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Texas Public Procurements: What Changed on September 1, 2017?

a/k/a: When is the Use of E-Verify Required?

Every contractor that does business with the federal government is familiar with the requirement to use of E-Verify in order to document the employability of a contractor's employees. But, when is a contractor required to use E-Verify in Texas? And, does this requirement to use E-Verify extend to the contractor's subcontractors? All contractors and each of their subcontractors will be required to use E-Verify for a variety of goods and services contracts with state agencies. Failure to understand these requirements could lead to your company losing out on the award of the next Texas public procurement contract.

First, a bit of history on the use of E-Verify in Texas public procurements. On December 3, 2014, Governor Perry issued Executive Order RP-80 which required all agencies under the direction of the Governor to utilize the DHS E-Verify system in two instances: (1) to verify the employment eligibility of all current and prospective employees; and (2) as a condition for award of all state contracts for services which utilizes contract employees and contractors (including subcontractors). In the same executive order, the Governor encouraged all other state agencies to make use of E-Verify in these two instances. In the 2015 legislative session, Senate Bill 374 was passed adding Chapter 673 to the Texas Government Code and was signed by Governor Abbott with an effective date of September 1, 2015. Chapter 673 requires state agencies to participate through DHS E-Verify in confirming employment eligibility for all newly hired state employees. State agencies, as referenced in Chapter 673, is defined by Section 659.101 of the Texas Government Code, to include: "a department, commission, board, office, or other agency or branch of state government, including an institution of higher education."

The Texas Attorney General was subsequently asked to opine on whether or not the provisions of Senate Bill 374 superseded Executive Order RP-80. On March 17, 2016, Opinion Number KP-0070 was issued and indicates that Chapter 673 of the Texas Government Code supersedes the portion of Executive Order RP-80 that deals with determination of employment eligibility of state employees, but does not have any impact on the provision of Executive Order RP-80 dealing with use of E-Verify for services contracts involving contractors and subcontractors. Therefore, while all state agencies are required to use E-Verify to determine eligibility for employment of all new state employees, only those agencies that fall under the direct control of the Governor are required to use E-Verify as part of the procurement process for contracts for services absent some other statutory or regulatory requirement.

In the 2017 legislative session, numerous bills were introduced concerning the use of E-Verify. However, only two bills passed to become law. House Bill 1818 adds Section 81.072 to the Texas

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Natural Resources Code which now prohibits the Texas Railroad Commission from awarding a contract for goods or services to a contractor unless the contractor and any subcontractor are registered with and participating in the E-Verify program to verify employee information. Senate Bill 312 adds Section 223.051 to the Texas Transportation Code which now prohibits the Texas Department of Transportation from awarding a contract for the construction, maintenance or improvement of a highway to a contractor unless the contractor and any subcontractor are registered with and participating in the E-Verify program to verify employee information. The Railroad Commission and the Department of Transportation are required under the applicable legislation to develop and establish procedures for the administration and enforcement of these new requirements. These laws took effect on September 1, 2017.

Each contractor should establish a requirement for each of its subcontractors to register with and participate in the DHS E-Verify program and provide proof of compliance as part of its subcontract duties and responsibilities.

There are currently no state statutes that mandate the use of the DHS E-Verify Program for any Texas governmental entity outside of the state agencies mentioned above. This means that E-Verify is not a state law requirement for counties, municipalities, school districts, or other special districts. However, a contractor should determine whether there are any requirements for certification of employment eligibility required by ordinance, law or regulation.

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