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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.
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> 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.