

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

Agency Name

Division

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173-3-05

Rule Number

NEW

TYPE of rule filing

Rule Title/Tag Line

Procuring goods and services by open and free competition.**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; 173.392; 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; 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. Change the title from "Competitive bidding process" to "Procuring goods and services by open and free competition." "Competition" is a term the title in 45 C.F.R. 74.43 (10-01-2013 edition) and a sub-title under 45 C.F.R. 92.36 (10-01-2013 edition).
2. 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)"]
3. Move language regarding debarred providers from this rule to rule 173-3-04 of the Administrative Code.
4. Highlight that there are four methods for using federal funds to procure service: 3 of which are competitive. The rule now lists by name and explanation "small-purchase procurement," "sealed-bidding procurement," and "competitive-proposals procurement."
5. Structure the rule so that exemptions that appear in the federal code also appear in the rule.
6. Add language to state an AAA's responsibilities under Section 306(a)(7)(B)(ii) of

the Older Americans Act of 1965, 79 Stat. 210, 42 U.S.C. 3001, as amended in 2006, to "facilitate the provision, by service providers, of long-term care in home and community-based settings." This will come into play if the AAA determines that only one entity can provide the good or services they want to procure--whether the one entity is a provider or the AAA itself.

7. Add a new paragraph (D) of the rule that says the AAA shall repay ODA if it violates federal procurement requirements, including improperly procuring goods or services through a non-competitive process.

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 that 45 C.F.R., Part 92 only allows AAAs an exception to procuring goods and services by means of open and free competition in limited circumstances. The United States Code and the Code of Federal Regulations are available to the general public, free of charge, on 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 that it did incorporate some of the text from the US Code and CFR and that it was not required to incorporate the entirety of the text of these federal laws into the rule because it properly referenced the federal laws in the rules and those federal laws are available to the general public, free of charge, or 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.

The new language that ODA proposes to adopt would reduce an AAAs administrative burden, especially if the AAA's planning and service are was largely rural. AAAs use program dollars to carry out administrative duties associated with the Older Americans Act, Alzheimer's Respite, and Senior Community Services funds. ODA's new language allows an AAA to use any option allowable under federal law to procure goods and services. Because the proposed new rule would allow an AAA to use the small-purchase methods for services that cost less than \$100,000 instead of requiring sealed bidding, the AAAs will see a reduced administrative burden.

In rural parts of the state, most provider agreements would be for less than \$100,000. Thus, an AAA with a mostly-rural planning and service area would experience a more significant savings than an AAA with more agreements costing over \$100,000.

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. Because ODA anticipates that the adoption of this proposed new rule would lead to fewer uses of sealed bidding, ODA estimates that providers may see a reduced administrative burden associated with compiling sealed bids.

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 requires 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? **Yes**

This proposed new rule requires 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.