

CONTRACTING AND PROCUREMENT

“The first principle of a civilized state is that the power is legitimate only when it is under contract.”

-Walter Lippman

General

Ohio Revised Code Section 340.04(A) empowers the Executive Directors of ADAMH/ADAS/CMH Boards to execute contracts on behalf of the Board, subject to the prior approval of the Board for each contract.

ADAMH/ADAS/CMH Boards must enter into various types of contracts in order to comply with state and local laws and to properly conduct business. They include but may not be limited to: Medicaid provider and non-Medicaid provider contracts, confidentiality agreements with business associates, local partnership agreements, and contracts with vendors, contractors and consultants for the provision of goods or services.

This chapter provides an overview of the various types of contracts most frequently entered into by ADAMH/ADAS/CMH Boards.

Types of Contracts

Provider Contracts

CMH Boards are required to “enter into contracts with public and private facilities for the operation of facility services included in the Board's community mental health plan and enter into contracts with public and private community mental health agencies for the provision of community mental health services listed in Section 340.09 of the Ohio Revised Code and included in the Board's community mental health plan” (ORC 340.03(A)(8)(a)).

ADAS Boards are required to “enter into contracts with alcohol and drug addiction programs for the provision of alcohol and drug addiction services” (ORC 340.033(A)(5)).

ADAMH Boards must adhere to the requirements of both CMH Boards and ADAS Boards, which are very similar regarding contracting>

The Board-provider contracting process and related legal requirements depend on whether the provider is a Medicaid or non-Medicaid agency.

1. Medicaid Contracts

In General

ADAMH/ADAS/CMH Boards have the responsibility to enter into standardized Medicaid payment contracts with any requesting ODADAS-certified/licensed treatment program for

any Medicaid-covered services it provides and with any requesting ODMH-certified provider agency for the specific Medicaid-covered services it is certified to provide.

Disputes

Boards have limited administrative authority related to resolving Medicaid disputes and should, therefore, direct agencies to forward such disputes to ODMH and/or ODADAS, as appropriate. ODADAS and/or ODMH make determinations in regards to disputes related to the standardized payment agreement, rate-setting issues, and instances where provider costs are not within specified parameters. All disputes related to final fiscal audits and the termination of standardized Medicaid Payment Agreements are subject to the ODJFS Ohio Revised Code Chapter 119 appeals process.

Sub-Recipient Monitoring

ADAMH and CMH Boards are required to perform the required Medicaid reviews (i.e., compliance, medical necessity documentation, utilization, etc.) for the providers for which the Board holds a Community Mental Health Medicaid Agreement in accordance with Ohio Administrative Code 5101:3-27-06.

ADAMH and ADAS Boards are not required to perform Medicaid reviews for alcohol and drug addiction programs.

2. Non-Medicaid Contracts

In General

Ohio Revised Code Chapter 340 governs the non-Medicaid contracting processes of ADAMH/ADAS/CMH Boards. In regards to contracts with providers of mental health and/or alcohol and drug addiction services, Boards may only contract with community mental health agencies whose services have been certified by the Director of ODMH (for mental health) and ODADAS-certified/licensed treatment programs (for alcohol and drug addiction).

Section 340.03(A)(8)(a), which applies to CMH and ADAMH Boards and Section 340.033(C), which applies to ADAS and ADAMH Boards, both state that when contracting with a community mental health agency or an alcohol and drug addiction program, Boards must consider the quality, continuity of care, and cost effectiveness of the services provided. The Board may review cost elements, including salary costs, of the services to be provided.

In addition, a utilization review process must be established as part of the contract for services, and the Board may establish this process in any way that it considers to be the most effective and efficient in meeting local needs.

Modifications or Non-Renewal

If an ADAMH/ADAS/CMH Board or the agency, facility or program with which it contracts proposes not to renew the contract or proposes substantial changes in its terms upon renewal, the other party must be given written notice at least one hundred twenty days before the expiration date of the contract. Ohio Revised Code Sections 340.03(A)(8)(a) and 340.033(D)

Dispute Resolution

During the first sixty days of the one hundred twenty-day period, both parties must attempt to resolve any dispute through good faith collaboration and negotiation in order to continue to provide services to persons in need. If the dispute has not been resolved sixty days before the expiration date of the contract, either party may notify ODMH/ODADAS of the unresolved dispute.

The Director of ODMH or ODADAS may require both parties to submit the dispute to a third party with the cost to be shared by the Board and the facility, agency or program. The third party must then issue to the Board, ODMH or ODADAS, and the facility, agency or program, recommendations on how the dispute may be resolved twenty days prior to the expiration date of the contract, unless both parties agree to a time extension. Ohio Revised Code Sections 340.03(A)(8)(a) and 340.033(D)

Competitive Bidding Not Applicable

The requirements of Ohio's competitive bidding law do not apply to contracts entered into between ADAMH/ADAS/CMH Boards and their mental health and/or alcohol and drug addiction service providers. Ohio Revised Code Sections 340.03(A)(8)(a) and 340.033(E).

3. Agencies, Facilities or Programs Providing Medicaid and Non-Medicaid Services

When a Board contracts with an agency facility or program that provides both Medicaid and non-Medicaid covered services, the agency must enter into both a standardized Medicaid provider payment contract, as well as a separate contract that governs the non-Medicaid portion of the provider's services.

Contractors and Consultants

As approved by the Board, Executive Directors of ADAMH/ADAS/CMH Boards are explicitly permitted to employ and remove consultants as may be necessary for the work of the Board, and fix their compensation and reimbursement within the limits set by budget approved by the Board. Ohio Revised Code Section 340.04(E).

The Ohio Supreme Court has held that competitive bidding is not required when contracting for personal services requiring the existence of a particular skill and aptitude. *Children Service Center, et al. v. Portage County Mental Health Board, et al., No. 1697 (11 Dist. 1987)*

Goods and Services

As previously stated, subject to the prior approval of the Board for each contract, Executive Directors are empowered to execute contracts on behalf of the Board. This permits Boards to contract for necessary goods and services.

Section 307.86 of the Ohio Revised Code requires competitive bidding to be utilized by Boards when anything to be purchased, leased, or constructed is in excess of \$25,000 (except for personal services which are specialized in nature as stated above). The purchase of services related to information technology (i.e. programming services), that are proprietary or limited to a single source, are explicitly exempt from competitive bidding requirements.

Real Property

Ohio Revised Code Section 340.031(B) empowers ADAMH/ADAS/CMH Boards to “acquire, convey, lease, or enter into a contract to purchase, lease, or sell property for community mental health and alcohol and drug addiction services and related purposes, and enter into loan agreements, including mortgages, for the acquisition of such property.” Ohio Revised Code Section 340.031

As indicated above, competitive bidding must be utilized by a Board when anything it purchases, leases or constructs is in excess of \$25,000 with certain exceptions.

Agreements for the Confidentiality of Health Information

The federal Health Insurance Portability and Accountability Act (HIPAA) of 1996 requires “covered entities” (such as Boards in their role as HIPAA-defined “health plans”) to enter into Business Associate Agreements (BAAs) with certain business partners to whom it discloses individually identifiable health information (as defined by HIPAA). When a Board must disclose protected health information (PHI) in order for another entity *to perform a service on its behalf*, the Board must enter into a BAA with that entity in order to protect the confidentiality of the PHI that is being disclosed.

Boards and the agencies, facilities or programs they contract with for the provision of mental health or alcohol and drug addiction services will not need to enter into Business Associate Agreements with one another under all but the rarest of circumstances. This is because when Boards and providers disclose PHI to one another, it is usually so that the provider can perform its functions as a health care provider and the Board can perform its functions as a “health plan”, not *on behalf of* one another as when a BAA is required.

Local Partnership Agreements

Agreements between the Board and other public entities are sometimes necessary to memorialize a mutually agreed upon course of action or the coordination of services. Such agreements are commonly referred to as memorandums of understanding (MOUs). Examples include Boards entering into MOUs with their local Red Cross chapter in order to determine which entity will respond in what capacity during an emergency situation and two Boards entering into an agreement with one another to determine which will be responsible for an individual’s services in certain residency situations.

Additional Considerations

- See the Board’s HIPAA policies and procedures for more information on when Business Associate Agreements must be entered into between a Board and its business partners.
- Any contract with a contractor or consultant should explicitly state that the individual is serving as an independent contractor.
- Some County Prosecutors have issued opinions prohibiting Boards from entering into contracts with an out-of-county provider.
- For helpful insights and advice on the art of negotiating contracts, read *Getting to Yes* by Roger Fisher.