Administration for Children and Families (ACF)	Centers for Medicare and Medicaid Services (CMS)	Food and Nutrition Service (FNS)
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Information Memorandum

Information Memorandum No. IM 05-04   Date May 2, 2005

TO: State Public Assistance Agencies, State Information Executives, and Other Interested Parties

SUBJECT: <u>FEDERAL/STATE INFORMATION TECHNOLOGY POLICY</u> – Use of Enterprise Level Commercial-Off-the-Shelf (COTS) Software in Automated Human Services Information Systems

RELATED   45 CFR PART 95, SUBPART F; 45 CFR PART 92;
REFERENCES: 7 CFR PART 277

PURPOSE: This Information Memorandum (IM) provides guidance regarding the use of COTS software within automated human services information systems to meet federal regulatory requirements.

                   This guidance is intended to supplement current considerations for jurisdictions in their analyses of alternatives and examination of the feasibility of employing enterprise-level COTS software.

BACKGROUND: The Administration for Children and Families (ACF), Centers for Medicare and Medicaid Services (CMS) and Food and Nutrition Service (FNS) are charged with oversight responsibility for information technology projects that result in automated information systems supporting the programs administered by these federal agencies.

DISCUSSION: When federal oversight of jurisdictions' automated system development efforts began, enterprise-level COTS software was neither rich in functionality nor mature and stable. Over time, enterprise-level COTS software has become richer and more flexible in functionality, as well as providing for a more mature, stable, and secure software development and operational environment. Enterprise-level COTS software has also benefited from broader acceptance and implementation of more uniform industry standards and best practices in programming languages, and development tools and methodologies. More and more, enterprise-level COTS software are providing platforms capable

of accommodating and supporting a variety of unique business practices not only vertically within, but across organizations as well, providing solutions that integrate disparate systems into heterogeneous technological environments. As such, using enterprise-level COTS software may benefit jurisdictions in several ways. However, although there now appear to be strong arguments for jurisdictions' use of enterprise-level COTS software, risks associated with its use exist.

Should a jurisdiction's business case support the use of these types of tools, appropriate strategies will need to be developed to mitigate a variety of risks. One such risk is the addition of new constraints put upon the jurisdiction due to the basic nature of enterprise level COTS software, which requires jurisdictions to license such software rather than own it. This introduces a potential loss of flexibility in its use. Since enterprise-level COTS software is substantially pre-built, the further constraint of limited technical flexibility may be introduced, unless the software allows for some level of modification.

Another inherent risk involves licensing costs, which are often subject to change based on market conditions, feature sets, hardware platforms, and volume. These changing factors can result in substantial, unanticipated cost increases over time.

Further risk may be encountered due to limited market share and the commercial availability of any given enterprise-level COTS software. Although some enterprise-level COTS software packages are now mature platforms employing proven technologies, any evaluation of such tools should examine industry stability and consult market surveys prior to any procurement.

Additionally, enterprise-level COTS software is proprietary and may be restrictive in nature. This can limit or otherwise unduly restrict competition, resulting in substantial cost increases over time.

Although these risks cannot be ignored, they can be mitigated and are no longer viewed as critical barriers to using enterprise-level COTS software within, or as a foundation, for human services information systems.

Certain other factors affecting whether, and to what degree, enterprise-level COTS software can be employed in a human services system should also be considered. For example, before a jurisdiction could designate specific enterprise COTS software as a "jurisdictional standard," it should conduct broad, in-depth

business, technical and financial analyses that incorporate all human service agencies, both current and future. In addition, a jurisdiction should ensure open and free competition based on requirements and criteria derived from the analyses.

Alternatively, based on the results of a rigorous feasibility study and thorough analysis of alternatives, a jurisdiction, having chosen new system development, could allow potential offerors the option to propose enterprise-level COTS software in their response to a competitive procurement process.

In both examples, the key requirement is that the use of enterprise-level COTS software must, as required by 45 CFR 95.605, first be justified through a comprehensive business case containing a requirements analysis, feasibility study, and status of alternative considerations establishing enterprise-level COTS software as the most cost effective and efficient solution available.

In developing or modifying an automated human services system, if the jurisdiction is seeking federal financial participation (FFP) in the systems development effort, the selection of vendors must be accomplished through an open and free competitive process as specified in CFR 45 Part 95.613, and OMB Circular A87. These guidelines require the state to afford to all vendors an equal opportunity to work with an enterprise-level COTS software product under penalty of disallowance of federal funding for its acquisition, installation, modification, and operation. Thus, if certain vendors are arbitrarily excluded from acquiring and working with certain enterprise-level COTS software by the COTS software licensor, or are given competitive advantages by the COTS software licensor not otherwise available to other public or private entities, the use of FFP for the costs of acquiring, installing, modifying, and operating those products is unallowable.

Finally, the use of enterprise-level COTS software will often result in the need to generate supplemental application software code in order to extend the functionality of the COTS software to support unique, user-specific business needs and processes. Many of these COTS software applications have built-in facilities for creating such extensions of the base COTS software application. Any such application code created by or on behalf of a jurisdiction, acquired in whole or in part with FFP, is subject to the applicable federal regulations governing software ownership and federal rights-in-license.

When supported by strong business cases that present

demonstrable business, economic and technological benefits for jurisdictions and the federal government, and when acquisitions are made through open and free competition, the approval and use of FFP for the cost of enterprise-level COTS software used in the design, development, installation and operation of automated human services software applications can be considered.

CURRENT POLICY: Consistent with their fiduciary and programmatic oversight responsibilities, these federal agencies support technological solutions that drive down developmental and operational costs, while yielding automated systems that are complete and compliant, fully support program administration responsibilities, and generate substantial financial benefits, all within the context of current federal statutes and regulations.

Therefore, jurisdictions are free to consider, along with new application development and system transfer, the use of enterprise-level COTS software in the development of automated human services systems. Jurisdictions under 45 CFR 95.605 are still required to engage in rigorous feasibility studies, analyses of alternatives, including cost and benefit analyses, utilizing their results to develop sound business cases. This does not necessarily preclude the use of enterprise-level COTS software as a foundation or component in one or more alternatives chosen for analysis, but neither does this suggest that any reliance on, or promotion of, enterprise-level COTS software is a preferred architectural solution. Given the substantial cost and resources required to build a human services system, the federal agencies seek to broaden the spectrum of choices that can be considered by jurisdictions as they pursue automated solutions that are cost effective and efficient.

We wish to stress that this policy neither negates nor alters previous federal regulations against the use of FFP for proprietary software that was developed specifically to support human services programs. Consistent with current policies, FFP will not be available for any proprietary software that is not available at catalog or market prices to the general public, nor will FFP be available for any COTS software, the licensing of which limits open and free competition in its acquisition or use. The use of all COTS software, including enterprise-level software, and its licensing, must conform to existing federal regulations regarding software use, ownership and licensing as specified in 45 CFR 95.617.

INQUIRIES: HHS –   Director, ACF/ACYF/CB/DSS
                 Director,   ACF/OCSE/OAPO/DSTS
                 USDA – FNS Regional Administrators
                 CMS –   Director, Division of State Systems

_____/s/_____   _____/s/_____
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