

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 Governmental Oversight and Accountability Committee

BILL: CS/CS/SB 1584

INTRODUCER: Criminal Justice Committee; Children, Families, and Elder Affairs Committee; and Senator Smith

SUBJECT: Human Services Contracts

DATE: April 10, 2010

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Preston</u>	<u>Walsh</u>	<u>CF</u>	Fav/CS
2.	<u>Dugger</u>	<u>Cannon</u>	<u>CJ</u>	Fav/CS
3.	<u>McKay</u>	<u>Wilson</u>	<u>GO</u>	Favorable
4.	_____	_____	<u>HA</u>	_____
5.	_____	_____	<u>WPSC</u>	_____
6.	_____	_____	_____	_____

Please see Section VIII. for Additional Information:

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|------------------------------|-------------------------------------|---|
| 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:

The bill creates s. 287.0575, F.S., relating to outsourced human services, and provides definitions. The bill requires that private accreditation standards be accepted in lieu of agency licensure requirements, and that lead agencies have more authority over human services contracts. The bill addresses material changes to such contracts and corresponding contract amendments, provides that unexpended but disbursed funds carry over to the next year as cash flow, and requires agencies to accept and maintain electronic versions of mandated reports.

In addition, the bill requires the Social Services Estimating Conference to meet annually for the purpose of developing information that is related to mental health, substance abuse, child welfare, or juvenile justice services needs.

This bill substantially amends section 216.136, Florida Statutes. The bill creates section 287.0575, Florida Statutes.

II. Present Situation:

Contracting and Outsourcing

Background

Privatization involves the provision of publicly funded services by nongovernment entities. Privatization can take several forms, including the cessation of services by government, the outsourcing of services by government, the divestiture of government assets, and the use of public-private partnerships. Outsourcing has become a common approach to providing human services as states and localities face budget crises and struggle to ensure the same level of services with limited resources. Government is increasingly turning to nonprofit groups, community-based organizations, faith-based organizations, charitable agencies, and private-sector companies to provide human services.¹

Although the terms “privatization” and “outsourcing” are often used interchangeably, the two service structures are different. With privatization, program infrastructure is transferred entirely from the government to another service provider. The government ceases to provide those services. With outsourcing, the government competitively contracts with a vendor to provide specific services. Most outsourced functions involve transferring responsibilities for the management, operation, upgrade, and maintenance of some infrastructure to the contracted vendor, with the government agency retaining a central role in program oversight.^{2,3} The Florida Statutes define “outsource” as the process of contracting with a vendor to provide a service as defined in s. 216.011(1)(f), in whole or in part, or an activity as defined in s. 216.011(1)(rr), while a state agency retains the responsibility and accountability for the service or activity and there is a transfer of management responsibility for the delivery of resources and the performance of those resources.⁴

Many factors drive government to outsource the delivery of human services, including the desire to improve service, increase efficiency, and ensure cost-effectiveness. State agency procurement contracts typically include oversight mechanisms for contract management and program monitoring. Contract monitors ensure that contractually required services are delivered in accordance with the terms of the contract, approve corrective action plans for non-compliant providers, and withhold payment when services are not delivered or do not meet quality standards.

Department of Juvenile Justice (DJJ)

The Department of Juvenile Justice contracts for residential, probation, prevention, and detention ancillary services pursuant to ch. 287, F.S., relating to procurement of personal property and

¹ Bandoh, E. *Outsourcing the Delivery of Human Services*, Welfare Information Network, Issue Notes. Vol. 7, No. 12 October 2003. Available at: <http://76.12.61.196/publications/outsourcinghumanservicesIN.htm> (Last visited March 14, 2010.)

² *Id.*

³ In Florida law, the term “outsource” means the process of contracting with a vendor to provide a service as defined in s. 216.011(1)(f), in whole or in part, or an activity as defined in s. 216.011(1)(rr), while a state agency retains the responsibility and accountability for the service or activity and there is a transfer of management responsibility for the delivery of resources and the performance of those resources. See s. 287.05721, F.S.

⁴ Section 287.05721(2), F.S.

services. All services are competitively procured, with the exception of medical and mental health care.⁵

Section 985.632, F.S., requires DJJ to conduct quality assurance reviews of all programs and services. Program monitors have been integrated with quality assurance reviewers to annually conduct programmatic monitoring as a team. Accreditation is not used to satisfy verification of contractual compliance or to determine whether programs are meeting appropriate health, safety, and treatment requirements. Program monitors provide oversight of contracted programs. A contract manager conducts administrative monitoring once per year for each provider. The department's administrative/fiscal monitoring focuses on the accounting for all contract funds/expenditures to determine that funds have been expended in accordance with the contract and all applicable laws, rules, and regulations. Programmatic monitoring focuses on the delivery of services to youth.⁶

Agency for Health Care Administration (AHCA)

The Agency for Health Care Administration does not typically outsource human services related to mental health, substance abuse, child welfare, or juvenile justice. The agency purchases and reimburses providers and managed care plans for these services.⁷

Department of Children and Family Services (DCF)

Section 20.19, and Chapters 287 and 402, F.S., require DCF, whenever possible in accordance with established program objectives and performance criteria, to contract for the provision of services by counties, municipalities, not-for-profit corporations, for-profit corporations, and other entities capable of providing needed services, if services so provided are more cost-efficient than those provided by the department.⁸ In addition, the department conducts competitive procurements for child welfare services that have been outsourced pursuant to s. 409.1671, F.S.

Payment Issues

Current law provides payment procedures for invoices submitted to a state agency. Invoices must be filed with the Chief Financial Officer (CFO), recorded in the financial systems of the state, approved for payment by the agency, and filed with the CFO not later than 20 days after receipt of the invoice and receipt, inspection, and approval of the goods or services. In the case of a dispute, the invoice recorded in the financial systems of the state shall contain a statement of the dispute and authorize payment only in the amount not disputed.⁹

Estimating Conferences

Economic, demographic, caseload and revenue forecasts are essential for a variety of governmental planning and budgeting functions. Most importantly, revenue and caseload

⁵ Department of Juvenile Justice. 2010 Legislative Session Bill Analysis, SB 1584, February 9, 2010.

⁶ *Id.*

⁷ Agency for Health Care Administration. 2010 Bill Analysis and Economic Impact Statement, SB 1584.

⁸ Department of Children and Family Services, Procurement and Contract Management, Contract Management System For Contractual Services. CFOP 75-2. Available at: <http://www.dcf.state.fl.us/admin/publications/policies/075-2.pdf>. (Last visited March 13, 2010).

⁹ s. 215.422, F.S.

estimates are needed to ensure that the state meets the constitutional balanced budget requirement. The various forecasts are primarily used in the development of the constitutionally required Long-Range Financial Outlook, the Governor's budget recommendations, and the General Appropriations Act. Economic and demographic forecasts are also used to support estimates of revenues and demands for state services.¹⁰

Each state agency and the judicial branch must use the official results of the conference in carrying out their duties under the state planning and budgeting system. While the Legislature is not bound to use the official consensus forecasts, it has consistently used the results of these conferences in its official duties since 1970.

Conference principals can call conferences and are generally responsible for developing and choosing the forecasts. Currently, the estimating conferences meet at the call of any of the principals, which is typically four times a year. However, meetings are not every quarter because more times are needed early in the fiscal year to produce the Long Range Financial Outlook. The Social Services Estimating Conference has met four times in 2010: January 26, January 29, February 12, and February 26.¹¹

III. Effect of Proposed Changes:

Definitions

The bill defines the term "financial impact" as an increase in reasonable costs of 5 percent or more in the annual aggregate payment to a contractor performing a contract for the outsourcing of human services.

The bill defines the term "human services" to mean services related to mental health, substance abuse, child welfare, or juvenile justice.

The bill also defines the term "new governmental mandate" as a statutory requirement, administrative rule, regulation, assessment, executive order, judicial order, or other governmental requirement, or an agency policy, that was not in effect when a contract for the outsourcing of human services was originally entered into and that directly imposes an obligation on the contractor to take, or to refrain from taking, an action in order to fulfill its contractual obligation.

Outsourced Human Services

The bill contains provisions that purport to create a more stable business environment for providing outsourced human services related to mental health, substance abuse, child welfare, or juvenile justice and to ensure accountability, eliminate duplication, and improve efficiency with respect to the provision of such services.

¹⁰ Office of Economic and Demographic Research, The Florida Legislature. Available at: <http://edr.state.fl.us/conferences/confprocess.pdf>. (Last visited March 14, 2010).

¹¹ Office of Economic and Demographic Research, The Florida Legislature. Available at: <http://edr.state.fl.us/conferences/schedule.pdf>. (Last visited March 14, 2010).

The bill provides that accreditation by certain accrediting bodies¹² shall be accepted by state agencies in lieu of the agency's facility licensure onsite review and administrative requirements, and as a substitute for the state agency's licensure, administrative, and program monitoring requirements. The bill provides that accreditation for administrative requirements satisfies the administrative requirements for licensure during the period of time that the accreditation is effective.

The bill also provides that the Department of Management Services (DMS or department) or agency may continue to inspect and monitor the provider as necessary with respect to reimbursement issues, complaints, and compliance with federal and state laws not covered by accreditation. DMS would not normally have anything to do with these types of contracts, unless they are established by DMS as state term contracts pursuant to s.

The bill requires each state agency that has been designated by the federal government and state law as the authorized state entity with respect to the provision of specified human services to be the lead agency for that designated human service population. By July 1, 2011, each lead agency is required to:

- Develop a common monitoring protocol that must be used by all agencies serving the same population;
- Implement a plan to coordinate monitoring activities related to the delivery of services to the populations being served by multiple state agencies;
- Adopt rules that guide the delivery of service across the jurisdictions of multiple state agencies serving the same population and coordinate all monitoring activities; and
- Provide for a master list of core required documents for contract monitoring purposes and provide for the collection of such documents from each service provider. DMS shall establish an electronic document vault for the storage, delivery, and retrieval of administrative documents required in the regulatory review processes. To the greatest extent possible, the department shall promote the development, implementation, and maintenance of the document vault by providers or provider trade associations.

The bill also requires:

- The establishment of a document vault for the storage, delivery, and retrieval of administrative documents required for regulatory review.
- Contracts to outsource human services related to mental health, substance abuse, child welfare, and juvenile justice must:
- Provide that if a material change to the scope of the contract is imposed upon a service provider and compliance with such change will have a material adverse financial impact on the service provider, the contracting agency shall negotiate a contract amendment with the service provider to increase the maximum obligation amount or unit price of the contract to offset the material adverse financial impact of the change if the service provider furnishes

¹² Those accrediting entities are the Joint Commission on Accreditation of Healthcare Organizations, the Commission on Accreditation of Rehabilitation Facilities, and the Council on Accreditation.

evidence to the contracting agency of such material adverse financial impact along with a request to renegotiate the contract based on the proposed change;

- Ensure that payment will be made on all items not under dispute and that payment will not be withheld on undisputed issues pending the resolution of disputed issues; and
- Provide that any disbursed funds that remain unexpended during the contract term be considered as authorized revenue for the purposes of cash flow, program expansion and development, and administrative costs.

The bill also provides:

- When a contractor is aggrieved by the refusal or failure of a governmental unit to negotiate a contract amendment to remedy a material adverse financial impact of a new governmental mandate pursuant to this section, this constitutes an agency action for the purposes of chapter 120.
- Each agency that contracts for the provision of specified human services must prepare a comprehensive list of all contract requirements, mandated reports, outcome measures, and other requirements of a provider and submit the list annually to the Governor, the President of the Senate, and the Speaker of the House of Representatives.
- State agencies shall provide an analysis of every new governmental mandate, form, or procedure required of a service provider under a contract for the outsourcing of human services which was not in effect when the contract was originally entered into. The analysis must identify the cost to the provider of any new requirements and must be transmitted to the provider before any new mandate, form, or procedure may be used or implemented. The analysis must also include a fiscal impact statement with respect to each new form, procedure, or mandate required or imposed.
- State agencies must accept all mandated reports and invoices from service providers electronically and shall establish a procedure that allows for posting all core documents in secure electronic storage. If a service provider uses such storage, the state agency must have access to the electronic storage for monitoring core documents, and shall by rule or contract require that the provider deposit administrative documents requested by the department or agency in such storage.

Estimating Conferences

The bill requires the Social Services Estimating Conference to be convened annually for the purpose of developing information that is related to mental health, substance abuse, child welfare, or juvenile justice services needs, including, but not limited to, enrollment, caseload, utilization, and expenditures that reflect population growth and economic trends.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Article II, section 3 of the Florida Constitution creates the three branches of Florida's government, and prohibits one branch from exercising the powers of another branch. This separation of powers doctrine includes a prohibition on one branch delegating its constitutionally assigned powers to another branch.¹³ Therefore, statutes granting power to the executive branch "must clearly announce adequate standards to guide ... in the execution of the powers delegated. The statute must so clearly define the power delegated that the [executive] is precluded from acting through whim, showing favoritism, or exercising unbridled discretion."¹⁴ The Legislature may delegate some discretion in the operation and enforcement of the law, but it cannot delegate the power to say what the law is.¹⁵

The bill requires agencies to accept "national accreditation of human services providers" notwithstanding any other provision of law, which appears to be a delegation problem on its face, since it requires the unfixed standards of a private entity to substitute for and supplant the Legislature's duty to determine the law.

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

DCF reports that there may be a fiscal impact on the private sector but it is impossible to measure that impact at this time.

C. Government Sector Impact:

The bill requires DMS to establish an "electronic document vault" for the storage, delivery, and retrieval of administrative documents required in the regulatory review process. It is uncertain whether there would be costs to establish and maintain the "vault."

¹³ *Chiles v. Children A, B, C, D, E & F*, 589 So.2d 260, 264 (Fla.1991).

¹⁴ *Fla. Dep't of State, Div. of Elections v. Martin*, 916 So.2d 769, 770 (Fla. 2005), citing *Lewis v. Bank of Pasco County*, 346 So.2d 53, 55-56 (Fla.1976).

¹⁵ *Dep't of Bus. Reg., Div. of Alcoholic Beverages & Tobacco v. Jones*, 474 So.2d 359, 363 (Fla. 1st DCA 1985).

Department of Juvenile Justice (DJJ)

The requirement in (4), lines 128-137, will result in a recurring fiscal impact on the DJJ of \$53,566, to hire one additional operations and management consultant because of the increased workload.

Department of Children and Family Services

DCF reports that the provisions of the bill will result in an increased workload and duplicative tasks for the department which will result in an unknown fiscal impact. DCF has not provided an estimate of how the bill will impact workload or duplicative tasks.

VI. Technical Deficiencies:

There are a number of provisions in the bill that are unclear, e.g.:

- Lines 147-148 of the bill should read, “Each agency shall annually review **and list** all contract ...”
- Lines 157-162 of the bill relating to the estimating conference are not clear whether this annual requirement is in addition to the current meeting requirements.
- Lines 143- 145 appear to have both a grammar issue and a substantive issue, which is described in Related Issues, below. As currently written, the bill states that “any contractor aggrieved...constitutes agency action...” The first four words of the sentence can be struck, to make clear that the governmental unit’s action constitutes the action, not the contractor.

VII. Related Issues:

The constitutional problem with delegating legislative authority as described in new s. 287.0575(2)(a), F.S., is discussed in Other Constitutional Issues, above, but this provision also presents practical issues. If the three private accreditation entities have different accreditation standards, there will be a lack of uniformity in standards. It is also unclear what “administrative requirements” are to be supplanted by the private accreditations.

DMS would not routinely have oversight of the types of contracts addressed in this bill, unless they are established by DMS as state term contracts pursuant to s. 287.042(2)(a), F.S., so the new s. 287.0575(2)(a), F.S., is a departure from current practice, and could lead to confusion among agencies relating to the authority for contract management duties.

Lines 86-88 of the bill give authority to a “lead agency” to “adopt rules that guide the delivery of service across the jurisdictions of multiple state agencies....” This provision may conflict with statutory grants of rulemaking authority to individual agencies, and may lead to uncertainty as to which agency has authority for what rule.

The bill requires DMS to establish an “electronic document vault for the storage, delivery, and retrieval of administrative documents required in the regulatory review process.” DMS is not routinely involved in human services contracts, so an agency occupied in these types of contracts would perhaps be better suited to the task, and agencies can possibly accomplish these tasks without the need for this “electronic document vault” and associated costs. The bill also provides that DMS must promote the implementation of the “vault” by providers or provider trade

associations. The bill could be clarified to require a competitive procurement for this “vault,” and specify more precisely what the vault is supposed to do that isn’t already being done by agencies.

Lines 99-110 requires that a contract to outsource human services must have a provision that material changes that have a financial impact on a provider must result in a contract amendment to increase the payment to the contractor. This provision may be susceptible to differing interpretations, since “material change” is not defined, and though “financial impact” is defined in the bill, it includes a reference to “reasonable costs,” which isn’t defined.

Lines 143-146 introduce the phrase “governmental unit” into the bill, but the rest of the bill refers to agencies. The Administrative Procedure Act (APA) applies to “agencies” and has no definition for “governmental unit,” so the effect of this provision is unclear, since, depending on what a “governmental unit” is, the APA may or may not be applicable.

This provision is also a substantial departure from current APA practice in terms of what constitutes “agency action,” currently defined as the whole or part of a rule or order, or the equivalent, or the denial of a petition to adopt a rule or issue an order. The term also includes any denial of a request for an agency to initiate rulemaking.¹⁶ The bill would essentially subject an agency to APA proceedings for *inaction*, if it failed to negotiate a contract amendment under certain circumstances. Those circumstances could include, by virtue of the bill’s definition of “new governmental mandate,” a judicial order that was not in effect when the contract was entered into.

The **Agency for Health Care Administration** has reported that if Medicaid providers are included in the definition of providers for outsourced human services, then a requirement for state agencies to accept national accreditations as a substitute for existing licensure and monitoring requirements may create notable impacts on AHCA. National accreditation standards may differ greatly from Florida Medicaid guidelines, and reducing the frequency and nature of the reviews may result in decreasing the quality of care for Medicaid recipients.¹⁷

The consequences of enacting this legislation on the agency’s licensing and monitoring processes cannot be determined at this time. Agency experience has shown that the processes for combining monitoring tools and coordinating monitoring activities can result in considerable outlays of staff time and a low rate of satisfaction from providers.¹⁸

The **Department of Juvenile Justice** has stated similar concerns surrounding accreditation. Accrediting entities currently recognized by DJJ conduct a site visit once every three years and are not intended to ensure contract compliance or the welfare and safety of youth served by the department. In a 2003 review of DJJ’s quality assurance and program monitoring, OPPAGA concluded:

One of the issues that has arisen regarding the department’s oversight of contracted residential programs is whether accredited programs should be

¹⁶ Section 120.52(2), F.S.

¹⁷ Agency for Health Care Administration. 2010 Bill Analysis and Economic Impact Statement, SB 1584,

¹⁸ *Id.*

exempt from the QA process. We concluded that this should not occur. Although the department's QA and accreditation standards are similar, accredited programs do not always perform well on QA reviews. This is likely due to differences in the length of time between the reviews and the thoroughness of the reviews. Due to these differences and the potential risks that programs pose to the state when they do not adequately care for youth in their custody, exempting all accredited programs from QA review is not in the best interest of the state.¹⁹

The **Department of Children and Family Services** has commented that the provision of the bill requiring that if a material change to the scope of contract that will have a material adverse financial impact on the service provider, the department must negotiate a contract amendment with the provider to increase the dollar amount, may be problematic:

There is no mention of a provision requiring a reduction in the overall contract amount or reduction in the unit price when there are savings associated with a change in the scope of service or other cost savings, so this is a one-sided provision. It is not clear if this provision would apply to changes in scope that preceded the effective date of the legislation. Any provision for renegotiation of price due to changes in the scope of work should work both ways, so that reductions or offsets due to savings are taken into account. In addition, there should be provisions to address budget and appropriation issues.²⁰

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 Criminal Justice on April 7, 2010:

Deletes the cost of living adjustment provision.

CS by Children, Families, and Elder Affairs on March 18, 2010:

The committee substitute:

- Expands provisions relating to accreditation to require that accreditation by certain accrediting bodies shall be accepted by state agencies in lieu of the agency's facility licensure onsite review and administrative requirements, and as a substitute for the state agency's licensure, administrative, and program monitoring requirements. Accreditation for administrative requirements satisfies the administrative requirements for licensure during the period of time that the accreditation is effective. It also provides that the Department of Management Services (DMS) or agency may continue to inspect and monitor the provider as necessary with respect to

¹⁹ Office of Program Policy Analysis and Government Accountability. *Juvenile Justice Can Improve Its Quality Assurance and Program Monitoring Processes*, Report 03-73, December 2003.

²⁰ Department of Children and Family Services, Staff Analysis and Economic Impact, SB 1584. February 4, 2010.

reimbursement issues, complaints, and compliance with federal and state laws not covered by accreditation.

- Requires the establishment of a document vault for the storage, delivery, and retrieval of administrative documents required for regulatory review.
- Requires state agencies to accept all mandated reports and invoices from service providers electronically and shall establish a procedure for posting all core documents in secure electronic storage.

B. Amendments:

None.