

# Is it “Construction” or “Maintenance”?

Or, really, “Construction or Not Construction?”  
Why do we ask and what difference does it make?

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## Why is that the question?

### ...because then I don't need an Architect

Wrong.

(b) An architectural plan or specification, as defined by §1.210(b) of this title, for an alteration or addition to an existing building owned by a public entity shall be prepared by an Architect...or by an engineer who may practice architecture...if:

(1) the total projected building construction costs at the commencement of construction exceed \$50,000;

(2) the alteration or addition requires the removal, relocation, or addition of a wall or partition or the alteration or addition of an exit; [.]

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## Why is that the question?

### ...because then I don't need an Engineer

Wrong.

Sec. 1001.407. CONSTRUCTION OF CERTAIN PUBLIC WORKS. The state or a political subdivision of the state may not construct a **public work involving engineering**...unless:

- (1) the engineering plans, specifications, and estimates have been prepared by an engineer; and
- (2) the engineering construction is to be performed under the direct supervision of an engineer.

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## Why is that the question?

### ...because then I don't need Bonds

Wrong.

Sec. 2253.021. PERFORMANCE AND PAYMENT BONDS REQUIRED. (a) A governmental entity that makes a **public work contract** with a prime contractor shall require the contractor, before beginning the work, to execute to the governmental entity:

- (1) a performance bond if the contract is in excess of \$100,000; and
- (2) a payment bond if:
  - (A) the contract is in excess of \$25,000

Sec. 2253.001

(4) "Public work contract" means a contract for **constructing, altering, or repairing** a public building or carrying out or completing **any public work**.

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## Bonds - "Public Work"

### So, what's a "public work"?

Sec. 2253.001

(4) "Public work contract" means a contract for constructing, altering, or repairing a public building or carrying out or completing any public work.

*LA Ash, Inc. v. Tex. A & M Univ.* (Waco Court of Appeals 2008):

Supplier sued Aggies because contractor on a pond-cleanup project didn't pay.

"The contract between A & M and EOG to clean up the pond was for the performance of a service, not the construction or installation of a fixture."

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## Why is that the question?

### ...because then I don't need a Prevailing Wage

Okay—maybe the right question...sorta...

Sec. 2258.002. APPLICABILITY OF CHAPTER TO PUBLIC WORKS. (a) This chapter applies only 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, without regard to whether the work is done under public supervision or direction.

Sec. 2258.021. RIGHT TO BE PAID PREVAILING WAGE RATES. (a) A worker employed on a public work by or on behalf of the state or a political subdivision of the state shall be paid:

- (1) not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the work is performed; and
- (2) not less than the general prevailing rate of per diem wages for legal holiday and overtime work.

(b) Subsection (a) does not apply to maintenance work.

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## The real reason to ask this question:

### Chapter 2269, Texas Government Code: **Contracting and Delivery Procedures for Construction Projects**

- Does my procurement need to comply?

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## Basics

- Texas Education Code section 44.031 is the starting point for school procurement
  - \$50,000 threshold
  - All contracts for goods or services (except fuel/produce)
  - Prescribed methods
  - Criteria
  - Emergency exception

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## Ed Code 44.031 methods

- (1) competitive bidding for services **other than construction services**;
- (2) competitive sealed proposals for services **other than construction services**;
- (3) a request for proposals, for services **other than construction services**;
- (4) an interlocal contract;
- (5) a method provided by Chapter 2269, Government Code, for construction services**;
- (6) the reverse auction procedure as defined by Section 2155.062(d), Government Code; or
- (7) the formation of a political subdivision corporation under Section 304.001, Local Government Code.

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## Gov't Code 2269

- Chapter 2269 exists independently of Education Code 44.031
- Largely, but not entirely, supplants 44.031 for construction
- “for construction services”

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## Okay, so what are “construction services?”

- Let’s look at what 44.031 says



Nothing!

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## Okay, so what are “construction services”?

- Where else can we look?
- Chapter 2269:
  - “Public work contract” means a contract for constructing, altering, or repairing a public building or carrying out or completing any public work.
- “...or completing any public work.”

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# Construction/Public Work

- *LA Ash, Inc.*: In viewing the caselaw, we know that a public-work contract does not include all contracts entered into by a governmental entity. A “public work” in the McGregor Act has been limited to traditional construction projects involving the development or repair of a building.
  - Buildings
  - Precast concrete above-ground storage tank and accessories
  - water supply system and treatment plant
- “The contract between A & M and EOG to clean up the pond was for the performance of a service, not the construction or installation of a fixture.”
- The materials that IDS purchased from LA Ash were incident to the service EOG was providing to Texas A & M. The materials were not used for the “construction” or “repair” of a public building or public work because they were not used for the repair or improvements of a public building.

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## Question: What do the laws say about “maintenance”?

- Education Code 44.031(b): Except as provided by this subchapter, in determining to whom to award a contract, the district shall consider:
  - (8) for a contract for goods and services, **other than** goods and services related to telecommunications and information services, **building construction and maintenance**, or instructional materials, whether the vendor or the vendor's ultimate parent company or majority owner:
    - (A) has its principal place of business in this state; or
    - (B) employs at least 500 persons in this state;

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## Question: What do the laws say about "maintenance"?

- Gov't Code 2269.401. JOB ORDER CONTRACTING. In this chapter, "job order contracting" is a procurement method used for 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.
- Gov't Code 2269.403. REQUIREMENTS FOR JOB ORDER CONTRACTS FOR FACILITIES. (a) A governmental entity may award job order contracts for the maintenance, repair, alteration, renovation, remediation, or minor construction of a facility if:
  - (1) the work is of a recurring nature but the delivery times are indefinite; and
  - (2) indefinite quantities and orders are awarded substantially on the basis of prescribed and prepriced tasks.

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## Other contexts

Code of Federal Regulations  
Title 48. Federal Acquisition Regulations System  
Chapter 2. Defense Acquisition Regulations System, Department of Defense (Refs & Ann)  
Subchapter D. Socioeconomic Programs  
Part 222. Application of Labor Laws to Government Acquisitions (Refs & Annos)  
    ▣ Subpart 222.4. Labor Standards for Contracts Involving Construction  
        ▣ 222.402 Applicability.

- This is just an example from a completely different context.
- Do not rely on this for your own projects.

- (d) *Repairs versus maintenance.* Some contract work may be characterized as either Construction Wage Rate Requirements painting/repairs or Service Contract Labor Standards maintenance. For example, replacing broken windows, spot painting, or minor patching of a wall could be covered by either the Construction Wage Rate Requirements or the Service Contract Labor Standards. In those instances where a contract service call or order requires construction trade skills (i.e., carpenter, plumber, painter, etc.), but it is unclear whether the work required is Service Contract Labor Standards maintenance or Construction Wage Rate Requirements painting/repairs, apply the following rules:
  - (1) Individual service calls or orders which will require a total of 32 or more work-hours to perform shall be considered to be repair work subject to the Construction Wage Rate Requirements.
  - (2) Individual service calls or orders which will require less than 32 work-hours to perform shall be considered to be maintenance subject to the Service Contract Labor Standards.
  - (3) Painting work of 200 square feet or more to be performed under an individual service call or order shall be considered to be subject to the Construction Wage Rate Requirements statute regardless of the total work-hours required.

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## Other contexts

### Role of the Comptroller General

The Comptroller General of the United States heads the Government Accountability Office (GAO), an agency within the legislative branch of the federal government. The Comptroller General is appointed by the President of the United States with the advice and consent of the Senate. When a vacancy occurs in the office of the Comptroller General, the Congress establishes a bipartisan, bicameral commission to recommend individuals to the President. The Comptroller General's term of office is set statutorily at 15 years and he is not eligible for reappointment.

- This is just an example from a completely different context.
- Do not rely on this for your own projects.

### DECISION

Four Star Maintenance protests invitation for bids (IFB) No. DAFK01-87-B-0081, issued by the Department of the Army for painting, flooring, maintenance and repair of military family housing at the Presidio of San Francisco, Fort Baker, Fort Barry, and Fort Mason, California. We deny the protest.

In this regard, the determination of whether items of work involve basic maintenance within the coverage of the Service Contract Act, or are more in the nature of construction, alteration, or repair within the scope of the Davis-Bacon Act, is **largely a matter of judgment.**

*Four Star Maint.*, B- 229703 (Comp. Gen. Apr. 7, 1988)

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## So, what's the bottom line?

- “Maintenance” doesn’t *really* have a role.
- Even for JOCs, the statute lumps maintenance in with “repair, alteration, renovation, remediation, or minor construction”
- **The real question is “construction services” vs. not “construction services.**

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## Let's Talk Through Some Examples

- Fixing an RTU
- Replacing an RTU
- Painting hallways
- Painting lines on football field
- Patching sheetrock
- Installing security cameras
- Replacing carpet

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## Differences in Procuring Construction vs. Non-construction

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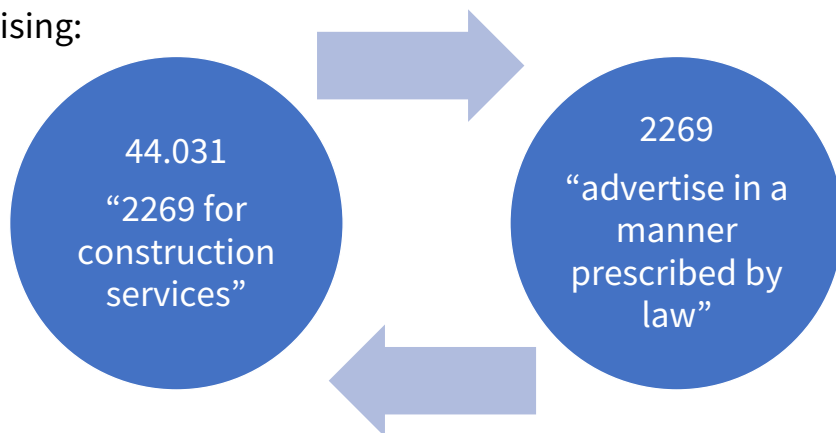
## Which law applies?

- Everything starts at 44.031
- \$50,000 or more? Then the only question is whether you get kicked over into 2269 or not.
- Less than \$50,000? Neither 44.031 nor 2269 applies

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## Advertising

- This requirement is the same
- For advertising:



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## Selection

- Non-construction services
  - But see § 44.031
- Construction services

(b) Except as provided by this subchapter, in determining to whom to award a contract, the district shall 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 underutilized businesses;
- (7) the total long-term cost to the district to acquire the vendor's goods or services;
- (8) for a contract for goods and services, other than goods and services related to telecommunications and information services, building construction and maintenance, or instructional materials, whether the vendor or the vendor's ultimate parent company or majority owner:
  - (A) has its principal place of business in this state; or
  - (B) employs at least 500 persons in this state; and
- (9) any other relevant factor specifically listed in the request for bids or proposals.

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## Methods

- For “construction services”: 2269 delivery methods
- Not for “construction services”: 44.031 lists methods that are less detailed than 2269:
  - (1) competitive bidding for services other than construction services;
  - (2) competitive sealed proposals for services other than construction services;
  - (3) a request for proposals, for services other than construction services;
  - (4) an interlocal contract;
  - (5) a method provided by Chapter 2269, Government Code, for construction services;
  - (6) the reverse auction procedure as defined by Section 2155.062(d), Government Code; or
  - (7) the formation of a political subdivision corporation under Section 304.001, Local Government Code.

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## Non-Construction Competitive Bidding

- Bids may be opened only by the Board at a public meeting or by an officer or employee of the District at or in a District office.
- A bid that has been opened may not be changed for the purpose of correcting an error in the bid price (subject to withdrawal for material mistake).
- May reject any and all bids.
- Want to consider safety record?
  - Board must adopt a written definition and criteria for accurately determining the safety record of a bidder;
  - Must give notice in bid specs
  - Must not be arbitrary and capricious

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## Non-Construction Competitive Bidding

- A school district **shall** award a competitively bid contract **at the bid amount** to the bidder offering the **best value** for the district. In determining the best value for the district, the district is not restricted to considering price alone but may consider any other factors **stated in the selection criteria**. The selection criteria may include the factors listed in Section 44.031(b).
- Contrast with Competitive Bidding for construction:
  - In this chapter, "competitive bidding" is a procurement method by which a governmental entity contracts with a contractor for the construction, alteration, rehabilitation, or repair of a facility by awarding the contract to the **lowest responsible bidder**.

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## Non-Construction CSP

- Prepare RFP
- State Selection Criteria to determine best value
  - Relative weights?
- Publicly open and read aloud names and prices
- Rank within 45 days
- Negotiate with #1
  - May discuss scope/time modifications and related price changes

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## Non-Construction Request for Proposals

- Remember: we're talking about RFP the procurement method, not RFP the instrument
- Now, let's look at the statutory rules for the RFP procurement method:

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## Statutory Rules for RFP Procurement Method



(just the standard 44.031 things like advertising, criteria to consider, etc.)

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## Non-construction Interlocal Contract

- No different than Construction, except for the certification requirement, which only applies to “construction-related goods or services” when buying through a purchasing cooperative

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## For the sake of completeness

- Remaining two methods under 44.031
  - (6) the reverse auction procedure as defined by Section 2155.062(d), Government Code; or
  - (7) the formation of a political subdivision corporation under Section 304.001, Local Government Code.

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## Non-Construction Methods: Which is Best?

- That depends, but RFP (the method) gives you the most flexibility and fewest restrictions on negotiation/bargaining



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## Non-construction methods: who picks?

- Check your CH (LOCAL) policy
- Make sure you can point to something concrete to demonstrate the method used
- QUESTION: How does this contrast with construction procurement?

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## Comparing Methods

### Non-Construction CSP

- Select Method
- Advertise
- State selection criteria
- Publicly open
- Rank within 45 days
- Negotiate

### Construction CSP

- Formally select CSP as method
- Select A/E to prepare construction documents\*\*\*
- Advertise
- State selection criteria and weights
- Publicly Open
- Rank within 45 days
- Negotiate

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# Comparing Methods

## Non-Construction RFP

- Select Method
- Advertise
- Consider statutory criteria
- Open negotiation

## Construction CSP

- Formally select CSP as method
- Select A/E to prepare construction documents\*\*\*
- Advertise
- State selection criteria and weights
- Publicly Open
- Rank within 45 days
- Negotiate

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# Remember

- Whether you classify as “construction” and follow 2269, or non-construction and follow 44.031, you still have to comply with:
  - Advertising
  - Competition
  - Required contract provisions

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## So, what's the benefit to classifying as "Not Construction"?

You have to run a procurement process anyway (assuming over \$50k)...why not just do a Construction CSP? Is it really that different?

- In one respect, yes: "shall" select A/E
- Next best option to just treat it as "construction" ?
- JOC

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# Questions?

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The information in this handout was prepared by Eichelbaum Wardell  
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