

Rebuilding Texas: Sealed Proposals And Job Order Contracts

By **Brian Gaudet and Courtney Lynch** (January 24, 2018, 12:11 PM EST)

In late August of 2017, Hurricane Harvey dropped a staggering 40-61 inches of rain across southeast Texas. Individual drops of water combined to create over \$180 billion worth of estimated damages to public and private buildings and structures statewide. The federal government has committed substantial dollars toward reconstruction efforts with the promise of more dollars to follow. Many public entities will be the recipients of those federal rebuilding dollars. For members of the construction industry who plan to enter the Texas market, and for those already in the private Texas market who wish to engage in public projects, there are important aspects to know about Texas public procurement law.



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This article is the fourth in a five-part series. The first provided an overview of public procurement in Texas. The second explained how Texas public procurement statutes regulate the construction manager-agent and the construction manager-at-risk project delivery methods. The third explored the design-build delivery method.

This article explains how Texas public procurement statutes, which allow for several alternative delivery methods on public projects, regulate competitive sealed proposals and job order contracting project delivery methods.



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Competitive Sealed Proposals

When a governmental entity engages in a construction project that is associated with the construction, rehabilitation, alteration or repair of a facility (as opposed to a civil infrastructure project), the governmental entity is permitted to utilize the competitive sealed proposal project delivery method.

To initiate proposal submissions, the governmental entity prepares its “request for proposals,” that includes the construction documents, the selection criteria, the weighted value for each criterion, the estimated budget, the project scope, the estimated project completion date, and any other information that a contractor may require to adequately respond to the request.

The governmental entity must evaluate and rank each proposal, in accordance with the published selection criteria, within 45 days of publicly opening the responses to the request for proposals. The governmental entity must then select the offeror with the proposal that offers the best value for the

governmental entity based on the selection criteria and the ranking evaluation. Once selected, the governmental entity will then attempt to negotiate a contract with the selected offeror. The negotiations may include options for modifications to the scope or time allowed for the project, and any price changes associated therewith. If the governmental entity is unable to negotiate a satisfactory contract with the selected offeror, it will end the negotiations in writing and move to the offeror next in line according to the ranking of the selection criteria. This process will continue until a contract is reached or the list of offerors is exhausted.

Job Order Contracting

Job order contracting is a contracting method similar in concept to the federal indefinite delivery, indefinite quantity method, a type of contract that provides for an indefinite quantity of supplies or services during a base period of time. Public entities may use job order contracting for the maintenance, repair, alteration, renovation, remediation or minor construction of a facility when the work is of a recurring nature. The delivery times, type and quantities of work are required for an indefinite timeframe. The job order contracting method is limited to buildings that are governed by accepted building codes, or to structures on land; this method cannot be used for civil infrastructure projects. A few examples of expressly prohibited projects are: highways, roads, streets, utilities, bridges, and water and wastewater plants. The job order contracting method may not be used for buildings or structures that are incidental to a contract that is primarily a civil engineering project.

In order for a governmental entity to use the job order contracting method, the work must be of a recurring nature, the delivery times must be for an indefinite time frame, and the work must be of the type that can be awarded substantially on the basis of pre-described and pre-priced tasks. Under this method, a maximum aggregate contract price is formally set when the governmental entity advertises the proposal, and individual job orders are issued against the maximum aggregate contract price. While there is a general flexibility as to who may issue a job order, there is an absolute requirement that any job order, task order, or purchase order in excess of \$500,000 must be approved by the governing body of the governmental entity.

Due to the nature of job order contracting (indefinite quantity of supplies or services, indefinite time periods), the primary measurable element of this selection process is how each offeror establishes the contractual unit prices for the work under the job order contract. The governmental entity may identify one or more published construction unit-price books, and the entity should specify the applicable divisions of line items or the list of work items. The request will ask the offerors to propose one or more coefficients or multipliers to be applied to the price book or pre-priced work items. It is in this stage that job order contracts find the competitive selection process that is common in governmental projects.

In addition to the traditional method of job order contracting, a governmental entity may also select job order contractors using the competitive sealed proposal method discussed above. Job order contracts may be awarded to more than one job order contractor in connection with each solicitation. In fact, it is common for a public entity that uses this method to have more than one job order contractor at its disposal.

The base term for a job order contract may not exceed two years. However, the term can be renewed annually for up to three additional years. The pricing for a job order contract may be based on unit pricing, or individual unit prices be rolled into a lump sum contract based on the estimated quantities and the contractual unit pricing.

Payment and Performance Bonds

Bonds are required on an individual job order basis. Depending on the type of governmental entity that solicits the work, payment bonds are required at either the \$25,000 or \$50,000 order threshold. Performance bonds are required at the \$100,000 job order threshold.

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