

## **CLIENT ALERT**

### **FINAL RULE REQUIRING FEDERAL CONTRACTORS TO USE E-VERIFY PUBLISHED IN THE FEDERAL REGISTER**

*November 14, 2008*

The U.S. Citizenship and Immigration Services (“USCIS”) published a final rule requiring certain federal contractors to enroll in and use the E-Verify system to check the employment authorization of new hires and of employees assigned to federal contracts. This final rule amends the Federal Acquisition Regulations (“FAR”) and implements President Bush’s June Executive Order mandating electronic employment eligibility verification by federal contractors. E-Verify is an Internet-based system administered by USCIS that allows employers to verify the employment eligibility of their employees based on the information provided by the employee on his or her Form I-9. E-Verify checks this information electronically against records contained in Social Security Administration (SSA) and Department of Homeland Security (“DHS”) and Social Security Administration (SSA) databases.

Consistent with the Executive Order, the final rule requires certain contractors to verify work authorization of their new hires through enrollment in and use of the E-Verify system. These contractors must also verify the employment eligibility of any current employee assigned by the contractor to perform work within the United States on the federal contract.

The final rule will be effective on January 15, 2009. It applies only to solicitations issued and contracts awarded after January 15, 2009. In addition, the final rule requires that the contract contain language specifically requiring participation in E-Verify. Thus, the E-Verify requirement only applies to contracts awarded after January 15, 2009 that contain the FAR E-Verify clause. When a contractor wins the bid on a federal contract on or after January 15, 2009 that contains the FAR E-Verify clause, the contractor will be required to enroll in the E-Verify program within 30 calendar days of the contract award date. After enrollment, there is a 90 day phase-in period for the contractor to begin verifying both new and current employees under E-Verify.

The final rule also provides a narrower definition of affected contracts than the original proposed rule. The final rule requires the insertion of the E-Verify clause only in prime federal contracts with a period of performance longer than 120 days and a value above the simplified acquisition threshold (\$100,000). Subcontracts are only covered where such contracts flow from a prime contract that includes the E-Verify clause if those subcontracts are for services or for construction with a value over \$3,000. The rule also does not apply to contracts to be performed outside the United States, or for acquisition of commercially available off-the-shelf items.

While current contracts are not affected, contractors with indefinite-delivery/indefinite-quantity contracts modified after the January 15<sup>th</sup>, 2009 effective date of the rule to include the FAR E-Verify clause for future orders will be required to enroll in E-Verify once their contracts are modified.

Federal contractors will generally be required to verify the employment eligibility of all new hires, whether they will work under the contract or not. Certain contractors (institutions of higher education, state and local governments, governments of federally recognized Native American tribes, and sureties performing under a takeover agreement entered into with a federal agency) will have the option of using E-Verify only for employees assigned to a covered federal contract.

The introductory comments to the final rule also clarify that the term “contract” as used in the rule does not extend to federal grants and cooperative agreements.

We are preparing a Client Update with further analysis of the provisions of this rule for affected clients. USCIS has also provided FAQs, available at [http://www.uscis.gov/files/article/FAR\\_FAQ\\_13nov08.pdf](http://www.uscis.gov/files/article/FAR_FAQ_13nov08.pdf).