2010. Section 743 calls for certain agencies, not including the Department of Defense, to submit annual inventories of service contracts. FAR subpart 4.17, Service Contracts Inventory, provides annual reporting requirements for agencies and contractors. Guidance for agencies is available at: *http://www.whitehouse.gov/omb/procurement-service-contract-inventories.* FAR clauses 52.204–14 and 52.204–15 provide contractors' annual reporting requirements. Prime and first-tier contractors will submit the information by October 31 at *www.sam.gov,* including total dollar amount invoiced for services performed in the prior Government fiscal year and total amount of labor hours for the previous Government fiscal year.

To lessen the burden on small and large business prime contractors, information is reported annually, reporting is phased in over three fiscal years, and only first-tier subcontracts are covered, not all tiers.

Contracting officers will verify that the clause is included in the contract or order. Agencies are responsible for reviewing contractor reported information to ensure it appears reasonable and consistent with available contract information. The agency is not required to address data for which the agency would not normally have supporting information. In the event the agency believes that revisions to the contractor reported information are warranted, the contractor is to be notified no later than November 15. By November 30, the contractor shall revise the report, or document its rationale for the agency for maintaining the information without change.

Item II—Prioritizing Sources of Supplies and Services for Use by Government (FAR Case 2009–024)

This final rule amends the FAR to update and clarify the priority of sources of supplies and services for use by the Government at FAR subpart 8.0. The final rule also includes a list of other existing Federal contract vehicles to consider for agency use, such as Governmentwide Acquisition Contracts (GWACs), Multi-Agency Contracts (MACs), and other procurement instruments intended for use by multiple agencies, including blanket purchase agreements under Federal Supply Service contracts. The policy at FAR 7.102(a) is also revised to conform with the amendments to FAR subpart 8.0.

Item III—Terms of Service and Open-Ended Indemnification, and Unenforceability of Unauthorized Obligations (FAR Case 2013–005)

This final rule adopts, without change, an interim rule which was published in the **Federal Register** at 78 FR 37686 on June 21, 2013. The interim rule amended the FAR to address concerns raised in an opinion from the U.S. Department of Justice Office of Legal Counsel that determined the Anti-Deficiency Act is violated when a Government contracting officer or other employee with the authority to bind the Government agrees, without statutory authorization or other exception, to an open-ended, unrestricted indemnification clause. This rule clarified for the public that an End User License Agreement, Term of Service, or similar agreement containing an indemnification provision, is unenforceable and nonbinding against the Government and Government-authorized end-users. The rule contained a new clause that applies to all solicitations and contracts and automatically applies to micro-purchases, including those made with the Governmentwide commercial purchase card.

Item IV—Trade Agreements Thresholds (FAR Case 2013–021)

This final rule amends the FAR to adjust the thresholds for application of the World Trade Organization Government Procurement Agreement and the Free Trade Agreements as determined by the United States Trade Representative, according to a pre-determined formula under the agreements.

Dated: December 19, 2013.

William Clark,

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

[FR Doc. 2013–31152 Filed 12–30–13; 8:45 am]

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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 2005–72; FAR Case 2013–005; Item III; Docket 2013–0005, Sequence 1]

RIN 9000–AM45

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

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

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA have adopted as final, without change, 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:* December 31, 2013.

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 2005–72, FAR Case 2013–005.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA published an interim rule in the **Federal Register** at 78 FR 37686 on June 21, 2013, to implement a recent DOJ OLC opinion, entitled ''Memorandum for Barbara S. Fredericks, Assistant General Counsel for Administration, United States Department of Commerce,'' which noted that the Anti-Deficiency Act (ADA) (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. 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 ADA and in accordance with OLC's opinion. See

OMB Guidance M–13–10, Anti-deficiency Act Implications of Certain Online Terms of Service Agreements. The interim rule became effective on June 21, 2013. One respondent 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 is provided as follows:

A. Summary of Significant Changes

No changes were made as a result of the public comments.

B. Analysis of Public Comments

1. Attachment of Clause to Licenses

Comment: The respondent believed that the clause does not reliably attach to licenses because of situations where an End User License Agreement (EULA) or Terms of Service (TOS) is passed through an intermediary contractor or subcontractor to the Government. The respondent recommended that the Government directly negotiate with major commercial software and service providers to ensure that the clause ''is included in those providers' EULAs or TOSs with the Government and that the interim rule make clear that commercial items and software can be accepted only where such an agreement has been made directly with the licensor''.

Response: The clause does attach to licenses. The clause is not limited to instances in which the Government has directly negotiated with the indemnitees. No change is made in the final rule.

2. Unintended Consequences

Comment: The respondent expressed concern that this rule could lead commercial companies to forego doing business with the Government. Not all contractors may be able to accept the risk re-allocation effected by the interim rule, according to the respondent.

Response: The interim rule became effective on June 21, 2013. The objective of the 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. Since the interim rule was published, the Councils have received no indications that the scenario envisioned by the respondent has come to pass. No change is made in the final rule.

3. Alternative Solutions To Address the ADA Concerns

Comment: The respondent suggested two alternatives. The first was for the Department of Justice to definitively indicate that agency disclosures are not required for (and contracting officers will not be prosecuted for) ADA violations stemming solely from open-ended indemnifications contained in commercial EULAs and TOSs so long as, once discovered, the Government negotiates with the licensor directly to limit the attendant open-ended risk. The other alternative was for the Government to retain the clause from the interim rule with a cap on licensors' liability at the amount of appropriated funds directed to the particular purchase.

Response: This type of additional guidance would not be included in the FAR. Development of this additional guidance is outside the purview of the Councils. No change is made in the final rule.

III. Executive Order 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 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:

This final rule is required to implement an opinion by the U.S. Department of Justice Office of Legal Counsel. The objective of the final 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.

The Chief Counsel for Advocacy of the Small Business Administration did not submit any comments in response to the rule.

This rule will impact all small entities with a supply or service contract subject to a supplier license agreement. 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.

DoD, GSA and NASA 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. DoD, GSA and NASA considered that the majority of the information technology purchases associated with this rule will be purchased through the GSA Information Technology Schedule 70 contracts. As such, DoD, GSA, and NASA 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. DoD, GSA and NASA 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. DoD, GSA, and NASA estimate that there are approximately 10 percent, or 321, more small entities across the Government with information technology acquisitions and other than information-technology acquisition with Government contracts that include EULAs or TOS and therefore impacted. As a result, it is estimated that this rule will impact approximately 3,538 small entities.

DoD, GSA, and NASA 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.

There is no record keeping or reporting requirement for this rule.

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.

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 12, 13, 32, 43, and 52

Government procurement.

Dated: December 19, 2013.

William Clark,

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

Interim Rule Adopted as Final Without Change

Accordingly, the interim rule amending 48 CFR parts 12, 13, 32, 43, and 52, which was published in the **Federal Register** at 78 FR 37686 on June 21, 2013, is adopted as a final rule without change.

[FR Doc. 2013–31150 Filed 12–30–13; 8:45 am]

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