

The Federal Information Technology Acquisition Reform Act (FITARA)

Explanation of Changes from 9/6/2012 DRAFT

Since the public release of the DRAFT legislation in September 2012, the Oversight Committee has received numerous comments and suggestions. In addition, two full committee hearings were held on Jan. 22 and Feb. 26 discussing the problems and challenges surrounding IT investment management and specific solutions outlined in the DRAFT legislation. Based on extensive feedback, a significant portion of the DRAFT legislation was redrafted. Listed below are organizations that provided comments. Numerous individuals not listed here also provided valuable feedback. Chairman Issa is seeking continued dialogue as the bill moves forward.

Software & Information Industry Association (SIIA), Citizens Against Government Waste (CAGW), Deloitte, Professional Services Council (PSC), Digital Realty, TechAmerica, Information Technology Industry Council, the Coalition for Government Procurement, BSA - the Software Alliance, IT Acquisition Advisory Council (IT-AAC), Adobe, Project Management Institute (PMI), Daon, Flexera, Censeo, the Ambit Group, VMware, Brocade Communications Systems, Amazon.com, Microsoft.

Sec. 3. Definitions.

Multiple commenters expressed concerns over the use of the term "commodity IT." Although the term has been used by OMB for the past several years to refer to commonly-used IT infrastructure and applications, such as e-mail, data centers, content management systems, web infrastructure, enterprise IT systems, and business applications, commenters expressed that there is no clear or official definition and that, even if the bill requires OMB to define the term, such definition is unnecessary. Commenters were also concerned that the new term may weaken the focus and emphasis toward the existing "commercial item" definition and the associated acquisition preference.

FITARA's goals are to eliminate unnecessary duplication and streamline IT acquisitions by first targeting numerous, commonly-used IT commodity-like investments. This can be done without the new definition, and instead referring to what they are - "infrastructure and common applications." Accordingly, the term "commodity IT" or any reference to it has been removed throughout the bill.

TITLE I—MANAGEMENT OF INFORMATION TECHNOLOGY WITHIN FEDERAL GOVERNMENT

Sec. 101. Increased authority of agency Chief Information Officers over information technology.

Based upon unanimous and strong support for the increased responsibilities and authority of CIOs over each agency's IT investment practices, a new requirement has been inserted making CIOs of the 16 major civilian agencies presidential appointees or designees. This is consistent with the appointment of CFOs for such agencies under the CFO Act (31 USC 901). In addition, clarification was added in Title 40 reinforcing the Clinger-Cohen Act requirement that these 16 presidentially-appointed CIOs maintain a direct reporting link with the head of the agency. This change should provide them with additional stature necessary to engage in portfolio-wide IT governance and budget planning. Listed below are the 16 agencies that are now encompassed, and excluding the DoD for the reasons described below--

- The Department of Agriculture.
- The Department of Commerce.
- The Department of Education.
- The Department of Energy.
- The Department of Health and Human Services.
- The Department of Homeland Security.
- The Department of Housing and Urban Development.
- The Department of the Interior.
- The Department of Justice.
- The Department of Labor.
- The Department of State.
- The Department of Transportation.
- The Department of the Treasury.
- The Department of Veterans Affairs.
- The Environmental Protection Agency.
- The National Aeronautics and Space Administration.

Subsection (b) pertaining to budget and personnel-related authority continue to apply to 23 civilian CFO Act agencies (i.e., 31 USC 901(b)(1) & (2)). Subsection (c) eliminates redundant CIO positions within each executive agency (covered by the Clinger-Cohen Act, 44 U.S.C. 3506) by requiring there be only one CIO for the entire agency.

The Department of Defense was generally excluded from Sec. 101 due to the differing procedures currently in place in Title 10 for DoD and its three military departments regarding the appointment, budget, and investment review process utilized by CIOs. Committee staff is continuing discussions with relevant House and Senate Committees to ascertain if the DoD CIO community can be reinforced and/or further supported in some fashion with similar policy changes in the future.

Sec. 102. Lead coordination role of Chief Information Officers Council.

Extensive stakeholder feedback was received regarding the enhancements to the role of the CIO Council. Broader authorities were put into place to drive a more robust role assumed by the CIO Council to provide enterprise-wide portfolio management. The enhanced authority of the CIO Council is intended to make it the lead interagency forum for coordination of common

platforms and shared services across the federal government. The word "acquisition" in the current statutory language was removed to clarify the potential conflict of authority between CIOs and CAOs. Additional reporting obligations were also codified to allow further transparency into the activities and roles of the CIO Council.

Sec. 103. Reports by Government Accountability Office.

This additional section was added to require GAO review of CIO Council effectiveness.

TITLE II, Subtitle A → TITLE II—DATA CENTER OPTIMIZATION

Sec. 202. Definitions.

The term "Data Center" has been modified to remove technical specifications and to allow Federal CIO administrative discretion to modify the definition.

Added the definition for "Power Usage Effectiveness," the industry standard for calculating and measuring data center energy efficiency.

Sec. 204. Performance requirements related to data center consolidation.

Based on the GAO findings and feedback, greater emphasis and clarity on performance was added.

New Sec. 205. Cost savings related to data center optimization.

A new provision was added to track and report costs/savings realized from Data Center Optimization and to authorize the savings to be used to offset implementation costs of the initiative, or be invested in IT enhancement that improve capabilities and services. GAO shall examine and verify the accuracy of the methods to calculate savings.

TITLE II, Subtitle B → TITLE III—ELIMINATION OF DUPLICATION AND WASTE IN INFORMATION TECHNOLOGY ACQUISITION

Sec. 211 → 301. Inventory of information technology assets.

Numerous comments were received regarding the need for the federal government to review and identify its existing IT infrastructure. Additional language was added to reduce the number of duplicative and wasteful software licenses into the bill.

REMOVED Sec. 212. Uniform classification of commodity information technology assets.

This provision was deleted based upon stakeholder comments regarding the cost and burden associated with such an effort.

Sec. 213 → 302. Website consolidation and transparency.

The updated draft bill further expands the need for federal agency websites to better comply with the requirements of the Rehabilitation Act.

Sec. 214 → 303. Transition to the cloud.

Based upon stakeholder comments, a provision was added granting broader budget flexibilities to the CIOs in the 24 CFO Act agencies to establish cloud service Working Capital Funds.

Sec. 215 → 304. Elimination of unnecessary duplication of contracts by requiring business case analysis.

Most commenters expressed support for the need to rationalize duplicative contracts across the federal enterprise. A few raised concerns that i) the additional business case approval process may hamper agency discretion and initiatives such as DHS EAGLE or Navy's SeaPort-e to achieve efficiencies and promote agency-wide strategic sourcing; and ii) existing streamlined vehicles such as GSA Schedules or GWAC contracts should be exempted from the external business case review process.

This provision, as drafted, does not affect single agency contracts such as DHS EAGLE or Navy's SeaPort-e (referred to as "enterprise-wide" contracts by the Service Acquisition Reform Act (SARA) Panel Report). The term "government-wide contract vehicle" is defined to treat DoD or DHS as a single "executive agency" (as defined in 5 USC §105).

Conversely, some commenters expressed a view that the provision should be expanded to include more contracts, including those potentially duplicative single-agency contracts. Recognizing this concern, the Administrator of the Office of Federal Procurement Policy (OFPP) will be allowed to exercise administrative discretion to add other contracts as necessary.

Further clarification was added to exempt GSA Schedules, GWACs, or orders against existing contracts.

TITLE III → IV—STREAMLINING AND STRENGTHENING INFORMATION TECHNOLOGY ACQUISITION

Subtitle A—Strengthening IT Program Management Practices

Sec. 301 → 401. Establishment of Federal Infrastructure and Common Application Collaboration Center.

Several commenters expressed concerns that the Commodity IT Center would have both policy-making and purchasing authority and may create a competing governance structure with

respect to the existing GSA-offered contracts such as GSA Schedules and Government-wide Acquisition Contracts (GWAC), or create a bias toward the host agency contracts. In addition, general concerns remained regarding the term "commodity IT" as discussed in Sec. 3 earlier.

At the same time, unanimous and strong support was expressed by the witnesses at both Full Committee Hearings and commenters that weaknesses in IT program management practices are problems that must be addressed as part of the broader acquisition workforce issue.

In response, the previous framework for the Federal Commodity IT Acquisition Center was removed. Instead, the Federal Infrastructure and Common Application Collaboration Center (Collaboration Center) will concentrate on developing centralized program and technical management expertise necessary for coordinated IT acquisition best practices. The Center, housed in OMB, will serve as an IT program management tiger team to assist agencies with challenging IT projects and assist the CIO Council in its TechStat reviews. It is funded without appropriations in a way similar to how the Federal Acquisition Institute is funded via Acquisition Workforce Training Fund (41 USC 1703(i)), utilizing the existing fees already collected for certain interagency contracts.

Sec. 302 → 402. Designation of Assisted Acquisition Centers of Excellence.

Some commentators expressed concerns that the mandatory use of AACEs may create unnecessary bureaucratic hurdles and diminish each agency's ability to efficiently acquire optimal IT solutions. FITARA's intent is to develop and share pockets of IT procurement special expertise that currently exists within government. The revised FITARA now makes use of AACEs optional. To strike the right balance, AACEs are provided with enhanced budget flexibilities unavailable to other contracting options. This flexibility is akin to the existing case law found in GAO Principles of Federal Appropriations Law (Red Book), B-302760 (May 17, 2004).

[Subtitle B—Strengthening IT Acquisition Workforce](#)

Sec. 311 → 411. Expansion of training and use of information technology acquisition cadres.

Strong and unanimous support was received for FITARA's emphasis on the acquisition workforce. Witnesses during the hearing called for even stronger and more detailed mandates to drastically increase the government's IT acquisition capability. In response, a provision was added to require OMB to prepare and implement a 5-year strategic plan. Annual implementation report and GAO verification were added to ensure utmost and consistent attention to this critical subject.

Various industry feedback focused on the current workforce competency in i) designing and aligning performance, life cycle costs, and incentives; and ii) handling best value evaluation. Among other things, additional provision was added to enhance the IT Acquisition Cadre's ability to handle such circumstances through effective cross-functional training, utilizing both government and private sector expertise.

Sec. 312 → 412. Plan on strengthening program and project management performance.

The witnesses at the 2/26 hearing and GAO identified lack of skills and experience of the government-led program management team as the single consistent problem in all underperforming IT investments. OMB's 25 Point Plan specifically calls for a specialized career path for IT program managers and enabling mobility and collaboration across the government and industry. Noting the assertion that "the people managing these programs must represent the best of the best" (p13, OMB's 25 Point Plan), this provision was strengthened to enhance recruitment and retention of skilled IT program/project managers.

TITLE IV → V—ADDITIONAL REFORMS

Sec. 401 → 501. Maximizing the benefit of the Federal Strategic Sourcing Initiative.

Several commentators were concerned that the mandatory use of the Federal Strategic Sourcing Initiative (FSSI) may create unnecessary bureaucratic hurdles and diminish each agency's ability to efficiently acquire optimal IT solutions. Some questioned the basic framework and value of FSSI, while others expressed a strong support and called for expanded use. Balancing this feedback, the mandatory use of FSSI was removed, instead requiring mandatory consideration and documentation of comparative value when FSSI is not used. The agency must at least consider the items available under the FSSI.

Sec. 402 → 502. Promoting transparency of blanket purchase agreements.

Some commenters expressed a concern that i) the price/cost information that enables reverse engineering of cost breakdown is proprietary and ii) the bill should not promote the use of BPAs. The final negotiated price offered by an awardee is public information and should be available to other government buyers. This provision does not promote the creation of duplicative BPAs. In contrary, by availing the list of existing BPAs, agency buyers will be able to utilize them rather than creating a new one.

REMOVED Sec. 403. Clarification relating to severable services contracts.

Removed. This provision was meant to codify the GAO opinion, B-317636 (April 21, 2009) in response to the inquiry from the Senate Committee on Homeland Security and Governmental Affairs.

Sec. 404 → 503. Additional source selection technique in solicitations.

Multiple commenters voiced strong concern that the use of Lowest Price Technically Acceptable (LPTA) evaluation techniques in IT acquisition is often contrary to the best interest of the government and that the use of LPTA is in the rise. The concern is valid.

A few commenters equated this provision with LPTA. That is a misunderstanding.

Currently under the Federal Acquisition Regulation (FAR), there are two main types of source selection evaluation techniques for competitive, negotiated procurements: “trade-offs” and LPTA. While both are designed to obtain best value, the relative importance of cost/price varies depending on the technique.

Under “trade-offs,” the difference in cost/price is weighed against the additional benefits in non-price factors such as quality, experience, or technical specifications. This allows the government to accept options other than the lowest-priced proposal. Effectively judging the relative merits of the competing proposals involves a complicated analysis on the part of the government acquisition workforce to appropriately and fairly evaluate and quantify the differences in price and technical factors.

Under the “lowest price technically acceptable” technique, an award will be selected on the basis of the lowest evaluated price of proposals meeting or exceeding the acceptability standards for non-price factors. This is a simpler evaluation process reserved generally for requirements that are based on well-established technology where varied qualification levels above industry standards will not result in significant performance risks.

There is another source selection technique often used by the government and private sector characterized as “fixed price technical competition” or “bid to price.” Under this technique, the solicitation, based on independent cost estimates or request for information (RFI), would set a pre-determined award price and invite offerors to compete on non-price factors only (e.g., quality, past performance, and technical factors). Because the price is pre-set, the evaluation of proposals is much simpler and strictly based on technical evaluations. This technique is appropriate when the buyer has a good understanding of the requirements and the technologies involved and can therefore rely on the validity of its independent cost estimate, as further refined by the RFI.

While this type of evaluation technique is not prohibited by the FAR and has been used successfully by some agencies, the FAR lacks clear guidance on when a “fixed price technical competition” approach would be appropriate. This source-selection technique, if used properly, could help both the government and industry acquisition workforce by lowering bid and proposal costs and simplifying the evaluation process, thereby alleviating acquisition workforce challenges.

Additionally, this new “fixed price technical competition” technique would:

- Force government buyers to fully develop requirement documents necessary to determine realistic and complete total cost estimates.
- Promote transparency and competition by maximizing government-industry exchange of ideas prior to formal solicitation.
- Encourage clear and fair criteria for technical evaluation by eliminating the danger of inconsistent valuation of minor quality or technical variations vis-à-vis price. Often, in a trade-off evaluation, inexperienced contracting officers have a hard time eliminating "low-

ball" offers by under-qualified offerors. Emphasis must be given to ensure selection of the best-qualified offeror that can get the job done at a fair and reasonable price.

- Significantly reduce the gamesmanship involved in the bid and proposal process. Often, companies will offer multiple proposals at various price ranges in response to one solicitation because they do not know whether the government is looking for an “economical” solution or a “luxury” solution.
- Help reduce program cost overruns by maximizing firm-fixed price arrangements.
- Be one of several optional source-selection techniques that may be used *when appropriate*.

NEW Sec. 504. Enhanced transparency in information technology investments.

Based on GAO findings, and to better leverage the benefits of the transparency and accountability of the IT Dashboard, a new section was added requiring 80 percent of the \$80 billion annual IT investment be covered. Currently, approximately 50 percent is covered. In addition, it requires OMB to ensure that i) the information posted is current, accurate, and reflects the risks associated with each covered IT investment, and ii) its budget submission includes accurate and timely analysis of agency trends associated with these investments.

NEW Sec. 505. Enhanced communication between Government and industry.

Based on unanimous feedback to strengthen the Government-industry exchange of information, a provision was added requiring the Federal Acquisition Regulation to codify the principles contained in OFPP’s myth-busters memo.

Sec. 405 → 506. Clarification of current law with respect to open source software.

Based upon extensive stakeholder feedback, the updated draft bill clarifies that open source software should be viewed on a level playing field with other forms of software acquisitions. This provision therefore establishes the open source business model as a viable alternative to the government when contemplating large IT investments. While open source does not fit every IT investment strategy, there are many instances where use of open source software and its attendant business model would greatly benefit the government while ensuring transparency to the public.