



June 1, 2021

The Honorable Jose Medina
Higher Education Committee
Sacramento, CA 94249

Re: Oppose AB 846: Local Agency Public Construction Act

Dear Chairman Medina:

On behalf of the over 3,500 members of the International Institute of Building Enclosure Consultants (IIBEC), and especially our 286 members in California, IIBEC respectfully requests that you oppose effort to extend a flawed procurement process in the state.

IIBEC members come from a diverse group of design and construction industry companies, including hundreds of engineering firms, architecture companies, consultants, contractors, and product manufacturers. Our members specialize in design, investigation, repair, and management of roofing, exterior wall, and waterproofing systems.

As written, AB 846 would extend authorization for job order contracting (JOC) for school districts and community college districts through 2027 and includes an enforceable commitment that a skilled and trained workforce will be used on large contracts. IIBEC respectfully defers to the Assembly's opinion regarding workforce agreements, however, we would like to draw your attention to problems associated with JOC when used for construction. Outlined below are some of the reasons cities, states and school districts across America are rejecting JOC and using trusted contracting processes like Qualification Based Selection to select for complex construction projects.

According to the Assembly Floor Analysis JOC is defined as:

Selection of the contractors is based on the lowest responsible bidder. JOC is intended to reduce costs and accelerate completion of smaller projects; it is not generally viewed as an appropriate method of contracting for large, complex construction projects that require extensive or innovative design or are likely to encounter changes and revisions during constructions.

IIBEC would refer you to the Long Beach City Auditor's Office 2016 audit of JOC¹ within the department of Public Works. The auditors found that city workers circumvented rules similar to those described in the preceding paragraph and corroborate a nationwide pattern of similar problems inherent with JOC when applied to construction projects. IIBEC has found these findings replicated in audits and studies done from coast to coast at all levels of government and should give you serious concerns about the usefulness of JOC for construction projects.

In brief, when applied to construction projects JOC fails in the following areas:

- Price should never be used as the primary determinant for public construction projects. As evidenced by the Long Beach City audit, and corroborated by many more from across the country, the use of price as the primary factor in determining which company secures a construction project invites problems.

¹ Long Beach City [Job Order Contract Audit Report](#) May 25, 2016.

- Inhibiting price competition. Although JOCs have a pre-bid price for certain services on a statewide or regional basis at some specific point-in-time, there is no way to know whether current market conditions might yield a lower price, especially for larger projects and work authorizations.
- Small and disadvantaged businesses are unable to compete for these projects. The parent contracting company is free to ignore state or local laws designed to protect and promote small and disadvantaged businesses and instead selects the companies whose services are offered based on their own values and algorithms.
- Circumvention of architectural and engineering judgement. The JOC system creates incentives to avoid architectural and engineering considerations, which usually lower costs and protect public safety by ensuring reduced operating expense and increasing the feasibility and functionality of the improvement.
- Increases exposure to risk of fraud. Based on the three components of the Fraud Triangle² (financial risk, opportunity, and justification of the act), audits across America are revealing an unsettling pattern of fraud when reviewing JOCs.
- Lack of transparency. The JOC price book makes it easier for procurement offices to spend money unnecessarily and more difficult to audit completed projects. Given the significant sums of public money involved and accessible technology, much more easily accessible information should be available to review projects and products, along with the overall program, budgets, what they sell to whom, how much money the entity brings in, where the money goes, and how "recommended providers" are selected along with the length of the contract.

Using California Code, Public Contract Code - PCC § 20665.20 as an example,

(b) A community college district shall prepare an execution plan for all modernization projects that may be eligible for job order contracting pursuant to this article. The community college district shall select from that plan a sufficient number of projects to be initiated as job order contracts during each calendar year and shall determine for each selected project that job order contracting will reduce the total cost of that project. Job order contracting shall not be used if the community college district finds that it will increase the total cost of the project.

The structural problems with this section are the following: 1) The requirement of “sufficient number of projects to be initiated as JOCs” leaves room for interpretation. Is there a directive from the JOC organization how many jobs need to be ordered per year? If so, then it is likely a large job could be split into pieces to meet the goal. 2) In regard to not using JOCs if the total cost will be more, the Long Beach Audit report, found that despite not meeting JOC project type requirements, employees reclassified troubled projects as JOCs in order to move them along faster without having to address problems with original contractors. Therefore, one cannot cite this provision as a selling point when it has been shown that employees will violate the spirit of the requirement in order to avoid hard work and complete a project using the proper procedures. The routine violation of procurement procedures by using JOC and the resulting improper allocation of taxpayer funds should give us all pause.

There are now several official state government reports on cooperative procurement and JOCs, which IIBEC can provide to your committee, conducted by states' auditors, indicating the problems with Job Order Contracting in school construction and other state construction projects. These reports show that JOC in construction results in higher project costs, excludes minority contractors and reduces the diversity of contractors able to do the work in the future.

While Job Order Contracting appears to be a solution, as you now know, when applied to complex construction projects it brings in other issues. For the reasons outlined by this letter, we urge you to reject AB 648 and remand it back to committee to include a robust examination of the state’s use of JOCs, a

² The Fraud Triangle is a [model](#) used by the Association of Certified Fraud Examiners.

comprehensive audit of completed JOC construction projects, and a determination if small and disadvantaged companies are excluded from participation.

We also recommend the committee review California Government Code §4525-4529.5³, which guides how contracts with private architects, engineering, land surveying, and construction project management firms are to be hired. To ensure neither those offering JOCs or procurement officials inadvertently violate this provision, we request the committee consider including a specific prohibition in the JOC authorizing statute from offering this type of work or as part of another listing so that it is clear to all parties.

A routine complaint is that the construction procurement process is too difficult, and an easier solution must be found. In actuality, complex construction projects are just that – complex and difficult. Succinctly stated, the first line of defense against misuse and waste in procurement is an organized procurement office with well trained staff. Buildings today are much more complex than those of yesteryear with multi-use green roofs designed to reduce heat retention and lower cooling needs, for example, or high efficiency building enclosures that allow for smaller air heating and cooling units, and others channel rain from the building into retention ponds to minimize storm water runoff and help recharge local groundwater. Qualified and trained procurement staff using the right procedures can ensure that complex construction projects are delivered on time and within budget, and taxpayer funds are protected.

We stand ready to be a resource to your committees on construction procurement and the myriad of issues involved in the process of JOCs.

Sincerely,



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Cc: Steven S. Choi, Ph.D. (Vice Chair)

³ CA Government Code §4525-4529.5 can be found at: <https://law.justia.com/codes/california/2011/gov/title-1/4525-4529.5/>