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April 5, 2001

**VIA HAND DELIVERY**

General Services Administration  
FAR Secretariat (MVRS)  
1800 F Street, N.W.  
Room 4035  
Washington, D.C. 20405

Attn: Laurie Duarte

**Re: FAR Case 1999-607  
Electronic and Information Technology Accessibility  
66 Fed. Reg. 7166 (Jan. 22, 2001)**

Dear Ms. Duarte:

On behalf of the Section of Public Contract Law (the "Section") of the American Bar Association ("ABA"), I am submitting comments on the above-referenced matter. The Section consists of attorneys and associated professionals in private practice, industry, and Government service. The Section's governing Council and substantive committees contain members representing these three segments to ensure that all points of view are considered. In this manner, the Section seeks to improve the process of public contracting for needed supplies, services, and public works.

The Section is authorized to submit comments on acquisition regulations under special authority granted by the ABA's Board of Governors. The views expressed herein have not been approved by the House of Delegates or the Board of Governors

of the American Bar Association and, therefore, should not be construed as representing the policy of the American Bar Association.<sup>1</sup>

The purpose of the proposed rule is to implement subsection 408(b) of Title IV of the Workforce Investment Act of 1998 (Pub. L. No. 105-220). Subsection 408(b) requires revision of the Federal Acquisition Regulation ("FAR") to incorporate standards of the Architectural and Transportation Barriers Compliance Board ("Access Board"). The Access Board issued the final rule forming the basis of this proposed rule on December 21, 2000. 65 Fed. Reg. 80500 (Dec. 21, 2000) (to be codified at 36 C.F.R. part 1194).

The Section generally agrees with the changes proposed by FAR Case 1999-607. In particular, the Section believes that a certification, warranty, or other representation by the contractor that the products supplied comply with the accessibility requirements is not necessary. Thus, the Section agrees with the decision not to include any such provision in the proposed rule and opposes the creation of any such requirement.

The Section believes, however, that the proposed rule should contain guidance for contracting officers and contractors in a number of areas not discussed in the proposed rule. These areas include: (1) application of the accessibility requirements to proposed acquisitions after June 20, 2001; (2) the role of accessibility requirements in evaluation criteria and source selection decisions; (3) "other factors" that may be considered in making an "undue burden" determination; and (4) compliance determinations where assistive technology is utilized. Each of these areas is addressed below.

### **Application to Proposed Acquisitions**

The proposed rule does not address what contract actions are subject to the accessibility standards. Without specific guidance, agencies might conclude that they are required to modify existing contracts to incorporate these new standards. To avoid

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<sup>1</sup> Mary Ellen Coster Williams, an Officer of the Public Contract Law Section, did not participate in the Section's consideration of these comments, and she abstained from voting to approve and send this letter.

this issue, the final rule should address whether or how the rule affects existing contracts.

FAR 1.108(d)(1) provides that, unless otherwise specified, “FAR changes apply to solicitations issued on or after the effective date of the change.” The proposed FAR rule does not establish a different effective date. Therefore, the accessibility standards are applicable to new solicitations and not to existing contracts.

The proposed FAR modifications at 7.103(o) further support the applicability of the standards only to new solicitations. Those modifications provide that an agency head is responsible for ensuring “that acquisition planners specify needs and develop plans, drawings ...that address Electronic and Information Technology Accessibility Standards (see 36 C.F.R. part 1194) in *proposed* acquisitions.” 66 Fed. Reg. at 7167 (emphasis added). Further, within the definition of “acquisition”, FAR 2.101 directs that “an acquisition begins at the point when agency needs are established and includes the description of requirements to satisfy agency needs, solicitation and selection of sources.” These two provisions in conjunction make it clear that the intent of the proposed rule is to limit its applicability to “proposed” needs, “proposed” descriptions of requirements, “proposed” solicitations and “proposed” selection of sources and not to existing contracts. The Section recommends that the final rule clarify this intent.

The FAR also should address how a contracting officer should modify a contract to incorporate the accessibility standards, in the event he or she determines it to be in the Government’s best interest. This is particularly important with the large number of multi-year contracts for information technology products, such as GSA Multiple Award Schedule contracts and Government-Wide Acquisition Contracts. Many of these contracts also contain “Technology Refreshment” or other similar clauses that one could construe as placing the burden of finding commercially available accessible products on the contractor, rather than on the agency where it belongs, according to the proposed rule.

The Section, therefore, recommends that the FAR require bilateral negotiations and modifications when the Government identifies the need to incorporate the new accessibility standards in existing contracts for information technology products. In this way, both agencies and contractors could determine the potential impact of the new accessibility standards, evaluate the most practical way to implement these standards within existing contracts that did not contemplate such standards at

inception, and negotiate equitable adjustments as needed. *See* FAR 1.108(d)(3). In addition, through bilateral negotiations the parties could resolve how the contractor's obligations under technology refreshment clauses interact with the Government's obligation to conduct market research to determine the commercial availability of accessible products and features.

### **Accessibility Requirements in Evaluation Criteria**

The proposed rule fails to address the weight that the accessibility requirements should receive in relation to other evaluation criteria and how the Contracting Officer should consider those requirements in source selection decisions. In other words, it does not address whether compliance with the accessibility requirements now becomes the most important evaluation factor in a procurement for information technology products, whether it becomes a *de facto* go/no-go evaluation factor, or whether the contracting officer may make cost/technical tradeoff decisions. The Section recommends that the FAR clarify this issue by (i) addressing how to integrate the accessibility factors into the evaluation criteria and (ii) confirming that "best value" source selection decisions are permitted and encouraged.

The Access Board's final rule makes it clear that an agency's procurement of accessible information technology products is subject to "commercial availability." The section-by-section analysis accompanying the final rule also states that:

**agencies cannot claim that a product as a whole is not commercially available because no product in the marketplace meets all the standards. If products are commercially available that meet some but not all of the standards, *the agency must procure the product that best meets the standards.***

65 Fed. Reg. at 80502 (emphasis added). Finally, the Access Board notes that "the FAR is the appropriate venue for addressing commercial availability." *Id.*

The proposed FAR rule in fact addresses the concept of commercial availability in the modification to FAR 10.001 entitled "Policy and Procedures for Market Research," stating that "[a]gencies must assess the availability of electronic and information technology that meets all *or part* of the applicable accessibility

standards. . . .” 66 Fed. Reg. at 7167 (emphasis added). In addition the proposed FAR rule emphasizes this concept of commercial availability stating that “[w]hen acquiring commercial items, an agency must comply with those accessibility standards that are available in the commercial marketplace in time to meet agency’s delivery requirements.” 66 Fed. Reg. at 7168 (proposed FAR 39.X03).

Therefore, the language in the Access Board’s final rule, in concert with the proposed modification to FAR sections 10.001 and 39.X03, suggests the following:

1. **When conducting market research for the acquisition of commercial items, an agency must assess which (all or part) of the accessibility standards are commercially available in electronic and information technology;**
2. **When acquiring commercial items, the agency must identify only commercially available standards within solicitation documents; and**
3. **An agency must have the discretion to evaluate what product best meets those identified commercially available standards as well as the agency’s total needs, considering both cost and technical factors.**

It should not mean that an agency must award a contract to the contractor whose product has more accessibility features than the other competing offers, regardless of other factors. The evolving nature of information technology products means that it will not be possible or reasonable to simply count the number of accessibility features on a given product.

As a result, the agency should retain the ability to make best value and cost/technical tradeoff decisions among competing products. The Section recommends that the proposed rule be amended to reflect an agency’s authority to make best value decisions when acquiring information technology products and that accessibility need not be the most important evaluation factor.

#### **Factors in “Undue Burden” Determinations**

Proposed FAR 39.X04(e)(1) currently sets forth the factors that an agency must consider in making a determination that compliance with the accessibility standards will impose an undue burden on the agency. These factors are mandatory, based on the Access Board's final rule. *See* 65 Fed. Reg. at 80505. Because the Access Board also recognized that other factors are appropriate to consider, the Section recommends that the FAR specifically reflect that contracting officers may consider such other factors.

In its proposed rule on accessibility standards, the Access Board sought comments on two "other factors" related to an undue burden determination. The first "addressed the compatibility of an accessible product with the agency's or component's infrastructure, including security, and the difficulty of integrating the accessible product." 65 Fed. Reg. at 80505. The second factor "concerned the functionality needed from the product and the technical difficulty involved in making the product accessible." *Id.*

Although the Access Board declined to require the consideration of these factors, it acknowledged "that these may be appropriate factors for consideration by an agency in determining whether an action is an undue burden." *Id.* at 80506. The Access Board also recognized that "undue burden is determined on a case-by-case basis" and that agencies "may consider other appropriate factors in their undue burden analysis." *Id.*

The Section believes that it is important to inform contracting officers and other agency officials that they have discretion in making undue burden determinations and that, although not mandatory, the Access Board has identified other factors that are appropriate to consider. Thus, the Section recommends including language reflecting the fact that determinations should be made on a case-by-case basis and that agencies may consider factors other than those identified in FAR § 39.X04(e)(1), including those the Access Board has discussed.

### **Compliance Determinations Where Assistive Technology is Utilized**

Neither the Access Board nor the proposed FAR rule clarifies the role of assistive technology relative to compliance with the proposed electronic and information technology ("EIT") rules. The compelling guidance given by both is that:

**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 the information and data by members of the public who are not individuals with disabilities.**

66 Fed. Reg. at 7168 (proposed FAR 39.X01); 65 Fed. Reg. at 80523 (Access Board final rule).

Significantly, the Electronic and Information Technology Standards allow the use of designs or technologies as alternatives to those prescribed, provided that they result in substantially equivalent or greater access to and use of a product for people with disabilities. *See* 36 C.F.R. § 1194.5.

The use of so-called “assistive technologies” to complement EIT is consistent with the spirit and intent of these guidelines and is not specifically prohibited under the regulations. These assistive devices are alternatives that will result in the development of better access solutions for individuals with disabilities. In addition, allowing compliance to be established in commercial items via connection to assistive devices will increase the rate of accessibility standards that are “available in the commercial marketplace.” The ability to “plug and play” with existing devices to establish compliance with standards will lead to a reduction of overall costs to the Government, because manufacturers will not have to incorporate substantial design changes for all products sold to the Government.

Moreover, the “plug and play” capability will allow agencies to structure their procurement needs on a case-by-case basis without having to absorb increased product costs when accessible devices are not needed at a particular location. In addition, if assistive devices are readily available in the marketplace, an agency can obtain appropriate “plug and play” devices to meet changing needs at particular locations.

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The ability to bring existing and in-production EIT products into compliance without product modification is also available under this scenario. At the same time, this strategy will allow assistive technology vendors to continue the development of state-of-the-art technologies independently and provide a range of compliant alternatives to people with disabilities on a "faster to market" pace than otherwise would exist if the requirement to provide compliant products rested solely on the EIT manufacturer.

Therefore, the Section recommends that the FAR be clarified to specifically require contracting officers to assess the availability of assistive technology that meets applicable accessibility standards during market research activities and to include these findings in the description of agency needs. In addition, the Section recommends that Subpart 39 be modified to specifically state that EIT meets applicable accessibility standards when: (1) technically compatible with assistive technology available in the marketplace; and (2) evaluated together with such assistive technology, the EIT is compliant with applicable accessibility standards.

The Section appreciates the opportunity to provide these comments and is available to provide additional information or assistance as you may require.

Sincerely,

Gregory A. Smith  
Chair, Section of Public Contract Law

cc: **Norman R. Thorpe**  
**Mary Ellen Coster Williams**  
**Hurbert J. Bell, Jr.**  
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**Co-Chairs and Vice Chairs of the  
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