
Coates' Canons Blog: E-Verify Requirements Apply to Public Contracts – NOW!

By Norma Houston

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UPDATE: The General Assembly amended the E-Verify contracting prohibition for cities and counties during the 2014 legislative session. Under Section 13 of **S.L. 2014-119**, which went into effect on October 1, 2014, the E-Verify contracting prohibition now **ONLY** applies to purchase and construction or repair contracts in the formal bidding ranges (i.e., those subject to G.S. 143-129). This change only affects cities and counties as all other units of local government were only subject to the E-Verify contracting prohibition for formal purchase and construction and repair contracts under the original legislation. The text of the post below has been updated to reflect this change.

In a dramatic turn of legislative events, the Reclaim NC Act (**S.L. 2013-418; HB786**) was passed by the General Assembly, vetoed by the Governor, and then passed by the General Assembly again when both Chambers voted by wide margins to override the Governor's veto yesterday and earlier today. While **controversy over the bill** focused on the change in E-verify requirements for temporary workers (extending the employment period for exempted seasonal workers from 90 days to nine months), the legislation also has a significant impact on public contracting because it imposes E-Verify requirements on most public contracts. The legislation went into effect immediately upon the Senate's override of the Governor's veto at 9:20am today (September 4, 2013), so it applies *now – yes, now!* – to *all* city and county contracts as well as *all* formal purchase and construction and repair contracts let by *any* public entity. Read on to find out what the new law prohibits and what local governments should do – NOW!

What is E-Verify?

E-Verify is a free, web-based system operated by the U.S. Department of Homeland Security in partnership with the Social Security Administration that allows participating employers to electronically verify the legal employment status of newly hired employees. Employers submit information taken from a new hire's Form I-9 (Employment Eligibility Verification Form) through E-Verify to the Social Security Administration and U.S. Citizenship and Immigration Services (USCIS) to determine whether the information matches government records and whether the new hire is authorized to work in the United States. The employer receives an electronic verification of the new hire's legal employment status.

Hiring Employees

Under existing North Carolina law, all state agencies, cities, counties, and local school boards must use E-Verify to check the work authorization of all new employees. (**G.S. 126-7.1; G.S. 160A-169.1; and G.S. 153A-99.1**). The requirement also applies to all private employers doing business in North Carolina who employ 25 or more employees in this state. (**G.S. 64-26(a)**) Private employers subject to the E-Verify requirement must maintain a record of verification of the employee's legal work status while the employee is employed and for one year thereafter. For more information on E-Verify, see two bulletins authored by our former SOG colleague, Sajal Zota (click **here** and **here**).

New E-Verify Requirements for Public Contracts

HB786 imposes E-Verify requirements on contractors who enter into certain contracts with state agencies and local governments. The legislation specifically prohibits governmental units from entering into certain contracts “unless the contractor and the contractor’s subcontractors comply with the requirements of Article 2 of Chapter 64 of the General Statutes.” (**Article 2 of Chapter 64** establishes North Carolina’s E-Verify requirements for private employers). It is important to note that the verification requirement applies to *subcontractors* as well as contractors.

The new laws specifically prohibit governmental units from entering into contracts with contractors who have not (or their subs have not) complied with E-Verify requirements. Although the new statutes don’t specify the consequences for entering into a contract in violation of this prohibition, it may be reasonable to assume that the contract would be void.

Which Contracts Are Affected?

The scope of HB786 varied depending on the unit of government and the type of contract. This legislation was subsequently amended in 2014, putting cities and counties on par with other units of local government. Based on the 2014 changes, the prohibition applies to three categories of public contracts :

1. **Formal Purchase and Construction/Repair Contracts:** The prohibition applies to *all* contracts subject to **G.S. 143-129**, which are purchase contracts with an estimated cost of \$90,000 or more, and construction or repair contracts with an estimated cost of \$500,000 or more. G.S. 143-129 applies to virtually all public entities., including cities, counties, local school boards, water and sewer authorities, and other special purpose local government districts and authorities.
2. **State Contracts:** The prohibition applies to *all* state contracts subject to **Article 3 of Chapter 143**.
3. **State IT Contracts:** The prohibition applies to *all* state information technology contracts procured by the **Office of Information Technology Services (ITS)**.

Unlike state agencies, the *only* local government contract subject to the E-Verify contracting prohibition are purchase and construction/repair contracts in the formal bidding range.

How Can Local Governments Comply With the New Law?

From a practical standpoint, how can local governments ensure that contractors and their subcontractors have complied with E-Verify requirements? The legislation does not specifically create an affirmative obligation on local governments to independently verify a contractor’s compliance. However, because a contract entered into in violation of the new requirement could be void, local governments have a vested interest in ensuring compliance by their contractors, and their contractors’ subcontractors. To avoid placing an undue burden on local governments and bidders by requiring specific documentation for each employee, local governments may wish to consider requiring all bidders to include *with their bids* an affidavit or similar statement attesting to (1) the contractor’s compliance with E-Verify (or, if the contractor employs less than 25 employees in this state, attesting to that fact), and (2) attesting to the contractor’s subcontractors’ compliance with E-Verify (or, if any subcontractors employ less than 25 employees in this state, attesting to that fact). In addition, local governments should also consider including a *provision in the contract* awarded to the winning bidder that requires the contractor to ensure compliance by any subcontractors subsequently hired by the contractor. A violation of this provision would provide grounds for a breach of contract claim by the local government should the contractor fail to ensure that his or her subcontractors have complied with the E-Verify requirement.

The E-Verify requirement went into effect *immediately* upon the Senate’s override of the Governor’s veto. The 2014 changes went into effect on October 1, 2014. Local governments should take appropriate steps to ensure compliance with the new law, especially for those contracts that are currently going through the bidding process (the effective date of the legislation did not exempt or “grandfather” contracts currently under bid).



For more information about other legislation affecting public purchasing and contracting and local governments in general, it's not too late to register for the second installment of the School of Government's annual Local Government Legislative Review webinar. *The webinar will be conducted tomorrow, September 5th from 10:00-12:00, and will also be available for on-demand purchase. To register for the webinar, [click here](#).* You can also peruse our 2013 legislative summaries on our **Legislative Reporting Service website**.

Links

- canons.sog.unc.edu/wp-content/uploads/2013/09/Veto-Senate-Override-Vote1.jpg
- www.ncleg.net/Sessions/2013/Bills/House/HTML/H369v8.html
- www.ncleg.net/gascripts/BillLookup/BillLookup.pl?Session=2013&BillID=H786&submitButton=Go
- www.wral.com/house-votes-to-override-two-vetoes/12847809/
- www.uscis.gov/e-verify
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=126-7.1
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=160A-169.1
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=153A-99.1
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=64-26
- sogpubs.unc.edu/electronicversions/pdfs/pelb36.pdf
- sogpubs.unc.edu/electronicversions/pdfs/ilb03.pdf
- www.ncleg.net/Sessions/2013/Bills/House/HTML/H786v5.html
- www.ncleg.net/EnactedLegislation/Statutes/HTML/ByArticle/Chapter_64/Article_2.html
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=143-129
- www.ncleg.net/EnactedLegislation/Statutes/HTML/ByArticle/Chapter_143/Article_3.html
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_147/GS_147-33.95.html
- www.sog.unc.edu/resources/microsites/resource-no-longer-exists
- lrs.sog.unc.edu/lrs/legislative-summaries