OFFICE OF INSPECTOR GENERAL

INTERNAL AUDIT UNIT

Use of Memorandums of Agreement/Understanding

A-1112DOH-004 **April 5, 2012**

SUMMARY

The Department of Health (DOH), Office of Inspector General examined Memorandums of Agreement (MOAs), Memorandums of Understanding (MOUs) and similar agreements executed at Central Office, county health departments (CHDs), Children's Medical Services (CMS) area offices, and other DOH locations that were active during the period January 1 through June 30, 2011.

The purpose of our audit was to determine whether MOAs/MOUs and similar instruments (hereafter all referred to as MOAs) that were executed are consistent with DOH policy.

To accomplish our objectives, we:

- reviewed applicable law, policy, and procedures;
- interviewed appropriate personnel at Central Office, CHDs, and CMS area offices;
- examined a judgmental sample from the population of known MOAs; and,
- evaluated risks and selected internal controls to determine whether the controls were in place and working effectively.

The audit was conducted in conformance with *International Standards for the Professional Practice of Internal Auditing*, issued by the Institute of Internal Auditors, as provided by Section 20.055(5)(a), *Florida Statutes,* and as recommended by Quality Standards for Audits by Offices of Inspector General (*Principles and Standards for Offices of Inspectors General*, Association of Inspectors General).

We identified 2,235 MOAs in use throughout DOH. We found that many of the MOAs that we examined are consistent with DOH policy. For the number of MOAs by site that we identified please see **EXHIBIT A**.

However, the following issues were identified and should receive additional review and corrective action by management:

- Further clarification is needed regarding the definition of an MOA, its use at DOH, and its distinction from a contract.
- Instances were noted where DOH continues to enter into contractual agreements for purchases of products or services with non-governmental entities using an MOA. Other concerns related to the execution of MOA documents were also noted.
- MOAs were generally not entered into the *Contract Information File* of FLAIR and therefore were unaccounted for by Central Office.

INTRODUCTION

Section 20.055, *Florida Statutes,* charges DOH's Office of Inspector

General responsibility to provide a central point for coordination of activities that promote accountability, integrity, and efficiency in government. Audits are conducted to review and evaluate internal controls necessary to ensure the fiscal accountability of DOH.

This audit was included in the Office of Inspector General's *Three Year Audit Plan beginning 2011-2012*, which is the result of an annual risk-assessment.

Audit fieldwork took place July through October 2011 at DOH headquarters in Tallahassee. The audit was conducted by Office of Inspector General audit staff Mark H. Boehmer, Certified Public Accountant, Senior Management Analyst II, Lead Auditor, under the supervision of Michael J. Bennett, Certified Internal Auditor, Director of Auditing.

BACKGROUND

DOH's Bureau of General Services is responsible for DOH's policies related to the purchase of commodities and contractual services. Section 287.057(15), *Florida Statutes*, requires that, "Each agency shall designate…a contract administrator responsible for maintaining a contract file and financial information on all contractual services contracts and who shall serve as a liaison with the contract managers and the department." DOH's Office of Contract Administration, within the Bureau of General Services, accordingly is the office of primary responsibility for DOH's contracting process for contractual services. Policies related to the purchasing of commodities generally falls under DOH's Central Purchasing Office, also under the Bureau of General Services.

Until 2008, DOH's DOHP 250-14-07, *Contractual Services Policies & Procedures*, was clear that *Letters of Agreement*, *Memorandum of Agreements*, and similar instruments, did not meet DOH's definition of a "contract" and their use was prohibited for DOH purchases of contractual services, except for general counsel's agreements with outside attorneys.

DOH's Office of General Counsel independently published its own guidance and clarification to all DOH attorneys in March 2008 for the use of MOAs. The guidance specifically precluded the use of these types of agreements for the purchasing of contractual services, except when purchasing from, "another governmental entity (i.e., …state agencies, federal, county and local governments)." The document acknowledged that until then, in reality DOH also used these agreements, "on a limited basis to formalize its contractual relationships with outside vendors." The guidance further advised that many of the protections and safeguards found within DOH's *Standard Contract* are not present in MOAs.

Although not explicitly stated in the Office of General Counsel's 2008 guidance, the intent appears to restrict the use of MOAs for memorializing the mutual understanding between DOH and another party when such agreements are necessary, but where the purchasing of contractual services (or commodities) is not required.

In an Office of the Auditor General report of the operational audit of *Children's Medical Services and Selected Administrative Matters*, published June 2011, it was mentioned 26 MOAs within the CMS Network were examined. The report explained that, "the lack of adequate procedures to properly identify all MOAs and MOUs in use within the Department and ensure adequate review and accounting for those agreements, increases the likelihood that the agreements will not

meet necessary legal requirements and will not protect the Department from financial risk. Further, the use of MOAs and MOUs when compensation will be required may result in the failure to follow law and policy governing procurement."

The State Surgeon General subsequently issued a memo to all DOH employees advising them of his priority to increase competitive procurement. It included a directive that DOH employees should be mindful that the use of MOAs should receive proper oversight and follow DOH policy.

FINDINGS, RECOMMENDATIONS, AND MANAGEMENT'S RESPONSE AND CORRECTIVE ACTION PLAN

The following findings and recommendations address issues that should receive additional review by management.

FINDING 1 – *Further clarification is needed regarding the definition of an MOA, its use at DOH, and its distinction from a contract.*

During our audit, we were unable to locate any formal policy, procedure, or other guidance available at DOH that distinguished an MOA from a contract.

As discussed in the Background section of this report, DOH's Office of General Counsel independently published a memorandum as guidance and clarification to all DOH attorneys in March 2008 for the use of MOAs. The guidance specifically precluded the use of these types of agreements for the purchasing of contractual services, except when purchasing from, "another governmental entity (i.e., …state agencies, federal, county and local governments)." This guidance was incorporated into the updated DOHP 250-14-11, *Contractual Services Policies & Procedures*, in July 2011 (after the scope of our audit).

While these efforts have assisted to provide guidance over the use of MOAs, more formal measures are necessary in order to help ensure proper use of these agreements. The Office of General Counsel's guidance was disseminated only once and is not a formal DOH policy. It is unclear how much weight "guidance" carries versus a formal policy that has been issued by DOH management. The guidance issued may have appeared to some to be opinion rather than a requirement.

While this guidance was incorporated into DOH's contract policy in July 2011, many individuals who create MOAs may not be contract managers and thus may not consider referencing a policy on contracts for direction on creating a MOA document. There is also an absence of oversight by an administrative office at DOH because no office has issued a formal, stand-alone policy on the topic. As a result, there continues to be a general lack of understanding as to how MOAs are to be used and written.

This lack of understanding was clearly evident during our testing. We found throughout our review of 216 MOAs that language and content varied widely among these agreements. Some agreements included language that the document was a contract. These agreements included all the elements of a contract, including an offer, acceptance, legal purpose/objective, mutuality of obligation ("meeting of the minds"), consideration, and competent parties. Meanwhile, several other MOAs included language that the agreement "[does] not create a contractual relationship".

Additionally, the Office of General Counsel's memorandum from March 2008 indicated that only MOAs between DOH and other governmental entities that included expenditures were considered contracts. However, several MOAs we examined that were not with other governmental entities also included expenditures, and yet gave the appearance of being considered a contract. (This is further discussed in Finding 2 below).

We also found no standardization of what the agreements were titled. These agreements were called by many different names, including Location Agreement, Service Level Agreement, Cooperative Service Agreement, Vendor Agreement, User Agreement, Contractual Services Business Agreement, Consultant Services Agreement, Participating Agency Agreement, Agreement to Provide Services, Contract, Performance-Based Contract, and others.

As part of our research, we reviewed an available policy on the use of Memorandums of Understanding (MOU) developed by the United States Geological Survey (USGS policy). The USGS policy governed the collaboration on matters of mutual concern or interest between two entities and was clear in the role MOUs (a document similar in nature to MOAs) played in their organization.

The USGS policy explained, "A MOU may be used whenever there is agreement to exchange information or coordinate programs to optimize the benefits from each party's efforts and neither party exchanges funds, personnel, property, services, or makes any kind of financial commitment or obligation."

The USGS policy further stated, "Regardless of their title, a MOU or similar type of agreement is not legally binding for any party and must be written in very broad and general terms. A MOU describes procedures for cooperation, such as: (1) cooperation relating to exchanges of information; (2) cooperation between a private entity and an agency in a particular endeavor; and/or (3) cooperation between agencies that have similar goals and statutory mandates or that are implementing the same law."

The USGS policy goes on to add, "The main distinguishing characteristic of a MOU, as opposed to legally binding agreements, is that a MOU only describes general cooperation procedures."

It should be noted that many state governmental entities have struggled with the role of MOAs and similar instruments. Executive-level guidance and/or policy from an entity over all state government agencies regarding MOAs would be helpful to individual agencies.

Meanwhile, the Office of General Counsel was recently reorganized to include practice groups, including a Transactions Practice Group. The Transactions Practice Group is to provide guidance and advice on arrangements and relationships, including MOAs.

RECOMMENDATION:

We recommend the Office of General Counsel work with the Division of Administration to develop and provide more formal guidance to users of MOAs at DOH, which distinguishes MOAs from contracts, and provides consistency of general language in these agreements. This guidance could be published by Office of General Counsel or could, through mutual agreement, be incorporated into policy publications published by the Division of Administration.

OFFICE OF GENERAL COUNSEL'S RESPONSE AND CORRECTIVE ACTION PLAN:
The Office of the General Counsel will develop formal guidance to users of memorandum of agreements (MOAs). This will generate agency-wide standards for such documents and promote consistency of analysis and ease of use in the various exchanges of money, labor, materials, and time we enter into with third parties. This may take up to 12 months to implement because it requires coordination with local county health department attorneys, the Division of Administration, and other interested parts of DOH personnel which could result in a fundamental rethinking of the Department's prior approaches in this area.

Anticipated completion date:
April 30, 2013

FINDING 2 – *Instances were noted where DOH continues to enter into contractual agreements for purchases of products or services with non-governmental entities using an MOA. Other concerns related to the execution of MOA documents were also noted.*

Generally, the MOAs we reviewed did not include purchases of commodities or services and were correctly used to memorialize agreements and understanding between DOH and another party. However, we determined some MOAs were used in conflict with established guidance to purchase contractual services and commodities.

DOH guidance in effect during our audit period allowed offices to use MOAs for contractual services as long as:
1) the agreement is with another governmental entity; or,
2) the agreement is with a non-governmental entity and the agreement does not involve DOH expenditure or compensation to the entity for services performed.

DOHP 250-14-11, *Contractual Services Policy and Procedures*, which was published after our audit period, further clarified that these types of agreements may not be utilized when contracting with state universities if monies are spent.

DOH's Office of Contract Administration provided us a list of 565 MOAs. These were recorded in the *Contract Information File* of the Florida Accounting Information Resource (FLAIR) by program offices, CHDs, and CMS area offices, as required. We examined 85 of these agreements.

We subsequently requested all CHDs and CMS area offices submit a list of known MOAs in order to validate the completeness of FLAIR data. We compiled a list of approximately 1,670 additional MOAs that were not listed in FLAIR. (Please see **EXHIBIT A** for the number of MOAs by site). We examined 131 of these agreements.

Not all agreements were with another governmental entity or with a non-governmental entity where the agreement did not involve expenditures.

Eighteen (18) of the 216 agreements we examined (8%) were with a non-governmental entity that involved expenditures. According to the 2008 guidance issued by the Office of General Counsel, these agreements should have used either a Written Agreement that begins with DOH's *Standard Contract* or a purchase order. The 2008 published guidance did provide an exception that could be made by CHD directors/administrators and deputy secretaries after consultation with legal counsel. However, none of the agreements we examined cited such an

exception or evidenced that such consultation took place.

Based on several interviews with contract managers, we also learned that contract managers and legal staff have sometimes interpreted that purchases of contractual services below the threshold to Category II ($35,000) could be made on an MOA instead of a *Standard Contract*.

Other issues noted.
Fourteen (14) agreements did not include a date at which the agreement ends.

Five agreements we examined were each tied to a corresponding purchase order.

Section 287.058(1), *Florida Statutes*, provides that, "In lieu of a written agreement, the department may authorize the use of a purchase order for classes of contractual services…The purchase order must include…an adequate description of the services, the contract period, and the method of payment." Per the Office of Purchasing, all contents of the agreement must be included within the purchase order and not included by attachment as a MOA.

RECOMMENDATION:
We recommend the Bureau of General Services provide clear directive and training to CHDs, CMS area offices and program offices that MOAs should not be used for or associated with any purchases (except between governments) of any dollar amount, and should not be tied to purchase orders.

MANAGEMENT'S RESPONSE AND CORRECTIVE ACTION PLAN:
We concur. The Bureau of General Services will issue a memorandum to county health departments and programs providing clear guidance and re-emphasizing the correct use of MOAs/MOUs.

Anticipated completion date:
April 30, 2012

FINDING 3 – *MOAs were generally not entered into the Contract Information File of FLAIR and therefore were unaccounted for by Central Office.*

DOH guidance in effect during our audit period allowed the use of MOAs and similar agreements within the parameters of certain criteria (as previously discussed in Finding No. 1). The guidance required that these agreements be entered into the *Contract Information File* of the Florida Accounting Information Resource (FLAIR) after execution.

Office of Contract Administration provided us a list of 565 MOAs that had been recorded in the *Contract Information File* of FLAIR by program offices, CHDs, and CMS area offices.

We subsequently asked all CHDs and CMS area offices to submit a list of known MOAs. We compiled a list of approximately 1,670 additional MOAs. These agreements had not been recorded in the *Contract Information File* of FLAIR.

The 2011 Legislature amended Section 215.985, *Florida Statutes*, making the Department of Financial Services responsible for the development and maintenance of a contract management system that will include DOH contracts. As that system becomes functional, DOH policy requirements of recording this data in the *Contract Information File* of FLAIR may need to be revised.

RECOMMENDATION:
We recommend the Bureau of General Services take steps to verify that each

program office, CHD, and CMS area office include their MOAs in at least one central database for reporting purposes. In light of the large quantity of MOAs within DOH, and also considering requirements to be defined by the Department of Financial Services in making its contract management system functional, DOH management should reevaluate whether it is appropriate for information related to MOAs to be captured in one or more systems so that DOH may centrally have access to information related to these types of agreements.

MANAGEMENT'S RESPONSE AND CORRECTIVE ACTION PLAN:
We concur. The Bureau of General Services will take appropriate steps to ensure the county health departments and programs adhere to the new and mandatory requirements for agencies to enter information on MOAs/MOUs in the new Florida Accountability Contract Tracking System (FACTS).

Anticipated completion date:
April 30, 2012

CLOSING COMMENTS

We would like to thank management and staff of the Bureau of General Services, and especially the Office of Contract Administration, for their cooperation and assistance to us during the course of this audit. We also appreciate staff at all CHDs and CMS area offices that responded to our request for MOAs. We also appreciate the assistance of the Office of General Counsel for their cooperation during the course of our audit.

EXHIBIT A

NUMBER OF MOAS BY SITE
INCLUDING THOSE RECORDED IN FLAIR
AND ADDITIONAL MOAS SUBMITTED BY CHDS, CMS AREA OFFICES AND PROGRAM OFFICES

Office or CHD	MOAs/MOUs per Site
Palm Beach	235
Duval	198
Miami-Dade	150
Hillsborough	123
Orange	99
Citrus	86
Broward	85
Lake	84
St. Johns	70
Collier	66
Alachua	59
Bay	59
Volusia	58
Central Office	52
Seminole	46
Okaloosa	41
Levy	40
Pasco	38
Nassau	31
Escambia	29
Putnam	28
CMS - Orlando	28
Osceola	27
Marion	26
Leon	25
Pinellas	24
Monroe	23
Baker	22
Brevard	22
Santa Rosa	21
Hernando	19
Charlotte	18
Highlands	18
CMS - Pensacola & Panama	17
Flagler	15
St. Lucie	13
Taylor	13
Walton	13

Office or CHD	MOAs/MOUs per Site
Madison	11
Manatee	11
Sarasota	11
Sumter	11
A.G. Holley	11
Jackson	10
Jefferson	10
Lee	10
Bradford	9
Okeechobee	9
CMS - Tampa Bay Region	9
Indian River	8
Suwannee	8
Union	8
Clay	7
Martin	7
Gulf	6
Dixie	5
Franklin	5
CMS - Tallahassee	5
Holmes	4
Polk	4
Wakulla	4
Washington	4
Columbia	3
Hardee	3
Hendry	3
Lafayette	3
CMS - Southwest Florida Region	3
CMS - Fort Lauderdale	3
CMS - Fort Pierce	3
Gadsden	2
Hamilton	2
CMS - Jacksonville	2
Calhoun	None
Desoto	None
Gilchrist	None
Glades	None
Liberty	None

TOTAL AGREEMENTS 2,235