



TEXAS MILITARY DEPARTMENT
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By Opinion Committee at 12:57 pm, Mar 21, 2025

RQ-0589-KP

March 20, 2025

Via Email to OPINIONCOMMITTEE@OAG.TEXAS.GOV

The Honorable Ken Paxton
Office of the Texas Attorney General
Attention: Opinion Committee
Post Box Office 12548
Austin, Texas 78711-12548

Dear General Paxton:

The Texas Military Department (TMD) respectfully requests an opinion on whether the Adjutant General's exclusive authority for State military construction under Texas Government Code section 437.054(a) exempts the agency from Texas Comptroller of Public Accounts State Procurement Division authority for military construction projects. Texas Government Code section 437.054(a) states:

The adjutant general is the decision-making authority on all matters concerning the location and maintenance of military forces and facilities in this state. The adjutant general may set priorities for the construction, renovation, repair, and maintenance of Texas military forces armories, facilities, and improvements owned or leased by this state. The adjutant general in this capacity is a public authority and a body politic and corporate and has all powers necessary for the acquisition, construction, rental, control, maintenance, operation, and disposition of Texas military forces facilities and real property and all associated property and equipment.

TMD interprets this language as providing the Adjutant General exclusive procurement, acquisition, and purchase authority for military construction contracts on all State military construction. This authority is exclusive of the Texas Comptroller of Public Account's Statewide Procurement Division (SPD) purchasing authority.

Inconsistent with State law and legislative intent, SPD has taken the position that SPD's delegation of purchase authority precludes the Adjutant General's exclusive statutory authority. SPD's position is that the Adjutant General must first seek and obtain SPD approval prior to procurement, acquisition, and purchase for military construction.¹

¹SPD is authorized to delegate its purchasing functions to agencies on behalf of the comptroller. A delegated purchase is made by an agency under the authority of SPD and subject to SPD's rules and procedures. For purchases made under SPD's delegation authority, SPD delegates to the agency the assessment whether to use the competitive sealed proposals procurement method or not. Agencies must

The effect of this requirement would serve to significantly delay often mission critical military construction needs. It would also allow SPD to deny TMD proposed procurements for State military construction and allow SPD to execute those procurements, effectively stripping the Adjutant General of his statutory authority. As the Governor and the State of Texas requires the Texas Military Department (TMD) and Texas National Guard (TXNG) to be ever ready in its military purpose, this redundant oversight and delay would compromise the readiness, safety, and execution levels of TMD's military response.

TMD manages and maintains a large portfolio of 65 Army Readiness Centers, 33 maintenance facilities, 20 All Forces Readiness Centers, and 4 training sites across the State. Maintaining these sites are necessary to train, operate, and execute critical response missions for the State of Texas. Executing construction, sustainment, and maintenance projects on these facilities requires a complicated mix of federal and state funding to ensure that TMD and the TXNG can effectively respond to both State and federal mission sets. The ability to program and execute both State and federal funds requires contract execution to occur within the appropriate state/federal fiscal year. Federal funding requires meeting all federal anti-terrorism, force protection, information security, and cyber security requirements further complicating the process. See Enclosure 1 for recent military response requirements.

Consideration of prior statutory authorities and legislative intent also support the Adjutant General's current statutory authorities. In 1997, the Texas Military Facilities (TMF) Commission was given "exclusive" authority over construction on TMF Commission military property and was vested with the authority to enter construction, repair or maintenance contracts on such property. TEX. GOV'T CODE ANN. § 435.013(a) (Vernon 1998). When the TMF Commission was abolished in 2007, all authorities, to include the authority for acquisition and contracting, were transferred to the Adjutant General. 80 (R), S.B. 1724 (2007). Those authorities, coupled with the Adjutant General's existing authorities, gave the Adjutant General exclusive authority over acquisition and contracting for military construction. When the current language of Texas Government Code section 437.054 was codified in 2013, there was no express or implied intent to divest the Adjutant General of his explicit authority over military construction. The stated intent was merely to consolidate and modernize the statutory language of Texas Government Code chapter 431 into a new chapter 437. 83 (R), S.B.1536 (2013). See Enclosure 2 for statutory history leading to current Texas Government Code section 437.054.

The Comptroller's authority is limited to the enumerated powers and duties described in Texas Government Code section 2151.004(d). That legislation transfers all powers and duties of the former Texas Building and Procurement Commission to the Comptroller, except as to powers given to the Department of Information Resources, the Texas Facilities Commission, or by other law. 83 (R), S.B.1536 (2013), TEX. GOV'T CODE § 2151.004(d) (2023). Texas Government Code section 437.054 is the "other law" under section 2151.004(d) and reserves "all powers" necessary to the Adjutant General regarding certain military functionalities including military construction.

follow the SPD Review and Delegation Process if the procurement request is for goods valued at more than \$50,000 or if requested services are valued at more than \$100,000. The ordering agencies initiate the process by submitting a delegation request to SPD either as an Open Market Requisition or via the Procurement Oversight & Delegation (POD) portal.

TMD operating under its exclusive authority, outside of SPD purchasing authority and SPD competitive bidding, does not entitle TMD to operate without constraint. TMD is required to follow Texas Government Code section 2261, State Contracting Standards and Procedures, when procurement of State goods or services are not made by the Comptroller or made outside of the Comptroller's delegation of authority. This statute was intended for State agencies, like the TMD, who have explicit procurement authority. Texas Government Code section 2261 requires TMD to adhere to competitive selection procedures, lowest and best bid requirements, prohibitions against certain bids, and other ethical and contracting standards. TMD has fully complied, and will continue to comply, with all Comptroller audits.

Based on the requirements of Senate Bill 20, 84th Legislature, TMD also maintains its own State Contract Management Guide (TMD Guide). The TMD Guide is maintained by the TMD's Purchasing and Contracts Division for the purpose of establishing consistent contracting policies and practices within TMD. These policies include detailed procurement rules, contract management rules, enhanced monitoring guidance for large contracts, and a host of other requirements.

The State legislature has always recognized the unique, complex, and strategic mission of the TMD. Their designating the Adjutant General as a public authority and vesting of all powers necessary ensures and will continue to ensure that the Texas Military Department can rapidly and flexibly respond to any mission, threat, or emergency, known or unknown, that the State may encounter, present or future.

For the foregoing reasons, I respectfully request the Texas Attorney General Opinions Division, issue an opinion regarding the interpretation of statutory language found in Texas Government Code section 437.054(a).

Sincerely,



Thomas M. Suelzer
Major General, TXANG
Adjutant General

Enclosures

Enclosure 1

The TXNG is the first of state forces called upon by the Federal government to defend the nation. Since 2001, over 35,000 TXNG Soldiers and Airmen have served in overseas contingency operations and, on average, there are approximately 1,000 Soldiers and Airmen deployed overseas at any given time. In this era of strategic competition with the People's Republic of China, and grey zone warfare with Russia, Iran, and North Korea, the TXNG is the United States' best trained, most experienced, and most productive reserve component element. This is best illustrated by the Department of Defense selecting the TXNG in recent years to lead three international State Partnership Program exchanges with Egypt, the Czech Republic, and Chile in addition to regular deployments of TXNG troops in Kuwait, Afghanistan, Syria, Jordan, Kosovo, and parts of Africa.

When not supporting the nation's national defense, the TXNG utilizes their training to support Texas during times of crisis or declared State disasters/emergencies. TMD's enabling statute is found at Texas Government Code, Title 4 Executive Branch, Chapter 437 Texas Military. This statute organizes its three branches (Texas Army National Guard, the Texas Air National Guard, and the Texas State Guard) under the TMD. All three branches are administered and commanded by the Adjutant General with the Governor as the commander-in-chief. The TXNG is the United States' largest state military force with just under 23,000 Soldiers and Airmen. TXNG support to the state has proved increasingly robust in recent years with the novel coronavirus (COVID-19) pandemic, civil disturbance, Winter Storm Uri, and border operations to name a few.

- March 2020, over 1000 TXNG activated and deployed for the statewide COVID-19 pandemic disaster declaration. Support missions included production of personal protective equipment, establishing/operating mobile testing teams (over 580,000 tested in 2020), establishing/operating nursing home disinfection teams, food bank support, and vaccination support sites (Texas Mobile Vaccination Team Program and "Save Our Seniors" vaccinating/assisted with vaccinating over 2.3 million Texans).
- In June 2020, the TXNG provided civil disturbance support to the Texas Department of Public Safety (DPS) due to nationwide protests and riots surrounding Mr. George Floyd's death in Minnesota. The TXNG deployed 4,400 members across Texas supporting 86 different locations, securing 5 historical sites, and protecting 42 public events.
- In February 2021, the TXNG deployed 1,546 TXNG to respond to Winter Storm Uri for 96 days manning shelters, assisting DPS with stranded motorists and aiding almost 36,000 Texans in danger. TXNG distributed 119,000 cases of bottled water and approximately 7,000 cases of meals to Texans in need. The TXNG Army aviators logged 300 total rotary wing hours (Chinook CH-47 and Blackhawk UH-60). The TXNG Air Force pilots logged 99.9 total fixed wing hours (C-17 and C-130).

- During August-September 2021, the TXNG responded to Hurricanes Nicholas and Ida. The TXNG mobilized 170 members to support 31 ground missions that assisted 24,599 families, 6,340 evacuations, distributed 18,287 cases of water, and distributed 12,974 meals.
- The TXNG has supported DPS and the United States Customs and Border Patrol along the Texas-Mexico border for various missions spanning two decades. These efforts were exponentially escalated, when on March 4, 2021, the Governor activated the TXNG to provide additional support to the DPS to stand up Operation Lone Star to assist with border operations and to help deter transnational criminal networks along the Texas-Mexico border.

Enclosure 2

Timeline of Construction Authorities

- a. In 1836, the legislature establishes the War Department.
- b. In 1935, the Legislature established the TXNG Armory Board providing authority to build and maintain TXNG armories. TEX. GOV'T CODE ANN. § 435.013(a) (Vernon 1998).
- c. In 1997, the TXNG Armory Board was renamed the Texas Military Facilities Commission (TMF Commission) and provided the authority to construct, repair, and maintain TXNG facilities located on TXNG properties. TEX. GOV'T CODE 435.013.
- d. In 1988, Texas Attorney General concluded that the TMF Commission's "authority was 'not necessarily exclusive' and the 'the adjutant general has broad powers which included the implied authority to build, maintain, and repair buildings necessary to carry out his responsibilities.'" Tex Tat's Gen. Op. No. JM-885 (1988).
- e. In 1997, the legislature amended Texas Government Code sections 431 and 435 and drew a distinction between TMF Commission owned property and TXNG owned property. 75 (R), S.B. 352 (1997). The TMF Commission had "exclusive" authority to the construct, repair, and maintain facilities located on TMF Commission property, and the Adjutant General continued to possess broad authority over the TXNG with the implied authority to build, maintain, and repair buildings necessary to carry out TXNG responsibilities.
- f. In September 2007, the legislature abolished the TMF Commission and transferred all TMF Commission's property and powers to the Adjutant General. The Adjutant General was expressly authorized to "enter into contracts in connection with any matter within his purposes or duties." 80 (R), S.B. 1724 (2007).
- g. In September of 2013, the legislature updated the TMD's enabling statute, Texas Government Code chapter 431. The stated intent was to consolidate current duplicative definitions, move Texas Government Code chapter 431 into a new chapter 437, and modernize the statutory language. 83 (R), S.B.1536 (2013).