

Maintenance and Operations: Navigating COVID-19 Issues

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Are Purchases Still “Emergency” Purchases?

Even if your Board adopted an emergency Resolution suspending state procurement requirements, you still must be able to satisfy the emergency test:

The delays posed by using a formal competitive procurement process would substantially impair or delay the conduct of classes or other essential operations

- ▶ This may not be true anymore now that needs are foreseeable
- ▶ Solution: Conduct a procurement or use a purchasing cooperative

Types of Purchases

- ▶ **Goods**
 - ▶ PPE
 - ▶ Cleaning and disinfecting supplies
 - ▶ Software and materials to support virtual learning and operations
 - ▶ Technology hardware (laptops, tablets)
 - ▶ Special HVAC HEPA filters
- ▶ **Non-Construction Services**
 - ▶ Cleaning and disinfecting
 - ▶ Filter replacement
 - ▶ Screening services (exempted from procurement through TEA)
 - ▶ Contact tracing services
 - ▶ Student and staff support services and training
- ▶ **Goods and non-construction services do not require bonds or prevailing wages**

Non-Construction (and Maintenance) vs. Construction

Factors to determine whether a project constitutes maintenance or construction:

- ▶ Whether you are making like-for-like replacements
- ▶ The scale and complexity of the project, including the amount of time and material required to complete the job
- ▶ The physical size of the object being worked on
 - OSHA Letter to Raymond Knobb (11/18/2003)

Definition of Maintenance

- ▶ According to the Texas Attorney General:
 - ▶ ordinary upkeep
 - ▶ repairs necessary to preserve something in good condition
 - ▶ to “keep up, keep from change; preserve”
 - ▶ includes “ordinary repairs necessary and proper from time to time for that purpose”
- ▶ If you are upgrading or installing or constructing something new that did not previously exist, it cannot be maintenance

“Like for Like”

- ▶ Equal in grade, quality and capacity,
- ▶ Without the addition of any new or upgraded components, appurtenances, features or functions

Even if it is “like for like,” do not forget to also consider:

- ▶ The scale and complexity of the project, including the amount of time and material required to complete the job (i.e. HVAC equipment replacements)
- ▶ The physical size of the object being worked on (i.e., entire roof replacements, turf replacements would not likely be maintenance)

Definition of Public Work Construction

Texas Government Code

- ▶ A Public Work Contract is defined as:
 - ▶ “...a contract for constructing, altering, or repairing a public building or carrying out or completing any public work.”
- ▶ “Public work labor” is defined as:
 - ▶ “...labor used directly to carry out a public work.”

Tex. Gov’t Code § 2253.001(4)-(6)

- ▶ 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).

If Seeking Federal Reimbursement

- FEMA prohibits use of out-of-state cooperatives
- Cooperative must be able to show that its procurement was compliant with 2 CFR Part 200
- FEMA requires multiple quotes when using cooperative vendors
- District should verify all documentation, including required 2 CFR Part 200 and DHS/FEMA contract provisions
- No cost-plus contracts (must have set unit prices or lump sum contracts)
- Must show that MWBEs were considered and given opportunity

Cleaning and Disinfecting Protocols

- ▶ Refer to CDC guidelines for disinfecting public schools
 - ▶ EPA approved list of disinfectant products
 - ▶ Diluted household bleach solution containing 5.25%-8.25% sodium hypochlorite
- ▶ TCEQ characterizes used PPE and cleaning and disinfection waste (rags, containers) as standard solid waste
 - ▶ Not hazardous waste
 - ▶ Not medical waste
- ▶ This is true even if cleaning after confirmed cases
- ▶ TCEQ recommends “double bagging” suspected or known contaminated PPE or waste

Construction Project Considerations

Cost Uncertainty

Problem:

- ❖ Concern about material cost increases and shortages
- ❖ Potential and unpredictable impacts on labor forces and need for overtime and acceleration

Solutions:

- ❖ Create dedicated allowances for fluctuating items (i.e., lumber)
- ❖ Adjust budgets and manage expectations

Schedule Uncertainty

Problem:

- ❖ Workers may become infected, may be required to quarantine or supply chain issues delay critical materials and equipment
- ❖ Contractors are concerned about breaches and liquidated damages
- ❖ Owners unsure what delays are truly COVID-related

Solutions:

- ❖ Require prompt notice and separate tracking of COVID-19 related delays with schedule updates
- ❖ Adjust deadlines, lead time and manage expectations

Preventing Claim Abuse

- ❖ Contractors should be advised to:
 - ❖ Submit frequent schedule updates
 - ❖ Collect and submit staffing plans reports from subs
 - ❖ Submit updates from material suppliers
 - ❖ Submit cost data as incurred
- ❖ Owners, Architects and Program Managers need to review and respond to documentation and claims promptly and on an ongoing basis
- ❖ **Do not wait until the end of the project!**
- ❖ Avoid lump sum cost increase requests; verify and pay as you go from allowance/contingency funds or with change orders

Controls for Upcoming Projects

- ❖ What was initially unforeseeable is now foreseeable
 - ❖ Screening measures, PPE, workforce distancing, staggered shifts should be contemplated in Owner's budgets and contractor proposals and schedules for foreseeable future
- ❖ Commit to use allowances/contingency to keep “fear factor” out of lump sum bid costs
- ❖ Consider a COVID contract addendum to dictate protocols for tracking and reporting
- ❖ Consider separate long lead purchases to mitigate against material/equipment delays and cost increases

Vendors Safety Plans

- ❖ Even where District implements safety requirements, Vendors are contractually responsible for job site safety and employee protocols
- ❖ All contractors should submit safety plans addressing COVID-19 measures, notification procedures
- ❖ Owners should be careful not to “direct” worker safety procedures or means and methods
- ❖ If screening and PPE measures increase the vendor’s general conditions costs, review costs and consider use of an allowance (or contingency) to process and audit additional costs

QUESTIONS?

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