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September 20, 2013

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MEMORANDUM:

TO: Greg Griffin
State Auditor

FROM: Elizabeth Harris EAH
Assistant Attorney General

RE: Senate Bill 160

This responds to your request for informal advice regarding implementation of the new affidavit and reporting requirements in light of the passage of Senate Bill 160 ("SB 160"), which became effective on July 1, 2013. As you are aware, this office has issued three previous memoranda regarding SB 160. Copies of these memoranda are enclosed. In your request, you have raised ten questions. Response to each of the questions are set forth separately below.

SB 160 in part amends O.C.G.A. § 13-10-91(b)(1) as follows:

> (b)(1) A public employer shall not enter into a contract for the physical performance of services unless the contractor registers and participates in the federal work authorization program. Before a bid for any such service is considered by a public employer, the bid shall include a signed, notarized affidavit from the contractor attesting to this following:
>
> (A) The affiant has registered with, is authorized to use, and uses the federal work authorization program;
> (B) The user identification number and date of authorization for the affiant;
> (C) The affiant will continue to use the federal work authorization program throughout the contract period; and,

> (D) The affiant will contract for the physical performance of services in satisfaction of such contract only with subcontractors who present an affidavit to the contractor with the same information required by subparagraphs (A), (B), and (C) of this paragraph.

Further, SB 160 amends the definition of "physical performance of services" as contained in O.C.G.A. § 13-10-90(4) as follows:

> "Physical performance of services" means any performance of labor or services for a public employer using a bidding process or by contract wherein the labor or services exceed $2,499.99; provided, however, that such term shall not include any contract between a public employer and an individual who is licensed pursuant to Title 26 or Title 43 or by the State Bar of Georgia and is in good standing when such contract is for service to be rendered by such individual.

The ten questions you have raised in your request and responses to each are set forth below:

1. Since the definition of "physical performance of services" is revised in O.C.G.A. § 13-10-90, is the guidance previously provided in the Department of Law memoranda and correspondence still applicable or does this revised definition broaden the scope of covered contracts beyond the previous guidance?

The memoranda previously issued by this Office on July 1, July 9, August 2, 2013, copies of which are enclosed, are based on the current law, including SB 160, and are still applicable.

The correspondence previously issued on January 31, 2012,[1] and other informal advice issued prior to July 1, 2013, were based on the prior versions of O.C.G.A. §§ 13-10-90 and 13-10-91. As SB 160 has changed the definition of "physical performance of services," the previously issued informal advice based on the prior definition is no longer applicable.

Specifically, SB 160 amended the definition of "physical performance of services" as follows:[2]

> . . . ~~the building, altering, repairing, improving, or demolishing of any public structure or building or other public improvements of any kind to public real property within this state, including the construction, reconstruction, or maintenance of all or part of a~~

[1] A copy of the January 31, 2012, correspondence is attached to the memorandum issued on July 9, 2013.
[2] For your reference, I have included the revisions made by the General Assembly.

> ~~public road, or~~ any ~~other~~ performance of labor or services for a public employer ~~within this state under a contract or other~~ using a bidding process or by contract wherein the labor or services exceed $2,499.99; provided, however, that such term shall not include any contract between a public employer and an individual who is licensed pursuant to Title 26 or Title 43 or the State Bar of Georgia and is in good standing when such contract is for services to be rendered by such individual.

As shown above, SB 160 expands the definition of physical performance of services, which was previously limited to public works. Please refer to the memoranda issued on July 1, 2013, and later for guidance based on the current definition.

2. The new definition of "physical performance of services" adds language regarding contracts exceeding a dollar threshold. Does this dollar threshold also apply to services solicited using a bidding process or are all services requiring bids covered?

O.C.G.A. § 13-10-90(4) provides in pertinent part:

> "Physical performance of services" means any performance of labor or services for a public employer using a bidding process or by contract wherein the labor or services exceed $2,499.99…"

The plain language of the statute indicates that the dollar threshold applies to contracts not using a bidding process. Therefore, an affidavit would be required for any contract for the performance of labor or services using a bidding process, including those totaling less than $2,499.99.

3. The new definition of "physical performance of services" contains exclusions for contracts between a public employer and an individual. Would the reference to an "individual" include only a person who was in business by himself or herself or could an individual have employees and/or subcontractors?

O.C.G.A. § 13-10-90(4) as amended by SB 160 provides in pertinent part:

> "'physical performance of services'…shall not include any contract between a public employer and an individual who is licensed pursuant to Title 26 or Title 43 or by the State Bar of Georgia and is in good standing when such contract is for services to be rendered by such individual…"

Thus, if such a licensed professional enters into a contract in his individual capacity for the performance of labor or services using a bid process or exceeding $2,499.99, the

licensed professional would not be required to submit an affidavit under the statute as written.[3]

You have asked whether an affidavit is required from a licensed professional who has employees and/or subcontractors. If the licensed professional is entering into the contract in his or her individual capacity, it seems reasonable that an affidavit would not be required regardless of whether he or she has employees or subcontractors. If the licensed professional is instead entering the contract on behalf of a corporation or other entity, then an affidavit would be required. If the licensed professional has subcontractors, whether an affidavit is required from the subcontractors will depend on the circumstances and any statutory provisions applicable to the subcontractors.

4. The exclusion for contracts between a public employer and an individual, referred to above, references individuals licensed pursuant to Title 26, Title 43, or the State Bar of Georgia. Given the media's interest in immigration related issues, particularly government construction and maintenance projects involving the use of contractors and subcontractors that did not participate in the federal work authorization program to verify employment eligibility, does this exclusion apply to all individuals in Title 43, including those listed below?

Architects (Chapter 4)
Electrical contractors, plumbers, conditioned air contractors, low-voltage contractors, and utility contractors (Chapter 14)
Professional engineers and land surveyors (Chapter 15)
Landscape architects (Chapter 23)
Residential and general contractors (Chapter 41)
Persons engaged in structural pest control (Chapter 45)

The plain language of O.C.G.A. § 13-10-90(4) applies to any "individual who is licensed pursuant to Title 26 or Title 43 or by the State Bar of Georgia and is in good standing when such contract is for service to be rendered by such individual." The statute does not specifically exclude any of the professionals listed in your question. As explained above, if such a licensed professional is entering into the contract in his or her individual capacity, an affidavit would not be required from the licensed professional. If, however, the licensed professional is entering into the contract in some other capacity, such as on behalf of a corporation or other entity, then an affidavit may be required.

5. One question that has arisen regarding 2011 House Bill 87 that was not addressed in Senate Bill 160 related to when contractor affidavits are required. According to O.C.G.A. § 13-10-91, the only time an affidavit is required to be submitted by a public employer is prior to consideration of a bid; the affidavit is a required part of the bid. Is this the only time that a public employer is required to receive the affidavit? Since not all contracts require bids, are affidavits only required for those contracts that do require bids?

---

[3] Such a licensed professional would be required to submit proof of lawful status as a prerequisite to obtaining his or her professional license. See O.C.G.A. § 50-36-1.

Under O.C.G.A. § 13-10-91(b), the affidavit requirement is triggered by entering into a contract for the physical performance of services, which by definition includes non-bid contracts for services exceeding $2,499.99. *See* O.C.G.A. § 13-10-90(4). O.C.G.A. § 13-10-91(b) further provides that before a bid for any such service is considered, the bid shall include a signed, notarized affidavit. This statute does not, however, provide for alternative means of demonstrating that a contractor with a non-bid contract is participating in the federal work authorization program. Thus, the provision requiring that the affidavit be included with the bid may be construed as specifying at what stage in the process an affidavit is required for bid contracts, rather than as limiting the affidavit requirement only to bid contracts.

Construing O.C.G.A. § 13-10-90(4) and § 13-10-91(b) together, an affidavit is required for a non-bid contract for labor or services exceeding $2,499.99. Thus, if a non-bid contract is for labor or services exceeding $2,499.99, the public employer should obtain an affidavit from the contractor prior to entering into the contract.

6. Section 8 of Senate Bill 160 provides for the submission of an annual immigration compliance report to the Department of Audits and Accounts that consolidates information previously required to be submitted in two separate reports under 2011 House Bill 187 with a public benefits report that was submitted to the Department of Community Affairs. In previous years, we advised governmental entities that had no reportable transactions to submit reports indicating as such to ensure that we received a report from each entity. Lines 435 through 438 of Senate bill 160 provide guidance on how to report for entities that are exempt from some but not all report requirements. However, it contains no provision for those entities exempt from all report requirements. This would apply to many governmental authorities that do not enter into contracts for the physical performance of services nor administer public benefits. However, we have no way of knowing this information unless they comply with the reporting requirements. Does the Department of Audits and Accounts have the authority to require report submission from those entities exempt from all reporting provisions?

O.C.G.A. § 50-36-4(b) as amended by SB 160 provides:

> Each agency or political subdivision subject to any of the requirements provided in Code Sections 13-10-91, 36-60-6, and 50-36-1 shall submit an annual immigration compliance report to the department by December 31 that includes the information required under subsection (d) of this Code section for the annual reporting period. If an agency or political subdivision is exempt from any, but not all, of the provisions of subsection (d) of this Code section, it shall still be required to submit the annual report but shall indicate in the report which requirements from which it is exempt.

This provision does not appear to require the submission of reports by agencies or political subdivisions who are exempt from all of the provisions of subsection (d).

O.C.G.A. § 50-36-4(c) as amended by SB 160 provides:

> The department shall create an immigration compliance reporting system and shall provide technical support of the submission of such reports. The department shall further provide annual notification of such reports with submission instructions to all agencies and political subdivisions subject to such requirements. The department shall be authorized to implement policy as is needed to carry out the requirements of this subsection.

Under this provision, it appears reasonable that the Department of Audits would be authorized to implement policy whereby it requests that governmental authorities who are exempt from all reporting requirements in a given year notify the Department of that fact, if such policy were needed to carry out the requirements of subsection (c).

[redacted]

[redacted]

8. Lines 454 through 458 of Senate Bill 160 specify that one of the provisions of the annual immigration compliance report is a "a listing" of each license or certificate issued by a county or municipal corporation…" In Section 4 of Senate Bill 160, line 97 strikes reference to renewals and lines 114 through 123 create a new requirement on renewals. If renewals are treated differently for purposes of Section 4, would this also apply to Section 8 such that a city of county would only be required to report licenses or certificates issued but not report licenses or certificate renewed?

O.C.G.A. § 50-36-4(d)(4) provides that the immigration compliance report submitted shall include in part:

> A listing of each license or certificate issued by a county or municipal corporation to private employers that are required to utilize the federal work authorization program under the provisions of Code Section 36-60-6 during the annual reporting period, including the name of the person and business issued a license and his or her federally assigned employment eligibility verification system user number as provided in the private employer affidavit.

O.C.G.A. § 36-60-6(d) as amended provides in part:

> (1) Before any county or municipal corporation issues a business license, occupational tax certificate, or other document required to operate a business to any person, the person shall provide evidence that he or she is authorized to use the federal work authorization program or evidence that the provisions of this Code section do not apply…
>
> (2) Upon satisfying the requirements of paragraph (1) of this subsection, for all subsequent renewals of a business license, occupation tax certificate, or other document, the person shall submit to the county or municipality his or her federal work authorization user number or assert that he or she is exempt from this requirement, provided that the federal work authorization user number provided for the renewal is the same federal work authorization number as provided in the affidavit under paragraph (1) of this subsection…

O.C.G.A. § 36-60-6(e) further provides that "counties and municipal corporations subject to the requirements of this Code section shall provide an annual report to the Department of Audits and Accounts pursuant to Code Section 50-36-4…"

As O.C.G.A. § 50-36-4 specifically requires the reporting of licenses issued but does not specifically require the reporting of licenses renewed, it seems reasonable that counties

and municipal corporations would not be required to report renewals. Further, O.C.G.A. § 36-60-6(d)(2) appears to contemplate that persons applying for a renewal of a business license would have previously provided their federal work authorization user number when initially applying for the license. Presumably, the initial issuance of the license would have been reported pursuant to O.C.G.A. § 50-36-4.

9. Since the provisions of Senate Bill 160 are effective July 1, 2013, for purposes of this initial compliance report would government entities be required to report in accordance with the 2011 house Bill 87 reporting requirements for the period ending June 30, 2013, and in accordance with the Senate Bill 160 reporting requirements for the period beginning July 1, 2013, or could the annual report due December 31, 2013, follow the Senate Bill 160 reporting requirements?

The reporting requirements contained in SB 160 became effective on July 1, 2013. The reporting requirements in effect prior to July 1, 2013, to the extent that they are different from those contained in SB 160, would be applicable to the period ending on June 30, 2013. For the annual report due on December 31, 2013, government entities would be required to report as follows: (a) for the period ending on June 30, 2013, report in accordance with the law in effect on June 30, 2013; (b) for the period beginning on July 1, 2013, report in accordance with SB 160.

10. Finally, under 2011 House Bill 127, the Department of Audits was required to create affidavits for use by contractors and recipients of public benefits, as codified in O.C.G.A. § 13-10-91 and § 50-36-1. Department of Law staff drafted these affidavits, and we made them available on the Department's website. I would appreciate it if your staff would review Senate Bill 160 and advise us if any changes are necessary to the affidavits as a result of this legislation. In addition, should there be an affidavit associated with O.C.G.A. § 13-10-91(b)(5)? A contractor furnishing a copy of his or her driver's license provides the public employer no documentation by the contractor of the intent to comply with this provision of the law.

I have reviewed the four affidavits available on the Department of Audits' website; copies of which are attached to this memorandum. The affidavits for contractors, subcontractors, and sub-contractors do not require any changes as a result of SB 160. The affidavit for applicants for public benefits does require minor changes, in that the two references to O.C.G.A. § 50-36-1(e)(2) need to be changed to O.C.G.A. § 50-36-1(f)(1) and § 50-36-1(f)(a)(A), respectively. These changes are marked on the attached copy of the affidavit.

O.C.G.A. § 13-10-91(b)(5) provides, in part, as follows:

> [i]n lieu of the affidavit required by this subsection, a contractor, subcontractor, or sub-subcontractor who has no employees and does not hire or intend to hire employees for purposes of satisfying or completing the terms and conditions of any part or all of the original contract with the public employer shall instead provide a copy of the state issued driver's license or state issued

> identification card of such contracting party and a copy of the state issued driver's license or identification card of each independent contractor utilized in the satisfaction of part or all of the original contract with a public employer. A driver's license or identification card shall only be accepted in lieu of an affidavit if it is issued by a state within the United States and such state verifies lawful immigration status prior to issuing a driver's license or identification card. . . .

O.C.G.A. § 13-10-91(b)(5), as written, does not require an affidavit to be submitted by a contractor with no employees.

I hope this informal advice is helpful. Please keep in mind that this is not an official or unofficial opinion of the Attorney General. If you have any questions or wish to discuss this matter, please contact me.

AFFIDAVITS

Contractor Affidavit under O.C.G.A. § 13-10-91(b)(1)

By executing this affidavit, the undersigned contractor verifies its compliance with O.C.G.A. § 13-10-91, stating affirmatively that the individual, firm or corporation which is engaged in the physical performance of services on behalf of (name of public employer) has registered with, is authorized to use and uses the federal work authorization program commonly known as E-Verify, or any subsequent replacement program, in accordance with the applicable provisions and deadlines established in O.C.G.A. § 13-10-91. Furthermore, the undersigned contractor will continue to use the federal work authorization program throughout the contract period and the undersigned contractor will contract for the physical performance of services in satisfaction of such contract only with subcontractors who present an affidavit to the contractor with the information required by O.C.G.A. § 13-10-91(b). Contractor hereby attests that its federal work authorization user identification number and date of authorization are as follows:

_____
Federal Work Authorization User Identification Number

_____
Date of Authorization

_____
Name of Contractor

_____
Name of Project

_____
Name of Public Employer

I hereby declare under penalty of perjury that the foregoing is true and correct.

Executed on _____, ___, 201__ in _____(city), _____(state).

_____
Signature of Authorized Officer or Agent

_____
Printed Name and Title of Authorized Officer or Agent

SUBSCRIBED AND SWORN BEFORE ME
ON THIS THE _____ DAY OF _____,201__.

_____
NOTARY PUBLIC

My Commission Expires:

_____

Subcontractor Affidavit under O.C.G.A. § 13-10-91(b)(3)

By executing this affidavit, the undersigned subcontractor verifies its compliance with O.C.G.A. § 13-10-91, stating affirmatively that the individual, firm or corporation which is engaged in the physical performance of services under a contract with (name of contractor) on behalf of (name of public employer) has registered with, is authorized to use and uses the federal work authorization program commonly known as E-Verify, or any subsequent replacement program, in accordance with the applicable provisions and deadlines established in O.C.G.A. § 13-10-91. Furthermore, the undersigned subcontractor will continue to use the federal work authorization program throughout the contract period and the undersigned subcontractor will contract for the physical performance of services in satisfaction of such contract only with sub-subcontractors who present an affidavit to the subcontractor with the information required by O.C.G.A. § 13-10-91(b). Additionally, the undersigned subcontractor will forward notice of the receipt of an affidavit from a sub-subcontractor to the contractor within five business days of receipt. If the undersigned subcontractor receives notice that a sub-subcontractor has received an affidavit from any other contracted sub-subcontractor, the undersigned subcontractor must forward, within five business days of receipt, a copy of the notice to the contractor. Subcontractor hereby attests that its federal work authorization user identification number and date of authorization are as follows:

_____
Federal Work Authorization User Identification Number

_____
Date of Authorization

_____
Name of Subcontractor

_____
Name of Project

_____
Name of Public Employer

I hereby declare under penalty of perjury that the foregoing is true and correct.

Executed on _____, ___, 201__ in _____(city), _____(state).

_____
Signature of Authorized Officer or Agent

_____
Printed Name and Title of Authorized Officer or Agent

SUBSCRIBED AND SWORN BEFORE ME
ON THIS THE _____ DAY OF _____,201__.

_____
NOTARY PUBLIC

My Commission Expires:

_____

Sub-subcontractor Affidavit under O.C.G.A. § 13-10-91(b)(4)

By executing this affidavit, the undersigned sub-subcontractor verifies its compliance with O.C.G.A. § 13-10-91, stating affirmatively that the individual, firm or corporation which is engaged in the physical performance of services under a contract for (name of subcontractor or sub-subcontractor with whom such sub-subcontractor has privity of contract) and (name of contractor) on behalf of (name of public employer) has registered with, is authorized to use and uses the federal work authorization program commonly known as E-Verify, or any subsequent replacement program, in accordance with the applicable provisions and deadlines established in O.C.G.A. § 13-10-91. Furthermore, the undersigned sub-subcontractor will continue to use the federal work authorization program throughout the contract period and the undersigned sub-subcontractor will contract for the physical performance of services in satisfaction of such contract only with sub-subcontractors who present an affidavit to the sub-subcontractor with the information required by O.C.G.A. § 13-10-91(b). The undersigned sub-subcontractor shall submit, at the time of such contract, this affidavit to (name of subcontractor or sub-subcontractor with whom such sub-subcontractor has privity of contract). Additionally, the undersigned sub-subcontractor will forward notice of the receipt of any affidavit from a sub-subcontractor to (name of subcontractor or sub-subcontractor with whom such sub-subcontractor has privity of contract). Sub-subcontractor hereby attests that its federal work authorization user identification number and date of authorization are as follows:

_____
Federal Work Authorization User Identification Number

_____
Date of Authorization

_____
Name of Sub-subcontractor

_____
Name of Project

_____
Name of Public Employer

I hereby declare under penalty of perjury that the foregoing is true and correct.

Executed on _____, ___, 201__ in _____(city), _____(state).

_____
Signature of Authorized Officer or Agent

_____
Printed Name and Title of Authorized Officer or Agent

SUBSCRIBED AND SWORN BEFORE ME
ON THIS THE _____ DAY OF _____,201__.

_____
NOTARY PUBLIC
My Commission Expires:

_____

O.C.G.A. § 50-36-1~~(e)(2)~~(f)(1) Affidavit

By executing this affidavit under oath, as an applicant for a(n) _____ [*type of public benefit*], as referenced in O.C.G.A. § 50-36-1, from _____ [*name of government entity*], the undersigned applicant verifies one of the following with respect to my application for a public benefit:

1) _____ I am a United States citizen.

2) _____ I am a legal permanent resident of the United States.

3) _____ I am a qualified alien or non-immigrant under the Federal Immigration and Nationality Act with an alien number issued by the Department of Homeland Security or other federal immigration agency.

My alien number issued by the Department of Homeland Security or other federal immigration agency is:_____.

The undersigned applicant also hereby verifies that he or she is 18 years of age or older and has provided at least one secure and verifiable document, as required by O.C.G.A. § 50-36-1~~(e)(1)~~(f)(1)(A), with this affidavit.

The secure and verifiable document provided with this affidavit can best be classified as: _____.

In making the above representation under oath, I understand that any person who knowingly and willfully makes a false, fictitious, or fraudulent statement or representation in an affidavit shall be guilty of a violation of O.C.G.A. § 16-10-20, and face criminal penalties as allowed by such criminal statute.

Executed in _____ (city), _____(state).

_____
Signature of Applicant

_____
Printed Name of Applicant

SUBSCRIBED AND SWORN
BEFORE ME ON THIS THE
___ DAY OF _____, 20____

_____
NOTARY PUBLIC
My Commission Expires:

PRIOR MEMORANDA

GEORGIA DEPARTMENT OF LAW
40 CAPITOL SQUARE SW
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SAMUEL S. OLENS
ATTORNEY GENERAL

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August 2, 2013

WRITER'S DIRECT DIAL
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MEMORANDUM:

TO: Daryl Griswold, Esq.
Board of Regents

FROM: Elizabeth Harris EAH
Assistant Attorney General

RE: Senate Bill 160

This responds to your request for informal advice regarding implementation of the new E-Verify affidavit requirement in light of the passage of Senate Bill 160 ("SB 160"), which became effective on July 1, 2013. As you are aware, this office has issued two previous memoranda regarding SB 160. Copies of these memoranda are enclosed.

In your request, you have raised the following question:

> If a contract is entered into without a bid, is the affidavit required? The express language of the statute only provides that the affidavit be obtained in a bid. Could a public employer comply with the statute in a non-bid situation by including a representation and warranty in the contract that the contractor has registered and participates in the federal work authorization program and will continue to do so for the term of the contract?

SB 160 in part amends O.C.G.A. § 13-10-91(b)(1) as follows:

> (b)(1) A public employer shall not enter into a contract pursuant for the physical performance of services unless the contractor registers and participates in the federal work authorization program. Before a bid for any such service is considered by a

> public employer, the bid shall include a signed, notarized affidavit from the contractor attesting to this following:
>
> (A) The affiant has registered with, is authorized to use, and uses the federal work authorization program;
> (B) The user identification number and date of authorization for the affiant;
> (C) The affiant will continue to use the federal work authorization program throughout the contract period; and,
> (D) The affiant will contract for the physical performance of services in satisfaction of such contract only with subcontractors who present an affidavit to the contractor with the same information required by subparagraphs (A), (B), and (C).

Further, SB 160 amends the definition of "physical performance of services" as contained in O.C.G.A. § 13-10-90(4) in part as follows:

> "Physical performance of services" means any performance of labor or services for a public employer using a bidding process or by contract wherein the labor or services exceed $2,499.99…"

Under O.C.G.A. § 13-10-91(b), the affidavit requirement is triggered by entering into a contract for the physical performance of services, which by definition includes non-bid contracts for services exceeding $2,499.99. *See* O.C.G.A. § 13-10-90(4). O.C.G.A. § 13-10-91(b) further provides that before a bid for any such service is considered, the bid shall include a signed, notarized affidavit. This statute does not, however, provide for alternative means of demonstrating that a contractor with a non-bid contract is participating in the federal work authorization program. Thus, the provision requiring that the affidavit be included with the bid may be construed as specifying at what stage in the process an affidavit is required for bid contracts, rather than as limiting the affidavit requirement only to bid contracts.

The alternative means proposed in your question, i.e. including a representation and warranty in a non-bid contract, would be different from an affidavit in that the representation and warranty would not be a sworn statement. Thus, a representation and warranty in the contract would not fulfill the affidavit requirement of O.C.G.A. § 13-10-91(b). Construing O.C.G.A. § 13-10-90(4) and § 13-10-91(b) together, an affidavit is required for a non-bid contract for labor or services exceeding $2,499.99.

Although O.C.G.A. § 13-10-91(b) does not specify when the affidavit should be obtained for a non-bid contract for services exceeding $2,499.99, common sense dictates that the affidavit should be obtained prior to entering into the contract, as O.C.G.A. § 13-10-91(b) requires that for contracts using a bidding process, the affidavit be obtained prior to consideration of the bid.

Thus, if a non-bid contract is for labor or services exceeding $2,499.99, the public employer should obtain an affidavit from the contractor prior to entering into the contract.

I hope this informal advice is helpful. Please keep in mind that this is not an official or unofficial opinion of the Attorney General. If you have any questions or wish to discuss this matter, please contact me.

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July 9, 2013

WRITER'S DIRECT DIAL
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FAX (404) 657-3239

MEMORANDUM:

To: Susan Scheff Wells
Associate Director for Legal Affairs
University of Georgia

From: Daniel J. Strowe
Assistant Attorney General

RE: Scope of Senate Bill 160

This responds to your request for informal advice regarding the impact Senate Bill 160 will have on the University of Georgia's compliance obligations when entering into contracts for various goods or services. Specifically, you have asked the following questions:

1) How does the statute apply to a contractor who is an individual with no employees?
2) Does the statute apply only to contracts that are solely for services or also to contracts for goods that include ancillary services, such as copier maintenance or software with IT support services (often provided from overseas)?
3) Does the statute apply to a foreign national or foreign group that does not have US employees and would not/could not register with eVerify? Examples would include a foreign symphony orchestra that performs on campus, shipment of scientific equipment on campus, IT services provided from abroad. These are often sole source transactions.

This memorandum will provide you with a brief synopsis of Senate Bill 160 followed by specific analysis of each of your questions.

BACKGROUND

As you are aware, public employers are required to "register and participate in the federal work authorization program to verify the employment eligibility of all newly hired employees" (hereinafter "E-verify"). O.C.G.A. § 13-10-91(a). "A public employer shall not enter into a

contract for the physical performance of services unless the contractor registers and participates in the federal work authorization program." O.C.G.A. § 13-10-91(b)(1). Each year public employers are required to submit to the Department of Audits and Accounts a compliance report certifying compliance with the E-verify requirements. O.C.G.A. § 13-10-91(b)(7)(A).

The specific questions you have raised relate to the requirements of O.C.G.A. § 13-10-91(b)(1), which became effective July 1, 2013[1], and provides in relevant part as follows:

> (b)(1) A public employer shall not enter into a contract ~~pursuant to this chapter~~ for the physical performance of services unless the contractor registers and participates in the federal work authorization program. Before a bid for any such service is considered by a public employer, the bid shall include a signed, notarized affidavit from the contractor attesting to the following:
>
> (A) The affiant has registered with, is authorized to use, and uses the federal work authorization program;
>
> (B) The user identification number and date of authorization of the affiant;
>
> (C) The affiant will continue to use the federal work authorization program throughout the contract period; and
>
> (D) The affiant will contract for the physical performance of services in satisfaction of such contract only with subcontractors who present an affidavit to the contractor with the same information required by subparagraphs (A), (B), and (C) of this paragraph.

2013 Ga. ALS 27. The General Assembly has specifically defined the phrase "physical performance of services" as:

> . . . ~~the building, altering, repairing, improving, or demolishing of any public structure or building or other public improvements of any kind to public real property within this state, including the construction, reconstruction, or maintenance of all or part of a public road, or~~ any ~~other~~ performance of labor or services for a public employer ~~within this state under a contract or other~~ using a bidding process or by contract wherein the labor or services exceed $2,499.99; provided, however, that such term shall not include any contract between a public employer and an individual who is licensed pursuant to Title 26 or Title 43 or the State Bar of Georgia and is in good standing when such contract is for services to be rendered by such individual.

[1] For your reference, I have included the revisions made by the General Assembly.

2013 Ga. ALS 27. Previously, O.C.G.A. § 13-10-91(b)(1) only applied to "contract[s] *pursuant to this chapter* [Chapter 10 of Title 13] for the physical performance of services." (Emphasis added). Thus, this office, in prior informal advice and correspondence[2], interpreted O.C.G.A. § 13-10-91(b)(1) to only apply to contracts for public works given the former definition of "physical performance of services." However, this narrow interpretation is no longer possible in light of the revisions made by the General Assembly that go into effect on July 1, 2013.

As quoted above, the specific requirement of O.C.G.A. § 13-10-91(b)(1) is that "[a] public employer shall not enter into a contract for the physical performance of services unless the contractor registers and participates in the federal work authorization program." On its face, O.C.G.A. § 13-10-91(b)(1) broadly applies to any "contract for the physical performance of services." The definition of "physical performance of services" has also been expanded to include "any performance of labor or services for a public employer using a bidding process or by contract wherein the labor or services exceed $2,499.99." O.C.G.A. § 13-10-90(4).

It is a fundamental precept of statutory construction that "all statutes are presumed to be enacted by the legislature with full knowledge of the existing condition of the law and with reference to it." *Allison v. Domain*, 158 Ga. App. 542, 544 (1981) (*quoting Botts v. Se. Pipe-Line Co.*, 190 Ga. 689, 700 (1940)). Furthermore, "when a statute is amended, '[f]rom the addition of words it may be presumed that the legislature intended some change in the existing law.'" *Bd. of Assessors of Jefferson Cnty. v. McCoy Grain Exch., Inc.*, 234 Ga. App. 98, 100 (1998) (*quoting C.W. Matthews Contracting Co. v. Capital Ford Truck Sales*, 149 Ga. App. 354, 356 (1979)). Clearly, the General Assembly knew how to limit the scope of O.C.G.A. § 13-10-91(b)(1) as the law formerly only applied to contracts for public works and, in fact, none of the changes found in Senate Bill 160 would be necessary if it was the intent of the General Assembly for the law to continue to have this narrow application. The caption to Senate Bill 160 further supports the broader interpretation of O.C.G.A. § 13-10-91(b)(1) as it provides as follows:

> [i]t is the intent of the General Assembly that all public employers and contractors at every tier and level *use the federal work authorization program on all projects, jobs, and work resulting from any bid or contract* and that every public employer and contractor working for a public employer take all possible steps to ensure that a legal and eligible workforce is utilized in accordance with federal immigration and employment.

(Emphasis added). In light of the above authorities, the scope of O.C.G.A. § 13-10-91(b)(1), as revised in Senate Bill 160, now requires that public employers and contractors comply with E-verify for all contracts that use a bidding process or where the labor or services rendered exceed $2,499.99. With this framework in mind, I will now attempt to address your specific inquiries.

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[2] Attached is a copy of letter dated January 31, 2012 from this office that reaches this conclusion.

QUESTIONS

1) **How does the statute apply to a contractor who is an individual with no employees?**

O.C.G.A. § 13-10-90(2) defines "contractor" as "a person or entity that enters into a contract for the physical performance of services."

O.C.G.A. § 13-10-91(b)(5) further provides, in part, as follows:

> [i]n lieu of the affidavit required by this subsection, a contractor, subcontractor, or sub-subcontractor *who has no employees* and does not hire or intend to hire employees for purposes of satisfying or completing the terms and conditions of any part or all of the original contract with the public employer *shall instead provide a copy of the state issued driver's license or state issued identification card of such contracting party* and a copy of the state issued driver's license or identification card of each independent contractor utilized in the satisfaction of part or all of the original contract with a public employer. A driver's license or identification card shall only be accepted in lieu of an affidavit if it is issued by a state within the United States and such state verifies lawful immigration status prior to issuing a driver's license or identification card. . . .

(Emphasis added). Thus, a public employer must require a contractor with no employees to submit a copy of his or her driver's license or state issued identification card before entering into an agreement for the performance of labor or services as a result of a bidding process or where the labor or services exceed $2,499.99. *See* O.C.G.A. § 13-10-91(b)(1). A public employer should also be aware that O.C.G.A. § 13-10-91(b)(5) provides that "[i]n the event that a contractor, sub-contractor, sub-subcontractor later determines that he or she will need to hire employees to satisfy or complete the physical performance of services under an applicable contract, then he or she shall first be required to comply with the affidavit requirements of this subsection." In sum, a solo contractor must provide a state agency with a valid driver's license or state issued identification card prior to entering into a contract for the physical performance of services and should the contractor need to hire employees to complete the terms of the contracts then the contractor is required to submit an affidavit attesting to his or her compliance with E-verify.

2) **Does the statute apply only to contracts that are solely for services or also to contracts for goods that include ancillary services, such as copier maintenance or software with IT support services (often provided from overseas)?**

Whether a contract is for "performance of labor or services . . . using a bidding process or by contract wherein the labor or services exceed $2,499.99," as provided for in O.C.G.A. § 13-10-90(4), will depend on the facts of the particular situation. When in doubt, it would be prudent to err on the side of caution and obtain an affidavit from the contractor in accordance with the E-verify requirements of O.C.G.A. § 13-10-91(b)(1).

Given the limited information provided for each of the hypothetical situations described above, it is difficult to determine whether the E-verify requirements as revised in Senate Bill 160 would apply to the proposed contracts. Arguably, an agreement that provides "maintenance" or "support" services in addition to the actual goods received, could be construed as a contract for "labor and services" from the vendor providing maintenance services. Whether such an agreement is subject to E-verify requirements also depends on if the contract is for the "physical performance of services," namely, is the contract subject to a bidding process or does the cost of the contract exceed $2,499.99. *See* O.C.G.A. §§ 13-10-91(b)(1) and 13-10-90(4). Should a contract meet these requirements, it would appear that compliance with E-verify is required and a public employer entering such an agreement is urged to obtain an affidavit from the contractor pursuant to O.C.G.A. § 13-10-91(b)(1). If you have a question regarding compliance requirements related to a specific contract, please forward a description of the transaction along with the underlying agreement so that our office can evaluate the applicability of E-verify.

3) **Does the statute apply to a foreign national or foreign group that does not have US employees and would not/could not register with eVerify? Examples would include a foreign symphony orchestra that performs on campus, shipment of scientific equipment on campus, IT services provided from abroad. These are often sole source transactions.**

If the literal language of O.C.G.A. § 13-10-91(b)(1) as amended by Senate Bill 160 were followed, a foreign symphony, whose musicians are presumably residents of a foreign country and usually perform outside the United States, would be required to obtain an E-verify affidavit in order to perform at a university in Georgia. Such a result would arguably be an absurdity, which could not have been intended by the General Assembly.[3]

As the issue is presented in this question, it would not appear reasonable to require an affidavit from the foreign symphony. The contracting state entity should take steps to ensure that the

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[3] "[T]he 'golden rule' of statutory construction . . . requires us to follow the literal language of the statute 'unless it produces contradiction, absurdity, or such an inconvenience as to insure that the legislature meant something else." *Judicial Council of Georgia, et al. v. Brown & Gallo, LLC*, 288 Ga. 294, 297 (2010) (*citing Telecom USA, Inc. v. Collins*, 260 Ga. 362, 363 (1990)).

symphony musicians are otherwise authorized by law to perform in the United States, including but not limited to having an appropriate visa.

Likewise, requiring a state entity to comply with E-verify requirements when receiving a shipment of equipment from a foreign country or obtaining IT services that are performed in a foreign country would appear to be unreasonable, as it would require a state entity to obtain an E-verify affidavit from a resident of a foreign country who is performing work in that foreign country. E-verify is a tool to assist employers in determining whether an employee is eligible to work in the United States, as employment of an unauthorized alien is unlawful under federal law. *See* 8 U.S.C.S. § 1324(a). Common sense dictates that it is irrelevant whether a resident of a foreign country performing work in that foreign country is eligible to work in the United States. Thus, requiring an E-verify affidavit in such a situation would produce an absurd result, which could not have been intended by the General Assembly.

Given that the stated purpose of Senate Bill 160 is to ensure a legal and eligible workforce in accordance with federal immigration and employment, requiring compliance with E-verify in this instance would not promote the purpose of the statute. Work performed in a foreign country by a resident of that country would not appear to implicate federal immigration and employment laws at all. As the issue is presented in this question, it does not appear reasonable to require a contractor, whose employees are residents of a foreign country and performing labor or services in that foreign country, to comply with the requirements of E-verify. Again, should you have questions regarding the applicability of E-verify to specific contracts similar to these hypothetical situations, please feel free to forward descriptions of the transactions and the underlying agreements to our office so that we can provide more specific advice regarding the applicability of E-verify to each contract and fact situation.

I hope this informal analysis has been helpful. I have also attached for your review a copy of recent informal advice from this office that addresses many of the same questions and issues. Please keep in mind that this is not an official or unofficial opinion of the Attorney General. Should you have any questions, please do not hesitate to contact me.

DJS/

attachments

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January 31, 2012

Honorable Chip Rogers
Senator, District 21
State Capitol, Room 236
Atlanta, Georgia 30334

Re: Scope of O.C.G.A. § 13-10-91(b)(1)

Dear Senator Rogers:

This responds to your letter dated January 23, 2012, requesting clarification regarding the scope of the requirements set forth in O.C.G.A. § 13-10-91(b)(1). Specifically, you have asked whether the provisions apply to "all labor and all services paid for with public funds" or instead "apply only to public funded jobs involved in 'buildings and roads.'" We have reviewed our prior informal advice and other correspondence in this area. Since the General Assembly amended O.C.G.A. § 13-10-91(b)(1) in 2009 to limit its scope to contracts entered into under Chapter 10 of Title 13,[1] this office has consistently concluded that the provisions in O.C.G.A. § 13-10-91(b)(1) apply to public works contracts.

The specific question that you have raised relates to the requirements of O.C.G.A. § 13-10-91(b)(1) which provides relevantly as follows:

> (b) (1) A public employer shall not enter into a contract *pursuant to this chapter* for the physical performance of services unless the contractor registers and participates in the federal work authorization program. Before a bid for any such service is considered by a public employer, the bid shall include a signed, notarized affidavit from the contractor attesting to the following:
>
> (A) The affiant has registered with and is authorized to use the federal work authorization program;

---

[1] Attached are copies of all of the prior informal advice and other correspondence issued by my office regarding the scope of O.C.G.A. § 13-10-91(b)(1).

> (B) The user identification number and date of authorization for the affiant;
>
> (C) The affiant will continue to use the federal work authorization program throughout the contract period; and
>
> (D) The affiant will contract for the physical performance of services in satisfaction of such contract only with subcontractors who present an affidavit to the contractor with the same information required by subparagraphs (A), (B), and (C) of this paragraph.
>
> An affidavit required by this subsection shall be considered an open public record once a public employer has entered into a contract for physical performance of services; provided, however, that any information protected from public disclosure by federal law or by Article 4 of Chapter 18 of Title 50 shall be redacted. Affidavits shall be maintained by the public employer for five years from the date of receipt.

(Emphasis added.) The General Assembly has specifically defined the phrase "physical performance of services" as:

> . . . the building, altering, repairing, improving, or demolishing of any public structure or building or other public improvements of any kind to public real property within this state, including the construction, reconstruction, or maintenance of all or part of a public road; or any other performance of labor for a public employer under a contract or other bidding process.

O.C.G.A. § 13-10-90(4). Notwithstanding the breadth of the definition of "physical performance of services," O.C.G.A. § 13-10-91(b)(1) only applies to "contract[s] *pursuant to this chapter* [Chapter 10 of Title 13] for the physical performance of services." Thus, the express language of O.C.G.A. § 13-10-91(b)(1) limits its applicability to contracts for public works.

The fact that O.C.G.A. § 13-10-91(b)(1) only applies to contracts for public works is evident by the fact that the General Assembly amended the law to specifically include this limitation. 2009 Ga. Laws 970, 971. Prior to 2009, O.C.G.A. § 13-10-91(b)(1) provided that:

> No public employer shall enter into a contract for the physical performance of services within this state unless the contractor registers and participates in the federal work authorization program to verify information of all new employees.

2006 Ga. Laws 105, 107. In 2009, the General Assembly revised O.C.G.A. § 13-10-91(b)(1) to specifically limit the scope of the legislation to contracts entered into pursuant Chapter 10 of Title 13 dealing with public works contracts.[2] It is a fundamental precept of statutory construction that "all statutes are presumed to be enacted by the legislature with full knowledge of the existing condition of the law and with reference to it." *Allison v. Domain*, 158 Ga. App. 542, 544 (1981) (quoting *Botts v. Se. Pipe-Line Co.*, 190 Ga. 689, 700 (1940)). Furthermore, "when a statute is amended, '[f]rom the addition of words it may be presumed that the legislature intended some change in the existing law.'" *Bd. of Assessors of Jefferson Cnty. v. McCoy Grain Exch., Inc.*, 234 Ga. App. 98, 100 (1998) (quoting *C. W. Matthews Contracting Co. v. Capital Ford Truck Sales*, 149 Ga. App. 354, 356 (1979)). Clearly, the General Assembly knew how to have the law apply to all contracts involving the physical performance of services and, at one time, it did so. However, in 2009, the General Assembly elected to limit the applicability of O.C.G.A. § 13-10-91(b)(1) to contracts entered into "pursuant to this chapter" which deals with public works contracts.[3]

---

[2] It is worth noting that the attached advice issued by this office on October 17, 2007, concluded that O.C.G.A. § 13-10-91(b)(1) applied to all contracts involving the physical performance of services and not just to public works contracts. However, the 2009 amendment limited the scope of the statute to public works contracts. This legislative limitation has been reflected in all of the advice issued by this office on this topic since the amendment.

[3] The fact that the General Assembly intended to limit the scope of the statute to public works contracts is further evidenced by the caption to Senate Bill 447, which enacted the definition of "physical performance of services" currently found in O.C.G.A. § 13-10-90(4). The preamble provides relevantly that its purpose is "[t]o amend Chapter 10 of Title 13 of the Official Code of Georgia Annotated, *relating to contracts for public works*." 2010 Ga. Laws 308 (emphasis added). Therefore, the preamble to the legislation enacting the definition of "physical performance of services" indicates that Chapter 10 of

In light of the above authorities, the scope of O.C.G.A. § 13-10-91(b)(1) is limited to "contracts for public works." There is no statutory definition of what constitutes a public works contract for purposes of Chapter 10 of Title 13. This absence of a definition creates some uncertainty as "[a] determination of what are public works is often a question of statutory construction and interpretation." 1967 Op. Att'y Gen. 67-271. However, there are several Attorney General Opinions which address the scope of public works contracts. For example, the term "public works contract" has been held to include contracts for the reclamation and rehabilitation of public land subjected to adverse effects of surface mining operations and to contracts to demolish a building. *See* 1976 Op. Att'y Gen. 76-98; 1967 Op. Att'y Gen. 67-271. In the context of providing advice regarding bond and procurement requirements, this office previously issued informal advice[4] attempting to synthesize the authorities and concluded that:

> A "public works contract" is *any contract*, to be *performed* on public property of the state *and involving a fixed asset*. This term includes a broad range of contracts, such as repair, maintenance, design, and consulting contracts and within its meaning includes all "construction contracts" and "public works construction contracts."

(emphasis in original).[5]

This office has not issued advice attempting to set forth all the contracts that qualify as public works contracts as it relates to the applicability of the provisions of O.C.G.A. § 13-10-91(b)(1). There is little question that contracts involving "the building, altering, repairing, improving, or demolishing of any public structure or building or other public improvements of any kind to public real property" as well as contracts involving "the construction, reconstruction, or maintenance of all or part of a public road" are public

---

Title 13 relates to "contracts for public works." The caption to legislation is indicative of the "legislature's own interpretation of the scope and purpose of the act" as it summarizes the legislation "at the time when the discussion of every phase of the question is fresh in the legislative mind." *Wimberly v. Ga. S. & Fla. Ry. Co.*, 5 Ga. App. 263, 265 (1908). *See also Sovereign Camp Woodmen of the World v. Beard*, 26 Ga. App. 130, 131-32 (1921); *Copher v. Mackey*, 220 Ga. App. 43, 45 (1996).

[4] A copy of the letter issued on April 28, 2009 is attached for your reference.

[5] I want to emphasize that this definition is not set forth in the statutes or in any published decisions. Instead, it is an effort to provide direction to a client in a different context.

works contracts and, thus, are covered by the provisions of O.C.G.A. § 13-10-91(b)(1). Similarly, there is little question that professional services contracts which are not construction related do not satisfy the definition of public works contracts. However, it is worth stressing that contracts besides construction related contracts can satisfy the definition of a public works contract set forth above. The question of whether a particular contract satisfies the definition of a public works contract will often involve a factual analysis of a number of factors, including, but not limited to: a) whether the contract involves a fixed asset, b) whether the contract is "performed on public property," and c) examining the scope of services under the contract. In the event a public employer is uncertain if a contract is a "public works contract," the public employer should strongly consider erring on the side of compliance with O.C.G.A. § 13-10-91(b)(1) in order to avoid the possibility of violating this provision.

In summary, O.C.G.A. § 13-10-91(b)(1) applies to more than contracts for "buildings and roads" but it does not apply to "all labor and services" contracts. The applicability of the statute is between these two extremes, which, in many cases, can only be determined by looking at the specific facts of the contract, as the "determination of what are public works is often a question of statutory construction and interpretation."

I hope that this is responsive to your letter. At your request, my office is willing to review any proposed legislation that you may wish to introduce this Session regarding O.C.G.A. § 13-10-91(b)(1).

Sincerely,

Samuel S. Olens
Attorney General

SSO/bf
Enclosures

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July 1, 2013

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MEMORANDUM:

TO: Joseph Kim, Esq.
Department of Administrative Services

FROM: Elizabeth Harris EH
Assistant Attorney General

RE: Senate Bill 160

This responds to your request for informal advice regarding implementation of the new E-Verify affidavit requirement in light of the passage of Senate Bill 160 ("SB 160"). In your request, you enumerate ten questions raised by various agency and university procurement officers. I have responded to each of the questions separately below.

As of July 1, 2013, SB 160 in part amends O.C.G.A. § 13-10-91(b)(1) as follows:

> (b)(1) A public employer shall not enter into a contract pursuant for the physical performance of services unless the contractor registers and participates in the federal work authorization program. Before a bid for any such service is considered by a public employer, the bid shall include a signed, notarized affidavit from the contractor attesting to this following:
>
> (A) The affiant has registered with, is authorized to use, and uses the federal work authorization program;
> (B) The user identification number and date of authorization for the affiant;
> (C) The affiant will continue to use the federal work authorization program throughout the contract period; and,

> (D) The affiant will contract for the physical performance of services in satisfaction of such contract only with subcontractors who present an affidavit to the contractor with the same information required by subparagraphs (A), (B), and (C).

Further, SB 160 amends the definition of "physical performance of services" as contained in O.C.G.A. § 13-10-90(4) as follows:

> "Physical performance of services" means any performance of labor or services for a public employer using a bidding process or by contract wherein the labor or services exceed $2499.99; provided, however, that such term shall not include any contract between a public employer and an individual who is licensed pursuant to Title 26 or Title 43 or by the State Bar of Georgia and is in good standing when such contract is for service to be rendered by such individual.

The ten questions you have raised and my responses to each are set forth below:

1. Does the state entity have to get the E-Verify affidavit with the bid, or can the E-Verify affidavit be obtained after the bid but before the contract is signed?

O.C.G.A. § 13-10-91(b)(1) provides in pertinent part that "[b]efore a bid for any such service is considered by a public employer, the bid shall include a signed, notarized affidavit from the contractor." Thus, the affidavit must be obtained before the time that the bid is considered.

2. If a state entity issues a purchase order before the SB 160 effective date of July 1, 2013, that has a delivery date or service date on or after July 1, 2013, is SB 160 applicable? Does the state entity need to get the E-Verify affidavit on or about July 1, 2013?

SB 160, effective July 1, 2013, requires the affidavit to be obtained before a bid for a contract is considered. If a purchase order was issued prior to July 1, 2013, then the state entity likely would not need to obtain an affidavit on July 1, 2013. However, the state entity should err on the side of compliance and ensure that the contract complies with the current law.

3. When a state entity has a program in another country (e.g. study abroad programs) which by their nature require the performance of service by citizens/vendors who are local residents of that foreign country, does the state entity have to obtain an E-Verify affidavit from that resident of that foreign country?

"[T]he 'golden rule' of statutory construction . . . requires us to follow the literal language of the statute 'unless it produces contradiction, absurdity, or such an inconvenience as to

insure that the legislature meant something else." *Judicial Council of Georgia, et al. v. Brown & Gallo, LLC*, 288 Ga. 294, 297 (2010) (*citing Telecom USA, Inc., v. Collins*, 260 Ga. 362, 363 (1990)).

If the literal language of O.C.G.A. § 13-10-91(b)(1) as amended by SB 160 were followed, a university conducting a study abroad program would be required to obtain an E-Verify affidavit from a resident of a foreign country to perform work in that foreign county. E-Verify is a tool to assist employers in determining whether an employee is eligible to work in the United States, as employment of an unauthorized alien is unlawful under federal law. *See* 8 U.S.C.S. § 1324(a). Common sense dictates that it is irrelevant whether a resident of a foreign country performing work in that foreign county is eligible to work in the United States. Thus, requiring an E-Verify affidavit in this instance would produce an absurd result, which could not have been intended by the General Assembly.

Given that the stated purpose of SB 160 is to ensure a legal and eligible workforce in accordance with federal immigration and employment, requiring an affidavit in this instance would not promote the purpose of the laws. Work performed in a foreign county by a resident of that country would not appear to implicate federal immigration and employment laws at all.

As the issue is presented in this question, it does not appear reasonable to require an affidavit from the resident of a foreign country performing work in the foreign country.

4. When a foreign company is visiting a state entity and performing a service for the state entity (e.g. a foreign symphony is paid to perform one or more concerts at a state university; a foreign professor is visiting and paid to lecture for a semester), is the state entity required to obtain an E-Verify affidavit from that foreign company or foreign national?

If the literal language of O.C.G.A. § 13-10-91(b)(1) as amended by SB 160 were followed, a foreign symphony, whose musicians are presumably residents of a foreign country and usually perform outside the United States, would be required to obtain an E-Verify affidavit in order to perform at a university in Georgia. Such a result would arguably be an absurdity, which could not have been intended by the General Assembly.

As the issue is presented in this question, it would not appear reasonable to require an affidavit from the foreign symphony or professor. The state entity should take steps to ensure that the symphony musicians or professor are otherwise authorized by law to perform or lecture in the United States, including but not limited to having an appropriate visa.

5. If a current contract for services is not a public works contract and therefore has no E-Verify affidavit, does a state entity have to obtain an E-Verify affidavit for that services contract on July 1, 2013, or when the service contract comes up for renewal?

O.C.G.A. § 13-10-91(b)(1) provides that "A public employer shall not enter into a contract for the physical performance of services unless the contractor registers and participates in the federal work authorization program."

"Physical performance of services" is defined in O.C.G.A. § 13-10-90(4) as follows:

> "Physical performance of services" means any performance of labor or services for a public employer using a bidding process or by contract wherein the labor or services exceed $2499.99; provided, however, that such term shall not include any contract between a public employer and an individual who is licensed pursuant to Title 26 or Title 43 or by the State Bar of Georgia and is in good standing when such contract is for service to be rendered by such individual.

The affidavit requirement is triggered by entering into a contract. For contracts entered into prior to July 1, 2013, and for which an affidavit was not required at the time the contract was entered into, it is not necessary to obtain an affidavit on July 1, 2013. If, however, the contract comes up for renewal on or after July 1, 2013, an affidavit should be obtained at that time, if the contract is for the performance of labor or services either under a bidding process or exceeding $2499.99.

6. When DOAS establishes a source of supply for services in accordance with O.C.G.A. § 50-5-57 (statewide contracts), is DOAS required to get an E-Verify affidavit? If so, how frequently would DOAS have to get a new E-Verify affidavit from the statewide contract vendor(s) since most statewide contracts run for multiple years or can be renewed for additional years? In addition, does each state entity that issues a purchase order against the statewide contract have to get an E-Verify affidavit from the statewide vendor(s) each time (or just the first time) the state entity issues a purchase order against the statewide contract, or can the state entity satisfy SB 160 by relying on DOAS's E-Verify affidavit?

As DOAS is the state entity entering into the statewide contract under O.C.G.A. § 50-5-57, DOAS should obtain an affidavit. An affidavit should be obtained before the bid for the statewide contract is considered. *See* O.C.G.A. § 13-10-91(b)(1). A new affidavit should be obtained before entering into a renewal of the statewide contract, as the affidavit requirement is triggered by entering into a contract. *Id.*

Because DOAS would have already obtained an affidavit for the statewide contract, a state entity entering a purchase order under that contract might not need to obtain an additional affidavit. However, the use of purchase orders cannot appropriately be used to avoid the affidavit requirement. When in doubt, the state entity issuing the purchase order should err on the side of compliance and obtain an affidavit.

7. If an individual state entity has its own open contract with a vendor authorizing the state entity to issue purchase orders from time to time to that vendor, can the state entity get one E-

Verify affidavit at contract signing or does the state entity have to get an E-Verify affidavit each time it issues a purchase order under its open contract; if the state entity can satisfy SB 160 by getting one E-Verify affidavit at the beginning of the contract, how frequently (if at all) would the state entity have to get a new E-Verify affidavit from the vendor?

The state entity should obtain an affidavit before the bid for the open contract is considered. *See* O.C.G.A. § 13-10-91(b)(1). A new affidavit should be obtained before entering into a renewal of the open contract, as the affidavit requirement is triggered by entering into a contract. *Id.* When entering a purchase order under the open contract, the state entity might not need to obtain an additional affidavit. However, the use of purchase orders cannot appropriately be used to avoid the affidavit requirement. When in doubt, the state entity issuing the purchase order should err on the side of compliance and obtain an affidavit.

8. If a state entity has multiple distinct service contracts with the same vendor, can the state entity have a single standing E-Verify affidavit with that vendor or does the state entity have to get an E-Verify affidavit for each of the service contracts with that vendor?

The state entity should obtain an affidavit for each of the service contracts with the vendor. O.C.G.A. § 13-10-91(b)(1) provides that "Before a bid for any such service is considered by a public employer, the bid shall include a signed, notarized affidavit." The statute makes clear that each bid must have an affidavit.

Further, subsection (b)(1)(C) provides that the affidavit should state that the affiant "will continue to use the federal work authorization program throughout the contract period," and subsection (b)(1)(D) provides that the affidavit should state that the affiant "will contract for the physical performance of services in satisfaction of such contract only with subcontractors who present an affidavit to the contractor with the same information required by subparagraphs (A), (B), and (C). As multiple distinct service contracts may involve different contract periods and different subcontractors, it makes sense that a new affidavit would be required for each contract and submitted before each bid is considered.

Moreover, the statute on its face does not appear to contemplate the use of one affidavit for multiple contracts or provide for what period of time one affidavit for multiple contracts could be used. Therefore, the practice of obtaining one affidavit for multiple contracts should not be followed.

9. When a state entity pays for services with a state purchasing card, is the state entity required to get an E-Verify affidavit?

If the contract is for "performance of labor or services…using a bidding process or by contract wherein the labor or services exceed $2499.99," then an affidavit is required. See O.C.G.A. § 13-10-90(4). On its face, the statute does not provide for exceptions to the affidavit requirement based on the method of payment.

10. Can you provide advice generally on what constitutes a service? For example, when a state entity contracts with a printer to provide a printed product (e.g. university publications), is that a service that requires an E-Verify affidavit or the furnishing of a product for which an E-Verify affidavit is not required? Although a separate maintenance agreement for a copier is a service contract subject to E-Verify affidavit requirements, if a copier is obtained via a lease which includes maintenance in the monthly lease rate, does that make the lease a service contract subject to E-Verify affidavit requirements? When a state entity contracts with a hotel to host a conference, is the contract with the hotel for rooms, catering or audiovisual needs a services contract subject to the E-Verify affidavit requirements?

Whether a contract is for "performance of labor or services…using a bidding process or by contract wherein the labor or services exceed $2499.99," as provided in O.C.G.A. § 13-10-90(4), will depend on the facts of the particular situation. When in doubt, it would be prudent to obtain an affidavit.

Given the limited information provided for each of the hypothetical situations described above, it is difficult to determine whether an affidavit would be required in each of these situations. Arguably a contact to provide a printed product such as a university publication could be construed as contract for the "labor or services" of the vendor printing the publication. Similarly, a lease for a copier that provides for maintenance services arguably could be construed as a contract for the "labor or services" of the vendor providing maintenance. As for a contract with a hotel to host a conference, whether an affidavit is required would likely depend on the terms of the contract and whether the hotel is providing services in addition to lodging. When in doubt, a state entity entering into such contracts for which an affidavit may potentially be required under O.C.G.A. § 13-10-90(4) should err on the side of compliance and obtain an affidavit.

I hope this informal advice is helpful. Please keep in mind that this is not an official or unofficial opinion of the Attorney General. If you have any questions or wish to discuss this matter, please contact me.