

PROCUREMENT AND LEGAL REQUIREMENTS FOR MAINTENANCE AND CONSTRUCTION

Micki Morris, Partner
Rogers, Morris & Grover, L.L.P.



ROGERS
MORRIS &
GROVER

- Competitive bidding for goods and services **other than construction services**;
- Competitive sealed proposals for goods and services **other than construction services**;
- Request for proposals for services **other than construction services**;
- Interlocal contract;
- A method provided by Chapter 2269, Government Code, for **construction services** (see next slide);
- Reverse auction procedure (real time internet bids); or
- Formation of a political subdivision corporation.

Tex. Ed. Code § 44.031

AUTHORIZED DELIVERY METHODS FOR CONSTRUCTION SERVICES

- Competitive Bidding (defined project)
- Competitive Sealed Proposals (defined project)
- Construction Manager at Risk (defined project)
- Construction Manager Agent (defined project(s) or program)
- Design-Build (defined project)
- Job Order Contracting or Coop (maintenance, repair, minor construction projects not yet defined; to be determined/assigned later)

“OTHER THAN CONSTRUCTION SERVICES”

- Procurement of all “construction services” valued at \$50,000 or greater in the aggregate is governed under Tex. Gov’t Code Chapter 2269
- The Education Code does not define “construction services”
- “Maintenance” is expressly mentioned in Tex. Gov’t Code Chapter 2269 as a permissible use of job order contracting method
- Procurement of “time and materials” maintenance vendors is prohibited under Tex. Educ. Code Chapter 44 procurement methods if vendors will provide “construction services”
- Public works statutes, OSHA, the AG’s Office, and case law define “construction services”



WHAT IS “MAINTENANCE”?

- According to the Texas Attorney General:
 - ordinary upkeep
 - repairs necessary to preserve something in good condition
 - to “keep up, keep from change; preserve”
 - includes “ordinary repairs necessary and proper from time to time for that purpose”

Tex. Att’y Gen. Op. No. O-1216 (1930)



WHAT IS “MAINTENANCE”?



- According to OSHA:

- **Maintenance activities =**

- “making or keeping a structure, fixture or foundation (substrates) in proper condition in a routine, scheduled, or anticipated fashion.”
- “This definition implies ‘keeping equipment working in **existing** state, i.e., preventing its failure or decline.’”

OSHA decision (08/11/1994) - Construction vs.

Maintenance [1926.32; 1910.12])

–OSHA relies on the same definitions for maintenance vs. construction that the Department of Labor uses in determining prevailing wage compliance.

WHAT IS “MAINTENANCE”?

- According to OSHA:
 - “Determinations of whether a contractor is engaged in maintenance operations rather than construction activities must be made on a case-by-case basis, taking into account all information available at a particular site.”
 - **Factors to determine whether a project constitutes maintenance or construction:**
 - One-for-one replacement (“like for like”)
 - Scale and complexity of the project, including the amount of time and material required to complete the job
 - The physical size of the object being worked on
- OSHA Letter to Raymond Knobb (11/18/2003)

WHAT IS “LIKE FOR LIKE”?

“Like for like” is not the sole factor of the test. Once you determine that a replacement will be:

- equal in **grade, quality** and **capacity**,
- without the **addition** of any **new** or **upgraded** components, appurtenances, features or functions

Do not forget to also consider:

- The scale and complexity of the project, including the amount of time and material required to complete the job (i.e. HVAC equipment replacements)
- The physical size of the object being worked on (i.e., entire roof replacements, turf replacements would not likely be maintenance)

WHAT IS “MAINTENANCE”?

- According to Texas Comptroller / Tex. Admin. Code:
 - Maintenance on real property:
 - For operational and functional improvements to realty, maintenance means scheduled, periodic work that is necessary to sustain or support safe, efficient, continuous operations, or to prevent the decline, failure, lapse, or deterioration of the improvement.
 - Maintenance does *not* include work to remodel, modify, upgrade, perform major repair, or restore, even if the work is scheduled or periodic.

“ELECTRICAL MAINTENANCE” DEFINED

- **Electrical Maintenance Work** – The replacement, or repair of existing electrical appurtenances, apparatus, equipment, machinery, or controls used in connection with the use of electrical energy in, on, outside, or attached to a building, residence, structure, property, or premises.
 - All replacements or repairs must be of the same rating and type as the existing installation.
 - No improvements may be made that are necessary to comply with applicable codes under Texas Occupations Code, Chapter 1305.
 - Electrical maintenance work does not include the installation of any new electrical appurtenances, apparatus, equipment, machinery, or controls beyond the scope of any existing electrical installation.

16 Tex. Admin. Code Chapter 73, Section 73:10(17)

WHAT IS “CONSTRUCTION”?

Texas Government Code

- A **Public Work Contract** is defined as:

- “...a contract for constructing, altering, or repairing a public building or carrying out or completing any public work.”

- **“Public work labor”** is defined as:

- “...labor used directly to carry out a public work.”

Tex. Gov’t Code § 2253.001(4)-(6)

- Case law has clarified that a “public work contract includes both traditional construction and **contracts for repair** of a building. *LA Ash, Inc. v. Tex. A&M Univ.*, 2008 Tex. App. LEXIS 8206, 2008 WL 4742135 (Tex. App. Waco Oct. 29, 2008); see also *Acratod Co. v. Housing Auth. of Houston*, 1999 Tex. App. LEXIS 889, 1999 WL 82450 (Tex. App. Houston 1st Dist. Feb. 11, 1999).

WHAT IS “CONSTRUCTION”?

- According to Texas Labor Code:
 - “Building or construction” includes:
 - (A) erecting or preparing to erect a structure, including a building, bridge, roadway, public utility facility, or related appurtenance;
 - (B) remodeling, extending, repairing, or demolishing a structure; or
 - (C) otherwise improving real property or an appurtenance to real property through similar activities.

Tex. Labor Code § 406.096(e)(1)

- AG: Section 406.096 “applies to every ‘building or construction contract’ entered into by the State or a political subdivision of the State, no matter how small the subject matter of the contract may be.”

Tex. Att’y Gen. Op. No. DM-300 (1994)

WHAT IS “CONSTRUCTION”?

- According to OSHA:
 - “Construction work is not limited to new construction. It includes the repair of existing facilities. The replacement of structures and their components is also considered construction work.”

OSHA decision (08/11/1994)



“ON-CALL” VENDOR POOLS

- Unless **ALL** work the District plans to have performed by a pool of “on-call” facilities vendors will fall within the definition of “maintenance,” the procurement should be conducted as a “construction services” procurement
- The only construction services procurement method allowed for the selection of one or more vendors to perform future, as-needed maintenance, repair or minor construction services is **Job Order Contracting**
- Job order contracting can be used for maintenance services, but Chapter 44 methods cannot be used for construction services.

EMERGENCY EXCEPTION TO PROCUREMENT

- Contracts for repair or replacement of school equipment, a facility, a part of a school facility or personal property is destroyed, severely damaged, or as a result of an unforeseen catastrophe undergoes major operational or structural failure
- Board must determine that the delay posed by competitive procurement **would substantially prevent or substantially impair the conduct of classes or other school activities**
- Required Board actions and approvals can be delegated for emergency situations

Tex. Ed. Code § 44.031(h); 44.0312

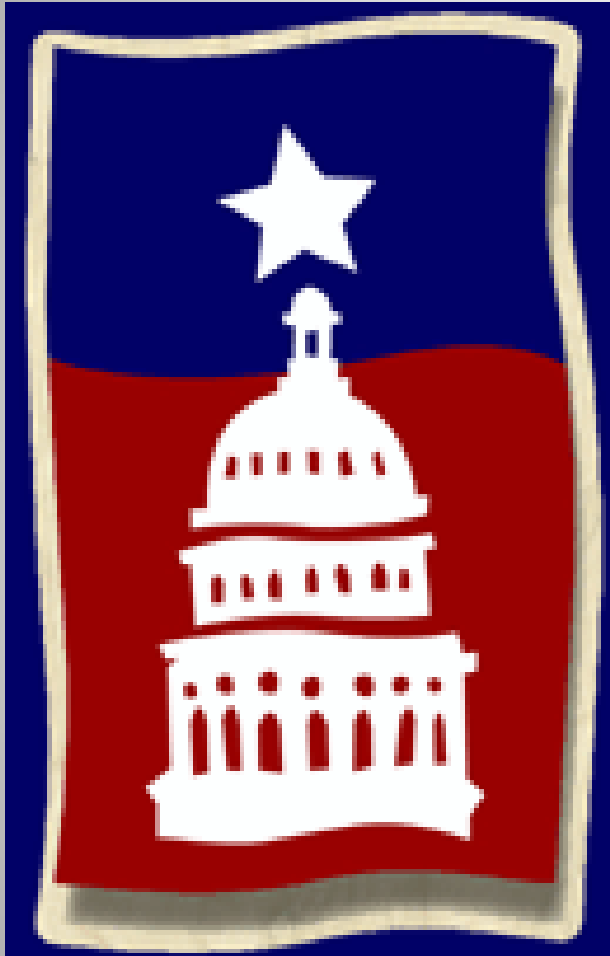
SOLE SOURCE EXCEPTION

“Without complying with Subsection (a), a school district may purchase an item that is available from only one source, including:

- (1) an item for which competition is precluded because of the existence of a patent, copyright, secret process, or monopoly;
- (2) a film, manuscript, or book;
- (3) a utility service, including electricity, gas, or water; and
- (4) a captive replacement part or component for equipment.” (i.e., required so as not to void warranties; certified parts or installers)

CHANGE ORDER STATUTE

- The District may approve change orders or amendments necessary to decrease or increase the quantity of work to be performed or of materials, equipment, or supplies to be furnished
- The Board may grant general authority to an administrative official to approve change orders
- A contract with an original contract price of \$1 million or more may not be increased by more than 25 percent
- If a change order for a contract with an original contract price of less than \$1 million increases the contract amount to \$1 million or more, the total of the subsequent change orders may not increase the revised contract amount by more than 25 percent of the original contract price



**Texas Government Code
Chapter 2269:
Construction
Services/Public Works
and Maintenance**

- Before considering a construction contract by a method other than competitive sealed bid, the **SCHOOL BOARD** must determine, before advertising, which delivery method provides the best value for the District
- No similar requirement for non-construction procurements
- The Board can delegate the authority to make this determination

Tex. Gov't Code § 2269.056

AUTHORIZED DELIVERY METHODS FOR CONSTRUCTION SERVICES

- Competitive Bidding (defined project)
- Competitive Sealed Proposals (defined project)
- Construction Manager at Risk (defined project)
- Design-Build (defined project)
- Job Order Contracting or Coop (projects not yet defined; to be determined/assigned later)
- Construction Manager Agent (defined project(s) or program)

PUBLISHING REQUIREMENTS

- Notice of when and where bids or proposals or the responses to a request for qualifications will be received and opened shall be published in the newspaper of the county where the District's central administrative office is located, once a week for at least two weeks prior to the deadline for receiving bids, proposals, or responses to a request for qualifications
- Must be at least 14 days between the first advertisement and the deadline for receipt of bids, proposals, or qualifications
- In a two-step procurement process, the time and place where the second-step bids, proposals, or responses will be received are not required to be published separately
- Beware of extending bid deadlines by addenda only

COMPETITIVE BIDDING

- District shall hire an engineer or architect to prepare construction documents for the project
- Request for bids must include construction documents, estimated budget, project scope, estimated completion date and other necessary information
- District selects the “lowest responsible bidder”
- No changes in scope, deadlines or price may be negotiated prior to contract award

COMPETITIVE SEALED PROPOSALS

- District shall hire an engineer or architect to prepare construction documents for the project
- Solicitation must include construction documents, weighted selection criteria, estimated budget, project scope, estimated completion date and other necessary information
- District must score and rank proposer within **45 days**; may negotiate modifications in scope or time, and price changes associated with modifications
- Can only negotiate with 1st ranked vendor; if unable to agree, must terminate negotiations and move to 2nd ranked, and so on until contract reached
- Cannot create a pool (unless it is a CSP for a JOC); but can reserve the right to award packages to one or more proposers

CONSTRUCTION MANAGER-AT-RISK

- Provides pre-construction services during the design phase (alongside the A/E), including cost estimating, scheduling, feasibility and constructability reviews, and long-lead item procurement
- The CMR serves as the general contractor during the construction phase; holds the contracts with the subcontractors
- District pays for actual costs of construction, plus a markup, up to a guaranteed maximum price
- Procured using two-step or one-step procurement process
- Step 1 is RFQ; in Step 2 up to 5 finalist may submit costs proposals for pre-construction services, fee, general conditions

PROCUREMENT OF SUBCONTRACTORS ON CMR PROJECTS

- A CMR shall publicly advertise for bids or proposals and receive bids or proposals from trade contractors or subcontractors for the performance of all major elements of the work *other than the minor work that may be included in the general conditions*

Tex. Gov't Code § 2269.255

- Usually occurs after GMP is set, but Texas law does not specify timing
- Contract can set specific timing; should be disclosed during procurement

REVIEW OF SUB BIDS OR PROPOSALS ON CMR PROJECTS

- Closed submission process, not a public opening; beware of phone-in bids, especially if CMR is competing for self-performed work
- If the CMR reviews, evaluates, and recommends a bid or proposal, but the District requires another bid or proposal to be accepted, the District shall compensate the CMR by a change in price, time, or GMP for any additional cost and risk that the CMR incurs because of the District's request

CMR SELF-PERFORMED WORK

- A CMR may seek to perform portions of the work itself if:
 - (1) the CMR submits its bid or proposal for those portions of the work in the same manner as all other trade contractors or subcontractors; and
 - (2) the District determines that the CMR's bid or proposal provides the best value
- Affiliates should be considered SPW
- CMRs should submit SPW bids to District in advance
- Auditors recommend cost-plus, not lump sum pricing for self-performed work

CONSTRUCTION MANAGER-AGENT (PROGRAM/PROJECT MANAGER)

- Acts as a fiduciary of the District, providing consultation, management or administration services during design and construction phase
- Must be competitively procured using a **publicly advertised RFQ process**; price competition prohibited
- Selected in the same manner as a professional service, but is NOT a professional service such that it is exempt from procurement requirements
- A CM-Agent may not act as a contractor or subcontractor on the project(s) and does not hold any construction contracts with any party
- District still must procure prime contractors or trade contractors for the project(s) in compliance with procurement laws
- CMA must carry a minimum of \$1,000,000 in professional liability or E&O insurance; not required to furnish bonds

DESIGN-BUILD

- Single firm *or team* provides both design and construction of a project
- Selected by **publicly advertised RFQ process**
- District must hire independent architect or engineer to represent District during project
- May not seek competitive pricing at the time you procure and select the firm/team, may seek “cost methodology” from up to five finalists
- Pricing negotiated after selection, typically a design fee during the design phase, and “cost-plus a fee” during the construction phase, up to a guaranteed maximum price
- Beware of contractors offering “turnkey” services – contractors not procured by design-build method should not provide professional design services either directly or by subcontract

JOB ORDER CONTRACTING

- “A procurement method used for maintenance, repair, alteration, renovation remediation, or minor construction” of facilities “when the “work is of a recurring nature, but the delivery times, types, and quantities of work required are indefinite”
- Only construction method that allows creation of a pool
- Only construction method that allows for use of a cooperative in lieu self-procurement
- Only method allowed to select contractors for future, undefined projects or tasks
- Use can use the CSP method to obtain proposals; clarify that it is a CSP for JOC services

HOW JOCS WORK

- Board approves method; District issues solicitation stating maximum aggregate expenditures
- Proposers compete on coefficients/multipliers to be applied to either a (i) designated published unit price book or (ii) a list of pre-priced work items; open T&M pricing not allowed in Texas
- Proposers may be asked to submit information relating to qualifications and experience
- District executes contract(s) with one or more vendors for future, as-needed work; maximum 2 year base term with up to three annual renewals
- District issues individual job orders, signed by both parties, stating scope and price of assigned tasks
- By law, the Board must approve any job order that exceeds \$500,000
- Payment and performance bond laws may apply – determined on a per job order basis

A/E SERVICES FOR JOC PROJECTS

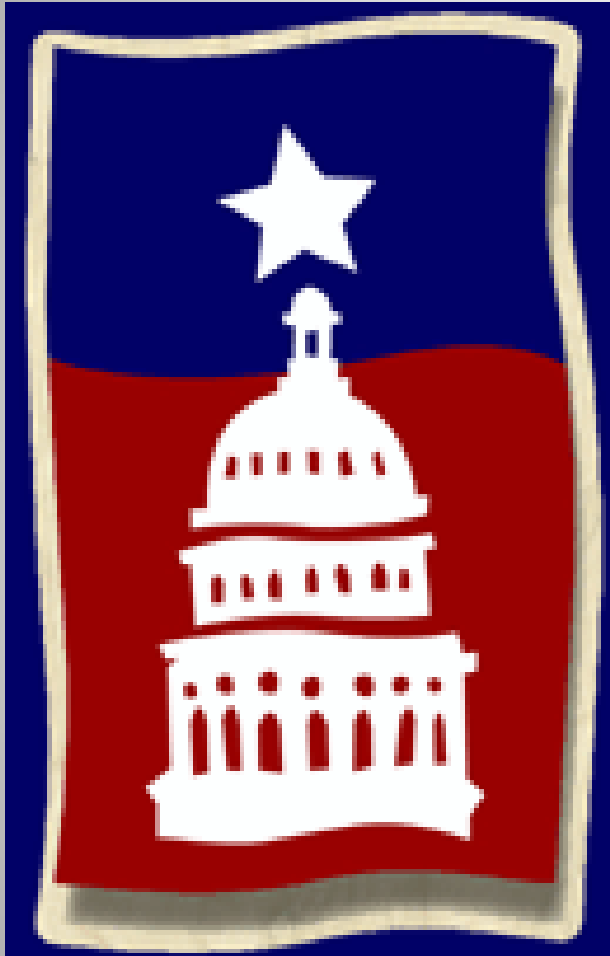
- District must independently hire A/E if services required
- Districts may not enter into a contract to purchase construction-related goods or services through a purchasing cooperative in an amount greater than \$50,000, **unless**:
 - A person designated by the local government certifies in writing that:
 - The project for which the construction-related goods or services are being procured does not require the preparation of plans and specifications under the Texas Engineering Practice Act or the Texas Board of Architectural Examiners; or
 - Required plans and specifications have been prepared

Tex. Gov't Code § 791.011(j)

PUBLISHED WEIGHTED SELECTION CRITERIA

The District may consider:

- (1) Price;
- (2) Offeror's experience and reputation;
- (3) Quality of offeror's goods and services;
- (4) Impact on the ability of the governmental entity to comply with rules relating to historically underutilized businesses;
- (5) Offeror's safety record;
- (6) Offeror's proposed personnel;
- (7) Whether the offeror's financial capability is appropriate to the size and scope of project; and
- (8) Any other relevant factor listed in the solicitation



**When the Services of an
Architect or Engineer
are Required by Law**

REQUIREMENTS FOR PUBLIC WORKS

TEX. OCC. CODE ANN. § 1051.703(A)

A new building owned by a political subdivision having construction costs exceeding \$100,000 or an alteration or addition to an existing building having construction costs exceeding \$50,000 must have architectural plans and specifications prepared by an architect.

PUBLIC WORKS PROJECTS

TEX. OCC. CODE ANN. § 1001.407

A political subdivision may not construct a public work involving engineering in which the public health, welfare or safety is involved unless the engineering plans, specifications, and estimates have been prepared by an engineer and the engineering construction is to be performed under the direct supervision of an engineer.

EXCEPTIONS

OCCUPATIONS CODE § 1001.053

- An engineer is not required for a public work project if:
 - A project involving electrical or mechanical engineering will cost \$8,000 or less
 - A project not involving electrical or mechanical engineering will cost \$20,000 or less (i.e., structural or civil)

JOB ORDER CONTRACTING

SEC. 2269.408: USE OF ARCHITECT OR ENGINEER

- “If a job order contract or an order issued under the contract requires architectural or engineering services that constitute the practice of architecture within the meaning of Chapter 1051, Occupations Code, or the practice of engineering within the meaning of Chapter 1001, Occupations Code, *the governmental entity shall select or designate an architect or engineer to prepare the construction documents for the project.*”

PORTABLE BUILDINGS

- Do not need a separate A/E to design “relocatable educational facilities” subject to and approved under Chapter 1202, Occupations Code (structure only); however, separate A/E may be required for designing utility connections or infrastructure (depending on cost)

PORTABLE AND MODULAR BUILDINGS

19 TAC § 61.1036(F)(3)

- Within 30 days of erection and installation (and before occupancy), a school district must have a portable or modular building inspected, including the construction of the foundation system and the erection and installation of the building on the foundation
- Must be inspected by the local building authority, if in a jurisdiction with adopted building code
- Must be inspected by a certified independent third party inspector if in an area with no adopted building code or building inspector
- Installation of portable/modular must be inspected even if manufacturer used State-approved and sealed plans for the building

PROCUREMENT AND LEGAL REQUIREMENTS FOR MAINTENANCE AND CONSTRUCTION

Micki Morris, Partner
Rogers, Morris & Grover, L.L.P.



ROGERS
MORRIS &
GROVER