



COURT DECISION CLEARS WAY FOR E-VERIFY IMPLEMENTATION

A recent court decision has cleared the way for the U.S. government to require many government contractors to participate in the Department of Homeland Security's new E-Verify program.

BACKGROUND

In June 2008, the Bush administration issued an Executive Order requiring certain federal contractors to participate in the E-Verify program.¹ On November 14, 2008, the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the "Councils") published a final rule amending the Federal Acquisition Regulation ("FAR") to implement this Executive Order (the "Final Rule").² The Final Rule requires certain federal contractors to enroll in the E-Verify system maintained by the Department of Homeland Security and to utilize the E-Verify system

to ensure that all new hires and certain existing employees are eligible to work in the United States (the "Program").

APPLICABILITY AND EXEMPTIONS

The Program generally applies only to solicitations issued and contracts awarded after September 8, 2009, the new effective date for the Final Rule.³ New orders issued under existing indefinite-delivery/indefinite-quantity ("ID/IQ") contracts will not automatically be subject to the Program's requirements. Instead, existing contracts will be covered only if an exemption does not apply and if there is a *bilateral* contract modification to incorporate the E-Verify clause. The new regulation instructs Contracting Officers to bilaterally modify an ID/IQ contract if (1) it has a remaining period of performance extending beyond March 8,

¹ E.O. 13465 (June 6, 2008).

² 73 Fed. Reg. 67651 (Nov. 14, 2008).

³ 74 Fed. Reg. 26981 (June 5, 2009).

2010, and (2) the Contracting Officer determines there is a “substantial” amount of work remaining under the contract.⁴

A number of provisions in the Final Rule further limit the applicability of the Program. First, it is limited to prime contracts with the U.S. government with a period of performance longer than 120 days and a value greater than \$100,000.⁵ The new E-Verify rules apply to lower-tier contracts only if they exceed \$3,000 and are for services or construction.⁶ In addition, the Final Rule exempts contracts for Commercially Available Off-the-Shelf (“COTS”) items, items that would be COTS items but for minor modifications, and select services that accompany COTS items.⁷ Finally, the Final Rule permits the head of an agency’s contracting activity to waive E-Verify requirements for a contract, subcontract, or a class of contracts or subcontracts in “exceptional cases.”⁸ The Councils intentionally did not define “exceptional cases” “in order to allow the head of a contracting activity the flexibility to use this waiver as unique situations arise within each agency.”⁹ Contracts that meet the Final Rule’s application criteria are known as “Covered Contracts” and are subject to the Program’s requirements.

Only employees working in the United States—defined as including the 50 states, the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands—are covered by the Program.¹⁰ Subject to this condition, the Final Rule generally applies to (1) all employees hired after the effective date¹¹ and (2) existing employees hired after November 6, 1986, that are assigned to work on a Covered Contract.¹² The Final Rule thus does not cover existing employees hired before November 6, 1986, or existing employees that are not assigned to work on a Covered Contract.¹³ The Final Rule also provides a limited number of exemptions for specific

4 *Id.*
5 73 Fed. Reg. at 67704.
6 *Id.* at 67705.
7 *Id.* at 67704.
8 *Id.*
9 *Id.* at 67677.
10 *Id.* at 67704.
11 However, institutes of higher education, state and local governments, and federally recognized Indian Tribes only have to verify employees assigned to a covered contract.
Id.
12 *Id.* at 67704-05.
13 *Id.*

types of employees, such as those holding an active security clearance at the confidential, secret, or top secret level.¹⁴

UNSUCCESSFUL LEGAL CHALLENGE

Implementation of the Final Rule has been delayed since its issuance due to a legal challenge brought by a group of plaintiffs, including the U.S. Chamber of Commerce, in the U.S. District Court for the District of Maryland. On August 25, 2009, the district court denied the plaintiffs’ requests for relief.¹⁵ As a result, the new E-Verify rules will take effect on September 8, 2009. Jones Day continues to help companies negotiate the evolving landscape of government procurement law, implement effective compliance programs, and resolve problems that arise in all aspects of the government contracting process.

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14 *Id.*
15 *Chamber of Commerce, et al. v. Secretary Napolitano*, Civil Action No. AW-08-3444 (D. Md. Aug. 25, 2009).

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