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April 29, 2008

Terri Sahli, Risk Manager
Department of Administrative Services
1225 Ferry Street SE, U150
Salem, OR 97301-4287

Re: Opinion Request OP-2008-1

Dear Ms. Sahli:

The Department of Administrative Services (DAS) is considering policies that (1) require state agencies to incorporate DAS-prescribed indemnity and insurance clauses in their contracts; and (2) preclude agencies from using contract clauses that may have the effect of exposing the State Insurance Fund to new liabilities without DAS's consent. You ask about DAS's authority in this area.

QUESTIONS PRESENTED

Question 1. Does DAS have authority to adopt a policy that requires state agencies to incorporate DAS-prescribed indemnity or insurance clauses, or both, into those agencies' contracts?

Short answer. DAS may require some but not all state agencies to insert DAS-prescribed indemnity or insurance clauses into the agencies' contracts. If a state agency enters into a contract pursuant to a DAS delegation under ORS 279A.140, then DAS may require the agency to insert such clauses. But if a state agency enters into a contract under its own statutory contracting authority, then DAS may not require the agency to include these clauses.

Question 2. Does DAS have authority to adopt a policy that precludes state agencies from expressly promising to indemnify or insure agencies' contractors against tort claims without DAS's permission?

Short answer. Yes.

DISCUSSION

1. Method of Statutory Analysis

To answer your questions, we must interpret the statutes that establish DAS's powers and duties. In ***PGE v. Bureau of Labor and Industries,*** 317 Or 606, 859 P2d 1143 (1993), the

Oregon Supreme Court set out the methodology for interpreting statutes. First, we examine the text and context. *Id.*, 317 Or at 610. Text is the language of the statutory provision and context includes other portions of the same statute, other provisions of the bill in which the statute was adopted and the chapter into which a provision has been codified. ***Vsetecka v. Safeway Stores, Inc.,*** 337 Or 502, 508, 98 P3d 1116 (2004); ***Morsman v. City of Madras,*** 203 Or App 546, 561, 126 P3d 6, *rev den* 340 Or 483, 135 P3d 318 (2006); ***State v. Ortiz,*** 202 Or App 695, 698, 124 P3d 611 (2005). In examining the text and context, we apply statutory and judicially-created rules such as to give "words of common usage" their "plain, natural, and ordinary meaning[,]" and, if there are several provisions, to adopt a construction, if possible, that gives effect to them all. ***PGE***, 317 Or at 611; ORS 174.010.

If the legislature's intent is clear from the text and context, the inquiry ends there. If legislative intent remains unclear, we look to the legislative history of the statute to discern that intent. ***PGE,*** 317 Or at 611-12.

2. DAS's Contracting Authority

An agency has the powers expressly conferred by statute or necessarily implied to carry out the powers expressly granted. ***Ochoco Const. v. DLCD,*** 295 Or 422, 426, 667 P2d 499 (1983). DAS has two potential sources of statutory authority to require agencies to include indemnity and commercial insurance requirements in their contracts or to preclude agencies from extending tort claim protection to contractors: (1) its contracting authority under ORS 279A.140 of the Public Contracting Code (ORS chapters 279A, 279B, and 279C); and, (2) its authority under ORS 278.405(1) to direct and manage all risk management programs of state government. For ease of analysis, we begin with DAS's contracting authority.

Under ORS 279A.140, DAS has the authority to enter into, administer, or approve contracts for many, but not all, state agencies:

> (1) The ***Oregon Department of Administrative Services shall conduct all procurements*** and administer the contracting for goods, services and personal services, including architectural, engineering and land surveying services and related services, for ***state agencies unless a state agency is specifically authorized by ORS 279A.050 or provisions of law other than the Public Contracting Code to enter into a contract***. The authority described in this subsection may be delegated in whole or in part in accordance with ORS 279A.075.
>
> (2) The following requirements and procedures apply to all contracts of state agencies:
>
> (a) A personal services contract is not valid or effective without the written approval of the department unless:
>
> (A) The contract is authorized under ORS 279A.050; or

> (B) The department has delegated authority to the contracting agency under ORS 279A.075 to make the personal services contract. * * *.

(Emphasis added.)

ORS 279A.050(3) through (6) authorize particular state agencies to enter into certain contracts. DAS has no authority to enter into, administer or approve those contracts pursuant to ORS 279A.140(1) and (2). Moreover, the Public Contracting Code does not apply to certain agencies and contracts. *See*, *e.g.*, ORS 279A.025 (providing partial list of exemptions); ORS 351.086 (exempting Oregon University System from much of the Code); ORS 461.120 (exempting State Lottery from Public Contracting Code "[e]xcept as otherwise provided by law").

If DAS has authority to enter into, administer, or approve contracts for a state agency under ORS 279A.140, that authority would include authority to require insertion of indemnity clauses and commercial insurance requirements. But DAS has no contracting authority to require such language in contracts specifically exempted from DAS contracting authority under ORS 279A.140 (or exempt from the requirements of the Public Contracting Code under ORS 279A.025 or other statutes). Because DAS might want the option to require *all* state agency contracts to contain certain indemnity or insurance clauses, we next examine whether DAS has the power to do so under its risk management authority.

3. DAS's Risk Management Authority

The legislature expressly charged DAS with the duty to direct and manage the state's risk management and insurance programs. ORS 278.405 provides:

> ***The Oregon Department of Administrative Services shall direct and manage all risk management*** and insurance ***programs of state government*** except for employee benefit insurance programs as otherwise provided in ORS chapter 243. ***Authority granted the department in this section includes but is not limited to the following authority***:
>
> (1) To provide all insurance coverages including coverage of related legal expenses required by law, requisitioned by individual agencies, or which the department determines necessary or desirable for the efficient operation of state government, including but not limited to casualty insurance, property insurance, workers' compensation insurance and surety insurance.
>
> (2) To purchase insurance policies, develop and administer self-insurance programs, or any combinations thereof, as may be in the best interest of the state in carrying out the authorities granted in subsection (1) of this section.
>
> (3) To consolidate and combine state insurance coverages.

> (4) ***To purchase such risk management,*** actuarial and other professional ***services as may be required***.
>
> (5) ***To provide technical services in risk management*** and insurance to state agencies.
>
> (6) ***To adopt rules and policies governing the administration of the state's insurance and risk management activities and to carry into full force and effect the provisions of this chapter,*** ORS 30.260 to 30.290, 278.322 and 655.505 to 655.555. The department, by rule or policy, may determine the Insurance Fund's contribution to the cost of defense, settlements and judgments in actions or proceedings. ***The department may condition payment of all or part of any loss covered by the Insurance Fund on compliance with the rules and policies adopted under this chapter***.

(Emphasis added.)

"Risk management" is not defined by the statute. Recently, this office concluded that, for purposes of ORS 278.405, "risk management" has its plain meaning, which is "the act of coping with and controlling the chance of loss or the perils to the subject matter of insurance." Letter of Advice, dated March 19, 2007, to Terri Sahli, Risk Manager, Department of Administrative Services (OP-2007-1) at 4, 2007 Or AG Lexis 4, 9 (March 19th Letter). In other words, as used in ORS 278.405, "risk management" means risk control. We noted that, when "risk management" is used as a term of art, it sometimes includes risk transference and risk retention as well as risk control, but "[a]s ORS 278.405 separately mentions insurance (risk transference) and self-insurance (risk retention), it appears that the legislature likely intended the term 'risk management' to encompass only a risk control element * * *." March 19th Letter at 4 n1.

For purpose of your current questions, we must determine whether, by giving DAS the authority to control risk, the legislature intended to give DAS the power to require state agencies to include certain clauses in their contracts, if those clauses might serve to minimize the state's losses. A clause requiring a contractor to indemnify the state potentially would minimize the state's losses by requiring reimbursement for those losses. A requirement that the contractor must maintain specific insurance also potentially minimizes state losses by ensuring that the contractor has available funds in the event of damage or liability. Thus, both clauses potentially could minimize the state's losses.

ORS 278.405 authorizes DAS generally to "direct and manage" all risk management programs of state government. In other words, DAS is the agency responsible for managing programs to control the state's risk. That authority "includes, but is not limited to" "purchas[ing] such risk management * * * services as may be required" and "provid[ing] technical services in risk management * * *." ORS 278.405(4) and (5), respectively. DAS could not rely on either of those two specific provisions to require state agencies to include certain clauses in their contracts, although it might rely on the latter ("provid[ing] technical services in risk management") to *recommend* inclusion of that language. Other than those two examples of "risk

management" activities, the text of ORS 278.405 does not contain any indication about what actions the legislature intended to authorize under the rubric of "risk management."

ORS 278.405 is a provision enacted into ORS chapter 278, the chapter governing "insurance for public bodies." We thus look to the insurance context for a description of "risk control" activities:

> Risk control is accomplished by conducting a venture so that risk is minimized. Brakes, train whistles, fire escapes, and safety campaigns are common instruments of such risk management. Risk control may be effected either through risk avoidance (as, for example, by effective enforcement of regulations against accumulations of flammable waste) or through risk reduction (such as the removal of accumulated waste materials to reduce the risk of fire). Risk control activities by an insurance company may even extend to participation in the design of a business operation (such as the specifications for the asphalt surfaces of loading platforms in amusement parks to assure firm footing under all weather conditions).

R. Keeton and A. Widiss, INSURANCE LAW: A GUIDE TO FUNDAMENTAL PRINCIPLES, LEGAL DOCTRINES, AND COMMERCIAL PRACTICES (1988) at 11 (footnotes deleted). In other words, risk control in the insurance context denotes a program of safety measures to minimize risk. The two specific examples of risk activities listed in ORS 278.405 are consistent with that understanding. On the other hand, nothing in ORS 278.405 unambiguously demonstrates that the legislature necessarily intended the term to be so limited. Because there remains some ambiguity about the scope of the term "risk management," we consult the legislative history.

4. Legislative History

The legislature enacted ORS 278.405 in 1985. Or Laws 1985, ch 731, § 2. Before 1985, the Department of General Services (DGS; DAS's predecessor) administered two separate insurance funds established under separate statutes: the "Restoration Fund," established under *former* ORS 278.011 – 278.085, and the "Liability Fund," established under *former* ORS 278.100 – 278.150. The Restoration Fund provided funds for replacing and rebuilding lost or damaged state property, and the Liability Fund provided funds for state and participating local public bodies' tort liabilities. No statute expressly authorized DGS to provide risk control services.

In 1985, at the request of DGS, the legislature enacted Oregon Laws 1985, chapter 731 (HB 2152), which consolidated those funds. At a hearing on that bill before the House Committee on State and Federal Affairs, Gene Snyder, the Administrator of DGS's Risk Management Division, explained that the bill was meant to give DGS authority to administer a comprehensive insurance program including risk control services:

> In addition * * * the consultant recommended that we provide a loss control program to state agencies to help reduce their losses and, in 1981 the Ways and Means Committee provided funding to establish a Risk Management Division to

> carry out these purposes. At that time we were unable to amend the statutes and redesign these statutes to do the job that was envisioned by the study and the Ways and Means Committee and that is the purpose of this bill today is to provide that statutory policy direction to operate the program.

Testimony of Gene Snyder, Administrator, Risk Management Division, DGS, House Committee on State and Federal Affairs (HB 2152), January 28, 1985, Tape 19, side 2 at 85. Mr. Snyder again discussed the risk control program in response to questions from the Committee about how the bill would affect the State Accident Insurance Fund's (SAIF) operations:

> SNYDER: We also would be working with [SAIF] in the area of their services that are provided to state agencies to make sure that the loss control services are properly utilized by state agencies.
>
> REPRESENTATIVE ROBERTS: Are you suggesting that loss control and charging agencies on the basis of their loss – that practice is something that [SAIF] is not now doing that you think needs to be corrected?
>
> SNYDER: Mr. Chairman, [SAIF] is providing these services to state agencies at the present time, but there's no statutes that identify a state agency that has got the responsibility for working with them [state agencies] and that is what we are proposing in this statute is to define * * * [DGS] as that state agency as a part of our overall risk management program.

Minutes, House Committee on State and Federal Affairs (HB 2152), January 28, 1985, Tape 20, side 2 at 85.

The legislative history of HB 2152 thus shows that, in 1985, no state agency had express legislative authority to provide loss control services to state agencies. The legislature enacted ORS 278.405 to give DGS that authority. ORS 278.405 also authorized DGS to adopt rules and policies to govern administration of the state's risk management activities.

In 1991, the legislature amended ORS 278.405 to give DGS additional authority to condition payment of all or part of any loss covered by the Insurance Fund on compliance with those rules and policies. Or Laws 1991, ch 566, section 6 (6). Thus, as of 1991, not only could DGS provide risk control services to state agencies, but it also could adopt state policies concerning risk control and enforce them by conditioning payment of agencies' losses covered by the Insurance Fund on compliance with those policies.

We also note that, in 1985, when the legislature enacted ORS 278.405(1), *former* ORS 279.712(1) (1983) authorized DGS to contract for the purchase of all supplies, materials, equipment and services other than personal required by state agencies, and *former* ORS 279.712(2) (1983) authorized DAS to approve all professional or personal services contracts of agencies for architectural, engineering, and related services. But *former* ORS 279.712(3) (1983) exempted the contracts of certain state entities from sections (1) and (2). So, when the legislature enacted ORS 278.405, like now, DGS did not have authority to contract for or

approve the contracts of all agencies. We next address the potential conflict between the limitations in ORS 279A.140 and the potentially broad grant of authority to DAS under ORS 278.405.

5. DAS's Public Contracting Authority and Risk Management Authority

The Public Contracting Code obviously governs public contracting and contains DAS's authority to enter into, administer, and approve public contracts. As noted above, under ORS 279A.140, DAS has no authority to contract for or approve the terms of those agency contracts that are specifically exempted from DAS oversight by ORS 279A.050 or other laws. The obvious intent of those statutes, as expressed in their unambiguous language, is to exempt certain agencies and contracts from DAS control as to certain contracting activities.

ORS 278.405, on the other hand, is part of the group of statutes that govern insurance for public bodies, rather than public contracting. ORS 278.405 addresses DAS's risk management authority in general, broad-brush terms except for the specific authorizations to purchase risk management services and provide technical risk management services to agencies. ORS 278.405(4) and (5). Nothing in ORS 278.405 unambiguously authorizes DAS to require that certain contract language be inserted into all state agency contracts. Construing ORS 278.405 to authorize DAS to require insertion of particular language in state agency contracts that are expressly exempted from DAS's contracting oversight under the Public Contracting Code would cause ORS 278.405 to conflict with the code. Whenever possible, we are to construe statutes to be consistent with each other. ***Fairbanks v. Bureau of Labor and Industries,*** 323 Or 88, 94, 913 P2d 703 (1996) (statutes should be read together and harmonized, while giving effect to a consistent legislative policy). If there is an irreconcilable conflict between a general and particular provision, the latter is paramount to the former so that a particular intent controls over a general intent that is inconsistent with the particular intent. ***Bobo v. Kulongoski,*** 338 Or 111, 119, 107 P3d 18 (2005).

Applying the rule of construction that we should first avoid a conflict between two statutes, if possible, we construe ORS 278.405 *not* to authorize DAS to *require* insertion of specific indemnity and commercial insurance requirements into contracts exempt from DAS control pursuant to the Public Contracting Code. But interpreting ORS 278.405 to authorize DAS to *recommend* insertion of those clauses does not create a conflict with ORS 279A.140 and would appear to be consistent with the legislature's intentions in enacting ORS 278.405.

6. Contract Clauses Creating Potential Liabilities

As a final matter, we must distinguish between the contract clauses discussed above that seek to avoid potential state liability and contract clauses that expressly create or enhance potential state liabilities. The latter may take various forms, such as: (1) contract language declaring a contractor to be an "agent" for purposes of the Oregon Tort Claims Act (OTCA), ORS 30.260 to 30.300, which, among other things, requires public bodies to indemnify their officers, employees, and agents against tort claims arising out of acts or omissions occurring in the performance of duty (but excluding cases of malfeasance in office or willful or wanton neglect of duty), ORS 30.285(1) and (2); (2) a contractual declaration that the parties "intend"

(but do not guarantee) that the contractor is an agent; (3) both a declaration that the parties "intend" the contractor to be an agent and a clause agreeing that the state will indemnify the contractor up to tort claim limits; or, (4) a clause extending insurance coverage to the contractor up to stated claims limits.[1/] The question is whether a state agency (or a contract) for which DAS has no contracting oversight authority under ORS 279A.140 may include such clauses without DAS's prior approval.[2/]

The foregoing clauses each affirmatively create or increase the risk of potential state liabilities that would not exist or be increased if a contract did not directly address these points. While it is possible for a contractor to be entitled to OTCA indemnity as a matter of law and the particular facts surrounding a claim, the purpose of these clauses is to shift risk (or increase the likelihood that risk will be shifted) from the contractor to the state. Accordingly, such clauses create contingent liabilities for the state. DAS, as the manager of the state's risk management and insurance programs, has an oversight role whenever state agencies purport to protect contractors from third party liabilities through contract clauses.

Article XI, section 7, of the Oregon Constitution prohibits the state generally from creating potential liabilities without currently funding them.[3/] Consequently, those potential liabilities must be funded either through the purchase of insurance or through the state's self-insurance fund.[4/]

State agencies may not purchase insurance (with exceptions inapplicable to this opinion) without DAS's approval. ORS 278.415. Thus, an agency neither could obligate itself to provide insurance nor purchase insurance to fulfill that obligation without express approval from DAS.

DAS also is authorized:

> To provide all insurance coverages including coverage of related legal expenses required by law, requisitioned by individual agencies, or which the department determines necessary or desirable for the efficient operation of state government, including but not limited to casualty insurance, property insurance, workers' compensation insurance and surety insurance.

ORS 278.405(1). According to this provision, DAS has authority to provide insurance if (1) the insurance is required by law; (2) requisitioned by an agency; or (3) DAS determines the insurance to be necessary or desirable for the efficient operation of state government. The first of those provisions is inapplicable, because this opinion addresses contractual obligations to extend indemnity or insurance coverage rather than insurance coverage required by law.

The second circumstance in which DAS may provide insurance is when an agency "requisitions" it. The most apt dictionary definition of "requisition" is

> **3a:** the act of requiring something to be furnished **b:** a demand or application made usu. with authority: as **(1):** a demand made by military authorities upon civilians (as the people of an invaded country) for supplies, labor, shelter, or other military needs * * * **(2):** a written request for something (as materials, supplies,

> or personnel) authorized but not made available automatically <sent a [requisition] to the purchasing department> <a [requisition] for clothing.>"

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY UNABRIDGED at 1929 (2002). Thus, as ordinarily used, the term "requisition" appears to have two elements: (1) a demand to furnish something; (2) that the requester is authorized to get. In other words, that language authorizes DAS to provide insurance to an agency that has some authority, independent of that provision itself, to obtain insurance. As discussed above, an agency only has the powers expressly conferred by statute or necessarily implied to carry out the powers expressly granted. ***Ochoco Const.,*** 295 Or at 426.

Accordingly, an agency would need express statutory authority to demand insurance or that authority would have to be necessarily implied to carry out the powers expressly granted to the agency. One example of such authority is contained in ORS 278.315. That provision gives the Department of Human Services (DHS) the discretion to provide tort liability coverage through DAS to certain county or private community care providers with whom DHS contracts. It further provides that the coverage may be part of the contract between DHS and those providers. But in the absence of similar authority to obtain insurance, an agency could not demand it from DAS.

On the other hand, an agency could ask DAS to exercise its discretion to provide insurance pursuant to the third circumstance listed in the statute, which gives DAS discretion to provide insurance if it determines that it is necessary or desirable for the efficient operation of the state government. This office previously concluded that this portion of ORS 278.405(1) authorizes DAS to provide insurance coverage to the Columbia River Gorge Commission and its members, even though that Commission was not a part of Oregon state government, if DAS determined that providing insurance coverage would promote state government's efficient operation. Letter of Advice dated May 20, 2005, to David Hartwig, Administrator, Department of Administrative Services (OP-2005-3) at 2, 2005 Or AG Lexis 4.

Similarly, DAS may determine that providing insurance to contractors in some instances furthers the efficient operation of state government because it furthers the state's ability to attract qualified people to provide services. But that decision is left to DAS, not to other state agencies. *See also* ORS 278.125(1) (authorizing DAS to purchase the insurance that it deems necessary or desirable to accomplish the purposes of ORS chapter 278 and the OTCA and such other insurance as may be desirable to "insure the state, participating local public bodies or their officers, employees or agents against liability.").

In light of the above, we conclude that DAS may require all state agencies to obtain DAS's consent to include clauses in their contracts that create potential demands, or increase the risk of such demands, on the State Insurance Fund or on state insurance policies where that demand would not otherwise exist by virtue of the work to be performed under the contract. As noted above, DAS has authority under ORS 278.405(6) "[t]o adopt rules and policies governing the administration of the state's insurance and risk management activities * * * " and to " * * * condition payment of all or part of any loss covered by the Insurance Fund on compliance with * * * [those] rules and policies * * *."

CONCLUSION

If a state agency enters into a contract pursuant to a DAS delegation under ORS 279A.140, then DAS may require the agency to insert DAS-prescribed indemnity or insurance clauses into the agency's contracts. But if a state agency enters into a contract under its own statutory contracting authority, then DAS may recommend but not require the agency to include such clauses in the contract. Nevertheless, DAS may preclude all state agencies from promising to indemnify or insure agencies' contractors against tort claims without DAS's permission.

Sincerely,

Donald C. Arnold
Chief Counsel
General Counsel Division

DCA:JTM:AEA:mcg/GEN330257

[1/] In the case of a contract that is silent as to indemnity or OTCA agency status, if the contractor satisfies the criteria for agency in relation to a claim under the OTCA, then the contractor likely will be entitled to OTCA indemnity. *See* ORS 30.285 (establishing indemnity rights and related procedures for public officers, employees, and agents); ***Moxness v. City of Newport***, 89 Or App 265, 268, 748 P2d 1014, *rev den* 306 Or 79 (1988) (describing a two-part test for OTCA "agency": (1) The "agent" must be performing a function "on behalf of" a public body – i.e., a function that the public body itself is authorized to undertake; and (2) the public body must retain a "right of control" over the agent).

[2/] This opinion does not address the complex policy question concerning whether state agencies *ought* to include any of those clauses in state contracts or the legal effect of including those provisions, but only whether certain agencies may include those provisions without first obtaining DAS approval.

[3/] Article XI, section 7, provides in relevant part:

> The Legislative Assembly shall not lend the credit of the state nor in any manner create any debt or liabilities which shall singly or in the aggregate with previous debts or liabilities exceed the sum of fifty thousand dollars * * * and every contract of indebtedness entered into or assumed by or on behalf of the state in violation of the provisions of this section shall be void and of no effect. * * *.

[4/] In a 1975 Attorney General's opinion, we concluded that the indemnity promised to state employees by ORS 30.285 did not violate Article XI, section 7, of the Oregon Constitution because the former Liability Fund (the predecessor to the State Insurance Fund) that backed that promise was a "special fund." 37 Op Atty Gen 911 (1975), 1975 Or AG Lexis 88.