DEPARTMENT OF DEFENSE
GENERAL SERVICES ADMINISTRATION
NATIONAL AERONAUTICS AND SPACE ADMINISTRATION
48 CFR Parts 2, 12, 22, and 52
[FAR Case 2007-013; Docket 2008-0001; Sequence 1]
RIN: 9000-AK91
Federal Acquisition Regulation; FAR Case 2007-013, Employment Eligibility Verification
AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).
ACTION: Proposed rule.
SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) are proposing to amend the Federal Acquisition Regulation (FAR) to require certain contractors and subcontractors to use the U.S. Citizenship and Immigration Services' (USCIS) E-Verify system as the means of verifying that certain of their employees are eligible to work in the United States.
DATES: Interested parties should submit written comments to the FAR Secretariat on or before [Insert 60 days after publication in the FEDERAL REGISTER] to be considered in the formulation of a final rule.
ADDRESSES: Submit comments identified by FAR case 2007-013 by any of the following methods:
* Regulations.gov: http://www.regulations.gov.
Submit comments via the Federal eRulemaking portal by inputting "FAR Case 2007-013" under the heading "Comment or Submission". Select the link "Send a Comment or Submission" that corresponds with FAR Case 2007-013. Follow the instructions provided to complete the "Public Comment and Submission Form". Please include your name, company name (if any), and "FAR Case 2007-013" on your attached document.
* Fax: 202-501-4067.
* Mail: General Services Administration, Regulatory Secretariat (VPR), 1800 F Street, NW, Room 4035, ATTN: Laurieann Duarte, Washington, DC 20405.
Instructions: Please submit comments only and cite FAR case 2007-013 in all correspondence related to this case. All comments received will be posted without change to http://www.regulations.gov, including any personal and/or business confidential information provided.
FOR FURTHER INFORMATION CONTACT: Meredith Murphy, Procurement Analyst, at (202) 208-6925 for clarification of content. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501-4755. Please cite FAR case 2007-013.

SUPPLEMENTARY INFORMATION:
A. Background
This rule proposes to amend the Federal Acquisition Regulation (FAR) to require that certain contracts contain a clause requiring that the contractor and certain subcontractors utilize the E-Verify System to verify employment eligibility of all newly hired employees of the contractor or subcontractor and all employees directly engaged in the performance of work in the United States under those contracts.
The Government awards numerous contracts each fiscal year worth hundreds of billions of dollars. At the same time, one of the Government's primary responsibilities is the enforcement of the immigration laws of the United States. It is appropriate to ensure that Government contractors and subcontractors abide by the immigration laws that the Government enforces.
In 1986, Congress amended the Immigration and Nationality Act (INA) to prohibit the hiring or continued employment of aliens, knowing that the aliens are unauthorized to work in the United States. Pub. L. 99-603, Title I, §

101(a)(1), 100 Stat. 3360, codified at 8 U.S.C. 1324a(a). Congress also established an employment verification system in 8 U.S.C. 1324a(b), and directed the President to evaluate that system's security and efficacy and implement necessary changes, subject to congressional oversight. 8 U.S.C. 1324a(d). To assist in the development of such changes and additions to the system, Congress also authorized the President to establish demonstration projects designed to strengthen the employment verification system. 8 U.S.C. 1324a(d)(4).

In 1992 the Immigration and Naturalization Service (INS) launched the Telephone Verification System (TVS) pilot program — an early form of what is now the E-Verify system — as a demonstration project. 69 Interpreter Releases 702 (June 8, 1992); 515 (Apr. 27, 1992). In 1996, Congress established the Basic Pilot program (now E-Verify) as part of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). Pub. L. No. 104-208, §§ 401-405, 110 Stat. 3009-655 – 3009-665 (1996) (8 U.S.C. 1324a note). The Basic Pilot statute instructs all departments of the Executive Branch to participate in E-Verify as part of their hiring process. IIRIRA § 402(e)(1).

This rule is authorized by an exercise of the President's authority under the Federal Property and Administrative Services Act of 1949 (FPASA), to "prescribe policies and directives" governing procurement policy "that the President considers necessary to carry out" that Act and that are "consistent" with the Act's aim of "provid[ing] the Federal Government with an economical and efficient" procurement system. 40 U.S.C. 121, 101. The "economy and efficiency" benefits to Federal contracting that flow from ensuring that the Federal Government does not do business with contractors that hire or employ unauthorized aliens were first set forth in Executive Order 12989 (see 61 FR 6091, February 15, 1996. That order, which pre-dated Congress's creation of the Basic Pilot program (now E-Verify), noted that the presence of unauthorized aliens on a contractor's workforce rendered that contractor's workforce less stable and reliable than the workforces of contractors who do not employ unauthorized aliens. The executive order entitled "Economy and Efficiency in Government Procurement Through Compliance with Certain Immigration and Nationality Act Provisions and Use of an Electronic Employment Eligibility Verification System" of June 6, 2008, amends Executive Order 12989 and, together with the Designation by the Secretary of Homeland Security, directs Federal agencies, in light of the recent advances in the reliability, convenience, and accuracy of the E-Verify system, to use this powerful tool to avoid both the general inefficiencies that flow from contracting with employers burdened with unstable workforces as well as the direct costs of disruptions to Federal contract performance that result when unauthorized aliens are found in, and must be subsequently removed from, the Federal contract workforce.

This proposed rule inserts a clause into Federal contracts committing Government contractors to use the United States Citizenship and Immigration Service (USCIS) E-Verify System to verify that all of the contractors' new hires, and all employees (existing and new) directly engaged in the performance of work under Federal contracts, are authorized to work in the United States. The E-Verify System is expected to help contractors avoid employment of unauthorized aliens and will assist Federal agencies to avoid contracting with companies that knowingly hire unauthorized aliens. This enhances the Government's ability to protect national security and ensure compliance with the nation's immigration laws — core aspects of the Government's mission that otherwise could be compromised by the presence of unauthorized aliens in Government facilities or by the employment of unauthorized aliens in the Government's supply chain. It also protects U.S. workers by creating another disincentive for companies to hire unauthorized aliens who may command lower wages.

In summary, the proposed rule—

1. Requires insertion of a clause into Government prime contracts that include work in the United States, other than those that do not exceed the

micro-purchase threshold (generally $3,000), or that are for commercially available off-the-shelf (COTS) items or items that would be COTS items but for minor modifications (the rule adopts the statutory definition of COTS).

2. Requires inclusion of the clause in subcontracts over $3,000 for services or for construction.

3. Requires a contractor or subcontractor to enroll in the E-Verify program within 30 days of contract award, begin verifying the employment eligibility of all new employees of the contractor or subcontractor that are hired after enrollment in E-Verify, and continue to use the E-Verify program for the life of the contract.

4. Requires contractors and subcontractors to use E-Verify to confirm the employment eligibility of all existing employees who are directly engaged in the performance of work under the covered contract.

5. Applies to solicitations issued and contracts awarded after the effective date of the final rule in accordance with FAR 1.108(d). Under the final rule, Departments and agencies should, in accordance with FAR 1.108(d)(3), amend existing indefinite-delivery/indefinite-quantity contracts to include the clause for future orders if the remaining period of performance extends at least six months after the effective date of the final rule and the amount of work or number of orders expected under the remaining performance period is substantial.

6. In exceptional circumstances, allows a head of the contracting activity to waive the requirement to include the clause. This authority is not delegable.

The proposed rule applies only to employment in the United States as defined at section 101(a)(38) of the Immigration and Nationality Act (INA), 8 U.S.C. 1101 et seq. “United States” includes the fifty States and the District of Columbia, Guam, Puerto Rico, and the United States Virgin Islands. It does not currently include the United States territories of American Samoa and the Commonwealth of the Northern Mariana Islands. Under the Consolidated Natural Resources Act of 2008, Federal immigration law will begin to apply—through a phased process-to the Commonwealth of the Northern Mariana Islands starting in mid-2009. At this time, however, these two territories have their own immigration laws and are not covered by the employment verification requirements of INA section 274A, 8 U.S.C. 1324a (see Form I-9). The proposed rule also does not apply to any employment outside the United States, including work on United States embassies or military bases in foreign countries. Finally, the proposed rule does not apply to any employee hired prior to November 6, 1986, as these employees are not subject to employment verification under INA section 274A, 8 U.S.C. 1324a. The Councils are attempting to balance competing needs in drafting this rule. It was written to apply the requirements in a manner to ensure effective compliance by the contractor community, but it exempts certain prime contracts and subcontracts when the cost of compliance would likely outweigh the benefits, e.g., COTS items. Comments are solicited with regard to how well this balance has been achieved.

The E-Verify program is an internet-based system operated by USCIS, in partnership with the Social Security Administration (SSA), and requirements for obtaining access to E-Verify and procedures for the use of E-Verify are established by the Department of Homeland Security (DHS), USCIS’s parent agency. Before an employer can participate in the E-Verify program, the employer must enter into a Memorandum of Understanding (MOU) with DHS and SSA. This MOU requires employers to agree to abide by current legal hiring procedures and to ensure that no employee will be unfairly discriminated against as a result of the E-Verify program. Violation of the terms of this agreement by the employer is grounds for immediate termination of its participation in the program. Employers participating in E-Verify must still complete an Employment Eligibility Verification Form (Form I-9) for each newly hired employee, as required under current law. Following completion of the Form I-9, the employer

must enter the worker's information into the E-Verify website, and that information is then checked against information contained in SSA and USCIS databases.

SSA first verifies that the name, SSN, and date of birth are correct and, if the employee has stated that he or she is a U.S. citizen, confirms whether this is in fact the case through its databases. If the employee is a U.S. citizen, SSA establishes that the employee is employment-eligible. USCIS also verifies through database checks that any non-U.S. citizen employee is in an employment-authorized immigration status.

If the information provided by the worker matches the information in the SSA and USCIS records, no further action will generally be required, and the worker may continue employment. E-Verify procedures require only that the employer record on the I-9 form the verification ID number and result obtained from the E-Verify query, or print a copy of the transaction record and retain it with the I-9 form.

If SSA is unable to verify information presented by the worker, the employer will receive an "SSA Tentative Nonconfirmation" notice. Similarly, if USCIS is unable to verify information presented by the worker, the employer will receive a "DHS Tentative Nonconfirmation" notice. Employers can receive a tentative nonconfirmation notice for a variety of reasons, including inaccurate entry of information into the E-Verify website, name changes, or changes in immigration status that are not reflected in the database. If the individual's information does not match the SSA or USCIS records, the employer must provide the employee with a written notice of the fact, called a "Notice to Employee of Tentative Nonconfirmation." The worker must then indicate on the notice whether he or she contests or does not contest the tentative nonconfirmation, and both the worker and the employer must sign the notice.

If the worker chooses to contest the tentative nonconfirmation, the employer must print a second notice, called a "Referral Letter," which contains information about resolving the tentative nonconfirmation, as well as the contact information for SSA or USCIS, depending on which agency was the source of the tentative nonconfirmation. The worker then has eight Federal Government work days to visit an SSA office or call USCIS to try to resolve the discrepancy. Under the E-Verify MOU, if the worker contests the tentative nonconfirmation, the employer is prohibited from terminating or otherwise taking adverse action against the worker while he or she awaits a final resolution from the Federal Government agency. If the worker fails to contest the tentative nonconfirmation, or if SSA or USCIS was unable to resolve the discrepancy the employer will receive a notice of final nonconfirmation and the employee may be terminated.

Participation in E-Verify does not exempt the employer from the responsibility to complete, retain, and make available for inspection Forms I-9 that relate to its employees, or from other requirements of applicable regulations or laws; however, the following modified requirements apply by reason of the employer's participation in E-Verify: (1) identity documents used for verification purposes must have photos; (2) if an employer obtains confirmation of the identity and employment eligibility of an individual in compliance with the terms and conditions of E-Verify, a rebuttable presumption is established that the employer has not violated section 274A(a)(1)(A) of the Immigration and Nationality Act (INA) with respect to the hiring of the individual; (3) the employer must notify DHS if it continues to employ any employee after receiving a final nonconfirmation, and is subject to a civil money penalty between $500 and $1,000 for each failure to notify DHS of continued employment following a final nonconfirmation; (4) if an employer continues to employ an employee after receiving a final nonconfirmation and that employee is subsequently found to be an unauthorized alien, the employer is subject to a rebuttable presumption that it has knowingly employed an unauthorized alien in violation of section 274A(a);

and (5) no person or entity participating in E-Verify is civilly or criminally liable under any law for any action taken in good faith based on information provided through the confirmation system.

Further information on registration for and use of E-Verify can be obtained via the internet at www.dhs.gov/E-Verify.

This proposed rule differs in one significant respect from the requirements generally applicable to employers participating in E-Verify; that is, current employees of Federal contractors that are assigned to work in the United States on a covered Federal contract, as well as the contractor's new hires in the United States, must be verified under this rule. In the initial contract start-up phase, employees assigned to the contract must be verified within 30 days; thereafter, the proposed rule requires newly hired and newly assigned employees to be verified within 3 days. Requiring employment eligibility confirmation of all workers assigned to a new Government contract is mandated by the June 6, 2008, Executive Order amending Executive Order 12989, is most consistent with the Federal Government's own obligation to use E-Verify when hiring Federal employees, and will most effectively ensure that the Federal Government does not indirectly exploit an illegal labor force.

USCIS is in the process of revising its MOU, program manual, training materials, web site, and other E-Verify System materials to reflect the duties that Federal contractors will take on when they sign a contract containing the clause promulgated by this proposed rule. Those E-Verify System accommodations will make this proposed FAR amendment and the E-Verify System consistent for Federal contractors, but will not apply to E-Verify users who are not required to comply with the contract clause promulgated by this rule. Federal contractors' compliance with that revised MOU will be a performance requirement under the terms of the Federal contract or subcontract, and the contractor must consent to the release of information relating to compliance with its verification responsibilities to contracting officers or other officials authorized to review the Employer's compliance with Federal contracting requirements. A revised MOU reflecting the program participation requirements for Federal contractors has been placed in the docket for this rulemaking and will be available online at http://www.regulations.gov.

B. Executive Order 12866 Regulatory Planning and Review

This is a significant regulatory action and, therefore, was subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is a major rule under 5 U.S.C. 804.

A Regulatory Impact Analysis that more thoroughly explains the assumptions used to estimate the cost of this proposed rule is available in the docket. For access to the docket to read background documents or comments received, go to http://www.regulations.gov. A summary of the cost and benefits of the proposed rule follows:

In the initial fiscal year, the rule is expected to be effective (2009), we estimate that there will be approximately 168,324 contractors and subcontractors that will be required to enroll in E-Verify due to this rule and there will be an additional 3.8 million employees vetted through E-Verify. In the initial year, the cost of the proposed rule at 7 % net present value is approximately $107.0 million and, over the ten-year period of analysis (2009-2018), the cost of the proposed rule is approximately $550.3 million. In the initial year, the cost of the proposed rule at 3% net present value is approximately, $111.2 million and, over the ten-year period of analysis (2009-2018), the cost of the proposed rule is $668.9 million. Compliance costs from participating in the E-Verify program fall into the following general categories and Table 1 below provides a summary of the costs:

Startup Costs – Employers must register to use the E-verify system and sign a Memorandum of Understanding with USCIS and SSA. A very small number of

employers may need to purchase a computer and internet connection for their hiring site if that hiring site does not already have internet access.
Training – Employees that use the E-Verify system are required to take an on-line tutorial. While USCIS does not charge a fee for this training, employers will incur the opportunity cost of the time the employee spends for this training, as the employee's time could have been spent on other activities.
Employee Verification – Employers will incur the opportunity cost of the time spent entering data into E-Verify and, if the employee receives a tentative nonconfirmation, employers would inform the employee and spend time closing out the case after resolution of the tentative nonconfirmation. In addition, the employer would incur lost productivity when an employee would need to be away from work to visit SSA to correct his/her information. We believe the employee would bear the cost of driving to SSA.
Employee Replacement (Turnover) Cost – There may be a small percentage of workers who are authorized to work in the U.S. and receive a tentative nonconfirmation, but choose not to take the steps necessary to resolve the tentative nonconfirmation (despite the strong economic incentives to resolve the issue). To the extent that the accompanying E-Verify rulemaking results in the termination of a worker authorized to work in the U.S., those costs could be considered to be a cost of the rule. However, the termination and replacement costs of unauthorized workers are not counted as a direct cost of this rule since current immigration law prohibits employers from hiring or continuing to employ aliens whom they know are not authorized to work in the U.S. The termination and replacement of unauthorized employees will impose a burden on employers, but INA section 274A(a)(1), (2), 8 U.S.C. 1324a(a)(1), (2), expressly prohibits employers from hiring or continuing to employ an alien whom they know is not authorized to work in the United States. Accordingly, costs that result from employers' knowledge of their workers' illegal status are attributable to the Immigration and Nationality Act, not to the Federal Acquisition Regulation requiring Employment Eligibility Verification for certain federal contractors and subcontractors.
Federal Government Cost – The Government will incur operating costs from each query that an employer executes and will also incur costs from resolving tentative nonconfirmations.

Table 1
10 Year Cost of Proposed Rule (7% Present Value)
Year
Employer
Employee
Government
Total

Startup & Training Costs
Authorized Employee Replacement Cost
Verification Cost
Verification Cost
Verification Cost

2009
$ 61,630,740
$ 18,980,895
$ 24,174,247
$ 677,403
$ 1,547,194
$107,010,479
2010

 $ 28,859,143
$ 9,840,872
 $ 12,533,427
 $ 351,208
 $ 802,161
$ 52,386,811
2011
 $ 28,319,789
$ 9,656,932
 $ 12,299,159
 $ 344,643
 $ 787,167
$ 51,407,690
2012
 $ 27,790,462
$ 9,476,427
 $ 12,069,267
 $ 338,201
 $ 772,454
$ 50,446,811
2013
 $ 28,040,474
$ 9,299,296
 $ 11,843,671
 $ 331,880
 $ 758,015
$ 50,273,336
2014
 $ 27,516,328
$ 9,125,478
 $ 11,622,295
 $ 325,676
 $ 743,847
$ 49,333,625
2015
 $ 27,002,030
$ 8,954,912
 $ 11,405,060
 $ 319,589
 $ 729,944
$ 48,411,535
2016
 $ 26,497,248
$ 8,787,531
 $ 11,191,882
 $ 313,615
 $ 716,300
$ 47,506,576
2017
 $ 26,589,062
$ 8,623,278
 $ 10,982,689
 $ 307,753
 $ 702,911
$ 47,205,693
2018
 $ 26,092,101

$ 8,462,096
$ 10,777,406
$ 302,001
$ 689,773
$ 46,323,377
Total
$ 308,337,378
$ 101,207,717
$128,899,103
$ 3,611,970
$ 8,249,766
$550,305,932

Because illegal aliens are at risk of being apprehended in immigration enforcement actions, contractors who hire illegal aliens will necessarily have a more unstable workforce than contractors who do not hire unauthorized workers. Given the vulnerabilities in the I-9 system, many employers that do not knowingly employ illegal aliens nevertheless have unauthorized workers, undetected, on their workforce.

This rule will promote economy and efficiency in Government procurement. Stability and dependability are important elements of economy and efficiency. A contractor whose workforce is less stable will be less likely to produce goods and services economically and efficiently than a contractor whose workforce is more stable. Because of the Executive Branch's obligation to enforce the immigration laws, including the detection and removal of illegal aliens identified through vigorous worksite enforcement, contractors that employ illegal aliens cannot rely on the continuing availability and service of those illegal workers, and such contractors inevitably will have a less stable and less dependable workforce than contractors that do not employ such persons. Where a contractor assigns illegal aliens to work on Federal contracts, the enforcement of Federal immigration laws imposes a direct risk of disruption, delay, and increased expense in Federal contracting. Such contractors are less dependable procurement sources, even if they do not knowingly hire or knowingly continue to employ unauthorized workers.

Contractors that use E-Verify to confirm the employment eligibility of their workforce are much less likely to face immigration enforcement actions, and are generally more efficient and dependable procurement sources than contractors that do not use that system to verify the work eligibility of their workforce. Rigorous employment verification through E-Verify will also help contractors to confirm the identity of the persons working on Federal contracts, enhancing national security at less expense to the Government than it would cost for contractors to obtain more rigorous security clearances. This is likely to be particularly beneficial where contractors operate at sensitive national infrastructure sites.

B. Regulatory Flexibility Act

The Councils expect this rule to impact nearly every small entity in the Federal contractor base. However, the direct cost this rule imposes does not appear to have a significant economic impact on a substantial number of small entities, within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. An Initial Regulatory Flexibility Analysis has been prepared and the results of the analysis show that the direct cost of this rule on an average cost per contractor basis does not appear to rise to the level of being economically significant; however, the Councils request comments on this finding.

The Councils expect this rule to carry certain benefits to employers in that it provides an economical, web-based method for performing verification of employment eligibility of employees, improving the reliability of the employment

verification procedures employers are already required to perform. Federal contractors' participation in E-Verify is also expected to reduce the likelihood that contractors will discover long after the fact that they have hired unauthorized aliens, thereby sparing contractors the cost of terminating and replacing employees not authorized to work under Federal immigration law after resources have been expended on the training of those employees.
An Initial Regulatory Flexibility Analysis has been prepared for public comment and is summarized as follows:

The June 6, 2008 Executive Order, amending Executive Order 12989, 61 FR 6091 (February 15, 1996), prohibits Federal agencies from contracting with companies that knowingly hire employees not eligible to work in the United States and instructs Federal agencies to contract with companies that agree to use an electronic employment verification system to confirm the employment eligibility of their workforce. The E-Verify System is the best available means for contractors and subcontractors to verify employment eligibility. Consequently, this proposed rule is being promulgated to institute a contractual requirement for contractors and subcontractors to utilize E-Verify as the means of verifying that all new hires of the contractor or subcontractor and all employees directly engaged in performing work under covered contracts or subcontracts are eligible to work in the United States. The proposed rule adds a new FAR Subpart 22.18 and a new clause.

The prohibition against Federal agencies contracting with companies that knowingly hire employees not eligible to work in the United States has existed since 1996. Virtually all employers in the United States, including Federal Government contractors and subcontractors, are prohibited from hiring an individual without verifying his or her identity and authorization to work and from continuing to employ an alien whom they know is not authorized to work in the United States (Section 274A(a) of the Immigration and Nationality Act of 1952, as amended (INA), 8 U.S.C. 1324a; 8 CFR part 274A). Many aliens, including lawful permanent residents, refugees, asylees, and temporary workers petitioned by a U.S. employer, are authorized to work in the United States (see 8 CFR 274a.12, listing classes of work-authorized aliens).

The new contractual requirement to use the E-Verify System will enhance the Government's ability to protect national security and ensure compliance with the nation's immigration laws—core aspects of the Government's mission that otherwise could be compromised by the presence of unauthorized aliens in Government facilities or by the employment of unauthorized aliens in the Government's supply chain.

This rule will impact nearly every small entity in the Federal contractor base. Major exceptions are contractors providing commercially available off-the-shelf (COTS) items and COTS items with only minor modifications and subcontractors that provide supplies, not services or construction. In Fiscal Year 2006, there were over 100,000 small businesses that received direct Federal contracts. While there are no reliable numbers for subcontracts awarded to small businesses, the Dynamic Small Business database of the Central Contractor Registration-a database of basic business information for contractors that seek to do business with the Federal Government-gives a number of 324,250 small business profiles that are registered. Assuming that 50% of these small businesses contract with the Federal at either the prime or subcontract level, then that number is 162,125 small businesses.

We have placed in the public docket a detailed Regulatory Impact Analysis of the compliance requirements of this rule. Generally, employers will incur

opportunity cost of the time expenses for the time their employees will spend complying with the requirements of the regulation. Employees will need to be trained in order to be able to operate the E-Verify system, as well as spend time on processing employee verifications. Employers will incur start-up costs from enrolling in the E-Verify program. We believe a small number of employers may need to purchase a computer and internet connection for their hiring site. Certain employee replacement (turnover) costs may also be incurred due to this regulation.

In order to further inform our understanding of the economic impact of this rule on small entities, we considered hypothetical contractors with 10, 50, 100, and 500 employees and estimated the economic impact of the rule on those four sizes of entities in their initial year of enrollment. The initial year a contractor enrolls in E-Verify is expected to be the year with the highest compliance cost, as the contractor is incurring both the start-up costs of enrolling in E-Verify as well as the costs of vetting employees through the E-Verify system.

We estimate the average direct cost of this rule to a contractor with 10 employees to be $419 in the initial year; for a contractor with 50 employees, we estimate the average direct cost of participating in E-Verify to be $1,168 in the initial year; for a contractor with 100 employees we estimate an initial year impact of $2,102; while a contractor with 500 employees is expected to have an initial year impact of $8,964. This level of direct cost burden is well under 1% of the expected annual revenue of these four sizes of entities and does not appear to represent an economically significant impact on an average direct cost per contractor basis. To the extent that some small entities incur direct costs that are higher than the average estimated costs, those employers may reasonably be expected to face a significant economic impact.

As discussed previously, we do not consider the cost of complying with preexisting immigration statutes to be a direct cost of this rulemaking. Thus, while some employers may find the costs incurred by replacing employees that are not authorized to work in the United States to be economically significant, those costs of complying with the Immigration and Nationality Act are not direct costs attributable to this rule.

In addition, the requirement for entities (both large and small) to enroll in E-Verify only applies to contractors and subcontractors who choose to perform certain work for the Federal Government. If an entity does believe that participating in E-Verify would impose a significant economic impact on their operation, the entity would make a business decision whether the revenue generated by doing business with the Federal Government would provide a financial return sufficient to justify the cost of such participation in E-Verify. 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.

The Councils seek further comment on the actual costs or expenditures, if any, of registering for and using the E-Verify System and the extent to which these costs may differ or vary for small entities.

The Councils are unaware of any duplicative, overlapping, or conflicting Federal rules. There are current requirements for all employers, not just Federal contractors and subcontractors, to verify the employment eligibility of their newly hired employees. These requirements have existed since 1986. Arguably related rules include DHS’s “No-Match” rule, which provides guidance to employers on how best to respond to the Social Security Administration’s (SSA)

no-match letters, through which employers are alerted annually about their employees whose names and social security numbers submitted on tax forms do not match up to the information in the SSA's database. Although this "No-Match" rule concerns the SSA's letters generated from one of the data sources used by the E-Verify system, the "No-Match" rule is not associated with use of the E-Verify System. The two rules interact insofar as use of E-Verify–and the resulting strengthening of Federal contractors' employment verification processes–is expected to reduce the incidence of SSA "No-Matches" in the Federal contract workforce resulting from the employment of unauthorized alien workers. But the "No-Match" rule is designed to assist employers to ensure that their entire existing workforce remains work-authorized, while this proposed amendment to the Federal Acquisition Regulation is designed to ensure that unauthorized aliens are not brought into the Federal Government's contractor workforce.

The Councils considered the following alternatives in order to minimize the impact on small business concerns:

* Whether to require E-Verify participation as a preaward eligibility requirement or treat it as a postaward contract performance requirement. The proposed rule is distinct from the existing E-Verify program, in that it would require E-Verify queries to be performed on certain existing employees of a contractor, and the Councils believe that the obligations created by the rule should be codified as a post-award contract performance requirement.

* Whether the use of E-Verify should be required for existing employees of the contractor that are assigned to work under the Government contract, or should be limited only to the new hires of the contractor. The Councils decided that requiring employment eligibility confirmation of all workers assigned to a new Government contract was most consistent with the Federal Government's own obligation to use E-Verify when hiring Federal employees, and would most effectively ensure that the Federal Government does not indirectly exploit an illegal labor force.

* Whether to require contractors to use E-Verify only for new hires that would be assigned to work under a Government contract, and exclude all other new hires of the contractor from the E-Verify requirement. The Councils decided that requiring contractors to use the E-Verify program as part of their standard hiring practices would simplify employment verification, and better conforms with a principal goal of the rule to ensure that the Federal Government does business with companies that do not employ unauthorized aliens.

* Whether the use of E-Verify should be required for all prime contracts or only for those contracts that do not call for COTS items or items that would be COTS items but for minor modifications, as defined at FAR Part 2, containing the definition of a commercial item. Because COTS suppliers by definition do not specialize in serving the Federal Government, and because the Government might lose access to COTS suppliers if they determine the cost of complying with the rule outweighs their gains from Government business, the Councils decided not to require the use of E-Verify for COTS items and items that would be COTS but for minor modifications.

* Whether the requirements of the rule should flow down to all subcontracts or should be limited to subcontracts for services or construction. The Councils determined to apply the proposed rule only to subcontracts for commercial or noncommercial services, including construction. It does not apply to subcontracts for material or to subcontracts less than $3,000.

The FAR Secretariat has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the FAR Secretariat. The Councils will consider comments from small entities concerning the affected Subpart FAR 22.18 in accordance with 5 U.S.C. 610. Comments must be submitted separately and should cite 5 U.S.C 601, et seq. (FAR case 2007-013), in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act (Pub. L. 104-13) applies because the proposed rule contains information collection requirements over and above the burden hours already approved for the E-Verify System. The OMB control number for the currently approved Information Collection Request is 1615-0092. The Privacy Impact Assessments and the System of Records Notice for the E-Verify program may be found at http://www.dhs.gov/xinfoshare/publications/editorial_0511.shtm#4 and at 73 FR 10793. Although the E-Verify System has a currently approved Paperwork Reduction Act clearance, we are seeking an additional approval for this proposed amendment to the FAR because the proposed FAR rule will increase the number of E-Verify users. The OMB control number for the currently approved Information Collection Request is 1615-0092. This additional burden is created by the requirement in this rule to verify employment eligibility of certain current employees in each contractor's existing workforce. Also included in the additional burden estimate is the number of employers and employees that would not have utilized E-Verify but for the issuance of this rule. Accordingly, the Councils will forward a request for approval of a new information collection requirement concerning this burden to the Office of Management and Budget under 44 U.S.C. 3501, et seq. Public comments concerning this request will be invited through a subsequent Federal Register notice.

Annual Reporting Burden:

The number of Respondents estimated below is the average number of covered contractors and subcontractors per year for the first three years the rule is in effect. The number of total annual responses is the sum of the MOUs that must be signed by each employer, the number of employer registrations, the number of employees that undergo training, and the average number of E-Verify queries per year for the first three years the rule is in effect. Public reporting burden for this collection of information is estimated to average .40 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

The annual reporting burden is estimated as follows:

Respondents: 177,196
Responses per respondent: 21.05
Total annual responses: 3,729,406
Preparation hours per response: .40 hrs
Total response burden hours: 1,500,357

D. Request for Comments Regarding Paperwork Burden

Submit comments, including suggestions for reducing this burden, not later than [insert date 60 days after publication in the FEDERAL REGISTER] to: FAR Desk Officer, OMB, Room 10102, NEOB, Washington, DC 20503, and a copy to the General Services Administration, FAR Secretariat (VPR), 1800 F Street, NW, Room 4035, Washington, DC 20405.

Public comments are particularly invited on: whether this collection of information is necessary for the proper performance of functions of the FAR and will have practical utility; whether the above estimate of the public burden of this collection of information is accurate and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which the burden of the collection of

information can be minimized on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.
Requester may obtain a copy of the justification from the General Services Administration, FAR Secretariat (VR), Room 4035, Washington, DC 20405, telephone (202) 501-4755. Please cite OMB Control Number 9000-XXXX in all correspondence.
List of Subjects in 48 CFR Parts 2, 12, 22 and 52
Government procurement.
Dated:

Al Matera,
Director,
Office of Acquisition Policy.

Therefore, DoD, GSA, and NASA propose amending 48 CFR parts 2, 12, 22, and 52 as set forth below:
1. The authority citation for 48 CFR parts 2, 12, 22, and 52 continues to read as follows:
AUTHORITY: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).
PART 2—DEFINITIONS OF WORDS AND TERMS
2. Amend section 2.101 in paragraph (b)(2), in the definition “United States,” by redesignating paragraphs (5) and (6) as paragraphs (6) and (7), respectively, and adding a new paragraph (5) to read as follows:
2.101 Definitions.
* * * * *
(b) * * *
(2) * * *
* * * * *
United States, * * *
* * * * *
(5) For use in Subpart 22.18, see the definition at 22.1801.
* * * * *
PART 12—ACQUISITION OF COMMERCIAL ITEMS
3. Amend section 12.301 by adding paragraph (d)(3) to read as follows:
12.301 Solicitation provisions and contract clauses for the acquisition of commercial items.
* * * * *
(d) * * *
(3) Insert the clause at 52.222-XX, Employment Eligibility Verification, as prescribed in 22.1803.
* * * * *
4. Amend section 22.102-1 by removing from the end of paragraph (g) the word “and”; removing the period from the end of paragraph (h) and adding “; and” in its place; and adding paragraph (i) to read as follows:
PART 22—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS
22.102-1 Policy.
* * * * *
(i) Eligibility for employment under United States immigration laws.
5. Add subpart 22.18 to read as follows:
SUBPART 22.18—EMPLOYMENT ELIGIBILITY VERIFICATION
Sec.
22.1800 Scope.
22.1801 Definitions.
22.1802 Policy.

22.1803 Contract clause.

22.1800 Scope.
This subpart prescribes policies and procedures requiring contractors to utilize the 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.
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 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 requirement to insert the clause at 52.222-XX, Employment Eligibility Verification, for a contract or subcontract or a class of contracts or subcontracts. This waiver authority may not be delegated.
22.1803 Contract clause.
Insert the clause at 52.222-XX, Employment Eligibility Verification, in all solicitations and contracts, except those that—

(a) Are for commercially available off-the-shelf items or 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);
(b) Are under the micro-purchase threshold; or
(c) Do not include any work that will be performed in the United States.
PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES
6. Add section 52.222-xx to read as follows:
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—

(1) 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.

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

(e) Individuals previously verified. The Contractor is not required by this clause to perform additional employment verification using E-Verify for any employee whose employment eligibility was previously verified by the Contractor through the E-Verify program.

(f) Subcontractor flowdown. The Contractor shall flow down the requirements of this clause, including this paragraph (f) (appropriately modified for identification of the parties), to each subcontract that—

(1) Is for commercial or noncommercial services or construction;

(2) Exceeds $3,000; and

(3) Includes work performed in the United States.

(End of clause)

[BILLING CODE 6820-EP]

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