

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

TIPS is not providing legal advice with this document but is alerting TIPS Members of statutory requirements that could be applicable to a TIPS Member's purchase when utilizing a cooperative JOC contract. TIPS recommends that you consult your legal counsel when entering into a contract.

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
- h. NEW LAW as of September 1, 2021. SB 13 Boycotting energy companies- District contract must contain new verification that company does not and will not boycott energy companies. Company must have 10 or more full time employees and does not include a sole proprietorship. Contract must be valued at \$100K or more to be paid with public funds.

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>.

- i. NEW LAW as of September 1, 2021. SB 19 Discriminating Against Firearm industry - District contract must contain new verification that company does not and will not discriminate against firearm and ammunition industries. Company must have 10 or more full time employees and does not include a sole proprietorship. Contract must be valued at \$100K or more to be paid with public funds. Exception for sole source provider.
- j. NEW LAW as of September 1, 2021. SB 291 The developer (any Texas public governmental entity) of a commercial building project (includes BUILDING FOR THE USE OR OCCUPATION OF PEOPLE FOR A PUBLIC PURPOSE) must visibly post the name of the public entity and contact information and description of the project at the entrance to the construction site.

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.

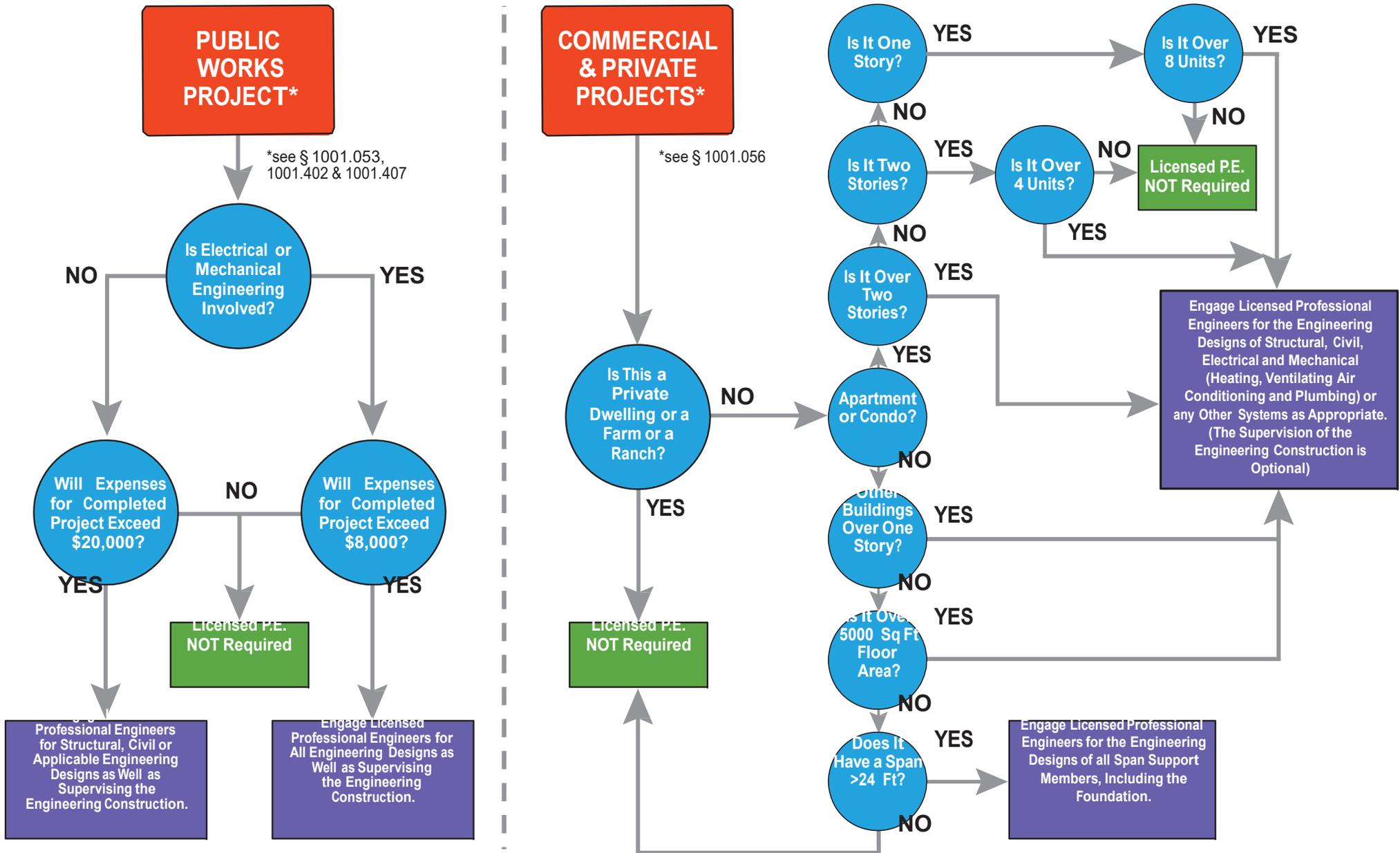
(i) If a contracting entity or subcontracting entity determines that Subsection (b) does not apply to an employee, the contracting or subcontracting entity shall make a reasonable effort to ensure that the conditions or precautions that resulted in the determination that Subsection (b) does not apply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

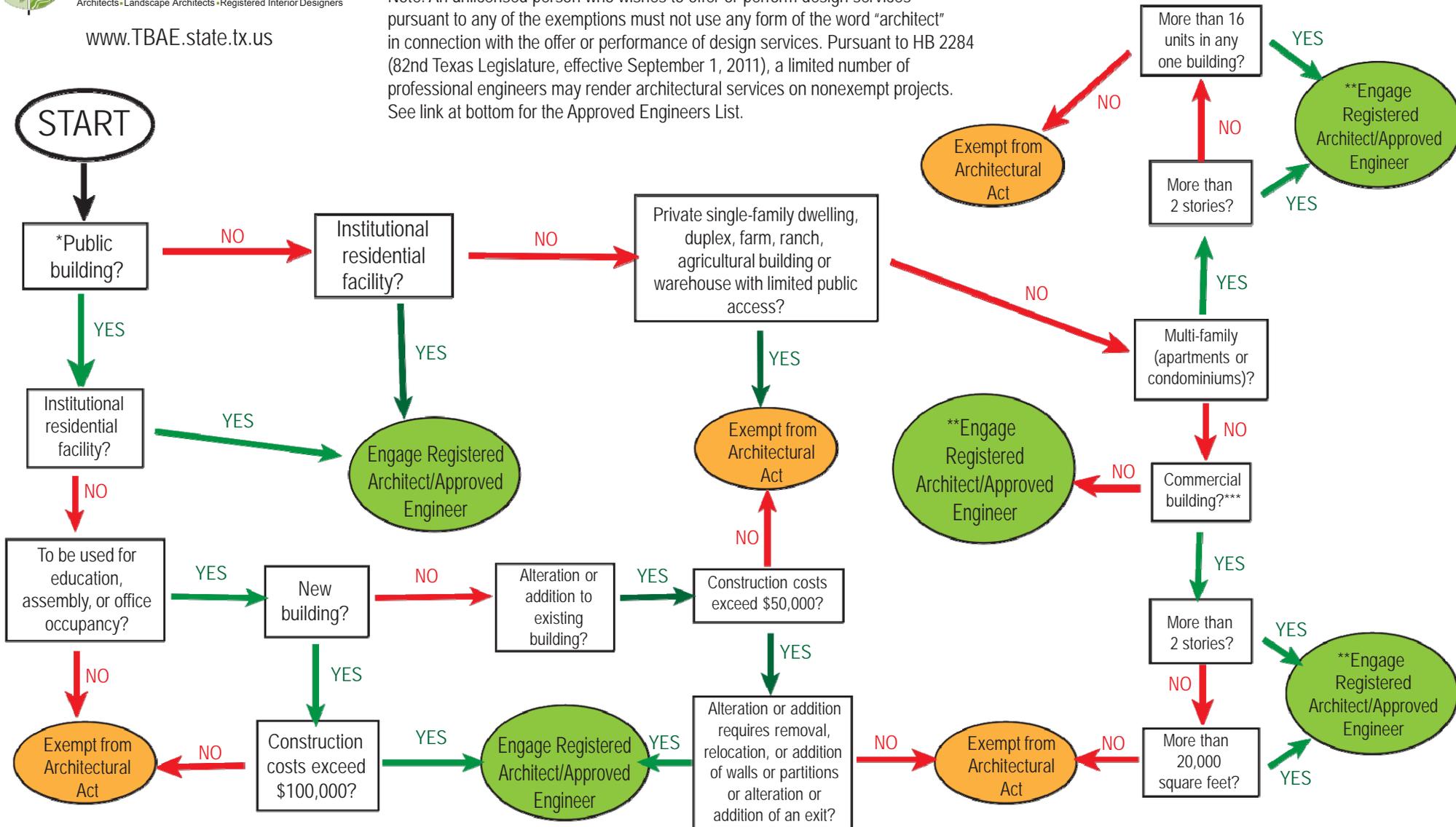
When is a Professional Engineer required on a project?



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.

List of Approved Engineers, pursuant to HB 2284 noted above: <http://www.tbae.state.tx.us/Content/documents/Home/ApprovedEngineerList.pdf>

More copies of this flowchart: <http://www.tbae.state.tx.us/Content/documents/LawsEnforcement/ArchRequiredFlowChart.pdf>

Verify the registration status of a TBAE registrant: <http://www.tbae.state.tx.us/PublicInformation/FindDesignProfessional>