August 11, 2008

VIA FACSIMILE AND FIRST CLASS MAIL

General Services Administration
Regulatory Secretariat (VPR)
1800 F Street, Room 4035
Attn: Laurieann Duarte
Washington, DC 20405


On behalf of the Section of Public Contract Law of the American Bar Association (the Section), I am submitting comments on the above-referenced FAR Case, FAR Case 2007-013: Employment Eligibility Verification, 73 Fed. Reg. 33374 (June 12, 2008) (Proposed Rule). The Section consists of attorneys and associated professionals in private practice, industry, and Government service. The Section’s governing Council and substantive committees have members representing these three segments, to ensure that all points of view are considered.

The Section is authorized to submit comments on proposed regulatory changes under special authority granted by the Association’s Board of Governors. The views expressed herein have not been approved by the House of Delegates or

Mary Ellen Coster Williams, the Section of Public Contract Law’s representative to the ABA House of Delegates, and Jeri K. Somers, a member of the Section’s Council, did not participate in the Section’s consideration of these comments and abstained from voting to approve and send this letter.
the Board of Governors of the American Bar Association and, therefore, should not be construed as representing the policy of the American Bar Association.  

COMMENTS

A. Introduction

On June 6, 2008, the President issued a revision to Executive Order 12989 that re-titled the order “Economy and Efficiency in Government Procurement Through Compliance with Certain Immigration and Nationality Act Provisions and Use of an Electronic Employment Eligibility Verification System.” Executive Order 12989 directs federal agencies to use the U.S. Citizenship and Immigration Service’s E-Verify system to verify the employment eligibility of employees of federal contractors and subcontractors. The objective of this directive is to promote the efficiency of the federal procurement process and enhance the Government’s ability to protect national security and ensure compliance with the nation’s immigration laws. Pursuant to this directive, the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) have proposed amending the Federal Acquisition Regulation (FAR) to require most federal contractors to utilize a new system of verification of employment eligibility of their personnel.

The Section supports the proposal to require the use of the E-Verify system to achieve these important goals. Nevertheless, as discussed further below, the Section is concerned that despite the current exclusion of commercially available off-the-shelf (COTS) items, the Proposed Rule may discourage commercial item contractors from supplying COTS to federal agencies. The Section also is concerned with the potential impact of the Proposed Rule on small businesses. In addition, the Section recommends that the Councils clarify the Proposed Rule to provide that contractors and subcontractors may authorize and pay their employees to commence work on federal programs pending the final determination of their employment eligibility under the E-Verify system. The Section further recommends that the Councils amend the Proposed Rule to exclude from contractors’ and subcontractors’ obligation to verify employment eligibility using the E-Verify system those employees who hold currently valid national security clearances, and to clarify that the verification requirements do not apply to employees working on proposals and not otherwise performing work under a federal contract. Finally, out of concern that sudden increased volume of usage of the E-Verify system may cause the system to suffer downtime or significant

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2 This comment letter is available in pdf format at http://www.abanet.org/contract/federal/regscomm/home.html under the topic “Performance Issues.”
periods of outages, the Section recommends that the Councils consider a phase-in period.

B. **The Proposed Rule May Discourage Contractors From Providing COTS Items to Federal Agencies.**

The Section commends the Councils for their recognition of the potential adverse effect of the Proposed Rule on suppliers of commercial items to federal agencies by their exclusion of COTS items from the requirements of the Proposed Rule. Nevertheless, the Section is concerned that the Proposed Rule may discourage commercial item contractors from supplying COTS to federal agencies, a result that would be inconsistent with the Government’s policy under the Federal Acquisition Streamlining Act of 1994 (FASA) to encourage the procurement of commercial items.

The Proposed Rule does not apply to contractors or subcontractors that supply only COTS items to the Government. The Proposed Rule will apply to COTS item contractors and subcontractors that also provide commercial item services to support COTS items. COTS suppliers customarily supplement their COTS offerings with ancillary commercial item services, such as commercial software or hardware maintenance, installation or other commercial services. Thus, the potential costs of complying with this rule could discourage COTS suppliers from supplying their COTS products to the Government. The Councils should consider exempting from the rule contractors and subcontractors that provide COTS items and ancillary commercial item services that the contractors or subcontractors customarily sell to the general public with their COTS items.

C. **The Proposed Rule May Impact Small Businesses.**

In addition to discouraging COTS contractors, the Proposed Rule has a potential cost impact on small businesses. The Proposed Rule requires that prime contractors and subcontractors (except those supplying only COTS items, or whose contract value is under the micro-purchase threshold (currently $3,000)) use the E-Verify system to verify the employment eligibility of employees who are performing work in the United States under a federal contract. The Proposed Rule further requires contractors to flow down the E-Verify requirement in all commercial and noncommercial services as well as construction contracts and subcontracts having a value in excess of $3,000. There is no exemption for small businesses. The Regulatory Flexibility Act analysis accompanying the Proposed Rule states that the “direct cost this rule imposes does not appear to have a significant economic impact on a substantial number of small entities.” 73 Fed. Reg. at 33378. The Councils, however, have solicited public comments on the cost
impact of the Proposed Rule. Although the Section cannot contribute empirical data or input as to the cost impact, it urges the Councils to consider carefully the comments they receive regarding the actual cost impact of the Proposed Rule on small businesses, and consider exempting from the rule businesses that qualify as ‘small’ under the size standards established by the Small Business Administration for various industries.

D. The Proposed Rule Should Be Modified To Minimize Any Impact Of Verification On Commencement Of Work And Payment.

The Section notes that the Proposed Rule may cause delay in commencing contract or subcontract performance, especially in emergency or other critical circumstances. The proposed clause at 52.222–XX will require prime contractors and subcontractors to enroll in the E-Verify program within 30 days after contract or subcontract award and to initiate an E-Verify query within 30 days of enrollment for each employee who is assigned to the contract or subcontract at the time of enrollment. Neither the Proposed Rule nor the proposed clause, however, is clear as to whether contractor and subcontractor employees may begin work prior to verification of their employment eligibility under the E-Verify program. If the Proposed Rule’s intent is that the employees may not commence work on the contract or subcontract until their employment eligibility is verified, contractor and subcontractor performance could be delayed. Furthermore, this delay could be considerable if the verification process is prolonged because of errors in the information inputted to the system or because of a tentative nonconfirmation.

Moreover, it is unclear whether contractors and subcontractors may use contract funds to pay employees for work prior to verification of employment eligibility, and whether such payments by the contractor and subcontractor would be allowable costs under Part 31 of the FAR.

Accordingly, the Section recommends that the Councils amend the Proposed Rule to clarify that contractors and subcontractors may charge the government for employees costs incurred for work on the contract or subcontract pending verification of their employment eligibility via the E-Verify program. Moreover, the amended rule should clarify that any payments made to contractor or subcontractor employees pending verification of employment eligibility are allowable costs to the contract or subcontract, even if an employee ultimately is determined to be ineligible for employment by the E-Verify program. Contractors and subcontractors should not be penalized for avoiding program delays by commencing work with newly hired employees pending verification of their eligibility.

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3 It is noteworthy that contractors and subcontractors must hire their employees before performing the E-Verify check.
employment eligibility. Alternatively, the Proposed Rule should allow such costs if
the Contracting Officer approved the commencement of work by the contractor's or
subcontractor's employees pending verification of their employment eligibility.

E. **The Proposed Rule Should Be Revised To Address Those Employees
   Holding Valid National Security Clearances.**

   The Section recommends that the Councils revise the Proposed Rule to
   provide that contractors and subcontractors shall not be required to use the E-
   Verify system to verify employment eligibility of employees who hold a valid
   national security clearance other than a Limited Access Authorization under
   Section 2-209 of the National Industrial Security Program Operating Manual
   (NISPOM). Only persons who are U.S. citizens may be granted such security
   clearances, and thus their employment eligibility already has been established.
   Requiring verification of these employees' employment eligibility using the E-
   Verify system would impose an unnecessary and duplicative cost on contractors
   and subcontractors.

F. **The Proposed Rule Should Be Clarified Regarding Employees Who
   Perform Proposal Work.**

   It is unclear whether the Proposed Rule applies to contractor employees and
   subcontractor teammate employees who are working on proposals in response to
   federal agency solicitations or requests for proposals when the Employment
   Eligibility Verification clause is included in the solicitation or request for proposal.
   Employees who work on proposal preparation are not performing work under a
   federal agency contract. Accordingly, the Section presumes that these employees
   would not be covered by the Proposed Rule, assuming they do not also perform
   work under the contract at issue. To clarify the scope of the Proposed Rule, the
   Section suggests that the Councils clarify the Proposed Rule to state that it does not
   apply to employees of contractors or subcontractors who perform proposal
   preparation but do not otherwise work on the underlying federal contract.

G. **The Councils Should Consider A Phase-In Period.**

   Finally, the Section is concerned that, if the sudden increased volume of
   usage of the E-Verify system causes the system to suffer downtime or significant
   periods of outages due to technical problems, this could disrupt or delay
government programs. Accordingly, the Section recommends that the Councils
consider either a phase-in of the required use of the system over a period of time or
perhaps a phase-in by agency, or, alternatively, some sort of automatic waiver
when the system is out of service so that contractors may verify employment by
other means during periods of system outage, and thus avoid undue disruption to their operations.

CONCLUSION

The Section supports the goals of the Proposed Rule but recommends the modifications and clarifications discussed in these comments. Specifically, the Section recommends broadening the exemption for COTS items, as discussed above, as well as creating a limited exemption for small businesses to address any potential cost impact of the Proposed Rule on small businesses. In addition, the Section recommends that the Councils clarify the Proposed Rule to authorize contractor and subcontractor employees to commence work under the contract or subcontract pending the final determination of their employment eligibility under the E-Verify program and to provide that contractor and subcontractor payments for such work shall be allowable costs under FAR Part 31, or alternatively, that such costs be allowed if the Contracting Officer authorizes such work. The Section further recommends that the Councils revise the Proposed Rule to provide that contractors and subcontractors shall not be required to use the E-Verify system to verify the employment eligibility of employees who hold valid national security clearances other than Limited Access Authorizations and to clarify that the verification requirements do not apply to employees working on proposals and not otherwise performing work under a federal contract. Lastly, the Councils should consider a phase-in period or waiver system to avoid any potential disruption to operations if the sudden increased volume of usage of the E-Verify system causes downtime or significant periods of outages.

The Section appreciates the opportunity to provide these comments and is available to provide additional information and assistance as the Councils may require.

Sincerely,

[Signature]

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Chair, Section of Public Contract Law

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