

Contractual Immunity:

The Bittersweet Treat that Makes Your Face Pucker and Head Hurt

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I. Basics We All Should Know

Texas law recites over and over again that governmental immunity, which is derived from the State's sovereign immunity, shields political subdivisions from suit and liability.¹ Governmental immunity protects governmental entities, such as cities, from lawsuits for damages absent express legislative consent.² Legislative consent (i.e. in the form of a waiver) must be expressed by clear and unambiguous language.³ When determining whether there is a clear and unambiguous waiver of immunity from suit, courts resolve any ambiguity in favor of retaining immunity.⁴

The legal issues involved in governmental immunity are heavily litigated in tort claims. However, the immunity also exists in contractual claims. When specifically dealing with immunity in a contract claim context, the Texas Supreme Court explained in *Tooke*:

"[G]overnmental immunity has two components: immunity from liability, which bars

enforcement of a judgment against a governmental entity, and immunity from suit, which bars suit against the entity altogether." "By entering into a contract, a governmental entity necessarily waives immunity from liability...but it does not waive immunity from suit."

Immunity from liability is an affirmative defense, while immunity from suit deprives a court of subject matter jurisdiction.⁵

Immunity from suit typically is only waived by express consent from the Legislature, with a few exceptions. Merely entering into a contract is not sufficient to waive immunity from suit.⁶ As a result, a City can agree to be held *liable* for a breach of a contract by executing the agreement, but without a waiver from suit, no claim can be brought to enforce the contract in a court of law.

In tort claim cases, even if a Plaintiff can establish a waiver of immunity from suit (such as when the City seeks affirmative relief and subjects itself to the jurisdiction of the court as discussed later), the City still has immunity from liability which can be

¹ *Tooke v. City of Mexia*, 197 S.W.3d 325, 332 (Tex. 2006).

² *See Fed. Sign v. Tex. S. Univ.*, 951 S.W.2d 401, 405 (Tex. 1997), *superseded by statute on other grounds as stated in Gen. Servs. Comm'n v. Little-Tex Insulation Co.*, 39 S.W.3d 591, 593 (Tex. 2001).

³ TEX. GOV'T CODE ANN. §311.034 (Vernon 2005); *Travis County v. Pelzel & Assocs. Inc.*, 77 S.W.3d 246, 248 (Tex. 2002).

⁴ *See Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 697 (Tex. 2003).

⁵ *See id.*; *see also Ben Bolt-Palito Blanco Consol. Indep. Sch. Dist. v. Tex. Political Subdivs. Prop./Cas. Joint Self-Ins. Fund*, 212 S.W.3d 320, 323 (Tex. 2006).

⁶ *State v. Langley*, 232 S.W.3d 363, 367 (Tex. App.—Tyler 2007, no pet.)

raised in a motion for summary judgment. However, with contract claims, immunity for liability is already waived. Therefore, the immunity battle in contract claims will turn on the jurisdictional element of immunity from suit.

II. Reminder of Basic Contract Law

To establish a prima facie case for breach of contract under Texas law, a plaintiff must show: 1) the existence of a valid contract; 2) the plaintiff's performance; 3) breach by the defendant; and 4) damages resulting from the defendant's breach.⁷ As a threshold matter, a contract must define its essential terms with sufficient precision to enable the court to determine the obligations of the parties.⁸ If the alleged contract is so indefinite that a court is unable to fix the legal rights and obligations of the parties, it is unenforceable. *See id.* Thus the essential terms of the contract must be agreed upon.⁹

A contract does not have to be contained within a single document, but may be determined based on a collection of documents.¹⁰ Further, a contract need not be in writing to be enforceable.

However, in order to have a valid contract with any governmental entity, such contract must be duly authorized by the governing body.¹¹ Statements or acts of the mayor or other officers or governing body members are ineffectual.¹² Persons or entities contracting with the City are charged by law with notice of the limits of their authority and are bound at their peril to ascertain if the contemplated contract is properly authorized.¹³ Proof of the City's authorization may only be supplied by the authenticated minutes of the meeting at which the action occurred, unless the minutes have been lost or destroyed.¹⁴ A plaintiff suing to establish a contract with a City has the burden to both plead and prove that the minutes show the council's act in authorizing or ratifying the contract.¹⁵

III. History of Prior Battles

Prior to 2005, the initial battles fought in breach of contract claims turned less on the elements of the contracts at issue and whether there was an actual breach to more on whether the Texas Legislature waived a governmental entity's immunity from suit via some statute to begin with. The key language at issue was usually some form of reference proving that individuals and entities, public and

⁷ *See Foster v. Centrex Capital Corp.*, 80 S.W.3d 140, 143-44 (Tex. App.—Austin 2002, pet denied).

⁸ *See Mabon Ltd. v. Afri-Carib Enters., Inc.*, 29 S.W.3d 291, 300 (Tex. App.—Houston [14th Dist.] 2000, no pet.).

⁹ *See T.O. Stanley Boot Co. v. Bank of El Paso*, 847 S.W.2d 218, 221 (Tex.1992).

¹⁰ *Padilla v. LaFrance*, 907 S.W.2d 454, 460 (Tex. 1995) (citing *Adams v. Abbott*, 151 Tex. 601, 254 S.W.2d 78, 80 (1952)).

¹¹ *City of Bonham v. Southwest Sanitation, Inc.*, 871 S.W.2d 765, 767 (Tex. App.—Texarkana 1994, writ denied).

¹² *Canales v. Laughlin*, 147 Tex. 169, 214 S.W.2d 451 (1948); *Alamo Carriage v. City of San Antonio*, 768 S.W.2d 937 (Tex. App.—San Antonio 1989, no writ).

¹³ *State v. Ragland Clinic-Hospital*, 138 Tex. 393, 159 S.W.2d 105, 107 (1942).

¹⁴ *Wagner v. Porter*, 56 S.W. 560 (Tex. Civ. App. 1900).

¹⁵ *City of Bonham*, 871 S.W.2d at 767 (citing *Wagner v. Porter*, 56 S.W. at 561).

private, may “sue and (or) be sued,” “(im)plead and (or) be impleaded,” “be impleaded,” “prosecute and defend,” “defend or be defended,” “answer and be answered,” “complain and (or) defend,” or some combination of these phrases. Dozens of Texas statutes contain such language.¹⁶

A distinct split in the various Texas appellate circuits had such language sometimes waive governmental immunity from suit, sometimes not waiving it, and holdings that sometimes the languages had nothing to do with immunity, referring instead to the capacity to sue and be sued or the manner in which suit can be had (for example, by service on specified persons).¹⁷ This battle waged in the courts for many years with varying and inconsistent results.

¹⁶ See *Tooke*, 197 S.W.3d at 328, 361-370 (providing a partial listing of such statutes).

¹⁷ *Disposal, Inc. v. City of Blossom*, 165 S.W.3d 887, 896 (Tex. App.—Texarkana Jun 09, 2005)(holding Sections 51.033 and 51.013 of the Texas Local Government Code stating a city can “sue and be sued” and “plead and be impleaded” resulted in waiver of city's immunity); *City of Greenville v. Reeves*, 165 S.W.3d 920 (Tex. App.—Dallas 2005) (holding that the “may plead and be impleaded in any court” language is not a clear and unambiguous waiver of immunity); See *Travis County v. Pelzel & Assocs., Inc.*, 77 S.W.3d 246, 249 (Tex. 2002) (superseded by statute on other grounds) (holding that statutory presentment language providing that “[a] person may not sue on a claim against a county unless the person has presented the claim to the commissioners court and the commissioners court has neglected or refused to pay all or part of the claim” did not “go as far as waiving immunity from suit, but merely establishe[d] a condition precedent to suit”).

IV. Current Statutory Waiver

A. Alteration in Legal Landscape

In 1999, the Texas Legislature created an administrative process for contractors to resolve any contractual disputes they had with the State of Texas.¹⁸ This administrative procedure did not waive the State’s sovereign immunity, but allowed for an administrative claims process on the performance of certain contractual obligations of the State. This chapter, however, does not apply to political subdivisions, such as municipalities.

In 2005, the Texas Legislature, borrowing from the claims process in Chapter 2260, created a limited waiver of immunity of both suit and liability for municipalities and other types of governmental entities relating to certain types of breach of contract claims.¹⁹ The Act can apply retroactively to already existing contracts.²⁰ For all other types of contract claims not covered and all contract claims for entities which did not fit within the definition under §271.151, the question of waiver by the “sue and be sued language” remained a question.

In 2006, the Texas Supreme Court resolved this issue once and for all in its holding in *Tooke v Mexia*.²¹ The Supreme Court noted that the “sue and be sued” and “plead and implead” language was **not** a clear and unambiguous waiver of sovereign

¹⁸ TEX. GOV’T CODE ANN. §2260.001, *et seq.*

¹⁹ Act of May 23, 2005, 79th Leg., R.S., ch. 604, § 1, 2005 Tex. Gen. Laws 1548 (codified at TEX. GOV’T CODE ANN. §§ 271.151-.160).

²⁰ *Paula Const., Inc. v. City of Lytle*, 220 S.W.3d 16, 18 (Tex. App.—San Antonio 2006).

²¹ See *Tooke*, 197 S.W.3d at 332.

immunity.²² Cities retain immunity from suit for any contract claims not covered by § 271.152 or other specific waiver statutes.

As a result, the legal landscape in governmental entity contract claims shifted. A City's primary defense is now to focus on whether the contract at issue falls within the types authorizing suit under §271.152. If not, then the municipality may retain immunity from suit against such a claim. If the claim falls within §271.152, the claimant must demonstrate he has satisfied all of the requirements under the subchapter.

B. Statutory Provisions

The relevant portions of Subchapter I of Chapter 271 of the Texas Government Code provide:

§ 271.151. Definitions

...

(2) "Contract subject to this subchapter" means a written contract stating the essential terms of the agreement for providing goods or services to the local governmental entity that is properly executed on behalf of the local governmental entity.

§ 271.152. Waiver of Immunity to Suit for Certain Claims

A local governmental entity that is authorized by statute or the constitution to enter into a

contract and that enters into a contract subject to this subchapter waives sovereign immunity to suit for the purpose of adjudicating a claim for breach of the contract, subject to the terms and conditions of this subchapter.

§ 271.153. Limitations on Adjudication Awards

(a) The total amount of money awarded in an adjudication brought against a local governmental entity for breach of a contract subject to this subchapter is limited to the following:

(1) the balance due and owed by the local governmental entity under the contract as it may have been amended, including any amount owed as compensation for the increased cost to perform the work as a direct result of owner-caused delays or acceleration;

(2) the amount owed for change orders or additional work the contractor is directed to perform by a local governmental entity in connection with the contract; and

²² *Id.* at 329.

(3) interest as allowed by law.

(b) Damages awarded in an adjudication brought against a local governmental entity arising under a contract subject to this subchapter may not include:

(1) consequential damages, except as expressly allowed under Subsection (a)(1);

(2) exemplary damages; or

(3) damages for unabsorbed home office overhead.

§ 271.155. No Waiver of Other Defenses

This subchapter does not waive a defense or a limitation on damages available to a party to a contract, other than a bar against suit based on sovereign immunity.

§ 271.156. No Waiver of Immunity to Suit in Federal Court

This subchapter does not waive sovereign immunity to suit in federal court.

§ 271.157. No Waiver of Immunity to Suit for Tort Liability

This subchapter does not waive sovereign immunity to suit for a cause of action for a negligent or intentional tort.

§ 271.159. No Recovery of Attorney's Fees

Attorney's fees incurred by a local governmental entity or any other party in the adjudication of a claim by or against a local governmental entity shall not be awarded to any party in the adjudication unless the local governmental entity has entered into a written agreement that expressly authorizes the prevailing party in the adjudication to recover its reasonable and necessary attorney's fees by specific reference to this section.

C. What To Do With the Statute

In order for a claimant to have a valid breach of contract claim against a City, they must fall within the limited statutory definitions and waiver provisions of Subchapter I of Chapter 271 of the Texas Government Code. When examining the legal validity of a claim consider the following:

i. Is the contract in writing?

There is no waiver of immunity for oral contracts against the municipality. However, remember that a contract can be inferred from multiple writings, when read together, manifest an intent to enter into a contract and spell out the essential terms.²³

ii. Was the City authorized by statute or the constitution to enter into a contract?

This goes more to the City's legal authority to enter into the contract and less on finding a specific statutory reference to the type of contract. Remember that a home-rule charter qualifies as a statute.²⁴ Most charters authorize the City to enter into contracts and therefore will probably allow a claimant to meet this element.

iii. Does the contract state the essential terms of the agreement?

Since typical contract law requires a contract to state its essential terms anyway, this goes more to whether or not you have a valid and enforceable written contract to begin with.²⁵

iv. Is the contract for goods or services?

Only contracts for goods and services are applicable. Lease contracts, contracts for the sale of real estate, easement agreements and the like are not contracts for "goods or services" and therefore the City retains immunity.²⁶

v. Is the claimant providing goods and services "TO" the municipality?

Subchapter I was enacted to allow contractors some redress for goods or services provided to governmental entities under a contract. It was not meant to waive immunity for every type of contract available or where the governmental entity has entered into a contract to provide services or goods to a third-party.

vi. Was the contract property executed?

In line with Texas legal precedent, a contract with a governmental entity is not valid unless authorized by the governing body (i.e. your City Council). However, be cautious that your Council does not officially act on something that can later be viewed as a contract.

vii. What damages are being sought?

Subchapter I only allows limited damages (i.e. an amount due under the contract

²³ *Padilla v. LaFrance*, 907 S.W.2d 454, 460 (Tex. 1995).

²⁴ *Howard v. Clack*, 589 S.W.2d 748, 750 (Tex. Civ. App.—Dallas 1979, no pet.).

²⁵ *Weitzman v. Steinberg*, 638 S.W.2d 171, 175 (Tex. App.—Dallas 1982, no writ) (a contract, whether written or oral, must define its essential terms with sufficient precision to enable the court to determine the obligations of the parties.); *Cent. Tex. Micrographics v. Leal*, 908 S.W.2d 292, 297 (Tex. App.—San Antonio 1995, no writ) (a contract which leaves essential terms open for later negotiation is unenforceable until the essential terms are fixed.).

²⁶ *Brown Water Marine Service, Inc. v. Aransas County Navigation Dist. No. 1*, No. 13-07-055-CV, 2008 WL 1822727 (Tex. App.—Corpus Christi Apr 24, 2008) (Not designated for publication); *Valley Mun. Utility Dist. No. 2 v. Rancho Viejo, Inc.*, No. 13-07-545-CV, 2008 WL 384320 (Tex. App.—Corpus Christi Feb 14, 2008)(mem.op) (not designated for publication).

and possible interest). Courts are holding claimants to a very strict pleading requirement. If they do not specifically plead the damages allowed under Subchapter I, then there is no waiver of immunity and the claims are being dismissed via pleas to the jurisdiction.²⁷

- viii. Does your contract specifically provide for attorney's fees?** Even if the contract at issue falls within Subchapter I, no attorney's fees are permitted for a successful claimant unless the contract itself expressly provides for them. Older contracts which may qualify, but do not provide for attorneys fees, cannot rely upon the statutory grant of attorney's fees under contract law.

V. Additional Traps and Things to Think About

A. General Considerations

When evaluating contractual issues either at the drafting stage or in responding to a lawsuit, there are several collateral aspects to keep in mind. While they may not directly address immunity from contract claims, they could have a potential effect on the City's ability to rely upon the defense later on.

²⁷ *City of San Antonio v. Polanco & Co., L.L.C.*, No. 04-07-00258-CV, 2007 WL 3171360 at *5, (Tex. App.—San Antonio Oct. 31, 2007)(not designated for publication); *SE Ranch Holdings, Ltd. v. City of Del Rio*, No. 04-06-00640-CV, 2007 WL 2428081 at *5, (Tex. App.—San Antonio Aug. 29, 2007, pet denied).

B. Verified Pleas

Texas Rule of Civil Procedure 93 requires verification of certain answers, including the denial of the authorized execution of any instrument in writing, upon which any pleading is founded or that it is without consideration.²⁸ If a Plaintiff raises a contract issue and the City disputes any contract exists, a verified answer should be filed. Failure to file a verified denial does not waive immunity, but will relieve the plaintiff of the burden of proving an executed (and authorized) contract exists or that such contract is without consideration.²⁹

C. Waiver

i. Seeking Affirmative Relief

Irrespective of any statutory waiver of immunity from suit, sometimes a City can waive such immunity by conduct, although such waivers are few and far between. The most notable waiver is when a City enters into the litigation process by asserting its own affirmative claims for monetary relief, it waives immunity to the extent of allowing opposing parties to assert as an offset any claims germane to, connected with, and properly defensive to those asserted by the governmental entity.³⁰ Which means that if the City sues a party (either in an original action or through a counter/cross-claim) the City has, by

²⁸ TEX. R.CIV. P. 93(7), (9).

²⁹ *Nelson Mobile Homes, Inc. v. Morace*, 486 S.W.2d 194 (Tex. Civ. App.—Houston [1st Dist.] 1972, no writ) (where plaintiff alleged suit was founded on written contract, and defendant did not deny under oath execution of contract, plaintiff was relieved of burden of proving execution).

³⁰ *Reata Constr. Corp.*, 197 S.W.3d at 377.

conduct, subjected itself to the jurisdiction of the court, to a limited degree. The City is only subjected to suit for monetary damages, however, to the extent an opposing party can assert and offset to the monetary damages claimed which are germane to, connected with, and properly defensive to those of asserted by the entity. Absent the Legislature's waiver of the City's immunity from suit, however, the trial court does not “acquire jurisdiction over a claim for damages against the City in **excess** of damages sufficient to offset the City's recovery, if any.”³¹

This exception to the “no waiver by conduct” doctrine, is not limited to simply filing suit, but has been applied when the entity seeks certain types of monetary relief, including attorney’s fees because attorney’s fees are ordinarily considered a claim for affirmative relief.³² However, if the affirmative relief being sought is merely relief sought as part of a defense, there is no waiver of immunity. In *DeMino*, the plaintiff brought suit against Sheridan, the University of Houston Provost.³³ Sheridan did not file a separate pleading suggesting a counterclaim. Rather, his general prayer for relief asked for attorneys' fees and costs of court. The *DeMino* court stated that the issue of whether an answer pleads a counterclaim or is defensive is whether a defendant could have maintained an independent suit. If the suit could not have been maintained, it is defensive.³⁴ The court concluded that Sheridan did not invoke

the jurisdiction of the trial court by his general prayer.³⁵

In *Bexar Metropolitan Water Dist. v. Education and Economic Joint Venture*,³⁶ the San Antonio Court of Appeals opined that a general pleading for costs is not the type of affirmative claim contemplated in *Reata*. However, be aware that seeking affirmative monetary relief outside of merely asserting a proper defense, can waive immunity from suit.

ii. Waiver Within the Contract

Cities enter into contracts on a regular basis, not just for goods and services, but for a host of other reasons. When trying to convince a contracting party to enter into a contract, the savvy party, understanding the City’s potential ability to walk away from the contract, may want some assurances or voluntary waivers of immunity from suit contained within the contract and the City may be willing to oblige. However, this issue is not as easy as it sounds.

In the context of contract claims, one of the “fundamental reason[s] why immunity exists [is] to prevent governmental entities from being bound by the policy decisions of their predecessors.”³⁷ Courts “defer to the Legislature to waive immunity” because “legislative control over sovereign immunity allows the Legislature to respond to changing conditions and

³¹ *Id.* (Emphasis added)

³² *In re Frost Nat'l Bank*, 103 S.W.3d 647, 650 (Tex. App.—Corpus Christi 2003, no pet.).

³³ *DeMino v. Sheridan*, 176 S.W.3d 359 (Tex. App.—Houston [1st Dist.] 2004, no pet.)

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Bexar Metropolitan Water Dist. v. Education & Economic Development Joint Venture*, 220 S.W.3d 25, 32 (Tex. App.—San Antonio 2006, pet. filed).

³⁷ *Catalina Dev., Inc. v. County of El Paso*, 121 S.W.3d 704, 706 (Tex. 2003).

revise existing agreements if doing so would benefit the public.’ To ensure that this legislative control is not lightly disturbed, a waiver of immunity must be clear and unambiguous.”³⁸

In *Fed. Sign v. Tex. State Univ.*, the Texas Supreme Court suggested in a footnote that there may be circumstances “where the State may waive its immunity by conduct other than [by] simply executing a contract.”³⁹ But since then, the Supreme Court has consistently declined to fashion a waiver-by-conduct exception to the doctrine of governmental immunity.⁴⁰

Since one of the primary reasons for upholding immunity from suit in contract claims is to prevent governing bodies from being bound by prior bodies (which is at odds with the basic fundamental principles of creating a contract), arguments exist that even if the City’s contract contains a waiver of immunity from suit, such waiver may not be valid.

The case of *Catalina Development, Inc. v. County of El Paso* illustrate a fundamental reason why immunity exists-to prevent governmental entities from being bound by the policy decisions of their predecessors. In this case, the County,

³⁸ *Tooke*, 197 S.W.3d at 332-33 (quoting *Tex. Natural Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 854 (Tex. 2002)).

³⁹ 951 S.W.2d 401, 408 n. 1 (Tex. 1997).

⁴⁰ See *IT- Davy*, 74 S.W.3d at 857 (“Creating a waiver-by-conduct exception would force the State to expend its resources to litigate the waiver-by-conduct issue before enjoying sovereign immunity's protections-and this would defeat many of the doctrine's underlying policies.”).

upon an electoral change in the commissioners court, determined that selling the property to Collins was a poor decision. Rather than lock El Paso County residents into a contract not in their best interest, the court properly protected the perceived interests of the public by rejecting the contract. In doing so, the County did not profit unfairly at Collins's expense.⁴¹

Further, in the case of *SE Ranch Holdings, Ltd. v. City of Del Rio*,⁴² after a political change in the City Council, the City walked away from an authorized and executed development agreement with SE Ranch to develop a master plan community on undeveloped land in a newly created Tax Increment Reinvestment Zone. The court did not find a waiver of immunity from suit and allowed the City to walk away from the contract.

However, one must always be aware of the old axiom, “bad facts make bad law.” *Reata* leaves open the ability of a court to hold a governmental entity

⁴¹ Further, the court noted that the bidding statute under which the sale of the County's land was conducted further supported conclusion. See TEX. LOC. GOV'T CODE ANN. § 272.001. Section 272.001(d) provides that a governmental entity acting under the statute is not required “to accept any bid or offer *or to complete a sale or exchange.*” *Id.* (emphasis added). Here, although the County had taken a number of steps toward closing the sale, it ultimately declined to complete the transaction. Section 272.001(d) makes clear that the County was under no statutory obligation either to accept any potential bids or to complete a transaction if it did decide to accept a bid. This statutory exception essentially relieved the County of any obligations under its contract.

⁴² *SE Ranch Holdings, Ltd. v. City of Del Rio*, No. 04-06-00640-CV, 2007 WL 2428081 at *5, (Tex. App.—San Antonio Aug 29, 2007, pet denied).

liable under an express contractual waiver of immunity from suit. Be cautious in considering whether the City could be held liable for walking away from a contract, even if the City may have an initial immunity from suit defense.

D. Declaratory Judgment

The Uniform Declaratory Judgment Act (DJA) is a remedial statute designed “to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations.”⁴³ Suits for declaratory judgment are not suits which implicate sovereign immunity.⁴⁴ All that is being sought is a declaration of rights and not monetary payments out of a government’s treasury.

However, suits to establish a contract's validity, to enforce its performance, or to impose its liabilities **are** suits against the entity that are precluded by the doctrine of immunity from suit.⁴⁵ A Plaintiff may not label such a suit as one for declaratory judgment merely to avoid the immunity-from-suit doctrine.⁴⁶

E. Proprietary Functions

A City is not immune from suit for torts committed in the performance of its proprietary functions.⁴⁷ Generally a municipality's proprietary functions are those conducted “in its private capacity, for the benefit only of those within its corporate limits, and not as an arm of the government,” whereas its governmental functions are “in the performance of purely governmental matters solely for the public benefit.”⁴⁸

The proprietary-governmental dichotomy has been used to determine a municipality's immunity from suit for tortious conduct on numerous occasions. However, Texas Supreme Court has never *held* that this same distinction determines whether immunity from suit is waived for breach of contract claims.⁴⁹ Nevertheless, the Texas Supreme Court has *stated*, “Contracts made by municipal corporations in their proprietary capacity have been held to be governed by the same rules as contracts between individuals.”⁵⁰ It has also *stated* that a City that contracts in its proprietary role is “clothed with the same authority and subject to the same liabilities as a private citizen.”⁵¹ As a result, be aware that the subject matter of a contract, if determined to be

⁴³ TEX. CIV. PRAC. & REM. CODE ANN. § 37.002(b).

⁴⁴ *Texas Logos, L.P. v. Texas Dept. of Transp.*, 241 S.W.3d 105, 114 (Tex. App.—Austin 2007, not pet.).

⁴⁵ *IT-Davy*, 74 S.W.3d at 855; *Tex. S. Univ. v. State St. Bank & Trust Co.*, 212 S.W.3d 893, 903 (Tex. App.—Houston [1st Dist.] 2007, pet. denied).

⁴⁶ *See IT-Davy*, 74 S.W.3d at 856.

⁴⁷ *City of Tyler v. Likes*, 962 S.W.2d 489, 501 (Tex. 1997).

⁴⁸ *Tooke*, 197 S.W.3d at 343 (quoting *Dilley v. City of Houston*, 148 Tex. 191, 222 S.W.2d 992, 993 (1949)).

⁴⁹ *Tooke*, 197 S.W.3d at 343; *City of Weslaco v. Borne*, 210 S.W.3d 782, 790 (Tex. App.—Corpus Christi 2006, pet. denied).

⁵⁰ *Gates v. City of Dallas*, 704 S.W.2d 737, 738-39 (Tex. 1986).

⁵¹ *Id.*

proprietary, may not qualify for any form of governmental immunity.

F. Suits Between Entities

Cities not only contract with private parties, but also with other governmental entities on a regular basis. Since the Texas Supreme Court's ruling in *City of Galveston v. State*⁵² held that a governmental entity can retain immunity from suit against a different governmental entity, the enforceability of many interlocal agreements may be in question.

Just this year, the Texas Supreme Court held in *Nueces County v. San Patricio*⁵³ that one county retained immunity from suit against the claims brought by another county. Nueces County allegedly collected ad valorem taxes on property later determined in a boundary dispute to belong to its neighbor San Patricio County. The Supreme Court dismissed the suit based on lack of subject-matter jurisdiction as it held Nueces County still retained immunity from suit.

VI. Conclusion

Even with the recent change in the legal landscape due to TEX. GOV'T CODE ANN. §271.152 and *Tooke v. Mexia*, the legal battles regarding immunity from suit in a breach of contract context are still alive and well. The primary defenses for many claims will now turn on whether the contract meets the strict statutory requirement of §271.152.

⁵² *City of Galveston v. State*, 217 S.W.3d 466 (Tex. 2007).

⁵³ *County Nueces County v. San Patricio County*, 246 S.W.3d 651 (Tex. 2008)