GEORGIA DEPARTMENT OF LAW
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SAMUEL S. OLENS
ATTORNEY GENERAL

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January 31, 2012

Honorable Chip Rogers
Senator, District 21
State Capitol, Room 236
Atlanta, Georgia 30334

Re: Scope of O.C.G.A. § 13-10-91(b)(1)

Dear Senator Rogers:

This responds to your letter dated January 23, 2012, requesting clarification regarding the scope of the requirements set forth in O.C.G.A. § 13-10-91(b)(1). Specifically, you have asked whether the provisions apply to "all labor and all services paid for with public funds" or instead "apply only to public funded jobs involved in 'buildings and roads.'" We have reviewed our prior informal advice and other correspondence in this area. Since the General Assembly amended O.C.G.A. § 13-10-91(b)(1) in 2009 to limit its scope to contracts entered into under Chapter 10 of Title 13,[1] this office has consistently concluded that the provisions in O.C.G.A. § 13-10-91(b)(1) are limited to public works contracts.

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) A public employer shall not enter into a contract *pursuant to this chapter* 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 the following:
>
> (A) The affiant has registered with and is authorized to use the federal work authorization program;

[1] Attached are copies of all of the prior informal advice and other correspondence issued by my office regarding the scope of O.C.G.A. § 13-10-91(b)(1).

> (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) of this paragraph.
>
> 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.) The General Assembly has specifically defined 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 within this state, 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(4). Notwithstanding the breadth of the definition of "physical performance of services," O.C.G.A. § 13-10-91(b)(1) only applies to "contract[s] *pursuant to this chapter* [Chapter 10 of Title 13] for the physical performance of services." Thus, the express language of O.C.G.A. § 13-10-91(b)(1) limits its applicability to contracts for public works.

The fact that O.C.G.A. § 13-10-91(b)(1) only applies to contracts for public works is evident by the fact that the General Assembly amended the law to specifically include this limitation. 2009 Ga. Laws 970, 971. Prior to 2009, O.C.G.A. § 13-10-91(b)(1) provided that:

> 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.

2006 Ga. Laws 105, 107. In 2009, the General Assembly revised O.C.G.A. § 13-10-91(b)(1) to specifically limit the scope of the legislation to contracts entered into pursuant Chapter 10 of Title 13 dealing with public works contracts.[2] It is a fundamental precept of statutory construction that "all statutes are presumed to be enacted by the legislature with full knowledge of the existing condition of the law and with reference to it." *Allison v. Domain*, 158 Ga. App. 542, 544 (1981) (quoting *Botts v. Se. Pipe-Line Co.*, 190 Ga. 689, 700 (1940)). Furthermore, "when a statute is amended, '[f]rom the addition of words it may be presumed that the legislature intended some change in the existing law.'" *Bd. of Assessors of Jefferson Cnty. v. McCoy Grain Exch., Inc.*, 234 Ga. App. 98, 100 (1998) (quoting *C. W. Matthews Contracting Co. v. Capital Ford Truck Sales*, 149 Ga. App. 354, 356 (1979)). Clearly, the General Assembly knew how to have the law apply to all contracts involving the physical performance of services and, at one time, it did so. However, in 2009, the General Assembly elected to limit the applicability of O.C.G.A. § 13-10-91(b)(1) to contracts entered into "pursuant to this chapter" which deals with public works contracts.[3]

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[2] It is worth noting that the attached advice issued by this office on October 17, 2007, concluded that O.C.G.A. § 13-10-91(b)(1) applied to all contracts involving the physical performance of services and not just to public works contracts. However, the 2009 amendment limited the scope of the statute to public works contracts. This legislative limitation has been reflected in all of the advice issued by this office on this topic since the amendment.

[3] The fact that the General Assembly intended to limit the scope of the statute to public works contracts is further evidenced by the caption to Senate Bill 447, which enacted the definition of "physical performance of services" currently found in O.C.G.A. § 13-10-90(4). The preamble provides relevantly that its purpose is "[t]o amend Chapter 10 of Title 13 of the Official Code of Georgia Annotated, *relating to contracts for public works*." 2010 Ga. Laws 308 (emphasis added). Therefore, the preamble to the legislation enacting the definition of "physical performance of services" indicates that Chapter 10 of

In light of the above authorities, the scope of O.C.G.A. § 13-10-91(b)(1) is limited to "contracts for public works." There is no statutory definition of what constitutes a public works contract for purposes of Chapter 10 of Title 13. 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 are several Attorney General Opinions which address the scope of public works contracts. For example, the term "public works contract" has been held to include contracts for the reclamation and rehabilitation of public land subjected to adverse effects of surface mining operations and to contracts to demolish a building. *See* 1976 Op. Att'y Gen. 76-98; 1967 Op. Att'y Gen. 67-271. In the context of providing advice regarding bond and procurement requirements, this office previously issued informal advice[4] attempting to synthesize the authorities and concluded that:

> 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."

(emphasis in original).[5]

This office has not issued advice attempting to set forth all the contracts that qualify as public works contracts as it relates to the applicability of the provisions of O.C.G.A. § 13-10-91(b)(1). There is little question that contracts involving "the building, altering, repairing, improving, or demolishing of any public structure or building or other public improvements of any kind to public real property" as well as contracts involving "the construction, reconstruction, or maintenance of all or part of a public road" are public

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Title 13 relates to "contracts for public works." The caption to legislation is indicative of the "legislature's own interpretation of the scope and purpose of the act" as it summarizes the legislation "at the time when the discussion of every phase of the question is fresh in the legislative mind." *Wimberly v. Ga. S. & Fla. Ry. Co.*, 5 Ga. App. 263, 265 (1908). *See also Sovereign Camp Woodmen of the World v. Beard*, 26 Ga. App. 130, 131-32 (1921); *Copher v. Mackey*, 220 Ga. App. 43, 45 (1996).

[4] A copy of the letter issued on April 28, 2009 is attached for your reference.

[5] I want to emphasize that this definition is not set forth in the statutes or in any published decisions. Instead, it is an effort to provide direction to a client in a different context.

works contracts and, thus, are covered by the provisions of O.C.G.A. § 13-10-91(b)(1). Similarly, there is little question that professional services contracts which are not construction related do not satisfy the definition of public works contracts. However, it is worth stressing that contracts besides construction related contracts can satisfy the definition of a public works contract set forth above. The question of whether a particular contract satisfies the definition of a public works contract will often involve a factual analysis of a number of factors, including, but not limited to: a) whether the contract involves a fixed asset, b) whether the contract is "performed on public property," and c) examining the scope of services under the contract. In the event a public employer is uncertain if a contract is a "public works contract," the public employer should strongly consider erring on the side of compliance with O.C.G.A. § 13-10-91(b)(1) in order to avoid the possibility of violating this provision.

In summary, O.C.G.A. § 13-10-91(b)(1) applies to more than contracts for "buildings and roads" but it does not apply to "all labor and services" contracts. The applicability of the statute is between these two extremes, which, in many cases, can only be determined by looking at the specific facts of the contract, as the "determination of what are public works is often a question of statutory construction and interpretation."

I hope that this is responsive to your letter. At your request, my office is willing to review any proposed legislation that you may wish to introduce this Session regarding O.C.G.A. § 13-10-91(b)(1).

Sincerely,

Samuel S. Olens
Attorney General

SSO/bf
Enclosures

Department of Law
State of Georgia

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June 2, 2011

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

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

Department of Law
State of Georgia

SAMUEL S. OLENS
ATTORNEY GENERAL

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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;

> (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:

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[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).

> *[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

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[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).

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.

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Department of Law
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THURBERT E. BAKER
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November 30, 2010

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,*

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[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).

> *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

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.

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[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).

R

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October 17, 2007

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MEMORANDUM:

TO: Joseph Kim, Esq.
Department of Administrative Services

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. 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

> 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.

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[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.

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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).

In this matter, I think there is a fairly strong argument that the language of O.C.C.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 statues 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.

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Re: Applicability of affidavit requirement in O.C.G.A. § 13-10-91(b)(1) to routine operation, repair, and maintenance projects involving public property.

Dear Mr. Hulsey:

This responds to your inquiry regarding whether part of the definition of "public works construction" found in O.C.G.A. § 36-91-2(12) can be grafted on to the definition of "physical performance of services" found in O.C.G.A. § 13-10-90(4). As noted in your correspondence, such an interpretation would exempt routine operation, repair, and maintenance projects involving existing public structures, buildings, and property from the affidavit requirement of O.C.G.A. § 13-10-91(b)(1). Since the General Assembly elected to exclude language from the definition of "physical performance of services" exempting routine operation, repair, and maintenance from its scope, it appears that the definition in O.C.G.A. § 36-91-2(12) cannot be utilized to limit the affidavit requirement in O.C.G.A. § 13-10-91(b)(1).

The specific question that you have raised relates to the requirements of O.C.G.A. § 13-10-91(b)(1)[1] which provides relevantly as follows:

> (b) (1) A public employer shall not enter into a contract pursuant to this chapter *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 the following:

[1] Effective July 1, 2011, O.C.G.A. § 13-10-91(b)(1) was slightly modified. 2011 Ga. Laws 794, 797, 817.

> (A) The affiant has registered with and is authorized to use 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) of this paragraph.
>
> 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.) The General Assembly has specifically defined 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 within this state, 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(4)[2] (emphasis added). By its express terms, O.C.G.A.

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[2] Effective July 1, 2011, the definition of "physical performance of services" was slightly modified. 2011 Ga. Laws 794, 796, 817.

§ 13-10-91(b)(1) requires the affidavit for "contract[s] pursuant to this chapter for the physical performance of services." The caption to Senate Bill 447 which enacted O.C.G.A. § 13-10-90(4) 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; . . . .

2010 Ga. Laws 308 (emphasis added). Therefore, the preamble to the legislation enacting the definition of "physical performance of services" indicates that Chapter 10 of Title 13 relates to "contracts for public works."

Based on the use of the phrase "contracts for public works"[3] in the preamble, you have inquired whether the definition of "public works construction" found in O.C.G.A. § 36-91-2(12) limits the scope of the affidavit requirement in O.C.G.A. § 13-10-91(b)(1). "Public works 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 public real property other than those projects covered by Chapter 4 of Title 32. *Such term does not include the routine operation, repair, or maintenance of existing structures, buildings, or real property.*

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[3] It is worth noting that 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 A.L.R.4th 1170, 1178 (1986). 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.*

O.C.G.A. § 36-91-2(12) (emphasis added). As noted in your correspondence, portions of the definition of "public works construction" are identical to the definition of "physical performance of services." However, there are some very significant deviations between these two definitions.[4] Relevantly, "public works construction" specifically excludes "routine operation, repair, or maintenance of existing structures, buildings, or real property" from its definition. This exception is notably absent in the definition of "physical performance of services."

Clearly, the General Assembly knew how to except "routine operation, repair or maintenance of existing structures, buildings, or real property" from the scope of a statute as it expressly did so in O.C.G.A. § 36-91-2(12). The General Assembly elected to not make this choice related to the affidavit required by O.C.G.A. § 13-10-91(b)(1). It is a fundamental precept of statutory construction that:

> *All statutes are presumed to be enacted by the legislature with full knowledge of the existing condition of the law and with reference to it.* They are therefore to be construed in connection and in harmony with the existing law, and as a part of a general and uniform system of jurisprudence, and their meaning and effect is to be determined in connection, not only with the common law and the constitution, but also *with reference to other statutes* and the decisions of the courts.

Allison v. Domain, 158 Ga. App. 542, 544 (1981) (*quoting Botts v. Southeastern Pipe-Line Co.*, 190 Ga. 689, 700 (1940)) (emphasis added). The fact that the definition of "physical performance of services" tracks, in part, the definition of "public works construction" established the correctness of the presumption that the General Assembly was aware of O.C.G.A. § 36-91-2(12) when it enacted O.C.G.A. §13-10-90(4). *See Allison*, 158 Ga. App. at 545 (holding that the fact the General Assembly used different language regarding different groups of covered employees, "is clearly indicative of the intention that the language is to have a different meaning as applied to" the different groups). As the definition of "physical performance of services" does not contain the

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[4] For example, "physical performance of services" expressly provides that it applies to "the construction, reconstruction, or maintenance of all or part of a public road" whereas the definition of "public works construction" expressly provides that it does not apply to "those projects covered by Chapter 4 of Title 32" which address construction of public roads.

exception for routine operation, repairs, and maintenance that is found in the definition of "public works construction," it appears that the exception is not a valid basis for non-compliance with the provisions of O.C.G.A. § 13-10-91(b)(1).

The definition of "physical performance of services" does not except "routine operation, repairs, and maintenance" from its scope and, therefore, whether the work required under the terms of a contract can be characterized as "routine" appears to be irrelevant. In order to determine if the affidavit requirement of O.C.G.A. § 13-10-91(b)(1) applies to a given contract, the question to be resolved is whether the work involves "the building, altering, repairing, improving, or demolishing of any public structure or building or other public improvements of any kind to public real property." It appears that at least some items which can be classified as "routine operations, repairs, and maintenance" would fall under the definition of "physical performance of services" and, thus, mandate that the contractor provide the required affidavit.

I hope that this response 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.

Sincerely,

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April 28, 2009

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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 Georgia[1], 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.

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,

GEORGE S. ZIER
Senior Assistant Attorney General

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