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48 CFR Part 2, et al.

48 CFR Chapter 1

Federal Acquisition Regulations; Electronic and Information Technology Accessibility and Small Entity Compliance Guide; Federal Acquisition Cirular 97–27, FAR Case 1999–607; Final Rules

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 2, 7, 10, 11, 12, and 39

[FAC 97–27; FAR Case 1999–607]

RIN 9000–AI69

Federal Acquisition Regulations; Electronic and Information Technology Accessibility

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulations (FAR) to implement Section 508 of the Rehabilitation Act of 1973. Subsection 508(a)(3) requires the FAR to be revised to incorporate standards developed by the Architectural and Transportation Barriers Compliance Board (also referred to as the ''Access Board'').

DATES: *Effective Date:* June 25, 2001.

Applicability Date: For other than indefinite-quantity contracts, this amendment applies to contracts awarded on or after the effective date. For indefinite-quantity contracts, it is applicable to delivery orders or task orders issued on or after the effective date.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC 20405, (202) 501–4755, for information pertaining to status or publication schedules. For clarification of content, contact Ms. Linda Nelson, Procurement Analyst, at (202) 501–1900. Please cite FAC 97–27, FAR case 1999–607.

SUPPLEMENTARY INFORMATION:

A. Background

The Workforce Investment Act of 1998, Public Law 105–220, was enacted on August 7, 1998. Title IV of the Act is the Rehabilitation Act Amendments of 1998. Subsection 408(b) amended section 508 of the Rehabilitation Act of 1973 (29 U.S.C. 794d). Subsection 508(a)(1) requires that when Federal departments or agencies develop, procure, maintain, or use Electronic and Information Technology (EIT), they must ensure that the EIT allows Federal employees with disabilities to have access to and use of information and data that is comparable to the access to and use of information and data by other Federal employees. Section 508 also requires that individuals with disabilities, who are members of the public seeking information or services from a Federal department or agency, have access to and use of information and data that is comparable to that provided to the public without disabilities. Comparable access is not required if it would impose an undue burden.

Subsection 508(a)(2)(A) required the Access Board to publish standards setting forth a definition of EIT and the technical and functional performance criteria necessary for accessibility for such technology by February 7, 2000. Subsection 508(a)(3) required the Federal Acquisition Regulatory Council to revise the FAR to incorporate the Access Board's standards not later than 6 months after the Access Board regulations were published. The Access Board published the final standards in the **Federal Register** at 65 FR 80500, December 21, 2000.

A proposed rule to amend the FAR was published in the **Federal Register** at 66 FR 7166, January 22, 2001. The 60-day comment period ended March 23, 2001.

This final rule implements the Access Board's regulations by—

- Including the definition of the term ''electronic and information technology,'' a term created by the statute;
- Incorporating the EIT Standards in acquisition planning, market research, and when describing agency needs; and
- Adding a new Subpart 39.2.

Applicability

The proposed rule did not address the issue of whether the new rule would apply to contracts already in existence. A number of public commentors asked for clarification about the applicability of the rule.

For other than indefinite-quantity contracts, this amendment applies to contracts awarded on or after the effective date. For indefinite-quantity contracts, it is applicable to delivery orders or task orders issued on or after the effective date. Indefinite-quantity contracts may include Federal Supply Schedule contracts, governmentwide acquisition contracts (GWACs), multi-agency contracts (MACs), and other interagency acquisitions. Exception determinations are not required for award of the underlying indefinite-quantity contracts, except for requirements that are to be satisfied by initial award. Indefinite-quantity contracts may include noncompliant items, provided that any task or delivery order issued for noncompliant EIT meets an applicable exception. Accordingly, requiring activities must ensure compliance with the EIT accessibility standards at 36 CFR part 1194 (or that an exception applies) at time of issuance of task or delivery orders.

Contracting offices that award indefinite-quantity contracts must indicate to ordering offices which supplies and services the contractor indicates as compliant, and show where full details of compliance can be found (*e.g.*, vendor's or other exact web page location).

The Access Board's EIT standards at 36 CFR part 1194 do not apply to—

- Taking delivery for items ordered prior to the effective date of this rule;
- Within-scope modifications of contracts awarded before the effective date of this rule;
- Exercising unilateral options for contracts awarded before the effective date of this rule; or
- Multiyear contracts awarded before the effective date of this rule.

Exceptions

Unless an exception at FAR 39.204 applies, acquisitions of EIT supplies and services must meet the applicable accessibility standards at 36 CFR part 1194. The exceptions in 39.204 include—

- Micro-purchases, prior to January 1, 2003. However, for micro-purchases, contracting officers and other individuals designated in accordance with 1.603–3 are strongly encouraged to comply with the applicable accessibility standards to the maximum extent practicable;
- EIT for a national security system;
- EIT acquired by a contractor incidental to a contract;
- EIT located in spaces frequented only by service personnel for maintenance, repair or occasional monitoring of equipment; and
- EIT that would impose an undue burden on the agency.

Micro-purchases

The exception for micro-purchases was in the proposed rule. It was made in recognition of the fact that almost all micro-purchases are made using the Governmentwide commercial purchase card. Government personnel, who are not warranted contracting officers, use the purchase card to purchase commercial-off-the-shelf items. Use of the purchase card makes it generally

impractical to comply with the EIT accessibility standards unless commercial-off-the-shelf products are labeled for standards compliance. Manufacturers are continuing to develop products that comply with the EIT accessibility standards. It is expected that almost all products will comply with the standards within the next two years, and be labeled by the manufacturer accordingly. Therefore, we have established a sunset date of January 1, 2003, for the micro-purchase exemption. Prior to that date, the Government will revisit the state of technology and the pace at which manufacturers have conformed to the required standards.

The micro-purchase exception does not exempt all products that cost under $2,500. Some commentors were confused about this. The exception is for a one-time purchase that totals $2,500 or less, made on the open market rather than under an existing contract. A software package that costs $1,800 is not a micro-purchase if it is part of a $3,000 purchase, or part of a $3,000,000 purchase. Regardless of purchase price, there still is an agency requirement to give reasonable accommodation for the disabled under section 504 of the Rehabilitation Act of 1973. The current micro-purchase limit is $2,500, set by statute. If the threshold is increased by a statutory change, the FAR Council will consider keeping the FAR Subpart 39.2 limit at $2,500.

In addition, GSA will recommend that agencies modify cardholder training to remind purchase cardholders of EIT accessibility requirements.

Undue Burden

Another set of comments wanted the FAR to elaborate on undue burden. The Access Board discussed undue burden in its final rule preamble (at 65 FR 80506 of the **Federal Register**). Substantial case law exists on this term, which comes from disability law. The Access Board chose not to disturb the existing understanding of the term by trying to define it. The FAR Council agrees with this approach. Agencies are required by statute to document the basis for an undue burden. Requiring officials should be aware that when there is an undue burden, the statute requires an alternative means of access to be provided to individuals with disabilities.

Clauses

Some commentors asked for a clause, pointing out that unless the FAR prescribes a clause, agencies may produce different clauses, resulting in inconsistent coverage across the Government. Some procurement offices want a clause to help address their lack of experience with the Access Board standards. No clauses were in the January proposed rule. The FAR Council is carefully considering whether clauses are needed and welcomes comments on this issue that would inform a potential rulemaking.

Other Issues

A topic of concern to commentors was the play between the definition of EIT and a contractor's incidental use of EIT. The rule was not intended to automatically apply to a contractor's internal workplaces. For example, EIT neither used nor accessed by Federal employees or members of the public is not subject to the Access Board's standards(contractor employees in their professional capacity are not members of the public for purposes of section 508).

Commentors asked for further information on section 508 product compliance. There is a website at http://www.section508.gov, providing information from manufacturers and vendors on how they meet Access Board standards. The website reference has been added to the FAR language at Subpart 39.2.

Commentors asked whether the Committee for Purchase from People Who Are Blind or Severely Disabled, and Federal Prison Industries (UNICOR) were covered. These are required sources for certain items. Agencies must consider noncompliant EIT items from these sources the same way that they would consider items from commercial sources, *i.e.*, whether purchasing the item would come under an exception. As a matter of policy, purchases from the Committee for Purchase from People Who Are Blind or Severely Disabled and Federal Prison Industries are to be treated as procurements.

The current status of compliance testing also was discussed in comments. Currently there is no uniform testing. However, there is an industry-led, Government-sponsored, program in the works, Accessibility for People with Disabilities through Standards Interoperability and Testing (ADIT). See the Section 508 website for information.

Questions arose on draft rule section 39.X03, Applicability, on the interpretation of standards available in the marketplace. The rule intended to recognize that initially there will be many products that do not meet all the Access Board's technical standards. Agencies may need to acquire these products. When acquiring commercial items, 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. Individual standards that cannot be met would be documented by the requiring official, with a copy to the contract file. If products are available that meet some, but not all applicable standards, agencies cannot claim a product as a whole is nonavailable just because it does not meet all of the standards.

Requirements Development, Market Research, and Solicitations

The requiring official must identify which standards apply to the procurement, using the Access Board's EITAccessibility Standards at 36 CFR part 1194. Then the requiring official must perform market research to determine the availability of compliant products and services; vendor websites and the Section 508 website would be helpful here. The requiring official must then identify which standards, if any, would not apply in this procurement because of, for example, nonavailability (FAR 39.203) or undue burden (FAR 39.204(e)). Technical specifications and minimum requirements would be developed based on the market research results and agency needs. This information would be submitted with the purchase request. The solicitation would then be drafted, or a task order or delivery order would be placed. Proposal evaluation may yield additional information that could require reconsideration of the need for an exception.

B. Executive Order 12866

The Access Board determined that their December 21,2000, final rule was an economically significant regulatory action under E.O. 12866, and was a major rule under 5 U.S.C. 804. An economic assessment was accomplished and was placed on the Access Board's website at http://www.accessboard.gov/sec508/assessment.htm. A copy can be obtained from the Access Board. The FAR Council has determined that the assessment conducted by the Access Board provides an adequate economic assessment of both the Access Board rule and this change to the FAR. Accordingly, the Access Board's regulatory assessment meets the requirement of performing a regulatory assessment for this change to the FAR and no further assessment is necessary.

This is an economically significant regulatory action and was subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is a major rule under 5 U.S.C. 804.

C. Regulatory Flexibility Act

This rule has a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because small businesses that choose to market their products to the Federal Government must ensure that their electronic and information technology supplies or services meet the substantive requirements of the Access Board's standards. Since this may result in increased costs of producing and selling their products, a Final Regulatory FlexibilityAnalysis (FRFA) has been performed and the analysis is summarized as follows:

The objective of this rule is to revise the FAR to improve the accessibility of electronic and information technology used by the Federal Government. The standards developed by the Access Board affect Federal employees with disabilities as well as members of the public with disabilities who seek to use Federal electronic and information technologies to access information. This increased access reduces barriers to employment in the Federal Government for individuals with disabilities and reduces the probability that Federal employees with disabilities will be under-employed. The EIT standards developed for the Federal Government may result in benefiting people outside the Federal workforce, both with and without disabilities. The accessible technology from the Federal Government may spill over to the rest of society.

Section 508 uses the Federal procurement process to ensure that technology acquired by the Federal Government is accessible. Failure of an agency to purchase electronic and information technology that complies with the standards promulgated at 36 CFR part 1194, may result in an individual with a disability filing a complaint alleging that a Federal agency has not complied with the standards. Individuals may also file a civil action against an agency. The enforcement provision of section 508 takes effect June 21, 2001.

This rule establishes that contractors must manufacture, sell, or lease electronic and information technology supplies or services that comply with standards promulgated at 36 CFR part 1194. For many contractors, this may simply involve a review of the supply or service with the standards to confirm compliance. For other contractors, these standards could require redesign of a supply or service before it can be sold to the Federal Government. According to the Federal Procurement Data System in fiscal year 2000, we estimate that there are approximately 17,550 contractors to which the rule will apply. Approximately, 58 percent, or 10,150, of these contractors are small businesses.

Small businesses will have to analyze whether the electronic and information technology they or their customers plan to sell to the Federal Government complies with the standards. Manufacturers may want to redesign to make their supplies and services compliant, to have a better chance for their items to be purchased by the Government. Retailers will need to coordinate with the manufacturers. The statute will decrease demand for some supplies and services that are not compliant, leading to decreased sales for small entities manufacturing or selling those items. Conversely, the statute will increase demand for some supplies and services that are compliant, leading to increased sales for small entities manufacturing or selling those items.

Since the statute imposes private enforcement, where individuals with disabilities can file civil rights lawsuits, the Government has little flexibility for alternatives in writing this regulation. To meet the requirements of the law, we cannot exempt small businesses from any part of the rule.

The FAR Secretariat has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small BusinessAdministration. A copy of the FRFA may be obtained from the FAR Secretariat. The Councils will consider comments from small entities concerning the affected FAR parts in accordance with 5 U.S.C. 610. Comments must be submitted separately and should cite 5 U.S.C. 601, *et seq.* (FAR case 1999–607), in correspondence.

D. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Parts 2, 7, 10, 11, 12, and 39

Government procurement.

Dated: April 20, 2001.

Al Matera,

Director, Acquisition Policy Division.

Federal Acquisition Circular

Federal Acquisition Circular (FAC) 97–27 is issued under the authority of the Secretary of Defense, the Administrator of Aeronautics and Space Administration.

All Federal Acquisition Regulation (FAR) changes and other directive material contained in FAC 97–27 are effective June 25, 2001.

Dated: April 19, 2001.

Deidre A. Lee,

Director, Defense Procurement.

Dated: April 16, 2001.

David A. Drabkin,

Deputy Associate Administrator, Office of Acquisition Policy, General Services Administration.

Dated: April 16, 2001.

Tom Luedtke,

Associate Administrator for Procurement, National Aeronautics and Space Administration.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 2, 7, 10, 11, 12, and 39 as set forth below:

1. The authority citation for 48 CFR parts 2, 7, 10, 11, 12, and 39 continues to read as follows:

Authority: 40 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 2—DEFINITIONS OF WORDS AND TERMS

2. In section 2.101, add in alphabetical order, the definition ''Electronic and information technology (EIT)'' to read as follows:

2.101 Definitions.

* * * * *

Electronic and information technology (EIT) has the same meaning as ''information technology'' except 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, but is not limited to, telecommunication products (such as telephones), information kiosks and transaction machines, worldwide websites, multimedia, and office equipment (such as copiers and fax machines).

* * * * *

PART 7—ACQUISITION PLANNING

3. In section 7.103, redesignate paragraphs (o) through (r) as (p) through (s), respectively; and add a new paragraph (o) to read as follows:

7.103 Agency-head responsibilities.

* * * * *

(o) Ensuring that acquisition planners specify needs and develop plans, drawings, work statements, specifications, or other product descriptions that address Electronic and Information Technology Accessibility Standards (see 36 CFR part 1194) in proposed acquisitions (see 11.002(e)) and that these standards are included in requirements planning, as appropriate (see subpart 39.2).

* * * * *

PART 10—MARKET RESEARCH

4. In section 10.001, add paragraph (a)(3)(vii) to read as follows:

10.001 Policy.

(a) * * *

(3) * * *

(vii) Assess the availability of electronic and information technology

that meets all or part of the applicable accessibility standards issued by the Architectural and Transportation Barriers Compliance Board at 36 CFR part 1194(see Subpart 39.2).

* * * * *

PART 11—DESCRIBING AGENCY NEEDS

5. In section 11.002, add paragraph (f) to read as follows:

11.002 Policy.

* * * * *

(f) In accordance with Section 508 of the Rehabilitation Act of 1973 (29 U.S.C. 794d), requiring activities must prepare requirements documents for electronic and information technology that comply with the applicable accessibility standards issued by the Architectural and Transportation Barriers Compliance Board at 36 CFR part 1194 (see subpart 39.2).

PART 12—ACQUISITION OF COMMERCIAL ITEMS

6. Amend section 12.202 by adding a new paragraph (d) to read as follows:

12.202 Market research and description of agency need.

* * * * *

(d) Requirements documents for electronic and information technology must comply with the applicable accessibility standards issued by the Architectural and Transportation Barriers Compliance Board at 36 CFR part 1194 (see subpart 39.2).

PART 39—ACQUISITION OF INFORMATION TECHNOLOGY

7. Revise section 39.000 to read as follows:

39.000 Scope of part.

This part prescribes acquisition policies and procedures for use in acquiring—

(a) Information technology, including financial management systems, consistent with other parts of this regulation, OMB Circular No. A–127, Financial Management Systems, and OMB Circular No. A–130, Management of Federal Information Resources; and

(b) Electronic and information technology.

8. Add Subpart 39.2, consisting of sections 39.201 through 39.204, to read as follows:

Subpart 39.2—Electronic and Information Technology

Sec.

39.201 Scope of subpart.
39.202 Definition.
39.203 Applicability.
39.204 Exceptions.

Authority: 40 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

39.201 Scope of subpart.

(a) This subpart implements section 508 of the Rehabilitation Act of 1973 (29 U.S.C. 794d), and the Architectural and Transportation Barriers Compliance Board Electronic and Information Technology (EIT) Accessibility Standards (36 CFR part 1194).

(b) Further information on section 508 is available via the Internet at http://www.section508.gov.

(c) When acquiring EIT, agencies must ensure that—

(1) Federal employees with disabilities have access to and use of information and data that is comparable to the access and use by Federal employees who are not individuals with disabilities; and

(2) Members of the public with disabilities seeking information or services from an agency have access to and use of information and data that is comparable to the access to and use of information and data by members of the public who are not individuals with disabilities.

39.202 Definition.

Undue burden, as used in this subpart, means a significant difficulty or expense.

39.203 Applicability.

(a) Unless an exception at 39.204 applies, acquisitions of EIT supplies and services must meet the applicable accessibility standards at 36 CFR part 1194.

(b)(1) Exception determinations are required prior to contract award, except for indefinite-quantity contracts (see paragraph (b)(2) of this section).

(2) Exception determinations are not required prior to award of indefinite-quantity contracts, except for requirements that are to be satisfied by initial award. Contracting offices that award indefinite-quantity contracts must indicate to requiring and ordering activities which supplies and services the contractor indicates as compliant, and show where full details of compliance can be found (*e.g.*, vendor's or other exact website location).

(3) Requiring and ordering activities must ensure supplies or services meet the applicable accessibility standards at 36 CFR part 1194, unless an exception applies, at the time of issuance of task or delivery orders. Accordingly, indefinite-quantity contracts may include noncompliant items; however, any task or delivery order issued for noncompliant items must meet an applicable exception.

(c)(1) When acquiring commercial items, an agency must comply with those accessibility standards that can be met with supplies or services that are available in the commercial marketplace in time to meet the agency's delivery requirements.

(2) The requiring official must document in writing the nonavailability, including a description of market research performed and which standards cannot be met, and provide documentation to the contracting officer for inclusion in the contract file.

39.204 Exceptions.

The requirements in 39.203 do not apply to EIT that—

(a) Is purchased in accordance with Subpart 13.2 (micro-purchases) prior to January 1, 2003. However, for micro-purchases, contracting officers and other individuals designated in accordance with 1.603–3 are strongly encouraged to comply with the applicable accessibility standards to the maximum extent practicable;

(b) Is for a national security system;

(c) Is acquired by a contractor incidental to a contract;

(d) Is located in spaces frequented only by service personnel for maintenance, repair or occasional monitoring of equipment; or

(e) Would impose an undue burden on the agency.

(1) *Basis*. In determining whether compliance with all or part of the applicable accessibility standards in 36 CFR part 1194 would be an undue burden, an agency must consider—

(i) The difficulty or expense of compliance; and

(ii) Agency resources available to its program or component for which the supply or service is being acquired.

(2) *Documentation*. (i) The requiring official must document in writing the basis for an undue burden decision and provide the documentation to the contracting officer for inclusion in the contract file.

(ii) When acquiring commercial items, an undue burden determination is not required to address individual standards that cannot be met with supplies or service available in the commercial marketplace in time to meet the agency delivery requirements (see 39.203(c)(2) regarding documentation of nonavailability).

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