

ARTICLE

Compliance with the Access Requirements of Section 508: Added Procurement Complexity for IT Industry and Federal Agencies

June 25, 2001

The date of June 25, 2001, marked the introduction of a new layer of acquisition complexity for Government contractors and procurement agencies. On that date, the Federal Acquisition Regulation (FAR) provisions implementing Section 508 of the Rehabilitation Act of 1973 became effective.

Section 508 was amended by the Workforce Investment Act of 1998 to require that when Federal agencies develop, procure, maintain or use electronic and information technology (EIT), they must insure that the EIT allows Federal employees and members of the public with disabilities to have access to and use of information and data that is comparable to the access and use enjoyed by other persons. Comparable access is not required if it would impose an undue burden on the agency.

Section 508 also directed the Architectural and Transportation Barriers Compliance Board (Access Board) to develop technical and functional performance criteria for EIT in order to provide access to the disabled. The Access Board published its Accessibility Standards in December 2000.

Section 508 also directed the FAR Council to revise the FAR to incorporate the Accessibility Standards. Accordingly, in April of 2001, the FAR Council issued its final rule incorporating the Standards. These new FAR provisions took effect on June 25, 2001 and are codified primarily at FAR Part 39.

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The new FAR provisions, like the Accessibility Standards, provide only general guidance. They do not address several difficult issues that may arise in implementing the Standards in the procurement system. Many questions that now exist will only be answered as the implementation process goes forward.

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Applicability

Although the FAR provisions and the Accessibility Standards do not explicitly address applicability, the preamble to the new FAR rule states that the provisions apply to all contracts (other than to an indefinite-quantity contract) awarded on or after June 25, 2001. The rule also applies to all delivery or task orders under indefinite-quantity contracts issued on or after June 25, 2001, even if the underlying contract was awarded prior to that date. The rule does not apply, however, to the decision to award the underlying indefinite-quantity contract, except to the extent that the award includes an order for initial quantities.

Definition of EIT

As noted above, Section 508 covers only "electronic and information technology." The new FAR rule defines EIT to have the same meaning as the phrase "information technology" in the FAR. In addition, EIT also includes "any equipment or interconnected system or subsystem of equipment that is used in the creation, conversion, or duplication of data or information." This compasses telecommunications products (such as telephones), information kiosks and transaction machines, worldwide websites, multimedia, and office equipment such as photocopiers and fax machines.

Exceptions

There are several exceptions in the FAR to the applicability of Section 508. The Standards do not apply to EIT that is (i) purchased in accordance with the micropurchase provisions prior to January 1, 2003; (ii) for a national security system; (iii) acquired by contractor incidental to a contract; or (iv) located in spaces frequented only by service personnel for maintenance, repair or occasional monitoring of equipment.

However, the exception likely to receive the most attention is the exception for "undue burden on the agency." Section 508 does not define undue burden. The Accessibility Standards define this phrase as "significant difficulty or expense." In considering burden, the Standards instruct agencies to "consider all agency resources available to the program or component for which the product is being developed, procured, maintained or used." The "undue burden" phrase derives from disability law, in particular case law interpreting Section 504 of the Rehabilitation Act and the Americans with Disabilities Act. Because of the legal precedents already addressing this phrase, the Access Board chose not to disturb the existing understanding of the term by trying to further define it.

The FAR Council likewise did not add to the definition of "undue burden." It is clear that the focus of the exception is the burden - in term of difficulty or expense - on the agency, not on vendors. The obligation of an agency to procure accessible EIT does not depend on the composition of its workforce. Section 508 requires that agencies procure accessible EIT regardless of whether they have employees with disabilities.

Since the burden determination must be made on a case-by-case basis, the Access Board declined to mandate a set percentage for the increased costs for an accessible product that would be considered an "undue burden" in every case. However, a Federal inter-agency steering committee on Section 508 recently opined that the higher price of a compliant product alone would not satisfy the "significant expense" component of the "undue burden" test, on the ground that such an analysis fails to consider all the resources available to the program or the component.

Certification

There is no requirement in Section 508, the Standards or the FAR provisions that a contractor provide a certification that its product(s) complies with the Standards. Presumably, this is in recognition of the fact that initially all products would not be fully compliant with the Standards, and certifications would thus be impossible for most, if not all, vendors.

It is anticipated that vendors will indicate the nature and extent of their product compliance on their websites and in other marketing vehicles. Such information is critical to assist agencies in fulfilling their responsibility to engage in market research to assess the availability of EIT that meets all or part of the Standards applicable to a particular procurement. Contracting officers will direct the requiring agency activities to locations where the details of compliance can be found (such as at the vendors' or other website locations). The preamble to the FAR provision implementing Section 508 states that website www.section508.gov will provide information from manufacturers on how they meet the Accessibility Standards.

At present, there is no uniform compliance testing. However, an industry-led, Government-sponsored group has been formed to facilitate discussion among interested industry and disability advocacy groups on ways to convey the extent to which particular products or services meet the technical provisions of the Standards. Requests for proposals are now beginning to appear that address Section 508. Interestingly, some of these RFPs apparently state that the agency will deem submission of a proposal to constitute a certification or representation by the offeror that the offered products or services comply with the applicable Standards. This

will undoubtedly present difficulty for certain vendors. Few products at present fully comply with all the Standards, and full certification thus is likely impossible for most contractors. Also, there may be differing interpretations as to how to meet certain Standards.

The General Services Administration and the Information Technology Industry Council have developed a template that vendors may use to provide product accessibility information on their websites. Although there is no compulsion to use this format, we understand that it is viewed as a reasonable means of providing information to agencies regarding product availability in the marketplace.

Enforcement

Section 508 places enforcement in the hands of individuals with disabilities. Disabled persons may sue agencies challenging non-compliant purchases of EIT occurring on or after June 21, 2001; complaints may be filed either at the agency or in Federal court. The available remedies include injunctive relief and attorneys fees, but not compensatory or punitive damages.

Contractors, of course, have the option of protesting an agency's implementation of Section 508 in the context of a particular procurement. Potential protest issues include (i) allegations that an awardee does not have and cannot provide a product that complies with the applicable Accessibility Standards, (ii) allegations that an agency improperly invoked (or failed to invoke) any of the five FAR exceptions to applicability of the Accessibility Standards, and (iii) allegations that an agency's best value determination is improper, especially in a situation where no one product meets all of the applicable Standards for a particular solicitation.