

Emergency Procurement During Severe Winter Weather

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Tex. Educ. Code § 44.031 Purchasing Contracts

Tex. Educ. Code § 44.031(h)



(h) If school equipment or a part of a school facility or personal property is destroyed or severely damaged or, as a result of an unforeseen catastrophe or emergency, undergoes major operational or structural failure, and the board of trustees determines that the delay posed by the methods provided for in this section would prevent or substantially impair the conduct of classes or other essential school activities, then **contracts for the replacement or repair of the equipment or the part of the school facility may be made by methods other than those required by this section.**



Tex. Educ. Code § 44.031(h)

- ▶ The board is not required to use one of the regular purchasing methods required by law to contract for replacing or repairing the damage.
- ▶ The board may employ the contracting method best suited for the district's needs.
- ▶ Rely on this provision only in the case of a **true emergency**.
- ▶ The district still must comply with performance and payment bond requirements.
 - ▶ Payment bonds are required for construction projects > \$25K
 - ▶ Performance bonds are required for construction projects > \$100K

Tex. Educ. Code § 44.031(h)



The statute is limited to purchases made with state and local funds. Procurement with federal funds must be done in accordance with federal law (2 CFR 200) and guidance from Federal Emergency Management Agency (FEMA). School districts are eligible to receive public assistance reimbursement from **FEMA** for **eligible disaster recovery expenses**. If using **FEMA** funds for procurement, see compliance rules below:

- ▶ FEMA Assistance for Governments and Private Non-Profits After a Disaster:
<https://www.fema.gov/assistance/public>
- ▶ FEMA Contracting with Federal Funds for Goods and Services Before, During and After Disasters:
<https://www.fema.gov/grants/procurement>
- ▶ Field Manual Procurement Disaster Assistance Team (PDAT):
https://www.fema.gov/sites/default/files/2020-07/fema_procurement_field-manual_2019.pdf
- ▶ FEMA Public Assistance; Reasonable Cost Evaluation: https://www.fema.gov/sites/default/files/2020-07/fema_pa_reasonable-cost-evaluation-job-aid.pdf
- ▶ FEMA Contract Provisions Template: https://www.fema.gov/sites/default/files/2020-07/fema_pdat_contract-provisions-template.pdf
- ▶ FEMA Checklist for Reviewing Procurements Under Grants by Non-Federal Entities:
https://www.fema.gov/sites/default/files/2020-07/fema_pdat_procurement-checklist.pdf

Tex. Educ. Code § 44.0312
Delegation

Tex. Educ. Code § 44.0312(c)



(c) Notwithstanding any other provision of this code, in the event of a catastrophe, emergency, or natural disaster affecting a school district, **the board of trustees of the district may delegate to the superintendent or designated person the authority to contract for the replacement, construction, or repair of school equipment or facilities** under this subchapter **if emergency replacement, construction, or repair is necessary for the health and safety of district students and staff.**

- ▶ Many boards have implemented such a delegation by provisions contained in Board Policies CH and CV (LOCAL).

Tex. Educ. Code § 44.006 Effect of Adopted Budget; Amendments



Tex. Educ. Code § 44.006

TEC § 44.006 addresses the amendment of existing budgets and the adoption of supplementary budgets:

- ▶ (a) Public funds of the school district may not be spent in any manner other than as provided for in the budget adopted by the board of trustees, but the board may amend a budget or adopt a supplementary emergency budget to cover necessary unforeseen expenses.
- ▶ (b) Any amendment or supplementary budget must be prepared and filed according to rules adopted by the State Board of Education.

Emergency Procurement Checklist

Construction Services



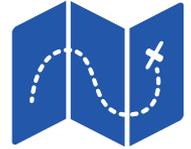
When contracting for construction services, the school board must:

- ▶ Select the construction deliver method—e.g., job order contracting
- ▶ Select independent design professionals: Architects or Engineers
 - ▶ **Architects:** required for renovations/repairs to buildings costing \$50,000; for new buildings, \$100,000.
 - ▶ **Engineers:** required for projects that include electrical or mechanical work that cost \$8,000; for projects that cost \$20,000 without electrical or mechanical work.
- ▶ Make any delegations of authority to staff or others for the construction procurement process.
- ▶ Get proper payment and performance bonds, workers compensation documentation, and general liability and other insurance certificates for any project.
- ▶ Work with your attorney to draft and review contracts for construction work.
- ▶ Review and follow **Board Policies CV and CH (LOCAL)**.

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Resolution of the Board

Adopting a Board Resolution



It is recommended that the board adopt a resolution identifying the emergency and declaring that the delay posed by the procurement methods specified in Tex. Educ. Code § 44.031(h) would prevent or substantially impair the conduct of classes or other essential school activities. The resolution should:

- ▶ Cover any contracts necessary for remediation or restoration of buildings, as well as contracts for repair or replacement of essential school equipment and personal property (i.e., vehicles, technology, supplies, etc.)
- ▶ Authorize the superintendent to procure, negotiate, and execute contracts as necessary to implement disaster restoration and resume the conduct of classes and other essential school activities
- ▶ State that the superintendent will report the nature and amount of the contracts to the board at the regular meeting following such contract(s)
 - ▶ The board may, but will not be required to, take action to ratify such contracts if the resolution also delegates authority to negotiate and execute the contracts

Sample Public Notice



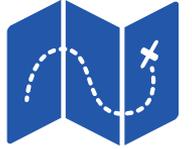
Notice is hereby given pursuant to Texas Government Code Sections 551.125 and 551.045 that due to damage caused by Hurricane/Tropical Storm _____, an Emergency Meeting of the Board of Trustees of the _____ Independent School District will be held on _____, 2021, beginning at _____ [time] at _____ [location].

- 1. Deliberate emergency remediation/repairs to District facilities and/or equipment.*
- 2. Consider adoption of resolution declaring emergency under Texas Education Code Section 44.031(h) due to catastrophic weather and delegating authority to Superintendent to procure goods and services necessary to repair and remediate storm damage.*
- 3. Consider adoption of resolution regarding wage payments during emergency school closings.*
- 4. Consider budget amendment(s).*

An emergency or urgent public necessity exists that requires immediate action of the Board or an imminent threat to public health and safety or a reasonably unforeseeable situation exists, as follows: The damage caused by Hurricane/Tropical Storm _____ to District facilities and equipment.

If, during the course of the meeting, discussion of any item on the agenda should be held in a closed meeting, the board will conduct a closed meeting in accordance with the Texas Open Meetings Act, Government Code, Chapter 551, Subchapters D and E or Texas Government Code section 418.183(f). Before any closed meeting is convened, the presiding officer will publicly identify the section or sections of the Act authorizing the closed meeting. All final votes, actions, or decisions will be taken in open meeting. [See BEC(LEGAL)]

Meeting by Telephone



- An emergency meeting can be held by telephone conference if the convening of a quorum at one location is difficult or impossible.
- Except for a lawfully authorized closed session, the telephone conference must be audible to the public at the location noticed for the meeting and must allow for two-way communications
- The telephone conference must be audio recorded and made available to the public
- Parties to the telephone conference should identify themselves before speaking

What if a Quorum is Unavailable?



A quorum is NOT required for a board to act if:

- 1) the district's jurisdiction is wholly or partly located in the area of a disaster declared by the president of the United States or the governor; and
- 2) a majority of the members of the board are unable to be present at a board meeting as a result of the disaster.

Tex. Gov't Code § 418.1102

Texas Division of Emergency Management (TDEM)



Operations Technology

- ▶ TDEM Hub Portal: <https://portal.tdem.texas.gov>
- ▶ Email: support@tdem.texas.gov
- ▶ Phone: (512) 424-5333
- ▶ Texas Disaster Impacts Field-Reporting Tool
 - ▶ <https://survey123.arcgis.com/share/9960a862346147ae918ba7a62dbfd50a>
 - ▶ Reporting damage to Emergency Management is a voluntary activity, is not a substitute for reporting damage to your insurance agency, and does not guarantee disaster relief assistance.

TDEM Questions?

Texas Division of Emergency Management
Questions, Technology
(512) 424- 5333 / support@tdem.Texas.gov

Thanks! Questions?

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Major Storm Recovery Procurement Checklist for Texas Governmental Entities

1. Remember to take pictures of everything prior to cleanup and document all work and emergency replacements and restoration.
2. When contracting with a restoration company, remember that any “build back” of destroyed facilities must be done through a contract that was procured under Texas Gov’t Code § 2269 (TGC 2269).
3. Restoration of existing damaged goods and building that does not require “build back” such as drying water extraction, etc. is not “build back”. Painting something that previously existed in its current form and was painted before, is a maintenance and not construction, but replacement of walls, floors, trim, HVAC, electrical, etc. that is damaged is construction and must follow TGC 2269. The legislature, in drafting TGC 2269 anticipated these emergency needs by including Job Order Contracting (JOC) as a delivery method and by utilizing TIPS JOC contractors, you can be on your way to recovery quickly.

When contracting for construction services, the governing board, such as the Board of Trustees or council must:

4. Select the construction delivery method (such as JOC or any of the methods provided in TGC 2269)
5. Select independent design professionals Architects or Engineers as appropriate. DO NOT let the contractor provide these services. (Architects are required for renovations/repairs to buildings costing \$50,000, for new buildings, \$100,000. Engineers are required for projects that include electrical or mechanical work that costs \$8000 and if no electrical or mechanical any project of \$20,000) This is a basic explanation and there are more complex rules in determining the need for independent design professionals.
6. Determine the Prevailing Wage Rate, (typically Davis-Bacon rates for the geographic area of the construction and required by FEMA, Texas law provides for an alternative method but Davis-Bacon is most common)
7. Make any delegations of authority to staff or others for the construction procurement process.
8. Be sure to get proper payment and performance bonds, workers compensation documentation and general liability and other insurance certificates for any project.
9. Work with your attorney to draft and review contracts for construction work.
10. Do not forget the Form 1295 –See <https://www.ethics.state.tx.us/filinginfo/1295/>
11. Get certification of compliance with Texas Gov’t Code 2270 relating to Israel. See <https://comptroller.texas.gov/purchasing/publications/divestment.php>
12. Make sure your contract provides that any choice of law and venue clauses specify Texas law and venue in compliance with the Business and Commerce Code §272 and SB807.
13. Check and document that the vendor is in compliance with statutory requirements related to Divestment Statute Lists and provided by the Comptroller at <https://comptroller.texas.gov/purchasing/publications/divestment.php> Ugg"lQE'EQQR"
.....EJ GEMNKUV'DGNQY 0
14. Review and follow your Board polices, specifically, CV and CH local.

See also document titled “JOC Coop Checklist” for state of Texas JOC Indefinite Delivery Indefinite Quantity (IDIQ) contracts through cooperatives. When Federal funds are used for the recovery projects, please check with the Federal agency providing the funds, such as FEMA, and your legal counsel to receive guidance on proper steps to take in the procurement process. TIPS can provide you with all the supporting documentation of our solicitation procedures for you to provide to the agency. TIPS believes it complies with 2 CFR Part 200 as written, however, many federal agencies add additional requirements in their guidance. See FEMA at <https://www.fema.gov/grants/procurement>

TIPS does not provide legal counsel and this document does not constitute legal advice. TIPS recommends you consult with your legal counsel to determine necessary steps and compliance with statutory requirements.

JOC COOP CHECKLIST

CONSTRUCTION CHECKLIST FOR TEXAS PUBLIC GOVERNMENT ENTITIES WHEN UTILIZING COOPERATIVE CONSTRUCTION JOB ORDER CONTRACTING (JOC)

Job Order Contracting is the only delivery method included in Texas Government Code § 2269 which can functionally be procured through a cooperative contract.¹ When contracting for construction services the following actions should be considered:

The Texas Government Entity's Governing Body Must:

- a. Select the Construction Delivery Method of Job Order Contract as the method which provides the best value for the governmental entity, when required.²
- b. Ensure that your entity has entered into an interlocal agreement with, or has otherwise become a member of, the selected purchasing cooperative.³
- c. Certify determination of need for Architect or Engineer. Per Texas Government Code 791.011(j), local governments procuring "construction related goods or services" greater than \$50,000.00 through an interlocal agreement, must have written certification determining the need for and/or engagement of a project Architect or Engineer.⁴
- d. Select *independent* design professionals, Architects and Engineers, as appropriate pursuant to the Texas Occupations Code. ***The selected contractor cannot provide these services.*** Generally, Architects are required for renovations to buildings costing \$50,000.00 or more and for new buildings costing \$100,000.00 or more. Generally, Engineers are required for projects costing \$8,000.00 or more which include electrical or mechanical modifications and if no electrical or mechanical modifications, then any project of \$20,000.00 or more. These are basic descriptions and there are more complex rules and considerations in determining the need for independent design professionals.⁵
- e. For any contract for a public work awarded by a political subdivision of the state, one must determine the prevailing wage rate for the geographic area which is typically done by determining the Davis Bacon Wage Rates. The current Davis-Bacon Wage Rates can be found at <https://wdolhome.sam.gov/>. This is required by FEMA, The Texas Department of Agriculture in relation to Child Nutrition Funds, and EDGAR funds. Texas law provides an alternative survey method which is not commonly used but can be found described in Texas Government Code Chapter 2258.⁶
- f. Make any delegations of authority to authorized representative, committee, or other person related to the construction procurement process. Notice of any delegation, the limits of the delegation, and the name or title of each person designated must be provided in notice by rule or through the published solicitation. This is often done through a resolution prepared by legal counsel and approved by the governing body.⁷
- g. The governing body of a governmental entity shall approve each job, task, or purchase order that exceeds \$500,000.00 for JOC procured through a cooperative contract.⁸

¹ See Texas Government Code Chapter 2269; § 2269.406-407. Found at <https://statutes.capitol.texas.gov/Docs/GV/htm/GV.2269.htm>.

² See Texas Government Code Chapter 2269; § 2269.056(a). Found at <https://statutes.capitol.texas.gov/Docs/GV/htm/GV.2269.htm>.

³ See Texas Government Code Chapter 791; § 791.011(d)(1). Found at <https://statutes.capitol.texas.gov/Docs/GV/htm/GV.791.htm>.

⁴ See Texas Government Code Chapter 791; § 791.011(j). Found at <https://statutes.capitol.texas.gov/Docs/GV/htm/GV.791.htm>.

⁵ See Texas Occupations Code §§ 1001.053 & 1051.703. Found at <https://statutes.capitol.texas.gov/Docs/OC/htm/OC.1001.htm#1001> and <https://statutes.capitol.texas.gov/Docs/OC/htm/OC.1051.htm#1051.703>.

⁶ See Texas Government Code Chapter 2258; § 2258.022. Found at <https://statutes.capitol.texas.gov/Docs/GV/htm/GV.2258.htm>.

⁷ See Texas Government Code Chapter 2269; § 2269.053. Found at <https://statutes.capitol.texas.gov/Docs/GV/htm/GV.2269.htm>.

⁸ See Texas Government Code Chapter 2269; § 2269.403. Found at <https://statutes.capitol.texas.gov/Docs/GV/htm/GV.2269.htm>.

The Entity Must (*which may or may not require the governing body's approval depending on local policy*):

- a. Prior to beginning the project, obtain proper Payment Bonds (generally required for projects valued at \$25,000.00 and greater) and Performance Bonds (generally required for projects valued at \$100,000.00 and greater) for public works contracts.⁹
- b. Obtain documentation that the contractor is providing workers compensation, general liability, and other insurance certificates for any project regardless of the size of the project.
- c. Work with your attorney to draft and review contracts for public work construction.
- d. If the project requires governing body approval **OR** exceeds \$1,000,000.00, obtain the Form 1295 Disclosures from the entity with which your entity is contracting and acknowledge that receipt with the State **BEFORE** signing any contracts.¹⁰
- e. When required, include written verification in the contract that the contracting party does not boycott Israel.¹¹
- f. Confirm that the contract provides that it will be governed and interpreted in accordance with the laws of the State of Texas as required by the Texas Business and Commerce Code. A provision providing exclusive venue of state district courts in your county is recommended.¹²
- g. Check the Texas Comptroller's website located at: <https://comptroller.texas.gov/purchasing/publications/divestment.php> and document that the Vendor not listed on any of the Comptroller's divestment lists in connection with Tex. Govt. Code 808.051, Tex. Govt. Code 2252.153, and Tex. Govt. Code 2270.0209, and for compliance with contracting requirements referenced in Tex. Govt. Code 2252.152, and Tex. Govt. Code 2270.002.¹³
- h. Ensure contractor and subcontractor compliance with Texas Education Code § 22.08341 et. seq. regarding criminal history information review by certain public works contractors and subcontractors.¹⁴
- i. Carefully review your entity's governing body's policies, specifically CV and CH Local for Texas School Districts.

⁹ See Texas Government Code Chapter 2253; § 2253.021. Found at <https://statutes.capitol.texas.gov/Docs/GV/htm/GV.2253.htm>.

¹⁰ See Texas Government Code § 2252.908 found at <https://statutes.capitol.texas.gov/Docs/GV/htm/GV.2252.htm>. See also, <https://www.ethics.state.tx.us/filinginfo/1295/>.

¹¹ See Texas Government Code Chapter 2271; § 2271.002. Found at <https://statutes.capitol.texas.gov/Docs/GV/htm/GV.2253.htm>.

¹² See Texas Business and Commerce Code Chapter 272; § 272.001. Found at <https://statutes.capitol.texas.gov/Docs/BC/htm/BC.272.htm>.

¹³ See <https://comptroller.texas.gov/purchasing/publications/divestment.php>.

¹⁴ See Texas Education Code Chapter 22; § 22.08341. Found at <https://statutes.capitol.texas.gov/Docs/ED/htm/ED.22.htm#22.08341>.

CERTIFICATION OF DETERMINATION OF NEED FOR ARCHITECT OR ENGINEER

If a construction project greater than \$50,000 is procured through an interlocal agreement, Texas Gov't Code 791.011(j) requires the following written certification determining the need for and/or engagement of a project Architect or Engineer when a Texas local government utilizes an Interlocal Agreement to procure construction related services utilizing a Job Order Contract.

I, _____, have been designated by the Texas
(insert name)

local government entity _____
(insert name)

located at _____
(insert address)

_____ ,
to determine whether or not an Architect or Engineer is required for the project described here
(insert project description on the next two lines)

_____ ,
I have determined that an Architect or Engineer is required. Type YES or NO here _____

If it is determined that an Architect or Engineer is required for the above referenced project, the following firm or firms were engaged for the project described herein.

(insert names and addresses of firm(s) below)

Signature of designee listed above _____

Date _____

Below are helpful guides to when an Architect or Engineer are required in Texas. If you are unsure, please consult your legal counsel or an Architect or Engineer that is licensed in Texas.

TX Govt Code 791.011(j)

(j) For the purposes of this subsection, the term "purchasing cooperative" means a group purchasing organization that governmental entities join as members and the managing entity of which receives fees from members or vendors. A local government may not enter into a contract to purchase construction-related goods or services through a purchasing cooperative under this chapter in an amount greater than \$50,000 unless a person designated by the local government certifies in writing that:

(1) the project for which the construction-related goods or services are being procured does not require the preparation of plans and specifications under Chapter [1001](#) or [1051](#), Occupations Code; or

(2) the plans and specifications required under Chapters [1001](#) and [1051](#), Occupations Code, have been prepared.

Texas Education Code Sec. 22.08341.

CRIMINAL HISTORY RECORD INFORMATION REVIEW BY CERTAIN PUBLIC WORKS CONTRACTORS. (a) In this section:

(1) "Contracting entity" means an entity that contracts directly with a school district, open-enrollment charter school, or shared services arrangement to provide engineering, architectural, or construction services to the district, school, or arrangement.

(2) "Instructional facility" has the meaning assigned by Section [46.001](#).

(3) "Subcontracting entity" means an entity that contracts with another entity that is not a school district, open-enrollment charter school, or shared services arrangement to provide engineering, architectural, or construction services to a school district, open-enrollment charter school, or shared services arrangement.

(b) This subsection applies to a person who is not an applicant for or holder of a certificate under Subchapter B, Chapter [21](#), and who is employed by a contracting or subcontracting entity on a project to design, construct, alter, or repair a public work if the person has or will have:

(1) continuing duties related to the contracted services; and

(2) the opportunity for direct contact with students in connection with the person's continuing duties.

(c) For purposes of Subsection (b), a person does not have the opportunity for direct contact with students if:

(1) the public work does not involve the construction, alteration, or repair of an instructional facility;

(2) for a public work that involves construction of a new instructional facility, the person's duties related to the contracted services will be completed not later than the seventh day before the first date the facility will be used for instructional purposes; or

(3) for a public work that involves an existing instructional facility:

(A) the public work area contains sanitary facilities and is separated from all areas used by students by a secure barrier fence that is not less than six feet in height; and

(B) the contracting entity adopts a policy prohibiting employees, including subcontracting entity employees, from interacting with students or entering areas used by students, informs employees of the policy, and enforces the policy at the public work area.

(d) A contracting entity or subcontracting entity may not permit an employee to whom Subsection (b) applies to provide services at an instructional facility if the employee, during the preceding 30 years, was convicted of any of the following offenses and the victim was under 18 years of age or was enrolled in a public school:

(1) a felony offense under Title 5, Penal Code;

(2) an offense on conviction of which a defendant is required to register as a sex offender under Chapter [62](#), Code of Criminal Procedure; or

(3) an offense under the laws of another state or federal law that is equivalent to an offense under Subdivision (1) or (2).

(e) For a person to whom Subsection (b) applies, the contracting entity or subcontracting entity that employs the person shall:

(1) send or ensure that the person sends to the department information that is required by the department for obtaining national criminal history record information, which may include fingerprints and photographs;

(2) obtain all criminal history record information that relates to the person through the criminal history clearinghouse as provided by Section [411.0845](#), Government Code; and

(3) certify to the school district, open-enrollment charter school, shared services arrangement, or contracting entity, as applicable, that the contracting entity or subcontracting entity that employs the person has received all criminal history record information relating to the person.

(f) A contracting entity shall certify to the school district, open-enrollment charter school, or shared services arrangement, as applicable, that the contracting entity has obtained written certifications from any subcontracting entity that the subcontracting entity has complied with Subsection (e) as it relates to the subcontracting entity's employees.

(g) On receipt of information described by Subsection (e)(1), the department shall obtain the person's national criminal history record information and report the results through the criminal history clearinghouse as provided by Section [411.0845](#), Government Code.

(h) A school district, open-enrollment charter school, or shared services arrangement may directly obtain the criminal history record information of a person to whom Subsection (b) applies through the criminal history clearinghouse as provided by Section [411.0845](#), Government Code.

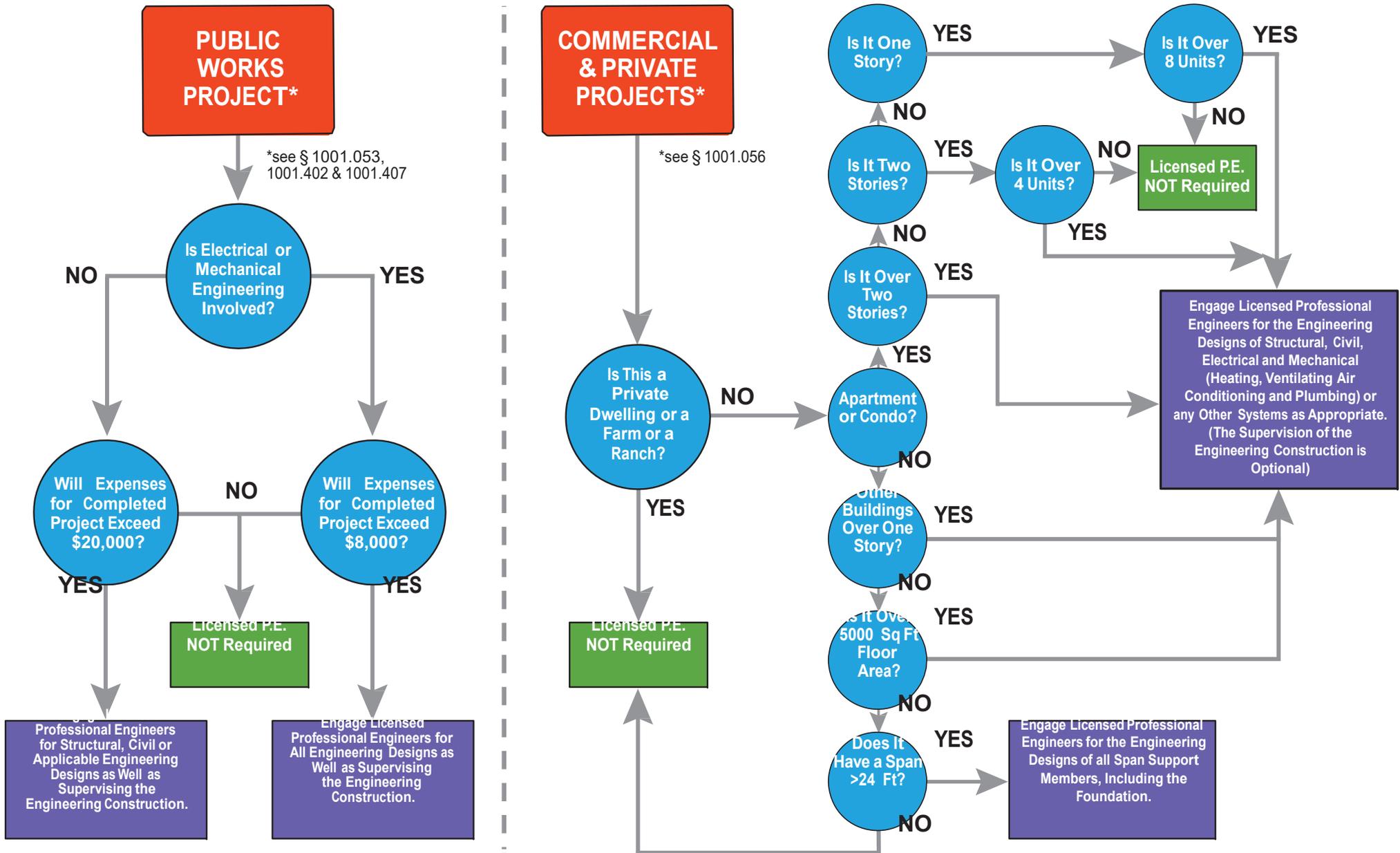
(i) If a contracting entity or subcontracting entity determines that Subsection (b) does not apply to an employee, the contracting or subcontracting entity shall make a reasonable effort to ensure that the conditions or precautions that resulted in the determination that Subsection (b) does not apply to the employee continue to exist throughout the time that the contracted services are provided.

(j) In the event of an emergency, a school district, open-enrollment charter school, or shared services arrangement may allow a person to whom Subsection (b) applies to enter an instructional facility if the person is accompanied by an employee of the district, school, or arrangement. A school district, open-enrollment charter school, or shared services arrangement may adopt a policy regarding an emergency for purposes of this subsection.

(k) The commissioner may adopt rules necessary to implement this section.

Added by Acts 2017, 85th Leg., R.S., Ch. 1070 (H.B. [3270](#)), ec. 2, eff. September 1, 2017.

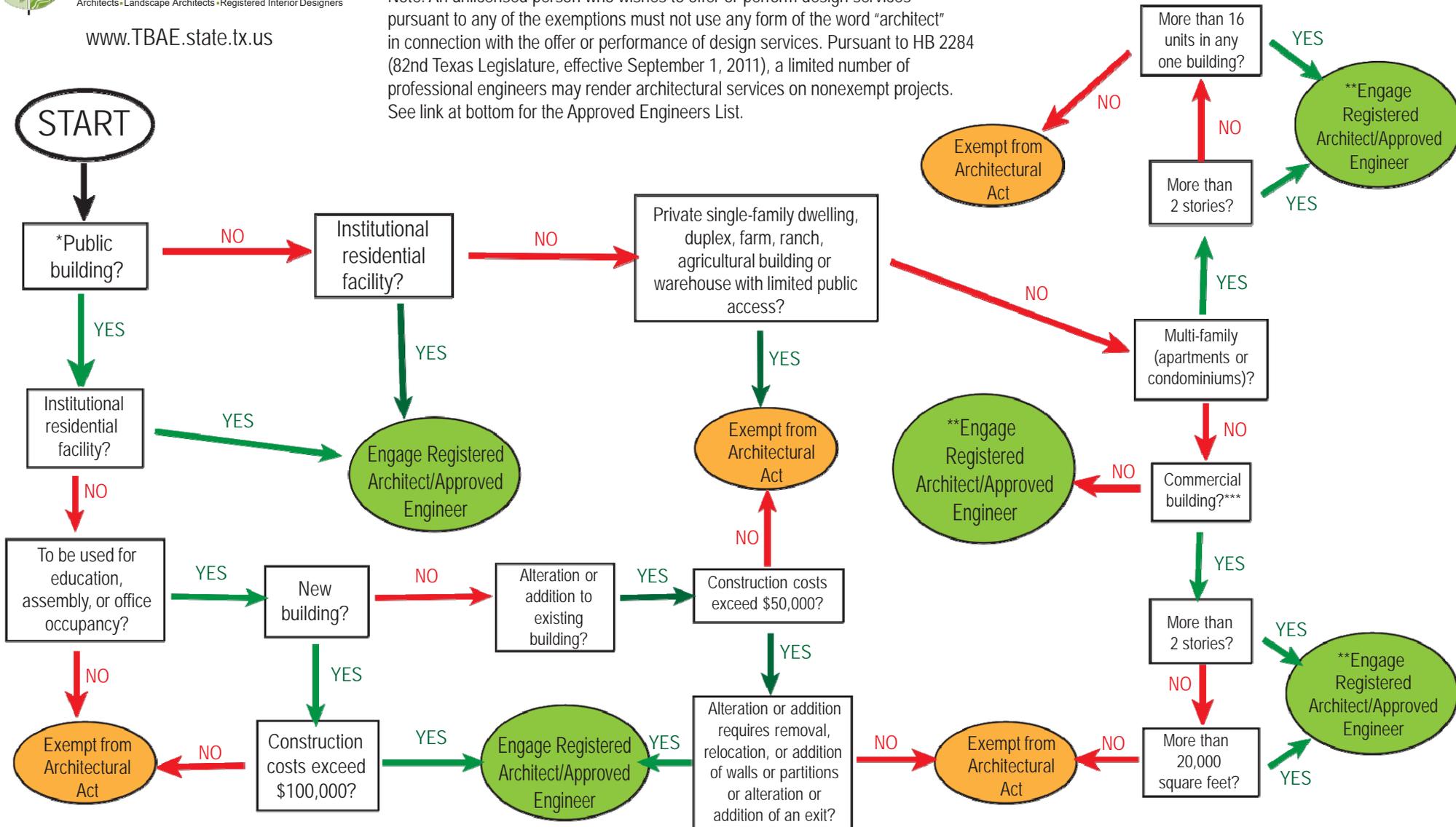
When is a Professional Engineer required on a project?



This flowchart is intended for guidance purposes only and the Texas Engineering Practice Act and Rules govern final interpretation. Local codes and ordinances may be more restrictive as long as not in conflict with the Texas Engineering Practice Act and Rules.

When to Engage an Architect or Approved Engineer for Design and Construction Observation

Note: An unlicensed person who wishes to offer or perform design services pursuant to any of the exemptions must not use any form of the word "architect" in connection with the offer or performance of design services. Pursuant to HB 2284 (82nd Texas Legislature, effective September 1, 2011), a limited number of professional engineers may render architectural services on nonexempt projects. See link at bottom for the Approved Engineers List.



* "Public Building" means any building that is owned by a State agency, a political subdivision of the State, or any other public entity in Texas.

** If a project involves only the alteration of an existing building and the alteration does not involve a substantial structural or exitway change to the building, the project is exempt from the architectural act.

*** "Commercial building" means an enclosed structure primarily used for the purchase, sale, or exchange of commodities or services.