

How many people does it take to procure a light bulb?: The impact of maintenance v. construction

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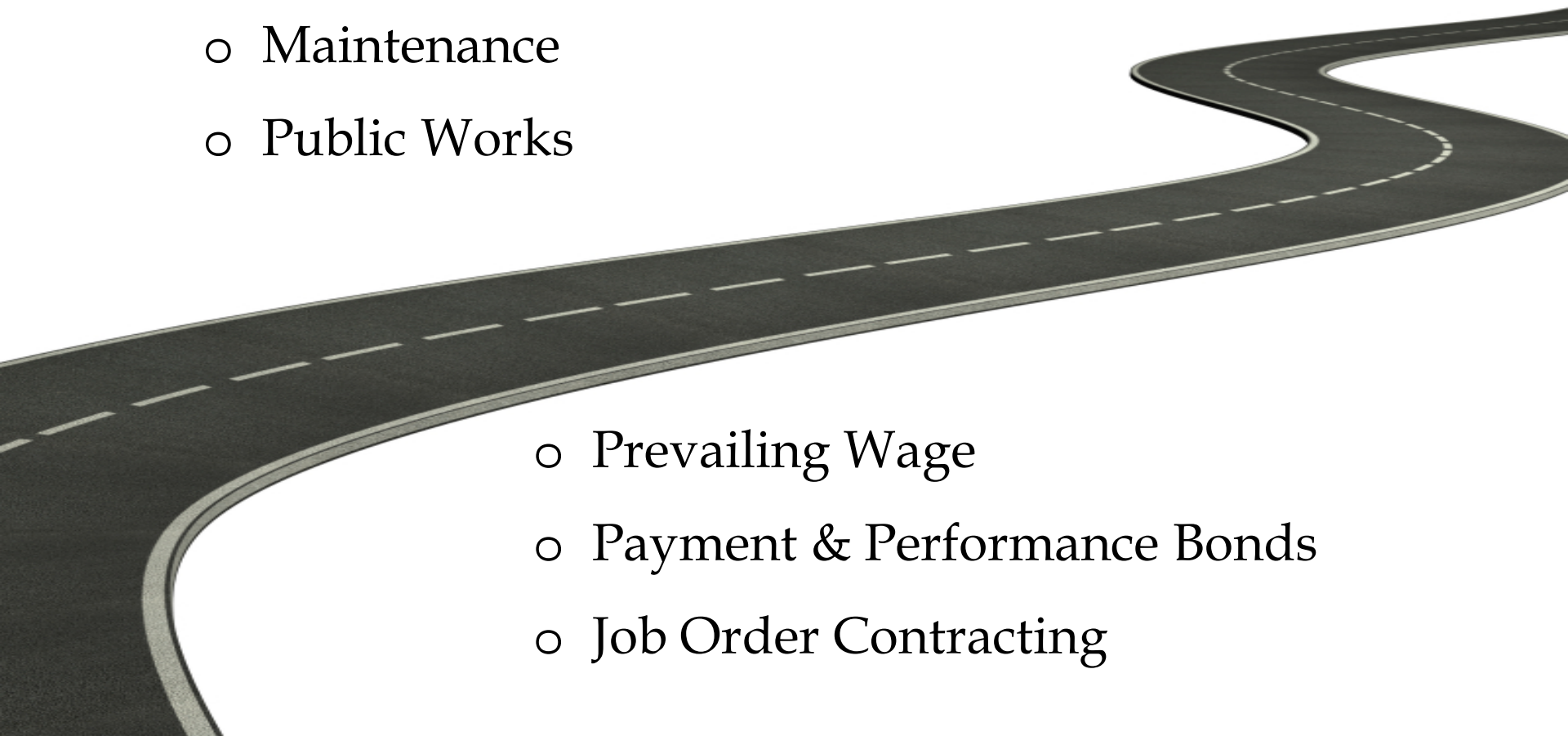
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Roadmap

- Introduction
- Maintenance
- Public Works

- Prevailing Wage
- Payment & Performance Bonds
- Job Order Contracting



Introduction

- The Texas Education Code does not provide a definition for the term “construction.”
- Generally, construction contracts can encompass both maintenance and public works projects.
- It is important to distinguish the difference between projects that are strictly maintenance, and projects that involve a “public works contract” as the latter may trigger bonding and prevailing wage requirements.

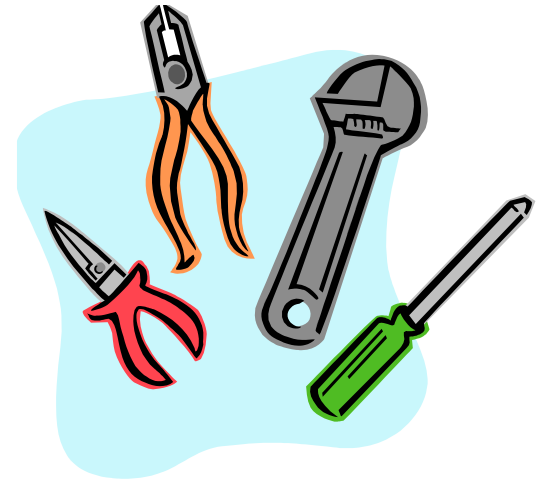
Maintenance

Maintenance

- According to the Attorney General –

- **Maintenance** =

- 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”



Maintenance



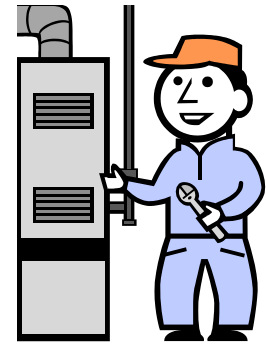
- According to the Texas Administrative Code—
 - **Maintenance** =
 - all replacements or repairs must be of the **same** rating, type, or grade as the existing installation;
 - they cannot be an upgraded part, appurtenance or material
 - scheduled, periodic work that is necessary to sustain or support 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 repairs, or restore, even if the work is scheduled or periodic.

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.’”



MAINTENANCE



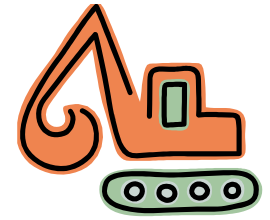
- Generally:
 - The replacement of a piece of equipment or components with equipment or components that are
 - equal in **grade, quality** and **capacity**,
 - without the **addition** of any **new** or **upgraded** components or appurtenances
 - will not amount to a “public work” and can be considered to be strictly maintenance projects.
 - Routine maintenance is not a public work.
 - Chapter 2253 regarding performance and payment bonds does not apply to maintenance contracts.
 - Chapter 2258 regarding prevailing wage rates does not apply to maintenance contracts.

Public Works

Public Work



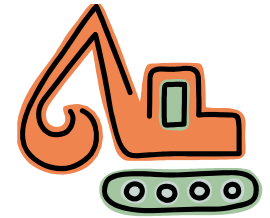
- A **Public Work Contract** is defined as:
 - “...a contract for constructing, altering, or repairing a public building or carrying out or completing any public work.”
- **“Public work labor”** is defined as:
 - “...labor used directly to carry out a public work.”



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
 - to remodel a city building
 - to build an elementary school
 - to make addition and renovations to a school district building

What is a “Public Work”?



- Texas courts have expressly found that the definition of “public work” includes a contract:
 - 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.
 - to construct a new roadway and parking lot

What is a “Public Work”?



- Texas courts have explicitly held that the definition of “public work” does **not** include a contract:
 - between a state university and prime contractor for the removal and disposal of contaminated water and residue in pond.
 - to develop and implement a records-retention schedule, a disaster recovery plan and a storage solution for old records.
 - with a county to prepare and deliver a map, plat-book system, and delinquent tax list.

Public Work vs. Maintenance

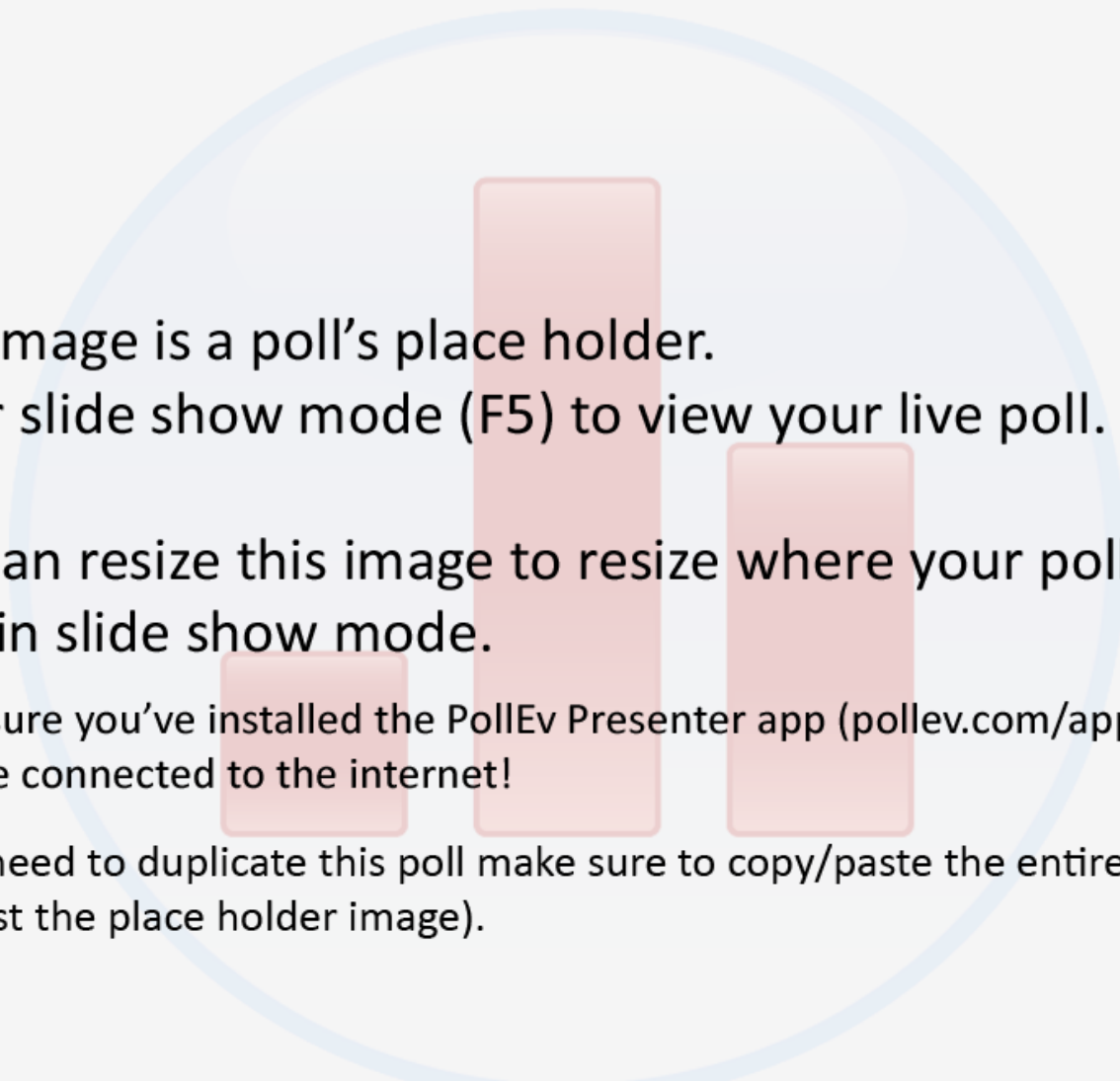


- Whether a particular maintenance contract is a “public work contract” depends upon whether such contract calls for a **substantial change** to a **public work** or a **public building**.
- If the work includes the **addition** of any **new** or **upgraded components** or **appurtenances** to a public building, it will likely be considered a “public work”.
- Example: according to AG, repainting a previously constructed structure is maintenance, while painting a newly constructed structure is a public work.

What do you think: Maintenance, or public work, or ????

- Break out your cell phones – yes, seriously!!
- Scenario
- Codes next to 4 answers
- Text the code next to your answer to 22333
- Can only vote once
- No charge



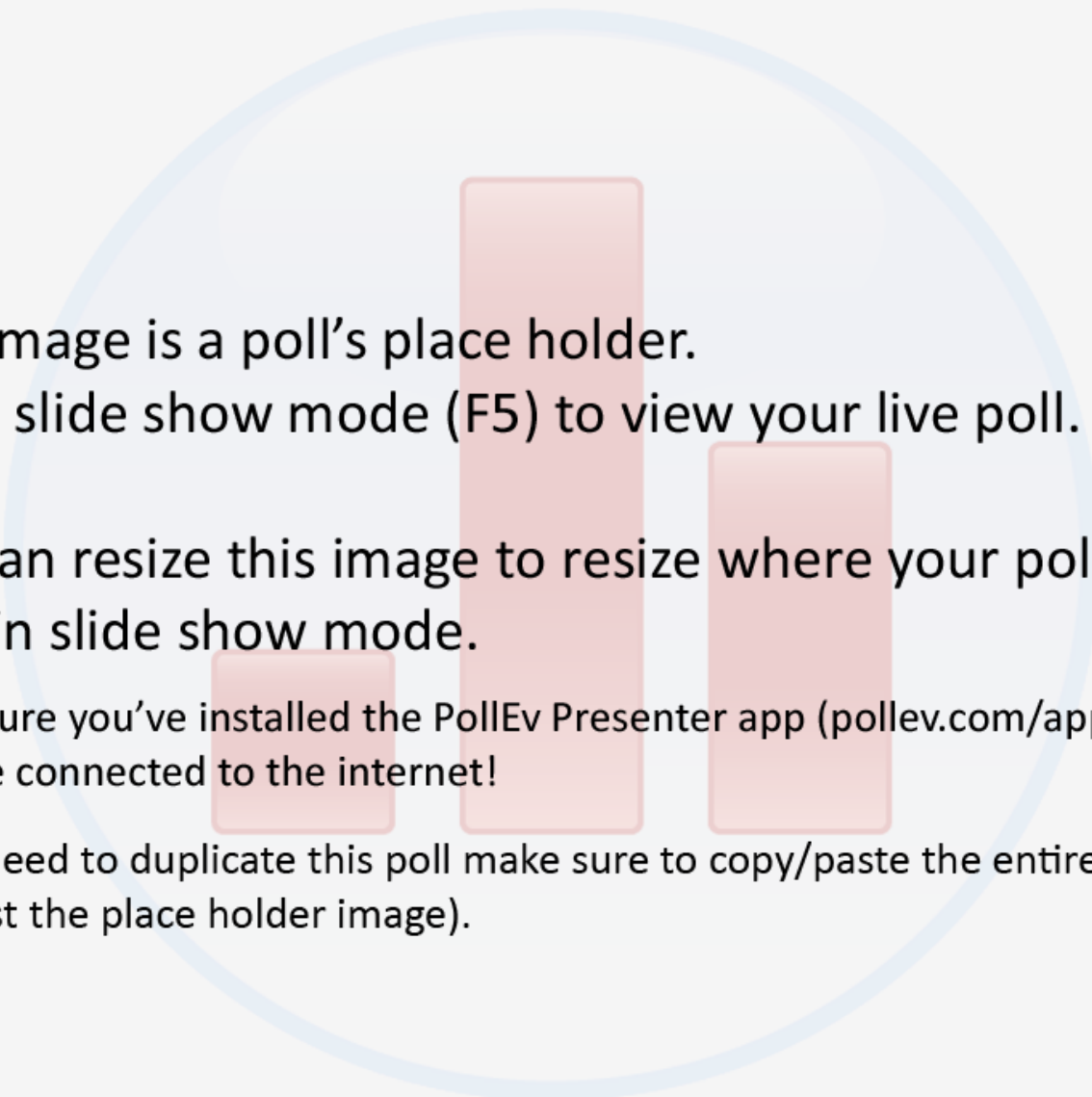


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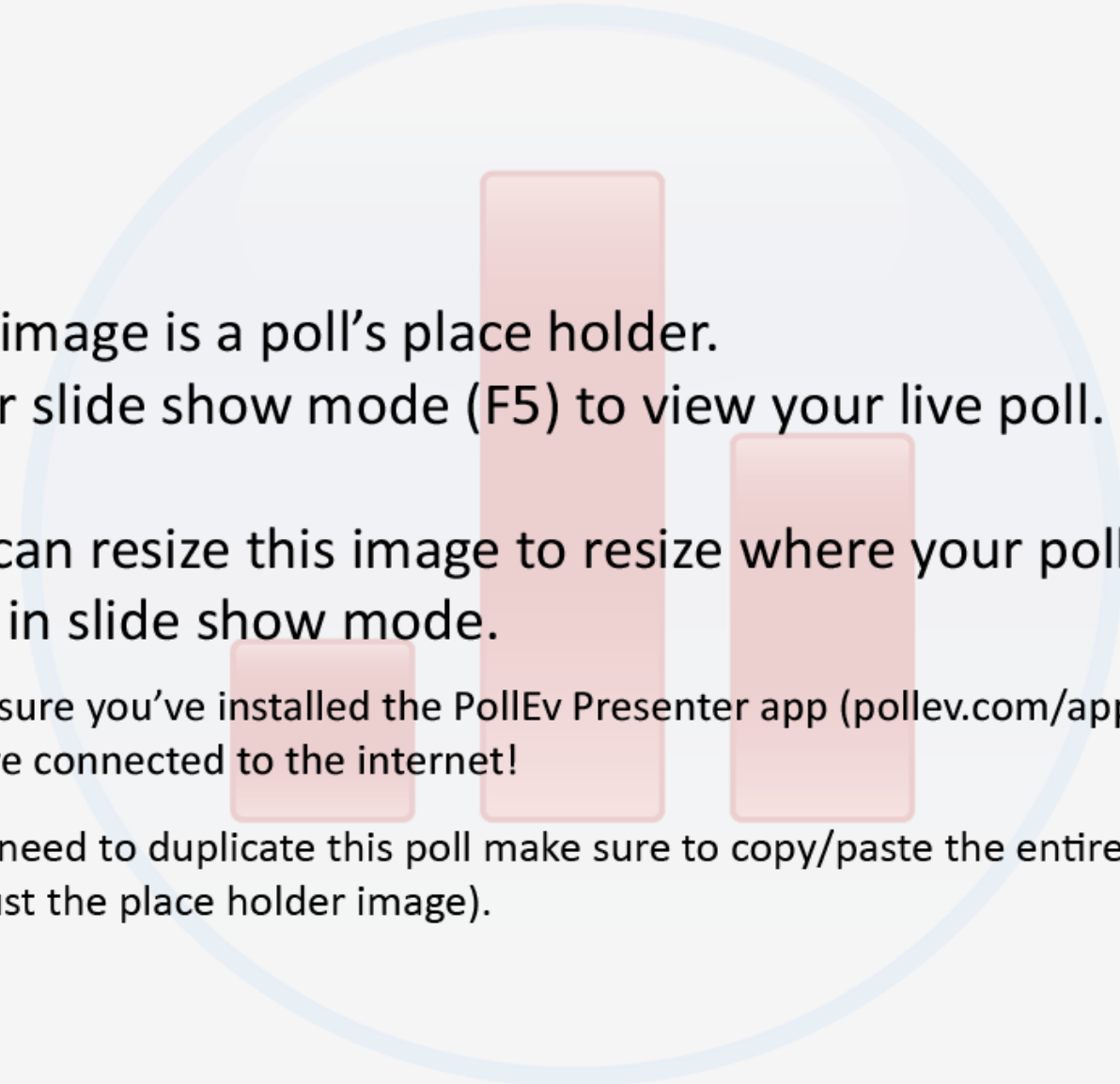


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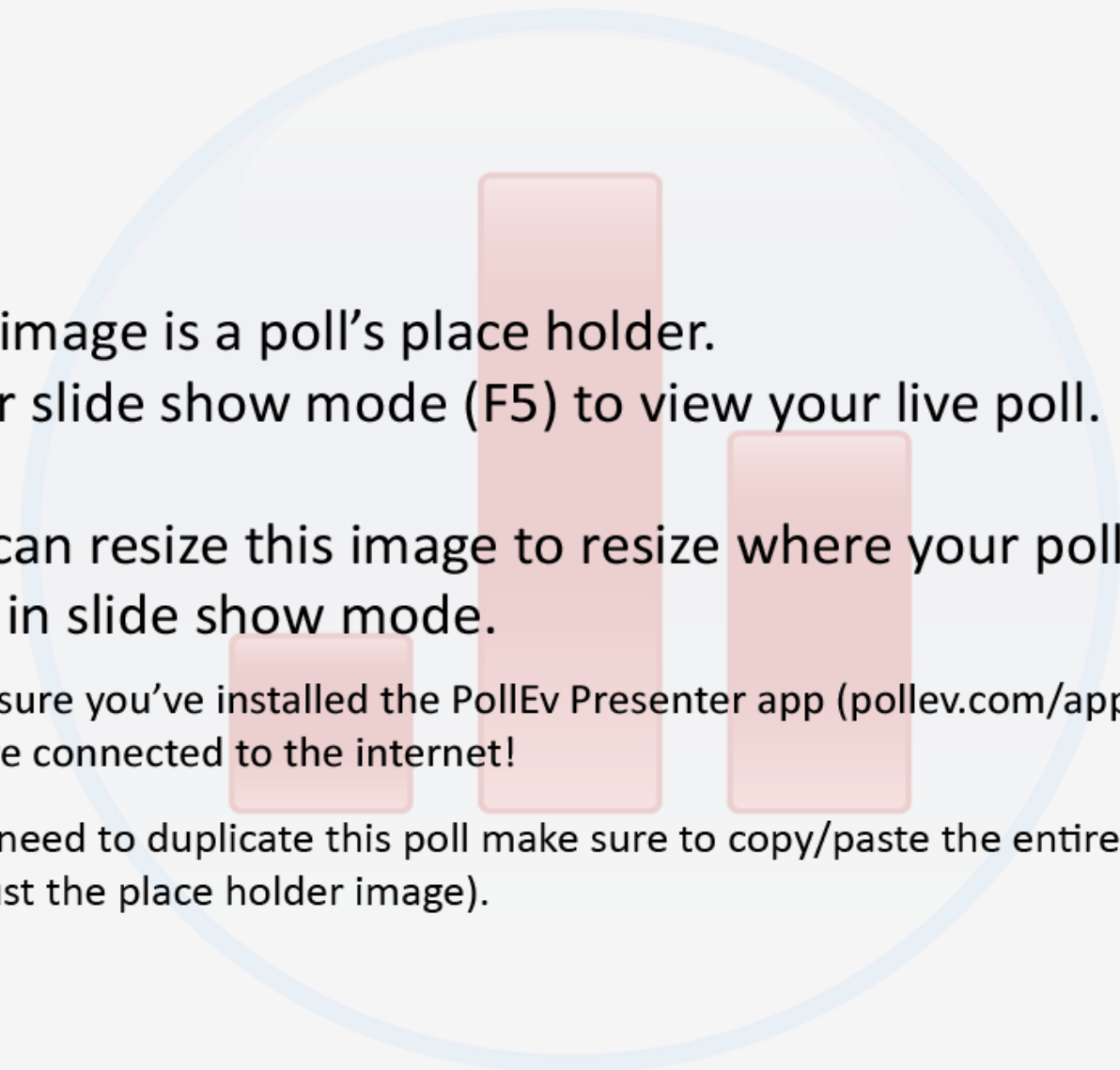


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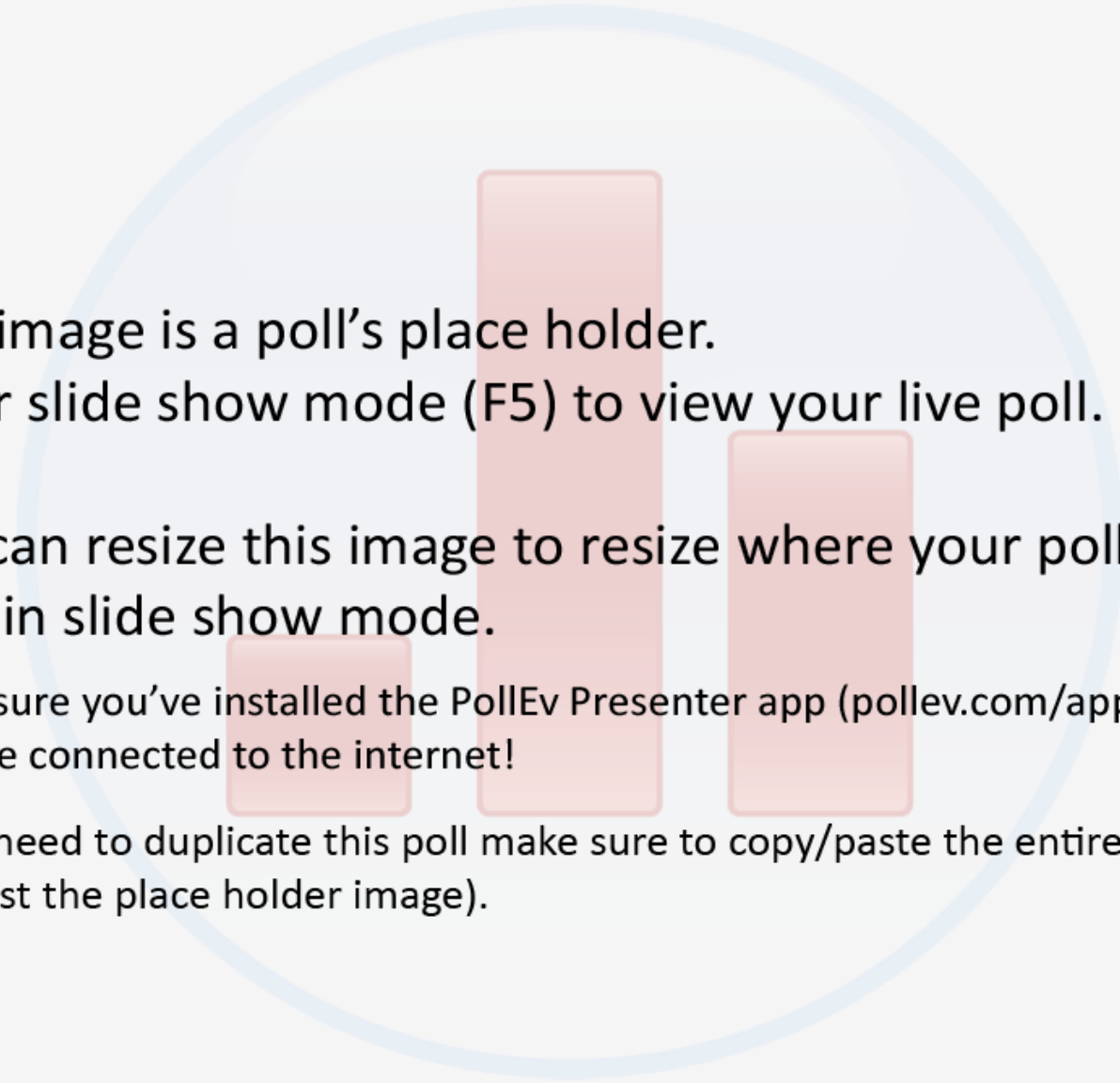


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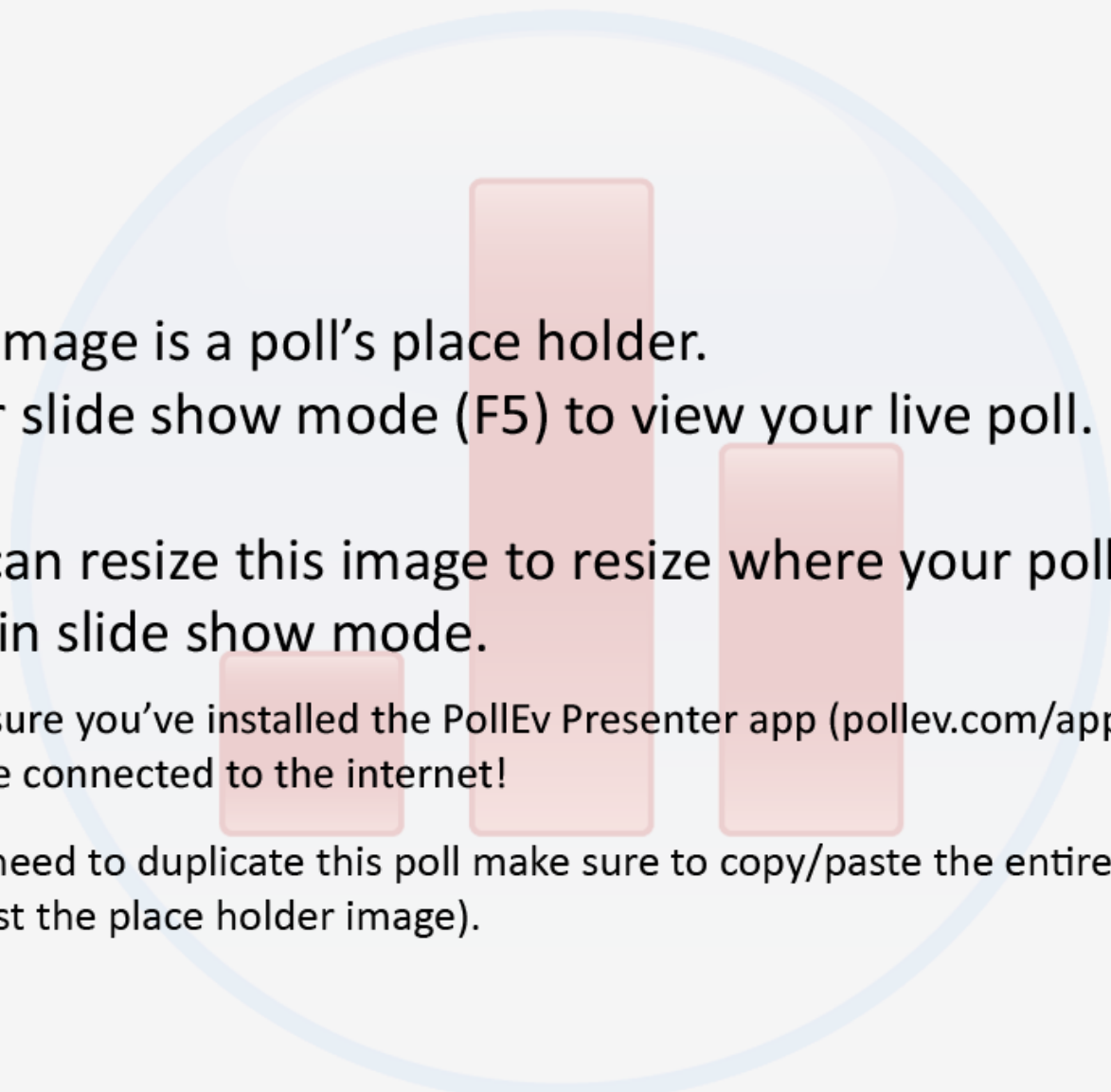


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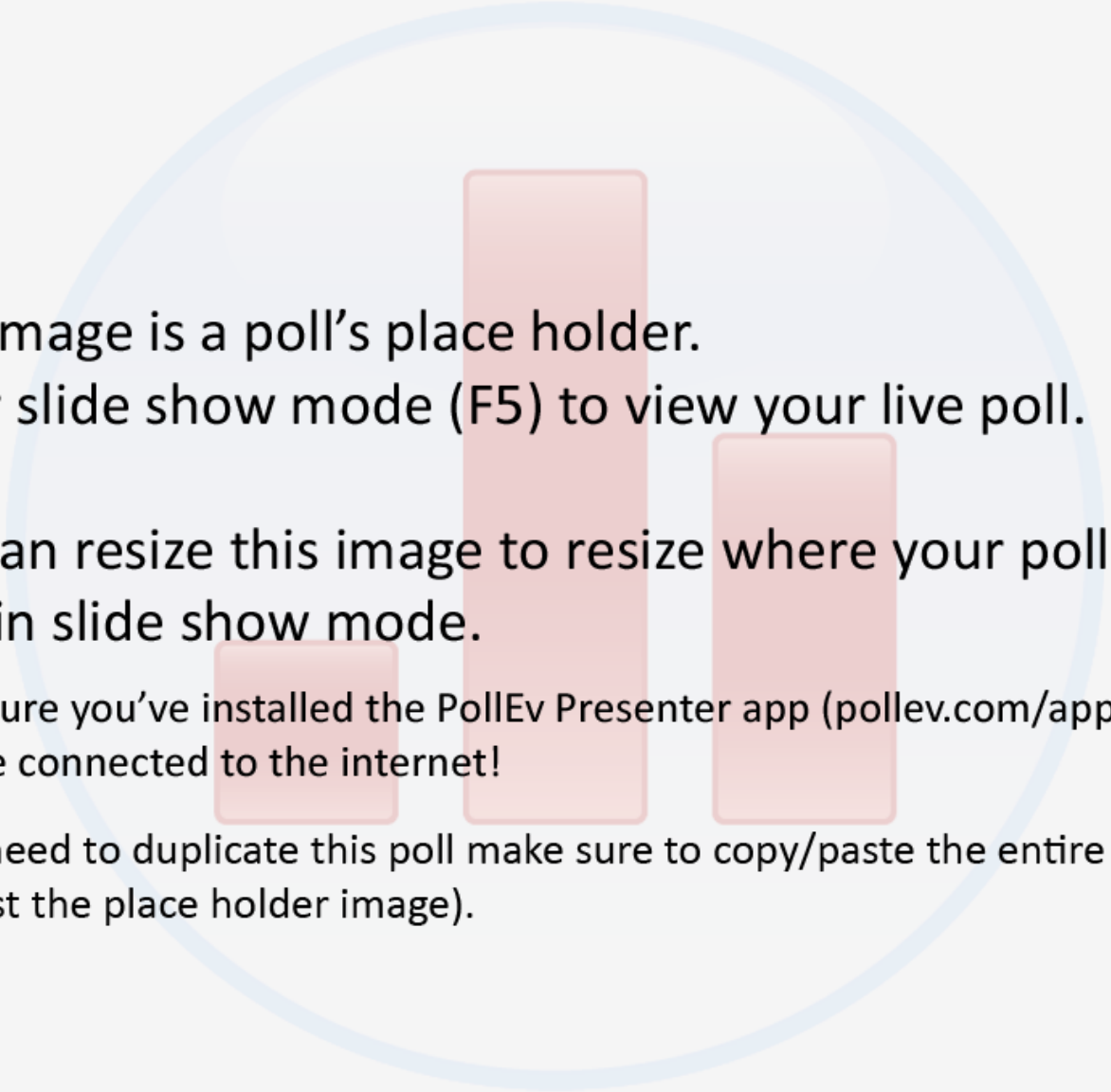


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Public Work vs. Maintenance

- A 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 work contract” if it involves construction work related to a public building.
- 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 didn't exist before is not maintenance. It is a very fact-based and case-by-case determination.



Prevailing Wage Rate

Public Works Contract – Prevailing Wage Rate



- Applicability:
 - Chapter 2258 applies to the construction of a public work **including a building, highway, road, excavation, and repair work**, or other project development or improvement, **paid for in whole or in part from public funds**.
 - The prevailing wage requirement does **not** apply to maintenance work.

Public Works Contract – Prevailing Wage Rate



- Right to be paid prevailing wage rates:
 - A worker employed on a public work by or on behalf of the state or political subdivision must be paid:
 - Not less than the general prevailing rate or per diem wages for work of a similar character in the locality in which the work is performed; and
 - Not less than the general prevailing rate of per diem wages for legal holiday and overtime.

Public Works Contract – Determination of Prevailing Wage Rate

- The public body must determine the general prevailing rate of per diem wages in the locality in which the public work is to be performed for **each craft or type of worker** needed to execute the contract **and** the prevailing rate for legal holiday and overtime work by:
 - Conducting a survey of the wages received by classes of workers employed on projects of a character similar to the contract work in the political subdivision of the state in which the public work is being performed; *or*
 - Using the prevailing wage rate as determined by the United States Department of Labor in accordance with the Davis-Beacon Act, and its subsequent amendments.



Public Works Contract – Determination of Prevailing Wage Rate

- A public body must specify in the call for bids for the contract and in the contract itself the wage rates determined under Chapter 2258.
- The public body's determination of the general prevailing rate of per diem wages is final.



Public Works Contract – Prevailing Wage Rate



- The obligation is on the contractor or subcontractor who is awarded a public works contract by a public body to pay no less than the rates determined under Chapter 2258.
- A contractor or subcontractor who violates the prevailing wage payment requirement must pay to the public body on behalf of whom the contract was made **\$60** for **each worker** employed for **each calendar day** or part of the day that the worker was paid less than the wage rates stipulated in the contract.
- However, a contractor or subcontractor does **not** violate this requirement if the public body awarding the contract does not determine the prevailing wage rates and specify the rates in the contract, as is required by this chapter.

Public Works Contract – Failure to comply with Prevailing Wage Rate requirements



- An officer, agent, or representative of the state or of a political subdivision commits an offense if he/she willfully violates or does not comply with a provision of Chapter 2258.
- Punishment:
 - A fine not to exceed \$500;
 - Confinement in jail for a term not to exceed six months; or
 - Both fine and a confinement.

Bonds

Public Works Contract – Performance and Payment Bonds

- A governmental entity that makes a public work contract with a prime contractor must require the contractor to provide:
 - A **performance bond** (in the amount of the contract)**if** the contract is in excess of \$100,000.
 - A **payment bond** (in the amount of the contract), **if**:
 - The contract is in excess of \$25,000; **and**
 - The governmental entity is **not** a municipality (or a joint board created under the Transportation Code).



Payment Bonds

Public Works Contract – Payment Bonds

- Required for public works contracts in excess of \$25,000
- Executed in the amount of the contract
- The purpose of the payment bond is to protect claimants who provide labor or materials in the construction of public works because public property is protected from forced sale and therefore may not be made the subject of a mechanic's lien.



Public Works Contract – Payment Bonds

- If a governmental entity fails to obtain a payment bond from a prime contractor:
 - The governmental entity is subject to the same liability that a surety would have if the surety had issued a payment bond and the entity had obtained the bond; and
 - The bond beneficiaries are entitled to a lien on the money due to the prime contractor in the same manner as if the public work contract was subject to Subchapter J, Chapter 53 of the Property Code (related to liens on money due to public works contractors).



Performance Bonds

Public Works Contract – Performance Bonds

- Required for public works contracts in excess of \$100,000
- Performance bonds are solely for the protection of the governmental entity awarding the contract.
- It is conditioned on the faithful performance of the work in accordance with the plans, specifications and contract documents.



Job Order Contracting

Tex. Gov't Code 2269

methods of construction procurement

- (1) competitive bidding;
- (2) competitive sealed proposals;
- (3) construction manager-agent;
- (4) construction manager-at-risk;
- (5) design build; and
- (6) JOC.



JOCs

- § 2269.401: JOC: maintenance, repair, alteration, renovation, remediation, or minor construction of a facility when the work is of a recurring nature but the delivery times, type, and quantities of work required are indefinite
- § 2269.402: JOC applies only to a facility that is a building, the design and construction of which is governed by accepted building codes, or a structure or land, whether improved or unimproved, that is associated with a building

No JOC



- § 791.402: NO JOC for:
 - a highway, road, street, bridge, utility, water supply project, water plant, wastewater plant, water and wastewater distribution or conveyance facility, wharf, dock, airport runway or taxiway, drainage project, or related type of project associated with civil engineering construction OR
 - a building a structure that is incidental to a project that is primarily a civil engineering construction project
- § 791.011(h): cannot procure architectural or engineering services via an interlocal
 - *But*, can use a JOC even if architectural/engineering services are needed
 - § 2269.408: If a job order contract or order requires engineering or architectural services, must select/designate engineer/architect to prepare construction docs for the project

Using a Co-Op's JOC

- HB 1050 prohibits a local government from entering into a contract to purchase construction-related goods or services through a purchasing cooperative under the Interlocal Cooperation Act 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.



Conclusion

- Distinguishing between projects that are strictly maintenance and projects that involve a “public works contract” is a critical step, as public work contracts may require the governmental entity to comply with bonding and prevailing wage requirements.
- Ask for help!
 - Legal counsel
 - Construction director
 - Procurement director





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