**UNDERSTANDING SOVEREIGN IMMUNITY**
**Public Contracts and Lessons from Recent Texas Cases**
**2025.1**

Generally, governmental entities are immune from lawsuits. One exception is contractual. If a governmental entity is party to a contract and likely procedural requirements are strictly followed (e.g., notice and/or presentation of claims, among others), then the government is deemed to have has waived its immunity and consented to the proper court's jurisdiction (power) when a contract is formed. However, such a waiver is only for breaches of the contract, not a host of other possible counts (e.g., quantum meruit, unjust enrichment, other equitable claims, or torts). This subject was also discussed in a prior column entitled "It's Good to be the King," published in January 2022. It is only by coincidence that it is again a topic for this January issue. Two cases from Texas illustrate this topic further.

In the first case, a Contractor agreed to build a research and technology center for TxDOT. A Surety provided a performance bond. Upon the Contractor's default, TxDOT demanded the Surety perform. The Surety engaged a New Contractor. Disputes arose as the New Contractor finished the, so the Surety asserted multiple claims for additional money to TxDOT's administrative dispute-resolution process.

TxDOT argued it retained sovereign immunity because there was no contract between TxDOT and the Surety, so the Surety could not pursue any claims against TxDOT. Although the Performance Bond was a contract between the Surety and the Original Contractor, TxDOT, as obligee, was merely a beneficiary of the Performance Bond.

Problematic for TxDOT, the Surety only asserted its administrative claims after TxDOT sued the Surety for breach of the Performance Bond when: (1) the original Contractor defaulted on the original contract and (2) the New Contractor also failed to perform. The lower court of appeals and the Texas Supreme Court agreed with the Surety that TxDOT waived its sovereign immunity by first suing the Surety. State of Texas v. Fidelity and Deposit Company of Maryland, 223 S.W.3d 309, (Supr. Ct. Texas, May 4, 2007).

However, because the Texas statute at that time creating administrative remedies for breaches of contract applied only to projects for roads and bridges and related necessary structures (e.g., guardrails), the court found that this project for a TxDOT research facility was not a structure necessary for roads or bridges. So, the Surety's damages were limited to offsetting TxDOT's affirmative claims. After this case, the statute was amended to include TxDOT building projects.

The second case arose from disputes over two, separate projects. On one project, the Contractor agreed to widen portions of the Sam Houston Tollway for Harris County, Texas in February 2016. On the second project, TxDOT engaged the same Contractor to work on a State Highway adjacent to the Tollway. The Contractor encountered delays on both projects due to design changes for the MSE and soil nail walls on the County project and a myriad of delaying events on the TxDOT project.

The intermediate appellate court held that because the County was not a party to the contract for the TxDOT project, the County did not waive its immunity related thereto. Even if the County was somehow involved in the TxDOT project, the County retained its immunity unless and until it became a party to the contract for the TxDOT project.

The County was also immune from the Contractor's lawsuit because the Contractor failed to provide prior written notice of its claim. Moreover, the Contractor had agreed that the Engineer's decision on its claims was "final and binding" absent gross misconduct or bad faith by the Engineer in deciding the

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