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## Coates' Canons Blog: IT'S BACK . . . New E-Verify Contracting Requirements

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In the waning days of the 2015 legislative session, the General Assembly enacted

legislation that once again changes the E-Verify contracting prohibition for state and local government contracts. In some respects **HB318** (Protect North Carolina Workers Act) limits the prohibition; in many other respects, however, the prohibition has been expanded. Local governments, school units, and public authorities should be aware of these changes and take steps to comply with them, especially since the new law will go into effect as soon as the bill is signed by Governor McCrory and will apply to all contracts entered into on or after that date.[1]

### **Background**

In 2013, the General Assembly enacted legislation which prohibited state agencies and local governments from contracting with businesses that did not comply with North Carolina's E-Verify hiring requirement. At that time, the prohibition applied to *all* contracts entered into by cities and counties; for all other local government entities, the prohibition only applied to purchase and construction or repair contracts in the formal bidding ranges. Then, in 2014, the General Assembly amended the law by limiting the prohibition for city and county contracts to only those for purchase and construction or repair in the formal bidding ranges, thus treating cities and counties like all other local government entities (**see this blog** for more discussion of both the 2013 and 2014 legislation). With the enactment of **HB318**, the E-Verify contracting prohibition has changed again, and not just for cities and counties.

### **New E-Verify Contracting Prohibition**

**HB318** changes the E-Verify contracting prohibition in the following ways:

1. Creates a new statute – G.S. 143-133.3 – which sets out the E-Verify contracting prohibition for all local governments and state agencies.
2. Applies the prohibition to *all* contracts entered into by *all* governmental entities except for the following contracts:
  1. Expenses related to travel, including transportation and lodging, for employees, officers, agents, or members of State or local boards, commissions, committees, or councils.
  2. Contracts *solely* for the purchase of goods, apparatus, supplies, materials, or equipment (contracts that involve a combination of purchase and construction or purchase and service would not be exempt).
  3. Contracts let under **S. 143–129(e)(1), (9), or (9a)** (the exceptions to competitive bidding requirements for purchases made directly from another unit of government or from a vendor under contract with the State of North Carolina or a federal agency).
  4. Contracts let under **S. 143–129(g)** (the piggyback exception to competitive bidding requirements).

3. Protects governmental units from noncompliant contractors or subcontractors *if* the contract includes a provision requiring the contractor and the contractor's subcontractors to comply with the requirements of **Article 2 of Chapter 64** of the General Statutes (North Carolina's E-Verify hiring requirement)
4. Amends the Local Government Budget and Fiscal Control Act (specifically, **S. 159-28(e)**) to deem a local government contract compliant with the E-Verify contracting prohibition if the contract includes the provision described in #2 above.
5. Expands the Commissioner of Labor's E-Verify enforcement jurisdiction to include government contracts subject to the prohibition. If the Commissioner finds that a complaint filed against a governmental entity is not false or frivolous, the Commissioner is required to hold a hearing to determine if a violation of the statute has occurred. If the Commissioner then finds that a violation has occurred, the Commissioner must notify the governmental entity's governing board. The Department of Labor is also charged with maintaining a list of governmental entities found to be in violation of the statute and must make that list available on its website.

The changes to the E-Verify contracting prohibition summarized above impact local governments significantly as described in more detail below.

### **Broader Scope**

The scope of the prohibition is now broader in that it applies to *all* contracts entered into by *all* local government entities regardless of the type of contract or its cost, except for those now specifically exempted under the new statute (see the next paragraph for a discussion of these exemptions). Cities and counties are familiar with this breadth of scope as that was the state of the law as it applied to them in 2013. For other units of local government, however, this broad scope is new. Until now, local boards of education, water and sewer authorities, transit authorities, and all other political subdivisions have dealt with the prohibition only when contracting for purchases or construction in the formal bidding ranges (purchase contracts costing \$90,000 and above and construction contracts costing \$500,000 and above). These –local government entities, as well as cities and counties, must now apply the prohibition to *all* contracts except those discussed in the next paragraph.

### **New Exemptions**

Although the scope of the prohibition is broader, the new law exempts certain categories of contracts that were not previously exempt. Significantly, all purchase contracts are exempt from the prohibition, regardless of cost, *so long* as the contract is *solely* for the purchase of apparatus, supplies, materials, and equipment (this language tracks the description of a purchase contract under **Article 8 of G.S. Chapter 143**). Previously, purchase contracts in the formal bidding range were subject to the prohibition; now they are not.

It is important to note that the exemption for purchase contracts applies *only* if the contract is *solely* for that purpose. If the contract includes a combination of purchase and some other kind of activity, such as construction or a service, then the exemption does not apply. For example, a contract for new carpet typically includes both a purchase (the carpet materials) and a service (the installation labor). This contract would not be eligible under the exemption because it is not *solely* a purchase contract. However, if the local government purchases the carpet (either through competitive bidding or under a bidding exception) and then contracts separately for the installation service, only the installation contract would be subject to the prohibition. Of course, local governments should be mindful of the prohibition against dividing a contract for purposes of evading bidding requirements (**G.S. 143-133**).

In addition to the general exception for purchase contracts, the new law also exempts contracts entered into under certain competitive bidding exceptions. Purchases made from other units of government anywhere in the country, purchases made from vendors under contract with the State of North Carolina or a federal agency (the latter typically referred to as GSA contracts), and purchases made from vendors under contracts previously bid by another unit of government (commonly referred to as piggyback contracts) are exempt from competitive bidding requirements (**G.S. 143-129(e)(1), (9), (9a), and (g)**). Contracts let under these bidding exceptions are also exempt from the E-Verify contracting prohibition. While these specific exemptions may seem redundant with the more general exemption for all purchase contracts

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discussed above (and in many cases they will be), the overlap is not entirely complete. A purchase contract entered into under one of these bidding exceptions that includes a service component would be exempt from the E-Verify contracting prohibition even though it is not *solely* a purchase contract. Take the carpet contract example discussed above. If the contract includes both the purchase of the carpet materials and the installation labor, it is not eligible under the general purchase contract exemption. However, if this same contract is entered into under the piggyback exception (**G.S. 143-129(g)**), it *would* be covered under the E-Verify contracting prohibition exemption applicable to piggyback contracts.

A final category of contracts exempt from the E-Verify contracting prohibition are those related to travel, including transportation and lodging, for public officials and employees. This means that payment of travel expenses such as a hotel room or an airline ticket are not subject to the prohibition.

### ***Protection from Contractor's Noncompliance***

The new E-Verify contracting prohibition statute provides two important protections for governmental entities when a contractor or subcontractor fails to comply with the state's E-Verify hiring requirement.

First, local government entities are deemed compliant with the E-Verify contracting prohibition if the contract includes a provision requiring the contractor and that contractor's subcontractors to comply with **Article 2 of G.S. Chapter 64** (the state's E-Verify hiring requirement). As a result, if a contractor or subcontractor are found to be in violation of the E-Verify hiring requirement, the local government is still compliant with the contracting prohibition if the contract contained the compliance provision. Many local governments began including such a provision in the standard terms and conditions of their contracts when the E-Verify contracting prohibition was first enacted in 2013. Below is a simple example of a compliance provision:

E-VERIFY. CONTRACTOR shall comply with the requirements of Article 2 of Chapter 64 of the General Statutes. Further, if CONTRACTOR utilizes a subcontractor, CONTRACTOR shall require the subcontractor to comply with the requirements of Article 2 of Chapter 64 of the General Statutes.

A local government should consult with its attorney in developing a standard compliance provision.

The second protection for local governments included in the new law benefits local government finance officers. If a contract includes the compliance provision described above and the contractor or subcontractor violate the E-Verify hiring requirement, the finance officer is not subject to personal liability under **G.S. 159-28(e)** for any funds expended under the contract. Of course, preaudit requirements still apply and failure to preaudit may still result in personal liability (see Kara Millonzi's **blog post** on recent preaudit legislative changes).

### ***Enforcement***

The Commissioner of Labor is authorized to investigate allegations of E-Verify hiring requirement violations (**G.S. 64-27 – 64-30**) and to impose sanctions on employers found to be in violation (**G.S. 64-31 – 64-33**). Under the old law, the Commissioner's investigative jurisdiction did not extend to local governments. Now, it does.

The Commissioner is now authorized to investigate a complaint made against a local government entity alleging a violation of the E-Verify contracting prohibition. If such a complaint is made, the Commissioner is required to hold a hearing to determine if a violation has occurred. If the Commissioner does find that a violation has occurred, the Commissioner is required to notify the governing body, and must include that government on a list of governmental units found to be in violation of the E-Verify contracting prohibition which will be posted on the NC Department of Labor's **website**.

Fortunately, the civil sanctions and fines that the Commissioner is required to impose on private employers who violate the E-Verify hiring requirement do not apply to governmental entities. So, while the Commissioner now may investigate alleged violations by local government entities, the only sanction against that entity is notification to its governing board

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and publically listing it along with other governmental entity violators.

### ***Where Can You Get More Information?***

In the coming weeks I will be revising the E-Verify FAQ's that I developed after the initial E-Verify legislation was enacted in 2013 and updated after last year's legislative changes. Please email me your questions so that I can incorporate them into the ever-evolving E-Verify FAQ's. My email address is [nhouston@sog.unc.edu](mailto:nhouston@sog.unc.edu) and I look forward to hearing from you.

[1] As of the date and time of this post, Governor McCrory has not yet acted upon HB318.

### **Links**

- [canons.sog.unc.edu/wp-content/uploads/2015/10/Everify.jpg](https://canons.sog.unc.edu/wp-content/uploads/2015/10/Everify.jpg)
- [www.ncleg.net/gascripts/BillLookup/BillLookup.pl?Session=2015&BillID=H318&submitButton=Go](http://www.ncleg.net/gascripts/BillLookup/BillLookup.pl?Session=2015&BillID=H318&submitButton=Go)
- [canons.sog.unc.edu/?p=7284](https://canons.sog.unc.edu/?p=7284)
- [www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=143-129](http://www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=143-129)
- [www.ncleg.net/EnactedLegislation/Statutes/HTML/ByArticle/Chapter\\_64/Article\\_2.html](http://www.ncleg.net/EnactedLegislation/Statutes/HTML/ByArticle/Chapter_64/Article_2.html)
- [www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=159-28](http://www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=159-28)
- [www.ncleg.net/EnactedLegislation/Statutes/HTML/ByArticle/Chapter\\_143/Article\\_8.html](http://www.ncleg.net/EnactedLegislation/Statutes/HTML/ByArticle/Chapter_143/Article_8.html)
- [www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter\\_143/GS\\_143-133.html](http://www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_143/GS_143-133.html)
- [www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter\\_143/GS\\_143-129.html](http://www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_143/GS_143-129.html)
- [canons.sog.unc.edu/?p=8230](https://canons.sog.unc.edu/?p=8230)
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