Government Immunity: Can I Sue for These Costs?

By Jeff Chapman

In my last column, I addressed bid protests. In that discussion, I addressed the fact that the statutes governing bidding of contracts with local governmental entities contain little if no guiding language for bid. On the other hand, those same statutes contain specific provisions waiving immunity and allowing suits for the enforcement of contract claims. In this column, I will discuss those statutes and address the types of relief contractors are able to obtain from a governmental entity.

The history of governmental immunity in Texas is long and confusing. Luckily for contractors and owners building projects in Texas, the rules governing sovereign immunity in construction are fairly simple and easy to find. For projects with a county, the waiver of immunity is contained in section 262.007 of the local government code. For project with other local governmental entities, such as cities and other local governmental entities such as regional water and utility authorities, the waiver of contained in section 271.152 of the local governmental code.

County Governments

Section 262.007 provides that a county may be sued for breach of any contract for engineering, architectural or construction services. It requires that suit be brought in state court in that county. Further, it provides that the total amount of money recoverable against a county on a breach of contract claim is limited to the following types of damages:

- The balance due and owed by the county 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;
- The amount owed for change orders or additional work required to carry out the contract;
- Reasonable and necessary attorney's fees that are equitable and just; and
- Interest as allowed by law.

The statute also specifically prevents a contracting party from recovering money from the county for the following types of damages that might be recoverable under construction law against a private party:

- Consequential damages, except as allowed under Subsection (b)(1);
- Exemplary damages; or
- Damages for unabsorbed home office overhead.

Cities and Other Local Governmental Entities

Of particular note, the statue defines local governmental entities as a municipality, a public school district and junior college district; and a 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, soil conservation district, communication district, public health district, emergency service organization, and river authority. Based on this definition, the vast majority of public design and construction projects awarded each year in this state area subject to the waiver of immunity in chapter 271.

That waiver specifically provides that any local governmental entity listed above waives its immunity from suit when it enters into a contract. Like suits against a county, the types of monetary damages both available to a claimant and specifically excluded from potential recovery are expressly listed. For the most part, the categories are the same. However, there are subtle differences in the words used by the legislature. Under the law, those differences typically matter if a question of law is raised and must be decided by the courts. In section 271.153 (a)(2), the language reads as follows: 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.

The emphasis above has been added to highlight the difference between the two statutes. Both statutes provide that a contractor may recover money spent or damages incurred for change orders or additional work, but the modifying clause differs substantially. The language for counties says "required to carry out the contract". The language for other local governmental entities says "the contractor is directed to perform." In the latter, the local governmental entity must have directed the contractor to perform the work that gives rise to a claim.

This difference meaningful because of generally accepted industry vernacular. In the statute for counties, the owner need not direct the contractor to perform extra work or incur additional costs to entitle the contractor to damages. Under that language, the contractor may sue for all damages incurred as may have been necessary to complete the work. In the other, the use of the word directed is problematic for contractors.

Most well-drafted and sophisticated contracts contain general conditions that allow for change directives and owner-directed work. In a situation where a contractor incurs additional costs due to material cost escalations (such as steel and concrete pricing that has recently been rising up to 1 percent per month) or other supply-side or similar disruptions that increase costs but do not cause delay, the contractor may be prevented by a court from recovering those costs because no owner directive was issues that specifically increased the contractor's costs to carry out the work. Under a county contract, a claim for those costs might be allowed because the costs were incurred to carry out and complete the originally contracted scope of work. Of course, in that situation, the contract must not contain language that prevents cost increases for reasons that are not caused by the owner.

This issue has not been well-developed by our courts. In fact, there are only a few cases that have mentioned this section of the statue. Because the courts have not fully developed that analysis, contractors working for local governmental entities should be diligent in providing notice of and characterizing claims. If, for example, a contact does not expressly prevent an increase of a contract amount, and a contractor finds itself losing money due to things like market fluctuations, it would be prudent to obtain an owner directive increase costs from the owner in the form of a notice-based dialogue in order to protect rights of recovery.

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