

- a. Revising the section heading;
- b. Revising the clause heading and the date of the clause;
- c. Removing from paragraph (b) “Central Contractor Registration (CCR)” and “CCR” and adding “System for Award Management (SAM)” and “SAM” in its place, respectively;
- d. Removing from paragraph (d) “CCR” and adding “SAM” in its place (two times); and
- e. Removing from paragraph (g) and paragraph (i) “CCR” and adding “SAM” in its place.

The revised text reads as follows:

**52.232–33 Payment by Electronic Funds Transfer—System for Award Management.**

\* \* \* \* \*

**Payment by Electronic Funds Transfer—System for Award Management (Jul 2013)**

\* \* \* \* \*

- 68. Amend section 52.232–34 by revising the section and clause headings and the date of the clause to read as follows:

**52.232–34 Payment by Electronic Funds Transfer—Other than System for Award Management.**

\* \* \* \* \*

**Payment by Electronic Funds Transfer—Other than System for Award Management (Jul 2013)**

\* \* \* \* \*

- 69. Amend section 52.232–35 by:
  - a. Revising the date of the clause; and
  - b. Removing from paragraph (a) “Central Contractor Registration” and adding “System for Award Management” in its place.

The revised text reads as follows:

**52.232–35 Designation of Office for Government Receipt of Electronic Funds Transfer Information.**

\* \* \* \* \*

**Designation of Office for Government Receipt of Electronic Funds Transfer Information (Jul 2013)**

\* \* \* \* \*

- 70. Amend section 52.232–36 by:
  - a. Revising the date of the clause; and
  - b. Removing from paragraph (a)(2) “Central Contractor Registration (CCR)” and “CCR” and adding “System for Award Management (SAM)” and “SAM” in their places, respectively.

The revised text reads as follows:

**52.232–36 Payment by Third Party.**

\* \* \* \* \*

**Payment by Third Party (Jul 2013)**

\* \* \* \* \*

- 71. Amend section 52.232–38 by:
  - a. Revising the date of the clause; and
  - b. Removing from the introductory text “Central Contractor Registration”

and adding “System for Award Management” in its place.

The revised text reads as follows:

**52.232–38 Submission of Electronic Funds Transfer Information with Offer.**

\* \* \* \* \*

**Submission of Electronic Funds Transfer Information With Offer (Jul 2013)**

\* \* \* \* \*

- 72. Amend section 52.244–6 by revising the date of the clause and paragraph (c)(1)(iii) to read as follows.

**52.244–6 Subcontracts for Commercial Items.**

\* \* \* \* \*

**Subcontracts for Commercial Items (Jul 2013)**

\* \* \* \* \*

(c)(1) \* \* \*

(iii) 52.219–8, Utilization of Small Business Concerns (Jul 2013) (15 U.S.C. 637(d)(2) and (3)), if the subcontract offers further subcontracting opportunities. If the subcontract (except subcontracts to small business concerns) exceeds \$650,000 (\$1.5 million for construction of any public facility), the subcontractor must include 52.219–8 in lower tier subcontracts that offer subcontracting opportunities.

[FR Doc. 2013–14612 Filed 6–20–13; 8:45 am]

BILLING CODE 6820–EP–P

**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Parts 4 and 17**

[FAC 2005–67; FAR Case 2012–010; Item IV; Docket 2012–0010, Sequence 1]

RIN 9000–AM36

**Federal Acquisition Regulation; Interagency Acquisitions: Compliance by Nondefense Agencies With Defense Procurement Requirements**

**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 adopting as final, with changes, an interim rule amending the Federal Acquisition Regulation (FAR) to add new requirements specific to the acquisition of supplies and services by nondefense agencies on behalf of DoD. This rule implements a section of the National Defense Authorization Act

(NDAA) for Fiscal Year (FY) 2008, with later amendments; and section 801 of the NDAA for FY 2013, Public Law 112–239.

**DATES:** *Effective Date:* July 22, 2013.

**FOR FURTHER INFORMATION CONTACT:** Ms. Patricia Corrigan, Procurement Analyst, at 202–208–1963 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 2012–010.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

DoD, GSA, and NASA published an interim rule in the **Federal Register** at 77 FR 69720 on November 20, 2012, to implement the requirements of section 801 of the NDAA for FY 2008 (Pub. L. 110–181) as amended, (10 U.S.C. 2304 note). The interim rule made the following changes:

- Clarified FAR 4.603(c) regarding the allocation of socioeconomic credit to the requesting agency for assisted acquisitions.
- Created a new FAR subpart 17.7, which establishes the policy related to internal controls and compliance certification under which nondefense agencies may procure supplies and services on behalf of DoD and identified DoD acquisition official responsibilities to identify DoD unique requirements. The new FAR subpart 17.7 cross-references and is cross-referenced at FAR subpart 17.5, Interagency Acquisitions.

To implement the NDAA for FY 2013, this final rule changes “defense” to “applicable” in FAR 17.703(a) and (b).

Three respondents submitted comments on the interim rule.

**II. Discussion and Analysis**

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) reviewed the comments in the development of the final rule. A discussion of the comments and the changes made to the rule as a result of those comments are provided as follows:

*A. Summary of Significant Changes*

No significant changes have been made in the final rule. However, the following minor changes have been made:

(1) References to the term “defense procurement” have been changed to “applicable procurement” in order to implement section 801 of the NDAA FY 2013, Pub. L. 112–239.

(2) Based on public comment, DoD class deviations have been included in

the list of laws and regulations that apply to procurements of supplies and services made by DoD through other Federal agencies in FAR 17.703(b)(2).

#### B. Analysis of Public Comments

##### 1. Location of Coverage

*Comment:* Suggest that this coverage be moved to a new section within FAR subpart 17.5 (e.g., FAR 17.505). This way, the rule would be where readers would reasonably expect it to be and they would not have to move back and forth between subparts, which are typically located on different Web pages.

*Response:* To simplify locating the required regulations, a cross reference to FAR subpart 17.7 is included at FAR 17.500 and another cross reference to FAR subpart 17.5 is included at FAR 17.700.

##### 2. Compliance With DoD Class Deviations

*Comment:* FAR 17.703(b)(2) does not mention DoD class deviations to the FAR and Defense Federal Acquisition Regulation Supplement (DFARS). If nondefense agencies will be required to comply with DoD class deviations, it is suggested that this be explicitly stated along with a Web address where they can be found.

*Response:* The rule was amended to reference DoD class deviations and the Web address where they can be found.

##### 3. Definition of DoD "Acquisition Official"

*Comment:* The commenter knew what a contracting officer is, but wondered what a DoD "acquisition official" other than a contracting officer might be. The commenter added that "all approvals should be routed through the office of the contracting division that would otherwise write the contract."

*Response:* The term "Department of Defense (DoD) acquisition official" is defined in FAR 17.701, consistent with statute, and is used throughout FAR subpart 17.7. Specific guidance regarding designation of agency acquisition officials, their delegated authority, and routing of contractual documents is more suitable for inclusion in agency regulations rather than the FAR.

##### 4. Frequency of Nondefense Agency Compliance Certifications

*Comment:* The commenter sees no benefit in adhering to an "annual" fiscal year self-certification requirement that ensures a nondefense agency is compliant with defense procurement requirements. The commenter recommends, as a means of eliminating

non-value-added paperwork for all parties and procurement delays, that DoD seek approval to change the nondefense agency self-certification requirement from "each fiscal year" to "every five years."

*Response:* The annual certification requirement for nondefense agencies that acquire supplies and services on behalf of DoD included in FAR subpart 17.7 is prescribed by law. The suggestion submitted by the commenter requires a statutory change that is beyond the scope of this FAR case.

#### 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 regulatory flexibility. This is not a significant regulatory action and, therefore, was not 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 have prepared a Final Regulatory Flexibility Analysis (FRFA) consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* The FRFA is summarized as follows:

Implementation of section 801 of the NDAA for FY 2008 (Pub. L. 110-181), section 806 of the NDAA for FY 2010 (Pub. L. 111-84), section 817 of the NDAA for FY 2012 (Pub. L. 112-81), and section 801 of the NDAA for FY 2013 (Pub. L. 112-239) address requirements specific to the acquisition of property and services by non-defense agencies on behalf of DoD, and are therefore, internal to the Government.

However, this rule also amends the FAR to include a clarification at 4.603(c), restating existing Office of Federal Procurement Policy (OFPP) and Federal Procurement Data System (FPDS) policy regarding the allocation of socio-economic credit for assisted acquisitions, *i.e.*, "for assisted acquisitions, the requesting agency will receive socio-economic credit for meeting small business goals, where applicable."

Although we do not expect the clarification to have a direct economic impact on a substantial number of small entities, there is the possibility that the regulatory clarification may improve the accuracy of FPDS data submissions allocating socio-economic credit to agencies for contracts and orders awarded to a substantial number of

small entities. Improved data accuracy can have a positive impact on agencies' annual small business goals.

The interim rule was published as part of FAC 2005-62 on November 20, 2012 (77 FR 69720). None of the comments received concerned the initial regulatory flexibility analysis.

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

#### V. Paperwork Reduction Act

The final 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).

#### List of Subjects in 48 CFR Parts 4 and 17

Government procurement.

Dated: June 13, 2013.

**William Clark,**

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

#### Interim Rule Adopted as Final With Changes

Accordingly, the interim rule amending 48 CFR parts 4 and 17, which was published in the **Federal Register** at 77 FR 69720, November 20, 2012, is adopted as final with the following change:

#### PART 17—SPECIAL CONTRACTING METHODS

■ 1. The authority citation for 48 CFR part 17 continues to read as follows:

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

■ 2. Amend section 17.703 by—

■ a. Removing from paragraph (a) and the introductory text of paragraph (b) "with defense" and adding "with applicable" in its place; and

■ b. Revising paragraph (b)(2).

The revised text reads as follows:

##### 17.703 Policy.

\* \* \* \* \*

(b) \* \* \*

(2) Laws and regulations that apply to procurements of supplies and services made by DoD through other Federal agencies, including DoD financial management regulations, the Defense Federal Acquisition Regulation Supplement (DFARS), DoD class deviations, and the DFARS Procedures, Guidance, and Information (PGI). (The DFARS, DoD class deviations, and PGI

are accessible at: <http://www.acq.osd.mil/dpap/dars>).

\* \* \* \* \*

[FR Doc. 2013-14613 Filed 6-20-13; 8:45 am]

BILLING CODE 6820-EP-P

## 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 Petrussek, 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