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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 12, 13, 32, 43, and 52

[FAC 2005-67; FAR Case 2013-005; Item V; Docket 2013-0005, Sequence 1]

RIN 9000-AM45

Federal Acquisition Regulation; Terms of Service and Open-Ended Indemnification, and Unenforceability of Unauthorized Obligations

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

ACTION: Interim rule.

SUMMARY: DoD, GSA, and NASA are issuing an interim rule amending the Federal Acquisition Regulation (FAR) to address concerns raised in an opinion from the U.S. Department of Justice (DOJ) Office of Legal Counsel (OLC) involving the use of unrestricted, open-ended indemnification clauses in acquisitions for social media applications.

DATES: *Effective Date:* June 21, 2013.

Comment Date: Interested parties should submit written comments to the Regulatory Secretariat at one of the addresses shown below on or before August 20, 2013 to be considered in the formation of the final rule.

ADDRESSES: Submit comments identified by FAC 2005-67, FAR Case 2013-005, by any of the following methods:

- *Regulations.gov:* <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by searching for "FAR Case 2013-005". Select the link "Submit a Comment" that corresponds with "FAR Case 2013-005." Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "FAR Case 2013-005" on your attached document.

- *Fax:* 202-501-4067.

- *Mail:* U.S. General Services Administration, Regulatory Secretariat Division (MVCB), ATTN: Hada Flowers,

1800 F Street NW., 2nd Floor, Washington, DC 20405.

Instructions: Please submit comments only and cite FAC 2005-67, FAR Case 2013-005, in all correspondence related to this case. All comments received will be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: Ms. Marissa Petrusek, Procurement Analyst, at 202-501-0136 for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at 202-501-4755. Please cite FAC 2005-67, FAR Case 2013-005.

SUPPLEMENTARY INFORMATION:

I. Background

In a recent opinion, DOJ's OLC noted that the Anti-Deficiency Act (31 U.S.C. 1341) is violated when a Government contracting officer or other employee with authority to bind the Government agrees, without statutory authorization or other exception, to an open-ended, unrestricted indemnification clause. See the March 27, 2012, Memorandum for the Assistant General Counsel for Administration, United States Department of Commerce, available at <http://www.justice.gov/olc/2012/aag-ada-impls-of-consent-by-govt-empls.pdf>. This opinion states that the Anti-Deficiency Act is violated under some circumstances when consent is given by a Government employee to online terms of service agreements containing an open-ended indemnification clause. The amendments made by this rule are designed to prevent violations such as those mentioned above, and other similar types of violations, from occurring in future Federal contracts.

The OLC opinion discusses a situation where a Government purchase card holder consents to an online terms of service (TOS) agreement in the course of registering for an account with a social media application on the Internet that holds the provider of the service harmless in the event harm is caused to a third party when the application is used by the Government. OLC explained that an Anti-Deficiency Act violation has occurred because an agency's agreement to an open-ended indemnification clause could result in the agency's legal liability for an amount in excess of the agency's appropriation.

On April 4, 2013, the Office of Management and Budget (OMB) issued guidance outlining a series of management actions to ensure agencies act in compliance with the Anti-Deficiency Act and in accordance with

OLC's opinion. See OMB Guidance M-13-10, Antideficiency Act Implications of Certain Online Terms of Service Agreements, available at <http://www.whitehouse.gov/sites/default/files/omb/memoranda/2013/m-13-10.pdf>. These actions include consultation with agency counsel and review of a GSA-maintained list of social media applications governed by TOS agreements that are compatible with Federal law, regulation, and practice. The due diligence steps described in OMB's guidance are designed to minimize disruption to agencies' continued use of social media products in support of initiatives that promote greater openness, transparency, and citizen engagement.

As a further step to help agencies maintain their ability to purchase social media products, OMB called on the Federal Acquisition Regulatory Council (FAR Council) to promptly develop appropriate Governmentwide regulations to address the risk of an Anti-Deficiency Act violation identified in OLC's opinion. Such action is necessary to facilitate a consistent approach across agencies for ensuring that future Federal contract actions do not involve the type of open-ended indemnification provisions discussed in OLC's opinion that give rise to Anti-Deficiency Act violations.

This interim rule focuses only on open-ended indemnification clauses to address the concern raised in OLC's opinion. However, there are also other clauses in commercial End User License Agreement (EULA) and TOS that could result in a violation of the Anti-Deficiency Act if executed by a contracting officer. For instance, a clause that automatically renews a contract, such as for subscription services, at its expiration would violate the Anti-Deficiency Act if it obligated the Government to pay for supplies or services in advance of the agency's appropriation. Additional coverage may be necessary to address these other instances of potential Anti-Deficiency Act (and other Federal law) violations.

II. Discussion and Analysis

This FAR case amends FAR parts 12, 13, 32, 43, and 52 to provide additional guidance and clauses to address OLC's opinion with respect to purchases containing an EULA, TOS, or other similar agreement containing an indemnification provision.

The objective of the interim rule is to clarify that the inclusion of an open-ended indemnification clause in a EULA, TOS, or other agreement, is not binding on the Government unless expressly authorized by law, and shall

be deemed to be stricken from the EULA, TOS, or similar legal instrument or agreement.

Many supplies or services are acquired subject to supplier license agreements. These are particularly common in information technology acquisitions, but they may apply to any supply or service. For example, computer software and services delivered through the internet (web services) are often subject to license agreements, referred to as EULA, TOS, or other similar legal instruments or agreements. FAR 12.216 and 32.705, Unenforceability of Unauthorized Obligations, are added to provide that many of these agreements contain indemnification clauses that are inconsistent with Federal law and unenforceable, but which could create a violation of the Anti-Deficiency Act (31 U.S.C. 1341) if agreed to by the Government.

FAR 13.202, Unenforceability of unauthorized obligations in micro-purchases, is added to require the clause at 52.232–39, Unenforceability of Unauthorized Obligations, to automatically apply to any micro-purchase, to prevent violations of the Anti-Deficiency Act.

The clause at FAR 52.212–4, Contract Terms and Conditions—Commercial Items, is modified and clause 52.232–39, Unenforceability of Unauthorized Obligations, is added, to address situations when there is an unrestricted, open-ended indemnification provision in EULA, TOS, or similar legal instruments or agreements. The changes clarify that if a EULA, TOS, or similar legal instrument or agreement, includes a clause requiring the Government to indemnify the contractor or any person or entity for damages, costs, or fees, or any other loss or liability that would create an Anti-Deficiency Act violation, such clause is unenforceable against the Government, and is deemed to be stricken from the agreement to prevent violations of the Anti-Deficiency Act.

FAR 12.302 is revised to prevent the contracting officer from tailoring the Unauthorized Obligation paragraph. The Unauthorized Obligation paragraph is added to the Order of Precedence paragraph at paragraph 52.212–4(s)(2).

III. 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. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

DoD, GSA, and NASA do not expect this rule to 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, as noted in the OLC opinion, it has always been unenforceable for a contracting officer or other employee with the authority to bind the Government to agree to an open-ended, unrestricted indemnification clause, and the FAR is merely being revised to reflect this. However, an Initial Regulatory Flexibility Analysis has been performed and is summarized as follows:

This interim rule is required to address an opinion by the U.S. Department of Justice Office of Legal Counsel. The changes clarify that if a EULA, TOS, or similar legal instrument or agreement, includes a clause requiring the Government to indemnify the contractor or any person or entity for damages, costs, or fees, or any other loss or liability that would create an Anti-Deficiency Act violation, such clause is unenforceable against the Government, and is deemed to be stricken from the agreement to prevent violations of the Anti-Deficiency Act.

The objective of the interim rule is to clarify that the inclusion of an open-ended indemnification clause in a EULA, TOS, or other agreement, is not binding on the Government unless expressly authorized by statute and specifically authorized under applicable agency regulations and procedures, and shall be deemed to be stricken from the EULA, TOS, or similar legal instrument or agreement.

This rule will impact entities that contract with the Government who have EULAs or TOS containing an indemnification clause.

This rule will impact all small entities with a supply or service contract subject to a supplier license agreement. However, there is no record keeping or reporting requirement. There may be a small beneficial impact on small entities because these revisions to the FAR will help save time and streamline processes since small entities will no longer have to individually renegotiate, on a prospective basis, a EULA, TOS, or similar agreement containing an indemnification provision. Further, clauses like open-ended, unrestricted indemnification clauses, have generally been unenforceable against the Government, unless expressly authorized by statute, and the FAR is being revised to reflect this.

The Councils estimate that this rule will impact approximately 3,538 small entities. Many supplies or services are acquired subject to supplier license agreements. These are particularly common in information technology acquisitions, but they may apply to any supply or service. The Councils believe the majority of the information technology purchases associated with this rule will be purchased through the GSA Information Technology Schedule 70 contracts. As such, the Councils used, as a basis for the estimate, the number of GSA Information-Technology Schedule 70 vendors, plus an estimate for contractors other than information technology acquisitions.

There are currently 4,988 GSA Information-Technology Schedule 70 vendors. The Councils estimate that this rule will impact 75 percent, or 3,741 of those vendors because they have EULAs or TOS in their Government contracts. Of those affected entities, it is estimated that around 86 percent, or 3,217, will be small entities. The Councils estimate that approximately 10 percent or 321 more small entities across the Government for information technology acquisitions and for other than information-technology acquisition whose Government contracts include EULAs or TOS will be impacted. As a result it is estimated that this rule will impact approximately 3,538 small entities.

The Councils do not anticipate an impact on small entities in acquisitions conducted through Government purchase cards. This is because the rule does not require entities to negotiate or change their agreement language.

The rule does not duplicate, overlap, or conflict with any other Federal rules.

The Councils did not identify any significant alternatives that would appropriately address the DOJ opinion. Steps have been taken in this interim rule to minimize the impact on small entities which help to save them time and streamline their processes; for example, this would greatly reduce the requirement to negotiate all EULAs, TOS, or similar arrangements on a case-by-case basis.

The Regulatory 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 Regulatory Secretariat. DoD, GSA and NASA invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD, GSA, and NASA will also consider comments from small entities concerning the existing regulations in subparts affected by this rule consistent with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAC 2005–67, FAR Case 2013–005) in correspondence.

V. Paperwork Reduction Act

The interim 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. chapter 35).

VI. Determination To Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense (DoD), the Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. As OMB explains in its guidance to agencies regarding the OLC opinion, an interim rule is necessary to allow agencies to continue with acquisitions using TOS or EULAs and minimize disruption to the timely acquisition of supplies and services needed to accomplish critical requirements that may otherwise arise unless immediate steps are taken to provide regulatory guidance to help them avoid future violations of the Anti-Deficiency Act. OLC's opinion, which was originally provided to the Department of Commerce on March 27, 2012, was released on November 15, 2012, putting agencies on notice at that time of the potential risk of violation and creating a need for this prompt Government-wide action to avoid future noncompliance with the Act and any associated adverse impacts to Federal missions or personnel.

This Government-wide rule will facilitate a consistent approach across agencies for addressing OLC's opinion and avoid the potential burden and cost contractors might otherwise incur in having to negotiate contract terms with each agency. The rule has been narrowly crafted to address only the specific concerns identified in the OLC opinion and OMB memorandum and to minimize changes that are promulgated without prior public comment on this subject.

Pursuant to 41 U.S.C. 1707 and FAR 1.501–3(b), DoD, GSA, and NASA will consider public comments received in response to this interim rule in the formation of the final rule.

List of Subjects in 48 CFR Parts 12, 13, 32, 43, and 52

Government procurement.

Dated: June 13, 2013.

William Clark,

Acting Director, Office of Governmentwide Acquisition Policy, Office of Acquisition Policy, Office of Governmentwide Policy.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 12, 13, 32, 43, and 52 as set forth below:

- 1. The authority citation for 48 CFR parts 12, 13, 32, 43, and 52 are revised to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 12—ACQUISITION OF COMMERCIAL ITEMS

- 2. Amend section 12.102 by revising paragraph (e)(4) to read as follows:

12.102 Applicability.

* * * * *

(e) * * *

(4) Using the Governmentwide commercial purchase card as a method of purchase rather than only as a method of payment; or

* * * * *

- 3. Add section 12.216 to read as follows:

12.216 Unenforceability of unauthorized obligations.

Many supplies or services are acquired subject to supplier license agreements. These are particularly common in information technology acquisitions, but they may apply to any supply or service. For example, computer software and services delivered through the internet (web services) are often subject to license agreements, referred to as End User License Agreements (EULA), Terms of Service (TOS), or other similar legal instruments or agreements. Many of these agreements contain indemnification clauses that are inconsistent with Federal law and unenforceable, but which could create a violation of the Anti-Deficiency Act (31 U.S.C. 1341) if agreed to by the Government. Paragraph (u) of the clause at 52.212–4 prevents any such violations.

- 4. Amend section 12.302 by revising paragraphs (b)(5) and (b)(6); and adding a new paragraph (b)(7) to read as follows:

12.302 Tailoring of provisions and clauses for the acquisition of commercial items.

* * * * *

(b) * * *

(5) Other compliances;

(6) Compliance with laws unique to Government contracts; and

(7) Unauthorized obligations.

* * * * *

PART 13—SIMPLIFIED ACQUISITION PROCEDURES

13.201 [Amended]

- 5. Amend section 13.201 by removing from paragraph (d) “at 32.1110” and adding “at 13.202 and 32.1110” in its place.

13.202 [Redesignated as 13.203]

- 6. Redesignate section 13.202 as section 13.203; and add a new section 13.202 to read as follows:

13.202 Unenforceability of unauthorized obligations in micro-purchases.

Many supplies or services are acquired subject to supplier license agreements. These are particularly common in information technology acquisitions, but they may apply to any supply or service. For example, computer software and services delivered through the internet (web services) are often subject to license agreements, referred to as End User License Agreements (EULA), Terms of Service (TOS), or other similar legal instruments or agreements. Many of these agreements contain indemnification clauses that are inconsistent with Federal law and unenforceable, but which could create a violation of the Anti-Deficiency Act (31 U.S.C. 1341) if agreed to by the Government. The clause at 52.232–39, Unenforceability of Unauthorized Obligations, automatically applies to any micro-purchase, including those made with the Governmentwide purchase card. This clause prevents such violations of the Anti-Deficiency Act.

PART 32—CONTRACT FINANCING

32.703–2 [Amended]

- 7. Amend section 32.703–2 by—
 - a. Removing from paragraph (a) “see 32.705–1(a)” and adding “see 32.706–1(a)” in its place; and
 - b. Removing from paragraph (b)(2) “see 32.705–1(b)” and adding “see 32.706–1(b)” in its place.

32.705 through 32.705–2 [Redesignated as 32.706 through 32.706–2]

- 8. Redesignate sections 32.705 through 32.705–2 as sections 32.706 through 32–706–2, respectively.
- 9. Add a new section 32.705 to read as follows:

32.705 Unenforceability of unauthorized obligations.

Many supplies or services are acquired subject to supplier license agreements. These are particularly common in information technology

acquisitions, but they may apply to any supply or service. For example, computer software and services delivered through the internet (web services) are often subject to license agreements, referred to as End User License Agreements (EULA), Terms of Service (TOS), or other similar legal instruments or agreements. Many of these agreements contain indemnification clauses that are inconsistent with Federal law and unenforceable, but which could create a violation of the Anti-Deficiency Act (31 U.S.C. 1341) if agreed to by the Government.

■ 10. Add section 32.706–3 to read as follows:

32.706–3 Clause for unenforceability of unauthorized obligations.

The contracting officer shall insert the clause at 52.232–39, Unenforceability of Unauthorized Obligations in all solicitations and contracts.

PART 43—CONTRACT MODIFICATIONS

43.201 [Amended]

■ 11. Amend section 43.201 by removing from paragraph (b) “see 32.705–2” and adding “see 32.706–2” in its place.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 12. Amend section 52.212–4 by revising the date of the clause and paragraph (s)(2); and adding paragraph (u) to read as follows:

52.212–4 Contract Terms and Conditions—Commercial Items.

* * * * *

Contract Terms and Conditions—Commercial Items (Jun 2013)

* * * * *

(s) * * *

(2) The Assignments, Disputes, Payments, Invoice, Other Compliances, Compliance with Laws Unique to Government Contracts, and Unauthorized Obligations paragraphs of this clause;

* * * * *

(u) *Unauthorized Obligations.* (1) Except as stated in paragraph (u)(2) of this clause, when any supply or service acquired under this contract is subject to any End User License Agreement (EULA), Terms of Service (TOS), or similar legal instrument or agreement, that includes any clause requiring the Government to indemnify the Contractor or any person or entity for damages, costs, fees, or any other loss or liability that would create an Anti-Deficiency Act violation (31 U.S.C. 1341), the following shall govern:

(i) Any such clause is unenforceable against the Government.

(ii) Neither the Government nor any Government authorized end user shall be deemed to have agreed to such clause by virtue of it appearing in the EULA, TOS, or similar legal instrument or agreement. If the EULA, TOS, or similar legal instrument or agreement is invoked through an “I agree” click box or other comparable mechanism (e.g., “click-wrap” or “browse-wrap” agreements), execution does not bind the Government or any Government authorized end user to such clause.

(iii) Any such clause is deemed to be stricken from the EULA, TOS, or similar legal instrument or agreement.

(2) Paragraph (u)(1) of this clause does not apply to indemnification by the Government that is expressly authorized by statute and specifically authorized under applicable agency regulations and procedures.

* * * * *

■ 13. Amend section 52.213–4 by revising the date of the clause; and adding paragraph (a)(2)(viii) to read as follows:

52.213–4 Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items)

* * * * *

Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items) (Jun 2013)

* * * * *

(a) * * *

(2) * * *

(viii) 52.232–39, Unenforceability of Unauthorized Obligations (JUN 2013).

* * * * *

■ 14. Amend section 52.232–18 by revising the introductory text to read as follows:

52.232–18 Availability of Funds.

As prescribed in 32.706–1(a), insert the following clause:

* * * * *

■ 15. Amend section 52.232–19 by revising the introductory text to read as follows:

52.232–19 Availability of Funds for the Next Fiscal Year.

As prescribed in 32.706–1(b), insert the following clause:

* * * * *

■ 16. Amend section 52.232–20 by revising the introductory text to read as follows:

52.232–20 Limitation of Cost.

As prescribed in 32.706–2(a), insert the following clause. The 60-day period may be varied from 30 to 90 days and the 75 percent from 75 to 85 percent. “Task Order” or other appropriate designation may be substituted for “Schedule” wherever that word appears in the clause:

* * * * *

■ 17. Amend section 52.232–22 by revising the introductory text to read as follows:

52.232–22 Limitation of Funds.

As prescribed in 32.706–2(b), insert the following clause. The 60-day period may be varied from 30 to 90 days and the 75 percent from 75 to 85 percent. “Task Order” or other appropriate designation may be substituted for “Schedule” wherever that word appears in the clause:

* * * * *

■ 18. Add section 52.232–39 to read as follows:

52.232–39 Unenforceability of Unauthorized Obligations.

As prescribed in 32.706–3, insert the following clause:

Unenforceability of Unauthorized Obligations (JUN 2013)

(a) Except as stated in paragraph (b) of this clause, when any supply or service acquired under this contract is subject to any End User License Agreement (EULA), Terms of Service (TOS), or similar legal instrument or agreement, that includes any clause requiring the Government to indemnify the Contractor or any person or entity for damages, costs, fees, or any other loss or liability that would create an Anti-Deficiency Act violation (31 U.S.C. 1341), the following shall govern:

(1) Any such clause is unenforceable against the Government.

(2) Neither the Government nor any Government authorized end user shall be deemed to have agreed to such clause by virtue of it appearing in the EULA, TOS, or similar legal instrument or agreement. If the EULA, TOS, or similar legal instrument or agreement is invoked through an “I agree” click box or other comparable mechanism (e.g., “click-wrap” or “browse-wrap” agreements), execution does not bind the Government or any Government authorized end user to such clause.

(3) Any such clause is deemed to be stricken from the EULA, TOS, or similar legal instrument or agreement.

(b) Paragraph (a) of this clause does not apply to indemnification by the Government that is expressly authorized by statute and specifically authorized under applicable agency regulations and procedures. (End of clause)

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