

<h1>ACF</h1> <p>Administration for Children and Families</p>	U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES Administration on Children, Youth and Families	
	1. Log No: ACYF-CB-PI-11-08	2. Issuance Date: July 7, 2011
	3. Originating Office: Children's Bureau	
	4. Key Words: Automated Child Welfare Information Systems; Advance Planning Document (APD); APD Reform; Federal Financial Participation (FFP)	

PROGRAM INSTRUCTION

TO: State, Tribal and Territorial Agencies Administering or Supervising the Administration of the Foster Care, Adoption Assistance and Guardianship Assistance programs under Title IV-E of the Social Security Act, Indian Tribes, Tribal Organizations and Tribal Consortia (Tribes); State and Tribal Information Systems Executives; and Other Interested Parties

SUBJECT: Use of Advance Planning Document (APD) Waiver Process for Commercial Off-the-Shelf Software Products

LEGAL AND RELATED REFERENCES: 45 CFR Part 95; 45 CFR Part 92; OMB Circular A-87; ACYF-CB-IM-05-02 (Issued May 3, 2005); ACYF-CB-IM-05-04 (Issued May 3, 2005); 75 FR 66319 (October 28, 2010).

PURPOSE: This Program Instruction (PI) provides information to States and Tribes (Agency/Agencies) concerning changes to the Federal regulations at 45 CFR 95 regarding the APD waiver process. Specifically, the PI defines what the Children’s Bureau expects a title IV-E Agency to provide in their APD (in accordance with the APD rules at 45 CFR 95.627) when requesting a waiver to use a commercial-off-the-shelf (COTS) software product designed for the title IV-E or title IV-B programs.

The Children’s Bureau (CB) recognizes that title IV-E Agencies may request waivers on any APD requirement. However, the scope of this PI is specifically focused on waiver requests to use COTS products developed for title IV-E and title IV-B child welfare programs.

OUTLINE: The PI contains two sections titled:

- Section I: Background
- Section II: Waiver of APD Requirements and COTS

Section I: Background

The APD regulations at 45 CFR 95.617(c) indicate that Federal financial participation (FFP) is not available for proprietary software applications developed for the public assistance programs covered under 45 CFR Part 95, Subpart F. The Administration for Children and Families issued revised APD rules on October 28, 2010 (75 FR 66319). Under the revised rules at 45 CFR 95.627, Agencies may request a waiver of any of the requirements in Subpart F, including those prohibiting the use of a COTS software solution designed to support the title IV-E or title IV-B program areas. All waiver requests concerning the APD rules at 45 CFR Part 95 Subpart F must be submitted as part of the Agency's APD for the applicable project.

The Secretary of the Department of Health and Human Services (the Department) has delegated authority to CB to approve APDs for projects where funding is limited to titles IV-E and IV-B. Therefore, the guidance provided through this PI is limited to projects that will exclusively benefit titles IV-B, IV-E and programs that do not have a prohibition from using COTS software designed to support their needs (e.g., Temporary Assistance for Needy Families, or programs funded exclusively with State or Tribal dollars).

Section 45 CFR 95.605 defines COTS software as proprietary software products that are ready-made and available for sale to the general public at established catalog or market prices. Multiple case management programs are available on the open-market that support child welfare-related social services programs. This PI is focused on COTS products designed to support the programs operated under titles IV-B and/or IV-E, and therefore, are ineligible for FFP under 45 CFR 95.617.

Given the unique and complex nature of child welfare and the program's relatively small size compared to other human service programs, the use of a COTS application may be preferable to custom system development or the transfer of an existing child welfare application from another source. Through this document CB is notifying Agencies of its willingness to consider a business case for using a COTS solution designed to support the title IV-E and/or title IV-B program areas. In general, the Agency must demonstrate in its waiver request that a COTS solution may provide an economical solution that will support its case practice model.

Section II: Waiver of APD Requirements Pertaining to COTS

The APD regulations at 45 CFR 95.627 allow an agency to apply for a waiver of any APD requirement by presenting an alternative approach to the applicable regulatory provision(s). The waiver requests must be submitted as part of the agency's APD or APD Update.

As required by 45 CFR 95.610, APDs, including those containing a waiver request to use a COTS solution, must be supported by a comprehensive business case that summarizes the results of the project requirements analysis, feasibility study and alternatives analysis. The waiver request should clearly demonstrate that the use of a publicly available COTS application will provide more efficient, effective, and economical administration of the child welfare programs for which FFP is being requested, and that the use of a COTS product, otherwise prohibited by 45 CFR 95.617(c), will successfully support the Agency's program requirements.

The Federal Agencies responsible for reviewing APDs believe that if State and Tribal procurements are conducted in a full and open competitive manner, the process will help minimize risks and foster lower costs. This belief is reflected in 45 CFR 95.613, where the Department retains the authority to provide greater oversight if it determines the procurement process is an impediment to competition that could impact project costs or increase the risk of failure. Additionally, 45 CFR 95.611 indicates that sole source procurements are a higher risk activity and therefore have a lower threshold requiring Federal review and approval.

Therefore, waiver applicants should outline their procurement approach for promoting free and open competition in the procurement of a COTS product. Additionally, the APD must describe the approach that the Agency will use in the request for proposals (RFP) to encourage multiple vendors to consider submitting a proposal. Considering our long-held goal of promoting free and open competition, waiver requests that identify a single-source product to the exclusion of others will not be considered.

Any request that seeks to waive the requirement at 45 CFR 95.617 that a COTS software application must be available to the general public at a catalog price will not be approved.

Instruction:

The waiver request to use a COTS product developed to support a title IV-E or title IV-B program must include all of the following items:

- A detailed summary of the alternatives analysis, and feasibility study (45 CFR 95.610);
- A comprehensive business case that provides clear justification to use the COTS product (45 CFR 95.610);
- An explanation of how the prohibition against the use of a COTS product is unnecessary, limits the Agency's ability to meet program requirements (45 CFR 95.627), or how the use of a COTS product will deliver benefits in the areas of efficient, effective and economical program administration (45 CFR 95.627);
- A plan detailing how a future transition from a COTS application to another application will be accomplished (45 CFR 95.610¹);
- A plan detailing how the Agency will encourage competition in its procurement of a COTS product (45 CFR 95.613); and
- A description of the risk mitigation plan associated with the use of COTS products, including a plan to control licensing costs, a description of the acceptable product's degree of technical flexibility, and the applicant's ability to work within the proprietary nature of the software (45 CFR 95.610).

Approval of the waiver request may be granted if the APD demonstrates that the alternative approach will safeguard the Agency and Federal government's interests and will simultaneously allow the Agency to be in substantial compliance with the remaining APD requirements.

¹ The lack of a transition plan would be a serious risk factor that would prevent CB from determining if the APD's feasibility study supported the use of a COTS product.

If approved, the waiver will become part of the State's approved APD. Disapproval of the waiver request will result in disapproval of the entire APD; this disapproval is not subject to an administrative appeal. Please note that if a waiver request is not approved, the title IV-E agency does not forfeit FFP entirely, but can submit a new APD for the project.

INQUIRIES: Director, Division of State Systems, Children's Bureau, Administration on Children, Youth and Families, Administration for Children and Families

/s/

Bryan Samuels
Commissioner
Administration on Children, Youth
and Families