GEORGIA DEPARTMENT OF LAW
40 Capitol Square SW
Atlanta, Georgia 30334-1300

CHRISTOPHER M. CARR
ATTORNEY GENERAL

www.law.ga.gov
(404) 656-3300

Writer's Direct Dial:
(404) 656-3303
Fax: (404) 656-3239

April 25, 2017

MEMORANDUM

TO: Catherine "McCall" Ginsberg
Deputy General Counsel
Georgia Department of Administrative Services

FROM: David Carson DVC
Assistant Attorney General

RE: Public Works Contracts and Public Works Construction Contracts with Respect to Payment Bonds and Procurement by the Department of Administrative Services.

This responds to your request for informal advice regarding the definition of the terms "public works" and "public works construction" contracts as used in Georgia statutes referencing the terms, more specifically O.C.G.A. § 13-10-60 (relative to payment bonds) and exemption from procurement by DOAS pursuant to O.C.G.A. § 50-5-72(e). Neither of these terms have an express statutory definition in Georgia, however there are numerous judicial interpretations of these terms.

This memorandum reaches the following conclusions, with discussions and examples following:

(a) 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, designed, and consulting contracts and within its meaning includes all "construction contracts" and "public works construction contracts."

(b) A **public works construction contract** is a subcategory of public works contract *involving the supply of labor or materials by any subcontractors or vendors to a project, whether supplied to the contractor or to a subcontractor, including the rental, purchase, delivery, and/or installation of all types and kinds of equipment associated with the project,* for the purposes of determining the contracts which require the contractor to provide payment and performance bonds.

A. Public Works Contracts

The term "public works contracts" is a broad term with no statutory definition that encompasses a wide variety of public contracts. 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 is a general two part test for a public works contract – that the contract be "public" and that it be for "work" or "works." *See* 48 ALR 4th 1170, 1178. A contract is considered "public" when it "bears a relation to legitimate governmental interests or activities on behalf of the public at large." *Id.* A contract is considered to be for "work" or "works" in the sense that it entails some "physical action" in connection with a "physical subject matter." *Id.*

The Attorney General applied this test in 1976 and determined that a contract for reclamation and rehabilitation of lands subjected to surface mining was a public works contract. The Attorney General reasoned:

> "First, the public at large will be benefitted by any such reclamation work, in that unsightly land will be rehabilitated. Moreover, land reclamation is an activity in which the general public and the state are vitally interested. In light of this, I am of the opinion that a court of law, if faced with the issue, would likely hold that such a contract would be equivalent to a public works contract." 1976 Op. Att'y Gen. 76-98 (interpreted in the context of the predecessor provision to O.C.G.A. § 50-5-72).

In Georgia, the term "public works contracts" has been held to include contracts for design, engineering, construction, alteration, modification, demolition, cleaning, maintenance or repair, as well as consultant contracts relative to such activities. *See* 1967 Op. Att'y Gen. 76-98; *see also* 1976 Op. Att'y Gen. 76-98; *Griffin Bros., Inc., v. Town of Alto,* 280 Ga. App. 176 (2006); *S. Elec. Supply Co. v. Trend Constr.*, 259 Ga. App. 666 (2003); *Abe Eng'g v. Fulton Cty. Bd. of Educ.*, 214 Ga. App. 514 (1994); *Martin v. Atlanta,* 155 Ga. App. 628 (1980); *Fortune Bridge Co. v. Dep't of Transp.*, 242 Ga. 531 (1978). Further, public works contracts include well-drilling for hazardous materials monitoring, service contracts for inspections, contracts for meeting certifications, landscape maintenance, utilities, and the like. *See City of Fitzgerald v. Caruthers,* 332 Ga. App. 731 (2015); *see also Desprint Servs. v. DeKalb Cty.*, 188 Ga. App. 218 (1988); *Glynn Cty. v. Teal,* 256 Ga. 174 (1986); *Bass Canning Co. v. MacDougald Const. Co.*, 174 Ga. 222 (1932). And, to the extent not already named above, public works contracts include all public contracts that are covered by the requirements for a payment or performance bond. If the contract is to be performed on public property and it involves a fixed asset, it is a public works contract.

For purposes of the exemption in O.C.G.A. § 50-5-72(e), all contracts of the type and character referenced above that are contracted by the Department of Transportation, the Board of Regents

of the University System of Georgia, and state authorities, such as the Stone Mountain Memorial Association, other state authorities such as the Georgia Ports Authority, Georgia World Congress Center Authority, and Jekyll Island State Park Authority, are *not required to be procured by DOAS, whether or not they are "construction" contracts.* Also, in this latter regard, the Georgia State Financing and Investment Commission is expressly exempt from all provisions of the DOAS statute by its implementing legislation. *See* O.C.G.A. § 50-17-22(j)(1); *see also* 1975 Op. Att'y Gen. 75-58.

Landscape Maintenance and Cleaning Services: Landscape maintenance and cleaning services contracts will be considered "public works" contracts as long as they "bear a relation to legitimate government interests or activities on behalf of the public at large" and entail some sort of "physical action." 48 ALR 4th 1170, 1178; *see* 1976 Op. Att'y Gen. 76-98. This means that DOAS would not be required to procure these types of contracts that are contracted by the Department of Transportation, Board of Regents, and state authorities, *whether or not they are "construction" contracts.*

B. Public Works Construction Contracts

"Public works construction" contracts are a subcategory of "public works" contracts. This term is used principally in conjunction with the requirement for obtaining payment (and performance) bonds for a particular type of contract. All public works construction contracts are considered public works contracts.

While there is no statutory definition in Chapter 10 of Title 13, the Court of Appeals recently looked to the General Assembly's definition of "public works construction" found in the Georgia Local Government Public Works Construction Law ("GLGPWCL") when it attempted to determine if a maintenance and cleaning services contract qualified as a "public works construction" contract under O.C.G.A. § 13-10-60.[1] *See* O.C.G.A. § 36-91-1 et. seq., *see also Bd. of Regents of the Univ. Sys. of Ga. v. Brooks*, 324 Ga. App. 15 (2013). For local government public works, the term "public work construction" is defined as:

> the building, altering, repairing, improving, or demolishing of any public structure or building or other public improvements of any kind to any public real property… . Such term does not include the routine operation, repair, or maintenance of existing structures, buildings, or real property[.]

O.C.G.A. § 36-91-2(12). Applying these principles, the Court of Appeals found that a maintenance and service contract with GSU, which included services such as the cleaning of rooms and refinishing of floors at GSU's facilities, did not fall under the definition of public

[1] The GLGPWCL governs local government public works construction and also requires a payment bond for public works construction contracts. *See* O.C.G.A. § 39-91-90 (payment bonds required for all public works construction contracts with an estimated contract amount greater than $100,000.00).

works construction contracts as it only covered "routine services and maintenance." *Bd. of Regents of the Univ. Sys. of Ga.*, 324. Ga. App. at 18. As a result, the provisions for payment bonds set forth in O.C.G.A. § 13-10-60 through § 13-10-65 did not apply. Notably, this leaves open the argument that maintenance and cleaning services that are not "routine" would be subject to the aforementioned payment bond requirements.

There is an abundance of case law and several opinions of the Attorney General which set forth specific examples of public works construction contracts. These include:

(1) Contracts to demolish a building (*see* 1967 Op. Att'y Gen. 76-98)

(2) Construction of public roadways and bridges (*see* O.C.G.A. § 32-3-70; *Fortune Bridge Co.*, 242 Ga. 531).

(3) Construction of public schools (*see Abe Eng'g*, 214 Ga. App. 514; *Southway Crane & Rigging v. Fed. Ins. Co.*, 294 Ga. App. 504 (2008)).

(4) Renovations and repairs to fixed assets (*see Sims' Crane Serv., Inc. v. Reliance Ins. Co.*,, 514 F. Supp. 1033 (S.D. Ga 1981) aff'd, 667 F.2d 30 (11th Cir. 1982); *S. Elec. Supply Co.*, 259 Ga. App. 666 (renovations to testing centers at Georgia Perimeter College); *State Dep't of Corr. v. Developers Sur. & Indemn. Co.*, 295 Ga. 741 (2014) (re-roofing several buildings at a state prison).

(5) Construction of a vessel for the public (*see* 38 Op. US Att'y Gen. 418 (1936); *Title Guaranty & Trust Co. v. Crane Co.*, 219 U.S. 24 (1911)).

Landscape Maintenance and Cleaning Services: Routine landscape maintenance and cleaning services contracts would not be subject to the payment bond requirement under O.C.G.A. § 13-10-60. However, if the work could be considered significant enough not to be "routine," there is a valid legal argument the contract is a "public works construction" contract and therefore would be subject to payment bond requirements. While there are no additional cases decided under O.C.G.A. § 13-10-60 dealing with such contracts, cases decided under O.C.G.A. § 36-91-90 are illustrative, as the Court of Appeals applied the GLGPWCL's definition of "public works construction" to decide a case under O.C.G.A. § 13-10-60. *See Bd. of Regents of Univ. Sys. of Ga.*, 324 Ga. App. at 18. Applying O.C.G.A. § 36-91-90, the Court of Appeals held last year that a contract to clean up sewage spills in approximately 100 dwellings was a public works construction contract and subject to payment bond requirements. *See J. Squared Plumbing Co, Inc. v. City of Atlanta*, 337 Ga. App. 229, 231-32 (2016). A valid legal argument therefore exists that significant landscape maintenance and/or cleaning services contracts may be subject to the payment bond requirement under O.C.G.A. § 13-10-60.

The bonding requirements are meant to protect materialmen and laborers who cannot perfect liens against the public property of the State of Georgia. Public property of the State of Georgia, including such entities as the Board of Regents, is not subject to liens. As a result, mechanic's

and materialmen's liens are of no effect and will not be construed to have effect upon public property or against a state agency.

Georgia passed what is known as the "Little Miller Act" (now codified at O.C.G.A. § 13-10-60) in an effort to protect materialmen and laborers.[2] Under the Little Miller Act, payment bonds are required for all state public work construction contracts with an estimated contract amount greater than $100,000.00. O.C.G.A. § 13-10-60. The purpose of the payment bond is to guarantee payment to lower tier subcontractors and materialmen who supply materials and labor for the project, as they cannot obtain a lien on the public property of Georgia. *See Western Cas. & Surety Co. v. Fulton Supply Co.*, 60 Ga. App. 710 (1939). Further, the guarantee of payment extends to third parties for work, tools, machinery, skill and materials. *Seibels, Bruce & Co. v. National Sur. Corp.*, 53 Ga. App. 705 (1940). To summarize, the bond is to cover unpaid subcontractors and all persons supplying labor, materials, machinery, or equipment to the contractor or subcontractor thereunder. If a bond is not obtained, the state entity is liable directly to those unpaid subcontractors, materialmen, and persons for any loss resulting to them from such failure, regardless of any payments that have been made to the prime contractor. *See* O.C.G.A. § 13-10-61.

The scope of the bond requirements is actually defined by the scope of mechanic's and materialmen's lien laws. When the Little Miller Act was enacted, mechanic and materialmen liens were considerably more limited. Judicial decisions on requirements for payment bonds, in particular, heavily relied upon the original theory – the provision for payments to subcontractors based upon the forfeiture of lien rights over public property. However, many more classes of consultants were given lien rights from state to state. As lien rights were broadened well beyond their original context, the General Assembly wisely inserted the word "construction" into the statutory expression for public works contracts to retain the original scope of coverage. The list of subcontractors, materialmen and vendors is now quite exhaustive. In Georgia, O.C.G.A. § 44-14-361 provides a list of persons that each have a special lien on the real estate or other property for which they furnish labor, services or materials:

(1) All mechanics of every sort who have taken no personal security for work done and material furnished in building, repairing, or improving any real estate of their employers;

(2) All contractors, all subcontractors and all materialmen in furnishing material to subcontractors, and all laborers furnishing labor to subcontractors, materialmen, and persons furnishing material for the improvement of real estate;

(3) All registered architects furnishing plans, drawings, designs, or other architectural services on or with respect to any real estate;

---

[2] Georgia passed the Little Miller Act to reflect the Miller Act, 40 U.S.C. § 3131, which the United States passed to protect materialman and laborers who cannot perfect liens on the public property of the United States. *U.S. for Use of Ardmore Concrete Material Co., Inc. v. Williams et al,* 240 F.2d 561, 564 (10th Cir. 1957). As a result, Georgia courts look to the decisions of federal courts construing payment bond requirements.

(4) All registered foresters performing or furnishing services on or with respect to any real estate;

(5) All registered land surveyors and registered professional engineers performing or furnishing services on or with respect to any real estate;

(6) All contractors, all subcontractors and materialmen furnishing material to subcontractors, and all laborers furnishing labor for subcontractors for building factories, furnishing materials for factories, or furnishing machinery for factories;

(7) All machinists and manufacturers of machinery, including corporations engaged in such business, who may furnish or put up any mill or other machinery in any county or who may repair the same;

(8) All contractors to build railroads; and

(9) All suppliers furnishing rental tools, appliances, machinery, or equipment for the improvement of real estate.

Note that items (3), (4) and (5) are the most recent addition to the lien laws. These permit liens in favor of persons such as architects, foresters, surveyors, and engineers which were not historically considered in the Little Miller Act. Similar lien rights have also been given in Georgia to real estate brokers and salespersons. As pointed out above, design and consulting contracts are included within the definition of "public works contracts." Consider if the statutory expression of O.C.G.A. § 13-10-60 did not include the word "construction" in the term "public works construction contracts." Then, any public works contracts, including contracts with architects, engineers, surveyors, and foresters, would be subject to payment bond requirements if they employed subconsultants while performing under the contract. The added word "construction" therefore has a substantial, and historically correct, limiting effect on when a payment bond is required.

Therefore, the plain language of O.C.G.A. § 13-10-60 does not cover design and most services or consultant contracts for the purposes of a payment and performance bond requirements. Further, relying upon federal interpretation, architectural services have been determined to not be within the scope of the federal Miller Act. Georgia judicial decisions support this interpretation, as the Court of Appeals has held the original bonding statute to be inapplicable to professional services such as an engineer. *Booker v. Mayor of Milledgeville*, 40 Ga. App. 540 (1929). Accordingly, continuing to omit contracts for design professionals from a payment and performance bond requirement is legally defensible.

Therefore, if the contract is a public works contract, a bond should be obtained if any work or materials or equipment as specified above is to be provided by a party other than the contractor (except for professional services set forth in items (3), (4) and (5) of the code section above). For example, a painter executing a painting contract where the painting is to be performed only be the contractor and his direct employees still must purchase paint from a vendor. In similar

cases, a contractor who is to install kitchen or hospital equipment still purchases such equipment from a vendor. Accordingly, all such contracts fall within the bonding statute.

Finally, it is important to note that the bonding statute only mandates a payment bond for all contracts over $100,000.00, on the penalty that a failure to obtain the bond requires the contracting state entity to have direct liability to the unpaid subcontractors and to all persons supplying labor, materials, machinery, or equipment to the contractor or any subcontractor for any loss resulting to them from such failure, regardless of any payments having been made to the prime contractor. *See* O.C.G.A. § 13-10-61. For this reason, you may wish to continue the policy of requiring a payment bond for public works construction contracts that are estimated at less than $100,000.00, as permitted by O.C.G.A. § 13-10-60.

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.