

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Health and Human Services Appropriations Committee

**BILL:** CS/CS/SB 770

**INTRODUCER:** Governmental Oversight and Accountability Committee; Children, Families, and Elder Affairs Committee; and Senator Fasano

**SUBJECT:** Area Agencies on Aging

**DATE:** April 13, 2009      **REVISED:** \_\_\_\_\_

|    | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION           |
|----|---------|----------------|-----------|------------------|
| 1. | Ray     | Walsh          | CF        | <b>Fav/CS</b>    |
| 2. | Wilson  | Wilson         | GO        | <b>Fav/CS</b>    |
| 3. | Peters  | Peters         | HA        | <b>Favorable</b> |
| 4. | _____   | _____          | _____     | _____            |
| 5. | _____   | _____          | _____     | _____            |
| 6. | _____   | _____          | _____     | _____            |

**Please see Section VIII. for Additional Information:**

- |                              |                                     |   |
|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="" type="checkbox"/> | Statement of Substantial Changes        |
| B. AMENDMENTS.....           | <input type="checkbox"/>            | Technical amendments were recommended   |
|                              | <input type="checkbox"/>            | Amendments were recommended             |
|                              | <input type="checkbox"/>            | Significant amendments were recommended |

**I. Summary:**

This bill clarifies that private non-profit Area Agencies on Aging (AAAs or agencies) who contract with the Department of Elder Affairs (DOEA or department) to administer federal Older Americans Act programs are not state agencies as contemplated by the Administrative Procedures Act, and are therefore not subject to its provisions.

The bill provides that a lead agency must be designated every six years rather than every three years.

The bill provides that the area agencies on aging shall develop their own dispute resolution procedures and requires that such agencies are nongovernmental, not-for-profit entities.

The bill requires that the request for proposal must be developed by the AAA.

There is no fiscal impact related to this bill.

This bill substantially amends sections 20.41 and 430.203, F.S.

## II. Present Situation:

The Department of Elder Affairs (DOEA) is created in s. 20.41, F.S. This section directs the department to plan and administer its programs and services through planning and service areas designated by the department. The department is designated as the state unit on aging as defined in the federal Older Americans Act (the act).<sup>1</sup>

The statutorily stated purposes of DOEA include but are not limited to:

- Serving as the primary state agency responsible for administering human services programs for the elderly and for developing policy recommendations for long-term care;<sup>2</sup>
- Recommending state and local level organizational models for the planning, coordination, implementation, and evaluation of programs serving the elderly population;<sup>3</sup> and,
- Overseeing implementation of federally funded and state funded programs and services for the state's elderly population.<sup>4</sup>

Federal law directs the department to administer the act using Florida's 11 AAAs.<sup>5</sup> Contractual agreements to implement the department's programs are executed at three levels:

- Contracts between DOEA and the AAAs for each major program;
- Contracts between the AAAs and lead agencies or service providers; and,
- Contracts between lead agencies and local service providers.

DOEA works closely with the 11 AAAs in Florida. The agencies administer funds locally and contract with a variety of provider agencies to offer a wide array of services designed to address the needs of their senior constituencies.<sup>6</sup> Some of the services offered through AAAs are:<sup>7</sup>

- Congregate and Home Delivered Meals;
- Senior Center Activities and Adult Day Care;
- Case Management;
- Transportation;
- Homemaker and Personal Care;
- Legal Assistance;
- Minor Home Repair;
- Alzheimer's Respite; and,
- Information and Referral.

The AAAs operate as 501(c)(3) public- and privately-funded non-profit corporations. Pursuant to s. 20.41(7), F.S., the department is required to “contract with **the governing body, hereafter**

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<sup>1</sup> Section 20.41(5), F.S.

<sup>2</sup> Section 430.03(1), F.S.

<sup>3</sup> Section 430.03(6), F.S.

<sup>4</sup> Section 430.03(7), F.S.

<sup>5</sup> 42 U.S.C.S§3025, codified in s. 20.41, F.S.

<sup>6</sup> Florida Association of Area Agencies on Aging website, <http://www.f4a.org/structure.html> (last visited March 13, 2009).

<sup>7</sup> Florida Association of Area Agencies on Aging website, <http://www.f4a.org/services.html> (last visited March 13, 2009).

referred to as the ‘board’, of the area agency on aging to fulfill programmatic and funding requirements.” [Emphasis supplied] The board is responsible for the overall direction of the agency’s programs and services and must ensure that the agency is administered in accordance with the terms of its contract with the department, legal requirements, established agency policy, and effective management principles. The Legislature specifically made the AAA subject to the public records law, and the public meetings law “when considering any contracts requiring the expenditure of funds.”<sup>8</sup>

Lead Agencies provide and coordinate services for elders in designated areas. There are 58 lead agencies serving all of Florida’s 67 counties. Some lead agencies provide services in more than one county due to the scarcity of providers in some rural counties. Lead agency providers are either non-profit corporations or county government agencies. Among the non-profit corporations are senior centers and councils on aging. Lead agencies are the only entities that can provide fee-for-service case management on an ongoing basis.<sup>9</sup>

A lead agency is an agency designated at least once every three years by a AAA as a result of a request for proposal process.<sup>10</sup>

### **Administrative Procedures Act**

The Florida Administrative Procedures Act, Chapter 120, F.S. (the Act), sets forth the process by which state agencies carry out their formal activities. The Act defines agency to include:

- the Governor;
- each --
  - state officer and state department
  - authority
  - board
  - commission
  - regional planning agency
  - multicounty special district
  - educational unit
  - entity described in chapters 163, 373, 380, and 582, and s. 186.504, F.S.;
- each other unit of government in the state to the extent they are expressly made subject to the Act.<sup>11</sup>

The Act prescribes procedures for handling rulemaking,<sup>12</sup> decisions affecting parties’ material interests,<sup>13</sup> and protests of competitive procurement decisions,<sup>14</sup> among others. The Division of

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<sup>8</sup> Section 20.41(9), F.S.

<sup>9</sup> Department of Elder Affairs, Elder Services Network Components and Their Roles, available at: <http://elderaffairs.state.fl.us/english/pubs/pubs/sops2007/Files/Elder%20Services%20Network%20Components%20and%20heir%20roles.pdf>

<sup>10</sup> Section 430.203(9), F.S.

<sup>11</sup> Section 120.52(1), F.S.

<sup>12</sup> Sections 120.536 – 120.56, F.S.

<sup>13</sup> Section 120.569, F.S.

<sup>14</sup> Section 120.57(3), F.S.

Administrative Hearings (DOAH) is designated to adjudicate these matters in accordance with the requirements of the Act.

### **Agency Procurement Process**

Agencies must carry out their purchases of commodities, insurance and contractual services pursuant to Part I of Chapter 287, F.S. The statute prescribes how and when an agency must bid; where it must advertise its procurement; the type of process it must use; how the bids must be evaluated; and, how its award is posted.<sup>15</sup>

The procedure by which an aggrieved bidder must protest an agency's procurement specification or intended award is described in s. 120.57(3), F.S. That process includes expedited review of the matter, imposing strict timeframes on the agency and the protester to settle the issue. If the parties cannot resolve the protest, the agency must refer the case to the DOAH, which likewise is required to adhere to an expedited hearing schedule. After receiving a recommended order from the DOAH, the agency must enter its final order to memorialize its resolution of the protest. That final order may be appealed to the district court pursuant to s. 120.68, F.S.

### ***Mae Volen Senior Center Inc. v. Area Agency on Aging Palm Beach/Treasure Coast, Inc.***<sup>16</sup>

In February 2006, the Area Agency on Aging Palm Beach/Treasure Coast issued a request for proposal (RFP) for a lead agency pursuant to s. 430.203(9)(a), F.S. Proposals were received from Mae Volen Senior Center (Mae Volen) and Ruth Rales Jewish Family Services (Ruth Rales). Following review by the AAA's review committee, the AAA posted its notification to award the contract to Ruth Rales on May 26, 2006.

Mae Volen filed its formal bid protest against the AAA and petitioned for an administrative hearing with the DOAH. The petition was dismissed on the grounds that the DOAH lacked jurisdiction because the AAA was not a state agency. This dismissal was appealed to the Fourth District Court of Appeals (DCA).<sup>17</sup> On February 13, 2008, the DCA reversed the dismissal and remanded the matter back to the DOAH:

Because the legislature designated the area agencies on aging as "boards" performing the programmatic and funding requirements of the DOEA, as well as the fact that they exercise multi-county authority and perform essentially government functions in authorizing the spending of public funds and contracting with lead agencies, we conclude that the DOAH has authority to hear this bid protest.

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In concluding that the administrative hearing officer has jurisdiction to hear appeals from bid protests on RFPs for lead agency contracts with area agencies on aging, our ruling is very narrow. **And if we are wrong in our analysis, and the legislature did not intend to confer**

<sup>15</sup> See generally s. 287.057, F.S.

<sup>16</sup> 978 So.2d 191

<sup>17</sup> The DCA issued its first opinion on August 8, 2007, reversing the dismissal. That order was vacated.

**jurisdiction on the DOAH to hear appeals of these cases, then it can certainly clarify the issue.**<sup>18</sup> [Emphasis supplied]

A similar case is currently pending before the Third District Court of Appeals.<sup>19</sup>

According to the DOEA, the ten AAAs outside the jurisdiction of the Fourth DCA are uncertain whether they are subject to the requirements of the Act.<sup>20</sup>

### **III. Effect of Proposed Changes:**

The bill clarifies that a AAA is not a state agency as contemplated by the Administrative Procedures Act and is therefore not subject to its provisions.

The bill provides that a lead agency must be designated every six years. The bill also clarifies that the Division of Administrative Hearings does not have jurisdiction to hear appeals relating to a request for proposal or the awarding of a request for proposal made by a AAA. The bill requires that the request for proposal must be developed by a AAA and not the department.

The bill corrects a cross reference and provides that it will take effect upon becoming law.

### **IV. Constitutional Issues:**

#### **A. Municipality/County Mandates Restrictions:**

None.

#### **B. Public Records/Open Meetings Issues:**

None.

#### **C. Trust Funds Restrictions:**

None.

### **V. Fiscal Impact Statement:**

#### **A. Tax/Fee Issues:**

None.

#### **B. Private Sector Impact:**

This bill will clarify for the AAAs whether they are subject to the requirements of the Act and allow them to conduct their procurement processes accordingly.

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<sup>18</sup> Id. at 194

<sup>19</sup> First Quality Home Care v. Alliance for Aging, Inc., Case No. 3D08-2949.

<sup>20</sup> Department of Elder Affairs 2009 Legislative Bill Analysis HB 747 and SB 770, undated, on file with the Committee.

**C. Government Sector Impact:**

The DOAH will hear disputes relating to AAA procurements, at least in the counties comprising the Fourth District Court of Appeals, and may be required to hear others if the ruling is applicable in other judicial districts.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

There are two distinct but complementary policy issues raised by this bill. The first is the extension of the jurisdiction of the DOAH to a non-public agency. Jurisdiction is established presently by statute to the extent existing units of government satisfy the test of “agency” in ch. 120, F.S. Contract vendors not otherwise public entities do not meet this test in the ordinary sense of the term. The second is the definition of agency provided in ch. 20, F.S., the table of organization of the Executive Branch of state government. Section 20.41, F.S., makes use of the term “agency” to describe area agencies on aging as distributive parts of the Department of Elderly Affairs. The definitions’ table in that chapter adopts use of the term “agency” to refer to such entities as units of state government in the Executive Branch. While such is not the connotation of this term for the purposes of the contract vendor relationship with area agencies on aging, the cited court opinions have indicated their discomfort with the implicit extension of this term to such relationships.

The risk this places the State of Florida and the area agencies on aging is a subsequent case in which one or more of these vendors suggests that these entities, given the DOAH jurisdiction and an analogous executive branch implication in ch. 20, F.S., are, in fact, state agencies. Such a ruling would imperil all of the vendor relationships with the department as they could no longer distinguish themselves as private, not for profit entities.

**VIII. Additional Information:**

**A. Committee Substitute – Statement of Substantial Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

**CS by Children, Families, and Elder Affairs on March 18, 2009:**

- Amends current law to provide that a lead agency must be designated every six years rather than every three years.
- Clarifies that the DOAH does not have jurisdiction to hear disputes regarding a AAA request for proposal or the awarding of a request for proposal.

**CS by Governmental Oversight and Accountability on March 31, 2009:**

- Provides that area agencies on aging will develop their own dispute resolution mechanisms without recourse to the Division of Administrative Hearings.
- Provides that area agencies on aging are nongovernmental, not-for-profit entities.

B. Amendments:

None.

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This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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