

**Rule Summary and Fiscal Analysis (Part A)****Department of Aging**

Agency Name

Division

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**173-3-04**

Rule Number

**NEW**

TYPE of rule filing

Rule Title/Tag Line

**Provider agreements in general.****RULE SUMMARY**

1. Is the rule being filed consistent with the requirements of the RC 119.032 review? **No**

2. Are you proposing this rule as a result of recent legislation? **No**

3. Statute prescribing the procedure in accordance with the agency is required to adopt the rule: **119.03**

4. Statute(s) authorizing agency to adopt the rule: **173.02; 173.04; 173.392; Section 305 (a)(1)(C) of the Older Americans Act of 1965, 79 Stat. 210, 42 U.S.C. 3001, as amended in 2006; 45 C.F.R. 1321.11 (10-01-2013 edition).**

5. Statute(s) the rule, as filed, amplifies or implements: **173.04; 173.392; Older Americans Act of 1965, 79 Stat. 210, 42 U.S.C. 3001, as amended in 2006; 45 C.F.R. Parts 74 and 92 (10-01-2013 edition).**

6. State the reason(s) for proposing (i.e., why are you filing,) this rule:

To comply with section 119.032 of the Revised Code, ODA reviewed this rule and is now filing it with JCARR as part of a 4-rule package.

Rules 173-3-01, 173-3-04, 173-3-05, and 173-3-09 of the Administrative Code pertain to provider agreements obtained through open and free competition (i.e., competitive bidding), not through provider certification. In general, open and free competition allows a winner to have a provider agreement, while provider certification allows any willing and qualified provider to have a provider agreement.

Rule 173-3-05 of the Administrative Code is the primary rule of this 4-rule package. It expounds upon federal codes that require open and free competition for provider agreements. Open and free competition gives any provider that wants a provider agreement (i.e., a contract or grant) to provide goods or services a fair chance at obtaining a provider agreement. Because the providers that win provider agreements do so by offering better goods and services and lower prices, open and free competition spurs providers to find ways to offer better goods and services and lower prices.

The three remaining rules of the package cover related topics. Rule 173-3-01 of the Administrative Code introduces Chapter 173-3 of the Administrative Code and defines terms used in the chapter. Rule 173-3-04 of the Administrative Code regulates provider agreements in general (e.g., limits to multi-year provider agreements). Rule 173-3-09 of the Administrative Code regulates appeals for when a bidder doesn't win a provider agreement with an area agency on aging (AAA) and has already appealed the matter to the AAA.

#### THE RULE PROJECT HAS 4 PRIMARY GOALS

##### GOAL 1: HIGHLIGHT OPTIONS FOR PROCURING GOODS AND SERVICES BY OPEN AND FREE COMPETITION

The primary goal of this rule package is to eliminate the need for AAAs to use the sealed-bidding method for open and free competition. The method costs AAAs more than other methods because it requires more administration. The method also costs providers more for the same reason.

Although the current version of rule 173-3-05 of the Administrative Code does not mention sealed bidding, it implies that sealed bidding is required. That is because the rule details a request-for-proposal process that is part of sealed bidding. ODA believes that AAAs regularly procure goods and services by sealed bidding because of current language in rule 173-3-05 of the Administrative Code.

Therefore, ODA is proposing to adopt a new rule 173-3-05 of the Administrative Code. The proposed new rule clearly indicates that sealed bidding is not always required. What the federal law requires is open and free competition and the federal law also gives AAAs a few ways to achieve the open and free competition. ODA

highlights all three ways in the proposed new rule.

One of the non-sealed-bidding methods is a small-purchase method. It is similar to the way a homeowner would shop for a plumber. If the homeowner wanted to contract with a plumber, he or she would contact a few plumbers and choose, discuss needs and prices, then hire the plumber who offered to do the job correctly for the lowest cost.

Federal law permits an AAA to use the small-purchase methods for services that cost less than \$100,000. In rural parts of the state, most provider agreements would be for less than \$100,000. An AAA with a mostly-rural planning and service area may be able to use the small-purchase methods for most of their provider agreements. This would be a significant reduction in administrative costs for the AAA and the providers.

One way that ODA proposes to highlight the small-purchase method is by stating the threshold amount in the rule.

#### **GOAL 2: CLARIFY WHEN, AND BY WHAT AUTHORITY, AN AAA MAY PROCURE GOODS AND SERVICES BY NON-COMPETITIVE MEANS**

The current version of rule 173-3-05 of the Administrative Code contained language that said an AAA could ask ODA for permission to not offer open and free competition. Federal law outlines situations under which an AAA may forego open and free competition. An AAA does not need to ask ODA for permission to forego open and free competition in those situations. Under other situations, federal law requires AAAs to use open and free competition. ODA cannot waive the federal law. Therefore, ODA is proposing to remove that language from the rule.

#### **GOAL 3: MAKE RULE 173-3-04 OF THE ADMINISTRATIVE CODE MORE READABLE**

ODA is proposing to organize the rule 173-3-04 of the Administrative Code under new sub-titles.

#### **GOAL 4: CLARIFY THE PROVIDERS' MODES OF BUSINESS UNDER ODA PROGRAMS**

The introduction to Chapter 173-3 of the Administrative Code in the current version of rule 173-3-01 of the Administrative Code implies that some providers are certified, while other providers are not. However, that is not the case.

Providers can enter many lines of business and often are both certified and non-certified at once. This doesn't compare to being licensed and unlicensed at once, which wouldn't be possible. Instead, it means that they serve consumers who are enrolled in multiple ODA-administered programs: (1) Some programs refer business to providers through a process that involves provider certification. Any

willing provider may provide the service so long as the provider meets the conditions of participation for that program. (2) Other programs procure goods and services from providers by allowing providers to compete for the business.

A provider may provide one service (e.g., an adult day service) to consumers who are enrolled in a variety of programs all at once. For example, some consumers could be enrolled in a Medicaid-waiver program like the PASSPORT, Choices, or Assisted Living Programs. Providers who serve these consumers do so as certified providers. Other consumers could receive services from the Alzheimer's Respite or Older Americans Act Programs. Providers who serve these consumers do so as non-certified providers. A provider who serves consumers who are enrolled in the PASSPORT Program and who receive services through the Older Americans Act are performing one service through two means at once: certified and uncertified.

PLEASE SEE THE BUSINESS IMPACT ANALYSIS FOR THIS RULE PACKAGE FOR MORE INFORMATION.

7. If the rule is an AMENDMENT, then summarize the changes and the content of the proposed rule; If the rule type is RESCISSION, NEW or NO CHANGE, then summarize the content of the rule:

ODA is proposing to adopt this new rule to replace a same-numbered rule that ODA is simultaneously proposing for rescission. Compared to the rule language that ODA adopted into the rule that ODA is proposing for rescission, in the proposed new rule, ODA is proposing to:

1. Add sub-titles to help readers thumb through the rule. (E.g., "Authority," "Federal uniform financial and program management requirements," "Purchase-of-service provider agreements," "Cost-reimbursement provider agreements," "No retroactive provider agreements," "Debarred providers," "Not earning funds," and "Multi-year provider agreement limitations.")
2. Organize paragraphs under the new sub-titles.
3. Move language regarding debarred providers from the current version of rule 173-3-05 of the Administrative Code to this proposed new rule.
4. Cite the edition numbers of the C.F.R. citations in the rule to comply with section 121.75 of the Revised Code. {E.g., "(10-01-2013 edition)"}
5. Add new language that repeats federal circular requirements for AAAs to place spending limits on cost-reimbursement provider agreements.
6. Clarify that an AAA may not enter into a multi-year provider agreement that has extends into the future past the date that the AAA's area plan expires.

8. If the rule incorporates a text or other material by reference and the agency claims the incorporation by reference is exempt from compliance with sections 121.71 to 121.74 of the Revised Code because the text or other material is **generally available** to persons who reasonably can be expected to be affected by the rule, provide an explanation of how the text or other material is generally available to those persons:

This rule informs providers 45 C.F.R., Parts 74 and 92 require providers AAAs to procure goods and services by means of open and free competition. The Code of Federal Regulations is available to the general public, free of charge, on [www.gpo.gov](http://www.gpo.gov).

9. If the rule incorporates a text or other material by reference, and it was **infeasible** for the agency to file the text or other material electronically, provide an explanation of why filing the text or other material electronically was infeasible:

ODA determined that it was not required to incorporate the entirety of the text of 45 C.F.R., Parts 74 and 92 into the rule because ODA referenced the federal regulations in the rules and those federal regulations are available to the general public, free of charge, or [www.gpo.gov](http://www.gpo.gov).

10. If the rule is being **rescinded** and incorporates a text or other material by reference, and it was **infeasible** for the agency to file the text or other material, provide an explanation of why filing the text or other material was infeasible:

*Not Applicable.*

11. If **revising** or **refiling** this rule, identify changes made from the previously filed version of this rule; if none, please state so. If applicable, indicate each specific paragraph of the rule that has been modified:

*Not Applicable.*

12. 119.032 Rule Review Date:

(If the rule is not exempt and you answered NO to question No. 1, provide the scheduled review date. If you answered YES to No. 1, the review date for this rule is the filing date.)

NOTE: If the rule is not exempt at the time of final filing, two dates are required: the current review date plus a date not to exceed 5 years from the effective date for Amended rules or a date not to exceed 5 years from the review date for No Change rules.

**FISCAL ANALYSIS**

13. Estimate the total amount by which *this proposed rule* would **increase / decrease** either **revenues / expenditures** for the agency during the current biennium (in dollars): Explain the net impact of the proposed changes to the budget of your agency/department.

This will have no impact on revenues or expenditures.

\$0.00

ODA estimates that the adoption of this proposed new rule would have no impact upon the biennial budget that Ohio General Assembly established for ODA in H.B.59 (130th), especially because ODA is simultaneously proposing to adopt this rule to replace a rule of the same number.

14. Identify the appropriation (by line item etc.) that authorizes each expenditure necessitated by the proposed rule:

GRF-490-411 Senior Community Services.

GRF-490-414 Alzheimer's Respite.

3220-490-618 Federal Aging Grants.

3M40-490-612 Federal Independence Services.

15. Provide a summary of the estimated cost of compliance with the rule to all directly affected persons. When appropriate, please include the source for your information/estimated costs, e.g. industry, CFR, internal/agency:

ODA estimates that the adoption of this proposed new rule would create no cost of compliance for any directly-affected person. ODA's proposed clarification that the Older Americans Act requires AAAs to develop area plans before entering procuring goods and services should ensure that more providers have an opportunity to compete for provider agreements. If an AAA is allowed to enter into multi-year provider agreements that extend years into the future, no other provider may bid for the opportunity to provide the goods or services until the multi-year provider agreement expires.

PLEASE SEE THE BUSINESS IMPACT ANALYSIS FOR MORE DETAILS ON THE ADVERSE IMPACT ASSOCIATED WITH THE 4-RULE PACKAGE.

16. Does this rule have a fiscal effect on school districts, counties, townships, or municipal corporations? **No**

17. Does this rule deal with environmental protection or contain a component dealing with environmental protection as defined in R. C. 121.39? **No**

**S.B. 2 (129th General Assembly) Questions**

18. Has this rule been filed with the Common Sense Initiative Office pursuant to R.C. 121.82? **Yes**

19. Specific to this rule, answer the following:

A.) Does this rule require a license, permit, or any other prior authorization to engage in or operate a line of business? **Yes**

This proposed new rule references federal regulations that require offering bids or estimates to an AAA in order to win an open and free competition for an agreement to provide goods or services to consumers through a program that uses Older Americans Act funds or a mix of Older Americans Act funds and other funds.

B.) Does this rule impose a criminal penalty, a civil penalty, or another sanction, or create a cause of action, for failure to comply with its terms? **No**

C.) Does this rule require specific expenditures or the report of information as a condition of compliance? **No**