No. 09-20-00180-CV

In the Court of Appeals

for the Ninth District of Texas

Beaumont, Texas

SAN JACINTO RIVER AUTHORITY,

Appellant,

V.

CITY OF CONROE, TEXAS AND CITY OF MAGNOLIA, TEXAS,

Appellees.

BRIEF OF AMICUS CURIAE
IN SUPPORT OF APPELLANT

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IDENTITY OF AMICUS CURIAE[1]

Amicus Curiae is The Woodlands Township ("Township"). The Township is a political subdivision of the state, being a conservation and reclamation district, created under Article XVI, Section 59 of the Texas Constitution, pursuant to the provisions of Chapter 289, Acts of the 73rd Legislature, Regular Session, 1993 as amended.

The Cities' position in this case drastically impacts the cost of water to all other signatories to the Groundwater Reduction Planning, Alternative Water Supply and Related Goods and Services ("GRP") contracts and the cost of water to the end user, including those homes and businesses located within the Township's boundaries. It is the Township's position that the trial court incorrectly granted the Cities' plea to the jurisdiction.

The Township is not a party to the GRP contracts, the enforcement of which is sought by the San Jacinto River Authority ("SJRA") and for which the Cities of Conroe and Magnolia seek sovereign immunity. Nonetheless, the Township has an active interest in the outcome of these proceedings. The Appellant SJRA's Woodlands Division acts as a water wholesaler from its groundwater wells (from the Evangeline and Jaspar Aquifers) to the ten municipal utility districts (MUDs) within

[1] The Amicus Curiae adopts the designation of the identities of the parties and their counsel as set forth in the Appellants' and Appellee's Briefs.

the Montgomery County portion of the Township. These MUDS in turn, provide retail water to the Township's residents.[2]

The Township is paying the fees associated with the preparation of this Amicus Brief.

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[2] These MUDS receive central management services through the Woodlands Water Agency (WWA, formerly Woodlands Joint Powers Agency), a governmental entity, by providing water distribution, wastewater collection and storm drainage, as well as tax collection services.

ARGUMENT

Political subdivisions, as well as municipalities, are afforded immunity from both liability and suit. *Tex. A & M University–Kingsville v. Lawson,* 87 S.W.3d at 520–21; *Federal Sign v. Texas S. Univ.*, 951 S.W.2d 401, 405 (Tex.1997). Immunities can only be waived by the Legislature. *Ben Bolt–Palito Blanco Consol. Indep. Sch. Dist. v. Tex. Political Subdivisions Prop./Cas. Ins. Joint Self–Insurance Fund,* 212 S.W.3d 320 (Tex. 2006); *Tex. Natural Res. Comm'n v. IT–Davy,* 74 S.W.3d 849, 854 (Tex.2002). The Texas Supreme Court has admittedly "consistently deferred to the Legislature" to effectuate waivers of immunity.[i] *Id.* at 326, *quoting Tex. Natural Res. Comm'n v. IT–Davy,* 74 S.W.3d 849, 854 (Tex. 2002).

State law provides that "a statute shall not be construed as a waiver . unless the waiver is effected by clear and unambiguous language." TEX. LOC. GOV'T CODE Ann. § 311.034 (the "Government Code").[ii] *See also IT-Davy*, 74 S.W.3d at 854, *citing Gen'l Serv. Comm'n v. Little-Tex Insulation Co., Inc.,* 39 S.W.3d 591, 594 (Tex. 2001). As the Court in *Leach v. Texas Tech University,* (Tex. App.—Amarillo [7th Dist.] 2011) explained, "What this means, then, is that unless the words of a statute controlling a particular dispute between the government and its wards clearly and unambiguously specify that one or both aspects of immunity are removed, the governmental entity continues to enjoy its judicially created insulation against paying damages."[iii] *Leach* at 392, *citing City of El Paso v. Heinrich,* 284

S.W.3d 366, 368–69 (Tex.2009).

It is axiomatic that the judiciary must determine in the first instance the existence and boundaries of governmental immunity. The legislature determines whether that immunity is waived and to what extent. *San Antonio River Authority v. Austin Bridge & Road, L.P.*, S. Ct. Texas. May 1, 2020, 601 S.W.3d 616, 63 Tex. Sup. Ct. J. 939.

The Texas Legislature has expressly waived immunity from suit for contracts entered by local governments for goods or services. *See* TEX. LOC. GOV'T CODE , Subchapter I, Sections 271.151 *et seq.* (the "Section 271.152 Waiver"). Services: "Services" provided to a local governmental entity, within meaning of statutory waiver of governmental immunity from suit for breach of contract claims involving contracts for goods or services, is broad enough to encompass a wide array of activities and includes generally any act performed for the benefit of another. *Tex. Loc. Gov't Code Ann. §§ 271.151(2)(A), 271.152. Id. Kirby Lake Dev., Ltd. v. Clear Lake City Water Auth.*, 320 S.W.3d 829, 839 (Tex. 2010); *Ben Bolt–Palito Blanco Consol. Indep. Sch. Dist. v. Tex. Political Subdivisions Prop./Cas. Joint Self–Ins. Fund*, 212 S.W.3d 320 (Tex. 2006); *Kirby Lake*, 320 S.W.3d at 839.

Statutory waiver of governmental immunity from suit for breach of contract claims involving contracts for goods or services does not apply to a contract that provides

only an indirect, attenuated benefit to the local government. TEX. LOC. GOV'T CODE §§ 271.151(2)(A), 271.152.

The trial court held, as a matter of law, that Local Government Code Chapter 271 did not waive the Appellees' immunity from suit for this breach-of-contract claim. The Township respectfully disagrees.

Chapter 271 waives a local governmental entity's immunity from breach-of-contract claims brought under the chapter. An authorized local government entity "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." The parties do not dispute that Appellees are local governments for purposes of chapter 271. *See* TEX. LOC. GOV'T CODE § 271.151(3). *See also,* § § 271.152 and 271.153 (limiting awards and damages). A "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." *Id.* § 271.151(2)(A). It is this latter provision which is the crux of the instant appeal, as Appellees dispute that the contracts in question state essential terms.

The GRP contracts in the case at bar, authorize the SJRA to charge participants (such as the Appellee Cities) for water, with the revenues being used to service the

project's indebtedness and allow the parties to these contracts to share the cost of a $554 million dollar water treatment plant and related pipelines and facilities in the County, for which the Texas Water development Board holds $439,230,000.00 in bonds. Appellee Cities contend that Chapter 271's waiver does not apply, because it contends the GRP agreement doesn't include essential terms, to wit, price. SJRA, in turn, contends that the price is stated via a legislatively determined formula for the GRP contracts.

The Act waives immunity from contract suits for local governmental entities, such as the Cities of Conroe and Magnolia. Section 271.152 of the TEX. LOC. GOV'T CODE states:

> 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.

A "contract subject to this subchapter" includes "a written contract stating the essential terms of the agreement for providing goods or services to the local governmental entity.

The Texas Supreme Court also subsequently ruled that the Section 271.152 Waiver applies to interlocal agreements entered under the authority of the Interlocal

Cooperation Act, when such agreements are for goods or services. *Ben Bolt–Palito Blanco Consol. Indep. Sch. Dist. v. Tex. Political Subdivisions Prop./Cas. Ins. Joint Self–Insurance Fund*, 212 S.W.3d 320, 328 (Tex. 2006), *rehearing denied.*

The Appellees have argued that since price is fixed to an external reference outside of the four corners of the GRP contract, that this somehow causes the GRP to be missing be an "essential term." Specifically, the Cities object that "one must go outside the GRP Contracts to SJRA's unilaterally-issued rate Orders to find rates." In light of the Appellee's citation to and reliance on *City of Houston v. Williams*, such an argument would seem ill-founded. In *City of Houston v. Williams*, the Texas Supreme Court had found both an agreement (and a waiver of immunity) in separate contract writings. 353 S.W.3d 128, 138-39 (Tex. 2011). That is, there was no single document which comprised the contract for which the count found a waiver of immunity. Rather, there were several documents, which the Court found, taken as a whole, to be the agreement. Thus, that a price (SJRA's Rate Orders) is located in an external document, much as the Consumer Price Index or another external document does not cause the failure of an "essential term", where the contract itself references such document. Moreover, the parties agreed as to the means of fixing the rate. Indeed, the City of Conroe sits on a committee which reviews any rate increase prior to its adoption; other cities vote for a representative city to sit on the six-member Review Committee. Moreover, Participants, in addition to the Review Committee

have an opportunity to comment on the GRP during the initial preparation stage, and during any amendments. In light of these facts, the rate isn't 'unilaterally' adopted, as the Cities now argue.

The Cities further arguments, therefore, regarding "price" are likewise not well-founded, as they are premised on a specious argument, that price not only must be expressed within the agreement, but must also be expressed numerically as a firm-fixed price. The Texas Local Government Code only requires "essential terms." While price is certainly an essential term of an agreement, until the trial court's decision in this matter, price has never been interpreted in such a limited manner. S*ee e.g., Kirby Lake Dev., Ltd. v. Clear Lake City Water Auth.*, which held that a written contract states the essential terms when it outlines the names of the parties, the property at issue, and the parties' "basic obligations." 320 S.W.2d 829, 830 (Tex. 2010). The other cases cited by Appellee Cities to the contrary are readily distinguishable. In one matter, the portion of the agreement which stated price was an addendum, which was to be appended to and be made part of the contract. In what the Court referred to as a fatal error in pleading, it was not included and appended as part of the pleadings submitted to the court. From the court's perspective, the agreement wasn't enforceable at all under the Statute of Frauds, much less for a waiver of immunity pursuant to §271.151(2)(A). *See, LTTS Charter School, Inc. v. Palasota*, 362 S.W.2d 202, 210-11 (Tex. App. – Dallas 2012, *no pet*.)

In West Travis County Public Utility Agency v. Travis County Municipal Utility District No. 12, the court determined that the disputed contract was contingent upon an agreement. That contract stated that the Agency would provide wholesale services for treatment of raw water and delivery of potable water to the MUD in return for payment, if the MUD installed water meter and the Agency approved the same. The court reasoned that the contingency lacked both price and time of performance for installation of water meter. Thus, there being no mechanism to enforce the contingency, the services contract failed, as it conferred only a unilateral benefit, rather than an enforceable right for the Agency to receive water. 537 S.W.3d 549, 557 (Tex. App. -Austin 2017, pet. denied).

Likewise, *Lubbock County Water Control and Improvement District v. Church & Akin*, is inapplicable to the case at bar. That matter involved a leasehold, which did not require that the property be used for a particular enumerated purpose but for one of the recited uses, finding it to be covenant against a noncomplying use, not a covenant to use in a particular manner, (as a marina). The court likewise determined that the even if it assumed that Church & Akin were providing the District with a marina as "services," rather than simply complying with a use restriction, any provision of marina services *to the District's residents* was not the provision of such services to the Water District itself. In other words, the agreement in that case failed,

because it didn't contain the requisite bargained -for flow of consideration or exchange between the parties, of price for services. *See, Church & Akin*, 442 S.W.3d 297, 306-08 (Tex. 2014, pet. den).

The Court noted however, that:

…[C]hapter 271 does not define the term "services," and that the ordinary meaning of the term "is broad enough to encompass a wide array of activities." 320 S.W.3d at 839. In support of this statement, we cited authorities holding that the term "includes generally **303* any act performed for the benefit of another under some arrangement or agreement whereby such act was to have been performed," *id.* (quoting *Van Zandt v. Fort Worth Press*, 359 S.W.2d 893, 895 (Tex.1962)), but would not extend to "contracts in which the benefit that the local governmental entity would receive is an indirect, attenuated one." *Id.* (quoting *Berkman v. City of Keene*, 311 S.W.3d 523, 527 (Tex.App.-Waco 2009, no pet.)). *Id.*, at 303

Indeed, the issue is of price (for the tickets), in that case was raised only at oral argument and was not stated in the lease or even an ancillary written agreement. The case is thus instructive to the one at bar, only to show that the courts consider each contract separately on a case-by-case basis to determine its essential terms. *See T.O. Stanley Boot Co. v. Bank of El Paso*, 847 S.W.2d 218, 221 (Tex. 1992); *see also Parker Drilling Co. v. Romfor Supply Co.*, 316 S.W.3d 68,

74 (Tex. App.—Houston [14th Dist.] 2010, pet. denied). Pursuant to Chapter 271, courts first look to the agreement's language to identify its essential terms, as the written agreement's terms themselves are the substance that determine whether immunity is waived *See Lubbock Cty. Water Control, 442 S.W.3d at 304.*

Significantly, however, the Cities' interpretation of the GRP Agreements, rests more on an implied comparison of the GRP Agreements to firm-fixed price contracts, rather than whether the GRP Contracts state the obligations of the parties and the Cities' intent to be bound thereby. Indeed, the Cities' limited definition of price under Section 271. 151(2)(A) would limit waiver to firm fixed-price contracts, precluding waiver in all requirements and output contracts. In many contracts for sale of goods or services (including for transactions under Article 2 of the Uniform Commercial Code or UCC), the parties numerically establish price, in dollars, subject to price adjustment mechanisms and most-favored customer clauses. These escalator clauses are frequently external to the document, are established and/or published by third parties and vary, based on certain criteria.

Sometimes, however, the parties may decide to either to not numerically establish the quantity, but establish the quantity based on the buyer's *requirements* of the goods and/or the seller's production or *output* of the goods. These requirements or output contracts are no less legally established than those agreements which

establish price numerically, as they provide consideration or non-numerically state price, stating and thus satisfying “price” as an “essential term of the agreement,” under classic contract hornbook law.

Such contract arrangements likewise exist for certain electric power agreements. Capacity contracts in electric power markets that are used in situations where regulatory requirements from a state public utility commission obligate load serving entities and load serving electric utilities to purchase ‘‘capacity’’ (sometimes referred to as ‘‘resource adequacy’’) from suppliers to secure grid management and on-demand deliverability of power to consumers. Many political subdivisions, including municipalities, have electric utilities and these utilities have such agreements.

Likewise, certain natural gas supply contracts include peaking supply contracts which enable an electric utility to purchase natural gas from another natural gas provider on those days when its local natural gas distribution companies curtail its natural gas transportation service. These latter agreements are unlike to numerically establish price; rather the price will be set at a yet unestablished market rate.

Indeed, the variety in the types of government contracts doesn’t require that price be stated either within the agreement itself, or even numerically. Indefinite-Delivery, Indefinite-Quantity agreements, for example, provide for the acquisition of supplies

or services but do not specify a firm quantity that will be issued and delivered during the period of the contract (as delivery orders or task orders). The basic contract will specify the contract types authorized (e.g. Cost Reimbursement or Firm Fixed Price) and each task order will identify the specific contract type utilized. These are used when a government entity cannot predetermine, above a specified minimum, the precise quantities of supplies or services it will require during the contract period and it is inadvisable for the governmental entity to commit itself for more than a minimum quantity. These are also commonly used when a recurring need is anticipated. There are three types of indefinite-delivery contracts: definite quantity, indefinite quantity, and requirements contracts. Pursuant to the GRP contracts, the parties agreed that the SJRA was authorized to set rates for the participants, under contractually recited procedures in the contracts.

Under the trial court's holding and the Cities' arguments in this case, all of these various contracts would, pursuant to *Tex. Loc. Gov't Code* § 271.151(2)(A), be lacking the essential term of price, inasmuch as they are not firm fixed-price agreements. Therefore, if one accepts the Cities' argument, the Legislature intended to only provide a waiver of immunity for a very limited portion of government contracts that is, only those where the governmental entity entered into firm-fixed price agreements.

Moreover, the above argument, that the GRP Agreements lack price and thus are unenforceable under *Tex. Loc. Gov't Code* § 271.151(2)(A), is at odds with the weight of other judicial authority holding that, to be enforceable, a contract must address its essential terms with "a reasonable degree of certainty and definiteness." *Pace Corp. v. Jackson*, 155 Tex. 179, 284 S.W.2d 340, 345 (1955); *see also Lubbock Cty. Water Control*, 442 S.W.3d at 309 (Willett, J., dissenting) (contract contains its "essential terms" when it "outlines the material terms necessary to make a contract enforceable") (citing *Kirby Lake*, 320 S.W.3d at 838).

As the court in *Clear Creek Independent School District v. Cotton Commercial USA, Inc.* noted, in determining whether services were sufficiently defined, 'a contract's essential terms must at least be sufficiently definite to confirm that both parties intended to be contractually bound. 529 S.W.3d 569, 580 (Tx. Ct. App – Houston [14th Dist], 2017), *See also, Fort Worth Indep. Sch. Dist. v. City of Fort Worth*, 22 S.W.3d 831, 846 (Tex. 2000). Even when that intent is clear, the agreement's terms must also be sufficiently definite to "enable a court to understand the parties' obligations," *id.*, and to give "an appropriate remedy" if they are breached. *Fischer*, 479 S.W.3d 231, 237 (Tex. 2016).

The GRP Contracts enunciate price in Article 6, spanning several pages of detailed

provisions and culminating in Section 6.02, which obligates the Cities to pay and pay by enumerated formulae based in the (1) amount of groundwater pumped or surface water taken, in an amount set by the SJRA's Rate Order.

There was no question that the Travis County Court sufficiently understood the parties' obligations, when it issued its Order on September 10, 2016. Nor is there any question that the other governmental entities who entered into these GRP agreements understand the implications of this Court's decision should it invalidate the agreements at bar as being somehow uncertain or lacking essential terms. Such a decision, at a minimum, would result in the Appellants being able to walk away from their contractual obligations – and cause the remaining governmental entities to shoulder the burden of providing that essential service – water - to their residents. However, in the larger context, it may well also be the watershed for utility agreements statewide.

CONCLUSION

For these reasons and the reasons explained by Appellant in its brief, this Court should find for the Appellant, overturn the ruling of the trial court and remand this case for a hearing on the facts, consistent with the Court's opinion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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