



5 Fiscal Law Hot Topics

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Hot Topics

- TMF Missions. Who Pays?
- Economy Act Transactions, Friend or Foe
- Antecedent Liability
- Unauthorized Commitment and Ratification
- SB 20 Update



TMF Missions, Who Pays? The Basics

- The Texas Military consists of:
 - Texas Army National Guard
 - Texas Air National Guard
 - Texas State Guard
 - Texas Military Department



- Largely funded with federal dollars for the federal military readiness mission and funded by state revenues for state readiness and support of the federal mission
- 32 USC, Tex. Gov't Code 437, NGR 10-4, NGR 500-5

Simple?

Category\Statuses	STATE ACTIVE DUTY (SAD)	TITLE 32 (T32) (Non-Federal)	TITLE 10 (T10) (Federal)
1. Who has command and control?	Governor	Governor	President
2. Where can National Guard Soldiers serve?	IAW State law, including EMAC	USA	Worldwide
3. What type of funds pay?	State	Federal	Federal
4. What type of missions can be performed?	IAW State law (support to civil authorities and law enforcement)	Unlimited, IAW applicable laws, regulation and policy. Includes (1) training for Federal missions; (2) Civil Support Teams; (3) counter-drug ops; (4) homeland defense missions approved by SECDEF; and (5) <i>other duty</i> requested by SECDEF with concurrence of the Governor.	Overseas training and as assigned after mobilization
5. What disciplinary code applies?	State Military Code	State Military Code	Uniform Code of Military Justice (UCMJ)
6. Does the Posse Comitatus Act apply?	No	No	Yes

Human Resources – Many Flavors

Title 32 Traditional, “MDAY” make up the majority of the TMF

- Train for federal missions in their MOS while in and Title 32 MDAY status in a paid status based on each member’s respective rank and time in service and accrue federal retirement points (See 32 U.S.C.A. § 502(f))

- May be activated for state-only missions, but the state is responsible for their pay and benefits (See Tex. Gov’t Code 437.005)



Full-Timers

- Title 32 Technicians

- Missions are federal in nature and subject to the control of the Adjutant General (See 32 USC § 709).
- May not be ordered to state active duty. If a member of the Texas National Guard, may be ordered in their military capacity to state active duty, and in a permissive leave status while serving. (See CNGB Notice 1401, 24 Feb 2012, at 5(c), See also 32 USC § 709).

- Title 32 Full Time National Guard Duty (FTNGD)

- FTNGD consists of full-time Servicemembers, subject to the command and control of the Governor of Texas, but funded solely by the federal government to support federal mission
- Generally Title 32 FTNGD are prohibited from supporting state missions (See CNGB Notice 1401, 24 Feb 2012, at 5(b))
- Some FTNGD are resourced in Title 32 status to support LEA (See 32 U.S.C. § 112)
- AGRs may support the state active duty mission in an AGR status, but only if their organic unit is ordered on state duty AND the state active duty support does not interfere with the AGR's primary duties (See CNGB Notice 1401, 24 Feb 2012, at 5(a)).

State Only Resources

- Texas State Guard

- Volunteer military forces that provide community service and emergency response activities for this state
- Organized under the Second Amendment to the United States Constitution, and operating as a defense force authorized under 32 U.S.C. Section 109.” (See *Tex. Gov’t Code 437.001(16)*).
- *No express federal mission or appropriations support, the Texas State Guard (TSG) is a subordinate command under the Adjutant General*
- *Members of the TSG may only be ordered to state active duty.*

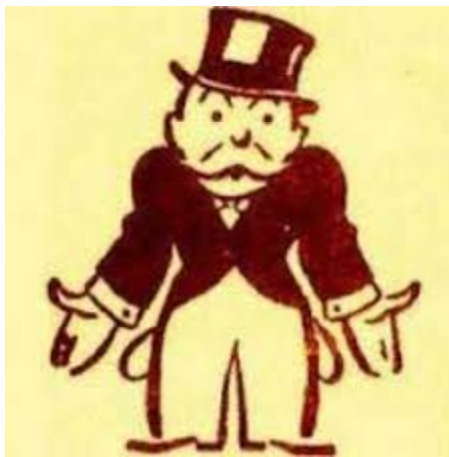
- State Civilians

- The Texas Military Department (TMD) employs civilians to manage the administrative functions the Texas Military.
- Handles payroll and benefits for the Texas State Guard, and houses state contracting and audit functions for the Adjutant General.

Equipment

- The majority of equipment is property of the federal government
- Federal property may be utilized by units of the Texas Military while in a state active duty status
 - Cost-reimbursement basis for the respective fiscal year in which the equipment was actually utilized (*See Army Regulation (AR) 700-131, Loan, Lease, and Donation of Army Material*)
- State property utilized for federally declared emergency is subject to reimbursement or replacement if damaged or destroyed

Questions About Who Pays for TMF Missions?



Economy Act Transactions (EAT) Friend or Foe?

- Economy Act (31 U.S.C. § 1535) authorizes interagency orders
- Ordering agency must reimburse the performing agency
- Servicing agency should credit monies received from the ordering agency to the “appropriation or fund against which charges were made to fill the order” (31 U.S.C. § 1536)
- See also 41 U.S.C. § 6307, similar intra-DOD project order authority
- DOD FMR, Vol. 11A, Ch.3 provides policies and procedures for Economy Act orders
- **Note... An exception to the Miscellaneous Receipts Statute



Economy Act Transaction Prerequisites



1. Transaction must be between authorized parties
2. Ordering agency has available funds to pay for the project
3. Ordering agency determines that the order is in the best interest of the government
4. Performing agency is able to support the project using its organic assets
5. Order cannot be satisfied “as conveniently or cheaply by a commercial enterprise”
6. The requested work is not an unauthorized re-delegation
7. There is no other statutory authority allowing the performing agency to perform the work
8. A written agreement is signed by authorized official from all party-agencies (DD1144 or MIPR).

FAR 17.502-2(c) (2005) and *11A U.S. DEP'T OF DEF., FIN. MGMT. REG.*
7000.14R para. 030304

Sound Easy?

- All Economy Act orders must be “specific, definite, and certain as to the work encompassed by the order and the terms of the order itself”
- On a DD 1144 with MOA

Period of performance: 20121210-20130930
Funds Expire for Obligation: 20130930
(1) The authority for this agreement: "Economy Act" (31 U.S.C. 1535)
(2) A description of the material or services required. - see BLOCK 12
(3) The dollar limits and any authority to exceed applicable: \$213,248
(4) The financing source or fund citation: Pending
(5) The delivery requirements - SEE BLOCK 12
(6) The payment provisions. via IPAC
(7) The duration of the agreement - Thru FY13
(8) All communication of ordering activity against this agreement will commence by telephone, e-mail, and other supplemental forms used for internal controls.
(9) No funding adjustments authorized without prior approval or change to agreement.
NAME/PHONE (DSN)/EMAIL for all:
SEE BLOCK 13

10 professors, History of Innovation)

Total

\$213,248



EXAMPLE DD1144

Pitfalls of the EAT

- Failure of Oversight (SOW lacks detail)
 - Non-local contracting officer
 - Non-local COR
 - One more link in the chain
- Failure in Funding
 - Projects costs exceed estimated costs (Potential ADA)
 - Projects severely under budget must be unobligated (creates grow back)



Questions About Economy Act (EAT)?



Antecedent Liability, What is it and Why Should I Care?

The Government's obligation under the subsequent price adjustment is to fulfill a bona fide need of the original fiscal year and therefore may be considered within the obligation which was created by the original contract award

So....If the contract was let with FY13 APF, and antecedent liability applies, contract changes are funded with FY13 \$



First is Scope Determination

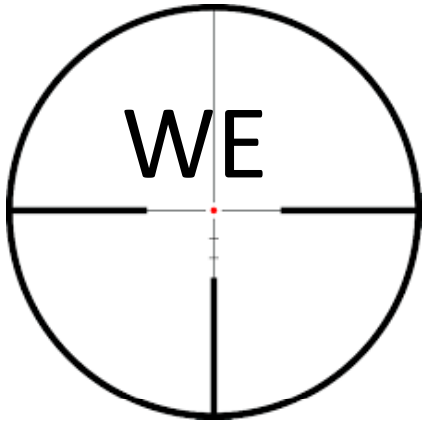
General Rule:

Is the contract, as modified, for essentially the same work as the parties originally bargained for?



Most important factor to consider is the extent to which a product or service, as changed, differs from the requirements of the original contract

- *Substantial changes in the work may be in-scope if the parties entered into a broadly conceived contract
- Changes in quantity depend on the volume and type of increase or decrease (out-of-scope increases are new starts and decreases are T4C)
- Number of in-scope changes may generate overall out-of-scope
- Increasing time of performance, if reasonable, is usually considered within scope as long as the contract is modified prior to expiration of the PoP
- Agreements by the contractor to proceed does not change scope determination



So, We Are in Scope...

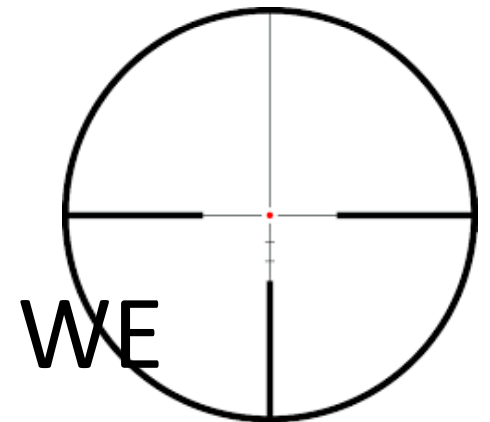
If the modification is within the scope of the original contract, changes are funded with the same FY appropriation as the original contract, even if that appropriation has expired.

EXAMPLES:

- Equitable Adjustments. When a contract price is made contingent upon certain performance costs that fluctuate unpredictably, the contract may include a clause allowing for equitable adjustment of the contract price.
 - Differing site conditions (Must determine Type I or Type II, etc.)
 - Unusual increases in contractor costs which make it uneconomical to complete task
- Changes Pursuant to Changes Clause. If a contract modification is made pursuant to the contract's changes clause, it is considered within the scope of the contract, as it was authorized by the contract itself. In such cases, original funds may be used to pay for any cost increases.

We “Thought” We Were In-Scope

- Contractor not required to perform work out of scope of the agreement, may file a protest
- Change determined to be out-of-scope is a new bona fide need that must be funded with current-year funds (Anti-Deficiency Act)
- Attempting to continue implicates the Competition in Contracting Act (CICA)





Questions About Antecedent Liability?



Unauthorized Commitment/Ratification

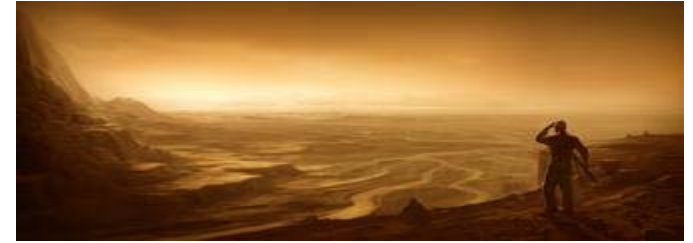
- An “unauthorized commitment” is an agreement that is not binding on the government solely because it was made by someone who did not have authority to bind the government. (FAR 1.602-3)
- Any binding contract attempt made by anyone other than a contracting officer will result in an unauthorized commitment. FAR 1.6; JP 4-10, para. III-2; FM 4-92, para. 1-20
- Someone with actual authority to bind the government may choose to subsequently ratify the unauthorized commitment (Contracting Officer)

Authority to Contract



- Express contract requirements
- Mutual intent to contract;
- Offer & acceptance; and
- Conduct by an officer having ACTUAL authority to bind the Govt in K (1947 Armed Services Procurement Act, 10 U.S.C. § 2301-2316 and Office of Federal Procurement Policy Act, 41 U.S.C. § 1101)
 - Authority...
 - Agency Head - Establishes subordinate K activities and delegates authority to subordinate activity leaders
 - Heads of Contracting Activities (HCAs) Manages all contracting actions w/in their activities
 - Principal Assistant for Contracting (PARC)
 - Contracting Officer (KO) appointed by HCA on SF 1402 (warrant), many levels of \$ authority
 - GPC and GTC users, limited level of \$ authority

Ratification Under FAR 1.602-3



- Supplies or services have been provided to and accepted by the Government, or the Government has obtained a benefit resulting from the unauthorized commitment;
- The ratifying official has the authority to enter into a contractual commitment;
- The resulting contract would otherwise have been proper if made by a KO;
- The KO reviewing determines the price to be fair and reasonable;
- The contracting officer recommends payment and legal counsel concurs
- Funds are available and were available at the time the unauthorized commitment was made
- The ratification is in accordance with other limitations prescribed under agency procedures.

**Nonratifiable commitments*

Cases that are not ratifiable may be subject to resolution as recommended by the GAO under its claim procedure (See GAO Policy and Procedures Manual for Guidance of Federal Agencies, Title 4, Chapter 2)



Letter of Intent...Contract?

CANCELLATION

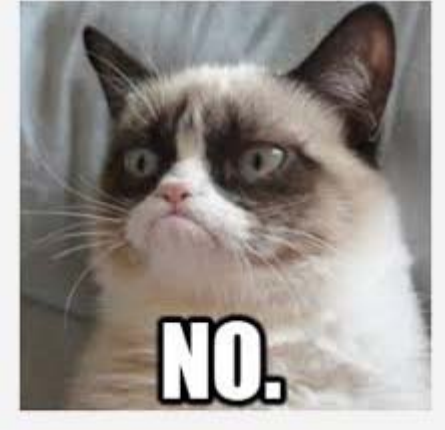
US ArmyNG TXARNG (US) agrees to provide Hotel with written notice of any decision to cancel agreement within five (5) days of such decision. US ArmyNG TXARNG (US) agrees that cancellation of this commitment would constitute a breach of US ArmyNG TXARNG (US)'s obligation to the Hotel and the Hotel would be harmed. It is further agreed that it would difficult to determine Hotel's actual harm and the chart below reasonably estimates the Hotel's harm for a cancellation. [The sliding scale on the chart reduces damages for early cancellation and reasonably estimates the Hotel's liability to lessen its harm by reselling US ArmyNG TXARNG (US)'s space and functions.] US ArmyNG TXARNG (US) agrees to pay Hotel, within thirty (30) days after any Cancellation, as liquidated damages and not as a penalty, the amount listed in the Chart below.

Date of Decision to Cancel	Amount of Liquidated Damages Due
From 0-30 days prior to September 25, 2015	= Full payment of guest rooms, room rental & estimated banquet charges
From 30-60 days prior to September 25, 2015	= 75% of the above.
From 61-90 days prior to September 25, 2015	= 50% of the above.

Once this Agreement is accepted and signed, there shall be no right of termination for the sole purpose of holding the same meeting or a smaller version in another facility. If US ArmyNG TXARNG (US) schedules the program contemplated by this agreement within the same geographic region as the Hotel, US ArmyNG TXARNG (US) shall be liable for the maximum amount indicated on the above chart.

Provided that US ArmyNG TXARNG (US) notifies the Hotel of the cancellation in a timely manner, and pays the liquidated damages in a timely manner, Hotel agrees not to seek additional damages from US ArmyNG TXARNG (US).

Examples of Unauthorized Commitments



- Hotel letters of intent by unit member
- Exceeding GPC maximum by card holder
- Using a GPC where you are not authorized
- “Phoning in” rations to caterer
- Ordering coffee at the hotel during a conference
- Contracting officer exceeds scope of warrant
- Contracting officer exceeds scope of contract
- Ordering supplies or services from a third party where an existing requirements contract is in place

Who Cares?



- Extreme delay in vendor payments
 - Unwillingness to do future business
 - Poor public perception
 - Prompt Payment Act requires interest payments
- Runs risk of over obligating budget
- Requires extra time to process
- TMCJ and administrative remedies in play
- Could lead to an Antideficiency Act issue



Questions About Unauthorized Commitments?

Texas Senate Bill 20

Makes comprehensive changes to state agency contracting, purchasing, and accounting procedures

Signed by The Governor of Texas on 4 June 2015

Effective 1 September 2015





Texas Senate Bill 20

- Requires the comptroller and governor's budget and policy staff to examine feasibility of consolidating state purchasing functions
- Restricts former state officers and employees who participated in procurement or contract negotiations with a person during their employment from accepting employment with that person for two years (Tex. Gov't Code § 572.069)
- Provides for verification of the use of a best value standard in state agency contracting (Tex. Gov't Code § 2101.041)

Texas Senate Bill 20



- Expands circumstances which a vendor may be barred (Tex. Gov't Code § 2155.077)
- Establishes additional requirements for the training, continuing education, and certification of state agency purchasing personnel and adds ethics training to the requirements (Tex. Gov't Code § 2155.078)
- Requires state agencies to review and report vendor performance after certain contracts are completed or terminated to the comptroller (Tex. Gov't Code § 2155.089)

Texas Senate Bill 20



- Authorizes the Texas Facilities Commission to participate in, sponsor, or administer a cooperative purchasing agreement (Tex. Gov't Code § 2156.181)
 - Akin to Economy Act
 - Not Applicable to TMF but could be useful and should be considered next session
- Requires agency contracting to purchase an information technology commodity to use Department of Information Resources (DIR) and prohibits a state agency from entering into a contract to purchase a commodity item if the value of the contract exceeds \$1 million (Tex. Gov't Code § 2157.068)



Texas Senate Bill 20

- Requires state employees involved in procurement and contract management for such an agency to disclose to the agency any potential conflict of interest with respect to any contract with a private vendor or bid for the purchase of goods or services from a private vendor (Tex. Gov't Code § 2261.252)
- Prohibits an applicable state agency from entering into a contract for the purchase of goods or services with a private vendor with whom certain persons have a financial interest (Tex. Gov't Code § 2261.252)
- Requires posting of certain contracts, enhances contract and performance monitoring, and establishes additional requirements applicable to contracts with a value in excess of \$1 million (Tex. Gov't Code § 2261.255)



Texas Senate Bill 20

- Authorizes the comptroller to assess fees for training contract managers (Tex. Gov't Code § 2262.053)
- Requires agency to use the vendor performance tracking system (Tex. Gov't Code § 2262.055)
- Requires the comptroller to make the vendor performance tracking system available to the public (Tex. Gov't Code § 2262.055)

Questions About Senate Bill 20?





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