

Job Order Contracting:

What you need to know to stay Legal & Compliant

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A hand is holding a black smartphone. The screen of the phone displays a presentation slide with a vertical gradient background transitioning from orange at the top to green at the bottom. The word "Objectives" is written in white, bold, sans-serif font in the center of the screen.

Objectives

Concepts & Terminology of Job Order Contracting (JOC)

Maintenance vs. Construction

Trade JOC vs. JOC

Quoting vs. Bidding

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
- 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 & subcontractors



Why Job Order Contracting (JOC)

- ~~“Time & Materials”~~

If providing “construction services”

- Only method allowed to select contractors for future, undefined projects

[TEC 44.031](#)(a)1-8



Maintenance VS. Construction

- **Factors to Consider**

- “Like for like” – NOT new or upgraded
- Scale and complexity of project
- Physical size of object being worked on

JOC contract (Coefficient)
(TGC 2269)



Repair &
Maintenance

Maintenance Contract (T&M)
(TEC 44.031)



Construction
Services

OSHA Letter to Raymond Knobb (11.18.2003)

What is 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.”

TEX. GOV'T CODE § 2269.401



Using JOC's procured by Purchasing Cooperatives

- Gov't Entity selects vendor without having to use its own competitive procurement process
- ONLY satisfies the *procurement* requirement, NOT the *contracting* requirement
- Statute **requires** a **written and signed** job order between the vendor and the Gov't Entity **TGC 2269.410(a)**
- Only construction method that allows for use of a cooperative in lieu of self-procurement
- Only method allowed to select contractors for future, undefined projects or tasks



Requires Established Contractual Unit Prices

- The contract specified UPB is a published maintenance or construction unit price book (RS Means or National Construction Estimator by Craftsman).
- Contains a list of tasks with an assigned cost for each task representing labor, material, and equipment cost.

What is a JOC/IDIQ Estimate?

- A line item assessment utilizing the Unit Price Book (UPB)
- Contains the tasks necessary to complete scope of work
- “Localized” by applying a City Cost Index (CCI) assigned to various cities
- Reduced by legally bid coefficient
- Contains contract number
- Subcontractor pricing must be estimated using the UPB for ALL scope of work

What is the Unit Cost?

- Includes all costs related to labor, materials, and equipment
- “Localized” by applying the City Cost Index (CCI) assigned to various cities

$$CCI(L+M+E) = \text{Total O\&P}$$

What is a Coefficient?

- Establishes a competitively bid cost adjustment or multiplier to the UPB pricing
- Includes contractor's overhead and profit
- Represented as a baseline of 1.0
- Coefficients are not created equal
 - Division 1
 - Overhead and profit
 - Poor way to compare pricing

JOC/IDIQ Estimate

Roofing JOC/IDIQ RS Means UPB Training Sample								
Vendor Name								
Job Description								
Choice Partners Contract #17/038CG-XX								
Data Release : Year 2017 Quarter 2 (Use most updated available at time quote is requested)								
Quantity	LineNumber	Description	Unit	Ext. Total O&P	Labor Type	Data Release	CCI Location	Notes
35	024119192040	Selective demolition, rubbish handling, 0 - 100' haul, load, haul, dump and return, hand carried, cost to be added to demolition cost	C.Y.	\$ 2,089.85	RR	Year 2017 Quarter 2	TEXAS / HOUSTON (770-772)	
35	024119193040	Selective demolition, rubbish handling, 50' haul, loading & trucking, hand loading truck, cost to be added to demolition cost	C.Y.	\$ 2,027.20	RR	Year 2017 Quarter 2	TEXAS / HOUSTON (770-772)	
9	024119200100	Selective demolition, dump charges, typical urban city, building construction materials, includes tipping fees only	Ton	\$ 729.00	RR	Year 2017 Quarter 2	TEXAS / HOUSTON (770-772)	
1600	070505100120	Selective demolition, thermal and moisture protection, downspouts, including hangers	L.F.	\$ 1,616.00	RR	Year 2017 Quarter 2	TEXAS / HOUSTON (770-772)	
2150	070505100420	Selective demolition, thermal and moisture protection, gutters, metal or wood, edge hung	L.F.	\$ 3,182.00	RR	Year 2017 Quarter 2	TEXAS / HOUSTON (770-772)	
2150	070505102270	Selective demolition, thermal and moisture protection, roof edge, gravel stop	L.F.	\$ 795.50	RR	Year 2017 Quarter 2	TEXAS / HOUSTON (770-772)	
2150	070505103730	Selective demolition, thermal and moisture protection, roofing, built-up, embedded gravel removal	S.F.	\$ 1,913.50	RR	Year 2017 Quarter 2	TEXAS / HOUSTON (770-772)	
2150	075216101800	SBS modified bituminous membrane, smooth surface flashing, 150 mils	S.F.	\$ 7,009.00	RR	Year 2017 Quarter 2	TEXAS / HOUSTON (770-772)	
1075	075216102020	SBS modified bituminous membrane, roofing asphalt, 20 to 30 mils	S.F.	\$ 881.50	RR	Year 2017 Quarter 2	TEXAS / HOUSTON (770-772)	
2150	077119101360	Gravel stop, galvanized steel, plain, with continuous cleat, 4" leg, 6" face height, 24 gauge	L.F.	\$ 22,489.00	RR	Year 2017 Quarter 2	TEXAS / HOUSTON (770-772)	
		RS Means Unit Cost Total		\$ 42,732.55				
		Total with Coefficient (.84 x RS Means Total)		\$ 35,895.34				
		2% Bond (Any additional Pass-Through Costs)		\$ 717.91				
		Total Project Quote		\$ 36,613.25				

Review the JOC Quote!



CCI location



Division 1



Coefficient



Adjustment Factors



O & P Pricing



Data release (most recent)

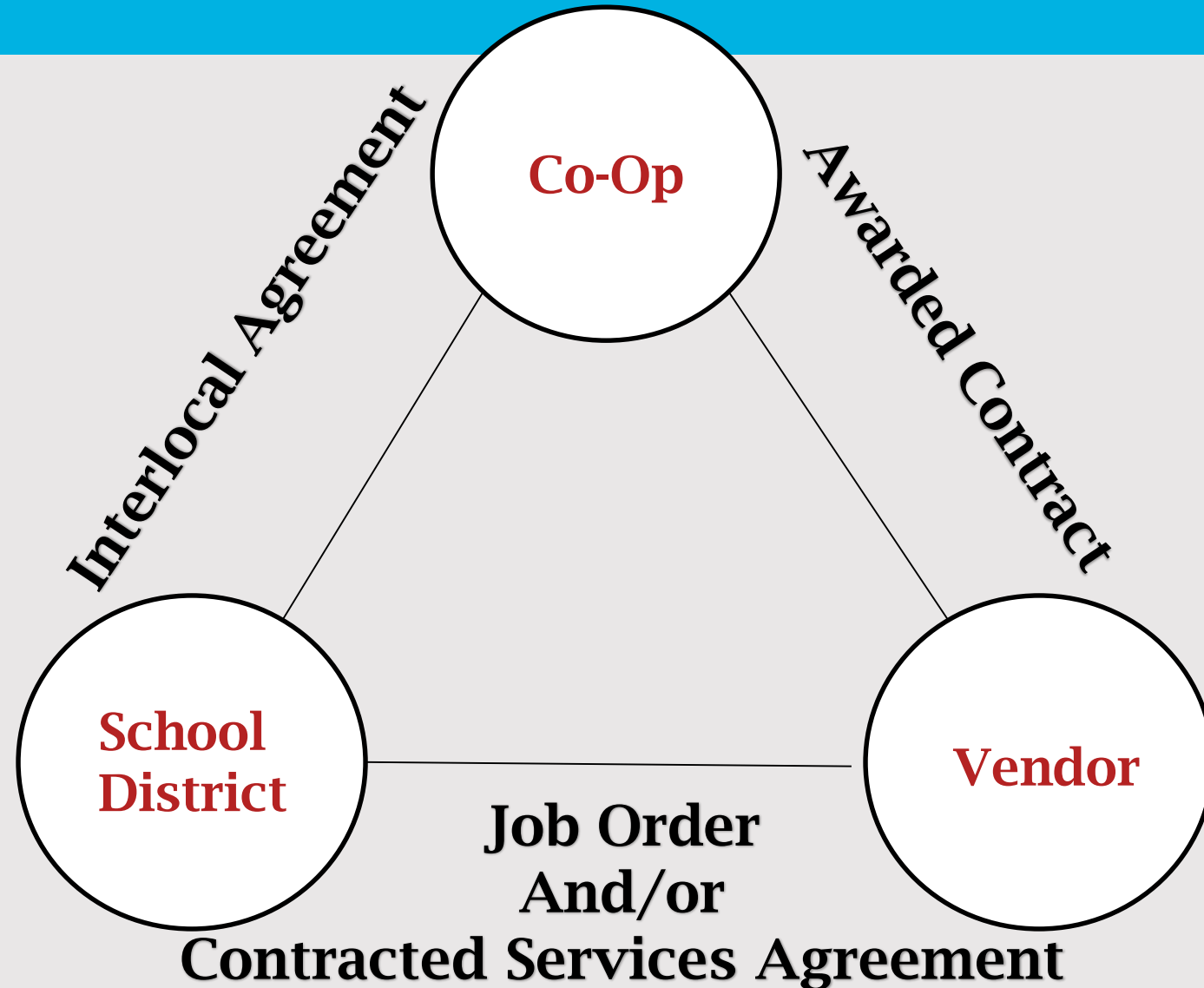


Non pre-priced items



Attempts to pass-through co-op fee

Coops and Contracting



Use A Master Job Order Contract!

- Contains District's project specific Scope of Work
- Includes Job Order & Prevailing Wage Rate as Attachments
- Liquidated Damages
- Retainage
- Terms & Conditions Specific to District
- Signed by District 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



The Job Order

- The **Job Order** is an attachment to the Job Order Contract (typically Attachment “A”):
 - Formally written
 - Project-specific
 - Owner authorization to provide a lump sum, fixed priced estimate
 - Based on the owner/contractor team’s defined scope of work.
 - Include Owner’s adopted prevailing wage rates as an attachment (required on all Public Works Projects) – Typically Attachment “B”



Public Works Bonds

- Performance bond required if contract is in excess of \$100,000
 - Protects the District from financial losses arising from default, material breach, termination or abandonment
- Payment bond required if a contract is in excess of \$25,000
 - A contract is in excess of \$25,000 and Gov't entity is not a municipality or joint board
 - A contract is in excess of \$50,000 and the Gov't entity is a municipality or joint board.
 - Protects the Gov't Entity from claims for nonpayment of suppliers, subcontractors, and sub-subcontractors.



TEX. GOV'T CODE § 2253.021

JOCs and Using an Architect or Engineer

- District 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

- Exceptions to Engineering Services:

- 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)

TEX. OCC CODE § 1001.053

What Must Go To The Board?

- **Determination of construction services project delivery method (if other than Competitive Sealed Bids)**
- Approval of competitive procurement results, where procurement is required
- Approval of all Interlocal Contracts for cooperatives
- Approval of the contract with any vendor
- Approval of all contract amendments or change orders
- All contract renewals and contract terminations
- Board may act to delegate all of the above powers (CH or CV Local)
- **Job Orders (including cooperative purchases) in excess of \$500,000**

Trade JOC vs. JOC

Trade JOC:

- allows the use of one trade or division
- reduces overhead expenses when multiple trades are not needed to complete project

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 the state's procurement requirements
- When using federal funds, must be 2 CFR Part 200 (EDGAR) compliant

Quote:

- job-specific price in writing
- based on vendor's previously bid & awarded contract coefficient
- When using federal funds, must request at least one of the three quotes from a minority-owned or woman-owned business

What We Learned from Hurricane Harvey

- The Importance of the “**6 Affirmative Steps**” under **2 CFR Part 200**
 - When soliciting multiple quotes, one of the three solicitations **MUST** be from a minority-owned or woman-owned business
 - Prime contractors **MUST** also demonstrate that it took “**6 affirmative steps**” when selecting sub-contractors or sub-consultants
 - COOPS **MUST** be able to demonstrate that it took “**6 affirmative steps**” when procuring and awarding contracts
- Office of Inspector General (OIG) will closely scrutinize purchasing cooperatives for compliance with 2 CFR Part 200
- While out-of-state cooperative purchasing programs are not expressly forbidden, they must comply with federal, state and local laws.
- Ignorance (“I Didn’t Know”) is not an acceptable excuse for FEMA or the OIG



What We Learned from Hurricane Harvey

- Have a contract in place for **ALL** procurements
 - Require vendor to provide set unit prices or rates
 - Require vendor to give a not-to-exceed or guaranteed maximum price
 - Include contractual provisions requiring itemized invoices and certified payroll with timesheet backup
 - Strike arbitration clauses, and ensure that choice of law & venue provisions are local
 - Be aware of scams from companies offering to handle claims in exchange for a portion of insurance or FEMA proceeds
- Why you chose the procurement method
- Why You chose the type of contract
- Why you chose or rejected a contractor
- The basis for the contract price
- **Pictures** and **Video** are invaluable



FEMA Top 10 Procurement Mistakes Leading to Loss of FEMA Funding

- Engaging in a noncompetitive procurement w/o carefully documenting urgent need
- Continuing work under noncompetitive contract after urgent need has ended
- Piggybacking onto another jurisdiction's contract. Noncompetitive or materially different (rarely allowable)
- Awarding a T&M contract w/o ceiling price. Must show no other contracting method is suitable.
- Awarding a "cost-plus-percentage-of-cost" or "percentage-of-construction-cost" contract
- Not including the required contract clauses (available at below link under "PDAT Resources" menu)
- Including a geographic preference in a solicitation (giving an advantage to local firms is violation of 6 Affirmative Steps)
- Not making and documenting efforts to solicit small business, minority businesses, and woman's business enterprises
- Conducting a procurement exceeding \$150,000 without conducting a detailed cost or price analysis
- Not carefully documenting all steps of a procurement to create a record if questions arise potentially years later

For more information, please visit <https://www.fema.gov/procurement-disaster-assistance-team>



Taking Emergency Exception to Procurement DOES NOT allow you to Bypass other Laws

- Payment bonds are still required for public works projects that exceed \$25,000 in value
- Performance bonds are required for projects that exceed \$100,000 in value
- Clean-up work (which includes dehumidifying, dewatering, debris removal, and removal of wet materials) is NOT a public works project and does not require bonding
- Buildback and restoration work (construction) ARE public works that require bonding

Takeaways

- Establish procurement method with your vendor prior to them quoting the job
- Include contract number on quote and PO
- Verify pricing by requesting the vendor's line item estimate with legally bid coefficient
- If utilizing a coop, send a confirming copy of each JOC PO issued to Coop
- Not all Co-ops are created equal, are in State, or are 2 CFR Part 200 (EDGAR) compliant
- Board Approval

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