# ONE-SIDED BARGAINS? LITIGATING GOVERNMENT CONTRACTS

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**IT WOULD SEEM A STRAIGHTFORWARD PROPOSITION** that entering into a valid, binding contract with a governmental entity allows the private party to sue the government for breach of contract. Not so fast. Sovereign and governmental immunity generally bar suits against governmental entities absent the Legislature's consent. So, the government can sue contractors for breaching contracts, but contractors have significant limitations on their ability to sue the government if it breaches.

Texas statutes provide governmental entities various degrees of protection through narrow waivers of immunity from breach of contract suits. Texas courts also continue to refine the case law around governmental immunity in contract litigation. This Article provides an overview of this legal landscape.

**I. Overview of Sovereign and Governmental Immunity Under Texas Law.**

Since the Republic of Texas, Texas' Supreme Court has "acknowledged the common-law rule that 'no state can be sued in her own courts without her consent, and then only in the manner indicated by that consent.'" *Tooke v. City of Mexia*, 197 S.W.3d 325, 331 (Tex. 2006) (quoting *Hosner v. DeYoung*, 1 Tex. 764, 769 (1847)). As early as 1843, the Supreme Court of the Republic took as a given the "maxim" that "it is one of the essential attributes of sovereignty not to be amenable to the suit of a private person without its own consent." *Bd. of Land Comm'rs v. Walling*, Dallam 524, 524-25 (Tex. 1843). As a result, a citizen of the Republic "could not sue the government without its consent expressed in a legislative act." *Id.* When such consent was given, a plaintiff had to strictly comply with any requirements or conditions of the act granting consent. *See id.* at 525-27.

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These rules remain "firmly established" and have "come to be applied to the various governmental entities in this State." *Tooke*, 197 S.W.3d at 332. "When performing governmental functions, political subdivisions derive" what is called "governmental immunity" from the State's sovereign immunity. *City of Houston v. Williams*, 353 S.W.3d 128, 134 (Tex. 2011). The same basic rules apply to both sovereign and governmental immunity. Both can be waived, but the Supreme Court defers to the Legislature to do so. *Id.* And a legislative waiver must use "clear and unambiguous language." *Id.* (citing Tex. Gov't Code § 311.034; *Tooke*, 197 S.W.3d at 328-29).

"Sovereign immunity has two components: immunity from suit, and immunity from liability." *Id.* But immunity from liability is waived whenever the government contracts with a private party. *Id.* Immunity from suit, however, is not waived by the mere act of contracting. *Fed. Sign v. Tex. S. Univ.*, 951 S.W.2d 401, 408 (Tex. 1997). As a result, in contract suits, courts usually focus on immunity from suit.

"Sovereign immunity from suit defeats a trial court's subject matter jurisdiction and thus is properly asserted in a plea to the jurisdiction." *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 225–26 (Tex. 2004). A "party suing the governmental unit bears the burden of affirmatively showing waiver of immunity." *City of Austin v. Powell*, 704 S.W.3d 437, 447 (Tex. 2024) (citation omitted). There is "a presumption against any waiver until the plaintiff establishes otherwise." *Id.* (citation omitted). The plaintiff "survives the plea to the jurisdiction only by showing that the statute clearly and affirmatively waives immunity and by also negating any provisions that create exceptions to, and thus withdraw, that waiver." *Id.* (cleaned up).

*Miranda* explores the standards and procedures for pleas to the jurisdiction in great detail, and it should be reviewed when drafting or responding to a plea. *See Miranda*, 133 S.W.3d at 225-29. In short, the government may challenge the pleadings, which is similar to a motion to dismiss; and/or the government may challenge the existence of jurisdictional

facts, which is similar to a motion for summary judgment. *See id.* at 226-29; *Powell*, 704 S.W.3d at 447-78. In either case, the "trial court must determine at its earliest opportunity whether it has the constitutional or statutory authority to decide the case before allowing the litigation to proceed." *Miranda*, 133 S.W.3d at 226.

If a trial court denies the plea to the jurisdiction, both the State and governmental entities can immediately file an interlocutory appeal, which stays all proceedings in the trial court *and* automatically supersedes the trial court's order. *See* Tex. Civ. Prac. & Rem. Code § 51.014(a)(8), (b); Tex. Civ. Prac. & Rem. Code ch. 6; Tex. R. App. P. 29.1(b). As a result, it can be years before a case gets back to the trial court and the litigation proceeds.

**II. Immunity for Breach of Contract Claims**

**A. The Supreme Court limits non-legislative paths to suing the government on contract claims.**

**1. The first 150 years—no suits to enforce contracts absent support from a statute.**

As early as 1847, the Supreme Court began rejecting contract claims due to sovereign immunity: "The state cannot be coerced into an observance of its contracts. It cannot be sued except by its own consent, in a mode provided by law." *Marshall v. Clark*, 22 Tex. 23, 31 (1858); *Borden v. Houston*, 2 Tex. 594, 611-12 (1847) (refusing to permit counterclaim for set-off based on bonds and promissory notes). The Supreme Court reinforced this principle repeatedly over the next 150 years. *See Herring v. Houston Nat. Exch. Bank*, 269 S.W. 1031, 1032-33 (Tex. 1925) (rejecting contract claim for damages against Texas Prison Commission); *W. D. Haden Co. v. Dodgen*, 308 S.W.2d 838, 840-42 (Tex. 1958) (rejecting declaratory judgment claim on alleged contract); *Mo. Pac. R. Co. v. Browns Navigation Dist.*, 453 S.W.2d 812, 813-14 (Tex. 1970) (recognizing that the State and political subdivisions are generally immune from suit on contracts).

However, the mere fact that a contract was involved did not always mean that sovereign immunity barred a suit. After the development of the *ultra vires* doctrine as an exception to sovereign immunity, suits against a government official to compel the payment of money were permitted if a statute or the constitution made the official's refusal to pay unlawful. *See State v. Epperson*, 42 S.W.2d 228, 231 (Tex. 1931). In *Epperson*, the Supreme Court[1] permitted a claim against a tax collector even though it sought recovery of money allegedly due under a contract. 42 S.W.2d at 231. Because a statute left no discretion over whether the tax collector should pay the money, the Supreme Court treated the suit as "simply an action to compel an officer, as agent of the state, to pay over funds to a party who claims to be lawfully entitled thereto"—that is, an *ultra vires* suit. *Id.* The Court noted that the trial court could not "enforce the specific performance of the contract . . . award damages for any breach of said contract." *See id.* The Supreme Court would limit *Epperson*'s permission to sue to contract suits backed up by statutory or constitutional duties. *See W.D. Haden*, 308 S.W.2d at 840-42 (distinguishing *Epperson* and applying *Herring* to reject contract claim).

In *Missouri Pacific*, the Supreme Court opened the courthouse doors to many more contract suits when it concluded that a statute providing that an entity may "sue and be sued" was "quite plain and gives general consent for [the governmental entity] to be sued in the courts of Texas in the same manner as other defendants." *See* 453 S.W.3d at 813-14. This phrase appeared in numerous statutes creating governmental entities, so *Missouri Pacific* would allow many contract suits against those entities until it was overruled decades later in 2006.

**2. The last 30 years—no waiver by entering contracts or other non-litigation conduct.**

In 1997, the Supreme Court held that the mere act of entering a contract did not waive immunity: "a private citizen must have legislative consent to sue the State on a breach of contract claim. The act of contracting does not waive the State's immunity from suit." *Fed. Sign v. Tex. S. Univ.*, 951 S.W.2d 401, 408 (Tex. 1997) (emphasis omitted). The Court tempered this holding with a footnote: "There may be other circumstances where the State may waive its immunity by conduct other than simply executing a contract so that it is not always immune from suit when it contracts." *Id.* at 408 n.1. This footnote—leaving open the possibility that the State's conduct could waive immunity—would cause confusion among lower courts in the years to come.

In a string of cases after *Federal Sign*, the Supreme Court confronted the issue left open in *Federal Sign*'s footnote—whether a governmental entity could waive and had waived immunity through its conduct. In *Little-Tex*, the Court squarely "refuse[d] to intercede . . . by judicially adopting a waiver-by-conduct doctrine," deferring instead to the Legislature and its recently enacted scheme in Government Code chapter 2260. *Gen. Servs. Comm'n v. Little-Tex Insulation Co.*, 39 S.W.3d 591, 595-98 (Tex. 2001). "We conclude that the State does not waive its immunity from a breach-of-contract action by accepting the benefits of a contract. Absent special statutory consent to sue, a party may not

pursue a breach-of-contract claim against the State without participating in Chapter 2260's administrative process." *Id.*

Even with *Little-Tex*'s seemingly brightline rule, the Supreme Court spent the next decade rejecting waiver-by-conduct theories. *See Tex. Nat. Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 856-57 (Tex. 2002) (plurality op.) (no waiver "by fully accepting benefits under the contract"); *see id.* at 860-62 (Hecht, J., concurring in judgment) (rejecting reasoning that would foreclose waiver-by-conduct theories); *Travis County v. Pelzel & Assocs., Inc.*, 77 S.W.3d 246, 252 (Tex. 2002) ("When a governmental unit adjusts a contract price according to the contract's express terms, it does not, by its conduct, waive immunity from suit, even if the propriety of that adjustment is disputed"); *Catalina Dev., Inc. v. County of El Paso*, 121 S.W.3d 704, 706 (Tex. 2003) (Alleged conduct does not fall "outside the realm of contract formation. And we have made clear that contract formation, by itself, is not sufficient to waive a governmental unit's immunity from suit."); *Sharyland Water Supply Corp. v. City of Alton*, 354 S.W.3d 407, 414 (Tex. 2011) ("[W]e reject the invitation to recognize a waiver-by-conduct exception in a breach-of-contract suit against a governmental entity.").

One important caveat to the waiver-by-conduct discussion: sovereign immunity no longer fully extends to counterclaims against the government once the government has filed suit or otherwise brought its own affirmative litigation claims. A governmental entity's decision "to file suit for damages encompasse[s] a decision to leave its sphere of immunity from suit for claims against it which are germane to, connected with and properly defensive to claims the" entity asserts. *Reata Const. Corp. v. City of Dallas*, 197 S.W.3d 371, 377 (Tex. 2006). However, that governmental entity "continues to have immunity from affirmative damage claims against it for monetary relief exceeding amounts necessary to offset the [entity's] claims." *Id.* In other words, the government's filing suit authorizes counterclaims up to the point that they offset the government's damages down to zero, but the government retains immunity such that it will not actually pay damages absent a Legislative waiver.[2]

In 2009, the Supreme Court considered the intersection of the *ultra vires* doctrine and sovereign immunity's general prohibition on contract claims for damages. *City of El Paso v. Heinrich*, 284 S.W.3d 366, 368 (Tex. 2009). Relying on *Epperson*, the Court explained that the mere fact that a contract is involved does not mean immunity bars the suit—which might be viable under the *ultra vires* doctrine. The "rule arising out of *Epperson* is that while suits for contract damages against the state are generally barred by immunity, where a statute or the constitution requires that government contracts be made or performed in a certain way, leaving no room for discretion, a suit alleging a government official's violation of that law is not barred, even though it necessarily involves a contract." *Id.* at 371. So, "suits to require state officials to comply with statutory or constitutional provisions are not prohibited by sovereign immunity, even if a declaration to that effect compels the payment of money. To fall within this *ultra vires* exception, a suit must not complain of a government officer's exercise of discretion, but rather must allege, and ultimately prove, that the officer acted without legal authority or failed to perform a purely ministerial act." *Id.*

Even under this framework, the government still retains its immunity for retrospective monetary claims. *Heinrich* held: "a claimant who successfully proves an *ultra vires* claim is entitled to prospective injunctive relief, as measured from the date of injunction." *Id.* at 376. But "retrospective monetary claims are generally barred by immunity," and *Epperson*'s suggestion to the contrary is no longer good law. *See id.* at 374, 376. *Heinrich* itself acknowledged the challenges with this line: the "line between prospective and retrospective remedies is neither self-evident nor self-executing." *Id.* at 375 (citation omitted). It is beyond the scope of this Article to address that line, but suffice it to say that careful framing is important when discussing the relief sought.

**B. The Supreme Court holds that "sue and be sued" and similar phrases, by themselves, do not qualify as clear and unambiguous waivers of immunity.**

Both the Supreme Court and the Legislature have firmly established the "rule that for the Legislature to waive the State's sovereign immunity, it must do so by clear and unambiguous language." *Duhart v. State*, 610 S.W.2d 740, 742 (Tex. 1980); Tex. Gov't Code§ 311.034 (A "statute shall not be construed as a waiver of sovereign immunity unless the waiver is effected by clear and unambiguous language."). "The same rule applies, of course, to the waiver of immunity for other governmental entities." *Tooke v. City of Mexia*, 197 S.W.3d 325, 329 n.2 (Tex. 2006).

The question then becomes: what qualifies as clear and unambiguous language? "Scores of Texas statutes provide, variously, that individuals and entities, public and 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, in

court." *Id.* at 328. Does saying a governmental entity may "be sued" clearly and unambiguously waive its immunity?

Overruling *Missouri Pacific*, the Supreme Court held in *Tooke* that statutes simply stating a governmental entity could "sue and be sued"—or using the various similar phrases listed above—did *not* by themselves waive immunity from suit. *Id.* at 328-29, 333-43. Rather than clearly addressing governmental *immunity* from suit, the phrases often refer to the legal *capacity* to be involved in litigation—for both governmental and non-governmental entities. *Id.* at 333-34, 337, 342.

In *Tooke*, the Supreme Court concluded that treating "sue and be sued" as a waiver of immunity would be "inconsistent with the Legislature's more recent limited waivers of immunity from suit on contract claims against the State and units of state government, counties, and local government entities"—which had been enacted from 1999 to 2005. *Id.* at 342. The Court viewed these statutes as the Legislature's agreeing with its conclusion and "reject[ing] the view that 'sue and be sued' and similar phrases, standing alone in organic statutes, waive immunity from suit." *Id.* at 346. Instead of blanket waivers of immunity, the Legislature "adopted a more measured approach," carefully prescribing the kinds of contract claims and the types of damages for which it waived immunity. *Id.* That comprehensive scheme is detailed below.

**III. Legislative Waivers.**

Over time, the Texas Legislature has expanded the waiver of immunity for government entities, with important differences depending on the entity. Contracts with state agencies and counties are subject to narrower waivers. Contracts with municipalities, however, are much easier to enforce in court.

**B. Infrastructure contracts.**

The Legislature has generally recognized that every level of government is highly dependent on a robust private sector with infrastructure-building capabilities, and thus has provided a broad waiver for infrastructure-related contracts. The statutes waiving immunity to suit for government entities entering into contracts for "engineering, architectural, or construction services" or related materials read similarly. *See* Tex. Civ. Practice & Rem. Code § 114.002 (state agencies); Tex. Local Gov't Code § 262.007 (counties).

While these waivers allow claims for breach of contract to proceed against the government, the waivers are limited in scope, particularly as to the scope of recoverable damages. Government contractors can only recover the balance due and owed under the contract, amounts owed for change orders, and reasonable and necessary attorney's fees. *See* Tex. Civ. Practice & Rem. Code § 114.004; Tex. Local Gov't Code § 262.007(b). Contractors cannot recover consequential or exemplary damages. *Id.* § 262.007(c).

**C. Contracts with state agencies and counties.**

Aside from the statutory waiver in CPRC Section 114, state contractors face a challenging path to resolution for claims against state agencies. In 1999, following the Supreme Court's *Federal Sign* decision, the Legislature created a comprehensive statutory scheme channeling most breach of contract claims against the state into an administrative process with mandatory dispute resolution. *See generally* Tex. Gov't Code ch. 2260. State agencies are required to include a provision in their contracts "stating that the dispute resolution process used by the unit of state government under this chapter must be used to attempt to resolve a dispute arising under the contract." Tex. Gov't Code § 2260.004(a). Chapter 2260's requirements are thus jurisdictional—they are "necessary step[s] before a party can petition to sue the State." *Little-Tex*, 39 S.W.3d at 597. The Texas Supreme Court had stated that this statutory scheme "does not waive the State's sovereign immunity." *In re City of Galveston* [CITE].

Contractors with a breach of contract claim against state agencies must first provide notice of the claim and then engage in mandatory negotiations with the state agency pursuant to rules promulgated by the agency. Tex. Gov't Code §§ 2260.051, .052. Only after can a contractor proceed to a contested case hearing in the State Office of Administrative Hearings (SOAH). *Id.* § 2260.102. Cases are heard by an administrative law judge "in accordance with the procedures adopted by the chief administrative law judge of the [state agency]." *Id.* § 2260.104(a). The ALJ's decision is appealable only for abuse of discretion, although that right of appeal may be illusory because state law does not specify how parties might file such an appeal. *Id.* § 2260.104(a); *Ed. Testing Serv. v. Tex. Edu. Ag'y,* SOAH Dkt. No. 701-23-03049, 2024 WL 6906671, at *2 n. 17 (Tex.. St. Off. Admin. Hgs. 2024) (noting that chapter 2260 claims are not subject to the Administrative Procedures Act's judicial-review provisions, even though it contemplates an appellate process).

Contractors may recover damages from the state agency only up to $250,000. *Id.* § 2260.105. For damages of $250,000 and above, the ALJ must issue a written report with findings and recommendations to the Legislature. *Id.* § 2260.1055. The report must recommend either that the Legislature make an appropriation to pay the judgment, or that it not appropriate money and consent to suit under chapter 107 of the Civil

Practice and Remedies Code.[3]

Unlike contracts with state agencies or municipalities, there is no waiver of immunity or other statutory dispute resolution mechanisms for contracts with counties outside of the limited waiver in Local Government Code 262.007.

**D. Contracts with municipalities.**

**1. Governmental vs. proprietary functions.**

Unlike state agencies and counties, breach of contract claims against municipalities involve a threshold inquiry that determines whether governmental immunity applies at all: whether the subject of the contract municipality was acting in a governmental or proprietary function. At bottom, the distinction is whether the municipality is acting in a traditional sovereign role, or whether they are operating more like a market player. The Texas Constitution grants the legislature the authority to "define for all purposes those functions of a municipality that are to be considered governmental and those that are proprietary, including reclassifying a function's classification assigned under prior statute or common law." Tex. Const. art 11, § 13.

In turn, the Texas Tort Claims Act waives liability for damages arising out of "rising from [a municipality's] governmental functions, which are those functions that are enjoined on a municipality by law and are given it by the state as part of the state's sovereignty, to be exercised by the municipality in the interest of the general public." Tex. Civ. Practice & Rem Code § 101.0215(a). That subsection then provides a non-exhaustive list of thirty-six such functions, including street construction and design, waterworks, museums, and parking facilities. *Id.* The TTCA goes on to distinguish proprietary functions as those that "a municipality may, in its discretion, perform in the interest of the inhabitants of the municipality," including operating a public utility and amusements owned by the municipality. *Id.* § 101.0215(b).

When the subject matter of a contract with a municipality implicates its proprietary function, the municipality has no immunity from suits for breach of contracts because it does not act for the benefit of the sovereign. *Wasson Interests, Ltd. v. City of Jacksonville*, 489 S.W3d 427, 434 (Tex. 2016) ("*Wasson I*") (extending governmental/proprietary dichotomy to government contracts). When it implicates a governmental function, the municipality retains immunity except as limited by the common law and statutes like the TTCA.

The Texas Supreme Court has formulated a test to determine whether a municipality is acting in a proprietary or governmental function in contracting: whether (1) the municipality's act of entering into the contract was mandatory or discretionary, (2) the contract was intended to benefit the general public or the municipality's residents, (3) the municipality was acting on the State's behalf or its own behalf when it entered into the contract, and (4) the municipality's act of entering into the contract was sufficiently related to a governmental function to render the act governmental even if it would otherwise have been proprietary. *Wasson Interests, Ltd. v. City of Jacksonville*, 559 S.W.3d 142, 150 (Tex. 2018) ("*Wasson II*"). Perhaps the most litigated prong is the second. In *Wasson II*, the Texas Supreme Court confirmed that courts should look at whether the contract is *primarily*—not necessarily exclusively—for the benefit of the municipality's residents. *Id.* at 151.

Case law on this dichotomy is unlikely to remain static. Recent cases indicate that the Supreme Court may refine its framework for assessing whether a contract reflects government or proprietary action. In *City of League City v. Jimmy Changas, Inc.*, two justices wrote separately to attack the *Wasson II* framework. Justice Young's concurrence rejected the use of the TTCA government function list in a breach of contract suit given the TTCA's limitation to tort actions. 670 S.W.3d 494, 508 (Tex. 2023). He focused on the fact that contract liability—unlike torts—is much more readily foreseen and thus cities can properly assign risk through contracting without needing the protection of governmental immunity. Justice Blacklock's dissent instead criticized *Wasson II* for veering too far from the fundamental question: whether the municipality acted in a "public capacity" or with a "private character." *Id.* at 518 (quoting *City of Galveston v. Posnainsky*, 62 Tex. 118, 130-31 (1884)). Justice Blacklock would instead ask whether the municipality's function was one only the government could perform. In *Jimmy Changas*, the contract was an economic development agreement providing tax abatements to a restaurant, and Justice Blacklock would have held that the contract involved a governmental function as only the government can grant tax abatements.

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**2. Statutory waiver of immunity for breach of contract claims**

Local Government Code section 271.152 creates a broader statutory waiver of immunity for municipalities[4] that enter into contracts. However, for immunity to be waived, the contract must be "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." Tex. Local Gov't Code 217.151(2) (emphasis added). While the subject matter of the contract isn't limited to infrastructure projects, the limitation on damages looks very similar to the limitations discussed in Section III.A above.

To avoid a successful plea to the jurisdiction based on a statutory waiver of immunity like Section 271.152, a contractor need only plead facts stating the essential terms of the contract and that the contract for "services," even if that was not the central purpose of the contract. *Campbellton Road, Ltd. v. City of San Antonio*, 688 S.W.3d 105, 122 (Tex. 2024). Courts take a broad view of "services" means—the only limitation is that the services must provide more than a mere "indirect, attenuated benefit." *Id.* (quoting *Kirby Lake Dev., Ltd. v. Clear Lake City Water Auth.*, 320 S.W.3d 829, 839 (Tex. 2010).

Chapter 271's "reference to 'essential terms' incorporates the requirements of the common law." *San Jacinto*, 688 S.W.3d at 134. Thus, the contract must state terms "that are 'basic obligations' of the type of contract at issue, as well as particular terms that the parties to the specific contract would reasonably regard as 'vitally important ingredients of their bargain.'" *Id.* (citation omitted). Those terms must be stated "with 'a reasonable degree of certainty and definiteness' sufficient to confirm the parties' intent to be bound, and to 'enable a court to understand and enforce' the obligations 'and provide an appropriate remedy when breached.'" *Id.* (citation omitted). Where a contract does not specify the price term but has "a detailed set of procedural and substantive limits on how prices are to be set, . . . the price term is sufficiently definite." *Id.* at 135. Likewise, a definite quantity term is not required, but can depend on parties' conduct and other contractual guidelines. *See id.* at 135-36. The analysis of whether a contract states essential terms focuses on the time of formation. *See id.* at 136. As long as "the contract meets the common-law 'essential terms' standard and [chapter 271'a] other stated requirements at the time it is formed, that is enough to show a waiver of immunity." *Id.*

Chapter 271 permits governmental entities to agree to—and be held to—contractual procedures for alternative dispute resolution, including agreeing to mandatory pre-suit mediation or arbitration. *See San Antonio River Auth. v. Austin Bridge & Rd., L.P.*, 601 S.W.3d 616, 625 (Tex. 2020); *San Jacinto River Auth. v. City of Conroe*, 688 S.W.3d 124, 132 (Tex. 2024). This only applies to "claims allowed to proceed against a local government under the subchapter's waiver of immunity." *Austin Bridge*, 601 S.W.3d at 625. "In effect, the Act establishes an order of operations: if the waiver of immunity . . . applies to the claim for breach of contract, then the contractual procedures for adjudicating that claim . . . are enforceable." *San Jacinto*, 688 S.W.3d at 131. The failure to comply with such procedures does not give rise to immunity or deprive the trial court of subject-matter jurisdiction. Rather, the court retains jurisdiction so that it can enforce the procedures by ordering compliance with them. *See id.* at 131-33.[5]

**IV. Drafting Tips for Government Contractors.**

- **Identify the services or goods provided.** Many statutory waivers are limited to contracts for goods and services.
- **Clearly establish the subject of the contract**. The type of good or service provided (e.g. engineering materials or services) can determine the scope of the waiver.
- **Spell out recoverable damages.** Because contractors may only recover damages owed under the contract in most instances, make sure that the scope of damages is clearly identified in the contract.
- **Agree on the function exercised by the government entity.** In contracts with municipalities, the parties should include language in the contract acknowledging whether the municipality is contracting to perform a sovereign function or a proprietary one.

**CONCLUSION**

Breach of contract litigation with government entities looks very similar to private party litigation, but contractors must be mindful of the various waivers of immunity that apply to breach of contract claims. Clear contractual language during the contract formation process can help avoid jurisdictional disputes down the road at the outset of litigation.

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[1] The Supreme Court adopted the opinion of the Commission of Appeals. *Epperson*, 42 S.W.2d at 232.

[2] The Supreme Court has explained that this was not a "waiver" of immunity by conduct, but rather the judiciary's modification and abrogation of immunity for governmental entities that file affirmative claims. *See City of Dallas v. Albert*, 354 S.W.3d 368, 374 (Tex. 2011).

[3] Chapter 107 of the CPRC permits the legislature, by resolution, to consent to individual suits under certain conditions.

[4] This waiver also applies to school districts, special purpose districts, and other local government entities (but not counties). Tex. Local Gov't Code § 271.151(3)

[5] One notable exception: an agreement that an arbitrator will decide immunity issues is not enforceable. An "arbitrator may not decide the [entity's] immunity or confer jurisdiction on the trial court; it is the non-delegable role of the judiciary to determine whether governmental immunity exists, whether such immunity has been waived, and to what extent." *Austin Bridge*, 601 S.W.3d at 628.