

BILL ANALYSIS

C.S.H.B. 2039
By: Nixon
Civil Practices
Committee Report (Substituted)

BACKGROUND AND PURPOSE

Most legislation creating or authorizing the creation of various local governmental entities contains language that authorizes the entity to "sue and be sued". Until recently, well established case law followed the plain meaning of such language and interpreted those provisions to constitute a statutory waiver of immunity from suit in cases arising from breach of contract. See, for example, the 1970 Texas Supreme Court opinion in *Missouri Pacific R. Co. v. Brownsville Nav. Dist.*, 453 S.W.2d (Tex. 1970). Also, see the more recent cases: *City of Texarkana v. City of New Boston*, 141 S.W.3d 778 (Tex.App. – Texarkana 2004, pet. filed); *United Water Services, Inc. v. City of Houston*, 137 S.W.2d 747 (Tex. App. – Houston [1st Dist.] 2004, pet. filed); *Alamo Community College Dist. v. Browning Constr. Co.*, 131 S.W.3d 146 (Tex. App. – San Antonio 2004, pet. filed); and *City of Mexia v. Tooke*, 115 S.W.3d 618 (Tex. App. – Waco 2003, pet. filed).

Several recent Texas Courts of Appeal decisions have ignored prior Texas case law and have disregarded the plain meaning of statutes by holding that they do not constitute a statutory waiver of immunity from suit in cases arising from breach of contract. See, for example, *City of Mesquite v. PKG Contracting, Inc.*, 148 S.W.3d 209 (Tex. App. – Dallas 2004, pet. filed); *Carrollton v. McMahon Contracting, L.P.*, 134 S.W.2d 925 (Tex.App. – Dallas 2004, pet. filed); *City of San Antonio v. Butler*, 131 S.W.3d 170 (Tex. App. – San Antonio 2004, pet. filed); and *Satterfield & Pontikes Constr., Inc. v. Irving Indep. School Dist.*, 123 S.W.3d 63 (Tex. App. – Dallas 2003, pet. filed).

Currently, at least 12 cases involving the issue of the statutory waiver of immunity from suit arising from the "sue and be sued" or similar language are pending before the Texas Supreme Court. Several cases have been pending since 2003. One case, *Reata Constr. Corp. v. City of Dallas*, 2004 WL 726906 (Tex. Apr. 2, 2004), 47 Tex.Sup.Ct.J. 408, was actually decided in April 2004 but is still pending on petition for rehearing.

C.S.H.B. 2039 is intended to clarify and re-express the Legislature's intent that all local governmental entities that have been given or are given the statutory authority to enter into contracts shall not be immune from suits arising from those contracts, subject to the limitations set forth in C.S.H.B. 2039.

RULEMAKING AUTHORITY

It is the committee's opinion that this bill does not expressly grant any additional rulemaking authority to a state officer, department, agency, or institution.

ANALYSIS

C.S.H.B. 2039 amends Chapter 271, Local Government Code, by adding Subchapter I to provide that all local governmental entities that are given the authority by statute or the constitution to enter into contracts waive sovereign immunity to suit for the purpose of adjudicating a claim arising under a written contract for goods or services, subject to the terms and conditions of the subchapter.

A "local governmental entity" subject to the subchapter is a political subdivision of this state, other than a county or a unit of state government, as that term is defined by Section 2260.001, Government Code. The amount recoverable against a local governmental entity is limited to the balance due and owed under the contract as it may have been amended, plus the amount owed for change orders or additional work required to carry out the contract, and interest as allowed by law.

CSHB 2039 provides that dispute resolution procedures set forth in the contract or which have been established by the local governmental entity and incorporated into the contract shall be enforceable except to the extent those procedures conflict with the subchapter. No defenses other than a bar against suit based on sovereign immunity are waived by the subchapter. Sovereign immunity to suit in federal court is not waived. Nothing in this subchapter shall constitute a grant of immunity to suit.

EFFECTIVE DATE

September 1, 2005

COMPARISON OF ORIGINAL TO SUBSTITUTE

C.S.H.B. 2039 differs from the introduced version by deleting the award of reasonable attorney's fees and by deleting the language originally contained in Sec. 271.157 that provided that the subchapter would not apply where immunity to suit is otherwise waived by other law or the local governmental entity.

C.S.H.B. 2039 also differs from the introduced version in that the language in SECTION 2 has been modified to make it more clear that the enactment of C.S.H.B. 2039 should not be construed to evidence any legislative intent that those claims arising from contracts executed before the effective date are subject to the defense of sovereign immunity from suit.