subcontractor claims, DHHS could, with the consent of BGH, distribute funds lawfully payable to BGH directly to subcontractors. DHHS has been attempting to negotiate such an agreement for several months. DHHS can lawfully pay BGH the amount of \$1,401,324.00. BGH owes its subcontractors approximately \$3,982,969 for services provided under the subcontracts. Under the proposed settlement agreement, \$1,401,324 would be distributed pro rata to the subcontractors. In exchange for this payment, subcontractors would waive any remaining claims against BGH arising out of the subcontracts, and would agree not to pursue any remedy against the State under the State Tort Claims Act or the State Contract Claims act. In addition, BGH would waive any claims against the State.

Copies of the proposed settlement agreements between the parties are attached. DHHS has contacted all BGH subcontractors seeking their reaction to this plan and their willingness to participate. Whether or not a settlement is reached will likely depend on the level of participation of BGH subcontractors.

AGREEMENT

THIS AGREEMENT is entered into by and among Boys and Girls Home of Nebraska, Inc. (BGH), _____ (Subcontractor), and the Nebraska Department of Health and Human Services (DHHS) as follows:

1. Contract shall mean the Service Delivery and Service Delivery Coordination Contracts between DHHS and BGH, for the Central, Northern, and Western Service Areas, dated October 30, 2009 and subsequently amended.
2. Subcontract shall mean any contract between BGH and a provider of any child welfare or juvenile services provided to satisfy BGH's obligations within the scope of services of BGH's Contract with DHHS.
3. The sum of \$1,401,324.00 remains unpaid to BGH under the Contract.
4. The aggregate amount of unpaid Subcontract claims against BGH is believed to be \$3,982,969.00.
5. BGH authorizes DHHS to pay Subcontractor from funds remaining unpaid to BGH under the contract the sum of \$ _____, in full and complete satisfaction of any subcontract claims. This amount is in proportion to the funds available from DHHS to BGH, compared to the aggregate unpaid Subcontractor claims.
6. Conditioned upon receipt of payment set forth herein, Subcontractor hereby releases and forever discharges BGH from any and all claims, demands, obligations, losses, causes of action, costs, expenses, attorney fees and liabilities of any kind arising out of services provided under the Subcontract. Subcontractor also waives any remedy against the State of Nebraska pursuant to the Nebraska State Tort Claims Act or the Nebraska State Contract Claims Act.
7. Conditioned upon the Subcontractor accepting payment as set forth herein in satisfaction of its claim, BGH, on behalf of itself and its successors and assigns, hereby releases and forever discharges Subcontractor from any and all claims, demands, obligations, losses, causes of action, costs, expenses, attorney fees and liabilities based on the Subcontract.
8. Each party to this Agreement will bear its own costs, expenses, and claims to interest and attorneys' fees, whether taxable or otherwise, incurred in or arising out of, or in any way connected with the matters which are referenced or covered in the mutual releases referenced above or which were otherwise related to the subject of this Agreement.
9. The parties each represent and warrant to one another that they have not sold, assigned, transferred, conveyed or otherwise disposed of any claim or demand covered by this Agreement, and that they and their undersigned representatives have authority to enter into this agreement.

This agreement is not binding unless fully executed by all parties on or before _____, 2011.

AGREEMENT

THIS AGREEMENT is entered into by and among Boys and Girls Home of Nebraska, Inc. (BGH) and the Nebraska Department of Health and Human Services (DHHS).

WHEREAS, DHHS and BGH entered into separate Service Delivery and Service Coordination Contracts for the Central, Northern, and Western Service Areas, under which BGH agreed to provide certain child welfare and juvenile services to children and families on behalf of DHHS; and DHHS agreed to provide payment for said services to BGH; and

WHEREAS, BGH entered into subcontracts with various subcontractors for the provision of necessary services under the Service Delivery and Service Coordination Contracts; and

WHEREAS, Subcontractors have made claims to BGH for services provided to BGH under the Subcontracts.

NOW, THEREFORE, the Parties mutually agree as follows:

1. Contract shall mean the Service Delivery and Service Delivery Coordination Contracts between DHHS and BGH, for the Central, Northern, and Western Service Areas, dated October 30, 2009 and subsequently amended.
2. Subcontract shall mean any contract between BGH and a provider of any child welfare or juvenile services provided to satisfy BGHs' obligations pursuant to the Scope of Services under the Contract with DHHS.
3. The sum of \$1,401,324.00 remains unpaid to BGH under the Contract.
4. Approximately \$3,982,969.00 remains unpaid to Subcontractors under their Subcontracts with BGH.
5. DHHS will pay each participating Subcontractor from funds remaining unpaid to BGH under the contract, a sum equal to the subcontractor's claim multiplied by a fraction, the numerator of which is \$1,401,324.00, and the denominator of which is \$3,982,969.00 (35.26%). This amount is in proportion to the funds available from DHHS to BGH, compared to the aggregate unpaid Subcontractor claims. DHHS will not pay from these funds a subcontractor who has not executed a settlement agreement. These Subcontractor settlement agreements must contain, at a minimum, a release by Subcontractor of all claims against DHHS and BGH arising out of the performance of services under the subcontract, and the amount of payment to be accepted by Subcontractor in complete settlement.
6. Conditioned upon payment of \$1,401,324.00, either to Subcontractors or BGH, BGH, on behalf of itself and its successors and assigns, hereby releases and forever discharges DHHS from any and all claims, demands, obligations, losses, causes of action, costs, expenses, attorney fees and liabilities based on the Contract.

7. The parties hereto agree and acknowledge that this Agreement is a compromise settlement of each party's disputed claims, and that the sums and covenants given in consideration of this Agreement, as well as the execution of this Agreement, shall not be construed to be an admission of liability on the part of any party with respect to the disputed matters set forth above.
8. Each party to this Agreement will bear its own costs, expenses, and claims to interest and attorneys' fees, whether taxable or otherwise, incurred in or arising out of, or in any way connected with the matters which are referenced or covered in the mutual releases referenced above or which were otherwise related to the subject of this Agreement.
9. In entering into this Agreement, the parties each acknowledge and represent that the terms of this Agreement have been completely read by them, and that those terms are fully understood and voluntarily accepted by them.
10. The parties each represent and warrant to one another that they have not sold, assigned, transferred, conveyed or otherwise disposed of any claim or demand covered by this Agreement.
11. The parties agree that they and their undersigned representatives have authority to enter into this agreement.
12. Nothing in this agreement is intended to release BGH from the performance of any obligations which survive the termination of the Contract.

FOR DHHS:

Kerry T. Winterer
Chief Executive Officer
Department of Health and Human Services

DATE: _____

FOR BGH:

Art Silva
Chief Executive Officer
Boys and Girls Home of Nebraska, Inc.

DATE: _____

MEMORANDUM OF LAW

DATE: June 23, 2011
TO: Brad Gianakos, DHHS Legal Services Administrator
FROM: Sarah Sujith, Attorney
RE: Contracting for certain DHHS duties under Juvenile Code and Office of Juvenile Services Act

QUESTION PRESENTED

Whether DHHS has authority to contract with private entities for Child Welfare/Juvenile Services case management.

SUMMARY

Yes, DHHS has authority to contract with private entities for Child Welfare/Juvenile Services case management, provided that DHHS retains a final decision-making role.

FACTUAL BACKGROUND

DHHS currently contracts with private or nonprofit entities for the provision of Child Welfare and Juvenile Services case management. This Memorandum discusses the legal authority for DHHS to contract for case management services.

APPLICABLE LAW

Statutory Authority:

NEB. REV. STAT. § 43-285
NEB. REV. STAT. §§ 43-404 to 43-406
NEB. REV. STAT. § 43-411
NEB. REV. STAT. § 68-1206
NEB. REV. STAT. § 68-1207
NEB. REV. STAT. § 81-3117 (2) and (3)

Cases and Other Authority cited:

2 Am.Jur.2d *Administrative Law* § 224 at 54-55 (1962)
Father Flanagan's Boys Home v. Dept of Soc. Servs, 255 NEB. 303, 583 N.W.2d 774 (1998).
Fulmer v. Jensen, 221 NEB. 582, 379 N.W.2d 736 (1986).
State ex rel. Creighton Univ. v. Smith, 217 NEB. 682, 353 N.W.2d 267 (1984).

DISCUSSION AND ANALYSIS

General Authority

DHHS has authority to contract with private entities for Child Welfare/Juvenile Services case management, provided that DHHS retains a final decision-making role. Nebraska jurisprudence supports the notion that DHHS can contract with the private sector to fulfill governmental duties.

In *Father Flanagan's Boys Home v. Dept of Soc. Servs.*, Father Flanagan billed DHHS pursuant to NEB. REV. STAT §79-445 for special and regular education provided to state wards placed at Boys Town. DHHS only reimbursed Father Flanagan for special education, arguing that regular education expenses are sectarian and therefore violate Nebraska's constitutional prohibition against public appropriations to private schools. The Nebraska Supreme Court held that the case did “not involve a contractual delegation of the state's duty to provide a free public education to its citizens. Rather, it involves a contract made by a state agency to obtain educational services for state wards for whom it is responsible in a quasi-parental capacity.” 255 NEB. 303, 583 N.W.2d 774 (1998).

In *State ex rel. Creighton Univ. v. Smith*, Creighton University sought a writ of mandamus compelling the Director of Health to consider Creighton's RFP for cancer research. The Director of Health argued its regulations only permit contracting with public postsecondary institutions. The district court held that the Director of Health needed to promulgate regulations that would permit private postsecondary educational institutions to qualify for bidding. The Director of Health appealed. The Supreme Court held, “the Nebraska Constitution does not prohibit the state from doing business or contracting with private institutions in fulfilling a governmental duty and furthering a public purpose.” 217 NEB. 682, 689-90, 353 N.W.2d at 267, 272 (1984).

In *Fulmer v. Jensen*, Fulmer alleged that the Director of Motor Vehicles had illegally delegated her quasi-judicial functions by allowing the deputy director to determine

whether Fulmer's operator's license should be revoked. Fulmer claimed that the director could not delegate the power vested in her, because the power in the relevant statute was quasi-judicial in nature and delegated solely to the director. The Nebraska Supreme Court held that the authority to delegate discretionary and quasi-judicial powers is implied where the powers bestowed upon an agency head “are impossible of personal execution.” 221 NEB. 582, 585, 379 N.W.2d 736, 739 (1986). Further, quoting 2 Am.Jur.2d *Administrative Law* § 224 at 54-55 (1962), the court stated that such delegation is not precluded by law, ‘apparently to any extent so long as the agency does not abdicate its power and responsibility and preserves for itself the right to make the final decision.’” *Id.*

This case is especially significant in reference to decisions that invoke administrative appeal rights rather than review through judicial proceedings. This would include administrative decisions such as moving an OJS ward to a placement at a lower level of care or at the same level of care, which can only be appealed through administrative processes. It appears that delegating such placement decisions would be allowable, so long as OJS retains authority to make the final decision.

The case law cited above is further supported by Nebraska statutes. The DHHS CEO is authorized to contract for services and programs, while maintaining a “management” role. NEB. REV. STAT. §81-3117 (2) and (3). This would seem to be supported by the *Fulmer* case cited above, which states that DHHS may delegate its powers to any extent “so long as the agency does not abdicate its power and responsibility and preserves for itself the right to make the final decision.” *Fulmer v. Jensen*, 221 NEB. 582, 585, 379 N.W.2d 736, 739 (1986).

NEB. REV. STAT. § 68-1206 charges DHHS with administering social services in the state and explicitly authorizes the agency to contract with outside entities for the provision of such services, stating that DHHS “shall administer the program of social services in this state. The department may contract with other social agencies for the purchase of

social services at rates not to exceed those prevailing in the state or the cost at which the department could provide those services” (emphasis added). Social services are defined as including, but are not limited to:

foster care for children, child care, family planning, treatment for alcoholism and drug addiction, treatment for persons with mental retardation, health-related services, protective services for children, homemaker services, employment services, foster care for adults, protective services for adults, transportation services, home management and other functional education services, housing improvement services, legal services, adult day services, home delivered or congregate meals, educational services, and secondary prevention services, including, but not limited to, home visitation, child screening and early intervention, and parenting education programs.

NEB. REV. STAT. § 68-1207 provides that DHHS “shall supervise all public child welfare services as described by law” (emphasis added). This indicates that any child welfare services placed in the responsibility of DHHS by statute must be supervised directly by DHHS. Read together with the statutes quoted above, this would support the conclusion that DHHS may contract with private agencies in carrying out its child welfare services, but that it must retain a supervisory role. This is congruent with the prior case law cited above, which outline that DHHS may contract out Child Welfare/Juvenile services case management so long as it retains final decision-making authority.

OJS Powers and Duties

The legislature has expressly granted OJS the power to contract for services in See NEB. REV. STAT. §§ 43-404, 43-405(1), 43-405(6) and 43-406(4). With the exception of issuing detainers for youth (see NEB. REV. STAT. §43-411, which states that only the CEO or the Administrator of OJS and YRTC superintendents as his designee may issue detainers), there is nothing in the OJS Act that would prevent OJS from contracting out case management, including parole functions.

Case Management under the Juvenile Code

The Juvenile Code is silent on the issue of contracting out or delegating DHHS’ duties. It does provide that “[w]hen the court awards a juvenile to the care of [DHHS] ... the

juvenile shall, unless otherwise ordered, become a ward and be subject to the guardianship of the department ... to whose care he or she is committed.” NEB. REV. STAT. § 43-285. Thus, DHHS has legal responsibility for caring for its wards. For this reason, in addition to the authority cited above requiring DHHS to maintain a supervisory role in the provision of child welfare/juvenile services, it is DHHS’ responsibility and in the agency’s interests to maintain an adequate level of oversight but also within its discretion to provide care as it sees fit within the limits noted above.

Under the Juvenile Code, DHHS’ responsibility, beyond caring for children in its custody, is primarily to make recommendations to the court. This arises in the form of court reports as well as recommendations for placement and treatment intermittently throughout the life of a case. The Juvenile Code gives the juvenile court authority to order DHHS to prepare and submit to the court “a proposed plan for the care, placement, services, and permanency which are to be provided to such juvenile and his or her family.” NEB. REV. STAT. §43-285(2). The statute cited above allows the court to order DHHS, rather than any other party, to prepare a report and most court orders do, in fact, order DHHS to prepare and submit a report. In order to comply with this law and the court orders that stem from it, DHHS must maintain a role in court reporting and making recommendations to the court.

CONCLUSION

Nebraska case law permits state agencies to contract out or delegate their governmental duties to private entities. The Legislature has expressly granted DHHS the power to delegate under the OJS Act as well as in social services statutes. DHHS needs to retain a supervisor or final decision-making role in order to carry out these contracts.