MEMORANDUM

TO: Tom Simmons, Policy Manager and Regulatory Ombudsman, Ohio Department of Aging

FROM: Sydney King, Regulatory Policy Advocate

DATE: February 26, 2014

RE: **CSI Review – Competition for Provider Agreements (Rules 173-3-01, 173-3-04, 173-3-05, and 173-3-09)**

On behalf of Lt. Governor Mary Taylor, and pursuant to the authority granted to the Common Sense Initiative (CSI) Office under Ohio Revised Code (ORC) section 107.54, the CSI Office has reviewed the abovementioned administrative rule package and associated Business Impact Analysis (BIA). This memo represents the CSI Office's comments to the Agency as provided for in ORC 107.54.

Analysis

The Ohio Department of Aging (ODA) submitted to the CSI Office four amended rules[1] being reviewed under the five-year review process required by ORC 119.032. The rule package was filed with the CSI Office on February 4, 2014, and the comment period for the rules closed on February 16, 2013. Three comments were received during the public comment period.

The rules provide the requirements for provider agreements between area agencies on aging (AAA) and community-based long-term care service providers (providers). According to ODA, the rules implement the Older Americans Act and allow for open and free competition for provider agreements. The amendments to the draft rules eliminate the need for AAAs to only use the sealed-bidding method, and provide clarification that other bidding methods, including the small-purchase method, are allowed. Federal law allows AAAs to use the small-purchase method

[1] Two of the existing rules are being amended by more than 50 percent; therefore, the Legislative Service Commission requires that the existing rule be rescinded and replaced by a new rule that has the same rule number.

for services that cost less than $100,000. ODA states this will reduce costs for both AAAs and providers. Additional amendments were made to provide clarity, remove redundancy in the rules, and cite federal law.

Several amendments were made to the rule package as part of the five-year rule review. According to the BIA, ODA contacted a significant number of stakeholders on multiple occasions to seek input on this rule. The rules were amended based on input, and explanations were provided when amendments were not appropriate. ODA provided a revised BIA on February 21, 2014 to address the comments received during the public comment period. The three comments received were from AAAs and not providers.

The BIA identifies any provider of long-term care services as the impacted business community and provides a detailed analysis of the costs associated with the bidding process. If the AAA is procuring goods or services that cost less than $100,000, the AAA can use the small-purchase procurement method, under which providers only submit estimates to the AAAs. The rules were amended to clarify that this method is available to AAAs. ODA estimates this significantly lowers the costs associated with bidding. If the goods or services cost at least $100,000, an AAA is required to request formal bids for the services. The BIA states that in the most costly formal bidding scenario, "a provider would have expended administrative time to gain the provider agreement that was valued at approximately less than 5% of the provider agreement's value." The BIA also identifies the appeals process for failing to win a provider agreement as an adverse impact. The process can include legal counsel and administrative costs. According to ODA, requests for a hearing under Rule 173-3-09 are rare.

ODA states the rules are necessary because open and free competition ensures quality, cost-efficient services are provided. Additionally, the Older Americans Act (45 C.F.R. 74.43 and 45 C.F.R. 92.36) require open and free competition when procuring services from providers.

After reviewing the proposed rules and the revised BIA, the CSI Office has determined that the rules satisfactorily meet the standards espoused by the CSI Office, and the purpose of the rules is justified.

Recommendation

For the reasons explained above this office does not have any recommendations regarding this rule package.

Conclusion

Based on the above comments, the CSI Office concludes that the Department should proceed with the formal filing of this rule package with the Joint Committee on Agency Rule Review.

cc: Mark Hamlin, Lt. Governor's Office