



December 9, 2020

Carol Anne Harley, Clerk of Court
Ninth Court of Appeals
1085 Pearl Street
Suite 330
Beaumont, Texas 77701-3552

Re: No. 09-20-00180-CV
San Jacinto River Authority v. City of Conroe, Texas and City of Magnolia, Texas
Letter Brief of the Texas Water Conservation Association and Others

To the Honorable Justices of the Ninth Court of Appeals:

Amici curiae the Texas Water Conservation Association (“TWCA”), the Trinity River Authority of Texas (“TRA”), North Texas Municipal Water District (“NTMWD”), Upper Trinity Regional Water District (“UTRWD”), Sabine River Authority of Texas (SRA), The Woodlands Water Agency (WWA), and Tarrant Regional Water District (“TRWD”) come forward as friends of the court in support of the Appellant, San Jacinto River Authority (“SJRA”), in the above-captioned matter. TWCA’s members, including the individual undersigned *Amici*, collectively provide water supply and wastewater treatment services that are critical for the public health and safety of the vast majority of Texans. Those services are sometimes furnished under contracts that do not specify the quantity of water to be delivered or wastewater to be treated. They often provide a formula for price setting or incorporate a rate set by action of the seller’s governing body. These contracts nonetheless contain all “essential terms” for purposes of Texas Local Government Code (“TLGC”) Chapter 271 and form the wholesale backbone for retail service to millions of Texans.

The Appellees, the Cities of Conroe and Magnolia (“Cities”), challenged the trial court’s jurisdiction on two independent bases. First, they urged that their contract with SJRA was insufficiently definite to waive their governmental immunity under TLGC Chapter 271. CR.300 Second, the Cities contended that the failure to mediate the dispute before suit “negate[d] any waiver of Conroe’s or Magnolia’s governmental immunity from suit under Section 271.152.” CR.297-98. The trial court did not specify the basis or bases upon which the Cities’ pleas were granted. CR.1144. *Amici* are concerned only with the first basis of the Cities’ pleas and express no opinion with regard to the second. *Amici* will also not address the incontestability arguments raised in SJRA’s briefing to the Court.

With regard to the first basis for their pleas, the Cities contend that their immunity has not been waived because the GRP Contracts do not contain all essential terms in accordance with the definition of “a contract subject to this subchapter” found in TLGC Section 271.151(2)(A). Cities’ Brief p. 16. In support of that claim, the Cities argue that, in order to be a “a contract subject to this subchapter,” a contract must contain a “volume” and “price.” *Id.* at 20 (arguing that “neither the volume nor the price—obviously essential terms—are stated within the GRP Contracts.”). Chapter 271, however, does not include any such requirement.

If the Court reaches the question of the Cities’ governmental immunity, the *Amici* respectfully urge caution. If the trial court’s order is sustained as to the Cities’ governmental immunity, it potentially places the stability and enforceability of many contracts for water supply and wastewater treatment in jeopardy.

TWCA has not paid any fees, and will not pay any fees, for the preparation of this brief. TEX. R. APP. P. 11(c).¹

TWCA is a 501(c)(4) association of water professionals and organizations in Texas. Its members include river authorities, navigation and flood control districts, water control and improvement districts, drainage and irrigation districts, utility districts, municipalities, groundwater conservation districts, all kinds of water users, and general/environmental water interests. As relevant to the above-captioned case, TWCA’s members include most large public water suppliers in the State of Texas.

TWCA serves as a leader and advocate for sound water policy in Texas, engaging on state-wide broad water issues that may affect its members. TWCA does not engage in individual or local water issues, except where those matters may have wide-ranging effects. The governmental immunity arguments urged by the Cities pose such an immediate threat to the stability of water supply in Texas that TWCA is compelled to provide this brief to the Court.

The additional *Amici*, all of which are members of TWCA, deliver treated or raw water and/or provide wastewater treatment services to municipalities like the Cities. For instance, TRA, NTMWD, UTRWD, SRA and WWA operate systems that provide treated water and/or wastewater treatment to municipal customers on a wholesale basis. Many of those systems are regional in nature and provide service to multiple municipal customers. These systems allow the individual *Amici* and their customers to leverage economies of scale that reduce costs, and those savings are passed on to millions of Texans every day. Many systems are operated under contracts that contain formula-based price and quantity terms, or incorporate a price set by the seller’s governing body, but do not include a fixed price or quantity term in the contract. If the enforceability of those contracts is called into question, the ultimate burden will fall on

¹ The following individual *Amici* paid fees to counsel related to the preparation of this brief: North Texas Municipal Water District, Upper Trinity Regional Water District, Sabine River Authority of Texas, and Tarrant Regional Water District.

individual Texans in the form of higher rates to account for the risk associated with contract enforcement.

The *Amici* submit that if the trial court concluded that flexible price and quantity term contracts are insufficiently definite to waive governmental immunity under TLGC Chapter 271, it did so in error. Contracts may, in fact, completely exclude a fixed price or quantity term and still state “the essential terms of the agreement” for purposes of TLGC Section 271.151(2)(a). Contracts for the sale of treated and raw water often exclude fixed price or quantity terms for both practical and statutory reasons. A finding that the absence of fixed price and quantity terms renders contracts too indefinite to waive governmental immunity would ignore general contract law principles. It would also fail to account for the specific nature of wholesale contracts for the sale of water or for wastewater treatment. If the Court opines on the issue of governmental immunity in this case, it should consider that its decision may affect the enforceability of numerous contracts across the state.

1. A contract does not need to include a fixed price term to waive governmental immunity under Texas Local Government Code Chapter 271.

TLGC Section 271.151(2) does not include the term “fixed price,” and requires only that the “essential terms” of the contract be identified in order to waive governmental immunity. Water and wastewater contracts, like any other contract, must adhere to the basic principles of contract law. A contract must be sufficiently definite in its terms to enable a court to understand the contractual obligations it creates. *Bendalin v. Delgado*, 406 S.W.2d 897, 899 (Tex. 1966). A contract need only state all “essential terms” for purposes of a waiver of governmental immunity under TLGC Chapter 271. TEX. LOC. GOV’T CODE § 271.151(2)(a).

Essential terms are stated when “the names of the parties, property at issue, and basic obligations are clearly outlined.” *Kirby Lake Dev., Ltd. v. Clear Lake City Water Auth.*, 320 S.W.3d 829, 838 (Tex. 2010) (emphasis added). The “failure to specify the price does not leave [a] contract so incomplete that it cannot be enforced,” provided that “the parties have done everything else necessary to make a binding agreement for the sale of goods or services.” *Bendalin*, 406 S.W.2d at 900. As observed in *Bendalin*, “[i]n most cases [where] the parties clearly intend to make a binding agreement, with the price left open, [] the court does violence to their intention, and injustice to one of them, if the agreement is defeated.” *Id.* (quoting William L. Prosser, *Open Price in Contracts for the Sale of Goods*, 16 MINN. L. REV. 733, 790 (1932)). That is precisely what the Cities seek to accomplish by asserting governmental immunity in this matter. And, it should be noted that the consequences of allowing the Cities’ claims of governmental immunity to stand are potentially far reaching.

As a matter of general contract law, the enforceability of open-price term contracts, those which exclude even a price formula, is recognized in the Texas Business and Commerce Code. TEX. BUS. & COM. CODE § 2.305(a) (providing that “parties[,] if they so intend[,] can conclude a contract for sale even though the price is not settled.”). In instances “where parties have done

everything else necessary to make a binding agreement for services . . . their failure to specify a price does not leave the contract so incomplete that it cannot be enforced.” *Pennington v. Gurkoff*, 899 S.W.2d 767, 770 (Tex. App.—Fort Worth 1995, writ denied) (citing *Bendalin*, 406 S.W.2d at 900; *Polland & Cook v. Lehmann*, 832 S.W.2d 729, 739–40 (Tex. App.—Houston [1st Dist.] 1992, writ denied)).

The use of non-fixed price terms in a water supply contract is not unique to the SJRA’s contracts with the Cities. In fact, it is the prevailing model in contracts for both wholesale water supply and wholesale wastewater treatment provided to municipalities like the Cities. That model is common because the use of a non-fixed price term is both practically and legally necessary.

Wholesale water supply contracts, especially for municipal supply, are often decades long. In some instances, water supply contracts may be of a duration of 100 years. Many contracts that provide for municipal customers to finance the development and operation of regional systems owned by a special district are effectively perpetual. Special districts like SJRA and the district *Amici* are authorized to enter into contracts with municipalities, like the Cities, for an “unlimited duration.” TEX. WATER CODE § 49.068(b); *see also*, TEX. GOV’T CODE § 791.026(d).

Anticipating the financial requirements to provide water or wastewater treatment to municipal customers decades into the future is simply not possible. It is without question, however, that those services will be needed. The use of non-fixed price terms permits sellers and buyers the flexibility of meeting current costs today, the ability to adjust future rates to meet future requirements, and the ability to raise funds for capital costs through bond issuance. That is the practical basis for the ubiquity of non-fixed price terms in such contracts. If that flexibility results in contracts being rendered unenforceable under TLGC Chapter 271, it imperils the operational and financial stability of the model underlying wholesale water supply and wholesale wastewater treatment across Texas.

Moreover, it is legally necessary in long-term water supply contracting to use something other than a fixed price, because rates charged to like customers must be “without discrimination.” TEX. WATER CODE §§ 11.036(b); *see also*, TEX. WATER CODE § 13.043(j) (providing that a rate charged for treated water or wastewater treatment services cannot be “unreasonably preferential, prejudicial, or discriminatory”). A flexible price term permits rates to be adjusted equally and simultaneously among like customers, so that those rates are always consistent, *i.e.*, without unreasonable discrimination.

If a contract for water supply or wastewater treatment must include a fixed price to be enforceable, it would undermine the ability of buyers and sellers to make contracts of long duration. That, in turn, would negatively affect the cost of capital available for system maintenance and expansion. Ultimately, it would increase the cost to end users: Texans, businesses and industry.

2. A contract does not need to include a fixed quantity to waive governmental immunity under Texas Local Government Code Chapter 271.

Contracts for water delivery and wholesale wastewater treatment service often provide that the seller will meet all of the buyer's needs, without the specification of an exact contract quantity. Contracts that do not specify a contract quantity are generally recognized as enforceable. TEX. BUS. & COM. CODE § 2.306(a) (providing that an open-quantity term is sufficiently definite for purposes of contract formation). Texas law has long recognized that an agreement to furnish or deliver the quantity of goods or services the buyer may need during the contract term — a requirements contract — “is sufficiently definite and certain to bind the parties and is not unilateral.” *McCall v. Texas Dragline Svc. Co.*, 188 S.W.2d 243, 245 (Tex. Civ. App.—Galveston 1945, writ ref'd w.o.m.) (citing *Tampa Shipbuilding & Eng'g Co. v. Gen. Const. Co.*, 43 F.2d 309, 312 (5th Cir. 1930)).

As with flexible price terms, the use of contracts that do not include a fixed quantity for furnishing water or wastewater treatment services is also a practical necessity. The amount of water required by a municipality in any year, whether next year or fifty years in the future, is quantifiable only in hindsight. Water demands and the quantity of wastewater generated by a municipality vary significantly depending on weather conditions and other considerations such as population growth and water conservation efforts.

Given that demands for water and wastewater treatment cannot be forecast with precision, even in the near term, it is unsurprising that contracts for those services commonly do not specify a contract quantity. If that form of contract is insufficiently definite to invoke the statutory waiver of a municipal purchaser's governmental immunity under TLGC Chapter 271, this again would undermine the stability of those contracts and lead to higher costs of capital. Ultimately, that would result in higher rates for the millions of Texans who rely upon municipal water and wastewater services in municipalities that depend upon special districts like the district *Amici* for water supply and wastewater treatment.

For the reasons set forth herein, the *Amici* respectfully request that if the Court opines on the issue of the governmental immunity of Appellees the Cities of Conroe and Magnolia, that it find that non-fixed price and quantity terms are sufficiently definite to waive governmental immunity under TLGC Chapter 271.

Respectfully submitted,

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