

To JOC or Not To JOC...

Why Texas schools, universities and municipalities need Job Order Contracting now more than ever

By:

Laura S. Fowler, Partner,

Henslee, Fowler, Hepworth & Schwartz, LLP

&

David Carrithers, Vice President of Marketing,

Centennial Contractors Enterprises

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1) JOC: A Proven Solution To Meet Growing Facility Demands

Texas continues to develop, becoming the state of choice to live, work and play. This growth impacts all aspects of our daily lives; from traffic patterns to how our children learn. One area impacted by growth and increased demand is educational facilities, specifically our universities, K-12 schools and municipalities. To better serve those living in these communities and allow the full use, enjoyment and benefit from them (and our tax dollars at work) it is important that we make sure those responsible for our facilities have the necessary resources, abilities and tools to manage their up keep in a responsive and responsible fashion.

One such necessary tool in the construction tool box is Job Order Contracting (JOC). JOC is a proven, effective means to accomplish construction work on existing or new facilities. JOC is a method of managing multiple details of renovation, remodeling, rehabilitation, repair, and other construction projects (both new and existing) using a predetermined set of pricing and standards. By using JOC, customers take advantage of a defined process that is fast and responsive to their needs while providing excellent quality and a competitive price for renovation, repair, alteration, rehabilitation, and new construction projects. Job Order Contracting is a way to get multiple projects done easily and quickly. A JOC contract usually applies to a specific site or sites, and can be used for any number of jobs that need to be done for as long as the contract is in effect. Through JOC, facility owners and managers are essentially provided with an on call general contractor who is familiar with the site and the owner's needs.

A Job Order Contracting (JOC) program is based on a competitively bid indefinite-delivery, indefinite-quantity (IDIQ) contract between a facility owner and a professional JOC construction contractor. The simple way to look at this is that a school, university or municipality seeks competitive bids up front through a solicitation process on an overall JOC program, including pricing – not specific to any one project but instead on an assumption of a number of individual projects comprising the ongoing work that will be delivered through this JOC contract. The contract typically has a base year with 2 to 4 option years. The contract may set parameters such as the types of work that can be done, location of the work, specifications, and estimated amount of work to be awarded. The contract also uses a unit-price book (UPB) that establishes a unit price to be paid for each of a multitude of construction line items. A typical UPB has over 40,000 line items and covers nearly every construction task. Items that are not in the UPB are called “non-prepriced” and can be negotiated, priced, and used in the job order proposal. Non-prepriced items that will be used frequently may be added to the UPB at any time.

The inherent flexibility of JOC, coupled with its very structured approach to construction, is what makes JOC one of the best ways to meet the increasingly complex and ever evolving demands of school, university and municipal construction. Once the scope of work to be done is agreed upon, the competitively bid and awarded contractor provides a schedule, submittals of materials to be used, and a line item proposal. The actual cost of the desired scope is known before the job order is issued. This allows for more accurate budgeting and forecasting for current construction needs, as well as forecasting for those costs that may arise in the future. Many facility owners work closely with their JOC contractors to help in the planning and

“Job Order Contracting is another innovative tool in the county-wide process of ongoing construction and maintenance. The JOC process can be utilized to get a quick handle on expected costs before going out for bid or streamlining complex construction projects from start to finish.”

Jerry Eversole, Commissioner,
Harris County Precinct 4

development of yearly budgets in anticipation of work over the year. This allows for better planning and execution of projects and budgets, and achieves the best results for the facility management team and (in the end) the facility's users.

Key Elements Of A Successful JOC Program:

- Competitively bid formal solicitation, focused on performance and technical ability, not lowest bid resulting in a best value procurement
- Professional JOC contractor with proven performance results & experience
- Published Price Book and a competitively negotiated coefficient (multiplier) that addresses local and specific requirements and needs
- Building trust and cooperative relationship with selected JOC contractor
- Enough work volume to sustain a JOC contractor's staff and operations

2) The History of Job Order Contracting in Texas

The JOC method of project delivery was devised by the U.S. military in the 1980's as a way to overcome problems of delays and poor quality with the traditional Design-Bid-Build (DBB) method. Using DBB, every project, no matter how small, had to be designed and put out for bid, with the award going to the lowest bidder. Going through this procedure for every little job was becoming impractical and costly. The common occurrences of construction delays, cost over runs, and quality disputes were successfully reduced using the new method, and JOC has been equally successful outside the Federal sector for more than a decade.

Spring Branch Independent School District (ISD) was the first school district to employ job order contracting in the State of Texas. They implemented it in 1993 using a two-step solicitation. Over the course of the next three and a half years, Spring Branch did approximately \$37.5 million worth of work using JOC. By the mid 1990's Houston ISD and San Antonio's Northeast and Northside Independent School District (ISD) quickly followed suit, each doing tens of millions of dollars of projects using JOC. In 1995, the Texas Legislature authorized the use of JOC and other alternatives to the traditional Design-Bid-Build process for public construction.

In 1997, the Legislature decided to provide more guidance and structure for the use of the alternative delivery methods by schools and higher education. A task force representing school districts, architects, builders, engineers, construction companies, and other key players in the industry was convened, and together they drafted what was to become Chapters 44 and 51 of the Texas Education Code that authorized and defined job order contracting, and other construction delivery methods for K-12 and higher education respectively. This guidance was further refined in 1999.

3) Job Order Contracting and Texas Law

Concerns have arisen recently over the legality of JOC. These concerns stem from a single, isolated and very complicated set of facts concerning Galveston Independent School District. Unfortunately, the very unique set of circumstances surrounding Galveston ISD has called the entire JOC process into question. Texas law makes it clear, however, that the Legislature intended for schools and municipalities to take advantage of the many benefits of JOC. Chapter 44 of the Texas Education Code specifically lists JOC as a delivery method available to public entities.

Section 44.031-Purchase Contracts

- (a) Except as provided by this subchapter, all school district contracts, except contracts for the purchase of produce or vehicle fuel, valued at \$25,000 or more in the aggregate for each 12-month period shall be made by the method, of the following methods, that provides the best value for the district:
 - (1) competitive bidding;
 - (2) competitive sealed proposals;
 - (3) a request for proposals, for services other than construction services;
 - (4) a catalogue purchase as provided by Subchapter B, Chapter 2157, Government Code;
 - (5) an interlocal contract;
 - (6) a design/build contract;
 - (7) a contract to construct, rehabilitate, alter, or repair facilities that involves using a construction manager;
 - (8) **a job order contract for the minor construction, repair, rehabilitation, or alteration of a facility;**
 - (9) the reverse auction procedure as defined by Section 2155.062(d), Government Code; or
 - (10) the formation of a political subdivision corporation under Section 304.001, Local Government Code.
- (b) Except as provided by this subchapter, in determining to whom to award a contract, the district may consider:
 - (1) the purchase price;
 - (2) the reputation of the vendor and of the vendor's goods or services;
 - (3) the quality of the vendor's goods or services;
 - (4) the extent to which the goods or services meet the district's needs;
 - (5) the vendor's past relationship with the district;
 - (6) the impact on the ability of the district to comply with laws and rules relating to historically under utilized businesses;
 - (7) the total long term cost to the district to acquire the vendor's goods or services; and
 - (8) any other relevant factor specifically listed in the request for bids or proposals.¹

"I believe the TCPN AJOCSM program offers benefits to any size school district. So far, our experience with the quality of work is excellent. We have plans to use the AJOCSM program on multiple projects with costs up to \$500,000. This is a unique program that offers us the opportunity to take advantage of a helpful, beneficial process we did not have access to before."

Tom Tasma, Superintendent,
Channelview ISD

1. Tex. Educ. Code Ann. § 44.031(a), (b) (Vernon 1996) (emphasis added).

Section 44.035-Evaluation of Bids and Proposals for Construction Services

- (a) The board of trustees of a school district that is considering a construction contract using a method specified by Section 44.031(a) must, before advertising, **determine which method provides the best value for the district.**
- (b) The district shall base its selection among offerors on criteria authorized to be used under Section 44.031(b). The district shall publish in the request for bids, proposals, or qualifications the criteria that will be used to evaluate the offerors and the relative weights given to the criteria.
- (c) The district shall document the basis of its selection and shall make the evaluations public not later than the seventh day after the date the contract is awarded.²

Section 44.041-Job Order Contracts for Facilities Construction or Repair

- (a) A school district may award job order contracts for the minor construction, repair, rehabilitation, or alteration of a facility if the work is of a recurring nature but the delivery times are indefinite and indefinite quantities and orders are awarded substantially on the basis of predescribed and prepriced tasks.
- (b) The school district may establish contractual unit prices for a job order contract by:
 - (1) specifying one or more published construction unit price books and the applicable divisions or line items; or
 - (2) providing a list of work items and requiring the offerors to bid or propose one or more coefficients or multipliers to be applied to the price book or work items as the price proposal.
- (c) The school district shall advertise for, receive, and publicly open sealed proposals for job order contracts.
- (d) The district may require offerors to submit additional information besides rates, including experience, past performance, and proposed personnel and methodology.
- (e) The district may award job order contracts to one or more job order contractors in connection with each solicitation of bids or proposals.
- (f) An order for a job or project under the job order contract must be signed by the district's representative and the contractor. The order may be a fixed price, lump-sum contract based substantially on contractual unit pricing applied to estimated quantities or may be a unit price order based on the quantities and line items delivered.
- (g) The contractor shall provide payment and performance bonds, if required by law, based on the amount or estimated amount of any order.
- (h) The base term of a job order contract is for the period and with any renewal option that the district sets forth in the request for proposals. If the district fails to advertise that term, the base term may not exceed two years and is not renewable without further advertisement and solicitation of proposals.

- (i) If a job order contract or an order issued under the contract requires engineering or architectural services that constitute the practice of engineering within the meaning of Chapter 1001, Occupations Code, or the practice of architecture within the meaning of Chapter 1051, Occupations Code, those services shall be provided in accordance with applicable law.³

JOC Summed Up Legally In Texas:

- JOC is allowed to be used, by law, in Texas.
- Each school district, university and municipality must determine which method provides the best value for them – and JOC is included in this mix.
- JOC can be used for construction, repair, rehabilitation or alteration of a facility.

4) “Best Value” and “Minor Construction”: Key Terms in JOC

“Best Value”

Section 44.031 establishes a bifurcated process for letting a contract, separating the selection of a purchasing method from the ultimate award of a contract using the chosen method.⁴ Thus, determining to whom to award a contract is different than determining which type of contract will afford the “best value.”⁵ Under subsection (a), a district must first evaluate which of the ten listed purchasing methods will provide the “best value.”⁶

The Legislature did not define the method through which a school district is to determine “best value.” Instead, the Legislature empowered school districts to independently establish the procedure and criteria to determine which purchasing method that will provide the “best value” in any particular instance.⁷ Section 44.031(d), authorizing a school district to adopt rules governing the procedures for the acquisition of goods or services, encompasses the power to adopt rules governing the procedure by which a school district will evaluate the enumerated purchasing methods.⁸

“Minor Construction”

The Texas Legislature did not fully define “minor construction,” preferring instead to let each board determine what “minor” means to their situation. Basically, minor is relative and different to each institution or organization. “Minor” was intended as a modifier for construction of new facilities as JOC would normally not provide the “best value” for construction of major new facilities such as a new school. Because of the differences in size and needs among various school districts, and municipalities around the state, it is up to the governing body to define “minor construction” for themselves as best suits their particular circumstances. Based on this thinking, it is important to keep in mind that the description of what “minor” means to a university with 100 buildings and 50,000 students compared to a small public school district with 6 buildings is relative to that specific facility make up and the board.

³ TEX. EDUC. CODE ANN. § 44.041 (Vernon 1996).

⁴ Tex. Educ. Code Ann. § 44.031 (Vernon 1996).

⁵ Tex. Att’y Gen. Op. No. JC-0037 (1999) at 4.

⁶ Tex. Att’y Gen. Op. No. JC-0037 (1999) at 3.

⁷ Tex. Educ. Code Ann. § 44.031 (Vernon 1996) (“The board of trustees of the district may adopt rules and procedures for the acquisition of goods or services”).

⁸ See id.; Tex. Att’y Gen. Op. No. JC-0037 (1999) at 4 (“Because nothing in the statutes expressly defines or directs a school district in determining best value, we conclude that a school district should establish, by rule, its own procedure and criteria to determine the purchasing method that will provide the best value in a particular instance”).

There is no limit on the total dollar value of an individual JOC project, nor is there a minimum dollar threshold for the budget utilizing JOC. Likewise, there is no statutory minimum or maximum limit on the size of a job order. The governing body should determine the parameters for their use of JOC considering the urgency, complexity, and other unique factors surrounding their needs. This provides each organization with the maximum flexibility as allowed by law.

5) The Benefits of Job Order Contracting

"Hidalgo County used TCPN's AJOCSM to quickly renovate a warehouse into a public health preparedness response operations center. They were very courteous, very prompt; there wasn't anything they couldn't do."

Eddie Olivarez,
Chief Administrative Officer,
Hidalgo County Health
Department

"We had gotten some bids ... and they were so far above our budget we couldn't afford to do it. But Job Order Contracting gave us a little bit more flexibility, so we could get it done. And I think we're going to come out with a really nice building that the citizens can be proud of without going over our targeted amount."

Ben Griffin, City Manager,
City of Tomball

The Texas Legislature recognized the inherent benefits in JOC, and made explicit provisions for its use by state entities. Some of the many advantages and benefits of JOC are as follows:

- A. **Excellent Quality:** Partnering and performance incentives produce high quality construction and service. If the JOC contractor does not meet expectations, the owner simply does not give the firm any more work. Because profit is heavily dependent upon volume, the JOC contractor will strive to perform at their best so as to become the preferred provider of construction services. Also, the JOC contractor can prequalify and use the best local subcontractors available to get the job done. These subcontractors are held to strict quality standards and periodic evaluations.
- B. **Fast and Responsive:** It takes much less time from a request for a JOC project to start up than the traditional Design-Bid-Build. Typical reductions can be as much as 75% of the normal up front time. Urgent requests can be done even faster. This speed is possible because projects do not require soliciting and acquiring a contract, detailed plans and specifications, and a long approval process. Having the contractor located on site also contributes to speed and responsiveness. Three years of research at the Center for Job Order Contracting Excellence (CJE) have identified the quick turnaround and delivery time of construction projects as the leading advantage of the JOC.
- C. **Dependability:** Long-term relationships, fixed pricing and simplified paperwork all help in meeting customer expectations for performance and price. The contractor is motivated to impress the facility owner with fast, dependable, quality service in order to receive the maximum possible amount of work from referrals and call backs.
- D. **Simplicity:** The simplified design documents and acquisition process eliminates the need for complicated and repetitive contract documents. Job orders are negotiated on a line-by-line basis under the guidelines and specifications of the overall contract.
- E. **Time and Cost Savings:** Three years of investigation at the CJE have shown that the timely and fast construction is the major advantage of JOC. It is obvious that with a competitively bid and selected performing JOC contractor, the reduction in administration, design and construction management cost would be substantial. To date, there has not been a comprehensive study to determine the extent of these cost savings. However, Spring Branch ISD found that they saved over \$2 million dollars in up front costs on \$37.5 million dollars of work.
- F. **Minimal Risk:** The JOC process has been proven to work very well at thousands of locations nationwide. If there are problems with the JOC contractor, the owner can unilaterally decide to stop using the contract based on poor performance. These occurrences are quite small. In a performance based procurement system it is all about giving the owners what they need, want and expect.

- G. **Benefits Small & Minority Businesses:** JOC maximizes use of local small and Historically Underutilized Businesses (HUBs). The JOC process stresses working with small, MWBE, and HUB businesses. The prime JOC contractor assists local subcontractors by mentoring them, paying them promptly, eliminating most bonding requirements, and assisting in obtaining and paying for large items of equipment. As a result it is easier for these businesses to successfully obtain profitable work through JOC than bidding for it on their own. Most JOCs significantly exceed government goals for the use of these businesses.
- H. **Not Alone:** By competitively selecting a JOC contractor who is only assured continued future success based on current performance, a facility management team gains a valuable, trusted ally in the success of that team and their facility projects. It is about long term performance, over many projects. A professional JOC contractor works hard at reducing a facilities manager's back log of work, allowing the existing in house team to focus on mission critical and/or priority projects. The JOC contractor is focused on helping the facility manager meet budgets and schedules. This allows for the full utilization of budgets, existing resources and facility performance.
- I. **Interactive Dialogue & Scope Development:** One obvious benefit is the ability for the JOC contractor and the facility owner to refine projects based on budget, time and project specific demands. Instead of the cumbersome process associated with the Design-Bid-Build process which requires new bidding documents and solicitations on every project no matter the size or scope, JOC allows for open, continual dialogue and refinement of the project scope. This facilitates teamwork and the best outcome for the owner.
- J. **Happy Facility Users & Customers:** With a competitively bid and awarded JOC contractor and program, the owner is able to get more done because the JOC contractor services as an extension of in house existing resources. It also allows for those less glamorous, yet beneficial, projects to get resources and effort needed for completion. A simple example is a school bond issue. In any bond campaign some percentage of the funds raised will go towards the construction of new schools (70% on average) and another percentage will go towards renovation and repair work. In most instances the "messy" renovation work may not be a priority over a highly visible new school building. Each of these groups are important, and with a JOC program in place, a school could begin renovating that local playground or ball field within 30 days of a bonds passage vs. months or years later (if ever). Never underestimate the negative impact of not quickly addressing the repair, renovation or remodeling projects on the next bond campaign.

"When the purchasing department came to us and said you might want to consider this, I felt like it would be really ideal for our situation. Centennial had a superintendent on site to supervise subcontractors. That's what really turned it over for me. It's been a great situation."

Joe Brown,
DeSoto Fire Training Center
Coordinator, City of DeSoto

6) Job Order Contracting and Interlocal Agreements: A Winning Combination

"I have no doubt that getting our schools open within two weeks in the aftermath of Hurricane Rita would not have been possible without the services of TCPN. Through TCPN, our district had ready access to contractors who responded in a timely and efficient manner in an emergency situation. This allowed us to gain access to reputable, efficient reconstruction services at bid list rates, which is crucial."

O. Taylor Collins, Ed.D.,
Superintendent,
West Orange Cove CISD

A decision in 2005 by the 56th State District Court in Galveston raised a concern over of whether JOC can be done through interlocal agreements or cooperatives. As with most court decisions, the results are strictly related to the very specific facts of that particular case. The Galveston ruling has no legal impact on any other project by any other school, university or city. The issue seems to stem from the combination of multiple contract forms to get to an existing JOC contract. This combination of an interlocal agreement with a separate cooperative agreement is the core of the issue. It is only when interlocal agreements are combined in conjunction with a JOC stand alone agreement and do not follow Texas laws that the two cannot work together to achieve the best result possible for the school district or municipality.

It is legal to use an interlocal agreement to access JOC contracts competitively procured by the government entity in accordance with TEC 44.041, TEC 51, or LGC 271. This is an authorized combination of delivery methods, and is simply a use of already competitively procured services through an interlocal agreement. In fact, this is often the best approach for the school district or municipality as there is no expense or time required for a competitive solicitation of their own. It is critical, however, that both the use of JOC as a delivery method and the interlocal agreement to access the JOC contract be approved in a formal session of the governing board. This requires listing the item on the agenda, then voting on and approving it in an open and legally posted meeting. The board's minutes should accurately reflect the meeting and the action taken.

Even after the JOC has been properly approved by the board, potential problems can still arise with respect to JOC implementation. The two most common mistakes are:

- (1) JOC contracts have been awarded to the lowest bidder rather than the best qualified firm, and;
- (2) More than one JOC contractor has been awarded for a particular area (multiple awards) and each job order (or also called task order) is competed among this selected pool of JOC contractors causing an increase in overhead cost and higher, rather than lower prices.

The best way to avoid these problems and other potential problems is to have a well thought out implementation plan. Prior to starting a JOC program, it would be wise to consult with someone who is familiar with the intricacies of a JOC program. This will allow for the capturing of best practices, benchmarking and industry knowledge assuring that from the solicitation phase to the implementation phase, your JOC program goes smoothly. There are a variety of JOC consultants in the market, along with the Center For JOC Excellence based out of Arizona State University (www.JOCexcellence.org), that are worth looking to for help.

7) Implementing JOC Correctly: A Checklist

There are certain critical steps that a school district, college or municipality must take to implement a JOC program through interlocal agreement. Specifically:

- a. Governing boards must determine the delivery method and what constitutes the best value for each project, or types of projects, at issue. The administration should review the entity's needs for construction, repairs, rehabilitation and alterations, in order to make recommendations to the board regarding the best construction delivery method for specific projects, and/or possible types of projects. The entity should also determine those types of projects where the unique characteristics of JOC will provide the "best value."
- b. The governing board must meet in a duly convened and properly posted session with an agenda item worded: "Deliberate to consider construction delivery method that provides the best value for _____ project," or rehabilitation, repair, alteration, and minor construction projects such as or in another similar fashion.

The board should legally post the agenda, vote publicly on the agenda item and resolution. The resolution may state simply: "Be it resolved that Job Order Contracting provides the best value for the _____ project, or the following projects and other similar projects." Similarly, a resolution stating: "Be it resolved that Job Order Contracting be available for a one year period of time for rehabilitation, repair, alteration, and minor construction projects. The superintendent of schools is hereby authorized to determine appropriate use for specific projects."

- c. If the entity creates its own competitive solicitation for a JOC, it must document the basis of its selection of the JOC contractor and make the evaluations public, not later than the seventh day after the date the contract is awarded.
- d. The entity may join a cooperative purchasing network to facilitate obtaining the advantages of larger volume and a contract already competitively procured and awarded. Some cooperative purchasing networks will also provide administration, management, and oversight of the contractors and assist in resolving any disputes.

When a district or other government entity has a multi-project, multi-year bond program, the entity may decide to use several delivery methods for the overall program, while determining which of the available methods provides the best value for each specific project. For example, a school district may decide to use a Construction Manager at Risk to construct a new high school, design-build for the new fine arts center, and JOC to rehabilitate the interior of a middle school and to repair, replace and upgrade the HVAC in three of its elementary schools.

8) Concluding Thoughts

"The good thing was that they could solicit subcontractors to do the roof and the mechanical work from people who had good reputations from doing good work. It all went really well."

Laura David, Project Manager,
Texas Parks and Wildlife

JOC is a well-established and proven construction method with a track record of billions of dollars worth of successful projects done by hundreds of government entities. Unfortunately, JOC in Texas finds itself under intense scrutiny as a result of a few careless actions. While JOC is not the single answer or silver bullet for all facility construction needs, it is a needed tool in the tool box of proper, professional and effective facility renovation, remodeling and repair work at any school, university or municipality in the state of Texas.

While the Galveston ISD matter has placed all eyes on JOC for the near future, JOC as a delivery method should come through the examining process even stronger as the full story is known. Once the Texas Legislature has had the opportunity to examine all of the facts, benefits of JOC for Texas will be better understood. Job Order Contracting has been and remains one of the most valuable and user friendly tools available for school districts, universities and municipalities facing new construction or repairs to existing facilities. Taking time to understand the process and its applications will yield tremendous dividends for all of your construction efforts—saving both time and money and ensuring peace of mind well into the future.

JOC Benefits For Texas:

- Getting more done with existing budgets and people
- Faster turn around and reduction in project backlog
- Improved facilities and communities
- Extending the lifetime value and use of public facilities

Additional JOC Info:

Center For JOC Excellence www.JOCexcellence.org

Texas Job Order Contracting Facts:

- **An estimated 5,000+ Texas owned businesses gain income and employ thousands of people** in Texas: directly related to Job Order Contracting (JOC) programs.
- Job Order Contracting **has been used since the early 1990's in Texas with success and high owner satisfaction.**
- **1,000+ individual task orders (projects) are completed each year utilizing JOC** without issues or problems in Texas.
- **Well recognized Texas publicly funded Universities, Cities, Municipalities, and Public School Districts currently utilize Job Order Contracting,** they include University of Texas at San Antonio/Tyler/Dallas/El Paso, Texas Tech Health Sciences Center, Clear Creek ISD, University of Texas at Austin, Houston ISD, Texas Parks and Wildlife, City of Corpus Christi, Hidalgo County, Dallas Fort Worth Airport, North East ISD (San Antonio), City of Desoto, Texas A & M University, Harris County, University of Houston, Houston Metro, Pasadena ISD, Trinity University, Texas State University, Northside ISD (San Antonio), City of Brownsville, Cameron County, Jefferson County, City of Houston (currently bidding), Houston Airport System, etc. **TOO MANY TO LIST HERE.** All regions of Texas utilize Job Order Contracting.

- **Job Order Contracting in Texas provides significantly enhanced opportunities for minority, small & disadvantaged companies** in Texas (the majority of dollars from JOC programs go to these businesses in the local communities).
- **Job Order Contracting programs are being competitively bid today in Texas** and have terms defined by the governing boards/approving authorities (years, size of task orders, what type of projects, budget ranges). No “SKIRTING” of competitive bidding requirements is occurring.
- **Job Order Contracting in Texas is an Indefinite Delivery, Indefinite Quantity (IDIQ) program**, with no guarantee of any amount of work by the facility owner – meaning that at anytime an owner can choose other approved construction methods.
- **Job Order Contracting programs are competitively bid today in Texas** and awarded by facility owners & boards directly, as well as through Purchasing Cooperatives, or through interlocal agreements between agencies.
- Job Order Contracting speeds up the delivery of construction services, and **allows more construction funds to result in physical work**, by eliminating inefficient and costly procurement processes.

Contact Info:

Laura S. Fowler, Partner
Henslee, Fowler, Hepworth & Schwartz, LLP

816 Congress Avenue
Suite 800
Austin, Texas 78701

lfowler@hfhsllaw.com

512-708-1804 800-969-7444 512-708-9037

David Carrithers, VP of Marketing
Centennial Contractors Enterprises

8500 Leesburg Pike
Suite 500
Vennia, VA 22182-2409

Office Direct Line #: 703-287-3042

Cell: 707-484-3620 Fax: 800-806-7382

dcarrithers@cce-inc.com www.JOCsolutions.com

Appendix – Questions/Answers

Q1. I heard that Job Order Contracting is illegal: Is that true?

Answer: No. JOC has been and continues to be legal.

The ruling by Judge Lonnie Cox of the 56th State District Court in Galveston was as follows:

“It is the order of this Court that the construction for Phase II for the renovation of Austin Middle School, under the current contract is enjoined from further performance, based on a failure to comply with Chapter 44B of the Texas Education Code.”

This ruling only affects Galveston ISD and one specific project; it is not final and binding.

It is our understanding that the dispute in this case was not about the legalities of using JOC as a delivery method. The dispute was whether that governing board implemented this delivery method for this specific project in accordance with applicable statutes of the State of Texas.

Q2. Does the ruling in Galveston impact The Cooperative Purchasing Network’s AJOC program?

Answer: No, it has no legal impact on any other project by any other school, city, university, etc.

However, some individuals may be confused about what they are reading in the press. We would be willing to sit down and review what we understand and answer any questions they might have. The simple answer is no.

Q3. Are TCPN and the BuyBoard the same thing?

Answer: No.

TCPN is completely different from BuyBoard, and is a department of the Region 4 Education Service Center, which is a political subdivision. BuyBoard is overseen by a private, non-profit association, the Texas Association of School Boards.

We are not aware of how the BuyBoard awards contracts and projects; questions about the BuyBoard operations would be best answered by the BuyBoard. What we do know a lot about is how TCPN awards contracts. TCPN follows all state requirements for soliciting and selecting vendors, and for interlocal agreements.

Q4. Does the definition of “minor construction” mean only small projects, like replacing a door knob?

Answer: No.

However, the definition of “minor construction” is not currently fully defined in the law.

Indeed, to date, no court has further defined or placed a limitation in dollar value on job order contracts. One reason for this is that the legislature wanted to leave it up to each board and organization to determine what “minor construction” means for their environment and situation. Because of the differences in size of organizations, what may seem minor to one is not minor to another. For that reason, “minor” was not defined in the law. It is up to the governing body to define “minor” and determine if JOC is appropriate for their needs.

The actual code reads:

Texas Education Code

44.041. JOB ORDER CONTRACTS FOR FACILITIES CONSTRUCTION OR REPAIR.

- (a) A school district may award job order contracts for the minor construction, repair, rehabilitation, or alteration of a facility if the work is of a recurring nature but the delivery times are indefinite and indefinite quantities and orders are awarded substantially on the basis of predescribed and prepriced tasks.
- (b) The school district may establish contractual unit prices for a job order contract by:
 - 1) specifying one or more published construction unit price books and the applicable divisions or line items; or
 - 2) providing a list of work items and requiring the offerors to bid or propose one or more coefficients or multipliers to be applied to the price book or work items as the price proposal.
- (c) The school district shall advertise for, receive, and publicly open sealed proposals for job order contract.
- (d) The district may require offerors to submit additional information besides rates, including experience, past performance, and proposed personnel and methodology.
- (e) The district may award job order contracts to one or more job order contractors in connection with each solicitation of bids or proposals.
- (f) An order for a job or project under the job order contract must be signed by the district's representative and the contractor. The order may be a fixed price, lump-sum contract based on substantiality on contractual unit pricing applied to estimated quantities or may be a unit price order based on the quantities and line items delivered.
- (g) The contractor shall provide payment and performance bonds, if required by law, based on the amount or estimated amount of any order.
- (h) The base term of a job order contract is for the period and with any renewal option that the district sets forth in the request for proposals. If the district fails to advertise that term, the base term may not exceed two years and is not renewable without further advertisement and solicitation of proposals.
- (i) If a job order contract or an order issued under the contract requires engineering or architectural services that constitute the practice of engineering within the meaning of Chapter 1001, Occupations Code, or the practice of architecture within the meaning of Chapter 1051, Occupations Code, those services shall be provided in accordance with applicable law.

Added by Acts 1997, 75th Leg., ch. 1179 § 2, eff. Sept. 1, 1997. Amended by Acts 1999, 76th Leg., ch. 1225, § 10, eff. Sept. 1, 1999; Acts 2006, 78th Leg., ch. 1276, § 14A.761, eff. Sept. 1, 2003.

Q5. Can JOC be used for new construction?

Answer: Yes.

It has been used for new construction, usually in relationship to additions to existing buildings, as well as stand alone new buildings. Again, it is up to the governing body to determine where and how JOC is appropriately used. The governing body would need to determine that JOC is the best value and that the project meets their criteria for “minor” construction.

Q6. Is it legal to mix JOC and interlocal agreements?

Answer: Yes.

However, it is important that whatever the form of state approved construction method or interlocal agreement used, both must be approved in a formal session of the governing board. The item must be listed on the agenda, then voted on and approved in an open and legally posted meeting, with minutes recording that action.

Q7. Does the Galveston ISD decision affect the TCPN interlocal agreement?

Answer: No.

At this time, the decision in Galveston has no legal bearing on TCPN or its use of interlocal agreements. An interlocal agreement is required for governmental entities to purchase from TCPN contracts.

Q8. What steps does a school district or college have to take to use JOC through interlocal agreements?

Answer: The checklist is below:

Governing boards must determine delivery method and what is the best value for each project.

Section 44, Subchapter B of the Texas Education Code addresses purchases and contract requirements for school district contracts. Section 44.031 Purchasing Contracts – specifies that contracts are to be made by the method that provides the best value for the district.

- 1) Competitive bidding; (see § 44.040)
 - 2) Competitive sealed proposals; (see § 44.039)
 - 3) A request for proposals, for services other than construction services;
 - 4) A catalogue purchase as provided by Subchapter B, Chapter 2157, Government Code;
 - 5) An interlocal contract;
 - 6) A design/build contract; (see § 44.036)
 - 7) A contract to construct, rehabilitate, alter or repair facilities that involves using a construction manager; (see § 44.037 and 44.038)
 - 8) A job order contract for the minor construction, repair, rehabilitation, or alteration of a facility; (see § 44.041) or
 - 9) The reverse auction procedure as defined by Section 2155.062(d), Government Code.
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- The administration should review the District's needs for construction, repairs, rehabilitation and alterations and make recommendations to the Board for the best construction delivery method for specific projects, and/or possible types of projects. If the District is considering using JOC, it should determine those types of projects where the unique characteristics of JOC will provide the "best value".

Note: Section 44.035(a) specifies that the Board of Trustees of a school district that is considering a construction contract using a method specified above, must, before advertising, determine which method provides the best value for the district.

The Cooperative Purchasing Network has already done the advertising for you, so the district just has to determine which provides best value.

Section 44.035 (b) specifies that the district shall base its selection on criteria, which shall have been published in the requests for bids, proposals.

The Cooperative Purchasing Network has already done that for you.

The governing board must then meet in a duly convened and properly posted session with an agenda item worded: "Deliberate to consider construction delivery method that provides best value for the 'ABC' project," or words to that effect.

Legally post the agenda, vote publicly on the agenda item and resolution.

The resolution may simply specify "Be it resolved, that Job Order Contracting provides best value for the 'ABC' project." Or "Be it resolved that Job Order Contracting be available for a one year period of time for the 'ABC' project. The superintendent of schools is authorized to determine appropriate use."

Note: Traditionally a yearly budget is assigned or defined for JOC-related products or needs and this budget range is agreed to and incorporated by the voting board into the budget and minutes of an official meeting.

For example, the Board might decide to use Construction Manager at Risk to construct the new high school; Design-build for the new Fine Arts Center, and JOC to rehabilitate the interior of the middle school and to repair, replace, and upgrade HVAC in three elementary schools. They could also authorize the use of JOC for urgent repairs and rehabilitations that arose through the year, with a periodic report made to the Board reviewing the results for responsiveness, schedule, quality, use of HUB/MWBE, and cost.

Note: Section 44.035 (c) specifies that the district shall document the basis of its selection and shall make the evaluations public not later than the seventh day after the date the contract is awarded.

The Cooperative Purchasing Network has already made the evaluations public, so all that remains for the district to do is document the basis of its selection as noted above.

- These decisions should be documented and made a part of the project files. Again, we do not know how other cooperatives acquire vendors and/or contracts. What we do know is that TCPN is in compliance with state regulations. School districts must comply with the Texas Education Code (See answer # 5 above.)

§ 44.041. JOB ORDER CONTRACTS FOR FACILITIES

Become a member of The Cooperative Purchasing Network.

To access the contracts that already have been advertised with published criteria, and awarded and publicized, districts must be a member of The Cooperative Purchasing Network.

- If the entity is not a member, the Board must put the question of membership on the agenda, legally post the agenda, vote to join the cooperative and have an authorized representative sign the board's resolution approving membership.
- The action must be duly recorded in the minutes of the meeting.
- The board should then direct an authorized representative to sign the cooperative's interlocal agreement. The resolution should be attached to the signed agreement.

A sample interlocal agreement and resolution are available at
http://www.tcpn.org/Membership_Y2k.com.