



GEORGIA DEPARTMENT OF LAW

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SAMUEL S. OLENS
ATTORNEY GENERAL

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June 22, 2011

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MEMORANDUM

To: Edward F. Blaha
Department of Audits and Accounts
Nonprofit and Local Government Audits

From: Bo Fears 
Senior Assistant Attorney General

Re: House Bill 87 and its impact on the affidavit required by
O.C.G.A. § 13-10-91(b)(1).

You have asked whether the advice previously issued by this office on March 10, 2011 is still valid in light of the passage of House Bill 87. The advice, a copy of which is enclosed for your convenience, concluded that the affidavit requirement set forth in O.C.G.A. § 13-10-91(b)(1) only applied to public works contracts. The conclusion was reached after analyzing O.C.G.A. § 13-10-91(b)(1), the definition of "physical performance of services" currently found at O.C.G.A. § 13-10-90(2.1), and the preamble to Senate Bill 447 which enacted O.C.G.A. § 13-10-90(2.1).

Based on my review of House Bill 87, it does not appear to me that its passage impacts the advice previously issued on March 10, 2011. Relevantly, House Bill 87 does not make any alterations to O.C.G.A. § 13-10-91(b)(1) or the definition of "physical performances of services,"¹ which would change the underlying rationale of the previous advice. Further, nothing in the preamble to House Bill 87 indicates or even suggests that the General Assembly intended the affidavit requirement to apply to contracts other than public works contracts.

I hope that this is responsive to your request. If you have any questions or wish to discuss this matter, please contact me.

enclosure

¹ Effective July 1, 2011, the definition of physical performance of services will be found at O.C.G.A. § 13-10-90(4).



SAMUEL S. OLENS
ATTORNEY GENERAL

Department of Law
State of Georgia

40 CAPITOL SQUARE SW
ATLANTA, GA 30334-1300

March 10, 2011

WRITER'S DIRECT DIAL
(404) 651-6247
FAX (404) 657-3239

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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Daryl Griswold
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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.



Department of Law
State of Georgia

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40 CAPITOL SQUARE SW
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THURBERT E. BAKER
ATTORNEY GENERAL

November 30, 2010

WRITER'S DIRECT DIAL
(404) 651-6247
FAX (404) 657-3239

MEMORANDUM:

TO: John Thornton
Department of Audits and Accounts

FROM: Wright Banks
Senior Assistant Attorney General

RE: O.C.G.A. §§ 13-10-90 and 13-10-91

This responds to your request for informal advice regarding O.C.G.A. §§ 13-10-90 and 13-10-91. As we have discussed, on October 17, 2007, I wrote a memorandum of informal advice to Joe Kim with the Department of Administrative Services regarding the language 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. A copy of my memorandum of October 17, 2007 is enclosed.

One of the questions that I addressed in my memorandum of October 17, 2007 related to whether O.C.G.A. § 13-10-91(b)(1) applies to all contracts involving the physical performance of services in this state or only applies to public works contracts involving physical performance of services in the state.¹ I concluded that I did not think it likely that a court would construe O.C.G.A. §§ 13-10-90 and 13-10-91 as applying only to public works contracts.

Since my memorandum of October 17, 2007, 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,

¹ O.C.G.A. § 13-10-91(b)(1) provides relevantly that "[n]o 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." (emphasis added).

John Thornton
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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). The General Assembly enacted O.C.G.A. § 13-10-90(2.1) in 2010. Ga. L. 2010, p. 308. The caption to the Senate Bill 447 which enacted O.C.G.A. § 13-10-90(2.1) provides relevantly that it is:

[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; . . .

(emphasis added). In *Wimberly v. Georgia Southern & Florida Railway 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. McKay*, 220 Ga. App. 43, 45 (1996).

As noted in my enclosed memorandum, 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

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Contracts for Public Works.² As I concluded in the enclosed, the 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 is not enough for me 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.

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/jgb
Enclosure

cc: Joe Kim, Esq., Department of Administrative Services w/enc.

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. § 36-9-2(12).

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Department of Labor
State of Georgia

THURBERT E. BAKER
ATTORNEY GENERAL

40 CAPITOL SQUARE SW
ATLANTA, GA 30334-1300

October 17, 2007

WRITER'S DIRECT DIAL
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MEMORANDUM:

TO: Joseph Kim, Esq.
Department of Administrative Services

FROM: Wright Banks *WB*
Senior Assistant Attorney General

RE: O.C.G.A. §§ 13-10-90 and 13-10-91

This responds to your request for informal advice regarding O.C.G.A. §§ 13-10-90 and 13-10-91. 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.

O.C.G.A. § 13-10-90 provides as follows:

As used in this article, the term:

(1) "Commissioner" means the Commissioner of the Georgia Department of Labor.

(2) "Federal work authorization program" means any of the electronic verification of work authorization programs operated by the United States Department of Homeland Security or any equivalent federal work authorization program operated by the United States Department of Homeland Security to verify information of newly hired employees, pursuant to the Immigration Reform and Control Act of 1986 (IRCA), D.L. 99-603.

(3) "Public employer" means every department, agency, or instrumentality of the state or a political subdivision of the state.

(4) "Subcontractor" includes a subcontractor, contract employee, staffing agency, or any contractor regardless of its tier.

(emphasis added). O.C.G.A. § 13-10-91 provides:

(a) On or after July 1, 2007, every public employer shall register and participate in the federal work authorization program to verify information of all new employees.

(b) (1) 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.

(2) No contractor or subcontractor who enters a contract with a public employer shall enter into such a contract or subcontract in connection with the physical performance of services within this state unless the contractor or subcontractor registers and participates in the federal work authorization program to verify information of all new employees.

(3) Paragraphs (1) and (2) of this subsection shall apply as follows:

(A) On or after July 1, 2007, with respect to public employers, contractors, or subcontractors of 500 or more employees;

(B) On or after July 1, 2008, with respect to public employers, contractors, or subcontractors of 100 or more employees; and

(C) On or after July 1, 2009, with respect to all public employers, contractors, or subcontractors.

(c) This Code section shall be enforced without regard to race, religion, gender, ethnicity, or national origin.

(d) Except as provided in subsection (e) of this Code section, the Commissioner shall prescribe forms and promulgate rules and regulations deemed necessary in order to administer and effectuate this Code section and publish such rules and regulations on the Georgia

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Department of Labor's website.¹

(e) The commissioner of the Georgia Department of Transportation shall prescribe all forms and promulgate rules and regulations deemed necessary for the application of this Code section to any contract or agreement relating to public transportation and shall publish such rules and regulations on the Georgia Department of Transportation's website.

(emphasis added). In your request, you indicated that you have a question regarding whether O.C.G.A. § 13-10-91(b)(1) applies to all contracts involving the physical performance of services in this state or only applies to public works contracts involving physical performance of services in the state. As discussed above, 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 However, I noted that the title to Ga. Laws 2006, p. 105 only contains the word "CONTRACTS."

As quoted above, the specific requirement of O.C.G.A. § 13-10-91(b)(1) is that "[n]o 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." On its face, O.C.G.A. § 13-10-91 appears to broadly apply to "contract[s] for the physical performance of services within this state."³ However, as you have pointed out, O.C.G.A.

¹ Pursuant to this authority, the Labor Commissioner has adopted a number of regulations. Ga. Comp. R. & Regs. r. 300-10-1-.01 through 300-10-1-.09. Labor Rule 300-10-1-.01 sets forth several definitions, but does not provide a definition of a "contract for the physical performance of services within this state." If the Labor Department adopts an interpretation of the phrase, the interpretation would likely be entitled to deference by the courts. See Georgia Dep't of Community Health v. Satilla Heath Services, Inc., 266 Ga. App. 880 (2004).

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."

³ It is worth noting that the phrase "public works construction contracts" is not used in O.C.G.A. §§ 13-10-90 and 13-10-91 although it is used in other places in Chapter 10 of Title 13. O.C.G.A. § 13-10-60. It is also worth noting that, in addressing certain income tax withholding requirements, Ga. Laws 2006, p. 105, § 7 broadly defines the

§ 13-10-91 is part of Chapter 10 of Title 13 which relates to public works contracts. When enacting legislation, the General Assembly is presumed to act with knowledge of the existing law. Nicholl v. Great Atlantic & Pacific Tea Co., 238 Ga. App. 30, 39-40 (1999). "In the construction of a statute, all laws in *pari materia* should be considered in order to ascertain the intention of the legislature." Oxford v. Carter, 216 Ga. 821, 822 (1961) (citing Harrison v. Walker, 1 Ga. 32 (1846)). Statutes "must be construed with reference to other principles of existing law." McDougald v. Dougherty, 14 Ga. 674, 681 (1854).⁴ Thus, in reading Chapter 13 of Title 10 together and in assuming the General Assembly realized O.C.G.A. §§ 13-10-90 and 13-10-91 would be part of Chapter 13 of Title 10, it seems that one could argue that O.C.G.A. §§ 13-10-90 and 13-10-91 were directed to only public works contracts entered into by "every department, agency, or instrumentality of the state or a political subdivision of the state."⁵ However, I am not certain that this is the most likely outcome.

term "labor services" as "the physical performance of services in this state." O.C.G.A. § 48-7-21.1(a)(3).

⁴ In enacting O.C.G.A. §§ 13-10-90 and 13-10-91, the General Assembly made reference to the legislation being enacted "to provide for procedures and requirements applicable to certain contracts or subcontracts." (Ga. Laws 2006, p. 105) (emphasis added). In construing statutes, courts can look to the caption of the legislation to ascertain the legislative intention. Sovereign Camp Woodmen of the World v. Beard, 26 Ga. App. 130, 131 (1921). The phrase "to provide for procedures and requirements applicable to certain contracts or subcontracts" does not seem to add much in this case.

⁵ I have given some consideration to the position that the General Assembly would have amended the State Purchasing Act if it wanted to address virtually all state contracts involving "the physical performance of services within this state." As you know, in 2004, the General Assembly enacted O.C.G.A. § 50-5-82 which addresses payment of sales tax by vendors contracting with the Department of Administrative Services or any other state agency subject to the State Purchasing Act. O.C.G.A. §§ 50-5-50 through 50-5-82. O.C.G.A. § 50-5-82(b) provides relevantly that "[o]n or after May 13, 2004, the Department of Administrative Services and any other state agency to which this article applies shall not enter into a state-wide contract or agency contract for goods or services, or both, in an amount exceeding \$100,000.00 with a nongovernmental vendor if the vendor or an affiliate of the vendor is a dealer as defined in paragraph (3) of Code Section 48-8-2, or meets one or more of the conditions thereunder, but fails or refuses to collect sales or use taxes levied under Chapter 8 of Title 48 on its sales delivered to Georgia." O.C.G.A. § 50-5-82 is part of the State Purchasing Act which empowers the Department of Administrative Services "[t]o canvass all sources of supply and to contract for the lease, rental, purchase, or other acquisition of all supplies, materials, equipment, and services other than professional and personal employment services required by the state government or any of its offices, agencies, departments, boards, bureaus, commissions, institutions, or other entities of this state under competitive bidding in the manner and subject to the conditions provided for in this article." O.C.G.A. § 50-5-51(a).

Joe Kim, Esq.
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In this matter, I think there is a fairly strong argument that the language of O.C.G.A. §§ 13-10-90 and 13-10-91 is clear and unambiguous and not subject to judicial construction. See Jersawitz v. Hicks, 264 Ga. 553, 554 (1994). Even if subject to construction, courts are generally required to construe statutes in a way that will “uphold a statute in whole and in every part . . .” Exum v. City of Valdosta, 246 Ga. 169, 170 (1980). A statute’s general language can be restrained only where an absurdity would result. Sirmans v. Sirmans, 222 Ga. 202 (1966). In reading the language of O.C.G.A. § 13-10-91, it appears that a construction of the language of O.C.G.A. §§ 13-10-90 and 13-10-91 which concludes the requirements therein only apply to public works contracts would create substantial confusion with the express provisions of O.C.G.A. § 13-10-91(a) which clearly require that “every public employer shall register and participate in the federal work authorization program to verify information of all new employees.”⁶ In O.C.G.A. § 13-10-91(a), the General Assembly clearly used language that broadly applies to “every public employer” and defined “public employer” in O.C.G.A. § 13-10-90(3) to include “every department, agency, or instrumentality of the state or a political subdivision of the state.” Construing O.C.G.A. §§ 13-10-90 and 13-10-91 as applying only to public works contracts would appear to be inconsistent with the express statutory language used related to public employers and their employees. Therefore, I do not think a court is likely to conclude that the General Assembly intended that the requirements of O.C.G.A. §§ 13-10-90 and 13-10-91 only apply to public works contracts.

I hope that this informal advice is helpful. If you would like to discuss this matter further, please contact me.

WB/jgb

The requirements of the State Purchasing Act do not apply to local governments. Stryker v. Long County Bd. of Commissioners, 277 Ga. 624 (2004). Thus, if the General Assembly wanted to reach local governments as it clearly did based on the language of O.C.G.A. § 13-10-90(3), it would not have been able to address the local governments in the State Purchasing Act.

⁶ A reading of O.C.G.A. § 13-10-91(b)(1) that resulted in its terms applying only to public works contracts would also appear to be inconsistent with the exception in O.C.G.A. § 13-10-91(d) related to “any contract or agreement relating to public transportation” which seems to be much broader than only public works contracts related to public transportation.