

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 Children, Families, and Elder Affairs Committee

BILL: SB 226

INTRODUCER: Senator Smith

SUBJECT: Human Services Contracting

DATE: March 18, 2011 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Preston	Walsh	CF	Pre-meeting
2.	_____	_____	CJ	_____
3.	_____	_____	GO	_____
4.	_____	_____	BC	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

The bill creates s. 287.0576, 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 requires a single agency to take the lead in developing policies and monitoring requirements for specified human services. The bill specifies duties for each lead agency, addresses material changes to 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.

The bill requires the Department of Management Services (DMS) to recognize established electronic storage vaults and to promote the development, implementation, and maintenance of such vaults.

In addition, the bill requires the Social Services Estimating Conference to add to the information it develops to include information that is related to mental health, substance abuse, child welfare, or juvenile justice services needs.

This bill substantially amends s. 216.136 and creates s. 287.0576, Florida Statutes.

II. Present Situation:

Contracting and Outsourcing

Background

Privatization involves the provision of publicly funded services by nongovernmental 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 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.³

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.

Agency for Health Care Administration (AHCA)

The Agency for Health Care Administration does not contract with providers of 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. Currently, AHCA contracts with Medicaid managed care organizations (MCO) to offer plans that cover Medicaid mental health services for Medicaid eligible recipients. The MCOs then subcontract with mental health service providers to deliver these services.⁴

¹ Bando, 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 16, 2011.)

² *Id.*

³ Section 287.05721(2), F.S.

⁴ Agency for Health Care Administration. 2011 Bill Analysis and Economic Impact Statement, SB 226.

For Medicaid providers who are reimbursed on a fee-for-service basis, specialists in each Medicaid area office conduct the administrative monitoring. In addition, AHCA and the MCOs also monitor many providers to ensure quality of services.⁵

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.⁶ In addition, the department conducts competitive procurements for child welfare services that have been outsourced pursuant to s. 409.1671, F.S.⁷

Agency for Persons with Disabilities (APD)

The Agency for Persons with Disabilities works in partnership with local communities and private providers to assist people who have developmental disabilities and their families. APD also provides assistance in identifying the needs of people with developmental disabilities for supports and services, and manages various Medicaid waivers.⁸ While it is a provider of human services, APD is not included in the bill among the human services agencies.⁹

Department of Health (DOH)

The Department of Health currently interprets child welfare services as being those services associated with adoption and foster care. The only service that DOH has in this area is child protective services within the Division of Children's Medical Services (CMS).¹⁰ Currently CMS performs the programmatic monitoring of approximately 23 child protection team contracts at an annual cost of \$31 million.¹¹

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

⁵ *Id.*

⁶ 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 16, 2011).

⁷ Department of Children and Family Services. Staff Analysis and Economic Impact, SB 226, December 20, 2010.

⁸ Prior to October, 2004, APD was the Developmental Disabilities Program Office within the Department of Children and Families.

⁹ However, the background screening requirements and the reporting requirements of the bill will affect APD. Agency for Persons with Disabilities. 2011 Bill Analysis, SB 226, February 11, 2011.

¹⁰ Section 39.303, F.S. provides that the Children's Medical Services Program at DOH shall develop, maintain, and coordinate the services of one or more multidisciplinary child protection teams in each of the service districts of DCF to supplement the assessment and protective supervision activities of DCF's family safety program. Such teams may be composed of appropriate representatives of school districts and appropriate health, mental health, social service, legal service, and law enforcement agencies. The two departments are required to maintain an interagency agreement that establishes protocols for oversight and operations of child protection teams and sexual abuse treatment programs.

¹¹ Department of Health. 2011 Bill Analysis, Economic Statement and Fiscal Note, SB 226, January 7, 2011.

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.¹²

Estimating Conferences

Economic, demographic, caseload and revenue forecasts are essential for a variety of governmental planning and budgeting functions. Most importantly, revenue and caseload 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.¹³

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 1970.¹⁴

Document Vaults

Section 287.0585, F.S., relating to the coordination of contracted services, establishes duties and responsibilities for DCF, APD, DOH, the Department of Elderly Affairs (DOEA), and the Department of Veterans' Affairs (DVA), and service providers under contract to those agencies. A single lead administrative coordinator for each contract service provider must be designated and the lead coordinator is required to maintain an accessible electronic file of up-to-date administrative and fiscal documents, including, but not limited to, corporate documents, membership records, audits, and monitoring reports. DCF reports that agencies are in the process of implementing this "document vault" for providers that would fall within "health and human services."¹⁵

Background Screening

The Florida Legislature in 1995 created standard procedures for the criminal history background screening of prospective employees in order to protect vulnerable persons, including children, the elderly, and the disabled. Over time, implementation and coordination issues arose as technology changed and agencies were reorganized.

To address these issues, the legislature enacted legislation in 2010 that substantially rewrote the requirements and procedures for background screening of the persons and businesses that deal primarily with vulnerable populations.¹⁶ Background screening requirements vary depending upon job classifications and populations of clients served.

¹² s. 215.422, F.S.

¹³ Office of Economic and Demographic Research, The Florida Legislature. Available at: <http://edr.state.fl.us/Content/conferences/index.cfm> (Last visited March 16, 2011).

¹⁴ *Id.*

¹⁵ Department of Children and Family Services. Staff Analysis and Economic Impact, SB 226, December 20, 2010.

¹⁶ Chapter 2010-114, L.O.F.

The Federal Bureau of Investigation (FBI) has only authorized Florida agencies to share FBI screening information with other Florida agencies if both agencies are using the information for the same purpose. For example, the FBI has authorized DCF to share information with APD, but has refused to allow these agencies to share their screening information with AHCA.¹⁷

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 intend to create a more stable business environment for contractors 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.

The bill provides that accreditation by the Joint Commission on Accreditation of Healthcare Organizations (JACHO), the Commission on Accreditation of Rehabilitation Facilities (CARF), and the Council on Accreditation 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 an agency may continue to inspect and monitor the contractor as necessary with respect to reimbursement issues, complaints investigations and suspected problems, and compliance with federal and state laws not covered by accreditation.

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

¹⁷ Agency for Persons with Disabilities. 2011 Bill Analysis, SB 226, February 11, 2011.

- 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;
- Provide for a master list of core required documents for contract monitoring purposes and provide for the submission or posting of such documents by each contractor, and
- If the same information or documentation is required by more than one agency, develop a common form to be used by all agencies requesting that information or documentation.

The bill requires that a department or agency must accept all mandated reports and invoices from human services contractors electronically, and allow all required core documents required to be posted in secure electronic storage. The Department of Management Services (DMS) is required to recognize electronic document vaults established for the purpose of storing, delivering, and retrieving documents required in monitoring and regulatory review processes. To the greatest extent possible, the department shall promote the development, implementation, and maintenance of such vaults by service providers or provider trade associations. If a contractor uses such storage, the department or agency must have access to the electronic storage in order to monitor required documents, and shall by rule or contract require the contractor to deposit documents requested by the agency in such storage.

The bill also requires that 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 evidence to the contracting agency of such material adverse financial impact along with a request to renegotiate the contract based on the proposed change;
- Provide for an annual cost of living adjustment that reflects increases in the cost of living index, subject to appropriation;
- 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 and continuation of the contract.

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, F.S.

- 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.
- 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.

Background Screening

The bill provides that Level 2 background screening conducted for one lead agency shall satisfy the screening requirements for all agencies requiring such screening.

Estimating Conferences

In addition, the bill requires the Social Services Estimating Conference to add to the information it develops to include information that is related to mental health, substance abuse, child welfare, or juvenile justice services needs.

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.¹⁸ 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

¹⁸ *Chiles v. Children A, B, C, D, E & F*, 589 So.2d 260, 264 (Fla.1991).

that the [executive] is precluded from acting through whim, showing favoritism, or exercising unbridled discretion.”¹⁹ 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.²⁰

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:

AHCA reports that a reduction in administrative monitoring may reduce provider costs.

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

APD reports that providers and some APD consumers may realize some savings if Level 2 background screenings for one lead agency will satisfy the requirements for all agency screenings.

C. Government Sector Impact:

Agency for Health Care Administration

ACHA reports that under the current definition of outsourced contracts, provisions of the bill would not impose a fiscal impact on the agency. If the intent of the bill is to apply the new provisions to all contracted health related services, then AHCA’s existing contracts with Medicaid managed care plans would have to be amended to add the new requirements which may result in significant fiscal issues if the agency must comply with new mandates and funds have not been appropriated to cover the cost.

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.

In addition, in relation to the Substance Abuse Program Office, the bill is unclear as to whether the exception for accredited agencies would also extend to the licensing fees

¹⁹ *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).

²⁰ *Dep’t of Bus. Reg., Div. of Alcoholic Beverages & Tobacco v. Jones*, 474 So.2d 359, 363 (Fla. 1st DCA 1985).

collected as part of the licensing process. If the accreditation exception was approved, and licensing fees not collected as part of accreditation requirements, the state would lose licensure revenue each year.

Department of Health

DOH reports that requiring contracts to outsource human services to provide a cost of living adjustment would result in a fiscal impact on the department. For example, if the cost of living increased by 1 percent, then there would be a potential for the child protection team contracts to increase by \$310,000. DOH reports that the cost increase not accompanied by an increase in services might be contrary to the provisions of s.215.425, F.S., relating to the prohibition of extra compensation claims.

VI. Technical Deficiencies:

None.

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.

Lines 101-103 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.

Lines 134-148 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.

The **Department of Children and Family Services** has raised a number of issues with the provisions of the bill including, but not limited to:

- Not every contracted service supplied by DCF necessarily falls within the category of “outsourced” and therefore the department would have considerable difficulty in providing clear operational instructions to employees. Examples of “outsourced” human services would be lead agencies under Section 409.1671, F.S., and managing entities under Section 394.9082, F.S. If the intent is to address only providers of outsourced services, then the number of affected providers is limited. On the other hand, if the intent is to address all providers of human services, then there are numerous types of providers that would be covered by the legislation.

- National accreditation typically only requires an onsite review every 3 years. In some cases the particular service purchased from a provider does not fall under national accreditation. The provider as an entity may not have accreditation over all programs for which it provides services to the DCF. The national accreditation would not provide assurance that the services paid for were delivered, and that the health, safety and welfare of the department's clients is not compromised.
- When considering the provisions of the bill related to substitution of accreditation for "programmatic monitoring", DCF is required to continue to operate a statewide quality assurance (QA) system pursuant to title IV-B and IV-E of the Social Security Act. In order for Florida to receive federal funding, regulations require the state to develop and implement standards to ensure that children in foster care placements in public or private agencies are provided quality services that protect the safety and health of the children. States must also implement standards to ensure that children in foster care placements are provided quality services that protect the safety and health of the children and operate an identifiable quality assurance system. The Federal Administration for Children and Families has confirmed that Florida will be out of compliance if there is not a QA system in place.
- Subsection (3) of the bill requires that the agency designated at the state or federal level as the authorized entity for a defined human service population be the "lead agency" for all human services to that population. While subsection (3) does not specifically duplicate the requirements of the statute that would immediately precede it in statutory order,²¹ the requirements of the two sections overlap significantly. Section 287.0575, F.S., already contains a statutory scheme for designating a lead state agency when multiple agencies contract with a single provider for "health and human services" and makes that lead agency responsible for establishing a coordinated schedule for administrative and fiscal monitoring, and establishing and maintaining a unified set of documents to be used by the multiple agencies.
- DCF has had experience in consolidating monitoring coordination efforts, which have proven to be unsuccessful and time intensive. Ultimately, each agency defaults to its own monitoring. Specifically, the Substance Abuse Program Office worked with AHCA, DJJ, and the Department of Corrections to develop a Unified Substance Abuse Monitoring Tool. While progress was made, a considerable amount of staff effort is required to implement consolidating monitoring tools.²²

Agency for Persons with Disabilities

APD reports potential issues with the background screening provisions in the bill. The bill does not specify how agencies should resolve disqualifying offenses that are unique to their individual screening requirements. Provisions of the bill also appear to conflict with federal requirements relating to the confidentiality of the screening results imposed by the FBI.²³

The **Department of Health** has raised a number of concerns with provisions of the bill including:

²¹ s. 287.0575, F.S.

²² Department of Children and Family Services, Staff Analysis and Economic Impact, SB 226. December 10, 2010.

²³ Agency for Persons with Disabilities. 2011 Bill Analysis, SB 226, February 11, 2011.

- Section 287.001, F.S. provides that all contracts must be awarded equitably and economically. The bill would give preference to some providers due to the cost of living provision.
- The bill requires the lead agency to develop a common monitoring protocol and it is unclear whether this is in addition to, or it supplants, the requirements of s. 287.0575(4), F.S., relating to the coordination of contracted services.
- Provisions of the bill appear to conflict with s. 287.0575, F.S., relating to the coordination of contracted services due to the fact that the bill limits monitoring activities on providers of human services accredited by JAHCO, CARF, and COA. Section 287.0575 F.S., does not provide for exceptions.
- The bill provides that unexpended contract funds will carry forward to the next contract cycle, which may conflict with some federal grant directives that require all unexpended funds to be returned.

The **Department of Health** and **the Agency for Persons with Disabilities** report the potential for increased litigation against the departments and agencies as a result of the provision of the bill that gives contractors additional administrative hearing rights related to the negotiation of contracts.

VIII. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

- B. **Amendments:**

None.