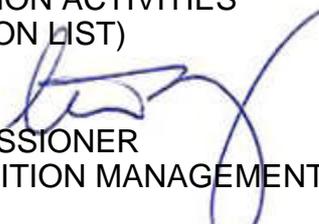


January 27, 2010

FAS INSTRUCTIONAL LETTER 2010-03

MEMORANDUM FOR ALL FAS ACQUISITION ACTIVITIES (QV DISTRIBUTION LIST)

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SUBJECT: Implementation of Employment Verification Requirements (E-Verify)

1. Purpose. The purpose of this Instructional Letter (IL) is to address changes in the Federal Acquisition Regulation (FAR) resulting from publication of FAR Case 2007-013, Employment Eligibility Verification, on November 14, 2008 in FAC 2005-29 (73 FR 65651). The applicability date of this new FAR rule was subsequently changed numerous times to the current applicability date of September 8, 2009 (see Amendment 4, 74 FR 26981). This IL provides guidance on how to implement the E-Verify requirements of FAR Case 2007-013 in all Federal Acquisition Service (FAS) solicitations and contracts, and the Department of Veterans Administration (VA) Federal Supply Schedule (FSS) solicitations and contracts.
2. Background. Federal contractors and subcontractors are required to begin using the U.S. Citizenship and Immigration Services' E-Verify system as of September 8, 2009, to verify their employees' eligibility to work in the United States as soon as they are awarded a contract containing the E-Verify clause.

This new FAR rule implements Executive Order 12989, as amended on June 6, 2008, directing federal agencies to require federal contractors to electronically verify the employment eligibility of their employees. The amended Executive Order reinforces the policy, first announced in 1996, that the federal government conduct business with companies that employ eligible workers. This new FAR rule requires federal contractors to use E-Verify to confirm the employment eligibility of all persons hired during the contract term, and to confirm the employment eligibility of federal contractors' current employees who are assigned to work on a federal contract within the United States.

Unless an exemption applies, solicitations issued and contracts awarded after September 8, 2009, must include FAR Clause, 52.222-54, Employment Eligibility Verification, requiring government contractors to use E-Verify. In addition, unless an exemption applies, this clause is required in subcontracts over \$3,000 for services. This clause is not applicable to contracts where performance takes place outside of the United States or the contract period of performance is less than 120 days. Contracts exempt from this rule include: those valued at less than or equal to the simplified acquisition threshold, those for commercial available off-the-shelf items (COTS), and those for items that would be COTS but for minor modifications.

Companies awarded a contract or order with the federal government will be required to enroll in E-Verify within 30 calendar days of the award date. In addition, contractors will

need to begin using the E-Verify system to confirm that all of their new hires and current employees directly working on federal contracts are authorized to work in the United States. Orders awarded before the effective date of the new FAR rule are not required to be modified.

3. Effective Date. Date of signature.
4. Termination Date. This IL expires one year from the effective date unless cancelled, extended, or incorporated into a handbook.
5. Applicability. This IL applies to all FAS contracting activities awarding and administering FAS contracts and VA acquisition activities awarding and administering Federal Supply Schedule (FSS) contracts.
6. Reference Regulations. This IL references FAR Subpart 22.18, Employment Eligibility Verification.
7. Instructions/Procedures. The following instructions/procedures apply to all clause changes delineated below.

A. Federal Supply Schedules.

- i E-Verify Applicability: FAR 22.1803 states that all solicitations and contracts that exceed the simplified acquisition threshold shall insert FAR clause 52.222-54, Employment Eligibility Verification, **except** those that:

- Are only for work that will be performed outside the United States;
- Are for a period of performance of less than 120 days;
- Are only for:
 - Commercially available off-the-shelf items (COTS);
 - Items that would be COTS items, but for minor modifications (as defined at paragraph (3)(ii) of the definition of "commercial item" at 2.101);
 - Items that would be COTS items if they were not bulk cargo; or
 - Commercial services that are --
 - (i) Part of the purchase of a COTS item (or an item that would be a COTS item, but for minor modifications);
 - (ii) Performed by the COTS provider; and
 - (iii) Are normally provided for that COTS item.

The following provides additional guidance on the applicability of the above exemptions to Schedule solicitations and contracts:

- Performance outside the United States: Since Schedule solicitations and contracts geographic scope requires domestic delivery within the 48 contiguous states, Alaska, Hawaii, Puerto Rico, Washington, DC, and U.S. territories (See GSAR Clause 552.238-78 Scope of Contract (Eligible

Ordering Activities), this exception does not apply to Schedule contracts.

- 120 Day Period of Performance: Since Schedule contract periods are longer than 120 days (See I-FSS-163 Option to Extend the Term of the Contract (Evergreen) (APR 2000)), the second exception will not apply to most Schedule contracts, except for those with less than 120 days remaining on the contract's period of performance with no contract options remaining.
 - COTS: The COTS exemption may apply to certain Schedule solicitations and contracts. In determining whether this exemption applies to certain FSS contracts, it is important to note the difference between the definitions of a commercial item for services found in FAR 2.101 commercial item (6) and the definition of commercial services in FAR 22.1803 (4). The exemption provided by FAR 22.1803 (4) has more limitations than the FAR 2.101 commercial item (6) definition for services in that FAR 22.1803 (4) exempts only commercial services that are a part of a purchase of a COTS item of supply, performed by the COTS provider, and are normally provided for that COTS supply item (see 22.1803 (4)(i)(ii)(iii)).
- ii Schedule Solicitation Refresh: Unless an exemption applies (see FAR 22.1802 and the exemption requirements outlined above in paragraph (i)) or in exceptional cases, pursuant to 22.1802(d), the Head of the Contracting Activity (HCA) may waive the E-Verify clause for a Schedule solicitation, FAS and VA acquisition activities awarding and administering Schedule contracts (hereinafter referred to as Schedules) should immediately refresh all Schedule solicitations, either in the Solicitation Writing System (SWS) or manually, to include FAR Clause 52.222-54, Employment Eligibility Verification into all FAS solicitations and VA Schedule solicitations. This clause is currently loaded in SWS and marked as required as applicable for all Schedule contracts.

In exceptional cases, pursuant to 22.1802(d), the Head of the Contracting Activity (HCA) may waive the E-Verify clause for a Schedule solicitation. This waiver authority may not be delegated. In addition, the Contracting Director may determine that all of the SINs of a Schedule contract meet the criteria for an exemption under FAR 22.1803 and the contract is therefore exempt from the requirement. All waivers or exemptions to the E-Verify requirements must be documented in a written determination that shall be maintained in the master contract file. A copy of the written determination shall be sent to the MAS Program Office within the Office of Acquisition Management within 14 calendar days of the issuance of this IL.

If a Schedule contract is determined to be exempt from the requirements of E-Verify pursuant to FAR 22.1803, each time a change to offerings under that Schedule is sought through the GSA Form 1649 process, a new written determination should be made in the master contract file regarding the applicability of E-Verify to the amended solicitation.

- iii Individual Schedule Contract Exemptions: If a Schedule contractor believes that one or more exemptions outlined in FAR 22.1803 is applicable to their offer or contract, the contractor may request an individual contract exemption from the E-Verify clause. Procuring Contracting Officers (PCOs) shall review the offer or the contract and make an independent determination of the appropriateness of the exemption. PCOs may seek the advice and assistance of legal counsel as necessary in making the determination. A new determination as to the

applicability of E-Verify shall be made for all exempt contracts by the PCO each time a contract modification request is submitted.

- iv In-House Schedule Offers: Schedule offers received prior to the solicitation refresh must be amended unless an exception applies as outlined in paragraph 7.A. i, to include the E-Verify Clause prior to contract award.
- v. E-Verify Contract Modification-FAS: The Office of Acquisition Management will issue a bilateral modification pursuant to FAR 1.108(d)(3) through the mass modification tool to Schedule contractors unless the contract has been determined to be either exempt or the requirement waived by their HCA. Contractors will have the opportunity to either: (1) accept the bilateral modification, (2) reject the modification, or (3) indicate that the requirement is not applicable to the contract because one of the enumerated exemptions in FAR 22.1803 applies. If the contractor responds by rejecting the modification or indicating that the requirement is not applicable, the PCO will be notified and shall make a determination as delineated in 7.A. iii.
- vi E-Verify Contract Modification-VA: The VA will issue a bilateral modification pursuant to FAR 1.108(d)(3), to Schedule contractors unless the contract has been determined to be either exempt or the requirement waived by the HCA. Contractors will have the opportunity to either: (1) accept the bilateral modification, (2) reject the modification, or (3) indicate that the requirement is not applicable to the contract because one of the enumerated exemptions in FAR 22.1803 applies. If the contractor responds by rejecting the modification or that the requirement is not applicable, the PCO will be notified and shall make a determination as delineated in 7.A. iii.

B. Other FAS Contracts (i.e. Government-wide Acquisition Contracts (GWACs), Multi-Agency Contracts (MACs), and Indefinite Delivery/Indefinite Quantity (IDIQs) Contracts).

- i Solicitations: Unless an exception is provided in accordance with FAR 22.1803, or a waiver is approved by the HCA and a written determination is placed in the contract file, then consistent with FAR 1.108(d)(1), all other FAS solicitations shall include FAR clause 52.222-54 Employment Eligibility Verification.
- ii Amendment of Solicitations and Offers: Offers received prior to the inclusion of the clause in solicitations must be amended unless an exception applies as outlined in paragraph B. iii. below, to include the E-Verify Clause prior to contract award.
- iii E-Verify Exemptions: Exemptions to the E-Verify requirement are the same as outlined in [FAR 22.1803](#) and as described in paragraph 7.A. i. above. All non-Schedule FAS solicitations and contracts that exceed the simplified acquisition threshold shall insert FAR clause 52.222-54, Employment Eligibility Verification, **except** those that:
 - Are only for work that will be performed outside the United States;
 - Are for a period of performance of less than 120 days;
 - Are only for:
 - Commercially available off-the-shelf items;

- Items that would be COTS items, but for minor modifications (as defined at paragraph (3)(ii) of the definition of "commercial item" at 2.101);
- Items that would be COTS items if they were not bulk cargo; or
- Commercial services that are--
 - (i) Part of the purchase of a COTS item (or an item that would be a COTS item, but for minor modifications);
 - (ii) Performed by the COTS provider; and
 - (iii) Are normally provided for that COTS item.

In exceptional cases, pursuant to 22.1802(d), the Head of the Contracting Activity (HCA) may waive the E-Verify clause for a solicitation. This waiver authority may not be delegated. All waivers or exemptions to the findings must be documented in a written determination that shall be maintained in the master contract file.

- iv Individual Contract Exemptions: If a FAS contractor believes that one or more exemptions outlined in FAR 22.1803 is applicable to their contract, the contractor may request an exemption from the E-Verify clause. PCOs shall review the offer or the contract and make an independent determination of the appropriateness of the exemption. Procuring Contracting Officers may seek the advice and assistance of legal counsel as necessary in making the determination. A new determination as to the applicability of E-Verify shall be made on all exempt contracts by the PCO each time a modification request is submitted on the basic contract as modified.
- v. E-Verify Contract Modification: Basic contracts must be bilaterally modified to incorporate FAR clause 52.222-54 Employment Eligibility Verification if the term of the contract will extend beyond 120 days after the effective date (date of IL signature) unless the contract has been determined to be either exempt or the requirement is waived by the HCA.

C. Applicability to FAS Task and Delivery Orders

The E-Verify clause is not required to be incorporated into FAS orders that were awarded before the basic contract was modified to include the clause. The E-Verify clause applies only to orders solicited or awarded after the modification effective date of incorporation of the E-Verify clause into the basic contract or if the basic contract was award containing the E-Verify clause.

8. Questions and Answers

- A. If the E-Verify clause is applicable, can the Government unilaterally modify FAS contracts to include the clause?

The clause may **only** be added on a bilateral basis.

- B. What remedies are available to the Government if a FAS contract is determined by the PCO to be subject to the E-Verify requirement, but the contractor refuses to accept the bilateral modification?

The PCO may utilize all existing contractual rights including canceling (applicable to Schedule contracts) the contract pursuant to the cancellation clause (See 552.238-73

Cancellation (September) 1999) or termination of the contract pursuant to the applicable clause prescribed in FAR 49.5. PCOs may seek the advice and assistance of legal counsel as necessary before initiating any contractual action. PCOs should be cognizant of the disparate treatment of those contractors who reject the modification but are not exempt from the requirement and should ensure that remedy for noncompliance is applied equitably.

- C. What documentation shall a PCO include in their written determination for the contract file?

A PCO shall draft a written determination in the nature of a Determination and Findings (D&F) as delineated in FAR 1.704 delineating the facts supporting an exemption finding.

- D. If the E-Verify clause, FAR 52.222-54, is included in a contract, what must the contractor do?

Under the final rule, if not already enrolled in the E-Verify system, employers are required to enroll in E-Verify and initiate verification of all new employees and employees currently assigned to the contract. Employees working on orders awarded before the effective date of the FAR rule are excluded from the requirement.

If the contractor has already enrolled in E-Verify the contractor will need to update their profile through the "Maintain Company" page on the E-Verify website and verify all new employees and employees assigned to the contract. Once the contractor designates itself as a federal contractor in the E-Verify system, all of the contractor's E-Verify users will need to take a federal contractor tutorial that explains the new policies and features that are unique to federal contractors.

- E. When must a contractor enroll in E-Verify?

When a contractor is awarded a contract or order that includes the E-Verify clause, or the contract or order is modified to include the E-Verify clause, the contractor and any covered subcontractors on the project are required to enroll in the E-Verify program within 30 calendar days of the contract, or subcontract award date. If the E-Verify clause is included in the contract through a modification then the company is required to participate in E-Verify within 30 calendar days of the modification date.

- F. How does a contractor enroll in E-Verify?

A contractor needs to enroll in the program before they can start using E-Verify. During enrollment, the contractor will be asked to provide some basic contact information and agree to follow the rules of the program. At the end of the enrollment process, the contractor will be required to sign an e-Verify Memorandum of Understanding (MOU) that provides the terms of agreement between the company and DHS. GSA is not a party to this MOU.

The Employer Registration Link is: <https://everify.uscis.gov/enroll/StartPage.aspx?JS=YES>

- G. Does E-Verify apply to subcontracts under a FAS contract or order that contains the E-Verify requirement?

Yes, the rule extends the E-Verify requirement to subcontracts for services with a value over \$3,000, except for commercial services that are part of the purchase of a

COTS item (or an item that would be a COTS item, but for minor modifications), performed by the COTS provider, and are normally provided for that COTS item.

H. Can a subcontractor verify under their prime's MOU?

No. Each employer must enter into a separate MOU with the Department of Homeland Security (DHS) and the Social Security Administration (SSA).

I. Does the rule apply to FAS contracts where contract performance is outside the United States?

The rule applies to contracts where the employees are performing work in the United States, which is currently defined to include the fifty States and the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands. Where contract performance is only for work to be performed outside of the United States, the contract is exempt from the requirement.

J. Can a contractor's entire workforce be verified?

Yes. Federal contractors and subcontractors have the option of verifying their entire workforce, both new hires and existing employees -- including those not assigned to a federal contract. If the contractor elects to do this, they must notify DHS by updating their company's profile through the "Maintain Company" page if they are a current participant, or during enrollment if they are a new participant. A contractor that chooses to exercise this option must initiate an E-Verify query for each employee in the contractor's entire work force within 180 days of updating its company profile.

K. What employees are not considered to be directly performing work under a FAS contract and therefore excluded?

Those employees who normally perform support work, such as general company administration, indirect or overhead functions, and do not perform any substantial duties applicable to the contract or order would be excluded.

L. A company is required to use E-Verify as a federal contractor for the first time. How do they proceed?

If a company has not yet enrolled in E-Verify, then they have 30 days from the date of contract award to enroll and 90 days from the date of their enrollment with E-Verify, to initiate verification queries for employees already on their staff who will be working on the contract and to begin using the system to verify newly hired employees. After this 90-day phase-in period, they will be required to initiate verification of each newly hired employee within 3 business days after their start date. To meet this three-day requirement, employers may initiate verification of a newly hired employee before their start date if the employee has accepted the job offer and filled out the Form I-9. Please note that pre-screening of job applicants is not allowed; the system may be used for new hires only after the employee has been offered the job and has accepted. Please also remember that they must continue to use E-Verify for the life of the contract for all their new hires, whether or not they are employees assigned to the contract, unless certain exceptions apply.

M. A company has already been using E-Verify for more than 90 days. When must they begin verifying existing employees assigned to work on a federal contract that contains the E-Verify clause?

If a company has been enrolled in E-Verify for more than 90 days, then they are required to continue to initiate verification of newly hired employees within three business days of their start date, but they have 90 days from the contract award date to begin using E-Verify for each employee already on their staff who are assigned to the contract. The transition to using the system as a federal contractor does not allow a federal contractor to stop using E-Verify for their new hires on the standard three-day schedule. The 90-day window in the FAR rule to start using E-Verify for new hires applies to new E-Verify users and is intended to provide additional implementation time.

Please remember that federal contractors are required to continue using E-Verify throughout the duration of their federal contract for all new hires, whether or not they are employees assigned to the contract, unless a company falls under one of the exceptions to this policy.

- N. A company's Federal contract has ended. Do they need to notify United States Citizen and Immigration Service (USCIS) if they no longer want to participate in E-Verify?

Yes. Federal contractors who no longer wish to participate in E-Verify after a contract has ended can terminate their participation by selecting the "request termination" link in the E-Verify system. If the company fails to do so then the terms of the MOU remain in place.

- O. What is the effect on a Federal Supply Schedule contractor's contract in regard to clause 52.212-5 if the contractor previously rejected the Recovery Act modification FX75?

In this situation since the FSS contractor did not accept the Recovery Act modification (FX 75) the operative clause in their FSS Schedule contract would be 52.212-5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders -- Commercial Items BASE Clause (September 2009). If a FSS contractor did accept the Recovery Act modification then 52.212-5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders -- Commercial Items (Sept 2009), Alternate II (May 2009) would be operative instead.