



New Requirement for Doing Business with the Government

*Mandatory use of E-Verify to Confirm Employees' Eligibility to
Work In The United States*

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The contentious political issue of immigration reform has spilled over into the government contract arena. Mandated government contractor and subcontractor use of the Department of Homeland Security's E-Verify employment eligibility system becomes effective January 15, 2009. The E-Verify system is an internet-based tool designed to confirm a worker's eligibility to work in the United States.

Effective January 15, 2009, if you have a Federal government contract or subcontract, you may be required to use E-Verify to verify employment eligibility of all your new hires working in the United States. You also may be required to use E-verify to confirm employment eligibility of all your current employees assigned to work directly on a Federal Government contract or subcontract—even if you previously determined the worker's employment eligibility by a means other than E-Verify.

Subject to certain minor exceptions, the requirement applies to all employees hired after November 6, 1986 who are directly working on a contract covered by the requirement. It does not, however, reach employees who perform only an overhead function for a contract covered by the requirement.

The new requirement is implemented by a new Final Rule issued by The Civilian Acquisition Council and the Defense Acquisition Council on Friday November 14, 2008. The Final Rule amends the Federal Acquisition Regulation ("FAR") to include a clause in federal contracts valued greater than \$100,000 that requires contractors and subcontractors to use the E-Verify system. See. 73 Fed. Reg. 67651 (November 14, 2008).

The rule makes no exception for small businesses and no exceptions for companies whose business only includes a small percentage of Federal Government work. It does, however, make exception for contracts for supply of "Commercially available off-the-shelf ("COTS") items" and for contracts with institutions of higher learning, state and local governments, federally recognized Indian tribes or sureties performing takeover functions. Because the rule is implemented by the FAR, it is presumed that it will have no application to grants, cooperative agreements, or non-FAR covered contracts.

E-VERIFY

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The final rule has four main requirements:

- If not already enrolled in E-Verify, contractors must enroll in E-Verify within 30 days of contract award.
- Within 90 days of enrolling in E-Verify contractors must begin to use E-Verify for all new hires who are working in the United States within 3 days of their hire date.
- Within 90 days of enrolling in E-Verify, or within 30 days of assigning an employee to work on a federal contract, whichever is later, contractors must initiate verification of all employees assigned to work on the contract.
- Contractors must also incorporate the new FAR clause in all subcontracts valued over \$3,000 related to the prime contract work.

In addition to the express requirements of the new Final Rule, contractors and subcontractors subject to the E-Verify requirement also will be required to comply with internal terms of use requirements of the E-Verify system. Those internal terms of use are detailed in a separate Memorandum of Understanding (“MOU”) to be executed by affected contractors at the end of the E-Verify enrollment process. The MOU is between the affected contractor and the Department of Homeland Security and the Social Security Administration. See <http://www.uscis.gov/files/natedocuments/MOU.pdf>

Use of the E-Verify system is free. However, according to the rule’s preamble, contractors can recover their costs associated with complying with the new rule by including such costs in their proposed prices for the work. 73 Fed. Reg. at 67672.

The new rule reflects the United States Government’s desire to avoid doing business with contractors that use workers who are not authorized to work in the United States. The E-Verify System is expected to achieve a higher level of verification accuracy than that previously achieved through the I-9 verification process alone. Id. at 67673. That said, compliance with the E-Verify rule does not change the Federal law requirement to complete I-9 forms on all newly hired employees. Therefore, contractors and subcontractors who use E-Verify must continue to complete I-9 forms for their employees.

The Government Contracts team at Brown Rudnick helps clients resolve a wide range of complex business disputes. From prosecuting and defending bid protests before the Government Accountability Office (GAO), to asserting and defending claims before courts and boards of contract appeals, to investigating and defending civil and criminal fraud accusations, this team delivers proven abilities and a grounded perspective.

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