

SUMMARY OF FINAL RULE

Federal Acquisition Regulation: Employment Eligibility Verification

August 2009

On November 14, 2008, the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council published a final rule that amends the Federal Acquisition Regulation (FAR) by requiring certain federal agency contracts that are performed within the United States to include a provision mandating use of the E-Verify program.¹ E-Verify is a voluntary, Internet-based program that allows employers to electronically verify the information a worker presents by accessing information in databases maintained by the Social Security Administration (SSA) and the U.S. Department of Homeland Security (DHS).² According to the final rule, in the initial fiscal year approximately 168,624 contractors and subcontractors and 3.8 million workers will be affected.³

Although a lawsuit was filed by business groups on December 23, 2008,⁴ and the effective date of the rule was postponed a number of times, in August 2009 the court ruled in favor of the government and dismissed the case.⁵ The rule, therefore, is effective on September 8, 2009, and applies to solicitations issued and contracts awarded after this date.⁶ The new rule also applies to future orders on indefinite-delivery/indefinite-quantity contracts if the remaining period of performance extends beyond March 8, 2009, and the amount of work or number of orders expected under the remaining performance period is “substantial.”⁷

■ Background

On August 10, 2007, the secretaries of DHS and the U.S. Department of the Treasury announced a “series of reforms the Bush administration will pursue to address border security and immigration challenges.”⁸ As part of the package, the administration announced that it would commence a rulemaking process to require all federal contractors and vendors to use E-Verify. On that same day, the Office of

¹ The final rule amends 48 CFR Parts 2, 12, 22 and 52, and was published in the Federal Register at 73 FR 67651–705 (Nov. 14, 2008). The proposed rule was published on June 12, 2008, at 73 FR 33374–81.

² For more information on E-Verify, see *Basic Information Brief: DHS Basic Pilot/E-Verify Program* (NILC, Mar. 2008), www.nilc.org/immsemplymnt/ircaempverif/e-verify_infobrief_2008-03-13.pdf.

³ 73 FR at 67701.

⁴ Chamber of Commerce of the United States of America, et al. v. Janet Napolitano, et al., No. 8:08-cv-03444-AW (D. Md., filed Dec. 23, 2008). NILC, together with the ACLU and MALDEF, filed an amicus brief in support of the plaintiffs.

⁵ *Id.*, Memorandum Opinion, Aug. 26, 2009.

⁶ 74 FR 26981 (June 5, 2009). Note that this was DHS’s fourth postponement of implementation. Implementation of the rule was first delayed until Feb. 20, 2009 (74 FR 1937 (Jan. 14, 2009)), then until May 20, 2009 (74 FR 5621 (Jan. 30, 2009)), and then until June 30, 2009 (74 FR 17793 (Apr. 17, 2009)).

⁷ 74 FR at 26981.

⁸ A copy is available at www.nilc.org/immlawpolicy/misc/dhs-admin_imm_measures_2007-08_10.pdf.

Management and Budget issued a memo stating that federal agencies should “encourage their existing and future contractors to use E-Verify.”⁹

Close to ten months later, on June 9, 2008, President Bush issued Executive Order (EO) 13465, “Economy and Efficiency in Government Procurement through Compliance with Certain Immigration and Nationality Act Provisions and the Use of an Electronic Employment Eligibility Verification System.”¹⁰ The EO requires that executive departments and agencies include a provision in contracts requiring use of “an electronic employment eligibility verification system designated by the Secretary of Homeland Security” to verify the employment of all new hires during the contract period and all persons assigned to the contract.¹¹ The final rule implements the EO and designates E-Verify as the electronic employment eligibility verification system to be used by federal contractors.

■ Summary of the Final Rule

NEW FEDERAL ACQUISITION REGULATION REQUIREMENTS

The rule requires all federal solicitations and contracts over \$100,000, lasting for a period of 120 days or more, to include a provision that contractors:

1. Enroll in E-Verify;
2. Use E-Verify for all new hires in the U.S.;
3. Use E-Verify for all workers assigned to the contract;¹² and
4. Include a provision in certain subcontracts for commercial or noncommercial services and construction that are over \$3,000, and that last for a period of more than 30 days, requiring use of E-Verify.

Contractors also may opt to reverify all existing workers hired after November 6, 1986,¹³ whether or not they are assigned to the contract. If a contractor takes this option, it must notify DHS and initiate verification within 180 days of notice to DHS or enrollment in E-Verify. The legality of this provision is particularly questionable, as the Basic Pilot (E-Verify) statute only authorizes the use of the program to verify new hires.¹⁴

DHS and SSA can terminate a federal contractor from using E-Verify if the contractor violates the terms of the memorandum of understanding that it signs with DHS and SSA.¹⁵ If this happens, the terminating agency must refer the contractor to a suspension or debarment official for possible suspension or debarment. If the determination is not to debar the contractor, the contractor must reenroll in E-Verify.

⁹ Memorandum from Stephen S. McMillin, Acting Director, U.S. Office of Management and Budget, “Verifying the Employment Eligibility of Federal Employees,” No. M-07-21, Aug. 10, 2007, www.whitehouse.gov/omb/memoranda/fy2007/m07-21.pdf.

¹⁰ 73 FR 33285-287 (June 11, 2008). Executive Order (EO) 13465 amends EO 12989 (61 FR 6091 (Feb. 15, 1996)), which previously amended EO 13286 (68 FR 10619 (Feb. 28, 2003)).

¹¹ 73 FR at 33286.

¹² “Assigned to contract” means an employee who was hired after Nov. 6, 1986, who is directly performing work in the United States under a contract subject to the final rule. Employees are not considered to be assigned to the contract if they (1) normally provide support work, such as indirect or overhead functions; and (2) do not perform any substantial duties applicable to the contract. See 73 FR at 67703-704.

¹³ The enactment date of the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359 (1986). Employees in the U.S. who were working for their present employers on or before Nov. 6, 1986, are exempt from having to establish that they are eligible to be employed in the U.S.

¹⁴ Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009-659 (Sept. 30, 1996). In the statute, the program’s name is “Basic Pilot.” The Bush administration started calling it “E-Verify” in Aug. 2007.

¹⁵ For a copy of the federal contractor MOU, see www.uscis.gov/files/nativedocuments/MOU.pdf.

EXCEPTIONS TO THE FAR REQUIREMENTS

1. Requirement to enroll in E-Verify

Certain federal contracts are exempt from the requirement, including those for:

- Commercially available off-the-shelf (COTS) items;¹⁶
- Items that, but for minor modifications, would be COTS items;
- Agricultural products shipped as bulk cargo¹⁷ that would otherwise have been categorized as COTS; or
- Commercial services that are (a) part of the purchase of a COTS item, (b) performed by the COTS provider, and (c) normally provided for that COTS item.

The final rule exempts COTS items because the government believes that COTS providers may choose not to do business with the government rather than enroll in E-Verify. If this were to happen, it could result in “an unacceptable reduction in the government’s access to items it needs in order to operate.”¹⁸

Additionally, in “exceptional” cases, the head of the contracting activity may waive the requirement to use E-Verify, either temporarily or for the period of performance.

2. Requirement to use E-Verify for new hires

The following entities may choose to verify only new hires assigned to the contract (instead of all new hires):

- An institution of higher education;
- A state or local government, or the government of a federally recognized Indian tribe; and
- A surety performing under a takeover agreement entered into with a federal agency pursuant to a performance bond.

3. Requirement to include E-Verify provision in certain subcontracts

Subcontractors that perform services that are part of the purchase of COTS items or items that, but for minor modifications, would be COTS items performed by the COTS provider, and that are normally provided for those COTS items, are not required to use E-Verify.

4. Option to use E-Verify to reverify all existing workers hired after November 6, 1986

If contractors take this option, they are not required to verify the following workers:

- Workers who have been previously verified by the contractor using E-Verify;
- Workers with active security clearance of “confidential,” “secret,” or “top secret”; or
- Workers for whom background investigations have been completed and credentials issued pursuant to Homeland Security Presidential Directive (HSPD) – 12, “Policy for a Common Identification Standard for Federal Employees and Contractors.”

¹⁶ COTS items are defined as “any item of supply” (e.g., food is an item of supply) that is (1) a commercial item; (2) sold in substantial quantities in the commercial marketplace; and (3) offered to the government, without modification, in the same form in which it is sold in the commercial marketplace. 73 FR at 67703.

¹⁷ “Bulk cargo” is cargo that is loaded and carried in bulk onboard ship without mark or count, in a loose unpackaged form, having homogenous characteristics. Examples include agricultural products and petroleum products. 73 FR at 67703.

¹⁸ 73 FR at 67678.

TIMEFRAMES FOR ENROLLMENT IN AND USE OF E-VERIFY BY FEDERAL CONTRACTORS ¹⁹

Contractors Not Enrolled in E-Verify at Time of Contract Award

TIMEFRAME	START POINT	REQUIRED ACTION
Within 30 days	Contract award	Enroll in E-Verify
Within 90 days	Enrollment in E-Verify	Verification of all <u>new</u> workers within 3 days of hire
Within 90 days	Enrollment in E-Verify	Verification of workers assigned to the contract
Within 30 days (if later than 90-day timeframe directly above) ²⁰	Workers are newly-assigned to the contract	Verification of workers newly-assigned to the contract
Within 180 days	Contract award	Optional to reverify <u>all</u> existing workers (not just those assigned to the contract)

Contractors Enrolled in E-Verify at Time of Contract Award

TIMEFRAME	START POINT	REQUIRED ACTION
Immediately (if enrolled in E-Verify 90 days or more)	Contract award	Verification of <u>new</u> workers within 3 days of hire
Within 90 days (if enrolled in E-Verify less than 90 days)	Enrollment in E-Verify	Verification of <u>new</u> workers within 3 days of hire
Within 90 days	Contract award	Verification of workers assigned to the contract
Within 30 days (if later than 90-day timeframe directly above) ²¹	Workers are newly-assigned to the contract	Verification of workers newly-assigned to the contract
Within 180 days	Notification to E-Verify Operations	Optional to reverify <u>all</u> existing workers (not just those assigned to the contract)

All Contractors

TIMEFRAME	START POINT	REQUIRED ACTION
Contracts with performance terms of less than 120 days	n/a	Not required to enroll in E-Verify
Subcontracts with performance terms less than 30 days	n/a	Not required to enroll in E-Verify

FOR MORE INFORMATION, CONTACT

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¹⁹ Note exceptions on page 3, above.

²⁰ The rule requires that workers assigned to the contract be verified within 90 days after enrollment in E-Verify *or* within 30 days of the worker's assignment to the contract, whichever date is later. See 73 FR at 67705.

²¹ The rule requires that workers assigned to the contract be verified within 90 days of the contract award *or* within 30 days of the worker's assignment to the contract, whichever date is later. See 73 FR at 67705.