Liability under Interlocal Agreements Concerning Homeland Security Prepared by: Office of General Counsel, Texas Department of State Health Services (DSHS) (April 17, 2008)

ISSUE: How can agreements between governmental agencies be written to minimize liability when one governmental agency is performing disaster or emergency assistance services for another?

ANSWER The Texas Legislature, in 2003, added §421.062 to the Texas Government Code ("Liability Under Interlocal Contract"). This provision is intended to eliminate the liability of state and local agencies performing a "homeland security activity" under an interlocal contract. A homeland security activity specifically includes natural or manmade disasters or an extraordinary law enforcement emergency. The statute states that such agencies are "immune from civil liability for any act or omission resulting in death, damage, or injury while acting under the interlocal contract." (Government Code §421.062(a)). To take advantage of this provision, three conditions must be met:

- 1) The agreement must be an interlocal contract as defined by Government Code §791.003. This is a statute that allows local governments to enter into contracts for governmental functions between themselves and with agencies of the State of Texas or other states. The agreement should recite that "This is an interlocal agreement under Chapter 791 of the Government Code." "Public health and welfare" is explicitly a governmental function under this statute (§791.003(3)(D)).
- 2) The agreement must "expressly state that the furnishing state or local agency is not responsible for any civil liability that arises from the furnishing of a service under the contract." (§461.062(b)(1)). For instance, a contract between DSHS and school district should contain the following statement: "Through this agreement, DSHS and District are furnishing a service related to homeland security and, under the authority of Tex. Gov't Code § 421.062, neither agency is responsible for any civil liability that may arise from furnishing any service under this agreement." This language attempts to absolve both parties, though the statute is limited to the "furnishing" agency. Since the statute does not define this term, a contract should not assume that only one party is "furnishing". For example, in contracts with local school districts (e.g., to serve as dispensing sites in a public health emergency) both parties are agreeing to provide specified services to the public.
- 3) The statute requires that "The state or local agency committed the act or omission while acting in good faith and in the course and scope of its functions to provide a service related to a homeland security activity." This provision specifies that this immunity does not attach to every conceivable act. It does not attach to those committed in bad faith, nor to those unrelated to homeland security. For example, a contract with a school district might be implemented because of a terrorist act or because of a naturally occurring disease outbreak.