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March 10, 2011

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MEMORANDUM:

TO: Joe Kim ✓
Department of Administrative Services

Daryl Griswold
Board of Regents

FROM: Wright Banks ✓
Senior Assistant Attorney General

RE: O.C.G.A. § 13-10-90(2.1)

This responds to your joint request for informal advice regarding O.C.G.A. § 13-10-90(2.1). As you are aware, I have written two previous memoranda regarding the provisions of O.C.G.A. §§ 13-10-90 and 13-10-91 which comprise Article 3 of Chapter 10 of Title 13 of the Official Code of Georgia Annotated. Copies of these memoranda are enclosed.

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) No public employer shall enter into a contract pursuant to this chapter *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 newly hired employees or subcontractors. 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;

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(B) The user identification number and date of authorization for the affiant; and

(C) The affiant is using and will continue to use the federal work authorization program throughout the contract period.

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.)

You have inquired regarding the contractual situations in which the affidavit referenced in O.C.G.A. § 13-10-91(b)(1) is required.¹ In 2010, the General Assembly amended the language of O.C.G.A. §13-10-90 to specifically define 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, 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(2.1) (emphasis added). By its express terms, O.C.G.A. § 13-10-91(b)(1) requires the affidavit for “contract[s] pursuant to this chapter for the physical performance of services.” The caption to the Senate Bill 447 which enacted O.C.G.A. § 13-10-90(2.1) provides relevantly that it is:

¹ The enclosed memoranda partially answer the question you have raised. Therefore, some of the discussion from those memoranda is restated herein. However, the enclosed do not specifically focus on the affidavit requirement in O.C.G.A. § 13-10-91(b)(1).

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[t]o amend Chapter 10 of Title 13 of the Official Code of Georgia Annotated, relating to contracts for public works, so as to provide certain contractual and purchasing preferences for materials and in letting contracts to materialmen, contractors, builders, architects, engineers, and laborers who reside within the state; to provide standards for construction projects; to provide a definition; to clarify certain provisions and requirements relating to public employers' verification of employee work eligibility;

2010 Ga. Laws 308 (emphasis added). In *Wimberly v. Ga. S. & Fla. Ry. Co.*, the Court of Appeals described the import of the legislative preamble as follows:

. . . in ruling as to the precise meaning of the language employed in a statute, nothing, as we have said before, is more pertinent, towards ascertaining the true intention of the legislative mind in the passage of the enactment, than the legislature's own interpretation of the scope and purpose of the act, as contained in the caption. The caption of an act of the legislature is properly an index to the contents of the statute as construed by the legislature itself,--a summarizing of the act, made right at the time when the discussion of every phase of the question is fresh in the legislative mind.

5 Ga. App. 263, 265 (1908). Other Court of Appeals decisions have relied on *Wimberly* in constructing legislative intent from the caption of legislation. *Sovereign Camp Woodmen of the World v. Beard*, 26 Ga. App. 130, 131-32 (1921); *Copher v. Mackey*, 220 Ga. App. 43, 45 (1996).

O.C.G.A. §§ 13-10-90 and 13-10-91 comprise Article 3 of Chapter 10 of Title 13 of the Official Code of Georgia Annotated. Article 3 is titled as "Security and Immigration Compliance." Chapter 10 of Title 13 is entitled "Contracts for Public Works."² The

² Some discussion of specific types of contracts being within the concept of public works contracts is found in 1976 Op. Att'y Gen. 76-98 and 1967 Op. Att'y Gen. 67-271. The Georgia Local Government Public Works Construction Law specifically defines "[p]ublic works construction" in relevant part to be "the building, altering, repairing, improving, or demolishing of any public structure or building or other improvements of any kind to any public real property other than those covered by Chapter 4 of Title 32." O.C.G.A. § 36-91-2(12).

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placement of O.C.G.A. §§ 13-10-90 and 13-10-91 in the Chapter of Title 13 addressing Contracts for Public Works, by itself, may not be sufficient to conclude that it applies only to contracts related to public works. However, considering the language used in O.C.G.A. § 13-10-90(2.1) and the preamble to Senate Bill 447, it appears that the phrase “physical performance of services” as used in O.C.G.A. § 13-10-91(b)(1) is intended to be limited to public works contracts. Therefore, it appears that the affidavit required by O.C.G.A. § 13-10-91(b)(1) applies only to public works contracts.

I hope that 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, please contact me.

WB/

Enclosures

cc: John Thornton, Department of Audits and Accounts w/encl.