

JOB ORDER CONTRACTING

LEGAL

VS

OPERATIONAL

PERSPECTIVE

LEGAL PERSPECTIVE

General Powers and Duties of Government Code 2269

Government Code 2269, Subchapter B, General Powers & Duties

Section Description	Section Number
Rules	.051
Notice Requirements	.052
Delegation of Authority	.053
Right to Work	.054
Criteria to Consider (when determining award of a contract)	.055

Government Code 2269, Subchapter B, General Powers & Duties

Section Description	Section Number
Using Method Other Than Competitive Bidding for Construction Services; Evaluation of Proposals; Criteria	.056
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LEGAL PERSPECTIVE

Job Order Contracting Provisions of Government Code 2269

Government Code 2269, Subchapter I, Section .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.

Government Code 2269, Subchapter I, Section .402 Applicability of Subchapter to Buildings, Exceptions

This subchapter 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. This subchapter does not apply to:

- (1) 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
- (2) a building or structure that is incidental to a project that is primarily a civil engineering construction project.

Government Code 2269, Subchapter I, Section .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.

(b) The governmental entity shall establish the maximum aggregate contract price when it advertises the proposal.

(c) The governing body of a governmental entity shall approve each job, task, or purchase order that exceeds \$500,000

Government Code 2269, Subchapter I, Section .404 Contractual Unit Prices

The governmental entity 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 propose one or more coefficients or multipliers to be applied to the price book or prepriced work items as the price proposal.

Government Code 2269, Subchapter I, Section .405 Competitive Sealed Proposal Method

- (a) A governmental entity may use the competitive sealed proposal method under Subchapter D for job order contracts.
- (b) The governmental entity shall advertise for, receive, and publicly open sealed proposals for job order contracts.
- (c) The governmental entity may require offerors to submit information in addition to rates, including experience, past performance, and proposed personnel and methodology.

Government Code 2269, Subchapter I, Section .406 Awarding of Job Order Contracts

The governmental entity may award job order contracts to one or more job order contractors in connection with each solicitation of proposals.

Government Code 2269, Subchapter I, Section .407 Use of Job Order Contract

A job order contract may be used to accomplish work only for the governmental entity that awards the contract unless:

- (1) the solicitation for the job order contract and the contract specifically provide for use by other persons; or
- (2) the governmental entity enters into an interlocal agreement that provides otherwise.

Government Code 2269, Subchapter I, Section .408 Use of Architect or Engineer

(a) If a job order contract or an order issued under the contract requires architectural or engineering services that constitute the practice of architecture within the meaning of Chapter [1051](#), Occupations Code, or the practice of engineering within the meaning of Chapter [1001](#), Occupations Code, the governmental entity shall select or designate an architect or engineer to prepare the construction documents for the project.

(b) Subsection (a) does not apply to a job order contract or an order issued under the contract for industrialized housing, industrialized buildings, or relocatable educational facilities subject to and approved under Chapter [1202](#), Occupations Code, if the contractor employs the services of an architect or engineer who approves the documents for the project.

Government Code 2269, Subchapter I, Section .409 Job Order Contract Term

The base term for a job order contract may not exceed two years. The governmental entity may renew the contract annually for not more than three additional years.

Government Code 2269, Subchapter I, Section .410 Job Orders

a) An order for a job or project under a job order contract must be signed by the governmental entity's representative and the contractor.

(b) The order may be:

(1) a fixed price, lump-sum contract based substantially on contractual unit pricing applied to estimated quantities; or

(2) a unit price order based on the quantities and line items delivered.

Government Code 2269, Subchapter I, Section .411 Payment and Performance Bonds

The contractor shall provide payment and performance bonds, if required by law, based on the amount or estimated amount of any order.

Government Code 2269, Subchapter J

Section Description	Section Number
Void Contract	.451
Declaratory or Injunctive Relief	.452

OPERATIONAL PERSPECTIVE

**Observations from Four Job Order
Contract Audits**

Auditor Recommended Best Practices

- Negotiating individual projects is critical to ensuring quality work at fair and reasonable prices.
- You should establish guidelines for evaluating and negotiating Job Order Contract proposals.
- Place limits (caps) on the use of non-catalog items.

Auditor Recommended Best Practices

- Proposals should be reviewed and priced by an independent source aside from the project manager and contractor, creating a mechanism to gauge whether the contractor's proposals are reasonable (there was concern about the pricing awarded being too low and therefore causing change orders or job stoppage).

Auditor Recommended Best Practices

- Develop specific training academies or programs that provide skills needed specifically for managing JOC projects and your entity's policies and procedures.
- Provide a detailed scope of work (SOW), which should serve as the roadmap for the JOC contractor to build an accurate and thorough cost proposal that meets the needs of your entity.

Auditor Recommended Best Practices

- Ensure procurement internal control processes are well designed, rigorous and consistent (there should be no conflicting T&Cs).
- Use a standard sign-off and checklists to capture requirements.
- If low bid is not selected, have a document separate from the scoring sheets with a thorough explanation.

Auditor Recommended Best Practices

- Have a succession plan for turnover (lost of an experienced player in middle of the process may have a serious impact on the project).
- Rotate duties occasionally (to help avoid the above).
- Provide more staff training as the need is identified.

Examples of Auditor Findings

- **Policy and Procedure**
- No formal policies, procedures or guidelines over the program, creating inconsistencies in project management and documentation (even though JOC had been in use for 13 years).
- No policy establishing JOC program purpose – to provide guidance to staff.

Examples of Auditor Findings

- **Scope of Work**
- Beginning with the project proposals – the scope was vague and there was not enough detail to determine if contractor pricing was appropriate.
- Poorly designed SOWs which can result in numerous change orders and cost overruns.

Examples of Auditor Findings

- **Subcontractors**
- Subcontractor selection requirements were not enforced.
- Staff did not compare the subcontractors used to those submitted in the proposal.

Examples of Auditor Findings

- **Approvals**
- Some required approvals were not obtained.
- Did not always ensure required reviews and approvals were obtained for contractor pay requests.

Examples of Auditor Findings

- **Split Requirement to Avoid Dollar Limits**
- Project appeared to have been split to bypass individual job order limits (two separate findings in two separate entity audits).
- JOC program is being used to bypass the lengthy traditional procurement process so that projects can be pushed along quickly, regardless of size or type, and without considering if JOC is the best option.

Examples of Auditor Findings

- **Cost Controls**

- More effective cost controls are needed during the project delivery phase.
- Excessive use of non-catalog items.
- High use of non-pre-priced items. Auditor reviewed 40 projects. For 8 of those the non-pre-priced items equaled the majority of total contract costs.

Examples of Auditor Findings

- **Process Controls**

- Significant systemic lack of controls over all key areas of the process, creating an environment that is highly vulnerable to fraud.
- Excessive Access to Files. Individuals had access to project files and could add, delete, change – some were subcontractors – some were employees no longer with the entity
- SOW did not say how late or incomplete proposals would be handled causing subjective interpretation on a case-by-case basis.

Examples of Auditor Findings

Process Controls

- Surety for bonds and insurance was not properly evaluated. There were 13 awards and only 6 furnished their bonding /insurance compliance with their responses. The other 7 were awarded without this information.
- No fact check process for vendor representations.
- Did not promptly and consistently inspect JOC projects.
- Lacked sufficient oversight to ensure program effectiveness.

Examples of Auditor Findings

Evaluations

- No Evaluation of Subcontractors (Subcontractors perform the majority of the work on JOC projects).
- Found examples of companies being selected even though they had the highest prices and appeared to fall short of other requirements; other vendors were not selected despite appearing to meet the criteria.
- Criticized the entity for not maintaining documentation to back up the selections.

Examples of Auditor Findings

Evaluations

- Evaluation committee did not receive proposals until the day all met. All 21 was evaluated by the group in one day.
- The audit report said that a fast review process and no back-up documentation to support the scoring of the bids "can cause one to doubt the integrity of the process and impact public confidence".
- Entity had a board policy of weighting pricing at 45% for competitive sealed proposals. Pricing was weighted to 30% - violating board policy.

Examples of Auditor Findings

Response/Contract Requirements

- Did not effectively ensure the required performance and payment bonds were provided.
- Did not review insurance received for compliance.

Examples of Auditor Findings

- **Reporting**
- Relatively no internal program reporting.
- No formalized reporting.
- No required or comprehensive reporting of key project information to the JOC program supervisor or other Department management.

Examples of Auditor Findings

Vendor Evaluations

- Did not use vendor evaluations as a basis to be better able to award or not for future projects.

Examples of Auditor Findings

Documentation/Records

- Improved records retention practices and contract documentation can improve efficiency and consistency of contract administration.
- No formal project Close Out procedure.
- Did not document contractor selection decisions (this was per project – not for master award).

Examples of Auditor Findings

Conflict of Interest

- Some contracted firms provide a variety of services that could lead to a Conflict of Interest.
- Relies on outside consultants to fill many of the project manager positions but provided little direct oversight to their activities. Would not know if consultant was personally benefiting or if inappropriate activities were taking place.

Examples of Auditor Findings

Conflict of Interest

- Vendor Conflict of Interest - During the audit, the entity's account manager held a contractor's license which was being used by a local construction company. This information was held in secrecy and was not disclosed by the account manager to the entity or to his employer. Given the lack of information and documentation held by the entity on subcontractors, it is unknown if this company was functioning as a subcontractor within the JOC program. If this was the case, there would have been the potential for this person to personally benefit from increased project costs.

Examples of Auditor Findings

Conflict of Interest

- Project where the consultant, acting as project manager, reported directly to another consultant instead of reporting directly to the JOC program manager.
- There are no JOC program controls to monitor or prevent multiple consultants from one consulting firm working in different capacities on the same project.
- 64% of project managers were consultants, many of them former employees (in this instance, there was a shortage of entity employees to manage high volume of projects, so consultants were hired).

THANK YOU

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JOC Audits Reviewed

Audits of JOC projects for the following entities were reviewed for the comments included in this presentation:

- City of Scottsdale, Arizona, June 2018
- City of Long Beach, California, May 2016
- Houston ISD, May 2015
- County of San Francisco, California, April 2015