



# Construction v. Maintenance

Making Sense of a Complicated Topic

2020

# Goals for Today

---

- Learn to distinguish between construction and maintenance projects.
- Learn to distinguish between construction projects and non-construction procurement services.
- Understand the implications of violating the construction and non-construction competitive bidding laws.



# Why Do We Care?

How a Project is Classified will Effect All Aspects of How that Project Proceeds

	Construction	Maintenance
UC Policy?	FACMAN	FACMAN (Vol. 6) & BUS 43
Administrator?	Capital Projects Contract Administrator	Procurement Officer
Law?	PCC §§ 10500-10506.10, 10520-10526	PCC §§10500.5, 10507-10510, 10520-10526
Pro's	Latent Defects	Timing, Cost, Efficiency



**STEP ONE:**

**Is it Construction or  
Maintenance?**

# Resources

---



- The FACMAN!
  - [www.ucop.edu/facil/fmc/facilman/](http://www.ucop.edu/facil/fmc/facilman/)
  - Volume 6- Operations and Maintenance
- Public Contract Code § 10500, et seq.- UC Competitive Bidding (Stull Act)
- BFB-BUS-43 Purchases of Goods and Services; Supply Chain Management

# Statutory Definition of a Construction Project

---

## **ARTICLE 1. Construction [10500 - 10506]**

( Article 1 added by Stats. 1984, Ch. 1128, Sec. 3. )

### **Public Contract Code 10500.**

As used in this article, “project” includes the erection, construction, alteration, repair, or improvement of any University of California structure, building, road, or other improvement that will exceed in cost, including labor and materials, a total of fifty thousand dollars (\$50,000).

(Amended by Stats. 1997, Ch. 563, Sec. 1. Effective January 1, 1998.)

# What is **Construction**?

---

- **Construction** consists of moving, demolishing, altering, upgrading, renovating, installing, or building a structure, facility, or system according to a plan or by a definite process.
- Exterior and interior painting or repainting of new or existing structures **is construction**.
- Upgrading or replacing a building system in its entirety when it has exceeded its useful life is **generally construction**, not maintenance.

# Repair is Construction

- **Repair** means to restore property, machinery, systems, and facilities, including buildings, roads, and grounds and their components to working order and may require:
  - the submission of plans;
  - the submission of calculations;
  - construction inspection requirements; and other data to ensure compliance with the California Building Code;
  - and/or requires a change to the stamped plans, specifications, reports or documents used for its construction.
- **Repair** does not include any matter that could reasonably be characterized as **maintenance**.



# What is Maintenance?

---



# What is Maintenance?

- **Maintenance** is the upkeep of property, machinery, systems, and facilities, including buildings, utility infrastructure, roads, and grounds.
- **Maintenance** consists of those activities necessary to keep facilities and systems operational and in good working order. It consists of the preservation, but not the improvement, of buildings and grounds, other real property improvements and their components.
- **Maintenance** *may* include replacement of components of equipment or building systems (roof, flooring, HVAC, etc.) if replacement is performed:
  1. on a *routine or recurring* basis,
  2. to bring the equipment or building system back to its fully functional state,
  3. to ensure the equipment or building system retains its functionality for its anticipated useful life.

# Maintenance Requires:

## In Kind Components

- Replacement of a component of a building system is a form of **maintenance** when the replacement component is a **duplicate**, i.e., replacement-in-kind, or, if not, **the replacement item is an upgrade because a duplicate component is obsolete or is no longer reasonably available.**

## “Building System”

- “a regularly interacting or interdependent group of items forming a unified whole”. Systems related to University facilities are specifically defined in the **FIRM (Facilities Infrastructure Renewal Model)**

# Examples

Building System	Components
HVAC- Equipment, Controls	Circulating pumps, fan coil units, thermostat, exhaust and ventilation units, heat exchangers, vacuum pumps
Electrical Equipment	Building transformers, service panels, fuses, emergency power, lighting, and generators, light fixtures, controls, power receptacles, motors

# Certain Maintenance is Considered Construction

---

- Upgrades/Improvements
- 50% Rule
- Minor Cap Rule

# Upgrade/Improvements Rule

- Remember the In-Kind replacement requirement?
- If you don't do In-Kind replacement, then the work is an upgrade/improvement, and, therefore, **construction!**
- Unless the component is obsolete!



# The 50% Rule

If the work associated with replacement of a system's component(s) is greater than 50% of the replacement value of its system, such work should be considered a system replacement and ...shall be considered **repair (therefore Construction)** and beyond the scope of **maintenance**.



# The Minor Cap Rule

---

If the value of the work associated with replacement of component(s) exceeds current University Minor Capital Project limits (\$1 Million), the Facility shall obtain Office of the President concurrence prior to proceeding with the work as **maintenance**.





**STEP TWO:**  
What Procurement  
Process is Required?

# Non-Construction Procurement

---

= Maintenance Procurement

**Public Contract Code 10507 – Materials,  
Goods and Services**

**Bus 43 Policy**

**New and Existing Agreements (Campus  
and System-wide)**



# Non-Construction Procurement

---

Public Contract Code 10507 –  
Materials, Goods and Services

University of California Competitive Bidding, Article 2,  
Materials, Goods, and Services

Bus 43 – UC Policy for purchasing and  
competitive bidding (non-construction)

Threshold of \$100,000 per year per supplier

Covered Services – UC Employees can do the work  
(with Minor Cap exception)

Sole Sources

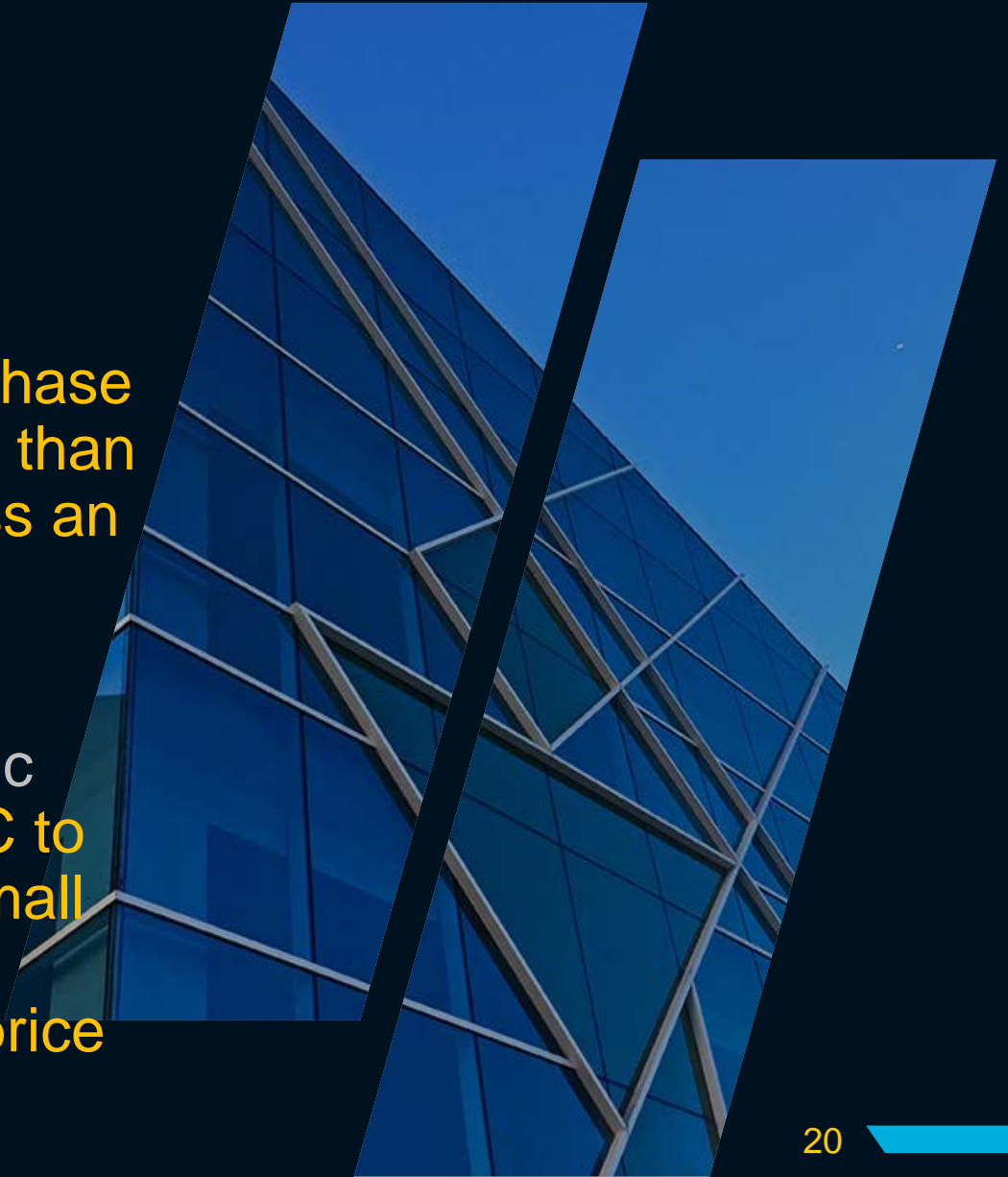


# Bus 43 Policy

---

General Requirements - requires that all Purchase Agreements involving an expenditure of more than \$100,000 annually be competitively bid, unless an exception applies.

a. Notwithstanding the above, California Public Contract Code Section 10508.5 allows the UC to award a Purchase Agreement to a certified small business up to \$250,000 without being competitively bid, so long as the UC obtains price quotations from two or more certified small businesses.

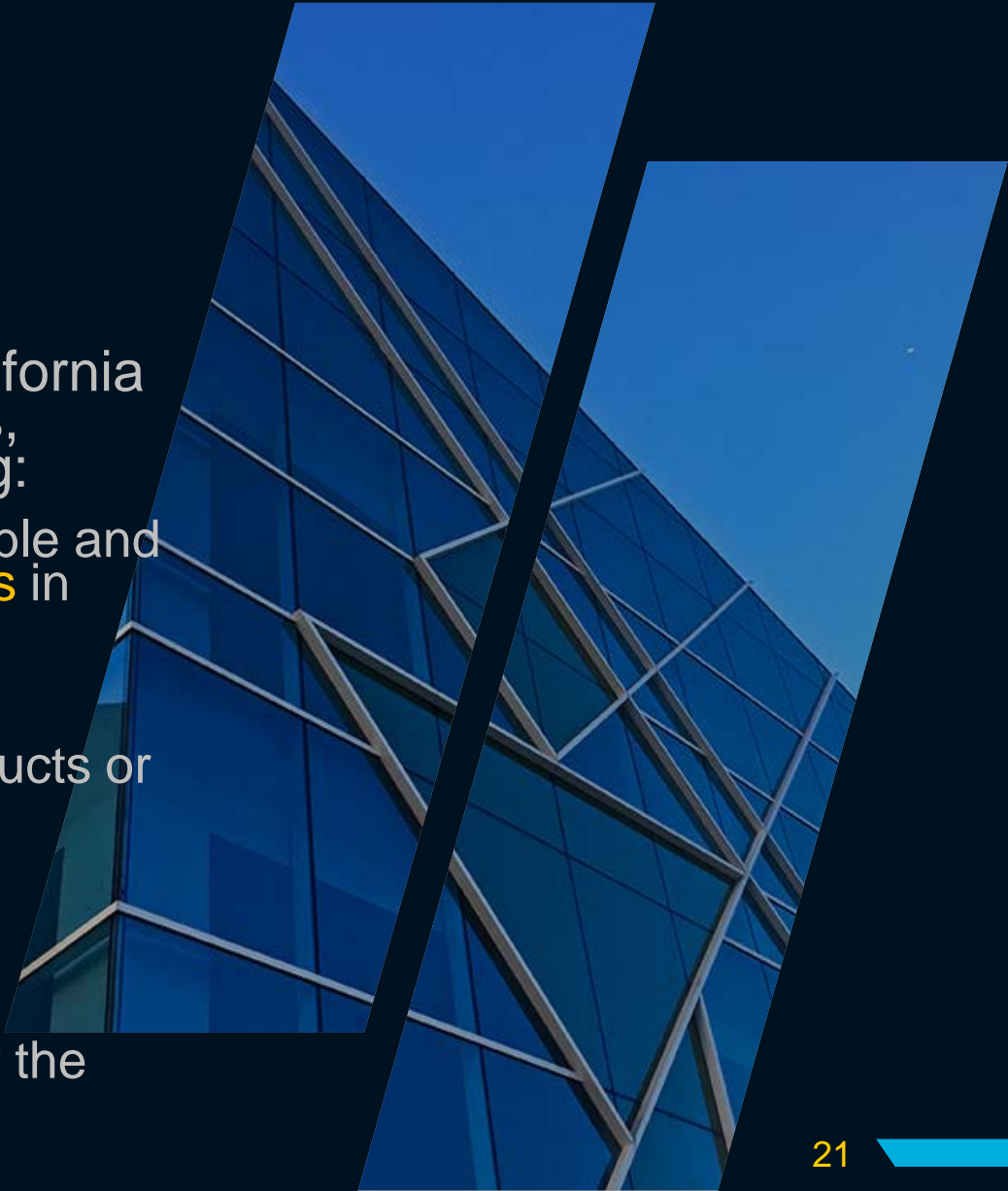


# Bus 43 Policy

---

PCC 10509. The Regents of the University of California shall prescribe methods of procurement for goods, materials, and services to be purchased, including:

- (a) Requirements for **public advertisement** where feasible and practicable or for **solicitation from at least three sources** in other cases.
- (b) Bidder prequalification and **evaluation standards**.
- (c) **Guidelines for negotiating contracts** for unique products or proprietary services.
- (d) **Procedures for solicitation** of vendor and service contractor interest.
- (e) **Dissemination of award** information.
- (f) Such other matters as may encourage the receipt of the **most favorable price and conditions of purchase** by the University.



# Bus 43 Policy Summary

---

Limit of \$100,000 per year without contract

-if under, informal bid and negotiate contract

-if over, competitive solicitation (RFP)

Covered Services - Regents Policy 5402

UC employees first

Sole Sourcing

Federally-funded purchases  $\geq$ \$10,000

Non-Federally-funded purchases  $\geq$ \$100,000

-Describe Funding Source

-Informal Bids, price comparison

-Justification and back up



# Maintenance "Tools" Ready

Existing Agreements (Campus and System-wide)

CalUSource – UC Contracts

Campus Procurement Services

(Online Catalog/Buying Systems)



Reach out to your Procurement Department!

# Maintenance Contracting

---

New Agreements (Campus and System-wide)

RFP process is 45 Days up to 1 year, initially

Remember Covered Services – Regents 5402

Think about warranty, review UC Terms and Conditions

**Reach out to your  
Procurement Department!**





# Construction Procurement

---

Find your Contract Administrator!!



# Construction Projects

\$\$\$ Amount?	Bidding?
\$50k or under	Negotiated
>\$50k but <\$300k	Informal Bids
>\$300k but <\$640k	Informal bids w/ prequal or formal bid w/o prequal
>\$300k	Formal Bid

# How is **Construction** Competitive Bidding Different from **Maintenance** Procurement?

- Publication Requirements
- Public Bid Opening
- Specific Documents Required for Solicitation
- Bid Bond, Performance and Payment bond requirements
- Subcontractor listing laws
- Bid Protests
- Subcontractor substitution hearings
- Bid mistakes and withdrawals and related preclusions
- Cost of Builder's Risk
- Also: Stop Payment Notice Rights, Certain Claims Rights
- Subcontractor may assert SPN rights on a Maintenance Contract!



Extra Credit!!

# No Splitting to Avoid Competitive Bidding!

---

- No splitting portions of labor
- No splitting portions of materials
- Every portion of a construction project (>\$50k) must be bid via construction competitive bidding



# Exceptions to **Construction** Competitive Bidding Rules

- Emergencies:\*
  - PCC 10504. ....when that work or those remedial measures are required *immediately* and are necessary to *protect the public health, safety, and welfare.*
- Specialized research equipment
- Construction < \$50k \*
- Rerouting and shutdowns of utilities and final connection of the project to existing utilities

\*Even though bidding is not required, construction contracts must be utilized for construction work.

# Emergency Can Be Procurement and Construction

---

- Work should be necessary to 1) address the causation of the emergency, and 2) protect public health, safety and welfare
- Example: Flood in a dorm from a broken plumbing pipe
- Emergency Work under procurement contract:
  - 1) Turn off water/stop leak
  - 2) Remediation work to dry out space/remove wet/damaged flooring/drywall/equipment
- Emergency Work under construction contract:
  - 1) Reconstructing new flooring/framing/drywall/painting or installing new equipment/furniture

# If you don't follow the law...





# CRIMINAL PENALTIES APPLY for violation of any competitive bidding laws:

---

## PCC 10522

- Any officer or employee of the University of California who corruptly performs any official act under this chapter\* to the injury of the university is guilty of a felony.
- Chapter covers both construction competitive bidding and non-construction (procurement) competitive bidding.

## PCC 10524

- Persons convicted ...are also liable to the University of California for double the amount the university may have lost or be liable to lose by reason of the acts made crimes by this article.

# What Happens to the Contract?

---

PCC 10520

Every contract or other transaction entered in violation of any provision of this chapter is void, unless the violation is technical or non-substantive.

# Case Study #1: AV Equipment

---

- Many AV contracts are handled through procurement
- Depending on Scope of Work, some work may actually be construction in nature and require a construction contract:
  - Installation of new conduit
  - Installation of additional cable runs through walls
  - Affixing equipment permanently to structures
- Pay attention to actual scope of work as different contracts may need to necessary for different scopes of work

# Case Study #2: DIRT Panels/Walls

---

- DIRT Panels/Walls have been purchased and installed through procurement
- While they are not “permanent”, they affect life/safety issues including egress paths, fire sprinkler access
- OP has determined that this work is construction in all instances

# Case Study #3: Konica v. Regents

---

- Konica Business Machine U.S.A., Inc v. The Regents (1988)  
206 Cal.App.3d 449
- Campus awarded copy contract to company who did not comply with specifications
- Court agreed with Konica that campus could not award contract to non-conforming bidder
- Take-away: Don't attempt to side-step competitive bidding requirements in procurement contracts

# Example 1: Maintenance?

---

A contractor provides operational support for the facilities group in the Sean Parker School of Engineering, including: implementation of specialized minor facility projects and work orders as assigned; move, install and or change large and small office laboratories; make repairs /changes to furniture and equipment as requested, typically using vendor supplied parts but sometimes fabricating as necessary; using and working with tools, various structure support and campus shops; responsible for minor changes to local use lines for inert gas, air, vacuum and water; and conduct minor maintenance of some lab support equipment.

Maintenance or **construction**?

# Example 2

---

UC wishes to remove an existing deteriorated stair and install a new accessible sidewalk, ramp and stair to meet current ADA code requirements.

Maintenance or construction?

# Example 3

---

- What if UC has entered into an agreement with another public agency whereby UC agrees to improve the other agency's property with a construction cost of \$250k?
  - Is construction competitive bidding required?
  - Or standard procurement competitive bidding?



# Tips



- Questions? Call OP Procurement or Campus Contract Administrator or OGC
- Remember: If purchasing material or equipment separately: PO generally does not cover cost of uninstalling and reinstalling defective product purchased with PO (unless assigned to Contractor)
- Risk management: PO does not fall within UC builder's risk insurance
- Risk management: Latent defect claims can be made 10 yrs after completion of construction (not maintenance)
- Risk management: If building has leaks or other defects, proceeding with several POs will preclude a single source of insurance/performance bond for recourse

# Take Home Tips

---

- **Construction** cannot be performed under a non-construction procurement on a PO.
- **Maintenance** can be performed under a non-construction procurement on a PO or via **construction** procurement.
- **Maintenance** work in excess of \$1 Million in cost must be procured via **construction** competitive bidding.\*
- **Maintenance** work in excess of 50% of replacement value of building system or with upgraded components must be procured via construction competitive bidding.
- No splitting to avoid competitive bidding!



# Credits

---

- **Matthew Hawk**, Construction Counsel  
UC Legal (Formerly Office of General Counsel)  
University of California, Office of the President
- **Sean Parker**, Senior Manager  
Construction Procurement Services, Strategic Sourcing Centers of Excellence  
University of California, Office of the President
- **Andrew Houston**, Counsel  
Business, Finance & Innovation  
University of California, Office of the President
- **Anthony Cimo**, Design & Construction Analyst  
Office of Design & Construction  
University of California, Office of the President



**THANK  
YOU!**

---