

# Understanding North Carolina’s New E-Verify Contracting Prohibition

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**NOTE: This document was revised September 29, 2013. Substantially revised sections are indicated throughout the document and in the table of contents below by \*\*.**

During the 2013 session of the North Carolina General Assembly, the legislature enacted the RECLAIM NC Act ([S.L. 2013-418; HB786](#)) which prohibits state and local governments from entering into certain contracts if the contractor or that contractor’s subcontractors are not compliant with North Carolina’s E-Verify law. The following pages provide answers to frequently asked questions posed by local governments as well as examples of contract provisions and affidavits they have begun to use in a good faith effort to ensure compliance with the new law. The text of this new law is reprinted at the end of this document. For the reader’s convenience, specific questions may be referenced by clicking on the question in the table of contents below.

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## I. Overview of the New E-Verify Contracting Prohibition

### 1. What is the new E-Verify contracting prohibition?

[Section 2 of S.L. 2013-418 \(H786\)](#) 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 prohibition applies to *subcontractors* as well as contractors.

The new prohibition is included in the following statutes: G.S. 153A-499 (counties), G.S. 160A-20.1 (cities); G.S. 143-129 (purchase and construction/repair contracts in the formal bidding range); 143-48.5 (state agencies); and G.S. 147-33.95 (state information technology contracts).

### 2. What is E-Verify?

[E-Verify](#) is a free, web-based system operated by the U.S. Department of Homeland Security’s Citizenship and Immigration Service (USCIS) in partnership with the Social Security Administration (SSA) 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 SSA and 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. For more information on E-Verify, see two bulletins authored by our former SOG colleague, Sajal Zota (click [here](#) and [here](#)).

### 3. \*\*Who is required to use E-Verify?

Certain public and private employers are required to use the E-Verify system to electronically verify the legal employment status of newly hired employees. The public entities required to use the E-Verify system are:

- All state agencies, departments, and institutions, public universities, community colleges, and local school boards (G.S. 126-7.1)
- Cities (G.S. 160A-169.1)
- Counties (G.S. 153A-99.1)

Private employers subject to the E-Verify requirement are those who do business in this state and employ 25 or more workers in this state.<sup>1</sup> The requirement applies regardless of the location of the employer’s headquarters, but only for newly hired employees working in North Carolina (it does not apply to employees working in another state). Private employers with 24 or fewer employees are not required to use E-Verify, even if they employ 25 or more employees in other states. In addition, the E-Verify requirement does not apply to seasonal temporary employees who are employed less than nine months in a calendar year. More

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<sup>1</sup> G.S. 64-25(4).

information about North Carolina's E-Verify requirement is available on the North Carolina Department of Labor's [website](#).

\*\*It is not clear whether the E-Verify hiring requirement applies to an employer who does not employ 25 or more workers in this state on a permanent basis if that employer brings more than 25 workers into this state on a temporary or time-limited basis.

#### **4. If a contractor is not subject to state E-Verify requirements, does its subcontractor still have to comply?**

Yes. The requirements of North Carolina's E-Verify law apply to all employers who are doing business in this state and employ 25 or more employees in this state even if that employer is a subcontractor to an out-of-state contractor or vendor who is not subject to state E-Verify requirements.

## **II. Units of Government Subject to the New Prohibition**

### **5. Which units of government are subject to the new law?**

The answer depends on the type of governmental unit. For cities, counties, and state agencies, the new prohibition applies to *all* contracts, regardless of the type of contract. For *all other* governmental units, the new prohibition only applies to purchase and construction/repair contracts in the formal bidding range.<sup>2</sup>

### **6. What about public schools?**

Only purchase and construction/repair contracts in the formal bidding range entered into by local boards of education are subject to the new E-Verify contracting prohibition.

### **7. \*\*What about utilities commissions, water and sewer authorities, transit authorities, and other local government authorities?**

If the commission or authority is an independent political subdivision of the state, only purchase and construction/repair contracts in the formal bidding range are subject to the new E-Verify contracting prohibition. However, if the authority or commission is legally a subunit of a city or county, the new prohibition applies to *all* contracts.

\*\*If an entity is not certain of its legal status for purpose of the E-Verify prohibition, that question can be answered by looking to the Local Government Budget and Fiscal Control Act (G.S. Chapter 159). If the entity is considered a city or county for purposes of that Chapter, it is not an independent political subdivision and all of its contracts are subject to the E-Verify prohibition. However, if the entity is a public authority for purposes of Chapter 159, then only

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<sup>2</sup> Under G.S. 143-129, the formal bid threshold for purchase contracts is \$90,000; for construction/repair contracts, the formal bid threshold is \$500,000.

its formal purchase and construction/repair contracts are subject to the prohibition. An easy way to make this determination is to look at who signs the preaudit certificate – if it is signed by a city or county finance officer or deputy finance officer, the entity is considered part of city or county government.

#### **8. What about Councils of Government (COG's)**

Only purchase and construction/repair contracts in the formal bidding range entered into by COG's are subject to the new E-Verify contracting prohibition.

#### **9. What about departments within county government like Health, DSS or the Sheriff's Office?**

These departments are subject to the same E-Verify contracting prohibition as other subunits of county government. Despite their semi-independent governance structure, they are still units of county government under the Local Government Budget and Fiscal Control Act (G.S. Chapter 159), and are subject to the same budget and contracting requirements and restrictions as other county departments.

\*\*On the other hand, local health departments that are not county agencies but are a public health authority (Hertford), a public hospital authority (Cabarrus), or part of a multi-county district health department (6 districts in NC comprised of 21 counties) are considered a public authority for purposes of the Local Government Budget & Fiscal Control Act (G.S. Chapter 159). As such, they are not considered part of county government for purposes of the E-Verify prohibition. Only purchase and construction/repair contracts in the formal bidding range entered into by these entities are subject to the new E-Verify contracting prohibition.

### **III. Contracts Subject to the New Prohibition**

#### **10. \*\*What contracts are subject to the new law?**

For purchase and construction/ repair contracts in the formal bidding range the prohibition applies to all governmental entities. For cities, counties, and state agencies, the prohibition applies to all contracts, regardless of the type of contract. The table below summarizes which categories contracts are subject to the new prohibition:

Type of Contract	City	County	Other Gov't Unit	State Agency
Construction – Formal	✓	✓	✓	✓
Construction – Informal	✓	✓		✓
Purchase – Formal	✓	✓	✓	✓
Purchase – Informal	✓	✓		✓
Design Services (Mini-Brooks Act)	✓	✓		✓
All Other (service, lease, grant to nonprofit, etc.)	✓	✓		✓

\*\*It may be helpful to keep in mind who the E-Verify hiring requirement applies to – if contractor or vendor employs less than 25 employees (not counting temporary seasonal workers employed nine months or less within a calendar year), it is not subject to the E-Verify requirement and the new prohibition would not apply to that contract *even if the contract falls into one of the categories checked above.*

### 11. Does the new prohibition really apply to all city and county contracts?

It appears so. G.S. 153A-499 (counties) and G.S. 160A-20.1 (cities) were both amended to add the following new subsection:

(b) Contractors Must Use E-Verify. – No county [or city] may enter into a contract unless the contractor and the contractor's subcontractors comply with the requirements of Article 2 of Chapter 64 of the General Statutes.

Some have suggested that the terms “contractor” and “subcontractor” should be interpreted to limit the prohibition to construction contracts since those terms are most commonly used in that context. However, the plain language of the new statutes does not contain any limiting or descriptive words or phrases to suggest that the General Assembly intended the prohibition to apply only to construction contracts. Instead, it prohibits a city or county from entering into “a contract” without further description or definition that clarifies or limits the scope of the prohibition.

By way of example, more descriptive and limiting language was contained in [HB160](#), a bill that also prohibited units of government from entering into certain contracts with non-E-Verify compliant contractors.<sup>3</sup> That bill contained the following specific language: “No contract for

<sup>3</sup> HB160 was not enacted and did not meet the cross-over deadline, so it is not eligible for consideration during the 2014 Short Session under the Senate and House Rules.

construction or repair work or for the purchase of apparatus, supplies, materials, or equipment . . .” This language clearly limits the scope of HB160 to purchase and construction contracts. Presumably, the General Assembly would have included more specific language in the enacted law (HB786) like that of HB160 had it intended such a limitation to apply.

Unless the new statutory language is either interpreted by the courts or clarified by the General Assembly, cities and counties that adopt the broader approach articulated above are likely to be in a better position to defend themselves against potential legal challenges involving contracts other than construction contracts.

### **12. Does “contractor’s subcontractors” mean only first tier subcontractors or all tiers?**

The new statutes do not distinguish between different tiers of subcontractors, so presumably the prohibition applies to all subcontractors. As discussed above, the term “subcontractor” is commonly used in the context of construction contracting. However, Webster’s defines “subcontractor” as “an individual or business firm contracting to perform part or all or another’s contract.”<sup>4</sup> Absent interpretation by the courts or clarification by the General Assembly, this broader interpretation is consistent with the standard rules of statutory construction under which terms not otherwise defined are to be given their “plain and definite meaning.”<sup>5</sup>

### **13. \*\*Does the new prohibition apply to employers with less than 25 employees?**

No. Only employers who are doing business in this state and employ 25 or more employees in this state are subject to North Carolina’s E-Verify requirement under Article 2 of Chapter 64. If the employer is not subject to E-Verify, the new contracting prohibition would not apply to contracts with that employer.

\*\*However, keep in mind that even if the business itself is not subject to E-Verify hiring requirements, its subcontractors might be and the new E-Verify prohibition would apply because it includes both contractors and subcontractors.

### **14. \*\*What about contracts with one person, like a parks & recreation instructor or a HVAC repair man?**

Only businesses that employ 25 or more employees are subject to the North Carolina E-Verify requirement. The new E-Verify contracting prohibition does not apply to contracts with individual persons or businesses that have less than 25 employees.

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<sup>4</sup> Merriam-Webster’s Collegiate Dictionary, 11<sup>th</sup> ed. (2005).

<sup>5</sup> *Lanvale Properties, LLC v. Cnty. of Cabarrus*, 366 N.C. 142, 154, 731 S.E.2d 800, 810 (2012).

\*\*However, keep in mind that even if the individual or business itself is not subject to E-Verify hiring requirements, its subcontractors might be and the new E-Verify prohibition would apply because it includes both contractors and subcontractors.

### **15. What about amendments to existing contracts?**

Since an amendment to an existing contract technically constitutes a new contract, the new E-Verify contracting prohibition appears to apply equally to amendments. However, if the unit of government has taken steps to ensure the contractor's compliance with state E-Verify requirements, it may not be necessary to repeat those steps in amending a contract with that same contractor.

### **16. \*\*What about unwritten agreements/oral contracts?**

The E-Verify contracting prohibition applies to oral contracts as well as written ones. However, in light of the North Carolina Court of Appeals' recent interpretation of the preaudit requirement (see Kara Millonzi's [blog post](#) on these cases), local governments should no longer enter into *any* oral contracts, *even if* state statutes do not require the contract to be in writing.

\*\*In addition to the preaudit requirement, state law specifically requires the following contracts to be in writing: *all* city contracts, all purchase and construction/repair contracts subject to formal bidding requirements, and all contracts for the purchase of goods costing \$500 or more.

### **17. What about contracts not subject to competitive bidding?**

For cities and counties, these types of contracts are subject to the new E-Verify prohibition, regardless of the cost of the contract. For other units of government, such as school boards and authorities, the prohibition does not apply.

### **18. What about contracts for design services (Mini-Brooks Act contracts)?**

For cities and counties, contracts governed by GS. 143-64.31 (the Mini-Brooks Act) are subject to the new E-Verify prohibition, regardless of the cost of the contract. For other units of government, such as school boards and authorities, the prohibition would not apply.

### **19. What about the new design-build construction method authorized by the General Assembly?**

During the 2013 session, the General Assembly enacted [S.L. 2013-401 \(HB857\)](#) which authorizes three new construction delivery methods for public construction contracts: design-build, design-build bridging, and public private partnerships. For cities and counties, these contracts are subject to the new E-Verify contracting prohibition. However, for all other units of local government (school boards, water and sewer authorities, etc.), these contracts are *not* subject to the new prohibition because they are not governed by G.S. 143-129 (the formal bidding



statute for purchase and construction/repair contracts), but instead are entered into under new statutory procedures generally governed by the Mini-Brooks Act. As discussed above, for all local governments except cities and counties, the new E-Verify contracting prohibition does not apply to Mini-Brooks Act contracts.

## **20. What about contracts for office supplies or other purchases?**

For cities and counties, these types of contracts are subject to the new E-Verify prohibition, regardless of the cost of the contract. For other units of government, such as school boards and authorities, the prohibition only applies to purchase contracts in the formal bidding range.

## **21. What about contracts with an out-of-state vendor?**

If the out-of-state vendor has fewer than 25 workers employed in North Carolina, the vendor is not subject to state E-Verify requirements and the new contracting prohibition does not apply. If the unit of government is unsure whether the vendor is subject to state E-Verify requirements, it should take the appropriate steps to either confirm compliance (such as with an affidavit or statement of compliance) or make the vendor aware of its legal obligations under North Carolina law (such as a provision in the contract or purchase order).

## **22. What about IT purchases?**

For cities and counties, all IT purchases are subject to the new E-Verify contracting prohibition. For other local governments, the prohibition only applies to IT purchase contracts in the formal bidding range.

## **23. What about purchases made under an exception to competitive bidding requirements, such as piggybacking, buying off a state contract, or purchasing through a group (cooperative) purchasing program?**

For local governments *other than cities and counties*, it appears that the new E-Verify prohibition would *not* apply to purchases made under one of the exceptions to formal competitive bidding requirements authorized under G.S. 143-129(e) and (g). The new provision added to G.S. 143-129 reads as follows:

(j) No contract *subject to this section* may be awarded by any board or governing body of the State, institution of State government, or any political subdivision of the State unless the contractor and the contractor's subcontractors comply with the requirements of Article 2 of Chapter 64 of the General Statutes. (emphasis added)

Since contracts entered into under one of the exceptions to the competitive bidding statutes are specifically *exempt* from the requirements of G.S. 143-129, that exemption presumably includes the new E-Verify prohibition (i.e., the contract is not “subject to this section”).

However, in an abundance of caution, governmental units should still consider including a provision in the contract giving notice to the vendor of that vendor's legal obligations under North Carolina's E-Verify law.

**\*\*For cities and counties**, the answer is different. While the argument above would appear to apply equally to city and county contracts entered into under one of the competitive bidding exceptions, there still remains the broader prohibition under separate statutes that apply to *all* contracts (G.S. 153A-499 for counties, and G.S. 160A-20.1 for cities). Under the rules of statutory construction, when both a specific and a general provision govern a situation, the specific provision controls.<sup>6</sup> One might argue that specific language of the amendment to G.S. 143-129 would control over the more general language of the city and county prohibition statutes. However, even if a contract is exempt from G.S. 143-129, the county and city contracting statutes cited above still apply.

#### **24. \*\*What about change orders on construction projects?**

Since change orders are also an exception to competitive bidding requirements, the analysis above applies. For cities and counties, if the change order is issued to a contractor from whom the unit has already obtained E-Verify compliance documentation, additional documentation may not be necessary. However, if the change order results in the contractor hiring a new subcontractor, the contractor should be reminded that the E-Verify prohibition applies to both contractors and subcontractors, and the unit may wish to consider requiring the contractor to obtain E-Verify compliance documentation from the subcontractor.

#### **25. What about p-card purchases, purchase orders, and other small purchases?**

For cities and counties, small purchases are a contract regardless of whether the transaction takes the form of a p-card, credit card, invoice, or purchase order. While all of these transactions are subject to the new E-Verify contracting prohibition, cities and counties may wish to consider employing moderate measures to ensure the vendor's compliance with state E-Verify requirements such as including boilerplate language in standard terms and conditions or similar documents alerting vendors to their legal obligations under North Carolina's E-Verify laws. In addition, if the transaction is made under a larger contract and the unit took steps to ensure the vendor's compliance as part of that contracting process, it seems unduly burdensome to reaffirm compliance for each individual transaction under that contract.

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<sup>6</sup> See *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384-85 (1992) (applying "specific over general" canon of construction in statutory context); *Abraham v. Rockwell Int'l Corp.*, 326 F.3d 1242 (Fed. Cir. 2003) (quoting *Restatement (Second) of Contracts* § 203(c) (1981) for the proposition that "specific terms and exact terms are given greater weight than general language").

For other units of local government, the new E-Verify contracting prohibition would only apply to these transactions if they fall within the formal bidding range for purchase or construction/repair contracts (which is highly unlikely).

## **26. What about warranties and other similar service agreements?**

For cities and counties, warranties and other services agreements are contracts and are subject to the new E-Verify contracting prohibition. For other local governments, since these contracts are service contracts, they are not subject to the prohibition.

## **27. What about personal property leases, including leases with an option to purchase?**

For cities and counties, a lease is a contract and is subject to the new E-Verify contracting prohibition regardless of whether the lease includes an option to purchase.

For other units of government (schools, authorities, etc.), a true lease is a service contract and is not subject to the new prohibition. However, if the lease includes an option to purchase, G.S. 160A-19 requires the lease to be treated as a purchase contract. If the estimated cost of the lease contract is \$90,000 or more, the lease is subject to formal bidding requirements under G.S. 143-129 which now includes the E-Verify contracting prohibition.

## **28. What about finance agreements?**

For cities and counties, finance agreements are contracts and are subject to the new E-Verify contracting prohibition. For other local governments, since these contracts are service contracts, they are not subject to the prohibition.

## **29. What about economic incentive agreements?**

Since a city or county economic development incentive agreement is a contract, it is subject to the new E-Verify contracting prohibition.

## **30. What about grants to non-profits?**

Although not commonly thought of as such, a grant by a unit of government to a non-profit organization is a contract (it is a legally binding agreement where the unit of government agrees to provide the grant funds and the nonprofit recipient agrees to spend the funds for the purposes for which the grant was awarded). Since non-profits appear to be subject to the state's E-Verify requirement,<sup>7</sup> the new E-Verify contracting prohibition applies.

It may be helpful to keep in mind who E-Verify requirement applies to – if the non-profit employs less than 25 employees (not counting temporary seasonal workers employed nine

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<sup>7</sup> Under G.S. 64-25(4), the definition of an “employer” includes “[a]ny person, business entity, or *other organization*.” (emphasis added)

months or less within a calendar year), it is not subject to the E-Verify requirement and the new prohibition would not apply to the grant.

### **31. \*\*What about grants from the state or federal government?**

Grants awarded by state agencies or the federal government are a contract (the state or federal agency agrees to provide the grant funds and the local government recipient agrees to spend the funds for the purposes for which the grant was awarded). However, federal agencies are not subject to state E-Verify requirements, so the new E-Verify contracting prohibition does not apply to federal grant agreements. While state agencies are subject to E-Verify requirements, state grant agreements are not subject to the new prohibition because state agencies are specifically exempt from Article 2 of Chapter 64 which triggers the E-Verify requirement for private employers.<sup>8</sup>

\*\*However, keep in mind that if the agency with which the unit is contracting uses private subcontractors on that contract, the new E-Verify prohibition would apply because it includes both contractors and subcontractors.

### **32. \*\*What about contracts with other units of government?**

Contracts with other units of government, including interlocal agreements under Article 20 of Chapter 160A and mutual aid agreements, are *not* subject to the new E-Verify contracting prohibition. While state agencies, cities, counties, and local school boards are required to use E-Verify for newly hired employees, these governmental units are specifically exempt from Article 2 of Chapter 64 which triggers the E-Verify requirement for private employers.<sup>9</sup>

\*\*However, keep in mind that if the local government with which the unit is contracting uses private subcontractors on that contract, the new E-Verify prohibition would apply because it includes both contractors and subcontractors.

### **33. What about contracts with individual employees of other units of government (such as hiring deputy sheriff's to provide security at a city event)?**

The E-Verify contracting prohibition does not apply since these contracts are with individual persons and as such, are not subject to the state E-Verify requirement. Similarly, if the city contracted with a private security company who in turn hired individual law enforcement officers, the contract between the city and the company would not be subject to the new E-

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<sup>8</sup> *Id.* The definition of “employer” specifically excludes “State agencies, counties, municipalities, or other governmental bodies.”

<sup>9</sup> *Id.* The E-Verify requirement for state agencies, cities, counties, and local schools are found elsewhere in the General Statutes, specifically in G.S. 126-7.1 (state agencies and public schools); G.S. 160A-169.1 (cities); and G.S. 153A-99.1 (counties).

Verify prohibition so long as the law enforcement officers are considered independent contractors and not employees of the company.

**34. What about contracts that generate revenue for the local government (such as athletic field or facility rentals) as opposed to contracts that require the local government to appropriate money (such as purchase or construction contracts)?**

For cities and counties, the E-Verify contracting prohibition appears to encompass revenue-generating contracts as well as contracts requiring the expenditure of public funds – in both instances, the city or county is still entering into a contract. For other units of local government, these contracts would not be subject to the new prohibition since they do not involve a contract for purchases or construction/repair in the formal bidding range.

**35. What about other types of transactions with the city or county like building permits, tax payments, and utility deposit refunds?**

Transactions such as permits, tax payments, fees, and refunds are not subject to the new E-Verify contracting prohibition.

**36. What about employee-related transactions, such as payroll deposits and travel reimbursements?**

These types transactions are not subject to the new E-Verify contracting prohibition.

**37. What about employee health insurance programs?**

For cities and counties, health insurance programs take the form of a contract between the unit of government and the health insurance company to provide health insurance benefits to the unit's employees and are therefore subject to the new E-Verify contracting prohibition. For other local governments, since these contracts are service contracts, they are not subject to the prohibition.

#### **IV. Effect on Existing Contracts**

**38. Does the new law apply retroactively?**

No. The new E-Verify contracting prohibition went into effect on September 4, 2013, and only applies to contracts entered into on or after that date. The prohibition does not apply to contracts entered into on or before September 3, 2013.

**39. What about existing contracts that are renewed after the law went into effect?**

Contracts renewed on or after September 4, 2013, are subject to the new E-Verify contracting prohibition when they are renewed. The prohibition would not apply to the existing contract if it was entered into prior to September 4, 2013.

## V. Penalties and Consequences

### 40. If the contractor or vendor is not E-Verify compliant, what are the consequences for the unit of government?

Although the new statutes do not impose any particular consequences or penalties on a local government that enters into a contract in violation of the E-Verify contracting prohibition, it may be reasonable to assume that a court would hold the contract void if the contract were challenged.

### 41. Is there a penalty if a contractor or vendor does not comply with E-Verify after the contract is executed?

An employer who violates Article 2 of Chapter 64 is subject to civil penalties. Local governments are not subject to these penalties

## VI. Compliance Strategies for Local Governments

### 42. What should local governments do to comply with the new prohibition?

The new prohibition statutes do not place any affirmative obligation on the governmental unit to ensure compliance on the part of a contractor or that contractor's subcontractors. From a practical standpoint, the specific measures a unit of local government employs are best determined by that unit. The affidavit suggested in this [blog post](#) is one way of protecting the local government's interests by putting the burden on the contractor to demonstrate compliance with state E-Verify laws (as discussed below, there is no independent method for determining whether an employer is or is not in compliance). However, an affidavit is not a statutory requirement. Some cities and counties are using the affidavit method extensively; others are opting to include boilerplate language in their standard terms and conditions. Each local government should examine its own procurement and contracting procedures and, *in consultation with its attorney*, determine what approach is both feasible and best protects its interests.

Since the new law does not place any specific, affirmative obligation on the local government, one might assume that the unit could take no action at all in ensuring compliance on the part of its contractors and vendors and simply continue to conduct business as usual. However, if a local government enters into a contract with a contractor who is not E-Verify compliant (or one of the contractor's subcontractors was not compliant) and is sued, a court could rule the contract void.

#### **43. Is there a database or other method to determine if an employer is compliant with North Carolina's E-Verify requirements?**

No. The NC Department of Labor is only authorized to investigate complaints; it is not authorized to maintain a database of employers subject to state E-Verify requirements. The US Citizenship and Immigration Service (USCIS) maintains a [national database](#) of employers who have chosen to self-report their enrollment in the E-Verify system (employers who use E-Verify are not required to enroll in the database). However, this database does not show employers who have enrolled and not chosen to self-report, or (and more importantly), on-going compliance with North Carolina E-Verify requirements which are triggered every time an employer hires a new employee.

#### **44. Are local governments required to monitor continuing compliance by its contractors and vendors?**

No. The new law does not impose any obligation on the local government to monitor E-Verify compliance by its vendors and contractors. In fact, the new law appears to limit the prohibition to the point in time when the contract is entered into (“No county may *enter into* a contract . . .”; “No contract subject to this section may be awarded . . .”). While we do not know how broadly a court might interpret the new prohibition, it seems unlikely a court would hold that a contract is void if the contractor becomes non-compliant after the contract is awarded. However, in an abundance of caution, some local government are now requiring contractors and vendors to not only confirm their E-Verify compliance when the contract is entered into (or even during the bidding process), but also are including contract language under which the contractor agrees to remain E-Verify compliant during the term of the contract.

#### **45. Are local governments required to ensure compliance by subcontractors?**

While the new prohibition applies to a contractor's subcontractors as well as the contractor himself, it is likely impractical for local governments to employ the same compliance measures that they choose to use for contractors. Given that the legal responsibility for compliance resides with the employer (be it the contractor or a subcontractor), local governments are better served by placing the burden of compliance by subcontractors on the contractor than attempting to assume this obligation themselves. Most of the examples provided in the next section include language to that places this obligation on the contractor.

#### **46. \*\*Can a vendor develop its own E-Verify documentation to provide to government clients demonstrating its compliance with E-Verify requirements (or that it is not subject to E-Verify)?**

Yes. Nothing in the new statutes that prohibits a vendor could from developing its own standard compliance document (an affidavit, certificate of compliance, etc.) that it provides proactively to government clients or uses when responding to E-Verify inquiries. If a unit of

government has developed its own compliance documents, the vendor should not assume that documentation it has developed will satisfy the unit's requirements.

## VII. Examples of Contract Provisions, Notices to Vendors, and Affidavits

The following contract provisions (which includes general conditions in bid documents), notices to vendors, and affidavits have been developed by local governments in response to the new E-Verify contracting prohibition. *Units of local government should consult their own attorneys before using any of these examples or developing their own compliance documents.*

### A. Contract Provisions

#### *Durham County*

E-VERIFY. As a condition of payment for services rendered under this agreement, CONTRACTOR shall comply with the requirements of Article 2 of Chapter 64 of the General Statutes. Further, if CONTRACTOR provides the services to the County utilizing a subcontractor, CONTRACTOR shall require the subcontractor to comply with the requirements of Article 2 of Chapter 64 of the General Statutes as well. CONTRACTOR shall verify, by affidavit, compliance of the terms of this section upon request by the COUNTY.

#### *City of Durham*

E-Verify Compliance. The contractor represents and covenants that the contractor and its subcontractors comply with the requirements of Article 2 of Chapter 64 of the North Carolina General Statutes (NCGS). In this E-Verify Compliance section, "contractor," "its subcontractors," and "comply" shall have the meanings intended by NCGS 160A-20.1(b). The City is relying on this section in entering into this contract. The parties agree to this section only to the extent authorized by law. If this section is held to be unenforceable or invalid in whole or in part, it shall be deemed amended to the extent necessary to make this contract comply with NCGS 160A-20.1(b).

#### *City of Raleigh*

**E-Verify** - I understand that E-Verify is the federal E-Verify program operated by the United States Department of Homeland Security and other federal agencies, or any successor or equivalent program used to verify the work authorization of newly hired employees pursuant to federal law in accordance with NCGS §64-25 et seq. I am aware of and in compliance with the requirements of E-Verify and Article 2 of Chapter 64 of the North Carolina General Statutes. To the best of my knowledge, any subcontractors employed by me as a part of this contract are in compliance with the requirements of E-Verify and Article 2 of Chapter 64 of the North Carolina General Statutes.



### *City of Asheville*

**Contractors Must Use E-Verify:** Per Session Law 2013-418, no city may enter into a contract unless the contractor and the contractor's subcontractors comply with Article 2 of Chapter 64 of the General Statutes.

**E-Verify Employer Compliance:** Employers and their subcontractors with 25 or more employees as defined in Article 2 of Chapter 64 of the NC General Statutes must comply with E-Verify requirements to contract with governmental units. E-Verify is a Federal program operated by the United States Department of Homeland Security and other federal agencies, or any successor or equivalent program used to verify the work authorization of newly hired employees pursuant to federal law.

### *City of Jacksonville*

North Carolina General Statutes, specifically §160A-20.1(b), prohibit the City from entering into contracts with contractors and subcontractors who have not complied with the requirement of Article 2 of Chapter 64. The Contractor shall submit the E-Verify Affidavit, located in the Bid Proposal section, with their bid. Bids that do not include this Affidavit will be considered non-responsive.

## **B. Notice to Vendors and Contractors**

### *Town of Morrisville*

You are receiving this email/letter as you have done, are currently doing or may do business with the Town of Morrisville. As a result of House Bill 786 which became law on September 4th, 2013, the Town of Morrisville is requesting your company fill out and send the attached affidavit to the Town of Morrisville for compliance purposes.

The new law prohibits local governments from contracting with contractors/companies who do not comply with E-Verify requirements and the law also applies to contractor's subcontractors.

Please understand your company is not obligated to fill out and return the affidavit; however failure to do so could inhibit the Town of Morrisville from contracting with your company.

The Town of Morrisville would like to thank you in advance for your time and consideration, and please do not hesitate to email or call if you have any questions.



### Town of Chapel Hill E-Verify Affidavit

STATE OF NORTH CAROLINA

AFFIDAVIT:

COUNTY OF ORANGE

E-VERIFY COMPLIANCE

\*\*\*\*\*

WHEREAS, North Carolina General Statute § 160A-20.1(a) authorizes cities and towns to contract with a private entity to carry out any public purpose that the city or town is authorized to engage in by law; and

WHEREAS, North Carolina General Statute § 160A-20.1(b) prohibits cities and towns from entering into a contract with a private entity unless said entity and its subcontractors complies with the requirements of Article 2 of Chapter 64 of the General Statutes; and

WHEREAS, Article 2 of Chapter 64 of the General Statutes requires an employer that transacts business in the State of North Carolina and employs 25 or more employees in the State of North Carolina to verify the work authorization of its employees through the federal E-Verify program; and

WHEREAS, in accordance of North Carolina General Statute § 160A-20.1(b) and as a condition of bidding on potential contracts, the Town of Chapel Hill, North Carolina, requires contractors to comply with the E-Verify requirements in Article 2 of Chapter 64 of the North Carolina General Statutes as evidenced by submission of this Affidavit.

NOW THEREFORE, I, \_\_\_\_\_ (the individual attesting below), being duly authorized by and on behalf of \_\_\_\_\_ (the entity bidding on project hereinafter "Contractor") and as a condition of bidding on \_\_\_\_\_ (the project, hereinafter "Project") with for the Town of Chapel Hill, North Carolina, after first being duly sworn hereby swear or affirm as follows:

1. Contractor is a person, business entity, or other organization that transacts business in the State of North Carolina and employs 25 or more employees in this State. (mark Yes or No)
  - a. YES \_\_\_\_\_, or
  - b. NO \_\_\_\_\_
  
2. Contractor understands that E-Verify is the federal E-Verify program operated by the United States Department of Homeland Security and other federal agencies, or any successor or equivalent program used to verify the work authorization of newly hired employees pursuant to federal law in accordance with North Carolina General Statute §64-25(5).

3. Contractor affirms that if the answer to question 1 above is “yes” then after hiring an employee to work in the United States it shall verify the work authorization of said employee through E-Verify in accordance with North Carolina General Statute §64-26(a).
4. Contractor acknowledges that a subcontractor that transacts business in the State of North Carolina and employs 25 or more employees in this State must comply with E-Verify.
5. Contractor will ensure that any subcontractor subsequently hired by Contractor will comply with E-Verify.

This \_\_\_\_ day of \_\_\_\_\_, 2013.

\_\_\_\_\_  
Signature of Affiant  
Print or Type Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
Contractor: \_\_\_\_\_

State of \_\_\_\_\_

County of \_\_\_\_\_

Signed and sworn to (or affirmed) before me, this the  
\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
Notary Public

My Commission Expires: .

|||  
(Affix Official/Notarial Seal)

### Buncombe County E-Verify Affidavit

STATE OF NORTH CAROLINA

AFFIDAVIT

COUNTY OF BUNCOMBE

\*\*\*\*\*

I, \_\_\_\_\_ (the individual attesting below), being duly authorized by and on behalf of \_\_\_\_\_ (the entity bidding on project hereinafter "Employer")

after first being duly sworn hereby swears or affirms as follows:

1. Employer understands that E-Verify is the federal E-Verify program operated by the United States Department of Homeland Security and other federal agencies, or any successor or equivalent program used to verify the work authorization of newly hired employees pursuant to federal law in accordance with NCGS §64-25(5).
2. Employer understands that Employers Must Use E-Verify. Each employer, after hiring an employee to work in the United States, shall verify the work authorization of the employee through E-Verify in accordance with NCGS§64-26(a).
3. Employer is a person, business entity, or other organization that transacts business in this State and that employs 25 or more employees in this State. (mark Yes or No)
  - a. YES \_\_\_\_\_, or
  - b. NO \_\_\_\_\_
4. Employer's subcontractors comply with E-Verify, and if Employer is the winning bidder on this project, Employer will ensure compliance with E-Verify by any subcontractors subsequently hired by Employer.

This \_\_\_\_ day of \_\_\_\_\_, 2013.

\_\_\_\_\_  
Signature of Affiant  
Print or Type Name: \_\_\_\_\_

State of North Carolina County of Buncombe

Signed and sworn to (or affirmed) before me, this the \_\_\_\_\_

day of \_\_\_\_\_, 2013.

My Commission Expires:

\_\_\_\_\_

Notary Public

(Affix Official/Notarial Seal)

**STATE OF NORTH CAROLINA**

**AFFIDAVIT**

**COUNTY OF WAKE**

NOW COMES Affiant, first being sworn, deposes and says as follows

1. I have submitted a bid for contract or desire to enter into a contract with the City of Raleigh;

2. As part of my duties and responsibilities pursuant to said bid and/or contract, I attest that I am aware of and in compliance with the requirements of E-Verify, Article 2 of Chapter 64 of the North Carolina General Statutes, to include (mark which applies):

After hiring an employee to work in the United States I verify the work authorization of said employee through E-Verify and retain the record of the verification of work authorization while the employee is employed and for one year thereafter; or

I employ less than twenty-five (25) employees in the State of North Carolina.

3. As part of my duties and responsibilities pursuant to said bid and/or contract, I attest that to the best of my knowledge any subcontractors employed as a part of this bid and/or contract are in compliance with the requirements of E-Verify, Article 2 of Chapter 64 of the North Carolina General Statutes, to include (mark which applies):

After hiring an employee to work in the United States the subcontractor verifies the work authorization of said employee through E-Verify and retains the record of the verification of work authorization while the employee is employed and for one year thereafter; or

Employ less than twenty-five (25) employees in the State of North Carolina.  
Specify subcontractor: \_\_\_\_\_

This the \_\_\_\_\_ day of \_\_\_\_\_, 2013.

\_\_\_\_\_  
Affiant

Sworn to and subscribed before me, this the \_\_\_\_\_ day of \_\_\_\_\_, 2013.

[OFFICIAL SEAL]

My Commission Expires: \_\_\_\_\_

\_\_\_\_\_  
, Notary Public

STATE OF NORTH CAROLINA

AFFIDAVIT

CITY OF BURLINGTON

\*\*\*\*\*

I, \_\_\_\_\_ (the individual attesting below), being duly authorized by and on behalf of \_\_\_\_\_ (the entity bidding on project hereinafter "Employer") after first being duly sworn hereby swears or affirms as follows:

- 1. Employer understands that E-Verify is the federal E-Verify program operated by the United States Department of Homeland Security and other federal agencies, or any successor or equivalent program used to verify the work authorization of newly hired employees pursuant to federal law in accordance with NCGS §64-25(5).
2. Employer understands that Employers Must Use E-Verify. Each employer, after hiring an employee to work in the United States, shall verify the work authorization of the employee through E-Verify in accordance with NCGS§64-26(a).
3. Employer is a person, business entity, or other organization that transacts business in this State and that employs 25 or more employees in this State. (mark Yes or No)
a. YES \_\_\_\_\_, or
b. NO \_\_\_\_\_
4. Employer's subcontractors comply with E-Verify, and if Employer is the winning bidder on this project Employer will ensure compliance with E-Verify by any subcontractors subsequently hired by Employer.
This \_\_\_\_ day of \_\_\_\_\_, 2013.

Signature of Affiant
Print or Type Name: \_\_\_\_\_

State of North Carolina City of Burlington

Signed and sworn to (or affirmed) before me, this the \_\_\_\_ day of \_\_\_\_\_, 2013.

My Commission Expires: \_\_\_\_\_

Signature of Notary Printed Name of Notary

(Affix Official/Notarial Seal)



## VIII. Text of S.L. 2013-418, Sec. 2

**SECTION 2.(a)** G.S. 153A-449 reads as rewritten:

"§ 153A-449. Contracts with private ~~entities~~entities; contractors must use E-Verify.

(a) Authority. – A county may contract with and appropriate money to any person, association, or corporation, in order to carry out any public purpose that the county is authorized by law to engage in.

(b) Contractors Must Use E-Verify. – No county may enter into a contract unless the contractor and the contractor's subcontractors comply with the requirements of Article 2 of Chapter 64 of the General Statutes."

**SECTION 2.(b)** G.S. 160A-20.1 reads as rewritten:

"§ 160A-20.1. Contracts with private ~~entities~~entities; contractors must use E-Verify.

(a) Authority. – A city may contract with and appropriate money to any person, association, or corporation, in order to carry out any public purpose that the city is authorized by law to engage in.

(b) Contractors Must Use E-Verify. – No city may enter into a contract unless the contractor and the contractor's subcontractors comply with the requirements of Article 2 of Chapter 64 of the General Statutes."

**SECTION 2.(c)** G.S. 143-129 is amended by adding a new subsection to read:

"(j) No contract subject to this section may be awarded by any board or governing body of the State, institution of State government, or any political subdivision of the State unless the contractor and the contractor's subcontractors comply with the requirements of Article 2 of Chapter 64 of the General Statutes."

**SECTION 2.(d)** Article 3 of Chapter 143 of the General Statutes is amended by adding a new section to read:

"§ 143-48.5. Contractors must use E-Verify.

No contract subject to the provisions of this Article may be entered into unless the contractor and the contractor's subcontractors comply with the requirements of Article 2 of Chapter 64 of the General Statutes."

**SECTION 2.(e)** G.S. 147-33.95 is amended by adding a new subsection to read:

"(g) No contract subject to the provisions of this Part may be entered into unless the contractor and the contractor's subcontractors comply with the requirements of Article 2 of Chapter 64 of the General Statutes."