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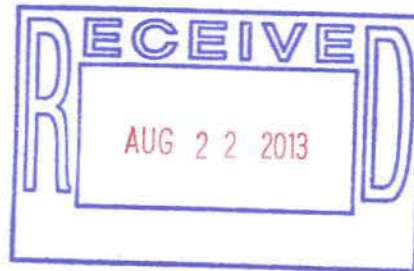
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August 14, 2013



8000100

Zylkia Martin-Yambo
FHWA CalSouth
Local Programs Engineer
888 S. Figueroa St, Suite 750
Los Angeles, CA 90017

Dear Zyikia Martin-Yambo:

SUBJECT: Special Experimental Project No. 14 (SEP-14)

The attached SEP-14 outlines a five-year Job Order Contracting (JOC) pilot program which San Diego Association of Governments (SANDAG) wishes to utilize for the performance of federally funded and eligible minor or recurring construction; or for the renovation, alteration, or repair of freeways and conventional highways. In support of this application, below is my legal opinion, as SANDAG's General Counsel, that the JOC process is a legal contracting method for SANDAG.

SANDAG's permissible contracting and procurement methods are broad in nature, and are reflected in Public Utilities Code 132352.4:

(a) The Legislature finds and declares that there is a compelling interest in ensuring that all federal, state, local, and private funds available to (SANDAG) are captured and used in a timely manner. In order to maximize the use of federal, state, local, and private funds and to maintain a competitive posture in seeking supplemental federal funds, (SANDAG) shall have the authority to establish and use a flexible contracting process to maximize efficient use of public funds.

Section 132352.4 (b) then sets forth specific allowances and limitations for SANDAG's contracting, concluding with the following "catch-all" allowance: "Notwithstanding any other provisions of this chapter, (SANDAG) is authorized to use any procurement method authorized for state or local agencies by state or federal law. . . ."

Certain public entities in California are expressly authorized to use the JOC process within limited parameters. SANDAG's ability to utilize the JOC contracting process is premised upon the statutory allowance granted to such entities. Conversely, however, SANDAG shares in the same general limitations imposed on the JOC process by this statutory framework.

As a general principle, JOC's are not allowed as a public entity contracting method absent an express grant of authority. 76 Ops. Cal. Atty. Gen 126 (1993). The Public Contract Code (PCC) does, however, specify at least three circumstances where JOC's may be utilized by public entities.

PCC section 20128.5 allows the board of supervisors of a county to award one or more JOC's, none of which shall exceed three million dollars. The object of these contracts must be "repair, remodeling, or other repetitive work to be done according to unit prices" which "shall not include design or contract drawings". Additionally, the contracts must be based on plans and specifications for "typical work", defined as "a work description applicable universally or applicable to a large number of individual projects, as distinguished from work specifically described with respect to an individual project." Section 20128.5 prohibits the use of a JOC for new construction.

PCC section 10710 allows the Trustees of the California State University system to award JOC's not exceeding three million dollars "for repair or other repetitive work, or renovation or modification, to be done according to unit prices." The contracts must be awarded to the lowest responsible bidder, and shall be based primarily on plans and specifications for "typical work" which is defined as "a work description applicable universally or applicable to a large number of individual projects, as distinguished from work specifically described with respect to an individual project."

PCC sections 20919 – 20919.15 allow, on a pilot basis, the Los Angeles Unified School District to utilize the JOC process on contracts not in excess of five million dollars. No specific limitations are prescribed for its use apart from various labor practices provisions.

Additionally, Charter Cities organized pursuant to Article 11, Section 3 of the California Constitution may utilize JOC's under limited circumstances. Charter cities are not required to comply with the general public entity bidding statutes provided that the city charter or a city ordinance exempts the city from such statutes, and the subject matter of the bid constitutes a municipal affair (generally a project wholly within the city's boundaries and not involving state or federal funding). Pub. Cont. Code § 1100.7; see also *R & A Vending Services, Inc. v. City of Los Angeles*, 172 Cal. App. 3d 1188 (1985); *Howard Contracting, Inc. v. G.A. MacDonald Constr. Co.*, 71 Cal. App. 4th 38 (1998). Currently the charter cities in San Diego County include Chula Vista, Del Mar, San Diego, San Marcos and Vista. Of these, only the City of San Diego specifically allows Job Order Contracting (Charter section 94.1). No specific limitations are placed on its use apart from an overall contract limit of ten million dollars.

Because SANDAG's contracting methodology may be based on state or federal law, the FTA's specific allowance of JOC's is also illustrative. FTA's Best Practices Procurement Manual (Section 6.1.6) endorses a JOC process utilized for the "repair, alteration, modernization, maintenance and rehabilitation of buildings, structures, or other real property".

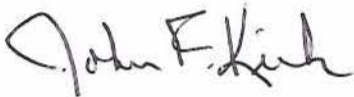
Thus, overall, SANDAG may employ the JOC process on projects with all of the following attributes:

- The project involves repair, renovation, alteration, remodeling, maintenance, rehabilitation or other repetitive work and does not involve new construction.

- The individual job order is to be awarded primarily utilizing unit prices set forth in the underlying contract.
- The individual job order does not necessitate the extensive use of design or contract drawings but instead is primarily based on the standard drawings set forth in the underlying contract.

If you have any additional questions regarding SANDAG use of the JOC process, please feel free to contact me directly at (619) 699-1997.

Sincerely,

A handwritten signature in black ink, appearing to read "John F. Kirk". The signature is fluid and cursive, with the first name "John" being more prominent.

JOHN F. KIRK
General Counsel

JKI/mpo

Attachment

**San Diego Association of Governments Job Order Contracting Work Plan for
Federal Highway Administration (FHWA) Funded Projects**

I. PURPOSE

The purpose of this SEP-14 work plan is to outline a five-year Job Order Contracting (JOC) pilot program which the San Diego Association of Governments (SANDAG) proposes to utilize for the performance of federally funded and eligible minor or recurring construction; or for the renovation, alteration, or repair of freeways and conventional highways. Examples of minor construction include fencing environmentally sensitive areas prior to the start of work on a major construction contract (such as fencing to protect Arroyo Toad habitat), chain and mow to prevent project delays due to migratory bird work windows, and construction of environmental mitigation projects for major projects. The pilot will evaluate the JOC procurement method's ability to:

- Provide quick and more timely project delivery;
- Reduce design costs, procurement costs, and construction costs;
- Provide a more efficient and flexible contracting method that SANDAG can use to address changing field conditions.

II. BACKGROUND

JOC was developed in the early 1980s to help the Department of Defense (DOD) expedite the procurement of repair, alteration, and minor new construction projects in support of its military facilities worldwide. DOD was looking for a procurement system to decrease the inherent inefficiencies in the typical design-bid-construct cycle when applied to a large volume of small to medium-sized construction projects. The initial results and benefits experienced by DOD were so positive that within a few years the JOC procurement system was implemented at virtually every major DOD installation worldwide.

Beginning in the early 1990s, non-DOD public facilities owners became aware of the substantial benefits of the JOC procurement system and began adopting JOC. Thus, JOC began rapidly migrating outside the DOD and quickly became a heavily utilized tool by municipal governments, state agencies, K-12 public school systems, utility and transportation authorities, colleges, universities, and public housing authorities. Today, JOC is used in almost every major metropolitan market to quickly and efficiently procure over \$1.5 billion annually in repair, alteration, and minor new construction projects.

In 2007, recognizing SANDAG's dynamic environment and the need for a more responsive contracting technique for the accomplishment of maintenance repair and construction projects, the SANDAG Board of Directors authorized the use of the JOC system as an innovative contracting system to enhance responsiveness while providing

a higher level of quality work at a lower cost. The JOC system has proven to be a successful and cost-effective procurement approach that has earned itself top honors for best practices in public procurement by the National Institute of Governmental Purchasing.

III. SCOPE

A. Job Order Contracting Overview

A JOC construction contract is built around a set of contract documents. SANDAG's JOC contract documents consist of three (3) parts:

Part 1 is a Construction Task Catalog® (CTC) that contains a wide variety of construction and construction-related tasks. Development and administration of the CTC is through a Consultant to SANDAG, whom is selected by a competitive procurement process prior to procuring a contractor to perform JOC work. Each task in the CTC has a complete and detailed description, a unit of measure, and a fixed unit price. For example, a square foot of interior painting, a linear foot of rigid conduit, and a square yard of carpet all have a certain associated price. The unit prices include the direct cost of labor, material, and equipment in the local market. The unit prices for some tasks are modified for large or small quantities, non-typical installation locations (i.e., in a confined space), or non-typical materials (i.e., stainless steel). The tasks in the CTC are developed and tailored specifically for SANDAG and encompass all the work that SANDAG anticipates completing under a JOC.

Part 2 of the contract documents is a set of performance-based Special Provisions recognized by and familiar to bidders. The Special Provisions reflect SANDAG's standards for the quality of workmanship and materials, and set the standard for the quality of work. The Special Provisions also include the Information for Bidders, form of contract, General Conditions, wage rate information, etc.

Part 3 consists of the bid forms, including a bidder's bond.

B. The JOC Bidding Process

During the bidding process, bidders are not told the exact tasks that they will be asked to perform. No commitments are made about specific quantities that will be ordered from the CTC. SANDAG informs bidders of some specific contract characteristics that are unique to JOC, such as:

1. Each JOC contract will have a definitive term. Each contract features a three-year term from the date of contract award. The total term of the JOC contract cannot exceed three years.

2. There is a minimum contract value set forth in the contract—limited by SANDAG Board Policy to a maximum of \$50,000—in order to provide sufficient consideration to make the contract binding. There is also a not-to-exceed Maximum Contract Value set forth in the contract.
3. A pre-bid meeting is held for all potential bidders. The contractors are given an overview of JOC and encouraged to ask questions about how it works. The pre-bid meeting is conducted as a workshop and the mechanics of being a Job Order Contractor are explained. Contractors are given guidance on analyzing the CTC, how to calculate adjustment factors, how to develop a price proposal, personnel requirements to staff a Job Order Contract, and generally how to be successful under the JOC system.

C. The JOC Contractor Selection Process

Based on the Construction Task Catalog, the Special Provisions, and the guidance provided at the pre-bid meeting, bidders competitively bid a set number of adjustment factors to be applied to the unit prices in the CTC. The adjustment factors may recognize various work factors including performing work: (1) during normal working hours, (2) during other than normal working hours, and (3) restricted work shifts.

The adjustment factors must include all of the contractor's indirect costs such as overhead, insurance, and bonds, as well as the contractor's profit. The adjustment factors apply to every task in the CTC. Adjustment factors can vary widely among different facility owners and contracts based on a host of factors including the maximum contract value, the type of work anticipated, and the locations and conditions under which the work will likely be executed. If a bidder views the CTC as equal to the direct cost of performing the work in the local marketplace, and desires 10% for overhead and 10% for profit, they would bid with a multiplier of 1.20. Furthermore, if the bidder believes that work to be completed during other than normal hours will require higher wages to be paid than work completed during normal hours, they would incorporate a premium into that adjustment factor.

Each adjustment factor is weighted (as determined prior to the bid and indicated on the bid form) and an award criteria figure is calculated. The award is made to the bidder providing the lowest (lowest and best award criteria figure) responsible and responsive bid. The contractor must also provide a statement of qualifications that demonstrates certain skill sets, licenses, and similar experience to be determined responsible and meet criteria under "Best Value Procurement."

D. Contract Execution and Job Order Utilization

Once SANDAG has executed a Job Order Contract with each contractor, they are standing by, available to perform work when called upon. The Job Order execution process begins with the identification of a project, an understanding of the general scope of work associated with the project, and an independent cost estimate prepared by the Project Manager (PM). After these preliminary steps are completed, the PM conducts a Joint Scope Meeting with the contractor to review the proposed general scope of work and evaluate the work site conditions. The contractor is invited to ask questions and make suggestions.

After the Joint Scope Meeting, the PM provides the contractor with a written Detailed Scope of Work. The level of detail and design included in the Detailed Scope of Work is a function of the difficulty and type of the particular project. The contractor then breaks the work down into individual items of work and prepares a pricing proposal by selecting the unit price tasks contained in the CTC to accomplish the Detailed Scope of Work. The total price is calculated by multiplying each unit price by the required quantity and then multiplying that result by the appropriate adjustment factor. Along with the proposal, the contractor also develops a schedule, a list of subcontractors, and any required drawings or sketches.

The proposal is then compared to SANDAG's independent cost estimate and reviewed to make sure the contractor selected the correct tasks and appropriate quantities. If the PM is satisfied with the proposal, the proposal is submitted for an independent contractual, legal, and financial review. Once approved, a firm fixed price job order is issued to the contractor.

The contractor is required to complete the Detailed Scope of Work for the lump sum price within the agreed-upon schedule. Once the work begins, the PM reviews submittals, inspects the work, monitors progress, approves payments, and closes out the job in accordance with typical SANDAG procedures. No variations from the procedures are permitted.

E. Compliance with Federal Regulations

On Job Orders funded directly by or assisted in whole or in part by and through the federal government, the contractor must comply with all applicable federal laws, rules, and regulations, including but not limited to the following:

- The Copeland "Anti-Kickback" Act (18 U.S.C. Section 874) as supplemented in Department of Labor regulations (29 CFR part 3);
- The "Anti-Kickback" Act of 1986 (41 U.S.C. Section 51 et seq.);

- Sections 103 and 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 327-330) as supplemented by Department of Labor regulations (29 CFR part 5);
- The Federal Fair Labor Standards Act (29 U.S.C. Section 201 et seq.);
- Buy America Requirements (49 CFR Part 661 and Section 165 of the Surface Transportation Act of 1982); and
- Disadvantaged Business Enterprise Program (49 CFR Part 26).

The General Accounting Office has fully reviewed the JOC concept and found it to be consistent with all federal procurement laws and policies.

The JOC concept was designed with internal controls as an integral part of the checks and balances process. The JOC concept relies on automated software developed by a consultant to SANDAG, which provides an excellent audit trail of all JOC job orders and transactions as well as various verification programs to ensure the integrity of the JOC database.

IV. SCHEDULE

As of October 2011, SANDAG's existing JOC program for regionally funded projects has resulted in the completion and issuance of 61 job orders totaling approximately \$27.2 million. Approximately a third of those were related to improvements on the state highway system. The state highway projects have included demolition, chaining and mowing, plant establishment, and construction of minor operational features. Based on this success, the region is intending to procure new JOC's by mid 2013. Prior to this new procurement, SANDAG wishes to expand the program to include federally funded highway improvements, similar to the existing contracts. Based on the current expenditure rates, the region would anticipate needing two JOC's to cover the five-year period for this SEP-14. The first JOC would cover the first three years of the SEP14 for \$15 million (2013-2016). The second JOC would be written for the final two years for \$10 million (2016-2018). Performance reports will be provided after two and four years, with a final performance report provided at the completion of the five year period.

V. MEASURES

The benefits of JOC can vary by job order; however, as a program, SANDAG expects to see benefits in cost and time. The Interim and Final SEP-14 Evaluation Report would address the following:

- Time to complete the plans.
- Cost to complete the plans.
- Time and cost of bid and award process.
- Overall cost to Award.

Projects utilizing JOCs will be measured against the California Department of Transportation (Caltrans) District 11's Minor Project Program as a baseline for traditional design-bid-build projects.

VI. REPORTING

An interim report will be completed two and four years into the process, with a final submitted after the five year period has ended. A report will be generated if a JOC has not been utilized, stating, no JOC's used. The reports will contain a comparison of the JOC vs Caltrans process on each JOC used, utilizing the Measures listed above. The final report will include an overall evaluation of the project along with any suggestions and recommendations for improving the process.