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UNITED STATES DEPARTMENT OF COMMERCE
Chief Financial Officer
Assistant Secretary for Administration
Washington, D.C. 20230

PROCUREMENT MEMORANDUM 2013-12

ACTION

MEMORANDUM FOR: Bureau Procurement Officials
Head of Contracting Offices
Contracting Officers
Contract Specialists
Agency Program Coordinators
Government Purchase Cardholders

FROM: Barry E. Berkowitz 
Senior Procurement Executive and
Director for Acquisition Management

Lauren K. Didiuk 
Chief, Contract Law Division
Office of the General Counsel

SUBJECT: Open-Ended Indemnification Clauses

Background

On March 27, 2012, the Office of Legal Counsel (OLC) of the Department of Justice issued an opinion to the Department advising that the Anti-Deficiency Act is violated when a Commerce employee with contracting authority enters into an agreement providing for open-ended indemnification of the contractor.¹ In response to this opinion, the Department trained all of its employees with contracting authority to recognize these types of provisions, as well as other provisions that could result in an Anti-Deficiency Act violation or are unlawful in other respects. The following is the link to the training.² The training required employees to obtain a review of the vendor's terms and conditions from the Office of General Counsel's Contract Law Division (CLD).

Purpose

The purpose of this Procurement Memorandum is to explain changes to existing law regarding the effect of contract terms and conditions attempting to impose indemnification liability on the Government and to announce changes to existing procedures.

¹ <http://www.justice.gov/olc/2012/aag-ada-impls-of-consent-by-govt-empls.pdf>

² <https://max.omb.gov/community/x/apktJQ> (User ID and password to OMB Max required for access)

Required Action

On June 21, 2013, a *Federal Register* notice titled, "Federal Acquisition Regulation; Terms of Service and Open-Ended Indemnification, and Unenforceability of Unauthorized Obligations" was published amending the FAR Parts 12 and 13 to automatically strike indemnification provisions from agreements entered into using those authorities and to make it clear that these indemnification provisions are not enforceable against the Government.³

For procurements conducted under FAR Parts 12 or 13, employees with delegated procurement authority no longer need to be concerned with the presence of an indemnification provision and it is no longer required to obtain CLD review of vendor-provided terms and conditions for such provisions. However, acquisition professionals still need to be concerned with the presence of indemnification provisions in procurements conducted under FAR Part 15, and should consult CLD as appropriate.

Further, the June 21 interim rule focused only on open-ended indemnification clauses to address the concern raised in OLC's opinion and noted the existence of other clauses, such as automatic renewal provisions, that could result in a violation of the Anti-Deficiency Act if executed by an employee with delegated procurement authority. Acquisition employees should still be concerned with these provisions in acquisitions regardless of which FAR Part is applicable and may consult with a CLD attorney.

The training also covered various other types of unlawful terms and conditions that are commonly encountered during the course of conducting acquisitions, such as choice of law or unilateral change provisions. Although these types of provisions are unlawful, they do not present the potential for liability as is the case with provisions violating the Anti-Deficiency Act. CLD remains available to provide guidance to members of the acquisition community regarding problematic terms and conditions similar to those identified in the training materials.

cc: Michelle McClelland
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³ <http://www.gpo.gov/fdsys/pkg/FR-2013-06-21/html/2013-14614.htm>