

The Building Blocks

of

Job Order Contracting

PTAC

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Learning Objectives

Maintenance vs.
Construction

Statutory
Requirements

Steps to Implement
a Legally Compliant
JOC Program

- What is Maintenance?
- What is Construction / Public Work?
- Factors to consider
- Why Legal Compliance Matters
- Limitations of JOC
- Engineering and Architectural Services
- Bonding
- Prevailing Wages
- The Line Item estimate
- Reviewing the estimate
- Use a Master Job Order Contract



Common Phrases

1

That's the way we have always done it.

2

It was like that when I got here

3

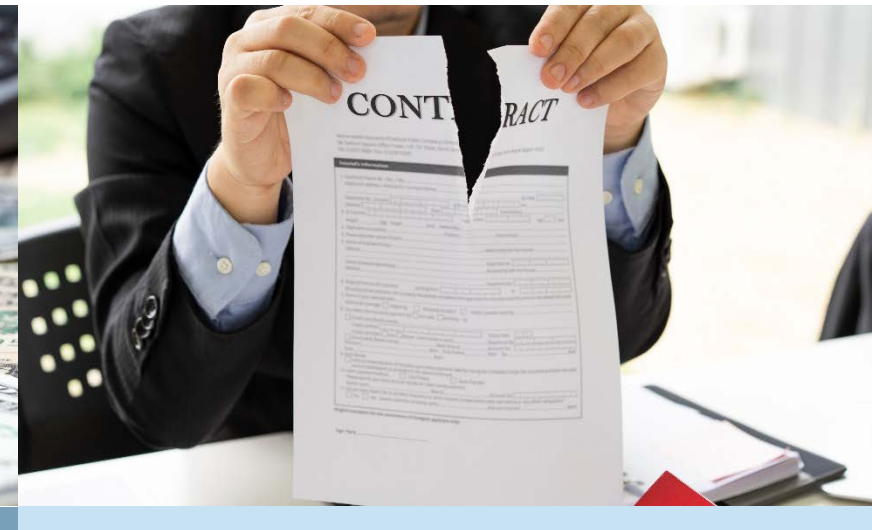
It's not right, but it's normal for us

4

Another department is responsible for that.

Standard
Open
Procedure

Why does legal compliance matter?



Different procurement rules apply

- Contracts not properly procured can be voided or unenforceable
- Officials and Officers who violate procurement statutes can be subject to criminal penalties

Bonding and Prevailing Wage

Public works contracts may trigger bonding and prevailing wage requirements.

Legal mistakes can

- DELAY Projects
- Jeopardize budgets and result in cost-overruns
- Subject gov't entity to financial liability to vendors and subcontractors



Non-Construction vs. Construction

- The Government Code does not provide a definition of the term “construction;” however all “construction services” are governed under Tex. Gov’t Code Chapter 2269
- Legislature used the term “construction services,” rather than “public works” when requiring compliance with Chapter 2269.
- It is unclear where “maintenance” falls.
- We have guidance, though, from public works statutes, OSHA, the AG’s Office, and caselaw.

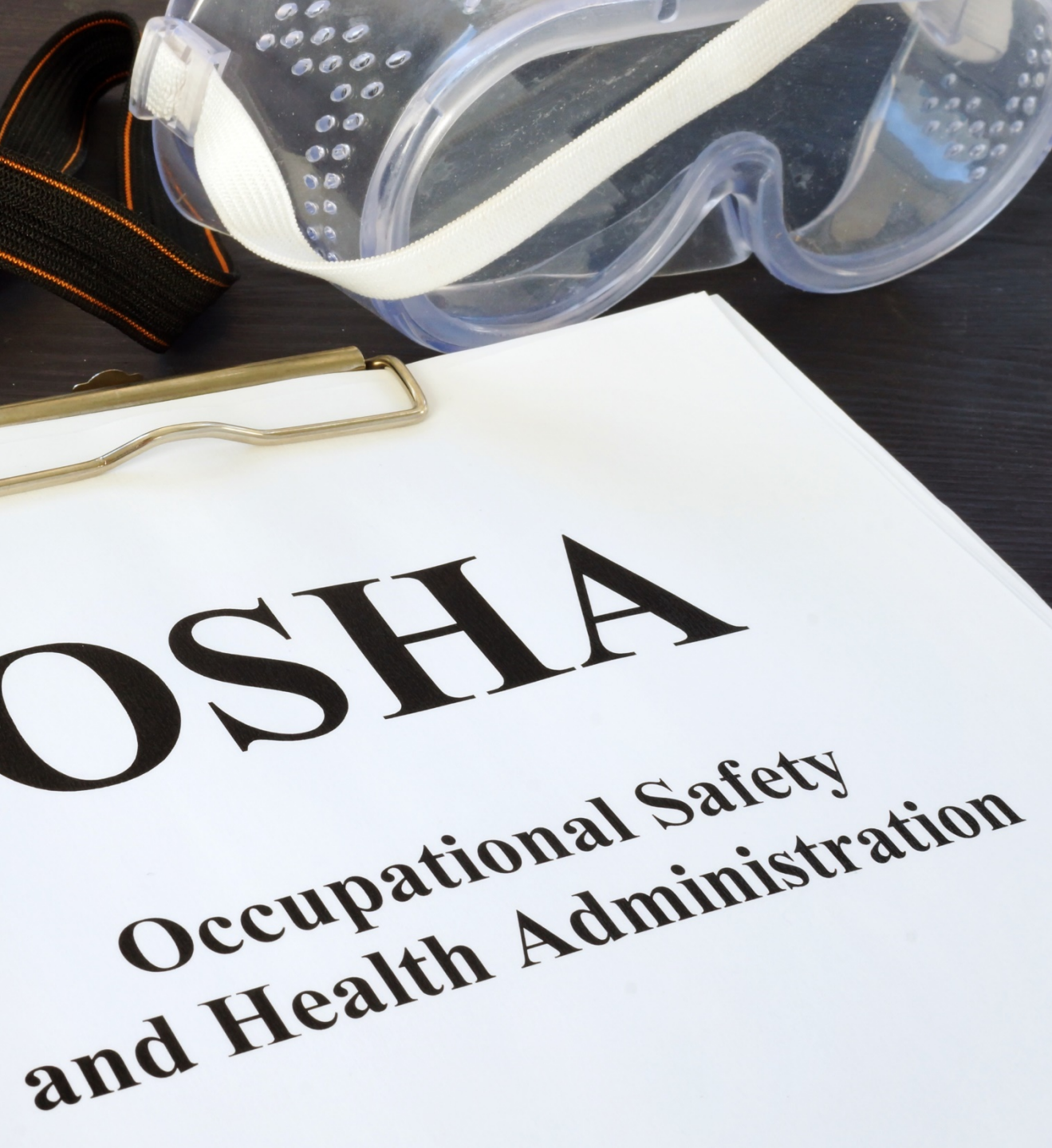
Maintenance





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”



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.



According to OSHA:

Determination of maintenance or construction must be made on case-by-case basis

- Factors to Consider
 - “Like for Like” – NOT new or upgraded
 - Scale & Complexity of project
 - Physical size of object being worked on

***OSHA Letter to Raymond Knobb
(11.18.2003)***



According to Texas Comptroller / Texas 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

*34 Tex. Admin. Code Chapter 33,
Section 3.357(7)*

What does not apply to Maintenance?



01 Bonds

TGC 2253 regarding performance and payment bonds does **NOT** apply to maintenance contracts

03 A/E Services

Tex. Occupations Code 1001 and 1051 does **NOT** apply to maintenance contracts

02 Prevailing Wages

TGC 2258 regarding prevailing rates does **NOT** apply to maintenance contracts

Construction and Public Works





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 a *public work*?

Texas courts have expressly found that the definition of *public work* includes a contract:

- To reconstruct a portion of a street;
- Remodel a city building;
- To build an elementary school;
- To make additions and renovations to a school district building;
- To construct a water supply system and treatment plant;
- For air conditioning of a county courthouse where the central system air conditioners and window units were to be installed in the courthouse as fixtures or improvements of a fixed nature; and
- To construct a new roadway and parking lot.



Public Works vs. Maintenance:

- **Good rule of thumb:** Generally, if a construction contract does not fall within the definition of *maintenance*, it is safe to consider it a *public works contract* if it involves construction work related to a public building.
- Definition of *routine maintenance* is narrow; safest bet is to use Job Order Contracting.
- For the past 75 years, the AG has defined maintenance as work required to keep a building in its current condition and prevent from decay. Providing something new that did not exist before is **NOT** maintenance. It is a fact-based and case-by-case determination.



Public Work vs. Maintenance:

- **Good rule of thumb:** Procure maintenance service contracts under *Tex. Gov't Code Chapter 2269*, rather than under non-2269 method (like TEC 44 for ISDs), if:
 - Maintenance and routine repair contracts could include significant replacements, repairs or installation of new structures, appurtenances, features, components or fixtures;
 - Repairs will be performed by laborers, workers or mechanics who would be required to furnish performance or payment bonds or would be entitled to a minimum prevailing wage rate under public works laws; or
 - There is a potential for a repair to require the services of an architect or engineer, the securing of permits, or compliance with updated building or electrical codes.

Steps to Implementing a legally compliant JOC program



The Job Order Process

1

Determination of Delivery Method

- Board or delegated designee must approve delivery method.
- Master Job Agreement in place?

2

Scope of Work

- Can work with contractor to develop
- Are A/E services required?
- Bonds required?

3

Job Order

- Contains scope of work
- Prevailing wage rates
- Signed by Gov't Entity & vendor.

4

Proposal

- Contractor provides proposal based on Unit Price Book (UPB)
- Review proposal for scope of work & contract Compliance

5

Purchase Order

- Issued once you are satisfied with proposal
- Is not the project specific contract

The JOC Estimate

HVAC Example

Vendor Name

Job Description

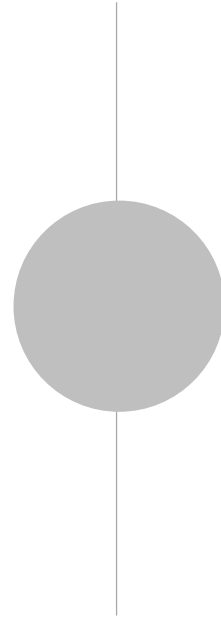
Choice Partners Contract #18/036MC-XX

Data Release : Year 2019 Quarter 2

Quantity	LineNumber	Description	Unit	Total O&P	Ext. Total O&P	Labor Type	Data Release	CCI Location	Notes
10	230505100400	Central station air handler, up thru 15 ton, selective demolition	Ea.	\$ 579.25	\$ 5,792.50	RR	Year 2019 Quarter 2 (Use most current at time quote is requested)	TEXAS / HOUSTON (770-772)	Insert any notes to describe location, what is being provided in line item, etc
1	237433101100	Rooftop air conditioner, single zone, electric cool, gas heat, 3 ton cooling, 60 MBH heating, includes, standard controls, curb and economizer	Ea.	\$ 4,359.00	\$ 4,359.00	RR	Year 2019 Quarter 2	TEXAS / HOUSTON (770-772)	
3	237433101150	Rooftop air conditioner, single zone, electric cool, gas heat, 7.5 ton cooling, 170 MBH heating, includes, standard controls, curb and economizer	Ea.	\$ 8,213.65	\$ 24,640.95	RR	Year 2019 Quarter 2	TEXAS / HOUSTON (770-772)	
1	237433101156	Rooftop air conditioner, single zone, electric cool, gas heat, 8.5 ton cooling, 170 MBH heating, includes, standard controls, curb and economizer	Ea.	\$ 9,733.10	\$ 9,733.10	RR	Year 2019 Quarter 2	TEXAS / HOUSTON (770-772)	
100	239110106050	Curbs/pads prefabricated, pad, condenser, fiberglass reinforced concrete with polystyrene foam core, 2" thick, 20" x 38"	Ea.	\$ 94.70	\$ 9,470.00	RR	Year 2019 Quarter 2	TEXAS / HOUSTON (770-772)	
1	015433602720	Rent crane truck mounted, hydraulic, 100 ton capacity, Incl. Hourly Oper. Cost.	Week	\$ 9,898.76	\$ 9,898.76	RR	Year 2019 Quarter 2	TEXAS / HOUSTON (770-772)	
		RS Means Unit Cost Total		\$ 32,878.46	\$ 63,894.31				
		Total with Coefficient (1.0 x RS Means Total)			\$ 63,894.31				
		Additional Discount of XX% good for current project only			\$ 57,504.88				***Optional if you need to give additional discount to be competitive.
		2% Bond (Any additional Pass-Through Costs)			\$ 1,150.10				
		Total Project Quote			\$ 58,654.98				

Review the JOC Quote

- ✓ City Cost Index (CCI)
- ✓ Coefficient
- ✓ O & P Pricing
- ✓ Data Release (most recent)



- ✓ Non pre-priced items
- ✓ Attempts to pass-through co-op fee
- ✓ Division 1
- ✓ Adjustment Factors

Use A Master Job Order Contract

- Contains Gov't Entity's project specific Scope of Work
- Includes Job Order and Prevailing Wage Rates as Attachments
- Liquidated Damages?
- Retainage?
- Terms & Conditions specific to Gov't Entity
- Signed by Gov't Entity and Vendor

“An order for a job or project under a job order contract **MUST** be signed by the governmental entity's representative and the contractor.”

Tex. Gov't Code § 2269.410



Public Works Bonds

Performance Bond

- Required if contract is in excess of \$100,000
- Protects the Gov't Entity from financial losses arising from default, material breach, termination or abandonment

Payment Bond

- Required if a contract is in excess of \$25,000
- Protects the Gov't Entity from claims for nonpayment of suppliers, subcontractors, and sub-subcontractors

Architect or Engineer



Gov't Entity must independently hire A/E if services required.

Tex. Gov't Code § 791.011(j)

Architect required for:

- A new building having construction costs exceeding \$100,000
- An alteration or addition having construction costs exceeding \$50,000

Tex. Occ. Code § 1051.703

An engineer is **NOT** required for a public work project if:

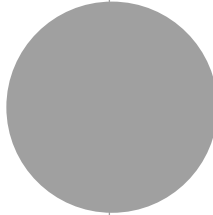
- A project *involving electrical or mechanical engineering* will cost **\$8,000 or less**
- A project *not involving electrical or mechanical engineering* will cost **\$20,000 or less**

Tex. Occ. Code § 1001.053

Trade JOC vs. JOC

Trade JOC:

- Allows the use of one trade or division
- Reduces overhead expenses when multiple trades are not needed



JOC:

- Allows for the use of all divisions and is typically a general contractor

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).

Bidding vs. Quoting

Bid / Proposal

- Formal
- Written
- Sealed response
- Satisfies state's procurement requirements

Quote

- Job-specific price in writing
- Based on vendor's previously bid & awarded contract coefficient
- When using FEMA funds, must request 3 quotes with one from a minority-owned or woman-owned business

THANK YOU!



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