



GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

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

[FAC 2021-07; FAR Case 2017-011; Item I; Docket No. FAR-2017-0011, Sequence No. 1]

RIN 9000-AN46

Federal Acquisition Regulation: Section 508-Based

Standards in Information and Communication Technology

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

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to incorporate recent revisions and updates to accessibility standards issued by the U.S. Access Board.

DATES: Effective **[INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]**.

FOR FURTHER INFORMATION CONTACT: Mr. Michael O. Jackson, Procurement Analyst, at 202-208-4949, or by email at michaelo.jackson@gsa.gov for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202-501-4755 or GSARegSec@gsa.gov. Please cite FAC 2021-07, FAR Case 2017-011.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA published a proposed rule at 85 FR 17831 on March 31, 2020, to implement the U.S. Access Board's revisions by strengthening FAR requirements for accessibility to electronic and information technology (now generally referred to as "information and communication technology" or "ICT") provided by the Federal Government. Among other things, section 508 of the Rehabilitation Act of 1973 mandates that Federal agencies "develop, procure, maintain, or use" ICT in a manner that ensures that Federal employees with disabilities have comparable access to, and use of, such information and data relative to Federal employees who are not individuals with disabilities. Section 508 also requires Federal agencies to ensure that members of the public with disabilities have comparable access to, and use of, information and data relative to members of the public who are not individuals with disabilities.

The Access Board, also known as the Architectural and Transportation Barriers Compliance Board, is tasked with issuing accessibility standards for ICT covered under section 508, and updating these standards periodically to reflect technological changes. The Federal Acquisition Regulatory Council, in turn, is required to revise the FAR

to incorporate the Access Board's accessibility standards or any amendments thereto.

In December 2000, the Access Board published its initial set of accessibility standards at 65 FR 80500, (December 21, 2000). Thereafter, a final FAR rule was published incorporating the Access Board's accessibility standards at 66 FR 20894 (April 25, 2001).

The Access Board completed a multiyear effort to "refresh" its initial, existing set of accessibility standards under section 508 to address advances in ICT, harmonize with accessibility standards developed by standards organizations worldwide, and ensure consistency with the Access Board's regulations that had been promulgated since the late 1990s. The revised section 508 Accessibility Standards support the access needs of individuals with disabilities, while also considering the costs of procuring ICT that complies with section 508.

The Access Board's final rule was published in the *Federal Register* at 82 FR 5790 on January 18, 2017. This final rule updates the FAR to ensure that the updated standards are appropriately considered in Federal ICT acquisitions. The final rule includes a "safe harbor" provision for existing (i.e., legacy) ICT, which considers legacy ICT in existence on or before January 18, 2018, to be compliant if it meets the earlier standard issued pursuant to section 508 of the Rehabilitation Act of 1973

(see E202.2 of Revised Standards) and the legacy ICT is not altered after January 18, 2018. In other words, such "untouched" ICT need not be modified or upgraded to conform to the revised 508 standards as long as it already conforms to the original 508 standards. However, ICT acquired on or before January 18, 2018, will need to be upgraded or modified to conform to the new standard if such ICT is altered after January 18, 2018, or does not comply with the original 508 standards. In addition, ICT acquired after January 18, 2018, must be upgraded or modified to conform to the new standard. The upgrades and modifications would be included in requirements documents issued by the agency.

Two respondents submitted comments on the proposed rule.

II. Discussion and Analysis

For details on the proposed changes to the FAR, see the proposed rule. The Councils reviewed the comments received in response to the proposed rule. Two respondents submitted public comments supporting the issuance of the rule. No changes were made to the final rule as a result of public comments. The Councils acknowledge support for the rule. However, clarifying changes were made to the language at section 7.105 to detail information that should be included in the acquisition plan when an exception or an exemption to the standards apply. At FAR section 39.204, paragraph (a)(3), examples are included of the portions of

ICT that are "operable parts" by adding the text "i.e., hardware-based user controls for activating, deactivating, or adjusting ICT".

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT) and for Commercial Items, Including Commercially Available Off-the-Shelf (COTS) Items

This rule does not create new solicitation provisions or contract clauses or impact any existing provisions or clauses. This rule amends FAR part 39, Acquisition of Information Technology, and other references to Government requirements for information and communication technology. The objective of the rule is to update the FAR text to align with the accessibility standards revisions made by the Access Board at 36 CFR 1194.1. The accessibility standards are currently applicable to all information and communication technology acquisitions. As such, determinations and findings under 41 U.S.C. 1905 to 1907 regarding the applicability of this rule to acquisitions at or below the SAT or to acquisitions for commercial and COTS items are not required.

Section 508 requirements will continue to apply when acquiring ICT through contracts at or below the SAT, or contracts for the acquisition of commercial items, including COTS items.

IV. Expected Impact of the Rule

This final rule amends the FAR to incorporate recent revisions and updates to the accessibility standards issued by the U.S. Access Board pursuant to section 508. These revisions and updates provide benefits that would accrue to Federal agencies, including productivity increases by Federal employees and time saved from reduced phone calls to Federal agencies. Additionally, persons with disabilities using public-facing Federal information and data (e.g., Federal websites) would experience improved access and time savings. There are also substantial unquantifiable benefits. For example, enhanced ICT accessibility for persons with disabilities can be expected to improve access and use of mission-critical ICT, productivity, ability to achieve professional potential, independent living, increase civic engagement, decrease stigma, promote equality, and enhance integration into American society. Updating the FAR to incorporate the revised 508 accessibility standards is also expected to provide benefits to ICT firms that are difficult to quantify and thus were not monetized. For example, harmonization with national and international consensus standards is likely to assist American ICT companies by helping to achieve economies of scale created by wider use of these technical standards.

This rule codifies changes made by the U.S. Access Board. As such, the monetized costs and benefits in the

Final Regulatory Impact Analysis (FRIA), which accompanied the U.S. Access Board's Final ICT Rule, are now realized at the Federal contract level.

The Access Board's FRIA estimates that, under the expected cost scenario, incremental compliance costs to Federal agencies for procured ICT under the revised 508 accessibility standards over a 10-year timeframe will be \$79.0 million per year using a 7% discount rate, and \$82.8 million per year using a 3% discount rate. These costs will largely be incurred from compliance with the revised 508 accessibility standards for procured ICT products and services.

With respect to monetized benefits attributable to procured ICT, the Access Board's FRIA estimates that, under the expected scenario, benefits for procured ICT (and, hence, this final rule) are likely to have an annualized value of \$33.1 million over a 10-year timeframe using a 7% discount rate, and \$35.2 million using a 3% discount rate.

To access the U.S. Access Board's FRIA, go to the Access Board's website (<https://www.access-board.gov/ict/fria.html>) or the electronic docket for the Access Board's Final ICT rule at the Federal eRulemaking Portal (<https://www.regulations.gov/docket/ATBCB-2015-0002>).

V. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993.

VI. Congressional Review Act

As required by the Congressional Review Act (5 U.S.C. 801-808) before an interim or final rule takes effect, DoD, GSA, and NASA will send the rule and the "Submission of Federal Rules Under the Congressional Review Act" form to each House of the Congress and to the Comptroller General of the United States. A major rule cannot take effect until 60 days after it is published in the *Federal Register*. The Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget has determined that this is not a major rule under 5 U.S.C. 804.

VII. Regulatory Flexibility Act

DoD, GSA, and NASA have prepared a Final Regulatory Flexibility Analysis (FRFA) consistent with the Regulatory

Flexibility Act, 5 U.S.C. 601-612. The FRFA is summarized as follows:

This final rule amends the FAR to incorporate recent revisions and updates to the accessibility standards issued by the Architectural and Transportation Barriers Compliance Board (referred to as the "U.S. Access Board") pursuant to section 508 of the Rehabilitation Act of 1973 (29 U.S.C. 794d). Section 508 generally mandates that Federal agencies develop, procure, maintain, and use information and communication technology (ICT) in a manner that ensures Federal employees and members of the public with disabilities have access to, and use of, information and data that is comparable to the access to, and use of, the information and data by Federal employees and members of the public who are not individuals with disabilities. The U.S. Access Board periodically reviews and revises these accessibility standards to reflect technological advances and other changes to ICT that occur over the passage of time.

There were no significant issues raised by the public in response to the Initial Regulatory Flexibility Analysis.

The rule applies to all contractors and subcontractors, regardless of size. Based on fiscal year 2018 data from the Federal Procurement Data System (FPDS), it is estimated that there are approximately 22,809 contractors that manufacture, sell, or lease ICT supplies or services required to comply with section 508 standards. Approximately 12,845 of these contractors are small businesses. As a result of incorporating the updated accessibility standards, the monetized costs and benefits in the Final Regulatory Impact Analysis, which accompanied the U.S. Access Board's Final ICT Rule, are now realized at the Federal contract level for small businesses. However, there are unquantifiable impacts at the Federal contract level for small businesses in the final rule. For instance, small businesses will have to analyze whether the ICT they or their resellers plan to sell to the Federal Government complies with the revised 508 accessibility standards. Manufacturers may want to redesign their supplies and services to make them fully compliant, to have a better chance for their items to be purchased by the Government. The final rule may decrease demand for some supplies and services that are not fully compliant, potentially leading to decreased sales for small entities manufacturing or selling those items. Conversely, the final rule may increase demand for some supplies and services that are fully compliant and meet agencies' business needs, potentially leading to increased sales for small businesses manufacturing or selling those items. To meet the requirements of the law, small businesses cannot be exempt from any part of the rule.

This rule does not include any new reporting or recordkeeping requirements. There is a compliance requirement; entities will need to familiarize themselves with the differences between the 2000 and 2017 standards in order to assess the impact on procurements and comply with the revised functional performance criteria and technical

accessibility standards beyond those currently mandated in FAR subpart 39.2.

There are no known significant alternatives to the rule for effective implementation of this statutory requirement. Since the statute imposes private enforcement, where individuals with disabilities can file civil rights lawsuits, the Government has little flexibility in promulgating alternatives to the Access Board's standards. The impact of this rule may be significant for small entities that are not currently in compliance with existing standards.

Interested parties may obtain a copy of the FRFA from the Regulatory Secretariat Division. The Regulatory Secretariat Division has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration.

VIII. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. 3501-3521).

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

Government procurement.

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Office of Government-wide
Acquisition Policy,
Office of Acquisition Policy,
Office of Government-wide Policy.

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. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 2—DEFINITIONS OF WORDS AND TERMS

2. In section 2.101, amend paragraph (b) (2) by—

a. Removing the definition “Electronic and information technology (EIT)”;

b. Adding in alphabetical order the definition “Information and communication technology (ICT)” to read as follows:

2.101 Definitions.

* * * * *

(b) * * *

(2) * * *

Information and communication technology (ICT) means information technology and other equipment, systems, technologies, or processes, for which the principal function is the creation, manipulation, storage, display, receipt, or transmission of electronic data and information, as well as any associated content. Examples of ICT include but are not limited to the following: computers and peripheral equipment; information kiosks and transaction machines; telecommunications equipment;

customer premises equipment; multifunction office machines; software; applications; websites; videos; and electronic documents.

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PART 7—ACQUISITION PLANNING

3. Amend section 7.103 by revising paragraph (q) to read as follows:

7.103 Agency-head responsibilities.

* * * * *

(q) Ensuring that acquisition planners specify needs and develop plans, drawings, work statements, specifications, or other product or service requirements (e.g., help desks, call centers, training services, and automated self-service technical support) descriptions that address information and communication technology (ICT) accessibility standards (see 36 CFR 1194.1) in proposed acquisitions and that these standards are included in requirements planning (see subpart 39.2).

* * * * *

4. Amend section 7.105 by redesignating paragraph (b) (5) (iv) as paragraph (b) (5) (v) and adding a new paragraph (b) (5) (iv) to read as follows.

7.105 Contents of written acquisition plans.

* * * * *

(b) * * *

(5) * * *

(iv) For information technology acquisitions, identify the applicable ICT accessibility standard(s). When an exception or an exemption to the standard(s) applies, the plan must list the exception and/or exemption, and the item(s) to which it applies. For those items listing 39.204 or 39.205(a)(1) or (2), the corresponding accessibility standard does not need to be identified. See subpart 39.2 and 36 CFR 1194.1.

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PART 10—MARKET RESEARCH

5. Amend section 10.001 by revising paragraph (a)(3)(ix) to read as follows:

10.001 Policy.

(a) * * *

(3) * * *

(ix) Assess the availability of supplies or services that meet all or part of the applicable information and communication technology accessibility standards at 36 CFR 1194.1 (see subpart 39.2).

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PART 11—DESCRIBING AGENCY NEEDS

6. Amend section 11.002 by revising paragraph (f) to read as follows:

11.002 Policy.

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(f) In accordance with section 508 of the

Rehabilitation Act of 1973 (29 U.S.C. 794d), the contracting officer shall obtain from the requiring activity the requirement documents, which must identify—

(1) The needs of current and future users with disabilities to determine how—

(i) Users with disabilities will perform the functions supported by the information and communication technology (ICT);

(ii) The ICT will be developed, installed, configured and maintained to support users with disabilities;

(2) The applicable ICT accessibility standards (see subpart 39.2); and

(3) Any ICT accessibility standards that cannot be met due to an exception or an exemption for any component or portion of the product (see 7.105(b)(5)(iv), 39.204, and 39.205).

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PART 12—ACQUISITION OF COMMERCIAL ITEMS

7. Amend section 12.202 by revising paragraph (d) to read as follows:

12.202 Market research and description of agency need.

* * * * *

(d) Requirements documents shall identify the applicable information and communication technology

accessibility standards at 36 CFR 1194.1 (see 11.002(f) and subpart 39.2).

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PART 39—ACQUISITION OF INFORMATION TECHNOLOGY

8. Amend section 39.000 by revising paragraph (b) to read as follows:

39.000 Scope of part.

* * * * *

(b) Information and communication technology (see 2.101(b)).

9. Revise section 39.001 to read as follows:

39.001 Applicability.

This part applies to the acquisition of—

(a) Information technology by or for the use of agencies except for acquisitions of information technology for national security systems. However, acquisitions of information technology for national security systems shall be conducted in accordance with 40 U.S.C. 11302 with regard to requirements for performance and results-based management; the role of the agency Chief Information Officer in acquisitions; and accountability. These requirements are addressed in OMB Circular No. A-130; and

(b) Information and communication technology by or for the use of agencies or for the use of the public, unless an exception (see 39.204) or an exemption (see 39.205) applies. See 36 CFR 1194.1.

39.101 [Amended]

10. In section 39.101 amend paragraph (a)(1)(i) by removing the word "accommodations" and adding the word "accessibility" in its place.

11. Revise subpart 39.2 heading to read as follows:

Subpart 39.2—Information and Communication Technology.

* * * * *

12. Amend section 39.201 by—

a. Revising paragraph (a); and

b. Removing from paragraph (c) introductory text the term "EIT" and adding the term "ICT" in its place.

The revision reads as follows:

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's (U.S. Access Board) information and communication technology (ICT) accessibility standards at 36 CFR 1194.1.

* * * * *

13. Revise sections 39.203 and 39.204, and add section 39.205 to read as follows:

39.203 Applicability.

(a) *General.* Unless an exception at 39.204 or an exemption at 39.205 applies, acquisitions for ICT supplies and services shall meet the applicable ICT accessibility standards at 36 CFR 1194.1.

(b) *Indefinite-quantity contracts.* Confirmation of an exception or a determination of an exemption is not required prior to award of an indefinite-quantity contract, except for requirements that are to be satisfied by initial award. The contract must identify 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).

(c) *Task order or delivery order.* At the time of issuance of a task order or delivery order under an indefinite-quantity contract, the requiring and ordering activities shall ensure compliance with the ICT accessibility standards and document an exception or exemption if applicable. Any task order or delivery order, or portion thereof, issued for a noncompliant ICT item shall be supported by the appropriate exception or exemption documented by the requiring activity.

(d) *Commercial items.* When acquiring commercial items, an agency must comply with those ICT accessibility standards that can be met with supplies or services that are available in the commercial marketplace and that best address the agency's needs, but see 39.205(a)(3).

(e) *Legacy ICT.* Any component or portion of existing ICT (i.e., ICT that was procured, maintained, or used on or before January 18, 2018) is not required to comply with the current ICT accessibility standards if it-

(1) Complies with an earlier standard issued pursuant to section 508 of the Rehabilitation Act of 1973 (29 U.S.C. 794d), which is set forth in Appendix D to 36 CFR 1194.1); and

(2) Has not been altered (i.e., a change that affects interoperability, the user interface, or access to information or data) after January 18, 2018.

(f) *Alterations of legacy ICT.* When altering any component or portion of existing ICT, after January 18, 2018, the component or portion must be modified to conform to the current ICT accessibility standards in 36 CFR 1194.1.

39.204 Exceptions.

(a) The requirements in 39.203 do not apply to acquisitions for—

(1) *National security systems.* ICT operated by agencies as part of a national security system, as defined by 40 U.S.C. 11103(a);

(2) *Incidental contract items.* ICT acquired by a contractor incidental to a contract, i.e., for in-house use by the contractor to perform the contract; or

(3) *Maintenance or monitoring spaces.* The portions of ICT that are operable parts (i.e., hardware-based user controls for activating, deactivating, or adjusting ICT) or status indicators, and that are located in spaces frequented only by service personnel for maintenance,

repair, or occasional monitoring of equipment.

(b) The contracting officer shall receive, as a part of the requirements documentation, written confirmation from the requiring activity that an exception, in accordance with paragraph (a)(1), (2), or (3) of this section, applies to the ICT supply or service (see 7.105(b)(5)(iv)). This documentation shall be maintained in the contract file.

39.205 Exemptions.

(a) *Allowable exemptions.* An agency may grant an exemption for the following:

(1) *Undue burden.* When an agency determines the acquisition of ICT conforming with all the applicable ICT accessibility standards would impose an undue burden on the agency, compliance with the ICT accessibility standards is only required to the extent that it would not impose an undue burden. In determining whether conformance to one or more ICT accessibility standards would impose an undue burden, an agency shall consider the extent to which conformance would impose significant difficulty or expense considering the agency resources available to the program or component for which the ICT supply or service is being procured.

(2) *Fundamental alteration.* When an agency determines that acquisition of ICT that conforms with all applicable ICT accessibility standards would result in a

fundamental alteration in the nature of the ICT, such acquisition is required to conform only to the extent that conformance will not result in a fundamental alteration in the nature of the ICT.

(3) *Nonavailability of conforming commercial items.* Where there are no commercial items that fully conform to the ICT accessibility standards, the agency shall procure the supplies or service available in the commercial marketplace that best meets the ICT accessibility standards consistent with the agency's needs.

(b) *Alternative means of access.* An agency shall provide individuals with disabilities access to and use of information and data by an alternative means to meet the identified needs when an exemption in paragraphs (a)(1), (2), or (3) of this section applies.

(c) *Documentation.* When an exemption applies, the contracting officer shall obtain, as part of the requirements documentation, a written determination from the requiring activity explaining the basis for the exemption in paragraphs (a)(1), (2) or (3) of this section. This documentation shall be maintained in the contract file.

(1) *Undue burden.* A determination of undue burden shall address why and to what extent compliance with applicable ICT accessibility standards constitutes an undue burden.

(2) *Fundamental alteration.* A determination of fundamental alteration shall address the extent to which compliance with the applicable ICT accessibility standards would result in a fundamental alteration in the nature of the ICT.

(3) *Nonavailability of conforming commercial items.* A determination of commercial items nonavailability shall include—

(i) A description of the market research performed;

(ii) A listing of the requirements that cannot be met; and

(iii) The rationale for determining that the ICT to be procured best meets the ICT accessibility standards in 36 CFR 1194.1, consistent with the agency's needs.

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