

12623801

**FAR Case 2007-013  
Employment Eligibility Verification  
DRAFT final rule**

**October 30, 2008**

*[Additions to the FAR are **[bolded and bracketed]**.*

*Deletions from the FAR or from the proposed rule are ~~lined through~~.*

*Changes from the proposed rule are underlined.*}]

**PART 2—DEFINITIONS OF WORDS AND TERMS**

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**SUBPART 2.1—DEFINITIONS**

**2.101 Definitions.**

\* \* \* \* \*

“United States,” when used in a geographic sense, means the 50 States and the District of Columbia, except as follows:

- (1) For use in Subpart 3.10, see the definition at 3.1001.
- (2) For use in Subpart 22.8, see the definition at 22.801.
- (3) For use in Subpart 22.10, see the definition at 22.1001.
- (4) For use in Subpart 22.13, see the definition at 22.1301.
- (5) For use in Subpart 22.16, see the definition at 22.1601.
- ~~[(6) For use in Subpart 22.18, see the definition at 22.1801]~~
- ~~(6)~~ [(7)] For use in Part 25, see the definition at 25.003.
- ~~(7)~~ [(8)] For use in Part 27, see the definition at 27.001.
- ~~(8)~~ [(9)] For use in Subpart 47.4, see the definition at 47.401.

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**PART 12--ACQUISITION OF COMMERCIAL ITEMS**

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**SUBPART 12.3--SOLICITATION PROVISIONS AND CONTRACT CLAUSES FOR  
THE ACQUISITION OF COMMERCIAL ITEMS**

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**12.301 Solicitation provisions and contract clauses for the acquisition of commercial  
items.**

\* \* \* \* \*

(d) Other required provisions and clauses.

\* \* \* \* \*

**~~[(3) Insert the clause at 52.222-XX, Employment Eligibility Verification, as  
prescribed in 22.1803.]~~**

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**PART 22--APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS**

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**22.102-1 Policy.**

Agencies shall cooperate, and encourage contractors to cooperate with Federal and State agencies responsible for enforcing labor requirements such as—

- (a) Safety;
- (b) Health and sanitation;
- (c) Maximum hours and minimum wages;
- (d) Equal employment opportunity;
- (e) Child and convict labor;

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- (f) Age discrimination;
- (g) Disabled and Vietnam veteran employment; and
- (h) Employment of the handicapped-[:; and
- (i) **Eligibility for employment under United States immigration laws.]**

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**[SUBPART 22.18--EMPLOYMENT ELIGIBILITY VERIFICATION.**

**22.1800 Scope.**

**This subpart prescribes policies and procedures requiring contractors to utilize the Department of Homeland Security (DHS), United States Citizenship and Immigration Service's employment eligibility verification program (E-Verify) as the means for verifying employment eligibility of certain employees.**

**22.1801 Definitions.**

**As used in this subpart—**

**~~“Assigned employee” means an employee who was hired after November 6, 1986, who is directly performing work, in the United States, under a contract that is required to include the clause prescribed at 22.1803.~~**

**“Commercially available off-the-shelf (COTS) item”—**

- (1) Means any item of supply that is--**
  - (i) A commercial item (as defined in paragraph (1) of the definition at FAR 2.101);**
  - (ii) Sold in substantial quantities in the commercial marketplace; and**
  - (iii) Offered to the Government, without modification, in the same form in which it is sold in the commercial marketplace; and**

(2) Does not include bulk cargo, as defined in section 3 of the Shipping Act of 1984 (46 U.S.C. App. 1702), such as agricultural products and petroleum products. Per 46 CFR 525.1 (c)(2), “bulk cargo” means cargo that is loaded and carried in bulk onboard ship without mark or count, in a loose unpackaged form, having homogenous characteristics. Bulk cargo loaded into intermodal equipment, except LASH or Seabee barges, is subject to mark and count and, therefore, ceases to be bulk cargo.

“Employee assigned employee to the contract” means an employee who was hired after November 6, 1986, who is directly performing work, in the United States, under a contract that is required to include the clause prescribed at 22.1803. An employee is not considered to be directly performing work under a contract if the employee—

- (1) Normally performs support work, such as indirect or overhead functions; and
- (2) Does not perform any substantial duties applicable to the contract.

“Subcontract” means any contract, as defined in FAR 2.101, entered into by a subcontractor to furnish supplies or services for performance of a prime contract or a subcontract. It includes but is not limited to purchase orders, and changes and modifications to purchase orders.

“Subcontractor” means any supplier, distributor, vendor, or firm that furnishes supplies or services to or for a prime contractor or another subcontractor.

“United States,” as defined in 8 U.S.C. 1101(a)(38), means the 50 States, the District of Columbia, Puerto Rico, Guam, and the U.S. Virgin Islands.

22.1802 Policy.

(a) Statutes and Executive orders require employers to abide by the immigration laws of the United States and to employ in the United States only individuals who are eligible to work in the United States. The E-Verify program provides an Internet-based means of verifying employment eligibility of workers employed in the United States, but is not a substitute for any other employment eligibility verification requirements.

(b) Contracting officers shall include in solicitations and contracts, as prescribed at 22.1803, requirements that Federal contractors must—

(1) Enroll as Federal contractors in E-Verify;

(2) Use E-Verify to verify employment eligibility of all new hires working in the United States, except that the contractor would verify only new hires assigned to the contract if the contractor is—

(i) An institution of higher education (as defined at 20 U.S.C. 1001(a));

(ii) A State or local government or the government of a Federally recognized Indian tribe; or

(iii) A surety performing under a takeover agreement entered into with a Federal agency pursuant to a performance bond;

(3) Use E-Verify to verify employment eligibility of all employees assigned to the contract; and

(4) Include these requirements, as required by the clause at 52.222-XX, in subcontracts for—

(i) Commercial or noncommercial services, 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; and

(ii) Construction.

(c) Contractors may elect to verify employment eligibility of all existing employees working in the United States who were hired after November 6, 1986, instead of just those employees assigned to the contract. The contractor is not required to verify employment eligibility of—

(1) Employees who hold an active security clearance of confidential, secret, or top secret or

(2) Employees for whom background investigations have been completed and credentials issued pursuant to Homeland Security Presidential Directive (HSPD) 12.

~~(b) Contracting officers shall include in contracts, as prescribed at 22.1803, a requirement for contractors to—~~

~~(1)(i) Enroll in the E-Verify program within 30 calendar days of contract award, and use E-Verify within 30 calendar days thereafter to verify employment eligibility of their employees assigned to the contract at the time of enrollment in E-Verify; or~~

~~(ii) If the contractor is already enrolled in E-Verify, use E-Verify within 30 calendar days of contract award to verify employment eligibility of their employees assigned to the contract; and~~

~~(2) Following this initial period, initiate verification of all new hires of the contractor and of all employees newly assigned to the contract within three business days of their date of hire or date of assignment to the contract~~

~~(c) Subcontractor flowdown. The contracting officer shall require contractors to flow down the requirement to use E-Verify to subcontracts that—~~

~~—(1) Are for commercial or noncommercial services or construction;~~

~~—(2) Exceed \$3,000; and~~

~~—(3) Include work performed in the United States.~~

(d) In exceptional cases, the head of the contracting activity may waive the E-Verify requirement ~~to insert the clause at 52.222-XX, Employment Eligibility Verification,~~ for a contract or subcontract or a class of contracts or subcontracts, either temporarily or for the period of performance. This waiver authority may not be delegated.

~~(e) DHS and the Social Security Administration (SSA) may terminate a contractor’s MOU and deny access to the E-Verify system in accordance with the terms of the MOU. If DHS or SSA terminates a contractor’s MOU, the terminating agency must refer the contractor to a suspension or debarment official for possible suspension or debarment action. During the period between termination of the MOU and a decision by the suspension or debarment official whether to suspend or debar, the contractor is excused from its obligations under paragraph (b) of the clause at 52.222-XX. If the contractor is suspended or debarred as a result of the MOU termination, the contractor is not eligible to participate in E-Verify during the period of its suspension or debarment. If the suspension or debarment official determines not to suspend or debar the contractor, then the contractor must reenroll in E-Verify.~~

22.1803 Contract clause.

Insert the clause at 52.222-XX, Employment Eligibility Verification, in all solicitations and contracts that exceed the simplified acquisition threshold, except those that—

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- ~~(a) Are only for work that will be performed outside the United States;~~
- ~~(b) Are for a period of performance of less than 120 days; or~~
- ~~(c) Are only for—~~
  - ~~(1) Commercially available off-the-shelf items; ~~or~~~~
  - ~~(2) Items that would be COTS items, but for minor modifications (as defined at paragraph (3)(ii) of the definition of "commercial item" at FAR 2.101); ~~or~~~~
  - ~~(3) Items that would be COTS items if they were not bulk cargo; or~~
  - ~~(4) 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;~~
- ~~(b) Have a value that does not exceed the micropurchase threshold or a period of performance of less than 120 days; ~~re for a period of performance of less than 120 days;~~~~
- ~~or~~
- ~~(c) Do not include any work that will be performed in the United States.]~~

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## PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

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### 52.212-5 Contract Terms and Conditions Required Implementing Statutes or Executive Orders-Commercial Items.

As prescribed in 12.301(b)(4), insert the following clause:



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**CONTRACT TERMS AND CONDITIONS REQUIRED TO IMPLEMENT STATUTES  
OR EXECUTIVE ORDERS—COMMERCIAL ITEMS (SEP-2008 [DATE])**

\* \* \* \* \*

**(b)**

\* \* \* \* \*

**[ (25) 52.222-XX, Employment Eligibility Verification (DATE). ( Executive Order  
12989). (Not applicable to the acquisition of commercially available off-the-shelf items or  
certain other types of commercial items as prescribed in FAR 22.1803.)]**

**[Note to editor: RENUMBER PARAGRAPHS BELOW]**

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**(e)(1)**

\* \* \* \* \*

**[(x) 52.222-XX, Employment Eligibility Verification (DATE).]**

**[Note to editor: RENUMBER PARAGRAPHS BELOW]**

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**[52.222-XX Employment Eligibility Verification.**

**As prescribed in 22.1803 ~~and 12.301(d)(3)~~, insert the following clause:**

**EMPLOYMENT ELIGIBILITY VERIFICATION (DATE)**

**(a) Definitions. As used in this clause—**

**“Commercially available off-the-shelf (COTS) item”—**

**(1) Means any item of supply that is--**

**(i) A commercial item (as defined in paragraph (1) of the definition at FAR 2.101);**

(ii) Sold in substantial quantities in the commercial marketplace; and

(iii) Offered to the Government, without modification, in the same form in which it is sold in the commercial marketplace; and

(2) Does not include bulk cargo, as defined in section 3 of the Shipping Act of 1984 (46 U.S.C. App. 1702), such as agricultural products and petroleum products. Per 46 CFR 525.1 (c)(2), "bulk cargo" means cargo that is loaded and carried in bulk onboard ship without mark or count, in a loose unpackaged form, having homogenous characteristics. Bulk cargo loaded into intermodal equipment, except LASH or Seabee barges, is subject to mark and count and, therefore, ceases to be bulk cargo.

"Employee assigned employee to the contract" means an employee who was hired after November 6, 1986, who is directly performing work, in the United States, under a contract that is required to include the clause prescribed at 22.1803. An employee is not considered to be directly performing work under a contract if the employee—

(1) Normally performs support work, such as indirect or overhead functions; and

(2) Does not perform any substantial duties applicable to the contract.

"Subcontract" means any contract, as defined in FAR 2.101, entered into by a subcontractor to furnish supplies or services for performance of a prime contract or a subcontract. It includes but is not limited to purchase orders, and changes and modifications to purchase orders.

"Subcontractor" means any supplier, distributor, vendor, or firm that furnishes supplies or services to or for a prime contractor or another subcontractor.

~~(2)~~ **"United States," as defined in 8 U.S.C. 1101(a)(38), means the 50 States, the District of Columbia, Puerto Rico, Guam, and the U.S. Virgin Islands.**

**(b) Enrollment and verification requirements.**

**(1) If the Contractor is not enrolled as a Federal contractor in E-Verify at time of contract award, the Contractor shall—**

**(i) Enroll. Enroll as a Federal contractor in the E-Verify program within 30 calendar days of contract award;**

**(ii) Verify all new employees. Within 90 calendar days of enrollment in the E-Verify program, begin to use E-Verify to initiate verification of employment eligibility of all new hires of the Contractor, who are working in the United States, whether or not assigned to the contract, within 3 business days after the date of hire (but see paragraph (b)(3) of this section); and**

**(iii) Verify employees assigned to the contract. For each employee assigned to the contract, initiate verification within 90 calendar days after date of enrollment or within 30 calendar days of the employee's assignment to the contract, whichever date is later (but see paragraph (b)(4) of this section).**

**(2) If the Contractor is enrolled as a Federal contractor in E-Verify at time of contract award, the Contractor shall use E-Verify to initiate verification of employment eligibility of—**

**(i) All new employees.**

**(A) Enrolled 90 calendar days or more. The Contractor shall initiate verification of all new hires of the Contractor, who are working in the United States, whether or not assigned to the contract, within 3 business days after the date of hire (but see paragraph (b)(3) of this section); or**

(B) Enrolled less than 90 calendar days. Within 90 calendar days after enrollment as a Federal Contractor in E-Verify, the Contractor shall initiate verification of all new hires of the Contractor, who are working in the United States, whether or not assigned to the contract, within 3 business days after the date of hire (but see paragraph (b)(3) of this section);

(ii) Employees assigned to the contract. For each employee assigned to the contract, the Contractor shall initiate verification within 90 calendar days after date of contract award or within 30 days after assignment to the contract, whichever date is later (but see paragraph (b)(4) of this section).

(3) If the Contractor is an institution of higher education (as defined at 20 U.S.C. 1001(a)); a State or local government or the government of a Federally recognized Indian tribe; or a surety performing under a takeover agreement entered into with a Federal agency pursuant to a performance bond, the Contractor shall only verify employees assigned to the contract, whether existing employees or new hires. The Contractor shall follow the applicable verification requirements at (b)(1) or (b)(2) respectively, except that any requirement for verification of new employees applies only to new employees assigned to the contract.

(4) Option to verify employment eligibility of all employees. The Contractor may elect to verify all existing employees hired after November 6, 1986, rather than just those employees assigned to the contract. The Contractor shall initiate verification for each existing employee working in the United States who was hired after November 6, 1986, within 180 calendar days of—

(i) Enrollment in the E-Verify program; or

(ii) Notification to E-Verify Operations of the Contractor's decision to exercise this option, using the contact information provided in the E-Verify program Memorandum of Understanding (MOU).

(5) The Contractor shall comply, for the period of performance of this contract, with the requirements of the E-Verify program MOU.

(i) The Department of Homeland Security (DHS) or the Social Security Administration (SSA) may terminate the Contractor's MOU and deny access to the E-Verify system in accordance with the terms of the MOU. In such case, the Contractor will be referred to a DHS-suspension or debarment official.

(ii) During the period between termination of the MOU and a decision by the suspension or debarment official whether to suspend or debar, the contractor is excused from its obligations under paragraph (b) of this clause. If the suspension or debarment official determines not to suspend or debar the contractor, then the contractor must reenroll in E-Verify.

~~(b) The Contractor shall~~

~~(1) Enroll in the E-Verify program within 30 calendar days of contract award;~~

~~(2) Use E-Verify to verify the employment eligibility of all assigned employees; and~~

~~(3) Comply, for the period of performance of this contract, with the requirements of the E-Verify program, including, but not limited to, verifying the employment eligibility of all new employees of the Contractor.~~

(c) Web site. Information on registration for and use of the E-Verify program can be obtained via the Internet at the Department of Homeland Security Web site:

<http://www.dhs.gov/E-Verify>.

~~(d) *Initiation of verification.* The Contractor shall initiate a verification query--~~

~~(1) Within 30 calendar days of its enrollment in the E-Verify program, for each assigned employee who is assigned to the contract at the time of enrollment in the E-Verify program;~~

~~(2) Within three business days of the date of assignment to this contract, or within 30 days of the award of the contract to which the employee is assigned, whichever is later, for each assigned employee who is assigned to the contract after the date of enrollment in the E-Verify program; and~~

~~(3) Within three business days of the date of employment, for all employees of the Contractor hired after the date of enrollment in the E-Verify program.~~

*(ed) Individuals previously verified.* The Contractor is not required by this clause to perform additional employment verification using E-Verify for any employee—

**(1) Whose employment eligibility was previously verified by the Contractor through the E-Verify program; ~~or~~**

**(2) Who has been granted and holds an active U.S. Government security clearance for access to confidential, secret, or top secret information in accordance with the National Industrial Security Program Operating Manual; or**

**(3) Who has undergone a completed background investigation and been issued credentials pursuant to Homeland Security Presidential Directive (HSPD) 12, Policy for a Common Identification Standard for Federal Employees and Contractors.**

***(fe) Subcontract[s] ~~or flowdown.~~* The Contractor shall flow down include the requirements of this clause, including this paragraph *(fe)* (appropriately modified for identification of the parties), to in each subcontract that—**

(1) Is for—

**(i) Commercial or noncommercial services (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); or**

**(ii) Construction;**

(2) ~~Exceeds~~**Has a value of more than \$3,000; and**

(3) **Includes work performed in the United States.**

**(End of Clause)]**