

DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Parts 2, 7, 10, 11, 12, and 39**

[FAR Case 1999-607]

RIN 9000-A169

**Federal Acquisition Regulation;
Electronic and Information Technology
Accessibility**

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

ACTION: Proposed rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) are proposing to amend the Federal Acquisition Regulation (FAR) to implement Subsection 408(b) of Title IV of the Workforce Investment Act of 1998, (Pub. L. 105-220). Subsection 408(b) 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: Interested parties should submit comments in writing on or before March 23, 2001 to be considered in the formulation of a final rule.

ADDRESSES: Submit written comments to: General Services Administration, FAR Secretariat (MVR), 1800 F Street, NW, Room 4035, ATTN: Laurie Duarte, Washington, DC 20405.

Submit electronic comments via the Internet to: farcase.1999-607@gsa.gov

Please submit comments only and cite FAR case 1999-607 in all correspondence related to this case.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC, 20405, at (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 FAR case 1999-607.

SUPPLEMENTARY INFORMATION:**A. Background**

On August 7, 1998, the President signed into law the Workforce Investment Act of 1998, Public Law 105-220. 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 shall 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) requires the Federal Acquisition Regulatory Council to revise the Federal Acquisition (FAR) to incorporate the Access Board's standards up to six months after the Access Board regulations are published. The Access Board published the final standards in the **Federal Register** at 65 FR 80500, December 21, 2000.

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

1. Including the definition of the term "electronic and information technology", a term added by the statute.

2. Incorporating the EIT Standards in acquisition planning, market research and when describing agency needs.

3. Adding a new Subpart 39.X to implement the Access Board's rule. Acquisitions of EIT will be required to meet the EIT accessibility standards unless an exception applies (*i.e.*, micro-purchase, national security system, acquired by a contractor incidental to a contract, located in spaces frequented only by service personnel for maintenance, repair or occasional monitoring of equipment; or would impose an undue burden (significant difficulty or expense)). The exemption for micro-purchases is 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 all

commercial-off-the-shelf products incorporate the standards.

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. 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.

B. Executive Order 12866

The Access Board determined that their proposed rule that provides the accessibility standard is an economically significant regulatory action under E.O. 12866 with a cost over \$100,000,000, and is a major rule under 5 U.S.C. 804. An Economic Assessment was accomplished and can be reviewed at <http://www.access-board.gov/sec508/508index.htm>. The Councils have 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 a significant regulatory action and, therefore, 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.

B. Regulatory Flexibility Act

The changes may have 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 who 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, an Initial Regulatory Flexibility Analysis (IRFA) 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 will 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. Failure of an agency to purchase electronic and information technology that complies with the standards promulgated under the Act may result in any individual with a disability filing a complaint seeking to enforce compliance with the standards.

This rule will apply to all contractors that manufacture, sell, or lease electronic and information technology supplies or services. 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. Based on fiscal year 1999 information from the Federal Procurement Data System, we estimate that there are approximately 11,000 contractors to which the rule will apply. Approximately 59 percent, or 6,500, of these contractors are small businesses.

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 IRFA to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the FAR Secretariat. The Councils will consider comments from small entities concerning the affected FAR parts 2, 7, 10, 11, 12, and 39 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.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the proposed 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: January 16, 2001.

Al Matera,

Acting Director, Federal Acquisition Policy Division.

Therefore, DoD, GSA, and NASA propose that 48 CFR parts 2, 7, 10, 11, 12, and 39 be amended 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—DEFINITION 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 web sites, multimedia, and office equipment (such as copiers and fax machines).

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PART 7—ACQUISITION PLANNING

3. In section 7.103, redesignate paragraphs (o) through (r) as (p) through (s); 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.X).

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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.X).

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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.X).

PART 12—ACQUISITION OF COMMERCIAL ITEMS

6. Amend section 12.202 by adding a sentence to the end of paragraph (c) to read as follows:

12.202 Market research and description of agency need.

* * * * *

(c) * * * This includes 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.X).

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.X, consisting of sections 39.X01 through 39.X04, to read as follows:

Subpart 39.X—Electronic and Information Technology

Sec.

39.X01 Scope of subpart.

39.X02 Definition.

39.X03 Applicability.

39.X04 Exceptions.

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

39.X01 Scope of subpart.

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). When acquiring EIT, agencies must ensure that—

(a) 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

(b) 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.X02 Definition.

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

39.X03 Applicability.

Unless an exception at 39.X04 applies, acquisitions of EIT must meet the applicable accessibility standards at 36 CFR part 1194. When acquiring

commercial items, an agency must comply with those accessibility standards that are available in the commercial marketplace in time to meet the agency's delivery requirements.

39.X04 Exceptions.

The requirements in 39.X03 do not apply to EIT that—

(a) Is purchased in accordance with subpart 13.2 (micro-purchases) prior to January 1, 2003. However, contracting officers and other individuals designated in accordance with 1.603-3 are 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) *Undue burden documentation*. (i) The requiring official must document 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 standards that are not yet available in the commercial marketplace in time to meet the agency delivery requirements. The requiring official must document the nonavailability and provide the documentation to the contracting officer for inclusion in the contract file.

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