

TJAGSA Practice Note

Faculty, The Judge Advocate General's School, U.S. Army

Contract & Fiscal Law Note

Procurement Disabilities Initiative Takes Effect

Introduction

The Internet brings a world of information into a computer screen, which has enriched the lives of many with disabilities. Yet, technology creates challenges of its own. Researchers here at the Department of Defense and at other agencies throughout the federal government and in the private sector are developing solutions to these problems.¹

With these words at the Department of Defense (DOD) Computer/Electronic Accommodations Program Technology Evaluation Center (CAPTEC),² President Bush highlighted the 25 June 2001 effective date for federal compliance with a new procurement disabilities initiative. Section 508 of the Rehabilitation Act of 1973³ requires all federal agencies to ensure that disabled employees and disabled members of the public have access to electronic and information technology (EIT) that is comparable to access available to people without disabilities.⁴

As of 25 June, government contracts awarded for EIT must contain technology that is accessible to disabled federal employees and disabled members of the public.⁵ Section 508 imposes a significant new requirement on DOD procurement officials to consider handicapped access when soliciting and awarding EIT contracts. This note explains the new accessibility rule, examines its key definitions, analyzes its exceptions, and discusses its applicability to military procurements. This note concludes with a brief discussion of the judge advocate's role in implementing Section 508 within the DOD community.

The Rule

Section 508 required the Architectural and Transportation Compliance Board (Access Board)⁶ to develop EIT access standards for federal agencies⁷. The Access Board published these access standards on 21 December 2000.⁸ The standards address software applications and operating systems, web-based intranet and Internet information and applications, telecommunications products, video and multimedia products, self-contained (closed) products,⁹ and desktop and portable computers.¹⁰ The Federal Acquisition Regulatory Council implemented these access standards by amending the Federal Acquisition Regulation (FAR)¹¹ on 25 April 2001.¹² Both the Access Board standards and the FAR amendments require agencies, when

1. Press Release, U.S. Department of Defense, President Bush Highlights Disabilities Initiative (June 19, 2001), available at http://www.defenselink.mil/news/Jun2001/b06192001_bt27-01.htm.

2. DOD's Computer/Electronic Accommodations Program (CAP) assists disabled government employees in gaining access to information and technology. Created in 1990, CAP serves approximately 20,000 employees in DOD and thirty-eight other federal agencies. More information on CAP is available at <http://www.tricare.osd.mil/cap>. *Id.*

3. Rehabilitation Act of 1973 § (codified as amended by the Workforce Investment Act of 1998 29 U.S.C.S. § 794d (LEXIS 2001)).

4. *Id.*

5. Electronic and Information Technology Accessibility, 66 Fed. Reg. 20,894 (Apr. 25, 2001) (to be codified at 48 C.F.R. pts. 2, 7, 10, 11, 12, 39).

6. The Rehabilitation Act of 1973, as amended by the Workforce Investment Act of 1998, 29 U.S.C.S. § 794d (LEXIS 2001), established the Access Board as an independent federal agency whose primary mission is to promote accessibility for people with disabilities. The Access Board consists of twenty-five members. The President appoints thirteen members from the general public, a majority of which must be disabled. The remaining twelve are heads of the following agencies (or their designees): Health and Human Services, Education, Transportation, Housing and Urban Development, Labor, Interior, Defense, Justice, Veterans Affairs, Commerce, the General Services Administration, and the Postal Service. Electronic and Information Technology Accessibility Standards, 65 Fed. Reg. 80,500, n.2 (Dec. 21, 2000) (to be codified at 36 C.F.R. pt. 1194).

7. Rehabilitation Act of 1973, as amended by the Workforce Investment Act of 1998, 29 U.S.C.S. § 794d (LEXIS 2001).

8. Electronic and Information Technology Accessibility Standards, 65 Fed. Reg. 80,500 (Dec. 21, 2000) (to be codified at 36 C.F.R. pt. 1194). The standards are available at <http://www.access-board.gov/ufas/ufas-html/ufas.htm>.

9. Self-contained (closed) products are products "that generally have embedded software and are commonly designed in such a fashion that a user cannot easily attach or install assistive technology. These products include . . . information kiosks and information transaction machines, copiers, printers, calculators, fax machines, and other similar types of products." Electronic and Information Technology Accessibility Standards, 65 Fed. Reg. 80,524 (to be codified at 36 C.F.R. pt. 1194).

10. *Id.* at 80,524-80,526 (to be codified at 36 C.F.R. pt. 1194).

11. GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REGULATION (June 1997) [hereinafter FAR].

developing, procuring, maintaining, or using EIT, to 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.¹³

The rule is two-pronged. It focuses on disabled government employees and disabled members of the general public. Unlike the Americans With Disabilities Act, Section 508 does not focus on reasonable accommodation of *individuals* with disabilities.¹⁴ Rather, Section 508 demands a *systemic* approach to creating access to EIT for disabled individuals. The DOD procurement officials must keep this systemic approach in mind when acquiring EIT.

Key Definitions

The Access Board standards contain definitions of twelve terms.¹⁵ An "agency" is "[a]ny Federal department or agency . . ."¹⁶ Therefore, the standards clearly apply to the DOD. The term "information technology" means:

Any equipment or interconnected system or subsystem of equipment, that is used in the automatic acquisition, storage, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information. The term information technology includes computers, ancillary equipment, software, firmware and

similar procedures, services (including support services), and related resources.¹⁷

The FAR amendments only contain one definition of "EIT."

[It] 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).¹⁸

The Access Board standards and the FAR amendments therefore apply to a broad range of EIT acquisitions.

Exceptions

Although broadly worded, Section 508 contains some significant exceptions. The most significant exception for DOD procurement officials is the "national security system" exception. Section 508 does not apply to EIT procurements for national security systems, as that term is defined in the Clinger-Cohen Act of 1996.¹⁹ "National security system" means:

Any telecommunications or information system operated by the United States Government, the function, operation, or use of which-

- (1) involves intelligence activities;
- (2) involves cryptologic activities related to national security;

12. Electronic and Information Technology Accessibility, 66 Fed. Reg. 20,894 (Apr. 25, 2001) (to be codified at 48 C.F.R. pts. 2, 7, 10, 11, 12, and 39).

13. *Id.*; Electronic and Information Technology Accessibility Standards, 65 Fed. Reg. at 80,500 (to be codified at 36 C.F.R. pt. 1194).

14. The Americans with Disabilities Act, 42 U.S.C.S. § 12101 (LEXIS 2001); *see also* U.S. DEP'T OF ARMY, REG. 600-7, NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS AND ACTIVITIES ASSISTED OR CONDUCTED BY THE DEPARTMENT OF THE ARMY (15 Nov. 1983).

15. Electronic and Information Technology Accessibility Standards, 65 Fed. Reg. at 80,524 (to be codified at 36 C.F.R. pt. 1194). Those twelve terms are: "agency," "alternate formats," "alternate methods," "assistive technology," "electronic and information technology," "information technology," "operable controls," "product," "self contained, closed products," "telecommunications," "TTY," and "undue burden." *Id.*

16. *Id.*

17. *Id.*

18. Electronic and Information Technology Accessibility, 66 Fed. Reg. at 20,896 (to be codified at 48 C.F.R. pt. 2.101).

19. *Id.* at 20,897 (to be codified at 48 C.F.R. pt. 39.204(b)); Electronic and Information Technology Accessibility Standards, 65 Fed. Reg. at 80,500, n.1 (to be codified at 36 C.F.R. pt. 1194) (citing the Clinger-Cohen Act of 1996, 40 U.S.C.S. § 1452(a) (LEXIS 2001)).

- (3) involves command and control of military forces;
- (4) involves equipment that is an integral part of a weapon or weapons system; or
- (5) . . . is critical to the direct fulfillment of military or intelligence missions.²⁰

At first glance, this definition appears to be a large loophole for the DOD. One imagines almost any EIT system being “critical to the direct fulfillment of military or intelligence missions.” The statute, however, somewhat narrows this broad definition in the next section: “Subsection (a)(5) of this section does not include a system that is to be used for routine administrative and business applications (including payroll, finance, logistics, and personnel management applications).”²¹ Procurement officials, therefore, cannot avoid the spirit of Section 508’s requirements when acquiring routine administrative and business EIT by simply invoking the “military missions” language of subsection (a)(5).²²

Related to the “national security system” exception is the “service personnel” exception.²³ When civilian contractors or government personnel service an EIT system “in spaces fre-

quented only by service personnel for maintenance, repair or occasional monitoring of equipment,”²⁴ Section 508’s accessibility standards do not apply to those systems.²⁵

Micro-purchases²⁶ are also exempt from Section 508’s requirements until 1 January 2003.²⁷ This exception is especially useful for government employees because most micro-purchases are for commercial off-the-shelf items that may not yet comply with the accessibility standards.²⁸ Despite this exception, contracting officers are nonetheless “strongly encouraged to comply with the applicable accessibility standards to the maximum extent practicable”²⁹ Moreover, this exception does not exempt all purchases under \$2500. The exception only applies to one-time purchases under \$2500, not to purchases less than \$2500 but part of a larger package costing more than \$2500.³⁰

Section 508 also does not apply to EIT “acquired by a contractor incidental to a contract.”³¹ In other words, Section 508 applies only to federal agencies, not to contractors who do business with those agencies.³²

Finally, the exception most prone to subjective interpretation is the “undue burden” exception.³³ Agencies need not comply with Section 508 if doing so would “impose an undue burden

20. The Clinger-Cohen Act of 1996, 40 U.S.C.S. § 1452(a).

21. *Id.* § 1452(b).

22. On the other hand, perhaps the savvy procurement official will note that § 1452(b) of the statute only refers to the “direct fulfillment of military or intelligence missions” exception of § 1452(a)(5). That still leaves the “command and control of military forces” exception of § 1452(a)(3). Might telephones in the command suite fall under this exception, even though disabled civilians might work there and disabled members of the public might phone there? Although the “command and control” exception can be interpreted very broadly, commands should carefully consider whether to invoke this exception unless in a purely military environment.

23. Electronic and Information Technology Accessibility, 66 Fed. Reg. at 20,897 (to be codified at 48 C.F.R. pt. 39.204(d)).

24. *Id.*

25. This exception applies only to those portions of the system serviced by maintenance personnel, not the entire system. This “back office” exception “applies only to EIT which is located in physical spaces frequented only by service personnel for maintenance, repair or occasional monitoring of equipment. If any services other than maintenance, repair, or occasional monitoring are performed at the data center, then the back office exception doesn’t apply.” General Services Administration, *Acquisition of Electronic and Information Technology Under Section 508 of the Rehabilitation Act: Frequently Asked Questions*, G.5.i, at <http://www.section508.gov/docs/508QandA.html> (last visited Oct. 19, 2001). Moreover, “[w]here “back office” equipment is connected to a computer network that may distribute information located on that equipment to other locations, the information delivered to other locations is not subject to the “back office” exception.” *Id.* at G.5.ii.

26. Micro-purchases are acquisitions of “supplies or services (except construction), the aggregate amount of which does not exceed \$2,500, except that in the case of construction, the limit is \$2,000.” FAR, *supra* note 11, at 2.101.

27. *Id.* at 20,897 (to be codified at 48 C.F.R. pt. 39.204(a)).

28. *FAC 97-27 Amends FAR On Acquisition of Accessible Technology*, GOV’T CONTRACTOR, May 2, 2001, at ¶ 183.

29. Electronic and Information Technology Accessibility, 66 Fed. Reg. at 20,897 (to be codified at 48 C.F.R. pt. 39.204(a)).

30. *Id.* at 20,895 (Apr. 25, 2001). For example, a “software package that costs \$1,800 is not a micro-purchase if it is part of a \$3,000 purchase” *Id.*

31. Electronic and Information Technology Accessibility, 66 Fed. Reg. at 20,897 (to be codified at 48 C.F.R. pt. 39.204(c)).

32. While contractors do not have to make their internal IT systems Section 508 compliant, they will have to sell compliant equipment to the government. The FAR Council estimates that Section 508 will impact approximately 17,500 contractors who sell EIT to the government. *Id.* at 20,896.

33. *Id.* at 20,897 (to be codified at 48 C.F.R. pt. 39.204(e)).

on the agency.”³⁴ “Undue burden” means “a significant difficulty or expense.”³⁵ Unfortunately, neither the Access Board standards nor the FAR amendments provide significant guidance in defining “significant difficulty or expense.” Both merely require the agency to consider “the difficulty or expense of compliance” and “[a]gency resources available to its program or component for which the supply or service is being acquired.”³⁶ If the agency invokes this exception, 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.”³⁷ Despite this documentation requirement, this exception is ripe for litigation. For example, an agency may buy a product that is not compliant because buying a compliant product would be too difficult or expensive. A losing bidder³⁸ that sells a compliant product may protest the award to its competitor, arguing that buying its compliant product would be neither difficult nor expensive. These protests are then going to boil down to what constitutes “difficult” and “expensive.”

Applicability to Military Procurements

For most procurement actions, Section 508 applies to all contracts awarded on or after 25 June 2001.³⁹ Note that the rules apply to contracts *awarded*, rather than *solicited*, on or after 25 June. For indefinite-quantity contracts, the rules apply to delivery orders or task orders issued on or after 25 June 2001.⁴⁰

The rules do not apply to:

- (1) Taking delivery for items ordered prior to [June 25];
- (2) Within-scope modifications of contracts awarded before [June 25];

(3) Exercising unilateral options for contracts awarded before [June 25]; or

(4) Multiyear contracts awarded before [June 25].⁴¹

Section 508 affects many within the DOD community. Contracting officers and the entire acquisition team must be familiar with the new requirements as well as the exceptions. The rules place an affirmative duty on requiring officials to identify which accessibility standards apply to a procurement, perform market research to determine the availability of compliant products, analyze exceptions to the accessibility standards, and to finally draft appropriate specifications.⁴² Resource managers must also understand the rules and their exceptions because of the budget implications of acquiring accessible EIT. Because the rules concern information technology, the Directorates of Information Management must also learn the applicability of the new requirements. Labor counselors should also become familiar with Section 508 because of the impact on the rights of civilian government employees.⁴³ Commanders, of course, should also learn the basics of the new rules, their exceptions, and how they apply within their commands.

Section 508 will touch many aspects of government acquisition. When updating public Web sites, webmasters must comply with the accessibility standards.⁴⁴ What about Armed Forces Radio and Television?⁴⁵ Because their target audience is civilian family members as well as active duty service members, its broadcasting will likely fall under Section 508. Installation telephone systems will also likely be subject to Section 508's requirement as long as civilian employees and members of the public use them. In short, unless an EIT system exists in a purely military environment (field radios and telephones, for instance), DOD acquisition planners must incorporate Section 508's accessibility requirements into their procurements.

34. *Id.*

35. *Id.* at 20,897 (to be codified at 48 C.F.R. pt. 39.202).

36. *Id.* at 20,897 (to be codified at 48 C.F.R. pt. 39.204(e)(1)); Electronic and Information Technology Accessibility Standards, 65 Fed. Reg. 80,524 (Dec. 21, 2000) (to be codified at 36 C.F.R. pt. 1194.4).

37. Electronic and Information Technology Accessibility, 66 Fed. Reg. at 20,897 (to be codified at 48 C.F.R. pt. 39.204(e)(2)(i)). Neither the FAR nor the new rules define “requiring official.” From context, the term seems to refer to the person in the agency who establishes the need for the particular good or service that is being ordered.

38. Along with bid protests, the statute also permits disabled individuals to file complaints against agencies for alleged noncompliant purchases of EIT after June 21, 2001. 29 U.S.C.S. § 794d(f) (LEXIS 2001).

39. Electronic and Information Technology Accessibility, 66 Fed. Reg. at 20,894.

40. *Id.*

41. *Id.*

42. *Id.* at 20,898 (to be codified at 48 C.F.R. pt. 1.)

43. Telephone Interviews with Cassandra Johnson, Assistant Deputy General Counsel, Office of the General Counsel, Department of the Army (July 17-18, 2001).

Judge advocates must play a key role in incorporating Section 508 into acquisition planning. With a broad client base, military attorneys must act as a clearing-house for information regarding the accessibility rules and their exceptions. Whether counseling a contracting officer on a proposed telephone acquisition, or advising a commander on the procurement of a target-acquisition system, judge advocates must be proactive in reminding their clients of the accessibility requirements. They must also be prepared to find an exception to those same requirements if available and in their client's best interests.

After the accessibility standards and the FAR amendments themselves, the single most useful tool in helping judge advocates (and others, for that matter) implement Section 508 is a multi-agency Web site hosted by the General Services Administration. Individuals may find much information, including answers to Section 508's "Frequently Asked Questions."⁴⁶ Practitioners may also find two other Web sites useful.⁴⁷ Regardless of where they obtain their information, judge advocates must constantly communicate with others in the EIT and procurement fields to share knowledge as new Section 508 issues develop.

As of 25 June 2001, Section 508 requires government contracts awarded for EIT to contain technology that is accessible to disabled federal employees and disabled members of the public. The new rules mean that DOD procurement officials must consider handicapped access when drafting EIT solicitations and awarding EIT contracts. Though broadly worded, the EIT requirements also contain several exceptions. Generally speaking, they do not apply to EIT acquisitions to be used in purely military environments. Nonetheless, the accessibility standards touch nearly all aspects of the DOD acquisition process. The standards also touch all players in DOD procurement operations. Judge advocates must play a key role in implementing the new accessibility standards. When advising their wide variety of acquisition clients, military attorneys must act as a clearing-house of Section 508 information. They must be proactive in reminding their clients of the accessibility requirements. They must also be prepared to find an exception to those same requirements if available and in their client's best interests. It appears that many of Section 508's ramifications will develop through implementing regulations and through reported case law. Judge advocates must take the lead in understanding these developments and in helping to implement them. Major Siemietkowski.

44. This should not mean, however, that webmasters must turn off Web sites that are not currently compliant. Rather, webmasters must ensure that all future Web site updates comply with the accessibility standards.

We do not encourage agencies to get rid of Web sites that would otherwise be used because they are not compliant. But agencies do need to provide good contact information so that people with disabilities have a way to find that information and agencies have a responsibility to quickly provide this information in an alternative format.

Mary Lou Mobley, Trial Attorney, Disability Rights Section, Civil Rights Division, U.S. Department of Justice, *quoted in GovExec.com, Industry Still Raising Questions About IT Accessibility* (May 10, 2001), at <http://www.govexec.com/dailyfed/0501/051001t2.htm>.

45. Johnson interviews, *supra* note 43.

46. See General Services Administration, *Federal IT Accessibility Initiative*, at <http://www.section508.gov/faq.html> (last visited Oct. 19, 2001); see also *Government Responds to FAQs As FAR § 508 Accessibility Rule "Goes Live"*, GOV'T CONTRACTOR, June 27, 2001, at ¶ 253.

47. James J. McCullough et al., *The New Section 508 Accessibility Rules: Threshold Compliance Issues for Both Federal Agencies and Contractors*, 75 FED. CONTRACTS REP. 536 (2001), available at <http://www.ffhsj.com/govtcon/ffgalert/fcrmay2001.pdf>; National Council on Disability, *The Accessible Future*, Report Submitted to the President (June 21, 2001), available at <http://www.ncd.gov/newsroom/publications/accessiblefuture.html>.