

Recent Developments in Section 508 Disabled Access Requirements for IT Procurements

By AARON P. SILBERMAN



Section 508 of the Federal Rehabilitation Act of 1973¹ generally requires that federal agencies acquire information technology (IT) that is accessible to persons with disabilities. In the past year, there have been several important developments related to section 508 specifically and to IT accessibility generally.

Last spring and fall (2004), the U.S. Government Accountability Office (GAO) issued the first and second (and, to date, only) bid protest decisions on section 508. This spring (2005), section 508's "micropurchase exception" expired. And, at all points in between, many states have adopted and implemented section 508 accessibility requirements for state IT purchases.

GAO Enforces Section 508 in CourtSmart Decisions

On February 13, 2004, in the Matter of *CourtSmart Digital Systems, Inc.*,² the comptroller general at the GAO issued the first reported bid protest decision based on the failure by a company proposing information technology to meet the disabled access requirements in section 508. The GAO sustained the protest, finding that the request for quotations (RFQ) required compliance with section 508; that the proposed awardee's technology did not meet section 508 requirements; and that the protestor's technology did meet those requirements.

The decision summarizes the relevant section 508 requirements in footnote one, stating that section 508 provides that agencies can only purchase electronic and information technology (EIT) that provides the same access to government employees and members of the public with disabilities as that provided to persons without disabilities, unless doing so would place an undue burden on the agency.³ EIT must meet applicable accessibility standards of the Architectural and Transportation Barriers Compliance Board (hereinafter "the access board").⁴ Under Federal Acquisition Regulations (FAR) subpart 39.2, an agency must require that all commercial item EIT it procures meets the access board standards, unless none are commercially available or it would be an undue burden to do so.⁵

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The Social Security Administration issued an RFQ for a portable digital recording system under the federal supply schedule (FSS). The RFQ required that proposed systems comply with section 508. It stated the following as the basis of award selection: "Award will be made, *after consideration of [section] 508 compliance issues*, to the lowest price, technically acceptable offeror providing a GSA schedule contract quotation."⁶

The RFQ defined "technically acceptable" as follows:

Meeting Section 508 criteria, the technical requirements of the solicitation . . . and acceptable past performance will constitute technical acceptability. Please note that if the Government determines in the course of its technical evaluation that one (or more) quotations are significantly more [section] 508 compliant than the others, it will only consider for award the quotation (or quotations) that provide the most [section] 508 compliant product as of the time of award.⁷

The RFQ stated that the government would evaluate section 508 compliance by (1) reviewing a technical questionnaire included in the RFQ and to be completed by the offeror; (2) reviewing a voluntary product accessibility template (VPAT)⁸ identified in the RFQ and to be completed by the offeror; and (3) pre-award testing of systems by the agency or an independent third party requested by the agency.

York Telecom Corporation and CourtSmart were among several vendors that submitted quotations in response to the RFQ. York's system was not section 508 compliant, as York's own quotation indicated, and, while the agency stated that it performed "initial [section] 508 testing" on York's system, it did not complete that testing. In contrast, CourtSmart's quotation, including its VPAT, indicated that its system was section 508 compliant. The agency never tested CourtSmart's system for section 508 compliance.

Despite all of this, the agency determined that York's quotation was acceptable and CourtSmart's was not (on other grounds), and the agency selected York for award. CourtSmart protested, asserting that York's quotation was technically unacceptable because its system was not section 508 compliant. The GAO agreed, but the agency pointed to the language in the RFQ that stated that if one or more quotations were significantly more section 508 compliant than the others, the government would only consider the most compliant quotations for award. The agency argued that this allowed it to award to an offeror whose system was otherwise technically acceptable, but not section 508 compliant, if it received no other technically acceptable quotations. The GAO rejected this argument, agreeing with

CourtSmart that the RFQ provision meant that, where a certain quotation or quotations equally exceed section 508's minimum requirements and others do not, the agency would only consider those exceeding the minimum requirements. The GAO was persuaded by guidance in the access board regulations and on its Web site. For example, the "Frequently Asked Questions" (FAQ) section on the access board's Web site⁹ states that agencies may (but are not required to) give evaluation credit to products that offer greater access than required by the access board.¹⁰ Further, the guidelines provide that, absent an undue burden determination, the agency cannot make a best value or cost/technical tradeoff between a product that meets all of the standards and one that does not.¹¹

The agency also attempted to support its award decision by arguing that no commercially available technology meets both section 508 requirements and the agency's technical requirements. The agency pointed to an "EIT Commercial Non-availability Certification" it issued one month after award to York. The GAO rejected this argument as well, noting that the regulations provide only very limited exceptions to the general requirement that EIT procured by the government be accessible, stating that if products are commercially available that meet some but not all of the applicable accessibility standards, then the agency must procure the one that best meets the standards.¹² The GAO stated that the RFQ did not allow the agency to waive section 508 requirements and, in any event, found that CourtSmart's technology was, in fact, compliant with the agency's technical requirements.

Although not explicitly stated in the decision, the GAO was likely influenced by the fact that the agency's commercial non-availability determination was made after its award decision. Under FAR, agencies must conduct market research before soliciting offers for commercial EIT acquisitions to determine the extent to which commercially available products meet applicable standards.¹³ The agency is excused from procuring fully conforming items if that market research reveals that none are commercially available.¹⁴

Postscript: Following this decision, the agency cancelled the RFQ and reissued it. The revised RFQ provided that award would be made to the vendor "[w]hose software is most Section 508 compliant (either fully compliant or compliant to the greatest degree)."¹⁵ The RFQ stated that the agency would perform "hands-on" section 508 testing of the quoted software and score the software based on compliance with applicable accessibility standards. Vendors, including York and CourtSmart, submitted quotations based on the new RFQ. The agency gave York's software a higher section 508 score than it did CourtSmart's and so awarded to York. CourtSmart protested on several grounds, including a contention that the agency "should have found that both firms' quotations were equally and substantially non-compliant with the Section 508 standards." In a decision issued on December 9, 2004, the comptroller general denied the protest, stating that the agency followed the evaluation methodology in the RFQ, that CourtSmart did not challenge any of the ratings it or York received and that, to the extent CourtSmart was challenging the evaluation methodology itself, the protest was untimely.¹⁶

Expiration of the Micropurchase Exception

Under the original implementing regulations for section 508, the section's requirements did not apply to federal IT purchases that totaled \$2,500 or less ("the micropurchase exception").¹⁷ This exception was initially set to expire on January 1, 2003, but was extended by interim rule to October 1, 2004. By interim rule published in the *Federal Register* on October 5, 2004, the micropurchase exception was further ex-

tended to April 1, 2005. With the expiration of the micropurchase exception, federal IT purchases below the \$2,500 threshold are now subject to section 508 requirements.

States Continue to Adopt Section 508 Requirements for Their IT Acquisitions

Since section 508 was amended in 1998, resulting in a governmentwide rule implementing its requirements in June 2001, many states have adopted the section 508 standards. By the end of 2003, several states had adopted section 508 standards for certain state IT procurements.¹⁸ This trend has continued in the past year. Since March 2004, at least six states—Arizona, Florida, Massachusetts, Missouri, South Carolina, and Virginia—have adopted statutes or policies implementing section 508 requirements for certain IT procurements, with most of them limited to Web-site procurements.¹⁹ In addition, in January 2005, the Indiana State Senate introduced a bill that would implement section 508 standards for certain state procurements.²⁰

Conclusion

In recent years, federal agencies and IT contractors have had to conform their practices to meet section 508's accessibility requirements. That these requirements are mandatory and will be enforced was made clear in the GAO decisions in *CourtSmart* in 2004. And, in the past year, the reach of those requirements has grown substantially, with the April 2005 expiration of the micropurchase exception and with many states' adoption of section 508 for their own IT procurements. Stay tuned. 

Endnotes

1. 29 U.S.C. § 794d.
2. B-292995.2 and B-292995.3, 2004 U.S. Comp. Gen. LEXIS 79 (2004), available at <http://www.gao.gov/decisions/bidpro/2929952.htm>.
3. 29 U.S.C. § 794d(a)(1).
4. Published at 36 C.F.R. pt. 1194 (2003).
5. FAR 39.201-39.204.
6. Citing RFQ, Evaluation Information, at 1 (emphasis added).
7. *Id.*
8. Available at <http://www.itic.org/policy/508/Sec508.html>.
9. At <http://www.section508.gov/docs/508QandA.html>.
10. FAQs § B.3.ii.
11. FAQs § E.2.
12. 36 C.F.R. § 1194.2(b).
13. FAR 10.001 (a)(3)(vii), 39.203(c).
14. FAR 39.203(c)(1).
15. Matter of CourtSmart Digital Systems, Inc., B-292995.8, 2004 U.S. Comp. Gen. LEXIS 285 (2004), available at <http://www.gao.gov/decisions/bidpro/2929958.htm>.
16. *Id.* (citing 4 C.F.R. 21.2(a)(1)).
17. FAR 39.204(a).
18. See, e.g., CAL. GOV. CODE § 11135(d)(3), 11137, 11139; COLORADO GOVERNOR'S OFFICE OF INNOVATION & TECHNOLOGY *Colorado IT Accessibility Standards FACTS and GUIDELINES for the Blind and Visually Impaired*; Ill. Admin. Order No. 1 (2002); IND. CODE §§ 4-23-16-5 and 4-23-16-12; KANSAS IT EXECUTIVE COUNCIL, *Web Content Accessibility Guidelines*, V.2.0; KY. REV. STAT. 61.980-61.988; MICH. DEP'T OF IT, *Look and Feel Standards for e-Government Applications*, p.15; and Oregon Statewide IT Policy, 1.0.
19. Arizona Statewide Policy P130 (effective 5/10/04); Florida Accessibility Statement (issued 6/23/04); MASS. IT DIV. *Enterprise Web Accessibility Standards*, V.2.0 (published 1/20/05); MO. REV. STAT. § 191.863 (8/28/04); SOUTH CAROLINA *Web Site Accessibility Policy and Transition Plan* (dated 7/23/04); VA. CODE § 2.2-2012.
20. Ind. S.B. 606 (introduced on 1/24/05).