

*** DRAFT - NOT YET FILED ***

TO BE RESCINDED

In the proposed new rule, ODA proposes to consistently use the same language regarding Older Americans Act funds and matching funds.

173-3-05

Procuring goods and services by open and free competition.

ODA is systematically adding "Older Americans Act" to the beginning of each rule title in Chapters 173-3 and 173-4. This will be reflected

(A) Applicability: An AAA shall procure goods and services according to this rule any time the AAA procures the services with Older Americans Act funds, whether AAA pays for the goods or services wholly with the Older Americans Act funds or with a mix of Older Americans Act funds and other funds.

In the proposed new rule, ODA proposes to consistently use "goods and services."

(B) Competitive procurement: Except as otherwise stated in paragraph (C) of this rule, each AAA shall use one of the following three methods of procurement when purchasing goods and services:

In the proposed new rule, ODA proposes to replace the list of competitive procurement methods with a requirement to comply with the federal governments requirements for competition in 45 C.F.R. Part 75.

45 C.F.R. Part 75 also now allows for micro-purchasing for contract and grant agreements valued under \$3,000.

(1) Small-purchase procurement: An AAA may use this type of competitive procurement for small purchases. For purposes of this rule, a "small purchase" is any purchase that costs less than the federal simplified acquisition threshold. The federal procurement law under 41 U.S.C. 134 (October 1, 2013) establishes the threshold at \$100,000. If an AAA uses this type of competitive procurement, the AAA shall obtain price or rate quotes from an adequate number of bidders who are qualified to provide the goods or services.

(2) Sealed-bidding procurement: An AAA may use this type of competitive procurement for goods or services if a complete, adequate, and realistic specification or description of the items to be purchased is available; two or more responsible bidders are willing and able to compete effectively for the business; the procurement lends itself to a fixed-price provider agreement; and the selection of the successful bidder can be made principally on the basis of price.

(3) Competitive-proposals procurement: An AAA may use this type of competitive procurement when the conditions are not appropriate for the use of sealed bidding, but adequate competition exists. If an AAA uses this method, the AAA shall comply with the following four requirements:

(a) The AAA shall publish the RFP and identify all evaluation factors and their relative importance. The AAA shall honor any request to a publicized proposal to the maximum extent practical.

(b) The AAA shall solicit proposals from an adequate number of bidders who are qualified to provide the goods or services.

- (c) The AAA shall have a method for conducting technical evaluations of the proposals it receives and for selecting awardees.
 - (d) The AAA shall award the responsible provider whose proposal is most advantageous to the program with price and other factors considered.
- (C) Non-competitive procurement: An AAA shall not procure goods or services through a non-competitive process unless all of the following four conditions are met:
- (1) The three competitive methods under paragraph (B) of this rule are infeasible.
 - (2) One of the following three circumstances exists:
 - (a) After soliciting a number of sources, the AAA can verify that competition is inadequate for competitive procurement because the goods or services that the AAA would have procured with open and free competition are available from only a single source. However, the AAA may not determine that competition is inadequate if its procurement was anti-competitive. 45 C.F.R 92.36(c) (10/1/2013 edition) says that any of the following seven situations are anti-competitive:
 - (i) Placing unreasonable requirements on firms in order for them to qualify to do business.
 - (ii) Requiring unnecessary experience and excessive bonding.
 - (iii) Non-competitive pricing practices between firms or between affiliated companies.
 - (iv) Non-competitive awards to consultants that are on retainer contracts.
 - (v) Organizational conflicts of interest.
 - (vi) Specifying only a "brand name" product instead of allowing "an equal" product to be offered and describing the performance of other relevant requirements of the procurement.
 - (vii) Any arbitrary action in the procurement process.

In June, 2014, ODA added this requirement to the rule. In the proposed new rule, ODA proposes to highlight that it is a state requirement that ODA is adding to the federal requirements. The goal is to ensure open and free competition.

- (b) A public exigency or emergency for the goods or services exists that would not permit the delay that would necessarily result if the AAA would procure by open and free competition.
- (c) The federal government mandates procuring for the goods or services by a means other than open and free competition.

→ (3) The AAA submits a request to ODA for authority to conduct a non-competitive procurement and provides ODA with evidence to verify that the circumstances in paragraphs (C)(1) and (C)(2) of this rule exist. If the AAA wants to procure goods or services from a single source, the AAA shall also verify that the circumstances in paragraphs (C)(1) and (C)(2) of this rule exist by including the names of all known providers of the goods or services that are located in, or willing to do business in, the planning and service area, combined with letters or emails from each of those providers that verifies that they are unable to provide the goods or services that the AAA wants to procure.

(4) ODA authorized the non-competitive procurement transaction and authorizes so before the AAA makes the purchase.

(D) Notwithstanding ODA's approval, an AAA that procures goods or services through a non-competitive process, or in violation of federal procurement requirements, shall be liable to ODA for the repayment of any costs that are later disallowed by the federal government.

173-3-05

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Effective:

Five Year Review (FYR) Dates:

Certification

Date

Promulgated Under:

119.03

Statutory Authority:

173.01, 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 (October, 2015 edition)

Rule Amplifies:

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. Part 75 (December 26, 2014)

Prior Effective Dates:

02/15/2009, 06/01/2014

DRAFT FOR ONLINE PUBLIC-COMMENT PERIOD
***** DRAFT - NOT YET FILED *****

173-3-05

Older Americans Act: procurement standards.

(A) Federal requirements: When an AAA procures goods or services paid, in whole or in part, with Older Americans Act funds, the AAA shall comply with the requirements under 45 C.F.R. 75.327 to 75.335 (December 26, 2014).

- (1) 48 C.F.R. Subpart 2.1 (December 26, 2014) establishes the federal micro-purchase threshold at three thousand dollars, except as otherwise discussed in Subpart 2.1. An AAA shall not use micro-purchase procurement for AAA-provider agreements ("agreements") worth more than three thousand dollars.
- (2) 2 C.F.R. Part 300 (December 26, 2014) establishes the federal simplified acquisition threshold at one hundred fifty thousand dollars. An AAA shall not use small-purchase procurement for agreements worth more than one hundred fifty thousand dollars.

(B) Additional state requirements: If an AAA submits a written request to ODA seeking permission to use a non-competitive procurement process, the AAA shall comply with paragraph (A) of this rule and the following:

- (1) The AAA shall submit its written request to ODA no fewer than thirty days before the AAA needs a decision from ODA.
- (2) The AAA's written request shall not consider a public exigency or emergency to be a basis for non-competitive procurement if the AAA created the exigency or emergency.
- (3) The AAA's request shall provide ODA with evidence to verify that the circumstances in 45 C.F.R. 75.329(f) (December 26, 2014) exist.
- (4) If the AAA wants to procure goods or services from a single source, the AAA's request shall verify that the circumstances in 45 C.F.R. 75.329(f)(1) (December 26, 2014) exist by including the names of all known providers of the goods or services that are located in, or willing to do business in, the planning and service area. The AAA's request shall also include emails or letters from each of those providers to verify that the providers are unable to provide the goods or services that the AAA wants to procure.