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Contracting with Government Entities

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I. Introduction

“Rex non potest peccare”, “the king can do no wrong” – Herbert Broom, *A Collection of Legal Maxims, Classified and Illustrated*, 23 (London, A. Maxwell and Son 1845).

“Everyone who receives the protection of society owes a return for the benefit.” – John Stuart Mill, *On Liberty*, 1859

“Rights that depend on the sufferance of the State are of uncertain tenure.” – Suzanne LaFollette, “The Beginnings of Emancipation,” *Concerning Women*, 1926.

Contracts form the backbone of commercial transactions. A fundamental premise underlying every contract is that the other party may be sued in court if it breaches that contract, with damages collected as compensation. However, governmental entities contract under a different set of rules, and contracting with governmental entities has long been fraught with risk. Unlike non-governmental entities, governmental entities face limits on the obligations they may assume in transactions and protections against suit and liability if a dispute arises.

This paper will discuss some of these attributes of Texas governmental entities that differentiate them from non-governmental entities, examining issues in contracting with Texas municipalities, counties and state agencies for goods and services from the vantage point of a non-governmental entity. This paper does not address construction contracts, contracts with other governmental entities (*e.g.* municipal utility districts, school districts, or conservation and reclamation districts) or tort claims.

II. Limits on a Governmental Entity’s Powers to Contract

A. Incurrence of Debt

Despite their apparent broad authority to enter into contracts, governmental entities face significant restrictions in their contracting ability. For example, cities may not incur debts unless at the same time arrangements are made to assess and collect annually a sufficient sum to pay the interest thereon and create a sinking fund of at least two per cent.¹ “The term ‘debt’ means any pecuniary obligation imposed by contract, except such as were, at the date of the contract, within the lawful and reasonable contemplation of the parties, to be satisfied out of the current revenues for the year or out of some fund then within the immediate control of the” city.² “Obligations in good faith intended to be, and lawfully, payable out of either the current revenues for the year of the contract or any other fund within the immediate control of the

¹ TEX. CONST. art. XI, §§ 5, 7.

² *McNeill v. City of Waco*, 33 S.W. 322, 89 Tex. 83 (Tex. 1895).

corporation” are not debts.³ Stated differently, “a debt created by a city, in order to be valid without compliance with the constitutional requirements to which we have referred, must run concurrently with the current revenues.”⁴ This rule has been refined to state that “[a] contract which runs for more than one year is a commitment only of current revenues, and so is not a ‘debt,’ if it reserves to the governing body the right to terminate at the end of each budget period.”⁵

With respect to the acquisition of property,

“[i]f a contract for the acquisition, including lease, of real or personal property retains to the governing body of a local government the continuing right to terminate at the expiration of each budget period of the local government during the term of the contract, is conditioned on a best efforts attempt by the governing body to obtain and appropriate funds for payment of the contract, or contains both the continuing right to terminate and the best efforts conditions, the contract is a commitment of the local government's current revenues only.”⁶

An exception to this prohibition on the incurrence of debt exists if the debt is not required to be repaid from *ad valorem* taxes.⁷

This restriction on the incurrence of debt also limits a government entity’s ability to provide indemnities to contractual counterparties.⁸ The Texas Supreme Court has held that “an indemnity agreement is a ‘debt’ within the constitutional sense, and . . . , as a corollary thereto, provision must be made for the payment of any interest that may accrue thereon and for the retirement of the obligation.”⁹

B. Payment Timing - Texas Prompt Payment Act – Texas Government Code Section 2251

Texas has promulgated a statute, the Texas Prompt Payment Act, that designates the payment terms for governmental entities and their vendors.¹⁰ The Texas Prompt Payment Act establishes a payment date for governmental entities of thirty days after the later of: (i) the date the governmental entity receives the goods under the contract, and (ii) the date the performance of the service under the contract is completed or the date the governmental entity receives an invoice for the goods or service.¹¹ A governmental vendor must pay subcontractors by the tenth day following receipt of payment from the governmental entity, and subcontractors must pay their suppliers by the tenth day following their receipt of payment from the vendor.¹² Interest on

³ *McNeill* 33 S.W. at 324.

⁴ *City of Fort Worth v. Bobbitt-Concurrency*, 41 S.W.2d. 228, 232 (Tex. Comm’n App, Opinion adopted. 1931).

⁵ *City-County Solid Waste Control Bd. v. Capital City Leasing, Inc.*, 813 S.W. 2d. 705, 707 (Tex. App–Austin 1991).

⁶ TEX. LOC. GOV’T CODE §271.093.

⁷ TEX. CONST. art. III, § 52-a.

⁸ *Texas and New Orleans Railroad v. Galveston County*, 169 S.W. 2d 714, (Tex Comm’n App. 1943).

⁹ *Brown v Jefferson County*, 406 S.W.2d 185 (Tex. 1966).

¹⁰ TEX. GOV’T CODE §2251.

¹¹ *Id.* §2251.021.

¹² *Id.* §2251.022, .023.

overdue payments will be owed at a rate equal to Prime (as published in the Wall Street Journal on the first day in July in the preceding fiscal year that is not a Saturday or Sunday) plus one percent.¹³

A governmental entity must notify a vendor of a dispute no later than the twenty-first day after the date on which the entity receives the invoice.¹⁴ The entity does not have to pay until the dispute is resolved, but it will owe interest if the amount was properly owed.¹⁵ If a dispute over amounts owed goes to an administrative or judicial proceeding, the prevailing party shall receive its attorney's fees.¹⁶

A vendor may suspend performance to a governmental entity (i) if the governmental entity has not paid an undisputed amount when due, and (ii) the vendor provides written notice of the failure to pay and its intent to suspend no fewer than ten days prior to the date of suspension.¹⁷

A subcontractor, likewise, has similar rights to suspend under the statute if the vendor does not pay it, even if this term is not in the subcontract.¹⁸

III. Limits on Remedies Against Governmental Entities

A. In General

The ability to bring a claim against a governmental entity or the recovery thereunder may also be impaired. Examples of these limitations include:

(i) a right of action for a county, incorporated city or town is not limited by most statutes of limitation under Texas law;¹⁹

(ii) damages recoverable from a governmental entity may be limited to exclude damages other than direct actual damages;²⁰ and

(iii) any action against a county must be brought in that county.²¹

However, the most important, and most litigated, restriction on enforcing claims is that of sovereign immunity.

¹³ *Id.* §2251.025.

¹⁴ *Id.* §2251.042.

¹⁵ *Id.*

¹⁶ *Id.* §2251.043.

¹⁷ *Id.* §2251.051.

¹⁸ *Id.* §2251.052.

¹⁹ TEX. CIV. PRAC. & REM. CODE §16.061.

²⁰ *See, e.g.*, Tex. Gov't Code Ann. §2260-001 (West 2008).

²¹ TEX. CIV. PRAC. & REM. CODE §15.015.

B. Sovereign Immunity

“A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends.”²²

1. History of Governmental Immunity

Under common law stretching back centuries, sovereigns have maintained immunity from liability and from suit.²³ The United States Supreme Court has described sovereign immunity as “an established principle of jurisprudence in all civilized nations,” and Texas courts have recognized over the course of the state’s existence that “no state can be sued in her own courts without her consent, and then only in the manner indicated by that consent.”²⁴ However, the doctrine of sovereign immunity has not been interpreted in as strict a manner as these statements would imply. The Texas Supreme Court first deviated from this doctrine in 1884, and the doctrine has continued to evolve in Texas ever since.²⁵

This premise has been described as “the King can do no wrong,” but United States law in general, and Texas law in particular, have moved away from this concept to a more utilitarian view that the detriment to a citizen who would desire to bring suit against and recover damages from the governmental entity of restrictions against such suit and receiving judgment therefrom is outweighed by the benefit to the other citizens whose public assets are protected from suit.²⁶ Under this school of thought, lawsuits against the state “hamper governmental functions by requiring tax resources to be used for defending lawsuits and paying judgments rather than using those resources for their intended purposes.”²⁷

Apart from the concern over the impact of litigation on a governmental entity’s citizens, governmental immunity from suits and damages also implicates separation of powers concerns. “In a world with increasingly complex webs of governmental units, the Legislature is better suited to make the distinctions, exceptions and limitations that different situations require.”²⁸ This recognizes that separation of powers requires judicial deference to the legislative branch with respect to the assumption of governmental risk in fiscal matters.²⁹

²² *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907).

²³ *Rusk State Hosp. v. Black*, 392 S.W.3d 88, 93 (Tex. 2012); *Ben Bolt-Palito Blanco Consol. Indep. Sch. Dist. v. Tex. Political Subdivisions Property/Cas. Joint Self-Ins. Fund*, 212 S.W.3d 320, 323 (Tex. 2006).

²⁴ *Tex. Adjutant Gen.’s Office v. Ngakoue*, 408 S.W.3d 350, 353 (Tex. 2013) (quoting *Hosner v. DeYoung*, 1 Tex. 764, 769 (Tex. 1847)); *Tooke v. City of Mexia*, 197 S.W.3d 325, 328 (Tex. 2006).

²⁵ *City of Galveston v. Posniansky*, 62 Tex. 118, 131 (Tex. 1884).

²⁶ See *City of El Paso v. Heinrich*, 284 S.W.3d 355, 375 (Tex. 2009); *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 695 (Tex. 2003) (quoting *Beers v. Arkansas*, 61 U.S. 527, 529 (Tex. 1857)).

²⁷ *Ngakoue*, 408 S.W.3d at 353 (citing *Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653, 655 (Tex. 2008)).

²⁸ *Harris County Hosp. Dist. v. Tomball Reg’l Hosp.*, 283 S.W.3d 838, 848 (Tex. 2009) (quoting *Nueces County v. San Patricio County*, 246 S.W.3d 651, 653 (Tex. 2008)).

²⁹ *Prairie View A&M Univ. v. Chatha*, 381 S.W.3d 500, 513 (Tex. 2012).

2. Sovereign immunity v. Governmental Immunity

Sovereign immunity is often used as a catchall term to refer to all governmental immunity from suit and liability, but this is technically incorrect and these terms represent “two distinct concepts.”³⁰ Sovereign immunity protects the State and its divisions, including agencies, boards, hospitals and universities; while governmental immunity protects political subdivisions of the State including cities, counties and school districts.³¹ However, this appears to be a distinction without a substantive difference, as case law has held that these concepts function identically, albeit for different entities.³² Accordingly, for purposes of this paper we will refer to governmental immunity and sovereign immunity interchangeably.

3. Immunity From Suit and Immunity From Liability

Sovereign immunity has two parts – immunity from suit and immunity from liability.³³ These concepts are distinct – immunity from suit deprives a trial court of subject matter jurisdiction in a suit absent the State’s consent.³⁴ Even if the State concedes liability, it still maintains immunity from suit unless such immunity has been waived.³⁵ Whether immunity has been waived is a jurisdictional issue, as a court may not address the substance of a dispute if it lacks the jurisdiction to hear the matter.³⁶ Further, governmental entities are presumed to possess immunity from suit, and therefore the plaintiff in a suit must establish that immunity has been waived as part of its obligation to demonstrate that the court has the jurisdiction to hear the suit.³⁷

Immunity from liability protects governmental entities from any legal judgment, even if the State consents to suit.³⁸

4. How Can Sovereign Immunity Be Waived?

Sovereign immunity may only be waived by the Texas Constitution or by the Legislature.³⁹

³⁰ *Taylor* 106 S.W.3d at 694, n.3.

³¹ *Id.*; *Tooke* 197 S.W.3d at 332; *Fed. Sign v. Texas S. Univ.*, 951 S.W.2d 401, 405 (Tex. 1997); *Rolling Plains Groundwater Conservation Dist. v. City of Aspermont*, 353 S.W.3d 756, 759 n.4 (Tex. 2011) (citing *Taylor* 106 S.W.3d at 694 n. 3).

³² *Ben Bolt*, 212 S.W.3d at 323 n.2; *Harris County Hosp. Dist.* 283 S.W.3d at 842; *City of El Paso v. Heinrich*, 284 S.W.3d 366, 369-70 (Tex. 2009).

³³ *City of Dallas v. Albert*, 354 S.W.3d 368, 373 (Tex. 2011); *Fed. Sign*, 951 S.W.2d at 405; *Taylor*, 105 S.W.3d at 694, n.3; *Tooke*, 197 S.W.3d at 332.

³⁴ *Id.*; *Rusk State Hospital*, 392 at 95; *Harris County Hosp. Dist.*, 283 S.W.3d at 842; *Tex. A&M Univ. v. Koseoglu*, 233 S.W.3d 835, 840 (Tex. 2007); *Texas Dep’t of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 224 (Tex. 2004). See also *Tex. Parks & Wildlife Dep’t v. Sawyer Trust*, 354 S.W.3d 385, 388 (Tex. 2011).

³⁵ *Taylor*, 106 S.W.3d at 695; *Fed. Sign*, 951 S.W.2d at 405.

³⁶ *Mission Consol. Indep. Sch. Dist. v. Garcia*, 372 S.W.3d 629, 636 (Tex. 2012); *Little v. Tex. Bd. Of Law Exam’rs*, 334 S.W.3d 860, 862 (Tex. App.—Austin 2011, no pet.).

³⁷ *Nueces County*, 246 S.W.3d at 653.

³⁸ *Rusk State Hosp.*, 392 S.W.3d at 95; *Fed. Sign*, 951 S.W.2d at 405.

³⁹ The Legislature may also grant a claimant permission to sue the State pursuant to Sections 107.001-107.005 of Chapter 107 of the Texas Civil Practice and Remedies Code.

a. Texas Constitution

The Texas Constitution contains waivers of immunity that are effective irrespective of any statutory waivers.⁴⁰ These constitutional waivers are self-executing if they provide “a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which these principles may be given the force of law.”⁴¹ Examples of these self-executing waivers are the waivers that relate to the Texas Constitution’s Takings Clause⁴² and that relating to the Bill of Rights.⁴³ For claims alleging a taking, these claims will not be permitted if they are breach of contract claims disguised as takings claims in order to avoid immunity.⁴⁴ For claims alleging a violation of the Bill of Rights, this waiver exists only for the purpose of holding acts contrary to the Bill of Rights to be void, thereby permitting equitable relief but providing no private right of action for damages.⁴⁵

b. Statutory Waivers

If the Legislature seeks to create a waiver of sovereign immunity it must do so “by clear and unambiguous language” to overcome the presumption that sovereign immunity exists.⁴⁶ The rationale for this policy is that the Legislature should possess discretion to delineate the claims for which immunity will be waived and the procedures that must be followed to obtain and maintain such waiver.⁴⁷ Statutory waivers of immunity are construed narrowly.⁴⁸ Ambiguities in language purporting to waive immunity are generally interpreted in favor of retaining immunity.⁴⁹

Waivers of immunity are most enforceable where they are most clear, ideally containing the statement that “sovereign immunity to suit is waived” or similar language.⁵⁰ When a statute does not contain such language, a clear indication of the legislative intent to waive immunity is required for such waiver to be enforceable.⁵¹ While the language waiving immunity is not required to employ “perfect clarity,” the waiver must exist beyond doubt.⁵² However, if a statute requires that the state be joined in a lawsuit for which immunity would otherwise attach, the

⁴⁰ *Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 782 (Tex. 2005).

⁴¹ *Id.* (quoting *Mitchell County v. City National Bank of Paducah, KY*, 91 Tex. 361 (1898)).

⁴² *City of Dallas v. Stewart*, 361 S.W.3d 562, 568 (Tex. 2012); *El Dorado Land Co., L.P. v. City of McKinney*, 395 S.W.3d 798, 801 (Tex. 2013).

⁴³ See *City of Beaumont v. Boullion*, 896 S.W.2d 143, 148-49 (Tex. 1995).

⁴⁴ *City of N. Richland Hills v. Home Town Urban Partners*, 340 S.W.3d 900, 915 (Tex. App.—Fort Worth 2011, no pet.).

⁴⁵ See *City of Elsa v. M.A.L.*, 226 S.W.3d 390, 392 (Tex. 2007); *Boullion* at 149.

⁴⁶ Tex. Gov’t Code § 311.034; *City of Galveston v. State*, 217 S.W.3d 466, 474 (Tex. 2007); *Taylor*, 106 S.W.3d at 696; see also *Nueces County*, at 652.

⁴⁷ *Chatha* at 512-513.

⁴⁸ *Ngakoue*, 408 S.W.3d at 353.

⁴⁹ *Id.*; *Tex. Dep’t. of Transp. v. York*, 284 S.W.3d 844, 846 (Tex. 2009) (citing *Taylor*, 106 S.W.3d at 697).

⁵⁰ *Taylor* at 696.

⁵¹ “[A] statute shall not be construed as a waiver of sovereign immunity unless the waiver is effected by clear and unambiguous language.” Tex. Gov’t Code Ann. §311.034 (West Supp. 2011); See also *Southwestern Bell Tel., L.P. v. Harris County Toll Rd. Auth.*, 282 S.W.3d 59, 68 (Tex. 2009).

⁵² *Harris County Toll Rd. Auth.*, 282 S.W.3d at 68; *Taylor*, 106 S.W.3d at 697.

Legislature is deemed to have waived immunity.⁵³ Further, it is deemed indicative of an intent to waive immunity if a statute also limits the potential liability of the state as part of the waiver.⁵⁴

Under the common law, it was once seen as a sufficient indication that immunity had been waived if a statute contained language permitting a governmental entity to “sue and be sued” or “implead and be impleaded.”⁵⁵ However, the Texas Supreme Court reversed this assumption, stating that language permitting a governmental entity to “sue and be sued,” “implead or be impleaded” or similar phrases may, but does not necessarily, mean immunity has been waived.⁵⁶ Instead, determining whether waiver was intended by the Legislature when “sue and be sued” or similar language is included in a statute depends on the context in which the language is used, as this language may mean only that the entity has the capacity to act as a corporate body.⁵⁷ In fact, the Supreme Court mentioned the multiple meanings that can be possessed by phrases such as “sue and be sued” and “implead and be impleaded” when reversing *Missouri Pacific*, stating that the ability of such phrases to connote different meaning inherently results in those phrases being ambiguous.⁵⁸

When a governmental entity settles a claim for which the Legislature has waived immunity, the governmental entity cannot claim immunity from suit claiming the governmental entity has breached the settlement agreement.⁵⁹

c. Uniform Declaratory Judgment Act

Some claimants have attempted to argue that the Uniform Declaratory Judgment Act (UDJA) constitutes a general waiver of immunity, but the Texas Supreme Court has rejected this argument.⁶⁰ The UDJA “does not enlarge a trial court’s jurisdiction, and a litigant’s request for declaratory relief does not alter a suit’s underlying nature.”⁶¹ “Private parties cannot circumvent the State’s sovereign immunity from suit by characterizing a suit for money damages...as a declaratory judgment claim.”⁶² This rule bars declaratory judgment actions that seek damages for breach of contract, to impose contractual liabilities, to enforce performance under a contract or to establish a contract’s validity.⁶³

⁵³ See *Harris County Toll Rd. Auth.*, 282 S.W.3d at 68-70.

⁵⁴ *Harris County Toll Rd. Auth.*, 282 S.W.3d at 68-69; *Taylor*, 106 S.W.3d at 698.

⁵⁵ *Missouri Pac. R. Co. v. Brownsville Nav. Dist.*, 453 S.W.2d 812 (Tex. 1970).

⁵⁶ *Tooke*, 197 S.W.3d at 347-355; *Kirby Lake Dev. Ltd. v. Clear Lake City Water Auth.*, 320 S.W.3d 829, 837 (Tex. 2010); *Harris County Hosp. Dist.*, 283 S.W.3d at 843.

⁵⁷ *Tooke*, 197 S.W.3d at 347-55.

⁵⁸ *Id.* at 342.

⁵⁹ *Tex. A&M Univ.-Kingsville v. Lawson*, 87 S.W.3d 518, 521 (Tex. 2002).

⁶⁰ *Heinrich*, 284 S.W.3d at 370.

⁶¹ *Id.*

⁶² *Id.* at 371 (quoting *Tex. Natural Res. Conservation Comm’n v. IT-Davy*, 74 S.W.3d 849, 856 (Tex. 2002)).

⁶³ *IT-Davy*, 74 S.W.3d at 855-56.

d. Waiver of Immunity For Breach of Contract

1) Section 271 of the Local Government Code

Courts in Texas have consistently held that a governmental entity waives immunity from liability by entering into a contract.⁶⁴ However, immunity from suit is not so waived, with courts deferring to the Legislature in this regard, because of the policy interest in maintaining Legislative control over the scope of immunity, “[i]n order to preserve [its] interest in managing state fiscal matters through the appropriations process....”⁶⁵ Even the governmental entity’s acceptance of benefits under a contract and the counterparty’s full performance thereunder does not necessarily waive immunity from suit.⁶⁶ If the governmental entity files an affirmative claim for relief in litigation, then immunity to suit is waived, but then only with respect to claims that are “germane to, connected with, and properly defensive to” the governmental entity’s claims, and only up to the amount of damages offsetting the governmental entity’s claim.⁶⁷ The Texas Supreme Court has left open the possibility that other circumstances may exist where immunity from suit may be waived by the conduct of the governmental entity but it has not yet recognized any other circumstances where this was in fact the case.⁶⁸

However, with respect to local government entities, immunity from suit is waived when (i) the local governmental entity enters into a contract; (ii) the local governmental entity is authorized to enter into the contract; and (iii) the contract is subject to subchapter I of section 271.⁶⁹

A local governmental entity is

“a political subdivision of this state, other than a county or a unit of state government, as that term is defined by Section 2260.001, Government Code, including a: (A) municipality; (B) public school district and junior college district; and (C) special-purpose district or authority, including any levee improvement district, drainage district, irrigation district, water improvement district, water control and improvement district, water control and preservation district, freshwater supply district, navigation district, conservation and reclamation district, communication district, public health district, emergency service organization, and river authority.”⁷⁰

A unit of state government is the state or an agency, department, office, court or other entity that is in any branch of state government and that is created by the Texas constitution or by statute,

⁶⁴*Catalina Dev., Inc. v. County of El Paso*, 121 S.W.3d 704, 705-06 (Tex. 2003); *Tooke*, 197 S.W.3d at 332; *Fed. Sign*, 951 S.W.2d at 405-06.

⁶⁵*Tooke*, 197 S.W.3d at 332; *IT-Davy*, 74 S.W.3d at 854 (quoting the Code Construction Act, TEX. GOV'T CODE § 311.034).

⁶⁶*IT-Davy*, 74 S.W.3d at 860; *Travis Cnty. v. Pelzel & Assoc., Inc.*, 77 S.W.3d 246, 251-52 (Tex. 2002).

⁶⁷*Reata Constr. Corp. v. City of Dall.*, 197 S.W.3d 371, 375-77 (Tex. 2006).

⁶⁸*Fed Sign*, 951 S.W.2d at 408 n.1.

⁶⁹TEX. LOC. GOV'T CODE §271.152.

⁷⁰*Id.* at § 271.151(3).

including a university system but excluding any county, municipal court thereof, special purpose district or other political subdivision of Texas.⁷¹

The second element is satisfied if the local governmental entity is authorized to enter into contracts by either the Texas Constitution or by a statute.⁷²

The third element requires that the local governmental entity enter into “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.”⁷³ The essential terms of the agreement include “the time of performance, the price to be paid . . . [and] the service to be rendered.”⁷⁴ Interestingly, the term “services” is not defined in Chapter 271, although the Texas Supreme Court has stated that the term should be liberally construed and that it is “generally any act performed for the benefit of another under some arrangement or agreement whereby such act was to have been performed.”⁷⁵ The benefit received must be a direct benefit because “if every contract that confers some attenuated benefit on a governmental entity constitutes a contract for a ‘service,’ the limitation of contracts covered by section 271.152 to contract for ‘goods or services provided to the entity’ loses all meaning.”⁷⁶ Immunity is only waived if the claimant is required to provide services directly to the local governmental entity.⁷⁷ Courts have held that section 271.152 does not waive immunity for *quantum meruit* claims;⁷⁸ a declaratory judgment suit on the validity of a contract;⁷⁹ or from equitable claims based on estoppel, waiver or detrimental reliance.⁸⁰ Damages awarded under section 271.152 are limited to:

- (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;
- (3) reasonable and necessary attorney's fees that are equitable and just; and
- (4) interest as allowed by law, including interest as calculated under Chapter 2251, Government Code.⁸¹

⁷¹ *Id.*

⁷² *See Dallas County Hosp. Dist. v. Hospira Worldwide, Inc.*, 400 S.W.3d 182, 185 (Tex. App. – Dallas 2013, pet. denied).

⁷³ TEX. LOC. GOV'T CODE §271.151(2)(A).

⁷⁴ *City of Houston v. Williams*, 353 S.W.3d 128, 138-39 (Tex. 2011) (quoting *Kirby Lake*, 320 S.W.3d at 838).

⁷⁵ *Kirby Lake*, 320 S.W.3d at 839 (quoting *Van Zandt v. Fort Worth Press*, 359 S.W.2d 893, 895 (Tex. 1962)).

⁷⁶ *Berkman v. City of Keene*, 311 S.W.3d 523, 527 (Tex. App.—Waco 2009, pet. denied) (quoting *East Houston Estate Apartments, L.L.C. v. City of Houston*, 294 S.W.3d 723, 736 (Tex.App.-Houston [1st Dist.] 2009, no pet.).

⁷⁷ *Lubbock County Water Control and Improvement Dist. v. Church & Akin, LLC*, 442 S.W.3d 297, 304 (Tex. 2014).

⁷⁸ *Harris Cnty. Flood Control Dist. v. Great Am. Ins. Co.*, 309 S.W.3d 614, 617 (Tex. App.—Houston [14th Dist.] 2010, no pet.).

⁷⁹ *Olympic Waste Serv. V. City of Grand Saline*, 204 S.W.3d 496, 500 (Tex. App.—Tyler 2006, no pet.).

⁸⁰ *H & H Sand & Gravel, Inc. v. City of Corpus Christi*, No. 13-06-00677-CV, 2007 WL 3293628 (Tex. App.—Corpus Christi Nov. 8, 2007, pet. denied).

⁸¹ TEX. LOC. GOV'T CODE §271.153(a).

An award of damages “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.”⁸² A suit seeking any of these barred damages will be deemed to be a suit for which immunity from suit has not been waived.⁸³

2) Common Law - *Wasson Interests Ltd. v. City of Jacksonville*

Texas has long held, in the context of torts, that governmental immunity from suit protects a city when it performs governmental functions, but not when it performs proprietary functions.⁸⁴ Proprietary functions are those conducted in the entity’s “private capacity, for the benefit only of those within its corporate limits, and not as an arm of the government.”⁸⁵ This common law distinction arises from the principle that cities derive their immunity from the State and therefore the derivative immunity can only attach when the city is acting as a branch of the State.⁸⁶ There was long debate as to whether this distinction also applied in the context of breach of contract cases, with Courts of Appeals splitting on the issue.⁸⁷ The Amarillo Court of Appeals had held that the governmental-proprietary distinction does not apply to contract disputes;⁸⁸ the San Antonio Court of Appeals had held that the governmental-proprietary distinction does not apply to contractual or quasi-contractual claims,⁸⁹ and the Amarillo Court of Appeals had held that this distinction does not apply to breaches of express contracts.⁹⁰ In contrast, the Austin Court of Appeals expressly disagreed with *Wheelabrator* and held that the proprietary-governmental dichotomy did apply and the Corpus Christi, Houston and Tyler Courts of Appeals likewise found that this dichotomy should be applied to breach of contract cases.⁹¹

In *Wasson Interests* the Supreme Court held that the governmental-proprietary distinction applies to breach of contract claims.⁹² Further, the Supreme Court held that Chapter 271 creates an

⁸² TEX. LOC. GOV’T CODE §271.151(b).

⁸³ *Zachry Construction Corp. v. Port of Houston Authority of Harris County*, 449 S.W.3d 98, 110 (Tex. 2014); *Tooke*, 197 S.W.3d at 346; *Sharyland Water Supply Corp. v. City of Alton*, 354 S.W.3d 407, 413 (Tex. 2011).

⁸⁴ See TEX. CIV. PRAC. & REM. CODE § 101.0215 (the Texas Tort Claims Act, or “TTCA”). See also *Wasson Interests Ltd. v. City of Jacksonville*, 489 S.W.3d 427, 429-30 (Tex. 2016) (citing *City of Tyler v. Likes*, 962 S.W.2d 489, 501 (Tex.1997); *Dilley v. City of Houston*, 222 S.W.2d 992, 993 (Tex.1949); *City of Galveston v. Posnainsky*, 62 Tex. 118, 127 (1884)).

⁸⁵ *Wasson Interests*, 489 S.W.3d at 436 (quoting *Dilley v. City of Houston*, 222 S.W.2d 992, 993 (1949)).

⁸⁶ *Id.*

⁸⁷ *Id.* at 438-39 (citing *Tooke*, 197 S.W.3d at 332-33, 343).

⁸⁸ *W. Texas Mun. Power Agency v. Republic Power Partners, L.P.*, 428 S.W.3d 299, 306 (Tex. App.—Amarillo 2014, no pet.).

⁸⁹ *City of San Antonio v. Wheelabrator, Air Pollution Control, Inc.*, 381 S.W.3d 597 (Tex. App.—San Antonio 2012, pet. denied); *Lower Colo. River Auth. v. City of Boerne*, 422 A.W.3d 60 (Tex. App.—San Antonio 2014, pet. filed)..

⁹⁰ *Republic Power Partners v. The City of Lubbock*, 424 S.W.3d 184 (Tex. App.—Amarillo 2014, no pet.).

⁹¹ *City of Georgetown v. Lower Colo. River Auth.*, 413 S.W.3d 803 (Tex. App.—Austin 2013, pet. filed); *City of Weslaco v. Borne*, 210 S.W.3d 782 (Tex. App.—Corpus Christi 2006, pet. denied); *City of Deer Park v. Ibarra*, No. 01-10-00490-CV, 2011 WL 3820798 (Tex. App.—Houston [1st Dist.] Aug. 25, 2011, no pet.) (mem. op.); *City of Emory v. Lusk*, 278 S.W.3d 77 (Tex. App.—Tyler 2009, no pet.). See also *City of Seguin v. Lower Colorado River Auth.*, 03-13-00165-CV, 2014 WL 258847 (Tex. App.—Austin Jan. 15, 2014 pet. filed) (mem. op.); *The City of Austin v. MET Ctr. NYCTEX, Phase II, Ltd.*, No. 03-11-00662-CV, 2014 WL 538697 (Tex. App.—Austin Feb. 6, 2014, pet. filed); *Galveston Indep. Sch. Dist. v. Clear Lake Rehab. Hosp.*, 324 S.W.3d 802 (Tex. App.—Houston [14th Dist.] 2010, no pet.).

⁹² *Wasson Interests*, 489 S.W.3d at 439.

additional waiver with respect to certain contract claims enumerated therein but does not preclude the common law application of the governmental-proprietary distinction for determining if immunity from suit applies to all breach of contract claims.⁹³ The Court acknowledged that the distinction between governmental and proprietary actions may be difficult to determine, but it placed the responsibility for doing so on the Legislature and referenced the TTCA as an example of how the Legislature could do so and as guidance for making the governmental-proprietary distinction in the breach of contract context.⁹⁴

3) Chapter 2260 of the Texas Government Code

After the Texas Supreme Court decided *Federal Sign*, the Legislature passed chapter 2260 of the Texas Government Code to provide an exclusive administrative process for resolving breach of contract claims against or to obtain legislative permission to sue a unit of state government.⁹⁵ This statute applies to most claims of breaches of contracts for good or services.⁹⁶ This statute Chapter 2260 restricts the damages recoverable under its provisions to the sum of:

- “(1) the balance due and owing on the contract price;
- (2) the amount or fair market value of orders or requests for additional work made by a unit of state government to the extent that the orders or requests for additional work were actually performed; and
- (3) any delay or labor-related expense incurred by the contractor as a result of an action of or a failure to act by the unit of state government or a party acting under the supervision or control of the unit of state government;”

less “[a]ny amount owed the unit of state government for work not performed under a contract or in substantial compliance with its terms.”⁹⁷ A claimant may not recover “(1) consequential or similar damages, except delays or labor-related expenses described by Subsection (a)(3); (2) exemplary damages; (3) any damages based on an unjust enrichment theory; (4) attorney's fees; or (5) home office overhead” under Chapter 2260.⁹⁸

A claimant utilizing Chapter 2260 must provide written notice of the claim to the relevant unit of state government that must state the nature of the alleged breach, the amount sought as damages and the legal theory of recovery.⁹⁹ An officer of the unit of state government and the claimant

⁹³ See *Id.* at 437-38.

⁹⁴ *Id.*

⁹⁵ TEX. GOV'T CODE § 2260-001. A “‘unit of state government’ means the state or an agency, department, commission, bureau, board, office, council, court, or other entity that is in any branch of state government and that is created by the constitution or a statute of this state, including a university system or institution of higher education. The term does not include a county, municipality, court of a county or municipality, special purpose district, or other political subdivision of this state.” *Id.*

⁹⁶ *Id.* This statute does not apply to claims for personal injury or wrongful death arising from the breach of a contract, a contract executed or awarded on or before August 30, 1999, or contracts subject to Section 201.112 of the Transportation Code or Chapter 114 of the Civil Practice and Remedies Code (both relating to construction contracts). *Id.* § 2260.001-.002.

⁹⁷ *Id.* § 2260.003

⁹⁸ *Id.*

⁹⁹ *Id.* § 2260.051.

must then negotiate in an attempt to resolve the claim.¹⁰⁰ If the parties are unable to resolve the claim by the two hundred seventieth day after the date the claim is filed, the claimant may file a request for hearing with the unit of state government that must state the factual and legal basis for the claim and request that the claim be referred to the State Office of Administrative Hearings for a contested case hearing.¹⁰¹ The claimant may recover up to \$250,000, and any damages award must be paid from funds appropriated to the unit of state government for payment of the contract at issue or for payment of contract claims in general.¹⁰² If these appropriated amounts are insufficient to pay the claim, the balance of the claim that would otherwise be recoverable may only be paid from funds appropriated by the Legislature for payment of the claim.¹⁰³ Any damages in excess of \$250,000 may only be paid if funds to pay the claim are specifically appropriated by the Legislature.¹⁰⁴ There is no permitted judicial review of the administrative judge's ruling "unless the order adversely affects a vested property right, or . . . the order otherwise violates some constitutional right."¹⁰⁵

5. *Ultra Vires*

One important exception to immunity exists when a state official is acting outside of his authority. In such instances, a suit alleging such an *ultra vires* act is not barred by immunity, even if it seeks monetary damages.¹⁰⁶ However, since such suits are premised on the idea that the official lacked the authority to take the action at issue, such suits must be brought against the individual official, while the governmental entity retains its immunity.¹⁰⁷ In addition, such suits must allege that the official at issue acted without legal authority or failed to perform a purely ministerial task – it is not enough to complain of a government official's exercise of discretion.¹⁰⁸

IV. Ethics in Governmental Contracting

A. Focus on the Revolving Door

Texas lawyers are bound by the Texas Disciplinary Rules of Professional Conduct (the "Texas Rules" and, as specifically identified below with reference to Texas Rule 1.10, sometimes the "Rule"). If a Texas lawyer violates the Texas Rules, he or she can be subject to discipline, including public or private reprimand, suspension, and up to, and including, disbarment. While commonly referred to in the context of politics, the "revolving door" problem is relevant to lawyers and the governmental agencies that hire them. The Texas Rules address the revolving door problem by establishing the boundaries of conduct in situations where a lawyer moves to private practice after serving as an officer or employee of a governmental entity—and vice versa.

¹⁰⁰ *Id.* § 2260.052.

¹⁰¹ *Id.* § 2260.055, 2260.102.

¹⁰² *Id.* § 2260.105.

¹⁰³ *Id.*

¹⁰⁴ *Id.* § 2260.1055.

¹⁰⁵ *Gen. Servs. Comm'n v. Little-Tex. Insulation Co., Inc.*, 39 S.W.3d 591, 599 (Tex. 2001).

¹⁰⁶ *Sawyer Trust*, 354 S.W.3d at 393; *Heinrich*, 284 S.W.3d at 372.

¹⁰⁷ *Heinrich*, 284 S.W.3d at 372, 373; *Tex. Dep't of Inc. v. Reconveyance Servs.*, 306 S.W.3d 256, 259 (Tex. 2010).

¹⁰⁸ *Heinrich*, 284 S.W.3d at 372.

Texas Rule 1.10 speaks to the revolving door issue and strikes a balance between the public and private interests at stake. On the one hand, it “prevents a private lawyer from exploiting public office for the advantage of a private client.”¹⁰⁹ On the other hand, the Rule seeks to protect a governmental entity whether its former officer or employee moved to private practice or to another governmental entity. The balance of the rule recognizes that private clients should not enjoy an unfair advantage due to information a private lawyer gleaned from his or her public service, while at the same time seeking to ensure the rules are not so restrictive as to prevent the movement of high quality attorneys into and out of governmental service.

Awareness of Texas Rule 1.10 is crucial to all lawyers—not just those currently or formerly employed in government service—because every lawyer’s duty to his or her client includes knowing whether counterparties have an unfair advantage because their counsel is privy to confidential government information.

Texas Rule 1.10 contains nine paragraphs and ten comments that address the conduct of private lawyers (and their firms) and public lawyers, as well as the public lawyers that jump from one “body politic” to another. The material below discusses a lawyer’s obligations under the Rule and is organized by role—be it a private lawyer or a public lawyer.

1. Private Lawyers

In keeping with its underlying purpose that private clients should not receive an unfair advantage due to his or her lawyer’s current or former government service, Texas Rule 1.10(a) prohibits a private lawyer from representing a private client in connection with a matter that the lawyer participated in—both personally and substantially—as a government officer or employee. Representation in the matter may be possible if the government agency is consulted on the matter and consents to the representation. Comment 2 points out that other Texas Rules, including those that prevent lawyers from representing adverse interests and protections afforded former clients, remain applicable. Likewise, Comment 2 references Texas statutes and regulations related to conflicts of interest and their ability to define the scope of the government agency’s consent to representation.

The Rule extends beyond the former government lawyer and reaches other lawyers in his or her firm. If Rule 1.10(a) is applicable to a private lawyer and a matter, Rule 1.10(b) prohibits other lawyers in his or her firm from knowingly undertaking or continuing representation in the matter. As is often the case in similar scenarios, such undertaking or continued representation may be authorized if (A) the former government lawyer is screened from any participation and is not apportioned any fee from the matter and (B) the relevant government agency is given reasonably prompt written notice.

The Rule does not expressly define what “screened” means, but the comments describe “screening” as the lawyer in question not furnishing or being furnished information relating to the matter nor participating as a lawyer or advisor in the matter. Moreover, for purposes of distinguishing fees related to the matter, the comments consider preexisting agreements related

¹⁰⁹ TEXAS DISCIPLINARY RULES OF PROF’L CONDUCT R. 1.10 cmt 1. (1989).

to salary or partnership share as too remote to be considered compensation from the matter in question.

While the Rule speaks of a private client in the most commonly understood usage—*i.e.*, a client represented by a private lawyer in his or her private practice—Rule 1.10(h) makes clear that a government agency is also considered a private client when that agency is represented by a lawyer in private practice and not as an officer or employee of the agency.

Finally, and relevant to all lawyers, Rule 1.10(c) prohibits a lawyer with knowledge of confidential government information about a person or entity (or that he or she should know is confidential government information) obtained in his government service from representing a private client with interests adverse to that person or entity. Similar to the Rule discussed above, Rule 1.10(d) expands the scope of the Rule 1.10(c) to lawyers in the firm with the former government lawyer. While Rule 1.10(d) similarly requires the former government lawyer be screened from the matter and be apportioned no part of the fee therefrom, Rule 1.10(d) is notably different in that it does not contain a requirement to deliver prompt written notice of the undertaking or continued representation to the applicable government agency.

2. Public lawyers

a. Generally

As applicable to public lawyers, the Rule imposes generally inverse obligations to those imposed on private lawyers. Most broadly, Rule 1.10(e) prohibits a lawyer that is an officer or employee of a government agency from participating in a matter that involves a private client if the lawyer represented that client in the same matter when he or she was in private practice. The public lawyer may participate, however, if under applicable law “no one is, or by lawful delegation may be, authorized to act in the lawyer’s stead in the matter[.]” The comments clarify that, unlike with private lawyers, this rule does not disqualify other lawyers in the relevant agency from participating in the matter. Moreover, Rule 1.10(e) does not require the lawyer in question to be screened, but it considers screening to be a “sound practice” if feasible.

Public lawyers are restricted in their use of their position as an officer or employee of a government agency to seek private employment after their public service. Rule 1.10(e)(2) prohibits a public lawyer from negotiating for such private employment with anyone that is involved as a party (or a lawyer for a party) in a matter in which the public lawyer participates personally and substantially.

b. Jumping to another body politic

The Rule distinguishes those public lawyers that leave one “body politic” but remain in government service with another governmental entity. The comments describe a body politic as “one unit or level of government such as the federal government, a state government, a county, a city or a precinct . . . [and not] different agencies within the same body politic or unit of government.” In situations where a public lawyer jumps to another body politic (for example, between a county attorney’s office and a Texas State agency), the Rule distinguishes the nature of the public attorney’s prior role for purposes of applying the public versus private lawyer rules.

In the example above, where the public lawyer previously served in county government and subsequently moved to State government, the State government (*i.e.*, second body politic) is to be considered a private client for purposes of Rule 1.10(a) and (c). Those paragraphs relate to a prohibition on a private lawyer's representation of a client when he or she participated in the same matter in government service and the use of confidential government information adverse to his or her opposing party. Similarly, the county government (*i.e.*, the first body politic) is to be considered a private client for purposes of Rule 1.10(e), which prohibits a public lawyer from participating in a matter involving a private client when the lawyer represented the private client in the same matter when in private practice.

In practice and with respect to our example, this means that once employed by the State agency, the public lawyer may not (A) use confidential government information about a person or entity he or she gleaned from participation in a matter at the county attorney's office if the State agency is opposite the same person or entity if that information would be adverse to the person or entity's interests, or (B) participate in a matter involving both the county attorney's office and the State agency if he or she participated in the same matter while at the county attorney's office.

B. It's Just Lunch!

In corporate circles it is commonplace for lawyers to treat clients or prospective clients to meals, sporting events or entertainment to cultivate business. While a governmental entity may act like a private entity when it enters into business transactions, its employees must be treated differently. A public servant who

“exercises discretion in connection with contracts, purchases, payments, claims, or other pecuniary transactions of government commits an offense if he solicits, accepts, or agrees to accept any benefit from a person the public servant knows is interested in or likely to become interested in any contract, purchase, payment, claim, or transaction involving the exercise of his discretion.”¹¹⁰

Similarly, “a member of the legislature, the governor, the lieutenant governor, or a person employed by a member of the legislature, the governor, the lieutenant governor, or an agency of the legislature commits an offense if he solicits, accepts, or agrees to accept any benefit from any person.”¹¹¹ In such instance, the person offering, conferring or agreeing to confer any benefit on a public servant whom the offeror knows is prohibited from accepting such benefit also commits a criminal offense.¹¹² Even an honorarium is prohibited if it is offered “in consideration for services that the public servant would not have been requested to provide but for the public servant's official position or duties.”¹¹³ There are some exceptions to this rule in the statute,

¹¹⁰ TEX. PENAL CODE § 36.08(d).

¹¹¹ *Id.* § 36.08(f).

¹¹² *Id.* § 36.09.

¹¹³ *Id.* § 36.07. Note, however, that transportation, lodging and meals in connection with a conference or similar event may be paid for so long as the public servant renders a service such as speaking at the conference and the service is “more than merely perfunctory.” *Id.*

including an exception for non-cash gifts with a value of less than \$50 and conference expenses permitted by section 36.07.¹¹⁴

¹¹⁴ *Id.* §36.10(a)(6), (8).