

# ALERT

GOVERNMENT REGULATION / GOVERNMENT CONTRACTS

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## Section 508 – IT Must Be Accessible to the Disabled

Information technology (IT) contractors need to take note of a new law that requires that products and services sold to the government be accessible to the disabled. On April 25, 2001, the Federal Acquisition Regulation (FAR) Council issued a final rule implementing a 1998 amendment to Section 508 of the Rehabilitation Act of 1973. 66 Fed. Reg. 20893. The amended Section 508 provides that federal agencies must ensure that federal employees with disabilities - including vision, hearing, and mobility impairments - have "access" to electronic and information technology (EIT) products and services that is "comparable" to the access of other federal employees. Members of the public with disabilities and who are seeking information or services from the government also must have access to information and data on a basis that is comparable to the access enjoyed by other members of the public.

Over 17,000 contractors are expected to be affected by the new rule. As used in the new rule, the term "EIT" has the same meaning as information technology, except that 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." The term EIT includes:

- software applications and operating systems
- web-based information or applications
- telecommunication products
- video and multimedia products
- self contained, closed products (e.g., information kiosks, calculators and fax machines)
- desktop and portable computers

The FAR rule states that manufacturers are currently developing products that comply with the EIT accessibility standards and that most products will comply with the standards within the next two years.

The FAR rule exempts the following EIT purchases from compliance with the Section 508 accessibility standards: (1) purchases made under the micro-purchase threshold of \$2,500 (only until 2003); (2) purchases for national security systems; (3) purchases made by a contractor incidental to performance of the contract (for so-called "back office" use); (4) purchases for EIT located in spaces frequented only by service personnel for maintenance, repair, or occasional monitoring of equipment; and, perhaps most significantly (5) situations in which purchasing compliant EIT would impose an "undue burden" on the procuring agency, as discussed further below.

Commercial item procurements need not necessarily comply with all the accessibility standards. The rule is that, when acquiring commercial products, an agency must comply with "those accessibility standards that can be met with supplies and services available in the commercial marketplace in time to meet the agency's delivery requirements." Thus, the agency must purchase those commercial items that meet the accessibility standards to the fullest extent possible, even if the product does not completely meet the "comparable access" goal. In that situation, the agency does not have to make an "undue burden" determination, but does have to document the nonavailability of fully-compliant products.

The "undue burden" exemption has generated a great deal of interest and raises much uncertainty as to its application, which could lead to problems in procurements, as well as to potential bid protests. The FAR rule defines an "undue burden" as a "significant difficulty or expense." Commentators on the proposed rule asked the FAR Council for a greater explanation of the term and its use in the context of federal procurement. In the final rule, however, the FAR Council declined to elaborate, stating instead that the term stems from disability law and noting that substantial case law exists

in that field regarding its interpretation and application. Whether a particular situation satisfies the “undue burden” standard will have to be evaluated on a case-by-case basis and will depend on the unique facts at hand. The FAR Council added that, if an agency determines that an undue burden exists, the agency must document its determination and provide an “alternative means of access” to disabled individuals.

The final rule also did not address the manner in which the government intended to ensure a contractor’s compliance with the accessibility standards. There is no requirement that the government include compliance as an evaluation factor in the solicitation for the applicable procurement, or in the list of representations and certifications offerors must execute in connection with securing the contract. Commentators on the proposed rule noted that, without a standard clause, contractors would be subject to different agency-specific interpretations. Other commentators, however, suggested that the imposition of an additional certification requirement would run counter to the goal of procurement streamlining and reform. In response, the final rule states only that the FAR Council is still considering these issues.

Information about the specific standards can be found at [www.section508.gov](http://www.section508.gov). The accessibility standards themselves were drafted by a board authorized by Section 508 of the act. The Access Board, as it became known (short for Architectural and Transportation Barriers Compliance Board), published these standards in December 2000 and they are incorporated by the new FAR rule.

One general issue that contractors may face is the means by which a product or services will comply with the accessibility standards: for example, whether a contractor must provide EIT products that are themselves compatible or whether a contractor may satisfy the accessibility requirement by providing non-compliant EIT products along with additional tech-

nology or devices which, when used in conjunction with the EIT products, allow disabled persons to use the non-compliant EIT products. Agencies and offerors alike may face this issue as solicitations are developed and proposals prepared and evaluated.

June 25, 2001 is the effective date of the new rule. All delivery orders and task orders placed, options exercised, modifications made, and contracts awarded on or after June 25, 2001 are subject to the new standards. This rule will apply, for example, to new orders placed under existing General Services Administration (GSA) schedule contracts, under other government-wide acquisition contracts (GWAC), under multi-agency contracts (MAC), and under other indefinite-delivery, indefinite-quantity (ID/IQ) contracts. This implementation schedule requires agencies to have performed the requisite acquisition planning and market research in order to ensure that procurements with an anticipated award date on or after June 25th comply with the new rule. Certain procurements could be delayed as result. The rule likewise may challenge contractors to react quickly to changes in their customers’ requirements as agencies seek to ensure that new EIT products and services meet the accessibility standards.

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