

Fifth Addendum: Congressman Davis Requests GSA to Issue Guidance Confirming Prohibition on Agency Requirement of Contractor Certifications of Section 508 Compliance

April 24, 2002

A. Introduction

Over the past months, we have received several reports from clients of solicitations for electronic and information technology ("EIT") in which the procuring agency has variously requested that offerors provide a "certification," "warranty" or "guarantee" that the proposed products and services comply with the Accessibility Standards under Section 508 of the Rehabilitation Act of 1973. There is no legal requirement for such a certification, warranty or guarantee in Section 508 of the Rehabilitation Act, the Section 508 Accessibility Standards promulgated by the Access Board or the implementing Federal Acquisition Regulation ("FAR") provisions. In response to continuing agency requests for such certifications from offerors, Congressman Thomas M. Davis III, Chairman of the Technology and Procurement Policy Subcommittee of the Committee on Government Reform, has written to the U.S. General Services Administration ("GSA") to request that GSA issue formal guidance confirming the prohibition against such certifications.

B. Absence of Legal Requirement for Section 508 Certification

Solicitations for EIT issued by Federal agencies since June 25, 2001, when the FAR provisions implementing Section 508 became effective, have included a number of provisions addressing offeror compliance with Section 508. Most do not require any affirmative representation by the offeror but deem the submission of an offer to constitute the

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guarantee of compliance. For example, a solicitation by one agency included the provision:

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Section 508. The Contractor *guarantees* compliance with Section 508 of the Rehabilitation Act of 1973 as provided in Addendum 3, Additional Terms and Conditions, Section 508 Access Standards (Technical), 1194.21, and Section 508 Functional Performance Criteria, 1194.31. (Emphasis added.)

Another agency stipulated to its "full support" for the "principles and goals" of Section 508, and prescribed that submission of an offer constituted representation of compliance, as follows:

When accessible technology is available in the market and unless otherwise approved by the contracting officer, all electronic and information technology deliverables and/or services, if applicable, must comply with section 508 of the Rehabilitation Act and the Access Board Standards. . . . Unless otherwise indicated, *Offeror represents by signature on its offer that all deliverables comply with these regulations.* (Emphasis added.)

In addition, according to Congressman Davis's letter to GSA, agencies also have contemplated "requiring contractors to submit to mandatory third-party testing as a condition for bidding on government contracts."

There is no requirement for any such certifications, warranties, guarantees or third-party testing in Section 508. Nor is there any provision in Section 508 authorizing the imposition of such certifications or testing. Similarly, the Section 508 Accessibility Standards promulgated by the Access Board contain no requirement for or authority to impose such certifications or testing. See 65 Fed. Reg. 80500 (Dec. 21, 2000).

Nor is there any such requirement or authority in the FAR provisions incorporating the Section 508 Accessibility Standards. See FAR Subpart 39.2. To the contrary, as a result of the recent acquisition reforms in the Clinger-Cohen Act of 1996, the FAR precludes any new certification unless (i) the certification requirement is specifically imposed by statute or (ii) the FAR Council sends written justification for the certification to the Administrator of Federal Procurement Policy and the Administrator approves the certification in writing. See FAR

§ 1.107. No such approval process has been followed for any Section 508 certifications.

Moreover, the representations and certifications for commercial item acquisitions are set forth in FAR § 12.301, and no Section 508 certification is listed there.

C. Offeror Options When Confronted with a Certification Request

Notwithstanding the absence of legal authority, agencies have continued to impose such certifications. Offerors have a number of options when confronted with a solicitation seeking a certification of Section 508 compliance. These options include:

(i) *Engage procuring agency's Section 508 coordinator.* Most, if not all, Federal agencies have appointed Section 508 "coordinators" who are generally more knowledgeable about Section 508 and the implementing FAR regulations than agency contracting or program offices. Some offerors have successfully enlisted the Section 508 coordinator to explain to those offices that no such certification should be demanded.

(ii) *Argue that an exception applies.* There are several exceptions to the application of Section 508 standards to a particular acquisition. Such exceptions exist, *inter alia*, for "national security systems," "undue burden," "back room" EIT and micro purchases. See FAR § 39.204. Although the decision as to whether an exception applies is to be made by the procuring agency, potential offerors are certainly free to submit argument that an exception should apply to a particular procurement, thus negating the certification issue.

(iii) *Argue that no Section 508 compliant product is commercially available.* Under the FAR, procuring agencies should conduct market research to determine whether there are commercially available items that meet the applicable Section 508 standards. See FAR §§ 10.001(a)(3)(vii), 39.203(c). Again, offerors can take the initiative to provide market information to the effect that no such products are on the market. Such a showing would also remove the certification question.

(iv) *Object to the certification requirement as a legal matter.* In light of the absence of any legal requirement or authority for a certification, some companies, when faced with a certification demand, have taken exception based on the points outlined above. Such an objection may be in the nature of a brief legal statement and a reference to the company's website for Section 508 product compliance information.

(v) *File an agency-level protest challenging the certification requirement.* If the foregoing remedies, including the legal argument, do not result in acceptable relief, an offeror has the option of challenging the certification requirement more formally by instituting a protest to the appropriate agency official.

D. Congressman Davis's Request to GSA to Reiterate Absence of Any Certification Requirement

Congressman Davis has now adopted the certification issue. In a February 20, 2002, letter to Stephen Perry, the GSA Administrator, the Congressman mentioned as a "key concern" regarding Section 508 "the continuing problem of Federal agencies requiring vendors to in effect certify that products being offered in response to a solicitation are '508 compliant.'" In particular, Congressman Davis complained that he had heard "various

reports of commercial contractors being asked to accept a variety of government-unique contract clauses assuring compliance with Section 508, or for statements of warranty indemnifying agencies from employee or public complaints regarding accessibility." The Congressman also stated that "other agencies have been contemplating requiring contractors to submit to mandatory third-party testing as a condition for bidding on government contracts."

Congressman Davis's view is that "*all of the above violate the letter and the spirit of the accessibility standards and FAR rule.*" (Emphasis added.) To remedy this situation, the Congressman requested that GSA "publish and disseminate guidance reiterating the prohibition against requiring Section 508 certifications, warranties and mandatory third party testing." Such an action would be consistent with less formal advice that GSA's Office of Acquisition Policy has previously given - that Federal agencies are not authorized to require contractors to certify or warrant whether their products "comply" with the Section 508 Accessibility Standards.

Congressman Davis's letter provides contractors with a further basis for objecting to any future procuring agency attempts to require certifications, warranties or guarantees of Section 508 compliance and, depending on GSA's response, could result in formal direction prohibiting such requirements.

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Fourth Addendum: Access Board Issues Final Accessibility Standards For Electronic And Information Technology