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April 28, 2009

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Linda M. Daniels, AIA
Vice Chancellor for Facilities
Board of Regents of the University System of Georgia
270 Washington Street, Sixth Floor
Atlanta, Georgia 30334

RE: Public Works Contracts and Public Works Construction Contracts
with Respect to Payment Bonds and Procurement by the Department
of Administrative Services.
Our File No. 6200-AA-Public Works Contracts (1086093)

Dear Vice Chancellor Daniels:

We have been requested by your office on behalf of several institutions to provide general guidance on the meanings of the terms "public works contracts" and "public works construction contracts" as used in Georgia statutes referencing the terms, more specifically O.G.C.A. §13-10-60 (relative to payment bonds) and exemption from procurement by DOAS pursuant to O.C.G.A. §50-5-72. Neither of these terms have an express statutory definition in Georgia, however there are numerous judicial interpretations of these terms.

We have reached the following conclusions, with discussion 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, design, 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 that encompasses a wide variety of public contracts. 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 ALR4th 1170, 1178). As a further explanation, the first test for a contract to be “public” is that it “bears a relation to legitimate governmental interests or activities on behalf of the public at large.” *Id.* The second test requires that the contract cover “work” or “works” in the sense that it entails some “physical action” in connection with a “physical subject matter.” *Id.* In this regard, the analysis of the Attorney General in 1976 is instructive:

“. . . [A] contract for reclamation and rehabilitation of lands subjected to surface mining constitutes a public works contract. First, the public at large will be benefited 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 contract” has been held to include (i) contracts for the reclamation and rehabilitation of public land subjected to adverse effects of surface mining operations (*see* 1976 Op. Att’y Gen. 76-98); (ii) contracts to demolish a building (*see* 1967 Op. Att’y Gen. 67-271); and (iii) repairs of 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)). Further, by express statute in Georgia¹, and in other states by implication, the term public works also includes construction of public roads.

Other contracts deemed to be public works contracts include (i) 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)); and (ii) salvage of a vessel where title was to be taken by the public in stages as it was salvaged (*see Shlager v. MacNeil Bros. Co.*, 27 F.Supp. 180 (1939)).

Public works contracts include contracts for design, engineering, construction, alteration, modification, demolition, cleaning, maintenance or repair, as well as consultant contracts relative to such activities. Public works contracts include well-drilling for hazardous materials monitoring, services contracts for inspections, contracts for meeting

¹ *See* O.C.G.A. §32-2-70.

certifications, landscape maintenance, utilities, and the like. 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 involves a fixed asset, it is a public works contract.

Thus, for the purposes of the exemption in O.C.G.A. §50-5-72, all contracts of the type and character referenced above, 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, Jekyll Island State Park Authority, are not required to be procured by DOAS, *whether or not they are "construction" contracts*. And 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.²

B. PUBLIC WORKS CONSTRUCTION CONTRACTS

The term "public works construction contracts" is 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.

These bonding requirements have a different historical antecedent. The public property of the State of Georgia, including state entities such as the Board of Regents, is not subject to liens or made subject to *Fi Fa*. 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. *Neal-Millard Co. v. Trustees of Chatham Academy*, 121 Ga. 208, 213-215 (1904); *B&B Elec. Supply Co. v. H.J. Russell Constr. Co.*, 166 Ga. App. 499, 503 (1983); 1982 Op. Att'y Gen. 82-91.

The United States, whose property is also not subject to lien or levy, passed the Miller Act (42 U.S.C. §1412). The purpose of the Miller Act is to protect materialmen and laborers who cannot perfect liens on the public property of the United States. *United States for Use of Ardmore Concrete Material Company, Inc. v. Williams et al.*, 240 F.2d 561, 564 (10th Cir.). Georgia passed its "Little Miller Act" (now codified at O.C.G.A. §13-10-60) for the same purposes. In Georgia, the courts look to the decisions of the federal courts construing payment bond requirements. *Amcon, Inc. v. Southern Pipe & Supply Co.*, 134 Ga. App. 655 (1975). And, as will be discussed below, the word "construction" recently inserted into "public works *construction* contract" in the bonding

² See O.C.G.A. §50-17-22(j)(1); *see also* 1975 Op. Att'y Gen. 75-58.

statute has a critical limiting effect upon the types of contracts required to have payment and performance bonds.

To expand the discussion above, which identifies the general meaning attached to public works and public works construction contracts, the scope of the bond requirements is actually defined by the scope mechanic's and materialmen's lien laws. Specifically, the purpose of a payment bond is to guarantee payment to third parties for work, tools, machinery, skill and materials. *Seibels, Bruce & Co. v. National Sur. Corp.*, 63 Ga. App. 705 (1940). More importantly, it extends to those third and lower tier subcontractors and materialmen who supply materials and labor for the project to subcontractors as well. *Western Casualty & Surety Co. v. Fulton Supply Co.*, 60 Ga. App. 710 (1939). To summarize this paragraph, the bond is to cover unpaid subcontractors and to 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.

When the Miller and Little Miller acts were enacted, mechanics and materialmens 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, may 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 insert 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 rights to the following subcontractors, materialmen, and persons:

- (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 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;

- (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 material 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) above, as recent additions to the lien laws. These permit liens in favor of persons such architects, foresters, surveyors, and engineers, not historically considered in the Miller and Little Miller Acts. Similar 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 did not include the word "construction" in the term "public works construction contracts," then an architect with subconsultants for such services who failed to pay his subconsulting architects or engineers, such persons would have a lien on the property, but forfeited by the fact that it is public property. 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, holding the original bonding statute 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.

Vice Chancellor Linda Daniels, AIA

April 28, 2009

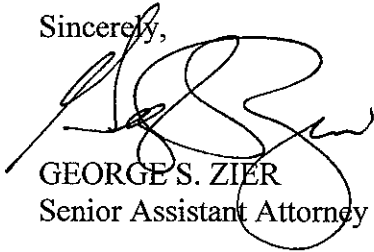
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Therefore, if the contract is a public works contract, then a bond should be obtained if any work or materials or equipment as specified above is to be provided by a party other than the contractor (except for professional services set forth in items (3), (4) and (5) of the code section above). For example, a painter executing a painting contract, with the painting to be performed only by the contractor and his direct employees, still must purchase the 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, 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 Regents' policy 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 trust this overview and discussion is useful to you in contracting for and bonding your construction activities.

Sincerely,

A handwritten signature in black ink, appearing to read "G. S. Zier", is written over the typed name and title.

GEORGE S. ZIER

Senior Assistant Attorney General

cc: D.C. Maudlin, GSFIC
Chris Tomlinson, DOT
Joe Kim, Esquire, DOAS
Sheree Srader, BOR