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Action Transmittal

Transmittal No. AT-OSSP-00-01 Date: March 13, 2000

TO: STATE PUBLIC ASSISTANCE AGENCIES, STATE INFORMATION EXECUTIVES, AND OTHER INTERESTED PARTIES

SUBJECT: FEDERAL/STATE INFORMATION TECHNOLOGY POLICY—Department of Health and Human Services Approval of Funding, When a State Fails to Obtain Prior Written Approval In Accordance with 45 CFR Part 95, Subpart F

RELATED REFERENCES: 45 CFR Part 95, Subpart F; 45 CFR Part 74; 42 CFR Part 433, Subpart C

PURPOSE: This Action Transmittal (AT) establishes procedures and new criteria by which the Department of Health and Human Services (DHHS) will, on a limited exception basis, consider approving Federal financial participation (FFP) in State automatic data processing (ADP) equipment and services acquisitions, when a State has failed to obtain DHHS' prior written approval in accordance with the requirements of 45 CFR Part 95, Subpart F.

BACKGROUND: DHHS rules at 45 CFR Part 95, Subpart F require that States obtain DHHS' prior written approval, as a condition for Federal financial participation in the cost of ADP equipment and services. These rules pertain to titles IV-B and IV-E, Child Welfare, Foster Care and Adoption Assistance; title IV-D, Child Support Enforcement; and title XIX, Medicaid of the Social Security Act. This requirement is one of the major tools by which the Department oversees State systems activities, which affect the administration of the covered programs. This oversight role is appropriate given that the Federal government provides a significant level of funding for these systems activities.

The rules at 45 CFR Part 95, Subpart F require States to obtain DHHS'

prior written approval when a State:

- plans to acquire ADP equipment or services with FFP at the regular matching rate of a program covered by these rules, that it anticipates will have total acquisition costs of $5,000,000 or more in Federal and State funds; or
- plans to acquire ADP equipment or services with proposed FFP at an enhanced matching rate of a program covered by these rules, regardless of the total cost of the acquisition; or
- plans a sole source (non-competitive) ADP acquisition of equipment or services from a non-governmental source, with FFP at the regular matching rate, that has a total State and Federal acquisition cost of more than $1,000,000.

The rules at 45 CFR Part 95, Subpart F detail the specific documents, such as advance planning documents (APDs), APD updates, request for proposals, contracts and sole source justifications, that require prior written approval to meet the above requirements. These rules also specify when changes to projects or ADP acquisitions, such as contract amendments, require prior written approval.

The policy established by this AT is based on a reading of 45 CFR Part 95, Subpart F, which states that the Secretary "may" deny FFP due to a State's failure to secure prior Federal written approval. Heretofore, DHHS has interpreted this requirement stringently. DHHS has recently reconsidered its policy and determined that it is appropriate, in light of the experience with ADP acquisitions, to allow limited flexibility in applying this requirement. Hence, in the future, according to the procedures and criteria outlined in this AT, DHHS will consider approving FFP for systems acquisitions for which States have failed to obtain DHHS' prior written approval.

DISCUSSION: DHHS' policy of requiring prior written approval of States' ADP equipment and services acquisitions is longstanding. It is the Department's intent that this policy remain in effect and be the principal process for approving FFP in proposed State systems acquisitions. The decision to establish procedures and criteria for considering providing FFP in limited instances where a State has failed to obtain prior written approval of an acquisition is not intended to weaken in any way the requirement for prior approval. It is intended to add flexibility to the existing policy, which will allow senior DHHS officials to determine when it is appropriate to grant FFP in instances where a State failed to obtain prior written approval. The procedures detailed in this AT are intended to assure that instances where approval is granted under these procedures and criteria are limited in number and consistent with the decision the DHHS would have rendered had the State submitted a

request for prior approval.

It is to both the Federal and State governments' advantage if States acquire prior written approval of their systems acquisitions. The process affords the Federal government the opportunity to assure that proposed acquisitions meet Federal requirements and will be beneficial to the programs. It also provides the opportunity for the Federal government to provide technical assistance and guidance gained from its knowledge of nationwide State systems and program activities. In particular for States, it ensures that a State knows before it makes a system acquisition whether or not DHHS FFP will be available for the acquisition. Failure to acquire prior written approval places a State at risk of not receiving FFP in its ADP acquisition expenditures.

POLICY: DHHS will consider approving FFP for ADP acquisitions in certain limited circumstances, where a State failed to obtain prior written approval, as required by 45 CFR Part 95, Subpart F. A request to approve FFP, when a State failed to acquire prior written approval, must adhere to the procedures and requirements set forth herein. DHHS' determination will be based upon a review of an advance planning document (APD) and other pertinent documentation (request for proposals, contracts, contract amendments, acquisitions under master contracts and procurement schedules, tasks orders, etc.), and consider the requirements and factors outlined below.

APPLICABILITY: This policy will apply prospectively to new acquisitions and to acquisitions initiated before the effective date of the policy, for which a State failed to obtain prior written approval, and for which there has not been a "final administrative decision" (as defined below), in accordance with the provisions of section 1132 of the Social Security Act and the regulations at 45 CFR Part 95, Subpart A.

A "final administrative decision" occurs when: HHS takes a disallowance, and the State has not appealed in 30 days; or HHS takes a disallowance, the State appealed to the Departmental Appeals Board (DAB), and the DAB sustained the disallowance; or HHS either denies the State's request for retroactive approval of funding or the State made no claim of funding, and the two-year claiming period provided for in the above-cited statute and regulation expired.

STATE SUBMISSION: A request for approval of a State systems acquisition, for which a State failed to acquire prior written approval, must:

- be submitted to the Director, Office of State Systems, Administration for Children and Families, DHHS by a State cabinet official who reports directly to the Governor of the State

(e.g., program agency head);

- or be submitted to the Director, Data and Systems Group, Center for Medicaid and State Operations, Health Care Financing Administration, DHHS, when the request pertains only to title XIX, Medicaid Management Information Systems;
- include an advance planning document (APD) and other related documentation (request for proposals, contracts, contract amendments, acquisitions from master contracts and procurement schedules, tasks orders, etc), that meet the information content requirements for these documents as defined by the rules at 45 CFR Part 95, Subpart F;
- explain the circumstances that caused the State's inadvertent failure to comply with the prior approval requirements; and
- detail the procedures the State will put in place to ensure future compliance with the prior approval requirements.

These submission procedures will apply to the programs covered by 45 CFR Part 95, Subpart F.

DHHS will review a State submission to assure that the State followed the required submission procedures outlined above.

DHHS DECISION: The DHHS decision will be based upon the following:

A. The request for approval must meet the following requirements:

1. the acquisition must be reasonable, useful and necessary;
2. the State's failure to obtain prior written approval must have been inadvertent (i.e., the State did not knowingly avoid the prior approval requirements);
3. the request was not previously denied by DHHS;
4. the acquisition must otherwise meet all other applicable Federal and State requirements, and would have been approved under 45 CFR Part 95, Subpart F had the State requested prior written approval;
5. the State must not have a record of recurrent failures, under any of the programs covered by the prior approval regulations, to comply with the requirement to obtain prior written approval of its automatic data processing acquisitions (i.e., submissions under these procedures, from States that have failed in the past to acquire prior written approval in accordance with 45 CFR Part 95, Subpart F, may be denied);
6. contracts must include, or be modified to include all related Federal requirements, such as those currently contained in 45 CFR Part 95, Subpart F; and
7. the State must agree to institute controls to ensure that

prior approval requirements are met in the future.

B. DHHS will also consider the following factors in making a decision regarding prior approval:

1. whether the acquisition has proved beneficial to the affected Federal program(s);
2. the extent to which the project is in good standing (i.e., within budget and on schedule); and
3. whether the activity involved a non-competitive acquisition as discussed below.

SOLE SOURCE ACQUISITIONS:

HHS' experience indicates that a large percentage of States' failures to obtain required prior written approval involves non-competitive acquisitions, including the execution of new contracts without competition, contract amendments, task orders against master contracts, etc. Federal policy, embodied in regulations, circulars, and other policy documents, is to encourage procurement of goods and services under Federally-funded grants through free and open competition. In this manner, the Federal government and States are most likely to receive the most value for taxpayer dollars.

In reviewing requests for funding of ADP acquisitions for which a State did not obtain prior written approval, HHS will look very closely at the circumstances surrounding all non-competitive acquisitions. The circumstances under which FFP for a non-competitive acquisition may be approved under the procedures herein are limited to the following:

- the procured item was available only from a single source;
- public exigency or emergency existed where the urgency for the requirement did not permit a delay incident to competitive solicitation;
- the Federal grantor agency (DHHS) would have authorized non-competitive negotiation if the acquisition had been submitted for prior written approval; or,
- after solicitation of a number of sources, competition was determined inadequate.

DHHS will approve funding for non-competitive acquisitions only to the extent that it determines that it would have approved funding for the non-competitive acquisition had the State submitted it for prior written approval. States should not expect full or automatic retroactive approval of non-competitive contracts. For example, where DHHS determines that it would not have approved a non-competitive acquisition or

approved it for only a limited time period, if it had been submitted for prior written approval, the decision on the State's request will be, respectively, a disapproval or approval for the period of time which DHHS would have approved if the request was timely.

DHHS DECISION ISSUANCE: Upon completion of DHHS' review of a State submission under these procedures, a written DHHS decision will be provided to the State:

- from the head of the responsible DHHS operating division (OPDIV) to which the submission applies (i.e., Assistant Secretary for Children and Families, Administrator, Health Care Financing Administration); or
- for submissions that apply to more than one DHHS OPDIV, from the Assistant Secretary for Children and Families, with the concurrence of the Administrator, Health Care Financing Administration. This is consistent with current procedures for State systems submissions that apply to more than one DHHS OPDIV.

The written decision will be final and will provide the rationale for the decision rendered on the submission.

EFFECTIVE DATE: On the date of this AT.

INQUIRIES: ACF Regional Administrators
HCFA Regional Administrators

/s/
Olivia A. Golden
Assistant Secretary for Children and Families

/s/
Nancy-Ann Min DeParle
Administrator
Health Care Financing Administration