

**Office of
The City Attorney
City of San Diego**

MEMORANDUM

DATE: May 10, 2013
TO: Dennis Gakunga, Director, Purchasing and Contracting
FROM: City Attorney
SUBJECT: PlanetBids –Interpreting Accessibility Regulations

INTRODUCTION

This is a follow-up to our memorandum, dated March 26, 2013, regarding PlanetBids' noncompliance with accessibility regulations. The purpose of this memorandum is to provide some legal guidance on the level of accessibility the PlanetBids website must achieve in order to best comply with accessibility laws and protect the City from exposure to liability for accessibility violations.

BACKGROUND

Several memoranda have been issued by this Office on the topic of PlanetBids. This memorandum follows up on the March 26, 2013 memorandum entitled "PlanetBids – Noncompliance with Accessibility Regulations," written by Deputy City Attorney Rahbeka Harris. Just prior to that memorandum being issued, and in response to a preliminary list of PlanetBids' website deficiencies (error reports) prepared by the City's outside accessibility testing vendor, SSB Bart, PlanetBids submitted a proposed timeline for making its website accessible. The initial timeline did not indicate that PlanetBids would be focusing on any of the top five violations identified by SSB Bart. At this time, no new timeline has been issued to the City by PlanetBids.

QUESTION PRESENTED

How will the City know when PlanetBids has reached an acceptable level of accessibility?

SHORT ANSWER

An individual with a disability should be able to navigate and utilize the website as effectively as someone without a disability. This requires, at a minimum, that a website must be navigable by using a screen reader as well as by keyboard alone, without the use of a mouse.

ANALYSIS

PlanetBids' contract requires compliance with Section 508 of the Rehabilitation Act and the web accessibility requirements of the World Wide Web Consortium (W3C). <http://www.access-board.gov/sec508/standards.htm> and <http://www.w3.org/WAI/guid-tech.html>. Legal requirements set forth by these two sets of standards were discussed in our March 26, 2013 memorandum. Both of these sets of standards have discrete programming requirements that, when addressed, are intended to allow the use of a website by individuals with a variety of disabilities. But, it would be a mistake to focus solely on a checklist of requirements when considering whether or not the PlanetBids website is "accessible." A website's purported compliance with Section 508 or W3C is *evidence* of a vendor's efforts to meet their ADA and accessibility responsibilities. Ultimately, the test is not whether such technical standards have been followed to the letter, but whether the website's communication is effective when navigated by individuals with disabilities.

Accessibility is best measured by how usable the website is to someone with a disability, a measurement not measured by percentages. The standard that both the IT Department and SSB Bart have stated consistently is that an accessible website is a website that is usable by someone with a disability.¹ Baseline usability is determined by asking two questions regarding performance criteria: (1) Can a person who is visually impaired navigate the website with a screen reader? (e.g., Can an individual who is blind use a computer program that "speaks" the content from the website and understand how to move among different portions of the website?); and, (2) Can a person with limited mobility navigate the website without having to use a mouse? (e.g., Can someone with carpal tunnel syndrome use keyboard buttons to move between areas of text and check boxes?) <http://www.w3.org/standards/webdesign/accessibility>. Answering "yes" to both of these questions is required to meet even minimal requirements for accessibility and must occur before a website's overall accessibility can be tested.

Perhaps some confusion has stemmed from hearing the IT Department note that it is common for software not to meet "full accessibility" (as in not having every piece of code written to be accessible). In some situations, this may be because the website vendor is not aware of the legal requirements for accessibility and has failed to program accordingly. In that case, there is no defensible argument for failure to provide accessibility. In other cases, a website may be considered less than "fully accessible" because it has not got every "bell and whistle" that exists to enhance accessibility, but the site is still usable and navigable by someone with a disability. In the latter case, the potential for liability is minimal, so long as the website is usable.

How a vendor makes their website usable to individuals with disabilities (i.e., which bells and whistles are chosen) is up to the vendor. As Ellen Schauer from the City's IT Department noted in her March 29th email, "we can't really tell [PlanetBids] which of the error corrections will bring them to minimal compliance as there are many different ways to make a web application accessible. We won't know until they make their corrections and we do our acceptance testing whether or not their changes meet those requirements." In essence, we can tell PlanetBids that

¹ SSB Bart stated that they utilize individuals with disabilities to test the usability of websites as part of their accessibility testing. Ellen Schauer from the City's IT Department noted similarly in her March 29th email that usability is the basis of the City's accessibility standards.

they must meet their contractual obligation to be accessible under the ADA, Section 508 and W3C, but it is ultimately up to them to figure out which changes they will make.

Up to this point, the court cases regarding website accessibility have resulted in settlements, which do not create legal precedent for future court decisions. Settlements accepted by various courts emphasize making websites usable to individuals with disabilities. Access to and use of information and data to individuals with disabilities must be comparable to the access and use enjoyed by individuals without disabilities. In keeping with these settlements, if the City institutes PlanetBids and is sued, a legal defense proving the website meets that degree of accessibility likely would be successful, even if plaintiffs could show that some of the website coding did not meet the specific requirements of Section 508 or the W3C.

The following are legal standards to consider when attempting to determine what level of accessibility is considered "acceptable" under the law:

- The ADA was enacted in 1990. Everything built or purchased by the City after the ADA was enacted must be accessible. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 2, 104 Stat. 327 (1990). This means that the PlanetBids website is expected to have already been accessible prior to purchase.
- Section 508 of the Rehabilitation Act was enacted in 1998. <http://www.access-board.gov/sec508/standards.htm>. This newer regulation requires that all technology be accessible. Section 508 specifically requires that when agencies develop, procure, maintain, or use electronic information technology, individuals with disabilities have access to and use of information and data that is comparable to the access and use enjoyed by individuals who do not have disabilities. *Id.*

"Substantial compliance," a term raised in recent internal meetings, is not the correct standard to apply to website accessibility for the following reasons:

- A website is not the same as a constructed facility. When dealing with constructed facilities, there is a concept under the ADA known as "program accessibility," which does allow for less than complete compliance with building codes under specific circumstances. However, program accessibility involves, for the most part, facilities that are currently being altered or that were built prior to 1992.² It does not apply to websites.
- The accessibility of a technological device or program is measured by how effectively a person with a disability can navigate or communicate using that technology. 36 C.F.R. §1194.31. A website is still inaccessible, even if a substantial number of the possible accessibility improvements on a punch list are made, if the website remains unable to be navigated by individuals with disabilities. Meeting a goal of "substantial compliance" might still result in a functionally unusable website.

² See 28 C.F.R. § 35.150(c) for a discussion of program accessibility. The concept of program accessibility is not applicable to anything built or procured after 1992.

- PlanetBids was purchased after the ADA was enacted and is required to be fully accessible under the law. 28 C.F.R § 35.130. (There are different rules for programs that were in place prior to 1992. None of those are applicable to this situation.)

Accessibility can best be measured by determining whether functional performance criteria are satisfied. Section 508 functional performance criteria require that websites such as PlanetBids have at least one mode of operation that does not require vision, one that does not require hearing, one that does not require speech, and at least one that does not require fine motor control and that is operable with limited strength and reach. 36 C.F.R. §§ 1194.1-1194.41.³

If the City were to be sued by someone claiming that PlanetBids is inaccessible, the best defense would be proof that the website is usable to individuals with disabilities. If the City were able to prove to the court that the website allows individuals with disabilities to use and navigate PlanetBids as effectively as someone without a disability, it would likely prevail in a case claiming the website was inaccessible.

CONCLUSION

PlanetBids was purchased after the ADA was enacted and is required to be fully accessible under the law. In addition to the ADA, technology regulations, such as Section 508 of the Rehabilitation Act, also require that technology used by the City be accessible. PlanetBids' Memorandum of Agreement, paragraph 11a-ADA-Compliance for Technology Solutions, specifically requires compliance with Section 508 of the Rehabilitation Act and the web accessibility requirements of the World Wide Web Consortium (W3C).

The accessibility of a technological device or program is measured by how effectively a person with a disability can navigate or communicate using that technology. The test is not whether technical standards have been followed to the letter, but whether the website's communication is effective when the website is navigated by individuals with disabilities. Legal settlements to date have focused on the general requirement that websites provide access to and use of information and data to individuals with disabilities that is comparable to the access and use enjoyed by individuals without disabilities.

When considering whether or not the PlanetBids website meets accessibility criteria required under the ADA, Section 508 and related access laws, the focus should be on determining whether or not an individual with a disability can navigate and utilize the website as effectively as someone without a disability. These are the considerations the City must keep in mind as; ultimately, it is up to the City, not the vendor, to determine whether the website meets accessibility requirements.

³ Also located at http://www.access-board.gov/sec508/standards.htm#Subpart_c.

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May 10, 2013

Page 5

Please contact this Office if you have any questions about this memorandum or PlanetBids' accessibility requirements. We look forward to continuing to work with you on this project and would be happy to provide further clarification, if required.

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