Federal Acquisition Regulation; FAR Case 2007–013, Employment Eligibility Verification

Introduction

The Executive branch has long recognized that the instability and lack of dependability that afflicts contractors that employ unauthorized workers undermines overall efficiency and economy in Government contracting. The first formal expression of this policy is found in Executive Order 12989[1]. The order among other things stated "Stability and dependability are important elements of economy and efficiency. A contractor whose work force is less stable will be less likely to produce goods and services economically and efficiently than a contractor whose work force is more stable…. contractors cannot rely on the continuing availability and service of illegal aliens, and contractors that choose to employ unauthorized aliens inevitably will have a less stable and less dependable work force than contractors that do not employ such persons."

Analysis

The E-Verify system, formerly known as the Basic Pilot/Employment Eligibility Verification Program, is an Internet-based system operated by the Department of Homeland Security United States Customs and Immigration Services (DHS USCIS), in partnership with the Social Security Administration (SSA) that allows participating employers to electronically verify the employment eligibility of their newly hired employees. Current law (8 U.S.C. 1324a(b)) requires all employers in the United States to complete an Employment Eligibility Verification Form (Form I–9) for each newly hired employee to verify each employee's identity and employment eligibility.

Executive Order 12989 Section 5.(a) requires executive departments and agencies to use an electronic employment eligibility verification system designated by the Secretary of Homeland Security. Federal contractors must enter the worker's identity and employment eligibility information into the E-Verify system, which checks that information against information contained in SSA, USCIS and other Government databases. Executive Order 12989 directs the agency heads of DoD, GSA and NASA (i.e., the FAR Council) to implement this policy through amendments to the FAR.

The proposed change to the FAR affected Part 2 (2.101, Definitions), Part 22 (adding a new subpart 22.18, Employment Eligibility Verification) and Part 52 (amending section 52.212–5). The part 22 change mandated the use of E-verify while the Part 52 change provided language for insertion into solicitations and contracts.

Data

A proposed rule was published by the FAR Council on June 12, 2008 with the final rule being published on November 14, 2008 (it should be noted that several revisions to final rule were required after this publication).

The rule generated 1,600 comments. More than 1,600 public comments on the proposed rulemaking from individuals, organizations, corporations, trade associations, chambers of commerce and Government entities were received. More than 600 commenters wrote in support of the proposed rule and strongly urged its adoption. One commenter, who identified himself as a 30-year Human Resources professional, stated that this E-Verify system is not too burdensome for employers. Another commenter said that the ''E-Verify program WORKS!'' and that he has found it to work accurately 100 percent of the time.

Many comments addressed the general issue of immigration reform. The commenter advocated ''fixing'' the ''broken'' immigration system. The response to these comments was that "comprehensive immigration reform is beyond the scope of this rulemaking and was not the purpose of Executive Order 12989. The mandate given was to implement the President's Executive Order as a means of creating a more economical and efficient Federal Government procurement system.

Some comments addressed the impact to small business, stating that "E-Verify may impose significant and costly administrative requirements on small business". Among the commenters was the Small Business Administration Office of Advocacy. The response stated "the requirement for entities (both large and small) to enroll in E-Verify only applies to contractors and subcontractors who choose to perform work for the Federal Government. Presumably, entities which do not receive the desired return on revenue to justify the expense of participating in E-Verify would choose not to be a Federal contractor or subcontractor. However, it was also noted it has been the law since 1986 that all employers must verify the eligibility of new hires to work in the United States. E-Verify provides a tool that will make this verification easier and more reliable. The final rule changed the requirement for insertion of the E-Verify clause in prime contracts to the simplified acquisition threshold ($150,000) instead of the micro-purchase threshold ($3,000). Also, the final rule removed the requirement for E-verify in contracts with a term of performance less than 120 days.

Many commenters were concerned that the timeframes provided were insufficient for compliance. The final rule extended the timelines. Federal contractors participating in the E-Verify program for the first time have a longer period to begin using the system for new and existing employees (90 calendar days instead of 30 calendar days). The final rule also provides a longer period after this initial enrollment period for contractors to initiate verification of

existing employees who have not previously gone through the E-Verify system when they are newly assigned to a covered Federal contract (90 days instead of 3 days).

Seven universities and two associations opposed the application of the rule to educational institutions. Also, many states and localities prohibit the use of E-verify or similar systems. The final rule modifies the contract clause so that institutions of higher education need only verify employees assigned to a covered Federal contract. Under the final rule, State and local governments (and federally recognized Indian tribes) need only E-verify employees assigned to a covered Federal contract.

Comments were received concerning the applicability of the proposed rule to Commercial Off-the-Shelf (COTS) items and certain services associated with the provision of COTS items. The rule was amended to provide exclusions for bulk cargo.

Conclusion

It is obvious that this particular change generated a great deal of public interest. This is one area which has generated a great deal of interest at the political level as well as among the general public.

Because of the widespread interest, identifying stakeholders, their influence and involvement in this process is challenging. To paraphrase the response, were policy objectives achieved without causing an undue burden? Did the proposed changes adequately address the concerns of the commenters?

NOTES

[1]Economy and Efficiency in Government Procurement Through Compliance With Certain Immigration and Naturalization Act Provisions (February 15, 1996) 61 Fed. Reg. No. 32

[2]Federal Acquisition Regulation; FAR Case 2007-013, Employment Eligibility Verification (June 12, 2008) 73 Fed. Reg. No. 114 (to be codified at 48 C.F.R. 48 CFR Parts 2, 22, and 52)

[3]Federal Acquisition Regulation; FAR Case 2007–013, Employment Eligibility Verification (November 14, 2008) 73 Fed. Reg. No. 221 (to be codified at 48 C.F.R. 48 CFR Parts 2, 22, and 52)