

**HOUSE OF REPRESENTATIVES STAFF ANALYSIS**

**BILL #:** CS/CS/HB 935 Area Agencies on Aging  
**SPONSOR(S):** Health & Family Services Policy Council, Elder & Family Services Policy Committee;  
Bogdanoff  
**TIED BILLS:** **IDEN./SIM. BILLS:** SB 770

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	<b>REFERENCE</b>	<b>ACTION</b>	<b>ANALYST</b>	<b>STAFF DIRECTOR</b>
1)	<u>Elder &amp; Family Services Policy Committee</u>	<u>8 Y, 0 N, As CS</u>	<u>Schoonover</u>	<u>Ciccone</u>
2)	<u>Health &amp; Family Services Policy Council</u>	<u>23 Y, 0 N, As CS</u>	<u>Lowell</u>	<u>Gormley</u>
3)	<u>Healthy Seniors Appropriations Committee</u>	<u></u>	<u>Edwards</u>	<u>Dixon</u>
4)	<u>Full Appropriations Council on General Government &amp; Health Care</u>	<u></u>	<u></u>	<u></u>
5)	<u></u>	<u></u>	<u></u>	<u></u>

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**SUMMARY ANALYSIS**

CS/CS/HB 935 amends several sections of law relating to Area Agencies on Aging. Specifically, the bill directs the area agencies on aging to develop and include in request for proposals a dispute resolution mechanism that is an alternative to judicial or administrative litigation. In addition, the bill clarifies that private, non-profit Area Agencies on Aging, that contract with the Department of Elderly Affairs to provide services according to the Federal Older Americans Act, are not state agencies as contemplated by the Administrative Procedures Act.

The bill revises the definition of a lead agency and provides that Area Agencies on Aging may develop service contracts with lead agencies for a period of six years, without consulting with the department.

This bill does not appear to have a fiscal impact on state or local governments.

The bill provides an effective date of July 1, 2009.

## HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### Current Situation

##### Background

##### *The Department of Elderly Affairs*

The Department of Elderly Affairs ("the department") is designated as the state unit on aging as defined in the Older Americans Act ("OAA") of 1965, exercising all responsibilities pursuant to that act.<sup>1</sup> The department is also responsible for the planning, policy development, administration, coordination, priority setting, and evaluation of all state activities related to the objectives of the OAA.<sup>2</sup>

The department must also administer all human services and long-term care programs in Florida funded by the OAA.<sup>3</sup> As directed by the OAA, the department must designate and contract with area agencies on aging in each of the department's 11 planning and service areas.

##### *Area Agency on Aging*

Area Agencies on Aging ("AAA") are responsible for the planning and distribution of funds for services to the elderly. It is the responsibility of each AAA to ensure a coordinated and integrated provision of long-term care services to the elderly in its designated service area. It must also offer prevention and early intervention services.<sup>4</sup> Section 430.203(9), F.S., directs each AAA to contract with a lead agency for the provision of long-term care services at least once every three years using a request for proposal ("RFP") process. Further, each lead agency is "given the authority and responsibility to coordinate some or all of the services, either directly or through subcontracts, for functionally impaired elderly persons."<sup>5</sup> AAAs are subject to the public records laws of ch. 119, F.S. and public meetings requirements of ss. 286.011-286.012, F.S., when considering any contracts requiring the expenditure of public funds.<sup>6</sup>

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<sup>1</sup> s. 20.41(6), F.S.

<sup>2</sup> s. 305(a)(1)(C), Older Americans Act

<sup>3</sup> s. 430.04, F.S.

<sup>4</sup> s. 20.41(6), F.S.

<sup>5</sup> s. 430.203(9)(c), F.S.

<sup>6</sup> s. 286.011-286.012, F.S.

### *Competitive Bid Process*

The department, in consultation with each AAA, must develop guidelines for the RFP for the lead agencies.<sup>7</sup> Section 430.203(9)(b), F.S., exempts from the competitive bid process any contract with a provider that meets or exceeds established minimum standards, as determined by the department. To date, the department has not created such standards.

### *Structure*

Section 20.41(7), F.S., directs the department to contract with the board of each area agency on aging when fulfilling funding and program requirements. The board is responsible for the direction of the AAA's programs and services. The board also ensures the accountability of each agency to the local communities included in the respective service and planning areas of the AAA. The AAA board consults with the Secretary of the department, and appoints an executive director, who is responsible for agency management and implementation of board policy, and also is accountable for the agency's performance.<sup>8</sup>

### Recent Case Law

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

In February 2006, the AAA for Palm Beach/Treasure Coast issued a RFP for a lead agency pursuant to s. 430.203(9), F.S. Proposals for service were received from Mae Volen Senior Center ("Mae Volen") and Ruth Rales Jewish Family Services ("Ruth Rales"), which was awarded the bid. Mae Volen filed a formal bid protest with the AAA for Palm Beach/Treasure Coast. The protest was transferred to the Division of Administrative Hearings (DOAH) since the protest guidelines in the RFP directed that a protest involving disputed issues of material fact and not resolved by mutual agreement be referred to DOAH.<sup>9</sup> Section 120.57(3), F.S., authorizes DOAH to hear bid protests disputes from agencies.

The Administrative Procedures Act has included in its definition of "agency":<sup>10</sup>

- State officer and state department, and each departmental unit described in s. 20.04, Florida Statutes.
- Authority, including regional water supply authority.
- Board, including the Board of Governors of the State University System and a state university board of trustees when acting pursuant to the statutory authority derived from the Legislature.
- Regional planning agencies.

DOAH dismissed the suit on the grounds that DOAH did not have jurisdiction since Mae Volen was not a state agency but rather a private, non-profit entity. Mae Volen appealed the dismissal to the 4th District Court of Appeal of Florida.<sup>11</sup>

The 4<sup>th</sup> DCA reversed, holding that DOAH does have authority to hear the bid protest between Mae Volen and the AAA because the AAA acts as an arm of a state agency, the DOEA. Two factors the court based its ruling on are as follows:

- 1) The Florida Legislature designated the AAAs as "boards" performing the programmatic and funding requirements of the DOEA, similar to the listing of boards under the definition of agency under the Administrative Procedures Act.
- 2) The AAA exercises authority in a multi-county area and performs government functions in authorizing the spending of public funds and contracting with lead agencies.<sup>12</sup>

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<sup>7</sup> s. 430.203(9)(a), F.S.

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

<sup>9</sup> *Mae Volen v. Area Agency on Aging Palm Beach/Treasure Coast*, 978 So. 2d 193 (Fla. 4th DCA 2008).

<sup>10</sup> s. 120.52(1)(b), F.S.

<sup>11</sup> *Mae Volen*, 978 So. 2d at 193.

<sup>12</sup> *Id.* at 194.

The court added that lead agency contracts are included in AAA's requirement to comply with the public records act and the sunshine laws with respect to contracts requiring the expenditure of public funds.<sup>13</sup> Additionally, the court stated that "where the nonprofit corporation functions under the direction and as a public agency for the purpose of contracting with lead agencies, we do not deem its 'private' label as dispositive of whether it is an agency for purposes of the APA."<sup>14</sup>

The court distinguished its holding from the holding in Vey v. Bradford Union Guidance Clinic, Inc., 399 So. 2d 1137 (Fla. 1st DCA 1981), in which the court held that a private clinic which provided mental health services for a mental health board was not an agency within the meaning of the APA.<sup>15</sup> In Vey, a clinic contracted to perform medical services. The contract described the clinic as an independent contractor providing a private service. The court concluded in Mae Volen that AAAs are not service providers, but rather coordinators and administrators of DOEA's programs, and therefore do not fall under the ruling in Vey. The court added that the contracts between the AAAs and the lead agencies direct the lead agencies to perform the same functions as an executive administrative agency.<sup>16</sup>

#### *Department of Elderly Affairs' Reaction to the 4th DCA Ruling*

Following the 4th DCA's ruling, the department filed a motion for a rehearing in the 4th DCA, which was subsequently denied. The department then attempted to appeal the 4th DCA's decision to the Florida Supreme Court, which denied certiorari.

The department believes that the impact of the 4th DCA ruling would require that private non-profit entities be subject to the Administrative Procedures Act, including bid protests and rule promulgation. Additionally, the department is concerned that the ruling will burden area agencies on aging with unanticipated and complex procedural obligations.

#### Pending Cases

Currently pending before the 3rd DCA is First Quality Home Care, Inc. v. Alliance for Aging, Inc. Alliance for Aging is the area agency on aging for Miami-Dade and Monroe counties. The issue with this case is very similar to the issue that was before the 4th DCA in Mae Volen. First Quality Home Care, Inc. formally filed its bid protest against Alliance for Aging with DOAH, which dismissed the petition on the grounds that DOAH lacked jurisdiction. Subsequently, First Quality Home Care, Inc. filed a Petition for a Writ of Mandamus in circuit court, asking the court to order DOAH to hear the bid protest. Upon the circuit court's refusal to grant the Writ of Mandamus, First Quality Home Care, Inc. appealed the circuit court's ruling to the 3rd DCA. First Quality Home Care, Inc. filed a Petition for a Writ of Mandamus asking the 3rd DCA to determine whether the circuit court should have ordered DOAH to hear the bid protest. The department submitted an Amicus Curiae Brief in the 3rd DCA, requesting denial of the petition on the grounds that Alliance for Aging, Inc. is a private corporation and is not an administrative agency. Oral arguments for the case were held on February 17, 2009 and the DCA has not yet issued its opinion.<sup>17</sup>

#### Effect of Bill

CS/CS/HB 935 amends several sections of law relating to area agencies on aging (AAAs). Specifically, the bill clarifies that the area agencies are non-governmental, independent, not-for-profit corporation under s. 501(c)(3) of the Internal Revenue Code. This change will prevent the area agencies on aging from possibly being classified as an arm of the state. The bill amends s. 20.41, F.S., and adds new language directing the department to contract with AAAs to fulfill programmatic and funding requirements. The bill also removes references to the governing body of the area agency on aging, currently referred to as the "board" and directs the area agency on aging, in consultation with the Secretary of the department, to appoint an executive director to be accountable for the AAA's performance. The effect of these changes eliminates the statutory relationship that current exists

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<sup>13</sup> Id.

<sup>14</sup> Id.

<sup>15</sup> Id.

<sup>16</sup> Id. at 195.

<sup>17</sup> Department of Elderly Affairs, Staff Analysis HB 935 (2009), on file with Council.

between the department and the “board” of each area agency on aging, which the 4th DCA relied upon in its ruling that an AAA was essentially an arm of the department [See Recent Case Law Discussed Above].

The bill amends several sections of law regarding “lead agencies.” Specifically, the bill revises the definition of a “lead agency” as provided in s. 430.203, F.S., to reflect the increase in the number of years --from three to six--that an area agency on aging may contract with a lead agency. The effect of this change will lengthen the contract period and relationships between AAAs and lead agencies.

The bill also revises guidelines for the request for proposals between the department and the AAAs and removes the requirement that the area agencies on aging consult with the department to develop these guidelines. In addition, the bill directs the area agencies on aging to develop and include in the request for proposals a dispute resolution mechanism that is an alternative to judicial or administrative litigation. The effect of these changes clarifies the independent operational structure of the AAAs and authorizes them to develop request for proposals as they deem fit. The effect also prevents area agencies on aging from awarding request for proposals without offering a mechanism to challenge the award. Each AAA will have discretion in creating its own request for proposal procedures outlining how the contract is awarded and how it can be challenged.

The bill also removes the statutory exemption that directed an AAA, in consultation with the department, to exempt from the competitive bid process any contract with a provider who meets or exceeds minimum standards. The effect of this change eliminates the department’s role in competitive bid exceptions.

The bill does not appear to have a fiscal impact on state or local governments.

#### B. SECTION DIRECTORY:

Section 1. Amends s. 20.41, F.S.; relating to the Department of Elderly Affairs.

Section 2. Amends s. 430.203, F.S.; relating to definitions and community care for the elderly.

Section 3. Amends s. 430.2053, F.S.; relating to aging resource centers.

Section 4. Provides an effective date of July 1, 2009.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

#### A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

#### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to spend funds or take any action requiring the expenditure of funds; reduce the authority that municipalities or counties have to raise revenue in the aggregate; or reduce the percentage of a state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

### IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

On March 18, 2009, the Elder & Family Services Policy Committee adopted one amendment by the bill sponsor that clarified the Division of Administrative Hearing's jurisdiction to hear disputes regarding an area agency on aging and its request for proposal or the awarding of a request for proposal.

The bill was reported favorably as a Committee Substitute.

On April 1, 2009, the Health & Family Services Policy Council adopted two amendments by the bill sponsor. The first amendment clarifies that area agencies on aging are private, non-profit corporations and are not governmental. The second amendment requires the area agencies on aging to develop and include protest guidelines in any request for proposals issued by the area agencies on aging.

The bill was reported favorably as a Council Substitute. The analysis reflects the Council Substitute.