

## **Business and Labor Committee**

**LB 1073**

**February 13, 2012**

**Kerry Winterer, CEO**

**Department of Health and Human Services**

Good afternoon, Senator Lathrop and members of the Business and Labor Committee. My name is Kerry Winterer (K-E-R-R-Y W-I-N-T-E-R-E-R). I am the CEO of the Nebraska Department of Health and Human Services. I am here to testify in support of LB 1073.

In November 2009, DHHS contracted with a number of agencies across the state to provide child welfare service delivery and service coordination. Following a competitive process, Boys and Girls Home was awarded contracts for the Central, Western and Northern Service Areas.

In the summer of 2010 DHHS grew increasingly concerned about the ability of Boys and Girls Home to meet its financial obligations, despite continued assurances that it could and would do so. In September 2010 several discussions occurred between DHHS and Boys and Girls Home regarding termination of the contracts, resulting in a verbal agreement that Boys and Girls Home would continue to perform until October 15, 2010, and that a written termination agreement to that effect would follow. Notwithstanding that verbal agreement, Boys and Girls Home ceased performance on September 30, 2010, and the families previously served by Boys and Girls Home were immediately transitioned back to DHHS.

By this time DHHS had determined, through inquiries to Boys and Girls Home and its subcontractors, that Boys and Girls Home owed its subcontractors approximately \$4 million. From the outset it was our concern that the subcontractors be paid for services they had provided to Boys and Girls Home. Under our contract with Boys and Girls Home, we owed them approximately \$1.6 million and were contractually obligated to pay them that amount, but we had no legal ability to pay this or any amount to the subcontractors without an agreement with Boys and Girls Home.

In order to effectuate partial payment to subcontractors, DHHS, Boys and Girls Home, and nearly all of the subcontractors reached a settlement agreement. Boys and Girls Home agreed to accept roughly \$1.6 million as full and complete payment under the contract, and also agreed to a *pro rata* distribution of those funds directly from DHHS to Boys and Girls Home subcontractors, which would result in payment to subcontractors of approximately 35% of the amounts they were owed. This also resulted in the waiver by Boys and Girls Home of any potential contract claims against DHHS.

Because subcontractors participating in the agreement would waive any remaining claims against it, Boys and Girls Home would not agree to participate in the settlement unless most subcontractors also agreed to participate. It was therefore crucial that the terms of the agreement be acceptable to as many subcontractors as possible, otherwise DHHS would be left with no option but to pay the remaining contract payment directly to Boys and Girls Home, leaving the subcontractors in the difficult position of attempting to obtain payment from Boys and Girls Home. This seemed unlikely at best in light of Boys and Girls Home inability to perform its contract obligations. In order to obtain the necessary participation of sufficient subcontractors a waiver of state miscellaneous claims for the remaining 65% of funds owed was removed from the proposed settlement agreement. Subcontractors were still however required to waive all state contract claims and state tort claims.

DHHS' intention to recommend denial of any such miscellaneous claims was made very clear to Boys and Girls Home subcontractors and their legal representatives on more than one occasion prior to the execution of the settlement agreements. DHHS was not a party to the agreement between Boys and Girls Home and its subcontractors, and the subcontractors were not a party to the agreement between DHHS and Boys and Girls Home. There was never any contractual relationship whatsoever between DHHS and the subcontractors. Although the contract between DHHS and Boys and Girls Home contains a provision that subcontractors be paid within 45 days, that provision does not operate to grant the subcontractors third-party beneficiary status under the contract, because the Nebraska Supreme Court has ruled that third parties may not enforce specific provisions in a government contract absent express language to that effect.

After thoroughly researching the legal issues surrounding the subcontractors' claims, including several legal theories proposed by the subcontractors' legal representatives, DHHS concluded and continues to believe that there is no legal basis for the state to pay these subcontractors claims. Absent a legal obligation to pay subcontractors DHHS lacks legal authority to expend state resources to make such payments. A number of the subcontractors that declined to participate in the settlement agreement are now pursuing contract claims against Boys and Girls Home.

Thank you for the opportunity to testify. I would be happy to answer any questions you have for me.