IMMUNITY IN CONTRACT CASES – MUDDY WATERS

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CHAPTER 10

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- Representing a municipality in defense of an environmental preferential purchasing resolution in Federal Court, obtaining the dismissal of the majority of plaintiff's claims, and resolution of remaining issues by favorable settlement
- Representing governmental entities and private enterprises in constitutional and civil rights litigation, including racial discrimination, Fair Housing Act and freedom of speech cases, including defense of federal court litigation at trial and appeal to the Fifth Circuit
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de la Fuente, José LITIGATION AND BUSINESS SERVICES

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- Resolving complex construction disputes, including claims relating to moisture incursion and other structural defects, and contract claims relating to performance and payment disputes
- Trial and judgment in breach of contract case in favor of a regional hospital and defense of the judgment on appeal
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- Representing physician practice group in pre-dispute counseling and settlement of contract disputes
- Obtaining emergency injunctive relief to prevent potential contamination of municipal water source
- Representing governmental entities and private parties in disputes arising from pipeline failures and spills, including contamination and product liability disputes
- Successful arbitration in defense of national technology services company in a dispute regarding stock purchase rights pursuant to merger agreement
- Successful jury trials to defense verdict in wrongful termination cases, including cases relating to race discrimination and workers' compensation claim retaliation
- Negotiating and drafting complex indemnity and risk-sharing agreements
- Representing a video game software company in a vendor contract dispute
- Representing physicians and practice groups when subpoenaed as third-party witnesses
- Representing private correctional facilities in wrongful death and personal injury litigation
- Representing a college athletic organization at trial and appeal to Texas Supreme Court
- Successful jury trials of insurance premium fraud cases
- Obtaining summary judgment for defense in multi-party lender liability case
- Appeals to Courts of Appeals and the Texas Supreme Court

Publications & Presentations

- "Preparing an Environmental Lawsuit for Filing and Conducting Discovery: Tasks and Strategies," Paper and panelist at Texas Environmental Superconference, August 2012
- "Arbitration's Lucky Charms," paper and presentation to Texas Public Power Association, October, 2007
- "Legal Issues for Directors of Non-Profit Corporations," paper and presentation, July, 2007
- "The Federal Fair Housing Act and Municipal Zoning and Regulation: New Developments That May Affect "New Developments," paper and presentation to Texas City Attorneys Association, June, 2007
- "Cross-Examination Dos and Don'ts," paper and panelist, Austin Bar Association Ultimate Trial Notebook Seminar, May, 2006
- "Developments in Substantive Law: Alternative Dispute Resolution 'Arbitration Tango,'" Texas Lawyer, December 19, 2005

Professional Associations & Memberships

- State Bar of Texas
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THE ISSUES

For contract cases against local government entities, the threshold jurisdictional question is always that of governmental immunity. Does immunity apply? If so, has it been waived?

APPLICABILITY: With respect to the question of whether governmental immunity applies, in the last two years, the Texas Supreme Court has been asked multiple times to decide an issue that is both unique and critical to cities:

Does the governmental-proprietary distinction apply to contract-related claims?

The Court has declined to resolve this question once,[1] but because there are now two pending petitions for review of cases involving the issue[2] and a direct split among the courts of appeals, it is reasonably likely that cities will have an answer soon. If the Court decides that the distinction applies to contract suits, then cities will ***not*** enjoy any immunity from contract-related claims arising from the exercise of proprietary functions. On the other hand, if the Court determines that the distinction does not apply to contract suits, then cities will be immune from contract-related claims unless immunity has been waived by the Legislature.

WAIVER: With respect to the questions of (1) when governmental immunity is waived in contract cases and (2) what damages are recoverable in such cases, the Supreme Court has issued two important opinions in the past year that answer in detail two fundamental questions about the applicability of the statute that provides a limited waiver of immunity in breach of contract cases:

To what type of contracts, and for what types of damages, does the Chapter 271 waiver apply?

In *Lubbock County*, the Supreme Court explained the criteria for contracts that would meet the waiver requirements set by Chapter 271, including clarifying that the contract must require that the claimant perform services (as opposed to simply allowing services to be performed), and the services must be provided *by* the claimant *to* the government entity.

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[1] *See City of San Antonio v. Wheelabrator Air Pollution Control, Inc.*, 381 S.W.3d 597 (Tex. App.—San Antonio 2012, pet. denied) (referred to in this paper as "*Wheelabrator I*," as there was another opinion issued in the case on subsequent appeal, cited below).

[2] *Wheelabrator Air Pollution Control, Inc. v. City of San Antonio*, 2014 WL 6687247 (Tex. App.—San Antonio 2014, pet. filed) (mem. op.) (referred to in this paper as "*Wheelabrator II*"); *Wasson Interests, Ltd. v. City of Jacksonville*, 2014 WL 3368413 (Tex. App.—Tyler 2014, pet. filed) (mem. op.). As an indication that the Supreme Court is likely to grant the petition for review in at least one of those cases, it recently granted petitions for review of two similar cases, *Lower Colo. River Auth. v. City of Boerne*, 422 S.W.3d 60 (Tex. App.—San Antonio 2014, pet. dismissed) and *City of Seguin v. Lower Colo. River Auth.*, 2014 WL 258847 (Tex. App.—Austin Jan. 15, 2014, pet. dismissed) (mem. op.). However, those cases were dismissed by agreement of the parties before they were submitted to the Court.

In *Zachry Construction*, the Supreme Court explained the type and character of damages that can be recovered in a case governed by Chapter 271, holding that the statute's allowance of damages for amounts "due and owed" effectively includes all direct contract damages. Both *Lubbock County* and Zachry Construction provide helpful guidance as to the overall interpretation of the Chapter 271 waiver, eliminating some of the uncertainty that arose from the fact that the Supreme Court had not materially addressed the statute since *Tooke v. City of Mexia* in 2006.

WHEN DOES IMMUNITY APPLY? THE GOVERNMENTAL-PROPRIETARY DISTINCTION

HISTORY & BACKGROUND

A. Judicial Developments

In 1884, the Texas Supreme Court carved out an exception to the general rule that cities enjoy governmental immunity from all lawsuits. *City of Galveston v. Posnainsky*, 62 Tex. 118, 131 (1884). For the first time, the Court recognized a distinction between a City's governmental and proprietary functions and held that Galveston was not immune from a tort claim based on its failure to maintain its sidewalks because such maintenance was a proprietary act. *Id*. When a city engages in a proprietary function, the Court explained, the city is treated as a private actor:

> In so far, however, as [cities] exercise powers, voluntarily assumed—powers intended for the private advantage and benefit of the locality and its inhabitants—there seems to be no sufficient reason why they should be relieved from that liability to suit and measure of actual damage to which an individual or private corporation exercising the same powers for a purpose essentially private would be liable.

Id. at 127. Over 100 years later, the Court again discussed the proprietary-governmental distinction. *Gates v. City of Dallas*, 704 S.W.2d 737, 739 (Tex. 1986). But, this time it did so in the context of a contract case. *Id*. After broadly stating that cities engaged in proprietary functions are subject to the same duties and liabilities as private persons, the Court held that Dallas was liable for attorney fees under the precursor statute to Chapter 37 of the Texas Civil Practice & Remedies Code. *Id*.

Although *Posnainsky* applied the governmental-proprietary distinction to a tort claim, a number of appellate courts extended the distinction to contract-related cases. *See City of Georgetown v. Lower Colo. River Auth.*, 413 S.W.3d 803, 810 n.4 (Tex. App.—Austin 2013, pet. withdrawn).[3] Most of these courts did so with little or no analysis, simply assuming that "the

[3] Citing *Bailey v. City of Austin*, 972 S.W.2d 180, 192-93 (Tex. App.—Austin 1998, pet. denied); *Temple v. City of Houston*, 189 S.W.3d 816, 819-820 (Tex. App.—Houston [1st Dist.] 2006, no pet.); *City of Roman Forest v. Stockman*, 141 S.W.3d 805, 811 (Tex. App.—Beaumont 2004, no pet.); *City of Mexia v. Tooke*, 115 S.W.3d 618, 624-25 (Tex. App.—Waco 2003), *aff'd*, 197 S.W.3d 325, 347 (Tex. 2006); *Williams v. City of Midland*, 932 S.W.2d 679, 683-84 (Tex. App.—El Paso 1996, no writ); *City of Houston v. Sw. Concrete Constr., Inc.*, 835 S.W.2d 728, 732-33 (Tex. App.—Houston [14th Dist.] 1992, writ denied); *City of Dallas v. Moreau*, 718 S.W.2d 776, 779-80 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.); *Int'l Bank of Commerce of Laredo v. Union Nat'l Bank of Laredo*, 653 S.W.2d 539, 546 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.); *Blythe v. City of Graham*, 287 S.W.2d 527, 530 (Tex. App.—Fort Worth 1956, writ ref'd n.r.e.); *Boiles v. City of Abilene*, 276 S.W.2d 922, 925 (Tex. App.—Eastland 1955, writ ref'd); *City of Crosbyton v. Tex.-N.M. Util. Co.*, 157 S.W.2d 418, 420-21 (Tex. App.—Amarillo 1941, writ ref'd w.o.m.); *Tex. One P'ship v. City of Dallas*, No. 05-92-01097-CV, 1993 WL 11621, at *3 (Tex. App.—Dallas Jan. 15, 1993, writ denied) (not designated for publication).

dichotomy applies with equal force to contract claims." *See*, *e.g.*, *City of Mexia v. Tooke*, 115 S.W.3d 618, 624-225 (Tex. App.—Waco 2003), *aff'd*, 197 S.W.3d 325 (Tex. 2006).

But, in 2006 the Texas Supreme Court brought that assumption into question when it stated that the "proprietary-governmental dichotomy has been used to determine a municipality's immunity from suit for tortious conduct . . . [b]ut we have never held that this same distinction determines whether immunity from suit is waived for breach of contract claims . . . ." *Tooke v. City of Mexia*, 197 S.W.3d 325, 343 (Tex. 2006). In support of that statement, the Court cited *Gates* with a "Cf." [4] signal. *Id.* It then explained that it did not need to decide whether the distinction applied to contracts because the contract in question involved a governmental function, and thus even if the distinction applied, the city had immunity. *Id*.

The Supreme Court's statement in *Tooke* regarding the applicability of the governmental-proprietary distinction did not have much of an impact initially. Several courts of appeals continued applying the distinction to contract claims. *See, e.g.*, *E. Houston Estate Apartments, L.L.C. v. City of Houston*, 294 S.W.3d 723, 731-32 (Tex. App.—Houston [1st Dist.] 2009, no pet.); *Smith v. City of Blanco*, No. 03-08-00784-CV, 2009 WL 3230836, at *3 (Tex. App.—Austin Oct. 8, 2009, no pet.) (mem. op.); *Casso v. City of McAllen*, No. 13-08-00618, 2009 WL 781863, at **5-7 (Tex. App.—Corpus Christi Mar. 26, 2009, pet. denied). Once again, they did so with virtually no analysis or discussion. *See id*. But then, the Fourth Court of Appeals decided *Wheelabrator I*. *City of San Antonio v. Wheelabrator Air Pollution Control, Inc.*, 381 S.W.3d 597 (Tex. App.—San Antonio 2012, pet. denied). After conducting the most thorough analysis of the issue to date, the court determined that the governmental-proprietary distinction did not apply to contracts-related claims. *Id*. at 601-605. Instead, it was limited to torts. *See id.* at 605. After full briefing, the Texas Supreme Court denied Wheelabrator's request for review. Thus, as of today the Supreme Court still has not weighed in on this issue.

B. Legislative Developments

During the period between *Posnainsky* and *Gates*, the courts were generally responsible for deciding whether a municipal activity was proprietary or governmental. *See City of Georgetown*, 413 S.W.3d at 809. That changed in 1987 when the Texas Constitution was amended to give the Legislature the authority to "define for all purposes those functions of a municipality that are to be considered governmental and those that are proprietary, including reclassifying a function's classification assigned under prior statute or common law." Tex. Const. art. XI, sec. 13(a). The Legislature immediately exercised that authority through the Texas Tort Claims Act ("TTCA"), expressly reclassifying many proprietary functions as governmental. *See* Tex. Civ. Prac. & Rem. Code § 101.0215; *see also City of Texarkana v. City of New Boston*, 141 S.W.3d 778, 783 (Tex. App.—Texarkana 2004, pet. denied)(noting that waterworks and a number of other municipal functions were consider proprietary under the common law, but were reclassified as governmental through § 101.0215 of the TTCA).

[4] Cf. means authority supports a proposition different from the main proposition but sufficiently analogous to lend support.

Since that time, the Legislature has enacted various statutes that waive a governmental entity's immunity from suit. But, none of those statutes have included a list of governmental and proprietary functions like the list found in the TTCA. In fact, most waiver statutes do not even mention the governmental-proprietary distinction. One of these statutes is Subchapter I of Chapter 271 of the Texas Local Government Code, which waives immunity from suit for breach-of-contract claims based on certain contracts for goods and services. Tex. Loc. Gov't Code § 271.151-.160.

THE CURRENT SPLIT

The Supreme Court's silence is unlikely to last much longer. Since the Fourth Court's decision in *Wheelabrator I*, nine additional appeals involving the governmental-proprietary distinction have been decided. Those decisions have created a split among the courts of appeals.

A. The Third Court of Appeals

The Third Court of Appeals (Austin) has held that the governmental-proprietary distinction applies to contract claims. It is the sole appellate court to do so. See:

1. *City of Georgetown v. Lower Colo. River Auth.*, 413 S.W.3d 803 (Tex. App.—Austin 2013, pet. withdrawn).
2. *City of Seguin v. Lower Colo. River Auth.*, 2014 WL 258847 (Tex. App.—Austin Jan. 15, 2014, pet. filed) (mem. op.)
3. *City of Austin v. MET Center NYCTEX Phase II, Ltd.*, 2014 WL 538697 (Tex. App.—Austin Feb. 6, 2014, pet. dismissed) (mem. op.)

B. The Fourth Court of Appeals

The Fourth Court of Appeals (San Antonio) has held that the governmental-proprietary distinction does not apply to contract claims. See:

1. *City of San Antonio v. Wheelabrator Air Pollution Control, Inc.*, 381 S.W.3d 597 (Tex. App.—San Antonio 2012, pet. denied) ("*Wheelabrator I")*
2. *Lower Colorado River Authority v. City of Boerne*, 422 S.W.3d 60 (Tex. App.—San Antonio 2014, pet. dismissed)
3. *Wheelabrator Air Pollution Control, Inc. v. City of San Antonio*, 2014 WL 6687247 (Tex. App.—San Antonio 2014, pet. filed) (mem. op.) ("*Wheelabrator II")*

C. The Seventh Court of Appeals

The Seventh Court of Appeals (Amarillo) has also held that the governmental proprietary distinction does not apply to contract claims. In so holding, the Court expressly rejected the Third Court's reasoning in *City of Georgetown*. See:

1. *Republic Power Partners, L.P. v. City of Lubbock*, 424 S.W.3d 184 (Tex. App.—Amarillo 2014, no pet.)

2. *West Texas Municipal Power Agency v. Republic Power Partners, L.P.*, (Tex. App.—Amarillo 2014, no pet.)

D. The Eighth Court of Appeals

The Eighth Court of Appeals (El Paso) recently held that the governmental-proprietary distinction does not apply to contract claims, and likewise rejected the reasoning of *City of Georgetown*. See:

1. *Gay v. City of Wichita Falls*, 457 S.W.3d 499 (Tex. App.—El Paso 2014, no pet.)

E. The Twelfth Court of Appeals

Finally, the Twelfth Court of Appeals (Tyler) has also held that the governmental-proprietary distinction does not apply to contract claims, specifically noting and rejecting the reasoning of *City of Georgetown*. See:

1. *Wasson Interests, Ltd. v. City of Jacksonville*, 2014 WL 3368413 (Tex. App.—Tyler 2014, pet. filed) (mem. op.)

As evidenced by the list of cases above, the Third Court in Austin is the outlier, as it is the sole appellate court to find that the distinction applies to contract claims. Notably, the cases involving the LCRA in the Third and Fourth courts are virtually identical. Thus, they illustrate a direct split between courts of appeals that cannot be explained by distinguishing the facts.

COMPETING LEGAL ARGUMENTS

The best way to understand the competing legal arguments on each side of this issue is to read the competing appellate court opinions in *City of Georgetown*, *Wheelabrator I*, and *City of Lubbock* (attached as Appendices A, B, and C) and the competing briefs in the *City of Boerne* case (attached as Appendices D and E), which thus far is the only case to be fully briefed to the Supreme Court (although it was dismissed by agreement before final submission to the Court). However, we will attempt to briefly summarize them here for those who may not have the time or inclination to tackle all the included materials.

Position 1: The governmental-proprietary distinction applies to contract claims—no immunity.

A central tenet of this position is that there is no proprietary immunity. *See City of Georgetown*, 413 S.W.3d at 809, 811. The governmental-proprietary distinction was created to reflect the relationship or the lack thereof between a city and the state. *Id*. Thus, when a city acts on behalf of the state by performing a governmental function, the city enjoys the state's immunity. *Id*. Conversely, when a city acts on its own behalf, solely for the benefit of its citizens, and because it chooses to do so, it is not imbued with the state's immunity. *Id*. The Texas Supreme Court has recognized this distinction, and appellate courts have been applying the concept in various contexts—

tort, contract, and estoppel—for years. *See Gates*, 704 S.W.2d at 739; *City of Georgetown*, 413 S.W.3d at 410 n.3.

The courts of appeals that recently decided that the distinction did not apply to contract claims mistakenly focused on the issue of waiver. *See City of Georgetown*, 413 S.W.3d at 814. The proprietary-governmental distinction is not a waiver. *Id*. The distinction relates to whether there is immunity in the first instance. *Id*. If an act is governmental, immunity applies; if it is proprietary, immunity does not exist. *See id*. Inquiries into waiver are only relevant *after* the court has determined that immunity applies. *See* Appx. D at pp. 12-13. The Fourth and Seventh courts failed to address the threshold question of whether immunity exists for claims on proprietary contracts.

Finally, the fact that the Legislature did not mention the governmental-proprietary distinction in the waiver applicable to local government contracts does not prove that the governmental-proprietary distinction does not apply to contract claims. *See City of Georgetown*, 413 S.W.3d at 812-14. At the time Subchapter I was enacted, the courts of appeal were uniformly applying the distinction in contract cases. *Id*. at 813. The Legislature is charged with this knowledge and could have changed the law if it so desired, but it did not. *Id*. Further, the purpose of Subchapter I was to expand a plaintiff's ability to sue the government, not to limit it by applying immunity to proprietary contract claims. *Id*. at 813-14. In fact, the statute itself explicitly states that it shall not constitute a grant of immunity to suit to a local governmental entity. *See id*. (citing Tex. Loc. Gov't Code § 271.158).

Position 2: The governmental-proprietary distinction does not apply to contract claims—immunity exists unless waived.

The governmental-proprietary concept was created for tort cases. *See Posnainsky*, 62 Tex. at 131. The Texas Supreme Court has never expanded the distinction to contract-related claims. *Wheelabrator I*, 381 S.W.3d at 604. Only courts of appeals have made that leap. *See id*. at 604-05. Importantly, the vast majority of cases extending the distinction to contracts were decided when immunity was disfavored. Appx. E at pp. 5-6. Prior to *Tooke*, courts presumed that immunity did not apply. *Id.* Today, the Texas Supreme Court has directed courts to presume just the opposite—immunity applies unless clearly waived, and courts should be hesitant to declare immunity non-existent. *Id*.

There are at least three important reasons why the governmental-proprietary distinction was created specifically for and should remain limited to torts. First, it is consistent with the overarching purpose of immunity—protecting the public fisc. *Id*. at 10-13. Although the Supreme Court has found immunity non-existent in two contexts since *Tooke* was decided, neither of those cases allowed a plaintiff to collect money damages from a governmental entity. *Id*. at 11-12. If immunity was found non-existent here, plaintiffs would be able to collect unlimited damages. Further, cities cannot insure around that liability.

Second, the policy that prompted the creation of the distinction for torts does not exist in the contract context. *Id*. at 13-15. Torts involve innocent victims injured through no fault of their own. Contracts, on the other hand, involve voluntary, consensual relationships. *Id*. Plaintiffs are free to

enter into contracts with cities, or not. *Id*. If they choose to do so, they assume the risk of loss associated with the city's immunity (and may seek additional compensation or other contractual terms to offset this risk). *Id*. In the contract context, the distinction simply acts to save contract claimants from the risk they knowingly *agreed* to bear. *Id*.

Third, the governmental-proprietary distinction is unworkable in the contract context because contracts may fall into more than one category or character. *Id*. at 15-16. For example, a city may have a long-term contract for gas to supply city vehicles, including its utility trucks and police cars. If the city discontinues its contract because it determines it can purchase less-expensive gas elsewhere, was the contract connected to the city's governmental or proprietary capacity? We don't know. Courts have not had to answer this questions because most governmental-proprietary cases involve torts, and torts generally correspond to a single act (e.g., being hit by a police car or a utility truck) that can be clearly identified as governmental or proprietary.

Finally, the Texas Supreme Court has repeatedly reiterated that the Legislature is in the best position to weigh competing interests involved in determining whether the government may be sued. *City of Lubbock*, 424 S.W.3d at 190 (citing *Tex. Natural Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 853-54 (Tex. 2002). The Legislature did just that when it enacted Subchapter I. *Id*. at 190, 192-93. Notably absent from that Subchapter is any reference to the governmental-proprietary distinction. *See* Tex. Loc. Gov't Code §§ 271.151-.160. As demonstrated by the TTCA, the Legislature knew how to incorporate the distinction, but in the contract-context it chose not to. *City of Lubbock*, 424 S.W.3d at 193. Courts should honor this decision.

IMPACT ON CITIES

If the Texas Supreme Court determines that the governmental-proprietary distinction applies to contract claims, cities will no longer have *any* immunity from suit or liability for claims arising from proprietary contracts. As such, cities could be sued for breach of their written contracts. But, perhaps more importantly, they could also be sued for breach of alleged oral contracts, quantum meruit, promissory estoppel, and perhaps even fraudulent inducement. These types of claims generally present many more fact issues (e.g., Was there an oral contract or not? If so, what were its terms?) than traditional breach-of-contract claims, and thus are more likely to lead to protracted litigation.

Further, if the distinction applies there would be no limit on damages for proprietary contracts. Currently, cities generally can be sued only for amounts that are due and owing under a written contract. *See* Tex. Loc. Gov't Code § 217.153. In other words, the city only has to pay for goods or services it received. Without immunity, however, cities would potentially be liable for consequential damages, including lost profits.

Finally, a number of additional issues have the potential to impact cities but will still need to be determined by the courts. For example, will the list of governmental functions articulated in the TTCA apply to contract claims? Some courts have indicated there is no reason to believe the Legislature would apply a different classification in the contract context, but smart plaintiffs' lawyers will undoubtedly attempt to argue that the common law—which classifies many more activities as

proprietary—should apply. In addition, courts will have to determine how to treat contracts that relate to more than one type of function. Can a plaintiff claim the city created and then breached an oral amendment to a gas contract if any of the gas was used for proprietary purposes? These questions and more will have to be answered, most likely through litigation, if there is no immunity for claims based on proprietary contracts.

RECOMMENDATIONS

Cities can take some steps to help protect taxpayer money from contract-related lawsuits. Each of the following mechanisms should be considered now, while the law remains unsettled, and would be equally applicable should the Texas Supreme Court rule that there is no immunity for proprietary contracts.

1. When contracting, consider whether the contract involves *or may involve* a proprietary function.

The best assumption for the time-being is that the TTCA list of functions will apply. That list defines the following activities as <u>governmental</u>:

- Police and fire protection and control
- Health and sanitation services
- Street construction and design
- Bridge construction and maintenance and street maintenance
- Cemeteries and cemetery care
- Garbage and solid waste removal, collection, and disposal
- Establishment and maintenance of jails
- Hospitals
- Sanitary and storm sewers
- Airports, including when used for space flight
- Waterworks
- Repair garages
- Parks and zoos
- Museums
- Libraries and library maintenance
- Civic, convention centers, or coliseums
- Community, neighborhood, or senior citizen centers
- Operation of emergency ambulance service
- Dams and reservoirs
- Warning signals
- Regulation of traffic
- Transportation systems
- Recreational facilities, including pools, beaches, and marinas
- Vehicle and motor driven equipment maintenance
- Parking facilities
- Tax collection
- Firework displays
- Building codes and inspection
- Zoning, planning, and plat approval
- Engineering functions
- Maintenance of traffic signals, signs, and hazards
- Water and sewer service
- Animal control
- Community development or urban renewal activities undertaken by municipalities and authorized under Chapters 373 and 374, Local Government Code
- Latchkey programs conducted exclusively on a school campus under an interlocal agreement with the school district in which the school campus is located
- Enforcement of land use restrictions under Subchapter E, Chapter 212, Local Government Code.

The listed proprietary functions are:

- Operation and maintenance of a public utility
- Amusements owned and operated by a city

- Any activity that is abnormally dangerous or ultrahazardous

Tex. Civ. Prac. & Rem. Code § 101.0215(a)-(b). Neither list is exclusive. *Id*. However, an activity that is listed as governmental cannot be proprietary. *Id*. at § 101.0215(c). Thus, although operation of a public utility is defined as proprietary, the operation of a water utility is governmental because it falls within the meaning of water and sewer service. *See* Tex. Civ. Prac. & Rem. Code § 101.0215(a)(32), (b)(1), (c).

It is very important to think broadly in considering whether a contract will relate to a governmental or proprietary activity. This is likely to be especially true for contracts for common supplies, like pens, paper, fuel, gravel, cleaning materials, etc. If the contract relates to a governmental function but contemplates performance over a period of time, think about whether and how the scope of the contract might change. Will there be a need to apply the goods or services to a proprietary function in the future? If so, consider treating the contract as proprietary.

2. Consider separate contracts for governmental and proprietary activities.

Although it may seem like a hassle, cities may want to consider entering into two separate contracts with the same vendor—one that relates to proprietary activities and another that relates to governmental. This could be particularly helpful for long term supply contracts. If the city discovers a better deal on light bulbs one year into a three-year contract, it could at least end the governmental-related contract early without fear of paying for future lost profits.

3. Insist on contractual limitations on liability.

Section 271.153 of the Texas Local Government Code limits the damages a plaintiff may recover from a city based on a breach of a goods or services contract. Tex. Loc. Gov't Code § 271.153. If immunity is not applicable to proprietary contracts, the statutory limitation would not apply. But, cities can still contractually limit their exposure. At the very least, cities can and should insist that they will not be liable for consequential damages, specifically lost profits. This could be easily accomplished by stating that damages will be limited to amounts recoverable under § 271.153 of the Texas Local Government Code.

4. Use merger and written amendment clauses.

If the governmental-proprietary distinction applies to proprietary contracts, plaintiffs will no longer be judicially and statutorily limited to claims based on written and properly authorized contracts. Instead, they can claim the parties agreed to additional terms, whether at the outset of the contract or by amendment somewhere down the line. To avoid factually-complicated disputes over the substance of the parties' agreement, include clauses that make clear that the contract contains the entire agreement (merger clause) and that amendments must be in writing and authorized by both parties (written amendment clause).

5. Watch out for contractual pitfalls.

It surely seems obvious, but carefully scrutinize proposed contracts. Provisions that might not have had any real effect in the face of immunity protections must be given extra thought. For example, look at termination clauses. Do they give the City the right to end the contract? Under what conditions? Does the contract contain liquidated damage provisions that might apply despite limitations of liability? After immunity, careful contract consideration is the best protection a city can employ to avoid liability and perhaps even litigation.

CHAPTER 271 WAIVER: THE TYPES OF CONTRACTS COVERED, AND THE TYPES OF DAMAGES AVAILABLE

LUBBOCK COUNTY WATER CONTROL AND IMPROVEMENT DIST. v. CHURCH & AKIN, LLC, 442 S.W.3d 297 (Tex. 2014)

In July of 2014, the Texas Supreme Court issued its opinion in *Lubbock County*, a case involving a dispute between the defendant Lubbock County Water Control and Improvement District (a local government entity that operates Buffalo Springs Lake and owns a marina on the lake), and the plaintiff lessee and operator of the marina, Church & Akin LLC. *Lubbock County*, 442 S.Wd.3d at 299. The dispute arose after the District terminated Church & Akin's lease six months into a five-year renewal term, when the District had already accepted payment of the first year's rent. *Id.* Church & Akin sued the District for breach of contract, and eventually amended its pleadings to allege that the statutory wavier of immunity in Chapter 271 of the Texas Local Government Code applied to overcome the District's plea to the jurisdiction asserting immunity. *Id.*; Tex. Loc. Gov't Code §§ 271.151-.160. The Court's opinion examined the contract at issue and the facts of the case in considering whether the Chapter 271 waiver of immunity applied, ultimately concluding that it did not apply, and immunity was not waived. *Id.* at 309.

The core dispute in the case was whether the contract included an "agreement for providing goods and services" to the District, as provided by Tex. Loc. Gov't Code §271.151 (2)(A) (defining a "contract subject to this subchapter"), so that the Chapter 271 waiver might apply. While the District understandably asserted that the contract was simply a real property lease and not an agreement to provide goods or services, the court noted that it "must look beyond the title of a written contract to determine whether it satisfies chapter 271's waiver requirements." *Id.* at 301. The court observed that (1) a contract can include both a granting of a property interest and an agreement to provide goods or services, (2) any contract that states the essential terms of an agreement for providing services to the governmental entity triggers the Chapter 271 waiver of immunity, and (3) the agreement to provide services need not be the primary purpose of the agreement. *Id.* at 302. Church & Akin argued that the lease included agreements to provide services to the District because Church & Akin agreed to "(1) operate the marina; (2) issue and redeem catering tickets; and (3) return a percentage of its profits from sundry sales." *Id.* The court examined each of those arguments in order.

Operation of the Marina: the "use" provision of the lease provided that the property was to be used only as a marina and related facilities. *Id.* Church & Akin argued that by operating the marina, it was providing a service to the District – effectively, it was operating the marina on behalf of the District, and was actually required to do so by the lease. *Id.* at 303. The District argued, and the court agreed, that under the lease, Church & Akin was not required to operate a marina; it was simply restricted from using the property for a different purpose. *Id.* Because Church & Akin could have chosen not to operate a marina (letting the property sit idle), the lease did not grant the District a right to receive services. The Court summarized its reasoning by stating that "[w]hen a party has no

right under a contract to receive services, the mere fact that it may receive services as a result of the contract is insufficient to invoke chapter 271's waiver of immunity." *Id.* Additionally, the court noted that for Chapter 271 to apply, the services must be provided to the government entity, and in the present case, any marina services were provided not to the District as landlord, but rather to the landlord's customers (the public using the marina). *Id.* at 304.

The court further observed that the Chapter 271 waiver limits a claimant's recovery to "the balance due and owed by the local government entity under the contract," plus attorney's fees and interest. *Id.*; Tex. Loc. Gov't Code §271.153(a)(1)(3). Because the waiver only applies to contracts in which the governmental entity agreed to pay the claimant for goods and services, the absence of any agreement by the District to pay for goods or services further indicates that Church & Akin did not agree to provide services to the District. *Id.* at 305.

Catering Tickets: the "use" provision of the lease also provided that "the marina will issue catering tickets that will be redeemed at the gate for admittance to the lake. These tickets will be redeemed by the marina at the price of $1.00 each. They will only be available to persons coming into the marina." Church & Akin argued that this provision required it to provide a service to the District by "issuing catering tickets." *Id.* The court did not agree, finding that the provision did not constitute an agreement by Church & Akin to provide a service to the District; instead, the tickets were a benefit that Church & Akin would give its customers to promote its own business. *Id.* Church & Akin further argued that the tickets constituted a service because the tickets may have increased marina sales, thus increasing its profits (a percentage of which it was to remit to the District), but the court held that such an indirect benefit to the District "could not, alone," convert Church & Akin's efforts to promote its own business into services *to the Water District.*" *Id.* at 306.

Profit-based Rent: Church & Akin's final argument was that its agreement to pay rent in the amount of 5% of its gross sales revenue was an agreement to provide services. Again, the court disagreed, reasoning that while the rent provisions requires Church & Akin to pay the District 5% of any proceeds that it receives, it does not require that Church & Akin have *any* sales proceeds. *Id.* at 308. The lease did not imply or require any minimum amount of sales proceeds; Church & Akin could have $0 in sales and would still meet its contract obligations. *Id.* Thus, because any such benefit was not a requirement of the agreement, the agreement was not an agreement for services.

SUMMARY OF WHAT WE HAVE LEARNED FROM *LUBBOCK COUNTY*:

(1) For the Chapter 271 waiver to apply, the agreement must clearly provide for services to be provided ***by*** the claimant ***to*** the governmental entity.

(2) An agreement that allows the claimant to provide services is not enough; the agreement must *require* the claimant to provide the services.

(3) An activity that provides only an indirect benefit to the government entity generally cannot, alone, constitute a service.

ZACHRY CONSTRUCTION CORP. v. PORT OF HOUSTON AUTHORITY OF HARRIS COUNTY
449 S.W.3d 98 (Tex. 2014)

Last August, the Supreme Court issued its much-awaited opinion in *Zachry Construction*, a case that was closely watched both for its examination of governmental immunity and the question of whether a "no-damages-for-delay" provision can shield an owner from liability for deliberately and wrongfully interfering with a contractor's work. While the second question is of great interest to many audiences (spoiler: the Court held that such a provision cannot shield an owner from liability for deliberately interfering with the contractor's work), this paper focuses only on the governmental immunity aspect of the case.

Zachry Construction arose from a suit filed by Zachry, which had contracted to construct a wharf for the Port of Houston Authority. *Zachry Construction*, 449 S.W.3d at 101. The project was very large, and became quite complex, particularly after the Port decided that it needed to add another significant section to the wharf. *Id.* at 102. The project eventually required the construction of multiple "freeze walls" (a frozen section of the channel floor to make a watertight workspace), as determined by Zachry and eventually agreed to by the Port via a change order. *Id.* at 103. The Port later changed its mind and would not allow Zachry to proceed as planned, which caused significant delay costs for which Zachry eventually sued. *Id.*

With respect to the application of the no-damages-for-delay provision, the Port argued that even if the provision was ineffective (as the Court eventually held), Chapter 271 does not waive immunity from suit for any recovery that a contract does not itself provide for. *Id.* at 105. In considering that argument, the Court noted that the issue had two parts: (1) whether chapter 271's limitations on recovery define and restrict the scope of the waiver of immunity, and if so, (2) whether the delay damages sought by Zachry were permitted by Chapter 271. *Id.* at 105-106. By reasoning discussed in detail below, the Court concluded that chapter 271's limitations on recovery do refine and restrict the scope of the waiver itself, but the delay damages sought by Zachry were nonetheless permissible chapter 271 damages.

The Court's examination started with a lengthy analysis of the essential waiver language of the statute itself:

> 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***.

Id. at 106 (emphasis in original) (quoting Tex. Loc. Gov't Code §271.152). The Court first went on to note that a "contract subject to this subchapter" is a contract for the provision of goods and services to the governmental entity, as discussed in *Lubbock County*. *Id.* The Court then discussed the "terms and conditions of this subchapter" language, which refers to the nine remaining sections of the act (§§ 271.152-.160). *Id.* Summarizing its analysis, the Court stated that §271.152 "should be read as follows: 'A local government entity . . . waives sovereign immunity to suit . . . subject to the terms and

conditions' of the Act." *Id.* at 108. The Court went on to explain that it thought that this reasoning would have been clear based on its decision in *Tooke v. City of Mexia*, 197 S.W.3d 325 (Tex. 2006), wherein the Court held that the Tooke's claim was not for damages within the limitations of §271.153 and therefore the city's immunity was not waived. *Zachry Construction*, 449 S.W.3d at 108. The Court was concerned, however, that some appellate decisions since then have retreated from that reasoning and found a waiver of immunity with respect to claims that did not seek damages within §271.153. *Id*.

To provide clarity, the Court unambigiously pronounced that Chapter 271 does *not* waive immunity from suit on a claim for damages not recoverable under §271.153. *Id.* at 110. The Court explained that *all* provisions of the act were relevant terms and conditions that had to be met for there to be a waiver, stating that "[t]he Act waives immunity for contract claims that meet certain conditions: the existence of a specific type of contract, a demand for certain kinds of damages, a state forum, etc." *Id.* Having so held, the Court then went on to examine the specific types of damages permitted by §271.153, and whether Zachry's claims would fall under one of those categories.

The Court specifically focused on §271.153(a)(1), which allows the recovery of "the balance due and owed by the local governmental entity 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," read in conjunction with §271.153(b), which precludes the recovery of consequential damages, "except as expressly allowed under Subsection (a)(1)." *Id.* at 110-111. The Port argued that, even under those provisions, no balance can be "due and owing" unless the contract expressly calls for payment. The Court disagreed, first noting that no such requirement or limitation was apparent from the statute's text. *Id.* at 111. The Court then construed "due and owed" using a plain-language analysis of the term, finding that a balance due and owed under the contract "is simply the amount of damages for breach of contract payable and unpaid." *Id.* The Court further explained that direct damages for breach, which are the necessary and usual result of the defendant's act, meet that standard. Finally, the Court concluded that the amount of the balance due and owed under the contract need not be ascertainable from the contract because §271.153(a)(1) expressly includes any amount owed "as a direct result of owner-caused delays," which amount generally cannot be determined in advance of the delay. *Id.* The Court thus summarized that, read together, "Subsections (a)(1) and (b) allow recovery of contract damages, including delay damages, but excluding other consequential damages," and nothing in the remainder of §271.153 requires that recoverable damages must be expressly stated in the contract. *Id.* at 112.

The Court thus held and explained that even though the Legislature clearly intended to exclude consequential damages from the Chapter 271 waiver, the statute does not create a unique and limited standard for measuring ***direct*** damages for breach of contract. *Id.* at 114. The Court recalled that the rule for contract damages is "just compensation for the loss or damage actually sustained," and in the context of chapter 271, that right to contract damages provided by law is as inherent to the contract as the rights the contract expressly creates. *Id.*

SUMMARY OF WHAT WE HAVE LEARNED FROM *ZACHRY CONSTRUCTION*:

(1) A valid Chapter 271 waiver-of-immunity claim must make a showing of a substantial claim that satisfies *all* conditions of the act, including the type of contract, the character of recoverable damages, etc.

(2) Amounts "due and owed" under §271.153(a)(1) encompasses all direct contract damages.

(3) The specific amount to be "due and owed" need not be known at the time the contract is executed.

INDEX OF APPENDICES

Appendix A — *City of Georgetown v. Lower Colorado River Authority*, 413 S.W.3d 803 (Tex. App.¬-Austin 2013, pet. withdrawn)

Appendix B — *City of San Antonio v. Wheelabrator Air Pollution Control, Inc.*, 381 S.W.3d 597 (Tex. App.-San Antonio 2012, pet. denied)

Appendix C — *Republic Power Partners, L.P., v. The City of Lubbock*, 424 S.W.3d 184 (Tex. App.-Amarillo 2014, no pet.)

Appendix D — *Lower Colorado River Authority v. City of Boerne*, Petition for Review

Appendix E — *Lower Colorado River Authority v. City of Boerne*, Response to Petition for Review

APPENDIX A

413 S.W.3d 803
Court of Appeals of Texas,
Austin.

CITY OF GEORGETOWN, Texas, Appellant
v.
LOWER COLORADO RIVER
AUTHORITY, Appellee.

No. 03–12–00648–CV. | Aug. 23, 2013. | Rehearing Overruled Nov. 13, 2013.

Synopsis

Background: Electricity supplier brought declaratory judgment action against city seeking judgment concerning parties' rights and obligations under wholesale power agreements. The District Court, Travis County, Tim Sulak, J., denied city's plea to the jurisdiction. City appealed.

[Holding:] The Court of Appeals, Scott K. Field, J., held that city was acting in its proprietary capacity when it entered into wholesale power agreement so governmental immunity did not apply.

Affirmed.

Melissa Goodwin, J., filed dissenting opinion.

West Headnotes (19)

[1] Pleading
Plea to the Jurisdiction

A "plea to the jurisdiction" is a dilatory plea that challenges the trial court's authority to determine the subject matter of a specific cause of action.

Cases that cite this headnote

[2] Municipal Corporations
Actions

Pleading
Plea to the Jurisdiction

Governmental immunity from suit deprives a court of subject-matter jurisdiction and therefore is properly asserted in a plea to the jurisdiction.

Cases that cite this headnote

[3] Appeal and Error
Cases Triable in Appellate Court

Whether a trial court has subject-matter jurisdiction is a question of law that is reviewed de novo.

Cases that cite this headnote

[4] Appeal and Error
Pleading

When the plea to the jurisdiction challenges the pleadings, Court of Appeals construes the pleadings liberally in favor of the plaintiff, and unless challenged with evidence, it accepts all allegations as true.

Cases that cite this headnote

[5] Municipal Corporations
Governmental powers in general

A municipality performs a governmental function when it acts as the agent of the State in furtherance of general law for the interest of the public at large.

Cases that cite this headnote

[6] Municipal Corporations
Governmental powers in general

Given that the municipality is effectively acting on behalf of the state when it performs a governmental function, it is imbued with the state's sovereign immunity, and therefore is entitled to governmental immunity.

Cases that cite this headnote

[7] Municipal Corporations
Corporate powers in general

"Proprietary functions" are those functions performed by a city, in its discretion, primarily

for the benefit of those within the corporate limits of the municipality.

Cases that cite this headnote

[8] **Municipal Corporations**

Corporate powers in general

Because the municipality is not acting on behalf of the state when it performs proprietary functions, the municipality traditionally is not entitled to governmental immunity for those functions, and thus has the same duties and liabilities as those incurred by private persons or corporations.

Cases that cite this headnote

[9] **Municipal Corporations**

Capacity to sue or be sued in general

States

What are suits against state or state officers

Sovereign immunity extends to the various divisions of the state government as well as its political subdivisions.

Cases that cite this headnote

[10] **Municipal Corporations**

Capacity to sue or be sued in general

Governmental immunity has two components: immunity from liability, which bars enforcement of a judgment against a governmental entity, and immunity from suit, which bars suit against the entity altogether.

Cases that cite this headnote

[11] **Municipal Corporations**

Rights and remedies of contractor and sureties

Public Contracts

Defenses

When a governmental entity enters into a contract it necessarily waives immunity from liability, but it does not waive immunity from suit.

Cases that cite this headnote

[12] **Municipal Corporations**

Rights and remedies of contractor and sureties

Public Contracts

Defenses

When governmental immunity applies, a governmental entity may not be sued for breach of contract unless its immunity from suit has been waived.

Cases that cite this headnote

[13] **States**

Mode and Sufficiency of Consent

The legislature's waiver of immunity from suit must be clear and unambiguous.

Cases that cite this headnote

[14] **Municipal Corporations**

Evidence

Courts generally presume that governmental immunity applies.

Cases that cite this headnote

[15] **Municipal Corporations**

Governmental powers in general

Municipal Corporations

Corporate powers in general

When a municipality exercises powers, public in nature, at the direction of the state, it performs a governmental function for which it has governmental immunity; but when a municipality acts within its discretion, primarily for the benefit of those within its corporate limits, it performs a proprietary function for which it has no immunity.

1 Cases that cite this headnote

[16] **Municipal Corporations**

Nature and grounds of liability

The legislature may, through statute, change the common-law classifications of municipal functions, effectively granting municipalities immunity from certain suits that could have been maintained at common law. Vernon's Ann.Texas Const. Art. 11, § 13(a).

Cases that cite this headnote

[17] Municipal Corporations

Rights and remedies of contractor and sureties

Public Contracts

Defenses

The proprietary-governmental dichotomy for determining if governmental immunity applied to municipality applies to contract claims under the common law.

1 Cases that cite this headnote

[18] Municipal Corporations

Rights and remedies of contractor and sureties

Public Contracts

Defenses

Legislature did not intend statute that waived sovereign immunity for municipalities for certain contract claims to abrogate the common law's treatment of the proprietary-governmental dichotomy, which provided immunity when a municipality exercised governmental functions but did not provide immunity when it exercised proprietary functions. V.T.C.A., Local Government Code § 271.152.

3 Cases that cite this headnote

[19] Electricity

Contracts for supply in general

City was acting in its proprietary capacity when it entered into wholesale power agreement with electricity supplier, and thus, city had no governmental immunity from supplier's declaratory judgment action seeking determination of parties' rights and obligations under the agreement. V.T.C.A., Local Government Code § 271.152; V.T.C.A., Civil Practice & Remedies Code § 101.0215(b)(1).

Cases that cite this headnote

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Before Chief Justice JONES, Justices GOODWIN and FIELD.

Opinion

OPINION

SCOTT K. FIELD, Justice.

In this interlocutory appeal, appellant City of Georgetown (the City) challenges the trial court's order denying its plea to the jurisdiction based on governmental immunity. The underlying controversy concerns the City's long-term contract to purchase electricity from appellee, the Lower Colorado River Authority (the LCRA). The LCRA sought declaratory relief concerning the parties' rights and obligations under the contract, and the City filed a plea to the jurisdiction, asserting that the LCRA's pleadings fail to demonstrate a valid waiver of governmental immunity. Because we conclude that the City has no immunity from this suit, we affirm the trial court's order denying the City's plea to the jurisdiction.

BACKGROUND

According to its pleadings, the LCRA entered into standard "Wholesale Power Agreements" with various municipalities, including the City, in 1974. Under the terms of the Wholesale Power Agreement, the City would purchase 100% of its electricity from the LCRA and then resell that electricity to the City's retail customers through its municipal utility. The Wholesale Power Agreement is set to expire June 25, 2016,

and the City has given LCRA notice of its intent not to renew the contract.

***806** The LCRA asserts that on June 28, 2012, the City sent a letter to the LCRA in which it alleged that the LCRA had breached the terms of the Wholesale Power Agreement by selling electricity to other customers at a lower rate. According to the LCRA, the letter stated that the City would terminate the Wholesale Power Agreement within thirty days unless the LCRA cured the alleged breach. On August 13, 2012, the City sent a follow-up letter in which it declared that the Wholesale Power Agreement was terminated.

In response, the LCRA filed this underlying action, seeking a declaratory judgment that it has not materially breached the Wholesale Power Agreement.[1] The City filed a plea to the jurisdiction, asserting that the LCRA's pleadings fail to affirmatively demonstrate a waiver of the City's governmental immunity. In its amended pleadings, the LCRA asserts that the City has no governmental immunity because this case arises out of the City's proprietary function, rather than its governmental function. Alternatively, the LCRA asserts that if the City has governmental immunity, that immunity has been waived by statute. *See* Tex. Loc. Gov't Code § 271.152 (waiving sovereign immunity for breach of contract claims "subject to the terms and conditions of this subchapter"). Following a hearing, the trial court denied the City's plea to the jurisdiction. This interlocutory appeal followed. *See* Tex.R.App. P. 51.014(a)(8) (permitting interlocutory appeal from denial of plea to jurisdiction).

STANDARD OF REVIEW

[1] [2] [3] [4] A plea to the jurisdiction is a dilatory plea that challenges the trial court's authority to determine the subject matter of a specific cause of action. *See Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 553–54 (Tex.2000). Governmental immunity from suit deprives a court of subject-matter jurisdiction and therefore is properly asserted in a plea to the jurisdiction. *State v. Lueck*, 290 S.W.3d 876, 880 (Tex.2009). Whether a trial court has subject-matter jurisdiction is a question of law that we review de novo. *Westbrook v. Penley*, 231 S.W.3d 389, 394 (Tex.2007). When, as here, the plea to the jurisdiction challenges the pleadings, we construe the pleadings liberally in favor of the plaintiff, and unless challenged with evidence, we accept all allegations as true. *Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226–27 (Tex.2004).

Some of the issues in this case concern interpretation of statutes, which is a question of law that we review de novo. *See First Am. Title Ins. Co. v. Combs*, 258 S.W.3d 627, 631 (Tex.2008). When construing a statute, our primary objective is to ascertain and give effect to the legislature's intent. *Id.* at 631–32. In determining legislative intent, we first consider the plain language of the statute. *GMC v. Bray*, 243 S.W.3d 678, 685 (Tex.App.-Austin 2007, no pet.). When statutory text is clear, it is determinative of legislative intent, unless enforcing the plain meaning of the statute's words would produce an absurd result. *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 437 (Tex.2009). Our analysis of the statute is also informed by the presumption that "the entire statute is intended to be effective" and that "a just and reasonable result is intended." Tex. Gov't Code § 311.021(2), (3). We may consider such matters as "the object ***807** sought to be attained," "the circumstances under which the statute was enacted," legislative history, and "common law or former statutory provisions, including laws on the same or similar subjects." *Id.* § 311.023(1)-(4).

DISCUSSION

[5] [6] [7] [8] A municipality performs a governmental function when it acts "as the agent of the State in furtherance of general law for the interest of the public at large." *Gates v. City of Dallas*, 704 S.W.2d 737, 738–39 (Tex.1986) (internal quotations omitted), *superseded by statute on other grounds as stated in City of Terrell v. McFarland*, 766 S.W.2d 809, 813 (Tex.App.-Dallas 1988, writ denied). Given that the municipality is effectively acting on behalf of the state when it performs a governmental function, it is imbued with the state's sovereign immunity, and therefore is entitled to governmental immunity.[2] *Id.* By contrast, "[p]roprietary functions are those functions performed by a city, in its discretion, primarily for the benefit of those within the corporate limits of the municipality." *Id.* Because the municipality is not acting on behalf of the state when it performs proprietary functions, the municipality traditionally is not entitled to governmental immunity for those functions, and thus has "the same duties and liabilities as those incurred by private persons or corporations." *Id.*; *see also Bailey v. City of Austin*, 972 S.W.2d 180, 192–93 (Tex.App.-Austin 1998, pet. denied) (concluding that city's provision of health insurance to its employees is proprietary function for which governmental immunity does not apply).

The LCRA asserts that when the City contracted to purchase power as a municipal utility, the City performed a proprietary function rather than a governmental function. *See* Tex. Civ. Prac. & Rem.Code § 101.0215(b)(1) (defining "operation or maintenance of a public utility" as proprietary function for purposes of Texas Tort Claims Act). Therefore, according to the LCRA, the City has no governmental immunity from this suit, which arises out of its operation of a municipal utility.

The City asserts that "the proprietary-governmental function dichotomy is a creature of tort law" that does not apply to contract claims. Specifically, the City argues that because section 271.152 of the Local Government Code—the statute that waives sovereign immunity for certain contract claims —does not mention the proprietary-governmental dichotomy, the legislature intended for the dichotomy not to apply to contract claims. Therefore, according to the City, municipalities have governmental immunity for contract claims regardless of whether the claim arises out of their proprietary or governmental functions. As a result, the City asserts that it has governmental immunity from LCRA's claims and that LCRA cannot demonstrate a clear and unambiguous waiver of the City's immunity. *See Tooke v. City of Mexia*, 197 S.W.3d 325, 332 (Tex.2006) (noting that legislature must clearly and unambiguously waive sovereign immunity).

***808** The arguments in this case primarily concern whether the proprietary-governmental dichotomy applies to contract claims. As we will explain, this issue involves two separate legal questions: (1) does the proprietary-governmental dichotomy apply to contract claims under the common law and (2) if so, has the legislature abrogated the common law? In making these determinations, we first discuss the history and underlying rationale for treating proprietary functions differently than governmental functions. Next, we consider whether the common law applies the proprietary-governmental dichotomy to contract claims. Finally, we determine whether the legislature has abrogated common-law precedent, thereby ending the application of the dichotomy to contract claims.

History and rationale for proprietary-governmental dichotomy

[9] [10] [11] [12] [13] Texas has long recognized sovereign immunity as the bedrock principle that " 'no state can be sued in her own courts without her consent, and then only in the manner indicated by that consent.' " *See Tooke*, 197 S.W.3d at 331 (quoting *Hosner v. DeYoung*, 1 Tex. 764, 769 (1847)). This immunity extends to the various divisions of the state government as well as its political subdivisions, such as the City. *See supra* n. 2. "[G]overnmental immunity has two components: immunity from liability, which bars enforcement of a judgment against a governmental entity, and immunity from suit, which bars suit against the entity altogether." *Tooke*, 197 S.W.3d at 332. When a governmental entity enters into a contract it "necessarily waives immunity from liability, ... but it does not waive immunity from suit." *Id.* Thus, when governmental immunity applies, a governmental entity may not be sued for breach of contract unless its immunity from suit has been waived. *Id.* We defer to the legislature to waive immunity from suit by statute or resolution. *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 695–96 (Tex.2003). The legislature's waiver of immunity from suit must be clear and unambiguous. *Tooke*, 197 S.W.3d at 332–33. These principles of immunity from suit and waiver of immunity are well established.

[14] However, it is also well established that before a court considers whether governmental immunity has been waived, the court must determine whether governmental immunity exists in the first place. *See, e.g., City of El Paso v. Heinrich*, 284 S.W.3d 366, 371–72 (Tex.2009) (explaining that ultra vires claims are not against state and therefore do not implicate sovereign immunity). "[T]he distinction between waiving immunity and finding it nonexistent is a fine one that yields the same effect and, '[d]ue to the risk that the latter could become a ruse for avoiding the Legislature, courts should be very hesitant to declare immunity nonexistent in any particular case.' " *Nueces Cnty. v. San Patricio Cnty.* 246 S.W.3d 651, 652 (Tex.2008) (quoting *City of Galveston v. Texas*, 217 S.W.3d 466, 471 (Tex.2007)). Therefore, courts generally presume that governmental immunity applies. *See id.* With these principles in mind, we turn to the history of the proprietary-governmental dichotomy.

Over 125 years ago, the Texas Supreme Court considered the extent to which governmental immunity applies to municipalities. *City of Galveston v. Posnainsky*, 62 Tex. 118 (1884). In *Posnainsky*, a father sued a municipality for injuries resulting from his minor child's fall into an uncovered drain on a public street. *Id.* at 122–23. The court held that because the municipality constructed and maintained the streets for its "own advantage or emolument," it was not immune from suit for ***809** negligently maintaining those streets. *Id.* at 131. As the court explained, when a municipality "exercises powers exclusively public in their character, forced upon it without its consent, simply because

the state can thus, through such local agencies, more easily and effectively discharge duties essentially its own, it is but proper that no action should be maintained against" the municipality unless the state has waived immunity from suit. *Id.* at 125. However, when municipalities "exercise power not of this character, voluntarily assumed—powers intended for the private advantage and benefit of the locality and its inhabitants,—there seems to be no sufficient reason why they should be relieved from that liability to suit and measure of actual damage to which an individual or private corporation" would be held. *Id.*

[15] *Posnainsky* established what has become the proprietary-governmental dichotomy. When a municipality exercises powers, public in nature, at the direction of the state, it performs a governmental function for which it has governmental immunity. But when a municipality acts within its discretion, primarily for the benefit of those within its corporate limits, it performs a proprietary function for which it has no immunity. *See Nueces Cnty.*, 246 S.W.3d at 652–53 (citing *Posnainsky*, 62 Tex. at 125).

[16] The courts have traditionally been left to determine which municipal functions are proprietary and which are governmental. *See, e.g., Gates*, 704 S.W.2d at 739. However, in 1987, the Texas Constitution was amended to give the legislature the authority to "define for all purposes those functions of a municipality that are to be considered governmental and those that are proprietary, including reclassifying a function's classification assigned under prior statute or common law." Tex. Const. art. XI, § 13(a). Thus, the legislature may, through statute, change the common-law classifications of municipal functions, effectively "grant[ing] municipalities immunity from certain suits that could have been maintained at common law." *City of Tyler v. Likes*, 962 S.W.2d 489, 503 (Tex.1997).

The legislature has exercised its authority to reclassify proprietary functions as governmental functions almost exclusively in the Tort Claims Act.[3] *See* Tex. Civ. Prac. & Rem.Code § 101.0215; *see also Likes*, 962 S.W.2d at 502 (noting that Tort Claims Act reclassified maintenance of storm sewers as governmental function even though considered proprietary function at common law). As noted above, the Tort Claims Act specifically defines the "operation and maintenance of a public utility" as a proprietary function, thereby affirming its common-law classification, at least with respect to tort claims. *See* Tex. Civ. Prac. & Rem.Code § 101.0215(b)(1); *San Antonio Indep. Sch. Dist. v. City of San Antonio*, 550 S.W.2d 262, 264 (Tex.1976) (noting that operation of public utility is proprietary function at common law).

The common-law rule and *Tooke v. City of Mexia*

[17] *Posnainsky* applied the proprietary-governmental dichotomy to a tort ***810** claim. *See* 62 Tex. at 125. Prior to *Tooke*, 197 S.W.3d at 343–44, the Texas appellate courts—including this Court—also unanimously applied the proprietary-governmental dichotomy to claims for contract damages. *See Bailey*, 972 S.W.2d at 192.[4] Although some of these opinions acknowledged that the dichotomy was originally applied to tort claims, the opinions mostly assumed, without explanation, that "the dichotomy applies with equal force to contract claims." *See City of Mexia v. Tooke*, 115 S.W.3d 618, 624–25 (Tex.App.-Waco 2003), *aff'd*, 197 S.W.3d at 347.

However, the supreme court's opinion in *Tooke* has brought that uniform assumption into question. In *Tooke*, the supreme court stated that the "proprietary-governmental dichotomy has been used to determine a municipality's immunity from suit for tortious conduct .... [b]ut we have never held that this distinction determines whether immunity from suit is waived for breach of contract claims ...."[5] 197 S.W.3d at 343. The court explained that it "need not determine that issue" because the case involved a governmental function, and thus, even assuming that the dichotomy applied, the municipality had governmental immunity. *Id.* Nevertheless, *Tooke* arguably called into question the vitality of the longstanding assumption that the proprietary-governmental dichotomy applies with equal force to contract claims as it does to tort claims. *See East Houston Estate Apartments, L.L.C. v. City of Houston*, 294 S.W.3d 723, 731–32 (Tex.App.-Houston [1st Dist.] 2009, no pet.) (discussing appellate courts' post-*Tooke* treatment of proprietary-governmental dichotomy for contract claims). However, until the supreme court answers this question, we rely on this Court's precedent, as well as the ***811** nearly unanimous opinions of our sister courts, to conclude that the proprietary-governmental dichotomy applies to contract claims under the common law.

Prior to *Tooke*, the appellate courts unanimously applied the proprietary-governmental dichotomy to contract claims. *See supra* n. 3. Following *Tooke*, several appellate courts, including this Court, have assumed without deciding that the dichotomy continues to apply to contract claims. *See, e.g.*,

East Houston Estate Apartments, L.L.C., 294 S.W.3d at 731–32; *Smith v. City of Blanco*, No. 03–08–00784–CV, 2009 WL 3230836, at *3 (Tex.App.-Austin Oct. 8, 2009, no pet.) (mem. op.). At least one of our sister courts has continued to expressly apply the proprietary-governmental dichotomy to contract claims post-*Tooke*. *See Casso v. City of McAllen*, No. 13–08–00618, 2009 WL 781863, at *5–7 (Tex.App.-Corpus Christi Mar. 26, 2009, pet. denied) (mem. op.) (concluding municipality's provision of health insurance to its employee is proprietary function for which it had no immunity from contract claim). These opinions did not engage in substantial analysis of why the dichotomy was equally applicable to contracts, perhaps because they did not think such analysis was necessary.

Although *Tooke* brought this issue into question, it did not suggest, and we have not found, any principled reason why the proprietary-governmental dichotomy should apply to tort claims but not contract claims under the common law. [6] *See* 197 S.W.3d at 343–44. Without such a principled reason or guidance from the supreme court, we are reluctant to overturn our own precedent or disagree with persuasive authority from the majority of our sister courts on the issue. *See Grapevine Excavation, Inc. v. Maryland Lloyds*, 35 S.W.3d 1, 5 (Tex.2000) ("Adhering to precedent fosters efficiency, fairness, and legitimacy."); *see also Bailey*, 972 S.W.2d at 192; *supra* n. 3. The proprietary-governmental dichotomy exists because we have determined that when a municipality does not act on behalf of the state, it is not imbued with the state's immunity. Thus, the underlying rationale for the dichotomy is the relationship, or lack thereof, between the municipality and the state, not the relationship between the municipality and the party bringing suit. *See Posnainsky*, 62 Tex. at 126–128.

In its brief, the City primarily relies on the San Antonio Court of Appeals' recent holding in *City of San Antonio ex rel. City Public Service Board v. Wheelabrator Air Pollution Control, Inc.*, 381 S.W.3d 597, 603–05 (Tex.App.-San Antonio 2012, pet. filed). In that case, the court held that the legislature's failure to include the proprietary-governmental dichotomy in "the contract-claim scheme" meant that the dichotomy did not apply. *Id.* at 605. In reaching this conclusion, the court did not expressly state whether the legislature abrogated the common-law rule that would have applied the dichotomy to contract claims. However, the court noted that *Tooke* brought *Gates*—a previous supreme ***812** court opinion that applied the proprietary-governmental dichotomy to a contact claim—into question because *Tooke* "used a compare signal when citing *Gates* right after explicitly stating it has never held that the proprietary/governmental distinction applies to determine whether immunity is waived for breach of contract claims ...." *Wheelabrator*, 381 S.W.3d at 604 (citing *Tooke*, 197 S.W.3d at 343 n. 89). To the extent *Wheelabrator*'s analysis suggests that *Tooke* changed the common law, we respectfully disagree.

We agree that *Tooke*'s citation to *Gates* could be read to mean that *Gates* did not expressly hold that the proprietary-governmental dichotomy applies to contract claims, and thus there is no binding precedent from the supreme court that answers this question. *See supra* n. 4. Nevertheless, we do not agree with *Wheelabrator*'s intimation that *Tooke* changed the common law or somehow called the holding of *Gates* into question. By its own terms, *Tooke* assumed without deciding that the proprietary-governmental dichotomy applied to contract claims and therefore did not overrule any prior precedent. *See* 197 S.W.3d at 343. Furthermore, the underlying analysis in *Tooke* primarily concerned whether the phrase "plead and be impleaded" within the local government code was a clear and unambiguous waiver of sovereign immunity. *See id.* at 342–43. As we have explained, the proprietary-governmental dichotomy concerns whether a municipality has governmental immunity in the first place, not whether that immunity has been waived. Therefore, *Tooke*'s analysis of waiver of immunity has little bearing on the proprietary-governmental dichotomy, and the more relevant precedents are those cases addressing whether governmental immunity exists in the first instance. *See, e.g., Heinrich*, 284 S.W.3d at 371–72; *Nueces Cnty.*, 246 S.W.3d at 652–53.

For the foregoing reasons, we adhere to our precedent and conclude that the proprietary-governmental dichotomy does apply to contract claims under the common law. *See Bailey*, 972 S.W.2d at 192. Having made this determination, we next consider whether the legislature has abrogated that common-law rule.

Legislative intent

[18] In its brief, the City argues that the legislature's failure to expressly adopt the propriety-governmental dichotomy for contract claims indicates that the dichotomy does not apply. As we have noted, the legislature has the authority to reclassify a municipality's functions as either proprietary or governmental, thereby abrogating their common-law classifications. *See* Tex. Const. art. XI, § 13(a). The legislature has exercised this authority almost exclusively in

the Tort Claims Act, in which it provided non-exhaustive lists of proprietary and governmental functions. *See* Tex. Civ. Prac. & Rem.Code § 101.0215; *supra* n. 3. Section 271.152 of the Local Government Code—the section that waives local governmental entities' immunity from suit for certain contract claims—does not reference the proprietary-governmental dichotomy. Given that chapter 271 does not mention the proprietary-governmental dichotomy in any respect, there is no plain statutory text from which we can determine whether the legislature intended to abandon the dichotomy for contract claims.

The City asserts that we should take the legislature's silence to mean that the proprietary-governmental dichotomy no longer applies to contract claims. The City again relies on the analysis in *Wheelabrator*, in which the San Antonio Court of Appeals stated the following:

> The Legislature easily could have included the proprietary/governmental dichotomy it used in the tort-claims context ***813** in the contract-claim scheme, but chose not do so. As it is solely the Legislature's role to clearly and unambiguously waive governmental immunity from suit, and it has not done so for quantum meruit claims, we hold [the municipality] is immune from suit on Wheelebrator's quantum meruit claim.

See 381 S.W.3d at 605 (internal quotation omitted). Because we conclude that this analysis incorrectly places the burden on the legislature to affirmatively adopt the common-law rule, we respectfully disagree.

We are mindful of the fact that although "silence can be significant .... legislatures do not always mean to say something by silence. Legislative silence may be due to mistake, oversight, lack of consensus, implied delegation to courts or agencies, or an intent to avoid unnecessary repetition." *PPG Indus., Inc. v. JMB/Houston Ctr. Partners Ltd. P'ship*, 146 S.W.3d 79, 84 (Tex.2004). Therefore, in order to give effect to the legislature's intent, we must utilize other tools of statutory construction. *See* Tex. Gov't Code § 311.023. In particular, we consider the common law's treatment of the proprietary-governmental dichotomy prior to the adoption of section 271.152, as well as the legislative history and purpose behind that section's adoption. *See id.* § 311.023(3)-(4); Tex. Loc. Gov't Code § 271.152.

Section 271.152 was signed into law on June 17, 2005, just over one year before the supreme court issued its opinion in *Tooke. See* Act of May 23, 2005, 79th Leg., R.S., ch. 604, §§ 1–2, 2005 Tex. Gen. Laws 1548, 1549; *see also Tooke*, 197 S.W.3d at 325. At the time the legislature considered and adopted section 271.152, the appellate courts unanimously applied the proprietary-governmental dichotomy to contract claims in the same manner that they applied the dichotomy to torts. *See supra* n. 3. We presume that the legislature was aware of the state of the common law when it adopted section 271.152. *See Shook v. Walden*, 304 S.W.3d 910, 917 (Tex.App.-Austin 2010, no pet.). The legislature did not express any disagreement with that precedent; therefore we presume that the legislature did not intend to abrogate the common law. *See Cash Am. Int'l Inc. v. Bennett*, 35 S.W.3d 12, 16 (Tex.2000) ("Abrogating common-law claims is disfavored and requires clear repugnance between the common law and statutory causes of action.") (internal quotations omitted). Furthermore, although the legislature could have repeated the list of proprietary and governmental functions from the Tort Claims Act in some part of chapter 271 of the Local Government Code, it could have reasonably concluded that such repetition was unnecessary. *See* Tex. Civ. Prac. & Rem.Code § 101.0215; *PPG Indus., Inc.*, 146 S.W.3d at 84 (noting legislative silence may indicate intent to avoid unnecessary repetition); *see also Tooke*, 197 S.W.3d at 343–44 (concluding that there is "no reason to think that the classification [of proprietary and governmental functions] would be different under the common law.").

Similarly, the history behind section 271.152 indicates that it was adopted to expand, rather than limit, plaintiffs' ability to sue municipalities for contract damages. As section 271.158 of the Local Government Code makes clear, nothing in section 271.152 "shall constitute a grant of immunity to suit to a local governmental entity." This is consistent with the bill analysis for section 271.152, which states that it "clarifies and re-expresses the legislature's intent that all local governmental entities that are given the statutory authority to enter into contracts shall not be immune from suits arising from contracts, subject to the limitations set forth in C.S.H.B. 2039." House Comm. On Civil Practices, ***814** Bill Analysis, Tex. H.B.2039, 79th Leg., R.S. 2005. Thus, the legislative history strongly indicates that section 271.152 was adopted to expand—or at a minimum not reduce—access to the courthouse.[7] It would be entirely inconsistent with this purpose to treat section 271.152 as an abrogation of the proprietary-governmental dichotomy for contract claims.

See Likes, 962 S.W.2d at 503 (noting that when legislature reclassifies proprietary function as governmental function, it expands governmental immunity beyond common law).

Finally, as we have explained, the proprietary-governmental dichotomy concerns whether governmental immunity exists in the first place, not whether it has been waived. Therefore, the statutory provision that waives governmental immunity in chapter 271 does not logically implicate the proprietary-governmental dichotomy, which applies before consideration of waiver. As a result, the legislature could have reasonably believed it did not need to reiterate the validity of the dichotomy in section 271.152. This interpretation is directly supported by section 271.158, in which the legislature expressly stated that nothing in section 271.152 "shall constitute a grant of immunity to suit to a local governmental entity."

[19] Therefore, we find that *Wheelabrator's* interpretation of the legislature's silence is inconsistent with legislative history and the purpose of section 271.152. We conclude that the legislature did not intend section 271.152 to abrogate the common law's treatment of the proprietary-governmental dichotomy. Having concluded that the common law applies that dichotomy to contract claims, and that the operation of a municipal utility is a proprietary function, we further conclude that the City was acting in its proprietary capacity when it entered into its contract with the LCRA. *See* Tex. Civ. Prac. & Rem.Code § 101.0215(b)(1) (listing operation and maintenance of municipal utility as proprietary function); *Tooke*, 197 S.W.3d at 344 (using classification of municipal function in Tort Claims Act in application to contract claim). Therefore, the City has no governmental immunity from the LCRA's claims, and the trial court did not err in denying the City's plea to the jurisdiction on this basis. [8]

CONCLUSION

We affirm the trial court's order denying the City's plea to the jurisdiction.

Dissenting Opinion by Justice GOODWIN.

MELISSA GOODWIN, Justice, dissenting.

Because I would conclude that the Lower Colorado River Authority (LCRA) failed to allege a valid waiver of governmental immunity from suit by the City of Georgetown (the City), I respectfully dissent. *See McCandless v. Pasadena Indep. Sch. Dist.*, No. 03–09–00249–CV, 2010 WL 1253581, at *3 (Tex.App.-Austin Apr. 2, 2010, no pet.) (mem. op.) ("Plaintiff bears the burden to affirmatively demonstrate the trial court's jurisdiction by alleging a valid waiver of immunity, which may be either by reference to a statute or to express ***815** legislative permission." (citing *Texas Dep't of Transp. v. Jones*, 8 S.W.3d 636, 637 (Tex.1999))).

The majority concludes that the "City has no immunity from this suit" based upon its conclusion that "the City was acting in a proprietary capacity when it entered into its contracts with the LCRA." This conclusion, however, ignores the well-established doctrine of governmental immunity that protects political subdivisions of the state, including cities, from suit. *See Ben Bolt v. Texas Political Subdivisions*, 212 S.W.3d 320, 324 (Tex.2006); *Tooke v. City of Mexia*, 197 S.W.3d 325, 328 (Tex.2006); *Multi–County Water Supply Corp. v. City of Hamilton*, 321 S.W.3d 905, 907 (Tex.App.-Houston [14th Dist.] 2010, pet. denied). "A political subdivision enjoys governmental immunity from suit to the extent that immunity has not been abrogated by the Legislature." *Ben Bolt*, 212 S.W.3d at 324 (citing *Texas Natural Res. Conserv. Comm'n v. IT–Davy*, 74 S.W.3d 849, 853 (Tex.2002)); *Multi–County Water Supply*, 321 S.W.3d at 907 ("Immunity from suit deprives the trial court of subject-matter jurisdiction and bars an action against the governmental unit in the absence of express, clear, and unambiguous consent to suit." (citing Tex. Gov't Code § 311.034; *Tooke*, 197 S.W.3d at 332–33)).

The majority's analysis of the proprietary-governmental dichotomy also glosses over LCRA's pleadings. In its pleadings, LCRA does not allege a breach of contract claim but seeks declaratory relief. *See* Tex. Civ. Prac. & Rem.Code §§ 37.001–.011 (UDJA); *see, e.g., East Houston Estate Apartments, L.L.C. v. City of Houston*, 294 S.W.3d 723, 731 (Tex.App.-Houston [1st Dist.] 2009, no pet.) (noting that courts of appeals have "applied the governmental-proprietary dichotomy to breach of contract cases"). The UDJA "does not enlarge a trial court's jurisdiction." *City of El Paso v. Heinrich*, 284 S.W.3d 366, 370 (Tex.2009). Except for suits challenging statutes or ordinances, the UDJA does not waive governmental entities' immunity from suit. *See id.; IT–Davy*, 74 S.W.3d at 855–56; *Multi–County Water Supply*, 321 S.W.3d at 907 (noting that UDJA "is not a general waiver of governmental immunity" and that "[b]y entering into a contract, a governmental entity waives immunity from liability but does not waive immunity from suit"); *Lower Colorado River Auth. v. Riley*, No. 10–10–00092–

CV, 2011 WL 6956136, at *2 (Tex.App.-Waco Dec. 28, 2011, no pet.) (mem. op.) (UDJA "not general waiver of sovereign immunity"). Thus, LCRA's UDJA claims do not satisfy its burden to allege a valid waiver of immunity from suit. *See, e.g., IT–Davy*, 74 S.W.3d at 855–56, 860 (stating that immunity generally protects a governmental entity from declaratory-judgment suits that seek to establish a contract's validity or enforce performance under the contract "because such suits attempt to control state action").

LCRA's pleadings also fail to establish that section 271.152 of the Local Government Code applies to waive the City's immunity from suit: the LCRA expressly states it is not bringing a breach of contract claim for money damages. [1] *See* Tex. Loc. Gov't Code §§ 271.151–.160 (waiving immunity of local governmental entities for ***816** breach of contract claims that seek to recover balance owed under a contract for goods or services and limiting recoverable damages); *McCandless*, 2010 WL 1253581, at *3 (concluding "without a properly pleaded breach-of-contract action, section 271.152 does not waive governmental immunity"); *cf. Ben Bolt*, 212 S.W.3d at 323, 328 (concluding that limited statutory waiver in section 271.151 applied to insurance coverage dispute in "declaratory judgment action seeking a determination that the loss was a covered occurrence under the insurance agreement's terms"); *City of San Antonio v. Wheelabrator Air Pollution Control, Inc.*, 381 S.W.3d 597, 599–600 (Tex.App.-San Antonio 2012, pet. filed) (plaintiff seeking money damages under a breach of contract claim or, alternatively, a quantum meruit claim). LCRA does not seek to recover the balance owed under a contract. *See* Tex. Loc. Gov't Code § 271.153 (listing recoverable damages).

Although a governmental entity waives its immunity from liability by entering into contracts, it was LCRA's burden to allege a valid waiver of immunity from suit. *See Ben Bolt*, 212 S.W.3d at 324 ("By entering into a contract, the State waives its immunity from liability but not its immunity from suit."); *Jones*, 8 S.W.3d at 637 (plaintiff's burden to allege valid waiver of immunity). I would conclude that LCRA failed to do so. [2]

Parallel Citations

Util. L. Rep. P 27,229

Footnotes

1 The LCRA also sought injunctive relief "commanding [the City] to desist and refrain from taking any further action to prematurely terminate the [Wholesale Power Agreement]." The trial court did not rule on the LCRA's request for injunctive relief, and that claim is not part of this interlocutory appeal.

2 Courts frequently use the terms sovereign immunity and governmental immunity interchangeably, but the terms technically involve two distinct concepts. *See Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 694 n. 3 (Tex.2003). "Sovereign immunity refers to the State's immunity from suit and liability," which extends to "the various divisions of the state government, including agencies, boards, hospitals, and universities. Governmental immunity, on the other hand, protects political subdivisions of the State, including counties, cities, and school districts." *Id.* (internal citations omitted). Although this distinction does not affect our analysis in this case, it is worth noting that when we refer to the City's immunity, or lack thereof, we are referring to governmental immunity. *See id.*

3 The legislature has also specified that certain public operations and government agencies perform only governmental functions. *See, e.g.*, Tex. Transp. Code § 452.0561(b) (stating that operations of public transportation entity are governmental functions); Tex. Water Code § 67.0105(b) ("The furnishing of a water supply and fire hydrant equipment by a governmental entity or a volunteer fire department ... is an essential governmental function ...."); Tex. Spec. Dist.Code § 3503.002(b) (stating that operations of "TexAmericas Center" are governmental functions for all purposes). The City's contract with the LCRA does not implicate any of these provisions, and therefore these statutes are not applicable to the case before us.

4 *See also Temple v. City of Houston*, 189 S.W.3d 816, 819–20 (Tex.App.-Houston [1st Dist.] 2006, no pet.); *City of Roman Forest v. Stockman*, 141 S.W.3d 805, 811 (Tex.App.-Beaumont 2004, no pet.); *City of Mexia v. Tooke*, 115 S.W.3d 618, 624–25 (Tex.App.-Waco 2003), *aff'd*, 197 S.W.3d 325, 347 (Tex.2006); *Williams v. City of Midland*, 932 S.W.2d 679, 683–84 (Tex.App.-El Paso 1996, no writ); *City of Houston v. Southwest Concrete Constr., Inc.*, 835 S.W.2d 728, 732–33 (Tex.App.-Houston [14th Dist.] 1992, writ denied); *City of Dallas v. Moreau*, 718 S.W.2d 776, 779–80 (Tex.App.-Corpus Christi 1986, writ ref'd n.r.e.); *International Bank of Commerce of Laredo v. Union Nat. Bank of Laredo*, 653 S.W.2d 539, 546 (Tex.App.-San Antonio 1983, writ ref'd n.r.e.); *Blythe v. City of Graham*, 287 S.W.2d 527, 530 (Tex.App.-Fort Worth 1956, writ ref'd n.r.e.); *Boiles v. City of Abilene*, 276 S.W.2d 922, 925 (Tex.App.-Eastland 1955, writ ref'd); *City of Crosbyton v. Texas–New Mexico Util. Co.*, 157 S.W.2d 418, 420–21 (Tex.App.-Amarillo 1941, writ ref'd w.o.m.); *Texas One P'ship v. City of Dallas*, No. 05–92–01097–CV, 1993 WL 11621, at *3 (Tex.App.-Dallas Jan. 15, 1993, writ denied) (not designated for publication). The parties do not cite to, and we could not find, any cases from

the Texarkana or Tyler Courts of Appeals applying or refusing to apply the proprietary-governmental dichotomy to a contract claim prior to *Tooke v. City of Mexia,* 197 S.W.3d at 343–44.

5 Immediately following this sentence, the court in *Tooke* cited *Gates v. City of Dallas,* a previous supreme court opinion in which the court noted that "[c]ontracts made by municipal corporations in their proprietary capacity have been held to be governed by the same rules as contracts between individuals." *See Tooke,* 197 S.W.3d at 343 n. 89 (citing *Gates,* 704 S.W.2d 737, 738–39 (Tex.1986)). Given that the disposition in *Gates* appears to have required an application of the proprietary-governmental dichotomy to a contract claim, it is not entirely clear what the court in *Tooke* meant when it said, in dicta, that it had never held that the dichotomy applies to such claims. *See id.; see also City of San Antonio ex rel. City Pub. Serv. Bd. v. Wheelabrator Air Pollution Control, Inc.,* 381 S.W.3d 597, 604 (Tex.App.-San Antonio 2012, pet. filed) (concluding *Tooke* brings *Gates* into question). Nevertheless, we will take at face value the supreme court's conclusion that it has never expressly held that the proprietary-governmental dichotomy applies to contract claims.

6 The City argues that we should be hesitant to conclude that governmental immunity does not exist in this context because such arguments can be used as a "ruse" to circumvent the legislature. *See Nueces Cnty. v. San Patricio Cnty.,* 246 S.W.3d 651, 652 (Tex.2008). While we agree that courts should not make this determination lightly, the proprietary-governmental dichotomy has existed for over 125 years and has been applied to contract claims for at least 70 years. *See City of Galveston v. Posnainsky,* 62 Tex. 118 (1884); *City of Crosbyton,* 157 S.W.2d at 420–21. Therefore, we disagree with the City's assertion that applying the proprietary-governmental dichotomy to contract claims is a ruse to avoid the legislature; rather, it is a reasonable application of jurisprudence that is nearly as old as the state itself. *See Posnainsky,* 62 Tex. at 127–28.

7 As our sister court explained, section 271.152 was adopted to overrule various appellate court cases that found that governmental entities' immunity from suit had not been waived for various contract claims. *See Clear Lake City Water Auth. v. MCR Corp.,* No. 01–08–00955–CV, 2010 WL 1053057, at *9 n. 6 (Tex.App.-Houston [14th Dist.] March 11, 2010, pet. denied) (mem. op.).

8 Having concluded that the City has no governmental immunity, we need not address the LCRA's alternative argument that the City's immunity has been waived.

1 In its pleadings, LCRA states: "it merely seeks to construe LCRA's obligations under a state statute and a contract and does not otherwise attempt to control Defendants or establish their liability for money damages.... LCRA does not seek to validate the contract, impose liability on Defendants, or enforce their performance.... LCRA's declaratory-action does not seek to establish that the City owes LCRA money or that the City previously breached its contractual obligations."

2 I also cannot join the majority's analysis of section 271.152 of the Local Government Code, the section expressly waiving immunity from suit for certain contract claims. *See* Tex. Loc. Gov't Code § 271.152. Section 271.151(2) defines a "contract subject to this subchapter" to mean "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). Contracts properly executed by a local governmental entity, such as a city, whether in its governmental or proprietary capacity, fall within the plain language of a "contract subject to this subchapter." *See id.*

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APPENDIX B

381 S.W.3d 597
Court of Appeals of Texas,
San Antonio.

CITY OF SAN ANTONIO, Acting By and Through CITY PUBLIC SERVICE BOARD a/k/a CPS Energy, Appellant,
v.
WHEELABRATOR AIR POLLUTION CONTROL, INC., Appellee.

No. 04–11–00821–CV. | Aug. 1, 2012.

Synopsis

Background: Subcontractor on project to add pollution control system to city power plant brought action against city seeking to recover the retainage funds under a breach of contract claim and, alternatively, a quantum meruit claim. The 225th Judicial District Court, Bexar County, Larry Noll, J., denied city's plea to the jurisdiction. City appealed.

Holdings: The Court of Appeals, Phylis J. Speedlin, J., held that:

[1] city was immune from subcontractor's quantum meruit claim;

[2] in a matter of first impression, the governmental/proprietary distinction employed in the Texas Tort Claims Act could not be used to determine municipality's immunity from suit on a contractual or quasi-contractual claim; and

[3] city's conduct in accepting the benefit of the contract did not waive its governmental immunity.

Reversed and remanded.

West Headnotes (16)

[1] Courts
Jurisdiction of Cause of Action

Subject matter jurisdiction is necessary for a court to have the authority to resolve a case.

Cases that cite this headnote

[2] Municipal Corporations
Actions

States
Liability and Consent of State to Be Sued in General

Sovereign and governmental immunity from suit deprive a trial court of subject matter jurisdiction.

Cases that cite this headnote

[3] Municipal Corporations
Pleading

To invoke a trial court's subject matter jurisdiction over a claim against a governmental entity, the plaintiff must allege a valid waiver of immunity from suit and plead sufficient facts demonstrating the trial court's jurisdiction.

Cases that cite this headnote

[4] Pleading
Plea to the Jurisdiction

A governmental entity properly raises immunity through a plea to the jurisdiction.

Cases that cite this headnote

[5] Appeal and Error
Pleadings and rulings thereon

In reviewing a trial court's ruling on a plea to the jurisdiction, appellate court does not examine the merits of the cause of action, but considers only the plaintiff's pleadings and any evidence relevant to the jurisdictional inquiry.

Cases that cite this headnote

[6] Appeal and Error
Pleading

In reviewing a trial court's ruling on a plea to the jurisdiction, appellate court construes the pleadings liberally in favor of jurisdiction, and accepts the pleadings' factual allegations as true.

Cases that cite this headnote

[7] **Appeal and Error**

Cases Triable in Appellate Court

The existence of subject matter jurisdiction is a question of law that is reviewed de novo.

Cases that cite this headnote

[8] **States**

Liability and Consent of State to Be Sued in General

States

What are suits against state or state officers

"Sovereign immunity" protects the State, as well as its agencies and officials, from lawsuits for damages and from liability.

Cases that cite this headnote

[9] **Counties**

Capacity to sue or be sued in general

Municipal Corporations

Capacity to sue or be sued in general

Education

Capacity to sue or be sued

The common-law doctrine of governmental immunity protects political subdivisions of the State, including counties, cities, and school districts, from lawsuits for damages and from liability.

Cases that cite this headnote

[10] **Municipal Corporations**

Capacity to sue or be sued in general

Political subdivisions of the State, such as a city, have governmental immunity from suit unless the Legislature has expressly waived such immunity by statute.

2 Cases that cite this headnote

[11] **Municipal Corporations**

Rights and remedies of contractor and sureties

A political subdivision may waive its immunity from liability by entering into a contract with a private party.

Cases that cite this headnote

[12] **Pleading**

Nature and scope of defense

Immunity from liability constitutes an affirmative defense.

Cases that cite this headnote

[13] **Municipal Corporations**

Implied contracts

City was immune from subcontractor's quantum meruit claim; because the Legislature chose to limit the statutory waiver of immunity for contractual claims against governmental entities to suits for breach of express written contracts, it consciously excluded quasi-contractual claims based on an implied contract or quantum meruit from the waiver. V.T.C.A., Local Government Code § 271.152.

6 Cases that cite this headnote

[14] **Municipal Corporations**

Governmental powers in general

A municipality's "governmental functions" for purposes of the Texas Tort Claims Act (TTCA) are those conducted in the performance of purely governmental matters solely for the public benefit. V.T.C.A., Civil Practice & Remedies Code §§ 101.021 et seq.

1 Cases that cite this headnote

[15] **Municipal Corporations**

Implied contracts

The governmental/proprietary distinction employed in the Texas Tort Claims Act (TTCA) could not be used to determine municipality's immunity from suit on a contractual or quasi-contractual claim such as quantum meruit. V.T.C.A., Civil Practice & Remedies Code § 101.0215(b); V.T.C.A., Local Government Code § 271.152.

6 Cases that cite this headnote

[16] Municipal Corporations

Rights and Remedies of Contractors and Sureties Against Municipality

City's conduct in accepting the benefit of the contract to construct pollution control system at city power plant, while withholding the retainage owed to subcontractor until contractor's claims against city were resolved, did not waive its governmental immunity from subcontractor's quantum meruit claim. V.T.C.A., Local Government Code § 271.152.

Cases that cite this headnote

Attorneys and Law Firms

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Sitting: PHYLIS J. SPEEDLIN, Justice, STEVEN C. HILBIG, Justice, MARIALYN BARNARD, Justice.

Opinion

OPINION

Opinion by: PHYLIS J. SPEEDLIN, Justice.

The City of San Antonio, acting by and through CPS Energy [1] (hereinafter "CPS"), appeals the trial court's denial of its plea to the jurisdiction in this lawsuit by Wheelabrator Air Pollution Control, Inc. in which it asserts a breach of contract claim and, alternatively, a quasi-contractual quantum meruit claim to recover a 10% contract retainage withheld by CPS. This interlocutory appeal raises a question of first impression—whether the governmental/proprietary distinction employed in the Texas Tort Claims Act applies in a contractual or quasi-contractual setting to determine whether a municipality is immune from suit. We hold that the governmental/proprietary distinction does not apply, and conclude CPS is immune from suit on the quantum meruit claim. Accordingly, we reverse the trial court's order denying CPS's plea to the jurisdiction, render judgment dismissing Wheelabrator's quantum meruit claim for want of jurisdiction, and remand the cause to the trial court for further proceedings. [2]

FACTUAL AND PROCEDURAL BACKGROUND

Contract for Project. On or about August 5, 2004, Wheelabrator Air Pollution Control, Inc. ("Wheelabrator") and Casey Industrial, Inc. ("Casey") entered into a written contract with CPS for the design and construction of two baghouses at the J.T. Deely Station, a coal-fired power station owned and operated by CPS. A baghouse traps fly ash, a coal byproduct, before it enters the air, providing a reduction in emissions from a power station. CPS agreed to pay $41,818,460 to Wheelabrator and $43,541,737 to Casey for their roles in the project. Wheelabrator was involved in the engineering design and procurement, while Casey was involved in the actual construction of the baghouse units. The contract provided that CPS would withhold from Wheelabrator 10% of the total contract price ($4,173,099) as retainage. CPS fully paid Wheelabrator its contract price, except for the agreed upon 10% retainage. When Wheelabrator sought payment of the retainage in 2007, contending it had fully and timely performed, CPS informed Wheelabrator that it was going to withhold payment of the retainage pending resolution of the claims asserted by Casey against CPS. Casey sought to recover an additional $12,000,000 from CPS for costs of delay it alleged were caused by Wheelabrator. Eventually, both Casey and Wheelabrator filed suit against CPS.

Casey Lawsuit. In 2008, Casey filed suit against CPS asserting claims of breach of contract, implied contract/ quasi-contract, and quantum meruit. The litigation proceeded for three years before ***600** Wheelabrator separately filed suit against CPS. Casey filed a summary judgment motion, asserting that the three-party contract entered into by CPS, Wheelabrator, and Casey is void due to violations of Texas' procurement law requiring competitive bidding, and that Casey should therefore be allowed to recover in quantum meruit for additional work it performed. The City, acting on behalf of CPS, filed its own summary judgment motion asserting the contract is valid and that Casey is barred from any equitable recovery outside the contract. After a hearing, the trial court denied the City's motion and granted Casey's

summary judgment motion, finding that the contract is void and that Casey "is entitled to prove liability, if any, and damages, if any, under the doctrine of quantum meruit." The City also filed a plea to the jurisdiction asserting it is immune from suit for additional work or quantum meruit; the trial court denied the plea. The City is appealing both rulings in the *Casey* appeal—the summary judgment order finding the contract is void, and the denial of its plea to the jurisdiction asserting immunity from the quantum meruit claim.

Wheelabrator Lawsuit. Wheelabrator filed suit against CPS on August 23, 2011, seeking to recover the $4,173,099 in retainage funds under a breach of contract claim and, alternatively, a quantum meruit claim.[3] CPS filed a plea to the jurisdiction asserting immunity from suit because there is no waiver of sovereign immunity for contractual claims outside the scope of Chapter 271 of the Local Government Code or for quantum meruit claims in equity. Wheelabrator responded that CPS does not have any immunity from suit for functions taken in its proprietary capacity, such as operation of a public utility, and even if it had immunity, it has waived it through its conduct; therefore, Wheelabrator's quantum meruit claim should survive. Wheelabrator's pleadings allege that CPS "is not immune from suit by virtue of the express terms of the Agreement, and by virtue of Chapter 271 of the Texas Local Government Code."

At the end of a hearing on the plea to the jurisdiction, the trial court denied CPS's plea. The court's written order finding CPS is "not immune from suit for claims for additional work or quantum meruit," and denying the plea to the jurisdiction, was signed on November 15, 2011. CPS now appeals that finding. *See* TEX. CIV. PRAC. & REM.CODE ANN. § 51.014(a)(8) (West Supp.2011).

STANDARD OF REVIEW

[1] [2] [3] [4] [5] [6] [7] Subject matter jurisdiction is necessary for a court to have the authority to resolve a case. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 443 (Tex.1993). Sovereign and governmental immunity from suit deprive a trial court of subject matter jurisdiction. *Reata Const. Corp. v. City of Dallas*, 197 S.W.3d 371, 374 (Tex.2006). To invoke a trial court's subject matter jurisdiction over a claim against a governmental entity, the plaintiff must allege a valid waiver of immunity from suit and plead sufficient facts demonstrating the trial court's jurisdiction. *Tex. Dept. of Parks and Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex.2004); *Tex. Ass'n of Bus.*, 852 S.W.2d at 446. A governmental entity properly raises immunity through a plea to the jurisdiction. *Reata*, 197 S.W.3d at 374. In reviewing a trial court's ruling on a plea to the jurisdiction, we do not examine the merits of the cause ***601** of action, but consider only the plaintiff's pleadings and any evidence relevant to the jurisdictional inquiry. *Miranda*, 133 S.W.3d at 227; *County of Cameron v. Brown*, 80 S.W.3d 549, 555 (Tex.2002). We construe the pleadings liberally in favor of jurisdiction, and accept the pleadings' factual allegations as true. *Miranda*, 133 S.W.3d at 226. The existence of subject matter jurisdiction is a question of law that we review de novo. *Tex. Nat'l Res. Conservation Comm'n v. IT–Davy*, 74 S.W.3d 849, 855 (Tex.2002); *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 928 (Tex.1998).

IMMUNITY FROM SUIT

On appeal, CPS contends the trial court does not have jurisdiction over Wheelabrator's quantum meruit claim because (i) the legislature has not waived CPS's immunity from suit for quantum meruit claims, (ii) the proprietary-governmental dichotomy has not been extended beyond the tort claim context, and (iii) CPS did not waive its immunity from suit by its conduct.

Presumption of Governmental Immunity

[8] [9] [10] [11] [12] Sovereign immunity protects the State, as well as its agencies and officials, from lawsuits for damages and from liability. *Ben Bolt–Palito Blanco Consol. Indep. Sch. Dist. v. Tex. Political Subdivs. Prop./Cas. Joint Self–Ins. Fund*, 212 S.W.3d 320, 323–24 (Tex.2006) (sovereign is immune from both liability and suit). "The appurtenant common-law doctrine of governmental immunity similarly protects political subdivisions of the State, including counties, cities, and school districts." *Id.* at 324; *City of Houston v. Williams*, 353 S.W.3d 128, 134 n. 5 (Tex.2011) (noting distinction between sovereign and governmental immunity). Political subdivisions of the State, such as the City of San Antonio, have governmental immunity from suit unless the Legislature has expressly waived such immunity by statute. *Williams*, 353 S.W.3d at 134; *Ben Bolt*, 212 S.W.3d at 324. A statute shall not be construed as waiving immunity unless the waiver is effected by "clear and unambiguous" language. TEX. GOV'T CODE ANN. § 311.034 (West Supp.2011); *Williams*, 353 S.W.3d at 134. It has long been recognized that it is the Legislature's sole

province to waive immunity from suit. *IT–Davy,* 74 S.W.3d at 853–54. On the other hand, a political subdivision may waive its immunity from liability by entering into a contract with a private party. *Id.* at 854. Only immunity from suit operates as a jurisdictional bar; immunity from liability constitutes an affirmative defense. *Williams,* 353 S.W.3d at 134; *Miranda,* 133 S.W.3d at 224.

Limited Legislative Waiver of Immunity for Certain Contract Claims

The Legislature has clearly and unambiguously waived a governmental entity's immunity from suit for certain contractual claims. *Ben–Bolt,* 212 S.W.3d at 327. Chapter 271 of the Local Government Code expressly waives qualifying local governmental entities' immunity from suit for certain breach of contract claims. TEX. LOC. GOV'T CODE ANN.. §§ 271.151–.160 (West 2005 & Supp.2011). For section 271.152's limited waiver to apply, three elements must be established: (1) the party against whom waiver is asserted must be a "local governmental entity," (2) authorized to enter into contracts, and (3) the entity must have in fact entered into a "contract subject to this subchapter." *Williams,* 353 S.W.3d at 134; TEX. LOC. GOV'T CODE ANN.. § 271.152 (West 2005). A "contract subject to this subchapter" is defined as "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." ***602** TEX. LOC. GOV'T CODE ANN. § 271.151(2) (West 2005); *Williams,* 353 S.W.3d at 135. Thus, the legislative waiver of immunity in the contract context is restricted to suits for breach of a written contract for goods and services. TEX. LOC. GOV'T CODE ANN. § 271.152; *Williams,* 353 S.W.3d at 135. Wheelabrator has indeed brought a breach of contract claim based on its written contract with CPS as its primary claim, and CPS has not claimed immunity with respect to this claim.

[13] CPS argues that because the Legislature chose to limit the statutory waiver of immunity for contractual claims against governmental entities to suits for breach of express written contracts, it consciously excluded quasi-contractual claims based on an implied contract or quantum meruit from the waiver. We agree. In 2008, we addressed this issue in *Somerset Indep. Sch. Dist. v. Casias,* and held that section 271.152's waiver of immunity does not apply to an implied contract claim or claim of quantum meruit. *Somerset Indep. Sch. Dist. v. Casias,* No. 04–07–00829–CV, 2008 WL 1805533, at *3 (Tex.App.-San Antonio Apr. 23, 2008, pet. denied) (mem. op.). We concluded that, based on its plain language, section 271.152 applies only to written contracts, and that quantum meruit claims, being based in equity, "are simply not included in section 271.152's limited waiver of governmental immunity." *Id.; see Excess Underwriters at Lloyd's, London v. Frank's Casing Crew & Rental Tools, Inc.,* 246 S.W.3d 42, 49–50 (Tex.2008) (equitable theory of recovery based on quantum meruit is a quasi-contractual doctrine under which one who provides valuable services may establish that recipient has implied-in-law obligation to pay for value of services when on reasonable notice that provider expects to be paid). Several other courts of appeals have agreed. *See, e.g., Harris Cnty. Flood Control Dist. v. Great Am. Ins. Co.,* 309 S.W.3d 614, 617 (Tex.App.-Houston [14th Dist.] 2010, no pet.) (section 271.152 does not apply to quantum meruit claims, which are barred by governmental immunity) (citing *City of Houston v. Petroleum Traders Corp.,* 261 S.W.3d 350, 359–60 (Tex.App.-Houston [14th Dist.] 2008, no pet.)); *Vantage Sys. Design, Inc. v. Raymondville Indep. Sch. Dist.,* 290 S.W.3d 312, 316–17 (Tex.App.-Corpus Christi 2009, pet. denied) (holding section 271.152's waiver of immunity does not extend to quantum meruit claims); *City of Houston v. Swinerton Builders, Inc.,* 233 S.W.3d 4, 12–13 (Tex.App.-Houston [1st Dist.] 2007, no pet.) (plain language of section 271.152 limits waiver of sovereign immunity to breach of contract, and "lists no other claims, either in law or in equity;" thus, legislature did not intend to include quantum meruit claims within the waiver).

Under the rules of statutory construction, we take the plain meaning of the statutory language, which expressly limits the waiver to breach of contract claims based on written contracts, and give effect to the Legislature's omission of other types of contractual and quasi-contractual claims. TEX. GOV'T CODE ANN. § 311.022 (West 2005); *Hernandez v. Ebrom,* 289 S.W.3d 316, 318 (Tex.2009) (statutory interpretation begins with plain language of statute); *City of Rockwall v. Hughes,* 246 S.W.3d 621, 625 (Tex.2008) (court construes legislative intent as expressed by statute's words); *Cameron v. Terrell & Garrett, Inc.,* 618 S.W.2d 535, 540 (Tex.1981) (in construing statute, court gives effect not only to terms used, but also to terms the legislature chose not to use). In excluding equitable claims such as quantum meruit from the waiver, the Legislature balanced competing interests and made a policy decision that binds this court. *Somerset,* 2008 WL 1805533, at *3.

603** ***Proprietary/Governmental Distinction

[14] Wheelabrator responds to CPS's argument that there is no waiver of immunity for contractual or quasi-contractual claims outside the scope of Chapter 271 by asserting CPS has no immunity in the first place with respect to its quantum meruit claim because it acted in a proprietary capacity when it contracted with Wheelabrator and Casey for the baghouse project. Wheelabrator seeks to import the proprietary/governmental distinction from the Texas Tort Claims Act into this quasi-contractual context. In Chapter 101 of the Civil Practice and Remedies Code, known as the Texas Tort Claims Act ("TTCA"), the Legislature has clearly waived governmental immunity from liability and suit for certain tort claims arising out of its governmental functions, as specified in the Act. *See* TEX. CIV. PRAC. & REM.CODE ANN. §§ 101.021–.029 (West 2011). A municipality's governmental functions are those conducted "in the performance of purely governmental matters solely for the public benefit." *Tooke v. City of Mexia,* 197 S.W.3d 325, 343 (Tex.2006) (quotation omitted). In the TTCA, the Legislature specifically excluded from the waiver of immunity all claims arising from a municipality's proprietary functions, which it defined to include "the operation and maintenance of a public utility." TEX. CIV. PRAC. & REM.CODE ANN. § 101.0215(b) (West 2011); *Tooke,* 197 S.W.3d at 343 (a municipality's proprietary functions are those conducted "in its private capacity, for the benefit only of those within its corporate limits, and not as an arm of the government").

In arguing for application of the governmental/proprietary dichotomy to its quasi-contractual claim, Wheelabrator first relies on cases that have characterized a city's operation of a public utility as a proprietary function. *See San Antonio Indep. Sch. Dist. v. City of San Antonio,* 550 S.W.2d 262, 264 (Tex.1976) ("A city which owns and operates its own public utility does so in its proprietary capacity."); *see also Int'l Bank of Commerce of Laredo v. Union Nat'l Bank of Laredo,* 653 S.W.2d 539, 546 (Tex.App.-San Antonio 1983, writ ref'd n.r.e.) (noting that a municipality's proprietary functions have been defined to include providing gas and electric service). Wheelabrator then argues that under common law when a municipality engages in a proprietary function it is subject to the same duties and liabilities as private persons and corporations, i.e., it is not immune from claims arising out of its proprietary acts. *See Gates v. City of Dallas,* 704 S.W.2d 737, 739 (Tex.1986) (noting that, "[c]ontracts made by municipal corporations in their proprietary capacity have been held to be governed by the same rules as contracts between individuals"). Thus, Wheelabrator asserts CPS has no immunity from a common law quantum meruit claim arising out of its proprietary actions.

The flaw in Wheelabrator's argument is that this common law principle pre-dates the 2005 enactment of Chapter 271 in which the Legislature established a statutory scheme imposing a limited waiver of a municipality's immunity for certain contract claims; it excluded quasi-contract claims such as quantum meruit from the statutory waiver of immunity, as discussed supra. As it had already done in the tort-claims context, the Legislature could have incorporated the proprietary/governmental distinction into the statutory waiver scheme for contract claims; however, it chose not to incorporate that distinction into a contract setting. *See Tex. Mut. Ins. Co. v. Ruttiger,* 381 S.W.3d 430, 451 (Tex.2012) (the court "presumes the Legislature deliberately and purposefully selects words and phrases it enacts, as well as deliberately and purposefully omits words and phrases it does not enact"). It is the ***604** Legislature's function to weigh competing interests and establish public policy. *Id.* at 449. "In the contract-claims context, legislative control over sovereign immunity allows the Legislature to respond to changing conditions and revise existing agreements if doing so would benefit the public." *IT–Davy,* 74 S.W.3d at 854. In excluding quasi-contractual claims from Chapter 271's waiver of immunity, the Legislature made a public policy decision. *Tooke,* 197 S.W.3d at 332–33 (Chapter 271's waiver of governmental immunity in the contract-claims context involves complex policy choices best made by the Legislature).

In addition, *Gates* pre-dates *Tooke* in which the Supreme Court made clear that sovereign immunity is the "default" rule for municipalities with respect to all types of claims. *Id.* at 331–32 (sovereign immunity in the absence of a clear legislative waiver is the firmly established principle); *see also Wichita Falls State Hosp. v. Taylor,* 106 S.W.3d 692, 694 n. 3 (Tex.2003) (general rule is immunity). When it issued *Tooke* the Supreme Court was well aware of the common law principle espoused in *Gates,* i.e., that "contracts made by municipal corporations in their proprietary capacity ... [are] governed by the same rules as contracts between individuals." *Gates,* 704 S.W.2d at 739. With that knowledge, the Supreme Court used a compare signal when citing *Gates* right after explicitly stating it has never held that the proprietary/governmental distinction applies to determine whether immunity is waived for breach of contract claims, thereby putting *Gates* into question. *Tooke,* 197 S.W.3d at 343 n. 89. Moreover, *Gates* deals with immunity from

liability, not immunity from suit. *Gates*, 704 S.W.2d at 739 (proprietary functions subject municipalities to the "same duties and liabilities" as private persons).

[15] By asking us to hold that CPS has no immunity from a common law quantum meruit claim arising out of a proprietary function, Wheelabrator requests that we create an exception to the default principle of sovereign immunity confirmed in *Tooke*. We decline to do so, as that is the sole province of the Legislature. *IT–Davy*, 74 S.W.3d at 853–54. As of this date, neither the Texas Legislature nor the Texas Supreme Court has stated that the proprietary/governmental distinction used in the tort-claims context is to be used to determine a municipality's immunity from suit on a contractual or quasi-contractual claim such as quantum meruit. Indeed, in considering application of the governmental/proprietary distinction to a breach of contract claim, the Supreme Court expressly said in *Tooke*, "we have never held that this same distinction [proprietary/governmental functions] determines whether immunity from suit is waived for breach of contract claims, and we need not determine that issue here." *Tooke*, 197 S.W.3d at 343. Since *Tooke*, the Supreme Court has not revisited the issue. [4]

Wheelabrator cites several courts of appeals cases decided after *Tooke* that it characterizes as applying the governmental/proprietary distinction in determining whether governmental immunity was ***605** waived for contract and quantum meruit claims, but they are not persuasive. In all the cases, the courts of appeals did not reach the issue of whether the governmental/proprietary distinction applies to contractual or quasi-contractual claims because they determined the municipality was engaged in a governmental function. *See, e.g., City of San Antonio v. Reed S. Lehman Grain, Ltd.*, No. 04–04–00930–CV, 2007 WL 752197, at *3 (Tex.App.-San Antonio Mar. 14, 2007, pet. denied) (city was acting in a governmental capacity and was immune from suit raising breach of contract and estoppel claims); *East Houston Estate Apartments, L.L.C. v. City of Houston*, 294 S.W.3d 723, 731–32 (Tex.App.-Houston [1st Dist.] 2009, no pet.) (city acted in governmental capacity in entering into loan agreement and was thus immune from breach of contract claim); *City of Emory v. Lusk*, 278 S.W.3d 77, 83 (Tex.App.-Tyler 2009, no pet.) (city was immune from suit for breach of contract); *City of Houston v. Petroleum Traders Corp.*, 261 S.W.3d 350, 355–56 (Tex.App.-Houston [14th Dist.] 2008, no pet.) (stating it need not decide whether the governmental/proprietary dichotomy applies in contract actions, but "even assuming for argument's sake that the dichotomy does apply" to the contract claim, the city's procurement of fuel was a governmental function); *City of Weslaco v. Borne*, 210 S.W.3d 782, 790–93 (Tex.App.-Corpus Christi 2006, pet. denied) (city's operation of mobile home park was governmental function, and thus city was immune from suit for breach of contract). [5]

In sum, the Texas Supreme Court has so far declined to address whether application of the governmental/proprietary distinction to a contractual or quasi-contractual setting is appropriate for purposes of determining a municipality's immunity from suit. *Tooke*, 197 S.W.3d at 343. The appellate courts that have considered the issue since *Tooke* have not squarely reached the issue, concluding that governmental functions were involved. In Chapter 271, the Legislature has balanced competing public and private interests and enacted a comprehensive scheme for handling contract claims against municipalities. *Sharyland Water Supply Corp. v. City of Alton*, 354 S.W.3d 407, 414 (Tex.2011). The statutory scheme for waiving a municipality's immunity from suit in the contract context omits quasi-contractual claims such as quantum meruit. *Somerset*, 2008 WL 1805533, at *3. The Legislature easily could have included the proprietary/governmental dichotomy it used in the tort-claims context in the contract-claims scheme, but chose not to do so. As it is solely the Legislature's role to "clearly and unambiguously" waive governmental immunity from suit, and it has not done so for quantum meruit claims, we hold CPS is immune from suit on Wheelabrator's quantum meruit claim. *See IT–Davy*, 74 S.W.3d at 853–54.

Waiver of Immunity by Conduct

[16] Finally, Wheelabrator makes an equitable argument, contending CPS waived its immunity from the quantum meruit claim by accepting benefits under the contract while wrongfully withholding the retainage; in addition, it asserts CPS was complicit in violating the competitive bidding laws based on the trial court's finding in the *Casey* litigation that the ***606** contract is void. CPS asserts that the circumstances of this case do not warrant a finding of waiver of immunity by conduct, and further asserts the concept of waiver by conduct has not been applied by the courts. We agree.

In arguing for application of a waiver-by-conduct, Wheelabrator relies on the Supreme Court's footnote in a 1997 case, *Federal Sign v. Texas Southern University*, that suggested there could be circumstances where the State waives its sovereign immunity by its conduct, other than by

entering into a contract. *Fed. Sign v. Tex. S. Univ.*, 951 S.W.2d 401, 408 n. 1 (Tex.1997). Despite the footnote, in the years since *Federal Sign* the Supreme Court has declined to apply a waiver-by-conduct theory. *See, e.g., Sharyland*, 354 S.W.3d at 414 (it is sole province of legislature to recognize waiver-by-conduct exception to immunity in breach of contract suit); *IT–Davy*, 74 S.W.3d at 856–57 (rejecting a waiver-by-conduct argument and stating it is legislature's province to waive immunity); *Tex. A & M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 840 (Tex.2007) (governmental unit does not waive immunity from breach of contract action by accepting benefits under a contract); *Catalina Dev., Inc. v. County of El Paso*, 121 S.W.3d 704, 705–06 (Tex.2003) (nothing in circumstances showed waiver of immunity by conduct). We have also repeatedly declined to apply waiver-by-conduct. *See Somerset*, 2008 WL 1805533, at *4 (also noting that although supreme court has discussed the "possibility" of waiver by conduct absent a legislative waiver of immunity, "it has recognized a 'tension' in this waiver concept"); *Dimmit Cnty. Mem'l Hosp. v. CPM Med., LLC*, No. 04–11–00710–CV, 2012 WL 1431366, at *5 (Tex.App.-San Antonio Apr. 25, 2012, no pet.) (mem. op.). Based on this precedent, CPS's conduct in accepting the benefit of the contract while withholding the retainage did not waive its governmental immunity.

CONCLUSION

Because the Legislature's limited waiver of governmental immunity from suit in Chapter 271 does not include quantum meruit claims, and the proprietary/governmental distinction from the TTCA does not apply in this contractual or quasi-contractual context, CPS is immune from suit on Wheelabrator's quantum meruit claim. In addition, the circumstances do not support a waiver of immunity by conduct. Therefore, the trial court erred in denying CPS's plea to the jurisdiction as to the quantum meruit claim. Accordingly, we reverse the trial court's order denying CPS's plea to the jurisdiction and render judgment that Wheelabrator's quantum meruit claim is dismissed for want of jurisdiction. We remand the cause to the trial court for further proceedings consistent with this opinion.

Footnotes

1 The City of San Antonio owns and operates the electric and gas utility known as CPS Energy, which is managed by a five-member board of directors; the City's mayor is a voting member of the board.

2 A related appeal also issued on this date, *City of San Antonio, Acting By and Through City Public Service Board a/k/a CPS Energy v. Casey Industrial, Inc.* (Appeal Nos. 04–11–791–CV & 04–11–00814–CV), arises out of the same underlying dispute and raises the same issue as to whether CPS is immune from suit on a quantum meruit claim, along with an additional issue concerning the validity of the contract.

3 Wheelabrator was not, and is not currently, a participant in the *Casey* litigation. CPS has sought to consolidate the *Wheelabrator* litigation with the *Casey* litigation at the trial level, but the trial court has not yet ruled on the issue of consolidation.

4 Wheelabrator cites us to *PKG Contracting, Inc. v. City of Mesquite*, 197 S.W.3d 388, 388–89 (Tex.2006) (per curiam), in which the Court rejected PKG's argument that the city's immunity from suit for breach of contract was waived because it acted in a proprietary capacity when it contracted for construction of a storm drainage system, finding it was part of the city's governmental functions. *PKG* was issued on the same day as *Tooke*, and the immunity analysis in *PKG* was not conducted under Chapter 271; in fact, the Court noted the newly enacted statute, and remanded for a determination of whether the statutory waiver of immunity applied to the breach of contract claim at issue. *Id.* at 389.

5 Wheelabrator also relies on *Temple v. City of Houston*, in which the court held the city had no sovereign immunity from a breach of contract suit because it was performing a proprietary function when it provided life insurance benefits to its employees. *Temple v. City of Houston*, 189 S.W.3d 816, 819–21 (Tex.App.-Houston [1st Dist.] 2006, no pet.). *Temple* was decided in January 2006, before *Tooke* was issued.

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APPENDIX C

424 S.W.3d 184
Court of Appeals of Texas,
Amarillo.

REPUBLIC POWER PARTNERS, L.P., Appellant
v.
The CITY OF LUBBOCK, Appellee.

No. 07–12–00438–CV. | Feb. 5, 2014.

Synopsis

Background: Private business entity that had a development agreement with municipal power agency to form a partnership to develop, finance, and operate future electric energy generation and transmission facility brought action against city, which was member of municipal power agency, and the agency for breach of development agreement. The 237th District Court, Lubbock County, Paul Davis, J., granted city's plea to the jurisdiction and denied agency's plea to the jurisdiction. Private business entity appealed.

Holdings: The Court of Appeals, Patrick A. Pirtle, J., held that:

[1] city had sovereign immunity from liability from action, and

[2] city was not a party to the development agreement, and, thus, did not waive sovereign immunity by the fact that agency entered into agreement.

Affirmed.

See also —— S.W.3d ——, 2014 WL 486287.

West Headnotes (22)

[1] Municipal Corporations
Evidence

The party suing a governmental entity bears the burden of affirmatively demonstrating the trial court has jurisdiction to hear the dispute.

Cases that cite this headnote

[2] Pleading
Plea to the Jurisdiction

A plea to the jurisdiction is a dilatory plea, the purpose of which is to defeat a cause of action without regard to whether the claims asserted have merit.

Cases that cite this headnote

[3] Pleading
Plea to the Jurisdiction

In the context of a claim of sovereign or governmental immunity, the proponent of a plea to the jurisdiction contends the trial court lacks subject matter jurisdiction over the claim because it is protected by immunity from suit which has not been legislatively waived.

Cases that cite this headnote

[4] Pleading
Plea to the Jurisdiction

Because immunity from suit defeats a trial court's subject matter jurisdiction, a plea to the jurisdiction is the proper way to assert a claim of sovereign or governmental immunity from suit.

Cases that cite this headnote

[5] Courts
Determination of questions of jurisdiction in general

Whether a court has subject matter jurisdiction is a question of law.

Cases that cite this headnote

[6] Pleading
Questions of law and fact

If the evidence creates a fact question regarding the existence of jurisdictional facts, the trial court cannot grant the plea to the jurisdiction and the fact issue must be resolved by the fact finder.

Cases that cite this headnote

[7] **Pleading**

Questions of law and fact

If the relevant evidence is undisputed or fails to raise a fact question on the jurisdictional issue, the trial court rules on plea to the jurisdiction as a matter of law.

Cases that cite this headnote

[8] **Appeal and Error**

Cases Triable in Appellate Court

Court of Appeals reviews a trial court's ruling on a plea to the jurisdiction under a de novo standard of review.

Cases that cite this headnote

[9] **Appeal and Error**

Review Dependent on Whether Questions Are of Law or of Fact

In reviewing a plea to the jurisdiction, Court of Appeals exercises its own discretion and redetermines each legal issue, without giving deference to the lower court's decision.

Cases that cite this headnote

[10] **States**

Liability and Consent of State to Be Sued in General

States

What are suits against state or state officers

Sovereign immunity protects the State, as well as its agencies and officials, from lawsuits for damages and from liability.

Cases that cite this headnote

[11] **Counties**

Capacity to sue or be sued in general

Education

Immunity in general

Municipal Corporations

Capacity to sue or be sued in general

The common law doctrine of governmental immunity protects political subdivisions of the state, including counties, cities, and school districts.

Cases that cite this headnote

[12] **States**

Liability and Consent of State to Be Sued in General

States

Necessity of Consent

The state and its political subdivisions are protected from both lawsuits and liability unless: (1) immunity does not apply to the claim, or (2) immunity has been waived.

Cases that cite this headnote

[13] **Municipal Corporations**

Rights and remedies of contractor and sureties

Public Contracts

Defenses

In the context of a suit arising from a breach of contract, a governmental entity may necessarily waive immunity from liability by entering into the contract, thereby binding itself to the terms of the agreement, but not waive immunity from suit.

Cases that cite this headnote

[14] **Municipal Corporations**

Capacity to sue or be sued in general

Governmental immunity may be waived, and the Legislature has the exclusive authority to do so by statute.

Cases that cite this headnote

[15] **Municipal Corporations**

Capacity to sue or be sued in general

Any ambiguity in a statute should be resolved in favor of retaining governmental immunity. V.T.C.A., Government Code § 311.034.

Cases that cite this headnote

[16] **Municipal Corporations**
Rights and remedies of contractor and sureties
Public Contracts
Defenses

City member of a municipal power agency had sovereign immunity from liability in action by private business entity that had a development agreement with agency to form a partnership to develop, finance, and operate future electric energy generation and transmission facility for breach of development agreement; legislature could have incorporated the proprietary/governmental distinction into the statutory waiver scheme for contract claims, but it chose not to do so, and legislature specifically sought to waive immunity to suit for certain claims arising under written contracts with governmental entities when the action fell within the category of contracts for which immunity was waived. V.T.C.A., Civil Practice & Remedies Code § 101.0215(a); V.T.C.A., Local Government Code § 271.152.

1 Cases that cite this headnote

[17] **Municipal Corporations**
Governmental powers in general

Texas Tort Claims Act clearly waives a municipality's governmental immunity from liability and suit for certain tort claims arising out of its governmental functions. V.T.C.A., Civil Practice & Remedies Code § 101.0215(a).

Cases that cite this headnote

[18] **Municipal Corporations**
Corporate powers in general

Sovereign immunity from liability applies to claims arising from the breach of an express contract arising out of the performance of a proprietary function. V.T.C.A., Local Government Code § 271.152.

Cases that cite this headnote

[19] **Municipal Corporations**
Rights and remedies of contractor and sureties
Public Contracts
Defenses

City was not a party to development agreement between municipal power agency and private business entity under which entity was required to form a partnership to develop, finance, and operate future electric energy generation and transmission facility, and, thus, city did not waive immunity from suit by entity for breach of development agreement by the fact that agency entered into agreement, although city was a member of the agency and was named in the opening paragraph of the agreement, where none of the documents were executed on behalf of any of the cities, and there was no intent that the city was a party or even a third-party beneficiary to the agreement, and, to the contrary, the agreement specified that the provisions of the agreement were for the exclusive benefit of the entity and agency. V.T.C.A., Local Government Code § 271.152.

Cases that cite this headnote

[20] **Municipal Corporations**
Rights and remedies of contractor and sureties
Public Contracts
Defenses

For the state's waiver of immunity to apply in breach of contract claim against a governmental entity, three requirements must be established: (1) the party against whom the waiver is asserted must be a local governmental entity; (2) the entity must be authorized by statute or the Constitution to enter into contracts; and (3) the entity must in fact have entered into a contract that is subject to subchapter of statutes governing adjudication of claims arising under written contracts with local governmental entities. V.T.C.A., Local Government Code § 271.152.

Cases that cite this headnote

[21] Municipal Corporations

Rights and remedies of contractor and sureties

Public Contracts

Defenses

In order for a contract to be subject to subchapter of statutes governing adjudication of claims arising under written contracts with local governmental entities, it must be: (1) in writing, (2) state the essential terms, (3) provide for goods or services, (4) to the local governmental entity, and (5) be executed on behalf of the local governmental entity. V.T.C.A., Local Government Code § 271.151 et seq.

Cases that cite this headnote

[22] Contracts

Duties and liabilities of third persons

A contract generally binds no one except the parties to it.

Cases that cite this headnote

Attorneys and Law Firms

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Thomas S. Leatherbury, Dallas, Adrian J. Rodriguez, Dallas, Matthew R. Stammel, Dallas, for Appellee.

Before CAMPBELL and HANCOCK and PIRTLE, JJ.

Opinion

OPINION

PATRICK A. PIRTLE, Justice.

This is an accelerated appeal wherein Appellant, Republic Power Partners, L.P., challenges the trial court's order granting the plea to the jurisdiction filed by Appellee, the City of Lubbock, in a suit filed by Republic Power claiming breach of contract and breach of warranties by the City of Lubbock and West Texas Municipal Power Agency (WTMPA). Presenting three issues, Republic Power questions whether the trial court erroneously granted the plea to the jurisdiction given that (1) the City of Lubbock was engaged in a proprietary function for which it has no immunity from suit, (2) governmental immunity has been waived for written contract claims against local governmental entities under section 271.152 of the Texas Local Government Code, and (3) the City of Lubbock waived its immunity from suit by its conduct. For the reasons to follow, we affirm.

FACTUAL BACKGROUND

In 1983 the cities of Brownfield, Floydada, Lubbock and Tulia formed WTMPA for the purpose of obtaining a reliable and adequate source of electric energy for its citizens. WTMPA is a municipal power agency created pursuant to subchapter C of chapter 163 of the Texas Utilities Code. *See* § 163.054(a). A municipal power agency created pursuant to this subchapter is a separate municipal corporation, a political subdivision of this State, and a political entity and corporate body distinct from the public entities creating it. *See id.* at § 163.054(c). A municipal power agency is expressly authorized to enter into contracts necessary to the full exercise of its powers, which includes the authority to enter into a contract, lease or agreement for the generation, transmission, sale or exchange of electric energy. *See id.* at § 163.060.

WTMPA currently obtains the electric energy it resells to its member cities from ***188** Southwestern Public Service (SPS). Under the *Power Purchase Agreement* with SPS, WTMPA is required to purchase all of its electric energy from SPS through May 2019. In 2007, WTMPA was notified by SPS that the existing *Power Purchase Agreement* would not be renewed. At that time, WTMPA began contemplating how it was going to supply electrical energy to its member cities after expiration of the existing *Power Purchase Agreement.* WTMPA ultimately negotiated and executed a *Development Agreement* with Republic Power, a private business entity, for the purpose of forming a partnership to develop, finance and operate future electric energy generation and transmission facilities. [1]

The *Development Agreement* required WTMPA to form a local government corporation to own and operate a power generation facility and issue bonds to finance its construction. The *Development Agreement* was executed on August 1,

2008, and on September 25, 2008, WTMPA's Board of Directors unanimously approved High Plains Diversified Energy Corporation as the local government corporation designated to own and operate the electric energy generation and transmission facilities contemplated by the agreement. Thereafter, one addendum dated July 23, 2009, and two amendments dated October 9, 2009, and May 18, 2011, were added to the *Development Agreement.* Initially, per the *Development Agreement*, the "Project Owner" was WTMPA, but those rights and obligations were assigned to High Plains.

Over the next three years, Republic Power raised millions in capital and expended considerable sums completing feasibility studies and arranging for financing of the project. The *Development Agreement* provided for issuance of first mortgage revenue bonds by the local government corporation, ultimately High Plains, for the purpose of obtaining the balance of the funds necessary to complete the project. In furtherance of that financing obligation, a bond validation hearing was ultimately scheduled in a Lubbock County district court to approve issuance of the revenue bonds.

Prior to that hearing, at a regularly scheduled meeting of the board of High Plains, a dispute arose as to the allocation of any surplus revenue generated by the project. Due to its greater usage of the electric energy to be generated, the City of Lubbock believed it should receive a greater percentage of any surplus revenue. The Board of Directors disagreed and ultimately, at the bond validation hearing, the City of Lubbock objected to issuance of the revenue bonds by arguing High Plains was not a valid local government corporation and WTMPA did not have the authority to create it. The district court agreed with the City of Lubbock and dismissed the bond validation proceeding with prejudice. As a result, no revenue bonds were ever issued.

After the bond validation suit failed, Republic Power filed the underlying suit against the City of Lubbock and WTMPA alleging breach of the *Development Agreement.* Initially, Republic Power alleged that WTMPA breached the agreement but sought to hold the City of Lubbock liable under a joint enterprise theory. Both defendants filed pleas to the jurisdiction asserting immunity from suit. Republic Power then amended its petition to allege the City of Lubbock directly breached the *Development Agreement.* In response, the City of Lubbock filed an amended plea to the jurisdiction. Following a hearing, the trial court granted the City of Lubbock's ***189** amended plea but denied WTMPA's plea. This appeal followed. [2]

STANDARD OF REVIEW— PLEA TO THE JURISDICTION

[1] [2] [3] [4] The party suing a governmental entity bears the burden of affirmatively demonstrating the trial court has jurisdiction to hear the dispute. *Tex. Dep't. of Criminal Justice v. Miller,* 51 S.W.3d 583, 587 (Tex.2001). A plea to the jurisdiction is a dilatory plea, the purpose of which is to defeat a cause of action without regard to whether the claims asserted have merit. *Bland Independent School Dist. v. Blue,* 34 S.W.3d 547, 554 (Tex.2000). In the context of a claim of sovereign or governmental immunity, the proponent of a plea to the jurisdiction contends the trial court lacks subject matter jurisdiction over the claim because it is protected by immunity from suit which has not been legislatively waived. Because immunity from suit defeats a trial court's subject matter jurisdiction, *Tex. Dep't. of Transp. v. Jones,* 8 S.W.3d 636, 638 (Tex.1999), a plea to the jurisdiction is the proper way to assert a claim of sovereign or governmental immunity from suit. *Bland,* 34 S.W.3d at 555.

[5] [6] [7] [8] [9] Whether a court has subject matter jurisdiction is a question of law. *Tex. Natural Res. Conservation Comm'n v. IT–Davy*, 74 S.W.3d 849, 855 (Tex.2002). Therefore, if the evidence creates a fact question regarding the existence of jurisdictional facts, the trial court cannot grant the plea to the jurisdiction and the fact issue must be resolved by the fact finder. *Tex. Dep't of Parks & Wildlife v. Miranda,* 133 S.W.3d 217, 227–28 (Tex.2004). A court deciding a plea to the jurisdiction is not required to look solely to the pleadings but may consider evidence submitted by the parties, and it must do so, when necessary to resolve the jurisdictional issues raised. *Bland,* 34 S.W.3d at 555. If the relevant evidence is undisputed or fails to raise a fact question on the jurisdictional issue, the trial court rules on the plea to the jurisdiction as a matter of law. *Miranda,* 133 S.W.3d at 228. Accordingly, we review a trial court's ruling on a plea to the jurisdiction under a *de novo* standard of review. *Tex. D.O.T. & City of Edinburg v. A.P.I. Pipe & Supply, LLC,* 397 S.W.3d 162, 166 (Tex.2013); *Miranda,* 133 S.W.3d at 226. In doing so, we exercise our own discretion and redetermine each legal issue, without giving deference to the lower court's decision. *See Quick v. City of Austin,* 7 S.W.3d 109, 116 (Tex.1999) (op. on reh'g).

SOVEREIGN/GOVERNMENTAL IMMUNITY

[10] **[11]** **[12]** Sovereign immunity protects the State, as well as its agencies and officials, from lawsuits for damages and from liability. *Ben Bolt–Palito Blanco Consol. Indep. Sch. Dist. v. Texas Political Subdivs. Prop./ Cas. Joint Self–Ins. Fund,* 212 S.W.3d 320, 323–24 (Tex.2006); *Reata Constr. Corp. v. City of Dallas,* 197 S.W.3d 371, 374 (Tex.2006). Similarly, the common law doctrine of governmental immunity protects political subdivisions of the State, including counties, cities and school districts. *Ben Bolt,* 212 S.W.3d at 324. Under the doctrines of sovereign and governmental immunity, ***190** it has long been recognized that there are two separate components to immunity: (1) immunity from liability, which bars enforcement of a judgment against a governmental entity, and (2) immunity from suit, which bars suit against the governmental entity altogether. *Tooke v. City of Mexia,* 197 S.W.3d 325, 332 (Tex.2006). Accordingly, the State and its political subdivisions are protected from both lawsuits and liability unless (1) immunity does not apply to the claim or (2) immunity has been waived. *IT–Davy,* 74 S.W.3d at 853.

[13] These components of immunity have come to be applied in a variety of circumstances to promote the pragmatic purpose of immunity, which is to "shield the public from the costs and consequences of improvident actions of their governments." *Tooke,* 197 S.W.3d at 332. Therefore, in the context of a suit arising from a breach of contract, a governmental entity may necessarily waive immunity from liability by entering into the contract, thereby binding itself to the terms of the agreement, but not waive immunity from suit. *Id. See also Federal Sign v. Texas S. Univ.,* 951 S.W.2d 401, 405–06 (Tex.1997).

[14] **[15]** Immunity may, however, be waived and the Legislature has the exclusive authority to do so by statute. To ensure that this legislative control is not lightly disturbed, statutes waiving immunity are strictly construed as not waiving immunity unless that waiver is effected by "clear and unambiguous" language. *See* TEX. GOV'T CODE ANN. § 311.034 (West 2013). *See also Oncor Elec. Delivery Co. LLC v. Dallas Area Rapid Transit,* 369 S.W.3d 845, 849 (Tex.2012); *Tooke,* 197 S.W.3d at 332–33. Any ambiguity should be resolved in favor of retaining immunity. *Wichita Falls State Hosp. v. Taylor,* 106 S.W.3d 692, 697 (Tex.2003).

In determining whether immunity has been waived, the Texas Supreme Court has consistently deferred to the Legislature, because doing so allows the Legislature to protect the complex policymaking function surrounding suits against governmental entities. *IT–Davy,* 74 S.W.3d at 853–54. As more fully discussed below, the Texas Legislature adopted section 271.152 of the Local Government Code to deal with the waiver of governmental immunity in the context of a breach of contract claim. *See* TEX. LOCAL GOV'T CODE ANN. § 271.152 (West 2005). The Supreme Court has specifically held that "legislative control over sovereign immunity allows the Legislature to respond to changing conditions and revise existing agreements if doing so would benefit the public." *Tooke,* 197 S.W.3d at 332 (quoting *IT–Davy,* 74 S.W.3d at 854). With these principles in mind, we turn to the parties' arguments.

ANALYSIS

Proprietary/Governmental Dichotomy

[16] By its first issue, Republic Power contends the trial court erred in granting the City of Lubbock's plea to the jurisdiction because immunity does not apply to suits arising from the performance of a proprietary function. Specifically, Republic Power contends that because "the construction and operation of an electric utility" is a proprietary function, no governmental immunity exists. We disagree.

In presenting this argument, Republic Power seeks to incorporate the proprietary/governmental distinction from common law and the Texas Tort Claims Act, TEX. CIV. PRAC. & REM.CODE ANN. §§ 101.021–.029 (West 2011), into this breach of contract claim. WTMPA contends the City of Lubbock was engaged in a proprietary function when it entered into the *Development Agreement* for the express purpose of providing electrical energy ***191** to the citizens of West Texas, and thus no immunity from suit exists against a claim based on that agreement. Relying on *Tooke,* 197 S.W.3d at 343, and *City of Galveston v. Posnainsky,* 62 Tex. 118, 133–34, 1884 WL 8868, at *12, 1884 Tex. LEXIS 196, at *32 (1884), WTMPA contends the Court has repeatedly held that immunity does not apply to tort claims arising from the governmental performance of proprietary functions. WTMPA seeks to extend that interpretation to contract claims by contending that the public policies underlying the proprietary/governmental dichotomy suggest no real justification for treating contract claims any different than tort claims. WTMPA also relies on three Texas

courts of appeals' decisions to support its claim: *Temple v. City of Houston*, 189 S.W.3d 816, 820–21 (Tex.App.-Houston [1st Dist.] 2006, no pet.), *Casso v. City of McAllen*, No. 13–08–00618–CV, 2009 WL 781863, at *1–2, 2009 Tex.App. LEXIS 2049, at *4–6 (Tex.App.-Corpus Christi Mar. 26, 2009, pet. denied) (mem. op.), and *Bailey v. City of Austin*, 972 S.W.2d 180, 192–93 (Tex.App.-Austin 1998, pet. denied).

On the other hand, relying on *City of San Antonio ex rel. City Public Service Board v. Wheelabrator Air Pollution Control, Inc.*, 381 S.W.3d 597, 603–05 (Tex.App.-San Antonio 2012, pet. denied),[3] the City of Lubbock responds that the proprietary/governmental dichotomy has never been recognized by the Texas Supreme Court in a breach of contract case. Furthermore, recognizing that *Wheelabrator* dealt with an attempt to avoid the doctrine of immunity in the context of a quasi-contractual claim for damages involving a proprietary function, the City of Lubbock further argues that even if immunity was not applicable to a contractual claim arising from a proprietary function, the activity involved in this case, to-wit: the operation and maintenance of an electric utility, was a "classic governmental function" protected by sovereign immunity.[4]

[17] The Texas Tort Claims Act clearly waives a municipality's governmental immunity from liability and suit for certain tort claims arising out of its governmental functions. A municipality's "governmental functions" are those functions conducted "in the performance of purely governmental matters solely for the public benefit." *Tooke*, 197 S.W.3d at 343 (quoting *Dilley v. City of Houston*, 148 Tex. 191, 222 S.W.2d 992, 993 (1949)). Specifically, the Legislature provided that a municipality is not immune from liability for damages arising out of its "governmental functions," which it went on to define as "those functions that are enjoined on a municipality by law and are given it by the state as part of the state's sovereignty, to be exercised by the municipality in the interest of the general public ...." TEX. CIV. PRAC. & REM.CODE ANN. § 101.0215(a) (West Supp.2013). In the non-exhaustive list contained in the ***192** Texas Tort Claims Act, the Legislature did not include the operation and maintenance of a public utility as a governmental function. *See id.* In contrast, the Legislature specifically excluded from this waiver of immunity all claims arising from a municipality's performance of a "proprietary function," which it went on to define as including "the operation and maintenance of a public utility." *Id.* at § 101.0215(b); *Tooke*, 197 S.W.3d at 343 (holding that a municipality's proprietary functions are those functions conducted "in its private capacity, for the benefit only of those within its corporate limits, and not as an arm of the government").

In arguing for the application of this proprietary/ governmental dichotomy in the context of a breach of contract claim, Republic Power argues that a municipality is not immune from claims arising out of its proprietary acts because under common law, when a municipality engages in a proprietary function, it is subject to the same duties and liabilities as private citizens and corporations. *See Gates v. City of Dallas*, 704 S.W.2d 737, 739 (Tex.1986) (holding that "[c]ontracts made by municipal corporations in their proprietary capacity have been held to be governed by the same rules as contracts between individuals").[5] In pursuing this argument Republic Power fails to distinguish the two distinct components of immunity: (1) immunity from liability and (2) immunity from suit. *Tooke*, 197 S.W.3d at 332. Interpreting contracts by the "same rules" is a function of liability, not a function of immunity from suit. Another serious flaw in Republic Power's argument is that the common law principle it relies upon pre-dates the adoption of both the Texas Tort Claims Act and the 2005 legislative enactment of subchapter I of chapter 271 of the Texas Local Government Code, entitled *Adjudication of Claims Arising Under Written Contracts With Local Governmental Entities. See* TEX. CIV. PRAC. & REM.CODE ANN. §§ 101.021–.029 (West 2011) and TEX. LOCAL GOV'T CODE ANN. § 271.152 (West 2005).

By enacting subchapter I of chapter 271 of the Texas Local Government Code, the Legislature specifically sought to waive immunity to suit for *certain claims* arising under written contracts with governmental entities. § 271.152; *Kirby Lake Dev., Ltd. v. Clear Lake City Water Auth.*, 320 S.W.3d 829, 838 (Tex.2010). In 2006, the Court stated that this section was enacted "to loosen the immunity bar so that *all* local governmental entities that have been given ... the statutory authority to enter into contracts shall not be *immune from suits* arising from those contracts." *Ben Bolt*, 212 S.W.3d at 327 (second emphasis added). Specifically, section 271.152 provides, "[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 ***193** 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." This language is a clear and unambiguous waiver of governmental

immunity from suit for a breach of contract claim falling within the category of contracts subject to subchapter I of chapter 271. *City of Dallas v. Albert*, 354 S.W.3d 368, 377 (Tex.2011) (holding that section 271.152 is a clear and unambiguous waiver of governmental immunity for breach of contract suits falling within the category of contracts subject to subchapter I of chapter 271).

"As it had already done in the tort-claims context [through the Texas Tort Claims Act], the Legislature could have incorporated the proprietary/governmental distinction into the statutory waiver scheme for contract claims; however, it chose not to incorporate that distinction into a contract setting." *Wheelabrator*, 381 S.W.3d at 603. We must presume the Legislature knew and understood exactly what it was doing when it enacted 271.152, and that it deliberately and purposefully omitted that distinction when it selected the words and phrases that it enacted. *Id.* at 603–04. Because it is the Legislature's function to weigh competing interests and establish public policy, specifically in the realm of governmental immunity, we conclude the Legislature did make a policy decision regarding the proprietary/ governmental dichotomy—and that policy decision was that the doctrine of immunity applies to contract claims arising from proprietary functions, subject to specific provisions of waiver found in section 271.152. *Id.* at 604.

As mentioned above, WTMPA relies on three Texas courts of appeals' decisions to support its position that immunity from suit does not apply because the City of Lubbock was engaging in a proprietary function. In *Temple*, the First District Court of Appeals held the City of Houston had no governmental immunity from a breach of contract suit because it was performing a proprietary function when it provided life insurance benefits to its employees. 189 S.W.3d at 819–21. Similarly, in *Bailey*, the Third Court of Appeals, relying on *Gates*, 704 S.W.2d at 739, and "[s]trictly construing the doctrine of municipal immunity *against* the municipality," held the City of Austin did not have governmental immunity because it was performing a proprietary function. 972 S.W.2d at 193 (emphasis added). Finally, in *Casso*, the Thirteenth Court of Appeals held that paying employee health insurance premiums amounted to a proprietary function that prevented the City of McAllen from asserting governmental immunity. 2009 WL 781863, at *4, 2009 Tex.App. LEXIS 2049, at *14. Because *Temple* and *Bailey* were decided before *Tooke* was issued and prior to the enactment of subchapter I of chapter 271 of the Texas Local Government Code, we question their reasoning and find them to be inapposite to this case. Because *Casso* incorrectly relies on *Tooke* and *Temple* for the *carte blanche* proposition that "a municipality is not immune from suit when it engages in the exercise of proprietary functions," we simply reject its reasoning. *Id.*

[18] Finding the reasoning of the San Antonio Court of Appeals in *Wheelabrator* to be convincing, we extend that ruling to find immunity does apply to claims arising from the breach of an express contract arising out of the performance of a proprietary function. [6] Issue one is overruled.

***194 Statutory Waiver of Immunity**

[19] By its second issue, Republic Power maintains the trial court erroneously granted the City of Lubbock's plea to the jurisdiction because immunity, if any, was waived under section 271.152. Again, we disagree.

Consistent with our disposition of issue one, there is but one route to the courthouse for breach-of-contract claims against a governmental entity, and that route is through section 271.152. *General Servs. Comm'n v. Little–Tex Insulation Co.*, 39 S.W.3d 591, 597 (Tex.2001). By enacting section 271.152, the Legislature specifically provided that a local governmental entity "waives sovereign immunity to suit for the purpose of adjudicating a claim for breach of contract, subject to the terms and conditions of [subchapter I]." § 271.152; *Kirby Lake*, 320 S.W.3d at 838. A "contract subject to this subchapter" is defined as "a written contract stating the essential terms of the agreement for providing goods or services to the local governmental entity". *See* § 271.151(2). *See also Albert*, 354 S.W.3d at 377.

[20] **[21]** For the statute's wavier of immunity to apply, three requirements must be established: (1) the party against whom the waiver is asserted must be a local governmental entity; (2) the entity must be authorized by statute or the Constitution to enter into contracts; and (3) the entity must in fact have entered into a contract that is "subject to this subchapter." *City of Houston v. Williams*, 353 S.W.3d 128, 134 (Tex.2011). Additionally, five elements must be met to determine if the contract is "subject to this subchapter." It must be (1) in writing, (2) state the essential terms, (3) provide for goods or services, (4) to the local governmental entity, and (5) be executed on behalf of the local governmental entity. *See* § 271.151(2). *See also Williams*, 353 S.W.3d at 135.

The opening paragraph of the *Development Agreement* provides it is "made and entered into ... by and between

West Texas Municipal Power Agency, a Texas joint power agency and municipal corporation ('WTMPA') *comprised of* the cities of Brownfield, Floydada, Lubbock and Tulia ...." (Emphasis added). Republic Power argues that WTMPA entered into the *Development Agreement* "on behalf of itself and the Cities" and it was executed on their behalf for purposes of section 271.152. The "RECITALS" portion of the *Development Agreement* does recognize a distinction between WTMPA and the cities themselves. Specifically, paragraphs C and D contain language that the "Project Owner" acts "on behalf of [WTMPA] *and* the Cities." (Emphasis added). However, those recitals apply only to certain determinations and not to obligations under the *Development Agreement.*

The *Development Agreement* further provides in part:

> IN WITNESS WHEREOF, the parties hereto have caused the Agreement to be executed by their proper officers respectively, being thereunto duly authorized, and their respective seals to be hereto affixed ....

In that regard, the signature page of the *Development Agreement* is signed by Gary Brown on behalf of WTMPA and John N. Crew on behalf of Republic Power. None of the cities involved in the formation of WTMPA are listed as signatories in the ***195** contract. The addendum and both amendments are also signed by Brown, Crew and Scott Collier, President of High Plains. WTMPA was named the "Project Owner" until it assigned the *Development Agreement* to High Plains who, in turn, became the "Project Owner."

While Republic Power acknowledges the City of Lubbock was not a signatory to the *Development Agreement,* it argues it should be held liable under the circumstances of this particular case. According to Republic Power, the City of Lubbock's insistence on nearly 100% of surplus revenue generated by the project equated it with being WTMPA.[7] We disagree. WTMPA is a municipal power agency created under chapter 163 of the Texas Utilities Code. It is a separate municipal corporation and is governed by its own board of directors. The City of Lubbock is not WTMPA.

Despite being named in the opening paragraph, the City of Lubbock and the other member cities were not parties to the *Development Agreement,* addendum or amendments. None of the documents are executed on behalf of any of the cities, and although Texas law recognizes that a contract need not be signed to be "executed" unless the parties explicitly require signatures, *Mid–Continent Cas. Co. v. Global Enercom Mgmt.,* 323 S.W.3d 151, 157 (Tex.2010), there is no intent that the City of Lubbock was considered a party or even a third party beneficiary to the *Development Agreement.* To the contrary, section 10.11 of the *Development Agreement* specifies that the "provisions of the Agreement are for the exclusive benefit of the Project Owner and Republic Power" and provides only for Texas Tech University as a third party beneficiary per section 3.4(c) of the *Development Agreement.*

[22] A contract generally binds no one except the parties to it. *BML Stage Lighting, Inc. v. Mayflower Transit, Inc.,* 14 S.W.3d 395, 400 (Tex.App.-Houston [14th Dist.] 2000, pet. denied). The City of Lubbock, as a member city, was "no more than an incidental beneficiary" to the creation of WTMPA for the purpose of providing electric energy to the communities involved. *See Sharyland Water Supply Corp. v. City of Alton,* 354 S.W.3d 407, 420 (Tex.2011). Accordingly, we conclude the City of Lubbock did not enter into the *Development Agreement* and no one executed it on behalf of the City. Consequently, two critical elements that must be satisfied for waiver of immunity to apply are absent and section 271.152 does not apply to the facts of this case. Therefore, we hold the trial court did not err in finding that the Legislature did not waive the City of Lubbock's immunity from suit pursuant to section 271.152 and thereby granting its plea to the jurisdiction. Issue two is overruled.

Waiver by Conduct

By its third and final issue, Republic Power asserts the City of Lubbock's plea to the jurisdiction was erroneously granted because immunity from suit was waived by its conduct.[8] We disagree. Republic Power further asserts the City of Lubbock waived its immunity, if any, by engaging in certain conduct, to-wit: knowingly entering into the *Development Agreement,* attempting to gain more than its 25% share ***196** of revenues, and then killing the deal by intervening in the bond validation action when it did not get its way on the surplus revenues issue.

The Texas Supreme Court has rejected the invitation to recognize an exception for waiver of immunity by conduct. *See IT–Davy,* 74 S.W.3d at 857. *See also Sharyland Water Supply Corp.,* 354 S.W.3d at 414. This Court has also refused to recognize waiver of immunity by conduct. *See Leach v. Tex. Tech Univ.,* 335 S.W.3d 386, 400–01 (Tex.App.-Amarillo 2011, pet. denied). Issue three is overruled.

We affirm the trial court's order granting the City of Lubbock's plea to the jurisdiction on Republic Power's claims for breach of contract.

CONCLUSION

Footnotes

1 Municipal power agencies are expressly authorized to contract with private persons. *See* TEX. UTIL.CODE ANN. § 163.060(b)(2)(C) (West 2007).

2 In a related appeal decided this same date, WTMPA challenged the trial court's order denying its plea to the jurisdiction. *See West Texas Municipal Power Agency v. Republic Power Partners, L.P.*, No. 07–12–00374–CV, —– S.W.3d ——, 2014 WL 486287 (Tex.App.-Amarillo Feb. 5, 2014, no pet. h.). In that opinion, we held the trial court did not err when it denied WTMPA's plea to the jurisdiction because the waiver of immunity provisions of section 271.152 of the Texas Local Government Code do apply so as to waive WTMPA's immunity claims.

3 In *Wheelabrator*, the San Antonio Court of Appeals held that the Legislature's failure to include the proprietary/governmental dichotomy to contracts in section 271.152 of the Texas Local Government Code meant the dichotomy did not apply, thereby holding the City of San Antonio was immune from suit on Wheelabrator's quantum meruit claim.

4 While the City of Lubbock contends the activities of the city giving rise to this suit were the performance of a governmental function, Republic Power contends the Texas Supreme Court and the Texas Legislature have both defined the construction and operation of an electric power utility as a proprietary—not governmental—function. *See San Antonio Indep. Sch. Dist. v. City of San Antonio*, 550 S.W.2d 262, 264 (Tex.1976); TEX. CIV. PRAC. & REM.CODE ANN. § 101.0215(b)(1) (West Supp.2013). For purposes of this opinion we will assume, without deciding, that the City of Lubbock was engaging in a proprietary function.

5 In *Gates*, the Texas Supreme Court acknowledged the common law principle that a city has immunity for governmental functions performed as an agent for the State "in furtherance of general law for the interest of the public at large," while at the same time acknowledging that "proprietary functions have subjected municipal corporations to the same duties and liabilities as those incurred by private persons and corporations." 704 S.W.2d at 738–39. The broad application of this principle to non-tort proprietary functions has, however, been called into question. *See Lower Colo. River Auth. v. City of Boerne*, No. 04–13–00108–CV, 422 S.W.3d 60, 65–66 (Tex.App.-San Antonio 2013, no pet.); *Wheelabrator*, 381 S.W.3d at 604. The Supreme Court itself has put this broad interpretation into question when it used a compare signal when citing *Gates* immediately after explicitly stating that it has never held the proprietary/governmental distinction applies to determining whether immunity from suit is waived for breach of contract claims arising from the performance of a proprietary function. *Tooke*, 197 S.W.3d at 343, n. 89.

6 We are aware of the Austin Court of Appeals's decision in *City of Georgetown v. Lower Colorado River Authority*, 413 S.W.3d 803 (Tex.App.-Austin 2013, pet. filed). Because that opinion was issued before the Supreme Court denied petition in *City of San Antonio ex rel. City Public Service Board v. Wheelabrator Air Pollution Control, Inc.*, 381 S.W.3d 597 (Tex.App.-San Antonio 2012, pet. denied), and for the reasons stated herein, we respectfully reject the reasoning expressed in that opinion.

7 In its *Second Amended Petition*, Republic Power alleges Lubbock's City Manager asserted at a High Plains Board of Director's closed meeting that "Lubbock is [West Texas]" and deserves more than 25% of the revenue.

8 Republic Power candidly acknowledges that waiver by conduct is rare but presents the argument to preserve the issue in the event of further appeal of the case.

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APPENDIX D

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No. _____

IN THE SUPREME COURT OF TEXAS

LOWER COLORADO RIVER AUTHORITY

v.

CITY OF BOERNE, TEXAS

PETITION FOR REVIEW

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STATEMENT OF THE CASE

Nature of the Case: This appeal arises out of a lawsuit filed by the Lower Colorado River Authority (the "LCRA") against electric cooperatives and cities, including the City of Boerne, Texas ("Boerne"), after Boerne and the other defendants repudiated their long-term energy purchase contracts with the LCRA. CR 1-35. The claims against Boerne were severed and transferred to Kendall County. CR 51-53. The LCRA sought declaratory judgment regarding its own compliance with its enabling legislation and the contract between the LCRA and Boerne, as well as damages for Boerne's breach of its contract to buy all of its electricity requirements from the LCRA through 2016. CR 74-131.

Trial Court: 216th District Court of Kendall County, Texas; Hon. Bill Palmer presiding.

Trial Court Proceedings: Boerne filed a Plea to the Jurisdiction, asserting that it enjoys immunity from suit even though the contract at issue arises out of proprietary functions Boerne performs for its citizens. CR 54-73. The trial court granted the plea in part and ordered that: (1) Boerne is immune from suit for the LCRA's claims for declaratory relief, but (2) the LCRA's breach of contract claims come within the waiver of immunity set out in Chapter 271 of the Texas Local Government Code. App. A. The LCRA appealed the order. CR 226-229.

Court of Appeals: Fourth Court of Appeals at San Antonio. Opinion by Justice Martinez joined by Chief Justice Stone and Justice Marion. App. B.

Court of Appeals Disposition:

The primary issue was whether cities enjoy immunity from suit on contract claims arising out of proprietary functions and not governmental functions. The court of appeals held that the dichotomy between governmental and proprietary functions does not apply to contract claims and affirmed the trial court's order granting, in part, Boerne's plea to the jurisdiction. App. B.

The court of appeals declined to overrule its prior opinion on the immunity issue, *City of San Antonio v. Wheelabrator Air Pollution Control*, 381 S.W.3d 597 (Tex. App.—San Antonio 2012, pet. denied). The LCRA had asked the Fourth court to sit *en banc* and overrule *Wheelabrator*.

Related case in this Court:

The same immunity issue is presented in another case pending in this Court: No. 13-1030, *City of Georgetown v. LCRA*, in the Supreme Court of Texas. The LCRA's claims in the *City of Georgetown* appeal are the same as those against Boerne, and they arise out of the same form contract; in fact, the LCRA originally filed its contract claims against Georgetown and Boerne in the same action in Travis County. CR1-35. The Third court in *City of Georgetown* made the opposite holding regarding immunity as that made by the Fourth court in this *City of Boerne* case. App. C.

APPENDIX

App. A Order Granting the City of Boerne's Plea to the Jurisdiction

App. B Opinion and Judgment, *Lower Colorado River Authority v. City of Boerne*, ___ S.W.3d ___, 2014 WL 51289, No. 04-13-00108-CV (Tex. App.—San Antonio Jan. 8, 2014, pet. filed).

App. C *City of Georgetown v. Lower Colorado River Authority*, 413 S.W.3d 803 (Tex. App.—Austin 2013, pet. filed).

STATEMENT OF JURISDICTION

This Court has jurisdiction over this petition pursuant to Texas Government Code section 22.001(a)(2) because the holding in this case regarding the core immunity issue conflicts with the prior decision of the Third court of appeals in *City of Georgetown v. Lower Colorado River Authority*, 413 S.W.3d 803 (Tex. App.—Austin 2013, pet. filed); App. C. The Third court has since decided another case that conflicts with this one on the same immunity issue. *City of Seguin, Texas v. Lower Colorado River Authority*, No. 03-13-00165-CV (Tex. App.—Austin Jan. 15, 2014, n. pet. h.) (mem.op.). There are two additional cases pending before the Eighth court of appeals that present the same immunity issue. *Gay v. Wichita Falls, Texas*, No. 08-13-00028-CV, in the Eighth Court of Appeals at El Paso, Texas (oral argument held Jan. 9, 2014); *City of El Paso, Texas v. High Ridge Constr., Inc.*, No. 08-13-00187-CV, in the Eighth Court of Appeals at El Paso, Texas (oral argument set May 5, 2014). The conflict is thus not going away but is likely to continue and expand over time.

This Court also has jurisdiction pursuant to section 22.001(a)(6) because the court of appeals committed an error of law regarding immunity from suit that is of such importance to the jurisprudence of the State that it requires correction.

ISSUES ON APPEAL

1. Does a city enjoy governmental immunity from a contract suit when the contract arises out of the city's performance of proprietary functions for the benefit of its own citizens, as opposed to governmental functions for the benefit of the public at large?

UNBRIEFED ISSUE

2. If the Court determines that governmental immunity from suit applies irrespective of whether the contract arises out of Boerne's proprietary functions, is immunity nonetheless inapplicable to the LCRA's declaratory judgment claims where:

   (1) the LCRA is not seeking to control Boerne's actions or establish its liability; and

   (2) the Court in *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), recognized that the waiver of immunity for contractual claims in Texas Local Government Code Chapter 271 extends broadly enough to allow declaratory judgment claims that could result in contractual liability for damages?

WHY THIS IMMUNITY ISSUE IS IMPORTANT

More than 125 years ago, this Court adopted a rule that cities do not enjoy immunity from suit for tort claims that arise out of their proprietary functions and not their governmental functions. *See City of Galveston v. Posnainsky*, 62 Tex. 118, 1884 WL 8868, at *7 (Tex. 1884). This Court and other courts have since applied the proprietary-governmental dichotomy in various contexts, but an absolute conflict has now developed between the Third and Fourth courts of appeals regarding whether the dichotomy applies to contract claims. The Third court in *City of Georgetown* held that it does, but the Fourth court in this appeal held that it does not. *Compare* Apps. B, C. This case and the *City of Georgetown* case involve the same claims by the LCRA, arising out of the same form contracts, filed originally in the same action in Travis County. Yet on the critical threshold question of immunity from suit, the two cases present opposite results. The conflict between courts of appeals could not be more manifest.

This Court recently declined to address the same immunity issue in *Wheelabrator*, but *Wheelabrator* was complicated by quasi-contract and *quantum meruit* issues that this case does not present. The immunity issue is cleanly presented in this case, and this Court should decide it.

STATEMENT OF FACTS

The LCRA may develop, generate, distribute, and sell electric power and energy. Tex. Special Dist. Local Laws Code Ann. §§ 8503.001–.031. With this authority, in 1974 the LCRA entered into Wholesale Power Agreements ("WPAs") with several dozen cities and electric cooperatives, including Boerne. CR 86-124. The WPAs had a 25-year term that extended for successive 25-year periods unless terminated by the LCRA or Boerne. CR 87 ¶ 1. The WPA required Boerne to purchase 100% of its total annual electric power and energy requirements from the LCRA. CR 87-89 ¶ 2.

In 1987, the parties signed an amendment that extended the term of the WPA to 2016 and provided that, if either party did not want to extend the WPA beyond 2016, it must give the other party notice by 2011. CR 125 ¶ 1.

As 2011 approached, the LCRA negotiated with its customers to extend their WPA terms beyond 2016. By this time, the Legislature had deregulated the electricity market such that the customers could potentially purchase their requirements on the open market. The LCRA negotiated amended WPAs for most of its customers (the "2041 Customers"). CR 79. The amendments extended the terms of the WPAs to 2041, and the 2041 Customers could buy a portion of their power and energy requirements from other sources, but they would still pay the same uniform rate for the power and energy they took from the LCRA. CR 79.

A few of the LCRA's customers (the "2016 Customers") did not extend their WPAs beyond 2016. CR 79-80. Boerne is a 2016 Customer. *Id.* LCRA offered Boerne the same form of amendments that the 2041 Customers received, but Boerne rejected the offer and instead gave notice in 2011 that it would allow its WPA to expire in 2016. *See* CR 79.

Boerne did not fulfill its obligation to perform until 2016. Instead, Boerne repudiated its WPA. On June 28, 2012, all of the 2016 Customers, including Boerne, sent letters to the LCRA claiming, among other things, that the LCRA had violated the WPA's Uniform Rate Clause by allowing the 2041 Customers to reduce the requirements they obtain from the LCRA. CR20-35. Boerne and the other 2016 Customers threatened to terminate their WPAs before the 2016 expiration date if the LCRA did not "cure" the alleged breach. *See* CR30-31 (Boerne letter).

The LCRA sued Boerne and the other 2016 Customers, including the City of Georgetown, seeking declarations that it had not breached the WPA. CR1-35. The LCRA later added a claim for breach of contract and damages for Boerne's repudiation of its WPA. CR 82-83. Boerne filed a Plea to the Jurisdiction asserting immunity from suit. CR 54-73. The court denied Boerne's Plea to the Jurisdiction as to the contract claims for damages and granted it as to the declaratory judgment claims. App. A. The court of appeals affirmed. App. B.

SUMMARY OF THE ARGUMENT

This appeal involves the dichotomy between a city's governmental and proprietary functions and whether a city enjoys immunity from suit when the suit arises from the city's proprietary functions rather than governmental ones. The proprietary-governmental dichotomy has been recognized by Texas courts for more than a century, and it has been applied in the context of contract and other claims, not just tort claims. The Third court very recently applied the dichotomy to the LCRA's contract claims in *City of Georgetown*. App. C.

Relying almost exclusively on a single case—*Wheelabrator*—the Fourth court held that the proprietary-governmental dichotomy is inapplicable and the body of case law applying it in the contract context is obsolete. App. B. In fact, the doctrine retains significant vitality, and it applies exactly here.

This case and the *City of Georgetown* case arise out of the same form WPA, and the LCRA filed both sets of claims originally in the same suit. Yet the courts of appeals reached exactly opposite results in the two cases on the critical threshold issue of immunity from suit. This Court should grant this petition to resolve the direct conflict between the Third and Fourth courts, and confirm that the longstanding proprietary-governmental dichotomy applies to contract claims.

ARGUMENT

A. The State and cities enjoy different standards of immunity.

Sovereign immunity protects the State by preventing suits against the State without its consent. *City of Houston v. Williams*, 353 S.W.3d 128, 134 (Tex. 2011). Governmental immunity provides similar protection to subdivisions of the state, like cities. *Harris Cnty. v. Sykes*, 136 S.W.3d 635, 638 (Tex. 2004). But for cities (unlike the State and state agencies), the immunity from suit is not absolute; rather, it applies only when a city performs governmental functions—*i.e.*, when a city acts as an agent of the state. *See Williams*, 353 S.W.3d at 134 (acknowledging that when performing governmental functions, a city is entitled to governmental immunity); *Gates v. City of Dallas*, 704 S.W.2d 737, 739 (Tex. 1986) (explaining that "municipal corporations have traditionally been afforded some degree of governmental immunity" for governmental functions).

Cities do not always act as agents of the state. Cities exercise their powers through two distinct sorts of functions: (1) governmental; and (2) proprietary. *Gates*, 704 S.W.2d at 738. A city performs governmental functions "'as the agent of the State in furtherance of general law for the interest of the public at large.'" *Id.* at 738–39 (quoting *City of Crystal City v. Crystal City Country Club*, 486 S.W.2d 887, 889 (Tex. Civ. App.—Beaumont 1972, writ ref'd n.r.e.)). In contrast, a city performs proprietary functions in its discretion, primarily for the benefit of

its own citizens. *Id.* at 739. Although a city enjoys a degree of governmental immunity when engaging in governmental functions, it has no immunity when engaging in proprietary functions. *Gates*, 704 S.W.2d at 738; *see also*, *Boiles v. City of Abilene*, 276 S.W.2d 922, 925 (Tex. Civ. App.—Eastland 1955, writ ref'd) (explaining that the "power to provide a water system is not governmental nor legislative in its character, but strictly proprietary, and the city, when engaged in prosecuting such an improvement, is clothed with the same authority and subject to the same liabilities as a private citizen").

Because the State does not engage in proprietary functions, cases involving suits against the State do not speak to the dichotomy between governmental and proprietary functions and shed no light on the immunity issue presented here. *See, e.g., Tex. Nat. Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 853 (Tex. 2002); *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 695 (Tex. 2003).

B. Texas adopted the proprietary-governmental dichotomy over a century ago.

Texas has recognized the proprietary-governmental dichotomy for over 100 years. In 1884, the Court first carved out an exception to a city's governmental immunity from certain claims by differentiating between a city's governmental and proprietary functions. *City of Galveston v. Posnainsky*, 62 Tex. 118, 1884 WL 8868 (Tex. 1884). That case involved tort claims, but the Court's analysis did not depend on that fact; rather the case turned on the nature of the activities. The

Court surveyed "the great body of the common law decisions on this question," including English law and the law of other states. 1884 WL 8868, at *8-12. It concluded that "the weight of authority...is so overwhelming that we feel constrained to hold the law so to be, and that an action lies....[*i.e.*, there is no immunity]" *Id*. at *12.

The *Posnainsky* Court did not base its decision on the nature of the cause of action at issue—a tort versus a contract claim—but rather on the notion that public entities and private entities should be treated equally when engaged in the same functions. The rule is thus function-focused, and not cause of action-focused. When a city engages in proprietary functions that a private actor might undertake, *Posnainsky* explained, the city will be treated the same as a private actor:

> In so far, however, as [the cities] exercise powers, voluntarily assumed—powers intended for the private advantage and benefit of the locality and its inhabitants—there seems to be no sufficient reason why they should be relieved from that liability to suit and measure of actual damage to which an individual or private corporation exercising the same powers for a purpose essentially private would be liable.

Id. at *7. If a city elects to engage in a proprietary function, it enjoys no higher standing in a Texas courtroom than a private actor engaged in a comparable enterprise. That rule and its sound policy of fairness is exactly applicable here.

About 100 years after *Posnainsky*, the Court confirmed the proprietary-governmental dichotomy, but this time in the context of a contract dispute rather

than a tort case. *See Gates*, 704 S.W.2d at 739. In *Gates*, the Court reiterated that cities engaging in proprietary functions are subject to the same duties and liabilities as those incurred by private persons. *Id.* The Court held that when a city contracts in its proprietary role, there is no immunity in the first instance (so no waiver is required), and the city is subject to the same rules as private citizens. *Id.*

Many Texas appellate courts have subsequently applied the proprietary-governmental dichotomy in contract cases and confirmed that a city that contracts in its proprietary role is not immune to suit on claims arising out of that contract. *See, e.g., City of Weslaco v. Borne*, 210 S.W.3d 782, 790 (Tex. App.—Corpus Christi 2006, pet. denied) (concluding that proprietary-governmental dichotomy applies to contract claims); *E. Houston Estate Apartments, L.L.C. v. City of Houston*, 294 S.W.3d 723, 731 (Tex. App.—Houston [1st Dist.] 2009, no pet.) (confirming that Texas courts of appeals have applied proprietary-governmental dichotomy to contract cases); *City of Deer Park v. Ibarra*, No. 01-10-00490-CV, 2011 WL 3820798, at *4 (Tex. App.—Houston [1st Dist.] Aug. 25, 2011, no pet.); *Bailey v. City of Austin*, 972 S.W.2d 180, 192–93 (Tex. App.—Austin 1998, pet. denied); *Hudson v. City of Houston*, 392 S.W.3d 714, 721-22 (Tex. App.—Houston [1st Dist.] 2011, pet. denied) ("Hudson correctly points out that classifying the City's conduct as either proprietary or governmental is the threshold inquiry underpinning the City's right to governmental immunity."); *Casso v. City of*

McAllen, No. 13-08-00618-CV, 2009 WL 781863, at *1 (Tex. App.—Corpus Christi Mar. 26, 2009, pet denied).

This Court and others have applied the proprietary-governmental dichotomy in other procedural contexts, and have not limited its application to tort cases. ***See, e.g., City of White Settlement v. Super Wash, Inc.***, 198 S.W.3d 770, 773 (Tex. 2006) (holding that Court has "long held that a city cannot be estopped from exercising its governmental functions," but the "same does not hold true when a city is performing its proprietary functions"); ***City of Corpus Christi v. Gregg***, 155 Tex. 537, 289 S.W.2d 746, 749-50 (1956) (city subject to estoppel because it acted in its proprietary capacity in entering into oil and gas leases; thus it could not deny the validity of leases); ***City of Lubbock v. Phillips Petroleum Co.***, 41 S.W.3d 149, 163 (Tex. App.—Amarillo 2000, no pet.) (city is subject to estoppel because it acted in a proprietary capacity in executing easement); ***see also Tex. Dept. of Transp. v. A.P.I. Pipe and Supply, L.L.C.***, 397 S.W.3d 162, 171 (Tex. 2013) ("Designing and planning a drainage ditch is a governmental function, and applying estoppel here would impair that governmental function."). This is consistent with the ***Posnainsky*** construct of a function-focused application of the dichotomy rather than a cause of action-focused application.

C. ***Tooke*** did not call the proprietary-governmental dichotomy into question in the contract context.

The Court in ***Tooke*** made this statement about the dichotomy:

> A municipality is not immune from suit for torts committed in the performance of its proprietary functions, as it is for torts committed in the performance of its governmental functions. But we have never held that this same distinction determines whether immunity is waived for breach of contract claims, and we need not determine that issue here.

Tooke v. City of Mexia, 197 S.W.3d 325, 343 (Tex. 2006). *Tooke* cited *Gates* for that proposition, and quoted *Gates* as holding that "contracts made by [cities] in their proprietary capacity have been held to be governed by the same rules as contracts between individuals." *Id*. n.89 (quoting *Gates*, 704 S.W.2d at 738-39). Given the result in *Gates*, it seems incongruous that the *Tooke* Court would state that it had never held that the dichotomy applies to contract claims.[1] But whatever the reason, *Tooke* did not overrule *Gates* or hold that the proprietary-governmental dichotomy *does not* apply to contract claims.

In fact, the *Tooke* Court relied on the dichotomy when determining that the City of Mexia was immune from suit because the case arose from the city's governmental functions and immunity had not been waived by general "sue and be sued" language. *Tooke*, 197 S.W.3d at 343-44; *see also PKG Contracting*, 197 S.W.3d at 388–89. If *Tooke* truly were rejecting *Gates* and the proprietary-governmental dichotomy, there would have been no need to analyze whether the contract at issue involved a governmental or a proprietary function, because

[1] The court in *City of Georgetown* noted: "Given that the disposition in *Gates* appears to have required an application of the proprietary-governmental dichotomy to a contract claim, it is not entirely clear what the court in *Tooke* meant when it said, in dicta, that it had never held that the dichotomy applies to such claims." App. C at 10, n.5.

immunity would have attached in either event. The Court thus gave no indication in *Tooke* that the dichotomy recognized in *Gates* is no longer the law, and various courts of appeals' opinions issued after *Tooke* continue to rely on *Gates* for the proposition that cities have no immunity from contract suits arising out of their proprietary functions.

For example, one court acknowledged that, although *Tooke* stated that the Court had "never *held"* that the proprietary-governmental dichotomy applies in contract cases, it "has *stated"* that contracts "made by municipal corporations in their proprietary capacity are governed by the same rules as contracts between individuals" and that "a city that contracts in its proprietary role 'is clothed with the same authority and subject to the same liabilities as a private citizen.'" *City of Weslaco*, 210 S.W.3d at 790 (court's emphasis) (quoting *Gates*, 704 S.W.2d at 738-39); *see also Casso v. City of McAllen*, 2009 WL 781863, at *1; *E. Houston Estate Apartments*, 294 S.W.3d at 730–31 (collecting post-*Tooke* cases applying the dichotomy in contract cases; decisions from Tyler, Houston First and Fourteenth, and Corpus Christi courts of appeals); *Ibarra*, 2011 WL 3820798, at *4; *Hudson*, 392 S.W.3d at 721-22.

Numerous courts in many contexts, including many after *Tooke*, have continued to apply the proprietary-governmental dichotomy to contract cases against cities and explained that no immunity attaches as a threshold matter when

the city is engaged in proprietary functions. No Texas court, except for the Fourth court in *Wheelabrator* and this case, has held otherwise.

D. Chapter 271 did not affect the proprietary-governmental dichotomy.

The longstanding precedent discussed above remains vital, even though it predates Chapter 271 of the Texas Local Government Code, which expressly waived a city's immunity for certain breach-of-contract claims. Chapter 271 broadened, not narrowed, the scope of contract claims that could be filed against cities. If no immunity from suit existed as to a particular sort of contract claim *before* Chapter 271 was adopted, there certainly would be no immunity for such claims *after* Chapter 271.

Chapter 271 has nothing to do with contract claims arising from a city's proprietary functions. That statute waived a city's immunity for certain contract claims only to the extent that such immunity existed before—*i.e.*, for *governmental* functions. It did not extend immunity to an area where immunity never existed—*i.e.*, for *proprietary* functions. In fact, Chapter 271 expressly provides that "[n]othing in this subchapter shall constitute a *grant of immunity* to suit to a local government entity." Tex. Local Gov't Code Ann. § 271.158 (emphasis added).

It is true that "the distinction between waiving immunity and finding it nonexistent is a fine one that yields the same effect." *See Nueces Cnty. v. San Patricio Cnty.*, 246 S.W.3d 651, 652 (Tex. 2008) (citing *City of Galveston v.*

Texas, 217 S.W.3d 466, 471 (Tex. 2007)). But that is exactly how the many courts that have analyzed the dichotomy treat the issue: express waiver is required for the immunity that attaches to governmental functions, but no immunity exists in the first instance for proprietary functions, so no waiver is required.

Moreover, that is exactly what this Court has held is the courts' function: "it remains the judiciary's responsibility to define the boundaries of the common-law doctrine and to determine under what circumstances sovereign immunity exists in the first instance." *Reata Constr. Co. v. City of Dallas*, 197 S.W.3d 371, 375 (Tex. 2006); *see also City of Galveston*, 217 S.W.3d at 475 (confirming that "sovereign immunity is a creature of the common law and not of any legislative enactment").

E. The Legislature retains control over the scope of immunity by defining which functions are governmental and which are proprietary.

This suit arises from the WPA between the LCRA and Boerne, through which Boerne agreed to buy all of its electric energy and power from the LCRA at wholesale rates in order to deliver that power to its own citizens at retail rates through the operation and maintenance of a public utility. Texas courts have long held at common law that the operation and maintenance of a public utility is a proprietary function. *San Antonio Indep. Sch. Dist. v. City of San Antonio*, 550 S.W.2d 262, 264 (Tex. 1976); *City of Crosbyton v. Tex.-N.M. Utils. Co.*, 157 S.W.2d 418, 421 (Tex. Civ. App.—Amarillo 1941, writ ref'd w.o.m.).

The Texas Legislature codified this long-established common law in 1987, after the Texas Constitution was amended to allow the Legislature to classify the functions of a municipality that are considered either governmental or proprietary.[2] Tex. Const. art. XI, § 13(a); *Tooke*, 197 S.W.3d at 343. The Legislature did so in the Texas Tort Claims Act (the "TTCA"). Tex. Civ. Prac. & Rem. Code § 101.0215. It identified 36 non-exclusive activities of cities that are "governmental functions" and three non-exclusive activities that are "proprietary functions." *Id.* § 101.0215(a)-(b). The Legislature, in accordance with the long line of cases addressing at common law a city's governmental-versus-proprietary functions, identified "the operation and maintenance of a public utility" as a proprietary function. *Id.* § 101.0215(b)(1).

Although the TTCA classified functions as proprietary or governmental in the context of tort claims, courts applying the dichotomy outside the tort context defer to the lists in the TTCA to decide which functions are which. In both *Tooke* and *PKG Contracting*, the Court deferred to the TTCA's categories in the context of contract disputes, finding "no reason…that the classification would be different." *PKG Contracting*, 197 S.W.3d at 388–89; *Tooke*, 197 S.W.3d at 343–44; *see also E. Houston Estate Apartments*, 294 S.W.3d at 732 ("We follow

[2] It is notable that the proprietary-governmental dichotomy was already so ingrained and developed in Texas law by 1987 that it required a constitutional amendment to allow the Legislature to tinker with it.

Tooke's holding that the Texas Constitution requires that courts defer to the legislature's classification of a governmental entity's actions as either governmental or proprietary.").

The Court continues to look to the TTCA classifications of governmental and proprietary functions outside the tort context. *See A.P.I. Pipe and Supply*, 397 S.W.3d at 171, n.38 (noting that the TTCA "classifies governmental acts related to 'sanitary and storm sewers' as 'governmental functions.' While this legislative interpretation of 'governmental functions' is binding only in the context of the [TTCA], we have previously found that the statute is helpful in our interpretation of whether an activity is a 'governmental function.'") (citations omitted); *Super Wash*, 198 S.W.3d at 776-77 (applying TTCA classifications to estoppel claim).

The Legislature has amended the lists over time, such that they reflect its current policy determinations regarding which functions are designated as proprietary and which as governmental for purposes of immunity. One court analyzed an amendment of the TTCA lists to classify "community development activity" as a governmental function rather than a proprietary one as courts had held at common law, and held that the change in classification applies to contract claims: "The legislature's amendment of [§ 101.0215] to include subsection (34) expresses its clear intent that Community Development Activities…be considered governmental activities in the tort context, and we hold that the legislature's

reasoning applies in the contract context as well." *E. Houston Apartments*, 294 S.W.3d at 732-33.

Because courts rely on the TTCA classifications outside the tort context, the Legislature thus retains the authority to decide when a city can be sued for a breach of contract and when it cannot. It can amend those lists at any time to change a function from proprietary to governmental if necessary to protect cities from potentially ruinous contractual obligations, and it has done so in the past. The Legislature has exercised that authority to classify operation of a public utility as a proprietary function that is not subject to immunity from suit, and the courts should defer to that classification.

CONCLUSION AND PRAYER

The proprietary-governmental dichotomy is a longstanding fixture in Texas law, and the Fourth court erred in holding that it does not apply in the contract context. But this case presents much more than simply an error of law, albeit on an important issue of immunity. In addition, this case presents an absolute conflict between courts of appeals and the absurd result of two identical cases—arising out of the same form contracts and originally filed together—having opposite results on the threshold question of immunity from suit. The issue of whether the proprietary-governmental dichotomy applies to contract claims is cleanly and squarely presented here, and this Court should resolve it.

WHEREFORE, the LCRA prays that this Court grant its petition for review, reverse the court of appeals' judgment that Boerne is immune from suit for the LCRA's claims, and grant LCRA such other and further relief to which it may be justly entitled.

Respectfully submitted,

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I certify that the foregoing document was filed electronically with the Clerk of the Court using the electronic case filing system of the Court. I also certify that a true and correct copy of the foregoing was served on the following counsel of record via e-mail on January 28, 2014:

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing Petition for Review was prepared using Microsoft Word 2010, and that, according to its word-count function, the sections of the foregoing brief covered by TRAP 9.4(i)(1) contain 3,922 words.

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APPENDIX

App. A Order Granting the City of Boerne's Plea to the Jurisdiction

App. B Opinion and Judgment, ***Lower Colorado River Authority v. City of Boerne***, ___ S.W.3d ___, 2014 WL 51289, No. 04-13-00108-CV (Tex. App.—San Antonio Jan. 8, 2014, pet. filed).

App. C ***City of Georgetown v. Lower Colorado River Authority***, 413 S.W.3d 803 (Tex. App.—Austin 2013, pet. filed).

APPENDIX E

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IN THE SUPREME COURT OF TEXAS

LOWER COLORADO RIVER AUTHORITY,
Petitioner,

v.

CITY OF BOERNE, TEXAS,
Respondent.

On Appeal from Cause No. 12-502
In the 216th Judicial District Court of Kendall County, Texas
Court of Appeals Cause No. 04-13-00108-CV

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STATEMENT OF THE CASE

Nature of Case:	This case is a declaratory-judgment and breach-of-contract action brought by the Lower Colorado River Authority ("LCRA") against the City of Boerne ("Boerne"). CR 81-82. Pursuant to Chapter 37 of the Texas Civil Practices and Remedies Code, LCRA seeks declarations that it (1) did not breach certain provisions of the wholesale power agreement ("WPA") between LCRA and Boerne; (2) was not obligated or required to take certain actions Boerne asserted LCRA was required to do; (3) did not commit any actions that constituted anticipatory breach of the WPA; and (4) had not otherwise materially breached the WPA or violated its enabling legislation. CR 74-131.
Trial Court:	The Honorable Tim Sulak, Judge Presiding, 261st District Court, Travis County, Texas. Subsequently transferred to the Honorable Bill Palmer, 216th District Court, Kendall County Texas.
Trial Court Disposition:	The trial court granted Boerne's plea to the jurisdiction concerning LCRA's declaratory judgment claims and denied the City of Boerne's Plea to the Jurisdiction regarding LCRA's breach-of-contract claim to the extent that it is subject to a waiver of immunity pursuant to Texas Local Government Code §§ 271.151-.160. CR 225. The trial court's order is attached as Appendix A. LCRA appealed.
Parties in the Court of Appeals:	The Lower Colorado River Authority was appellant and the City of Boerne was appellee.

Court of Appeals:	Fourth Court of Appeals; Justice Rebeca C. Martinez authored the opinion that was joined in by Chief Justice Catherine Stone and Justice Sandee Bryan Marion, *Lower Colo. River Auth. v. City of Boerne*, 04-13-00108-CV, 2014 WL 51289 (Tex. App.—San Antonio Jan. 8, 2014). Opinion and judgment attached as Appendix B.
Court of Appeals Disposition:	Affirmed trial court's order granting the City of Boerne's plea to the jurisdiction immunizing the City from LCRA's suit for declaratory relief. The Fourth Court of Appeals held that the dichotomy between governmental and proprietary functions does not apply to contract claims. LCRA's request for en banc consideration was denied.
Related case in this Court:	The immunity issue presented by this appeal is also presented in another Petition for Review in this Court: No. 13-1030, *City of Georgetown v. Lower Colorado River Authority*. But, the Third and Fourth Courts of Appeals reached exactly opposite results. LCRA's declaratory-judgment claims in the *City of Georgetown* appeal are the same as those against Boerne, and they arise out of the same underlying form contract. LCRA originally filed suit against Boerne and Georgetown in the same action in Travis County. CR 1-53.

STATEMENT OF JURISDICTION

Boerne agrees with LCRA that this Court has jurisdiction pursuant to section 22.001(a)(2) of the Texas Government Code because the justices of the Third, Fourth, and Seventh Courts of Appeals disagree on whether immunity exists for contract-related claims that arise from a municipality's exercise of proprietary functions. *See* Tex. Gov't Code Ann. § 22.001(a)(2) (West 2004). The Fourth Court of Appeals has now twice determined that the governmental-proprietary distinction does not apply to contract claims. *City of San Antonio v. Wheelabrator Poll. Control, Inc.*, 381 S.W.3d 597 (Tex. App.—San Antonio 2012, pet. denied); *Lower Colo. River Auth. v. City of Boerne*, 04-13-00108-CV, 2014 WL 51289 (Tex. App.—San Antonio Jan. 8, 2014, pet. filed). The Seventh Court of Appeals has also reached the same conclusion at least twice. *Republic Power Partners, L.P. v. City of Lubbock*, 07-12-00438-CV, 2014 WL 486411 (Tex. App.—Amarillo Feb. 5, 2014, no. pet. h.); *W. Tex. Mun. Power Agency v. Republic Power Partners, L.P.*, 07-12-00374-CV, 2014 WL 486287 (Tex. App.—Amarillo Feb. 5, 2014, no. pet. h.). However, the Third Court of Appeals has reached the opposite conclusion in *City of Georgetown v. Lower Colorado River Authority*, 413 S.W.3d 803 (Tex. App.—Austin 2013, pet. filed), *City of Seguin v. Lower Colorado River Authority*, 03-13-00165-CV, 2014 WL 258847 (Tex. App.—Austin Jan. 15, 2014, no. pet. h.) (mem. op.), and *City of Austin v. MET Center NYC TEX, Phase II, Ltd.*, No. 03-11-

00662-CV, 2014 WL 538697 (Tex. App.—Austin Feb. 6, 2014, no pet. h.) (mem. op.).[1]

Boerne disagrees with LCRA's assertion that this Court has jurisdiction pursuant to section 22.001(a)(6), because the Fourth Court of Appeals did not commit an error of law. The Fourth Court correctly determined that the governmental-proprietary distinction does not apply to contract claims.

[1] This conflict between the appellate courts is likely to continue and to expand as additional cases addressing the applicability of governmental immunity for contract claims arising from proprietary functions are currently pending before at least the Eighth Court of Appeals (*Gay v. City of Wichita Falls*, No. 08-13-00028-CV, 2013 WL 3907197 (Tex. App.—El Paso May 20, 2013) (Appellate Brief)) and the Twelfth Court of Appeals (*Wasson Interests, Ltd. v. City of Jacksonville*, 12-12-0076-CV, 2014 WL 569433 (Tex. App.—Tyler Jan. 31, 2014) (Appellee Brief)).

ISSUE PRESENTED

Does governmental immunity apply to a declaratory-judgment suit against a municipality regarding a wholesale electric power contract?

STATEMENT OF FACTS

In 1974, Boerne and others entered into virtually identical wholesale power agreements ("WPAs") with LCRA for the purchase of electricity. CR 86-124. Those agreements were subsequently amended and extended to 2016. CR 125-128.

On June 28, 2012, Boerne notified LCRA that it had materially breached its WPA and enabling legislation by, among other things, charging a discriminatory rate. CR 30-31. Boerne also notified LCRA that it would terminate its WPA if LCRA did not cure the breaches identified within thirty days. *Id*. In response, LCRA filed a declaratory-judgment action against Boerne and other customers who also sent notice of breach letters. CR 1-37. Boerne subsequently gave LCRA written notice that the contract was terminated because of LCRA's failure to cure, and then LCRA amended its petition. CR 74-131.

In its Second Amended Petition, LCRA requested declarations that it had not breached the WPA or its enabling legislation in any manner. CR 81. But, it expressly denied that it was seeking "to control the Defendant or establish its liability for money damages based on a breach of contract" through its requested declaratory relief. CR 81. LCRA also alleged a breach-of-contract claim for goods and services under the WPA. CR 82-83.

Boerne filed a Motion to Transfer Venue and Sever that was granted, and this matter was severed from the original action in the 261st Judicial District Court of Travis County, Texas and transferred to the 216th Judicial District Court of Kendall County, Texas, which is the action that is the subject of this appeal. CR 38-53. Boerne then filed its Plea to the Jurisdiction, asserting the LCRA's claims against it should be dismissed for lack of jurisdiction because Boerne had governmental immunity from suit that had not been waived by the Legislature. CR 54-73. The trial court granted Boerne's Plea to the Jurisdiction regarding the request for declaratory relief against Boerne and denied Boerne's Plea to the Jurisdiction to the extent that it is subject to a waiver of immunity pursuant to Texas Local Government Code §§ 271.151-.160. CR 225; *see also* App. A.

SUMMARY OF ARGUMENT

The Fourth Court of Appeals correctly decided this case. The governmental-proprietary distinction was created for torts, and that is where it should stay. The courts of appeals that long ago extended the governmental-proprietary distinction to contracts did so under the outdated presumption disfavoring municipal immunity. The law now recognizes a strong presumption in favor of immunity, particularly when its absence would threaten the public fisc. This case squarely presents that threat. If the Court finds that Boerne enjoys no immunity from

contract-related suits that arise out of proprietary functions, parties will have open and unlimited access to public funds.

This Court has determined that contract claims against the government involve complex policy choices that are best left to the Legislature. No reason justifies a departure from that principle now. Instead, the Court should find that immunity exists for contract-related claims against municipalities regardless of the function implicated. Public policy supports such a conclusion. It protects the public from the "cost and consequence of improvident" contracts while recognizing the critical differences between tort and contract suits.

The Legislature has balanced the rights of parties that contract with cities and the State's interest in protecting public resources from unjustified burdens by waiving a city's immunity for (1) certain breach-of-contract claims and (2) declaratory-judgment claims to challenge or construe a statute or ordinance. LCRA claims that these waivers apply to its declaratory-judgment claims, but its pleadings belie that argument. The declaratory relief sought relates to the parties' contract (rather than a statute or ordinance), but does not seek to adjudicate a claim for "breach of contract." Thus, LCRA has not met either waiver, and Boerne is immune from suit on LCRA's declaratory-judgment claims.

ARGUMENT

I. The Fourth Court of Appeals correctly decided that the governmental-proprietary distinction does not apply to contract-related claims.

A. This Court has never applied the governmental-proprietary distinction to contract-related claims.

In 1884, this Court carved out an exception to the general rule that cities enjoy governmental immunity from all lawsuits. *City of Galveston v. Posnainsky*, 62 Tex. 118, 131 (1884). The Court recognized a distinction between a city's governmental and proprietary functions and held that Galveston was not immune from its ***negligent*** failure to maintain its sidewalks because such maintenance was a proprietary (rather than governmental) act. *Id.* Importantly, the Court only applied the exception to ***torts***. *Id.* And over the next century, it continued to limit its application of the governmental-proprietary distinction to torts. *See, e.g.*, *Dilley v. City of Houston*, 222 S.W.2d 992, 993 (Tex. 1949). So that in over 125 years, the Court "never held that this same distinction determines whether immunity from suit is waived for breach of contract claims…." *Tooke v. City of Mexia*, 197 S.W.3d 325, 343 (Tex. 2006).

B. Some courts of appeals have improperly expanded the governmental-proprietary distinction to contract-related claims.

Since *Posnainsky*, some appellate courts have extended the governmental-proprietary distinction to contract-related cases. *See, e.g.*, *City of Georgetown*, 413 S.W.3d 803, 810 n.4. The Third Court relied on this precedent in reaching its

decision in *City of Georgetown*, stating there was no "principled reason" not to do so. *Id*. However, the Fourth and Seventh Courts of Appeals have rejected that reasoning. *Wheelabrator*, 381 S.W.3d at 603-605 (Tex. App.—San Antonio 2012, pet. denied); *City of Boerne*, 2014 WL 51289 at *5; *Republic Power Partners*, 2014 WL 486411 at *7 n.6 (expressly rejecting the Third Court's decision in *City of Georgetown*, and concluding that immunity barred a breach-of-contract claim against the City of Lubbock regardless of whether Lubbock was acting in its proprietary capacity); *W. Tex. Mun. Power Agency*, 2014 WL 486287 at *4 n.6. The Fourth and Seventh Courts of Appeals' decisions should be upheld and the Third Court reversed for at least two significant reasons.

First, a sea of change in immunity law has occurred since most of the cases cited by LCRA and the Third Court were decided. Specifically, courts once strictly construed immunity ***against*** cities, presuming that immunity ***did not*** exist. *See, e.g.*, *City of Gladewater v. Pike*, 724 S.W.2d 514, 519 (Tex. 1987) ("[T]he doctrine of nonliability is construed strictly against the municipality."); *City of Houston v. Shilling*, 240 S.W.2d 1010, 1012 (Tex. 1951). This presumption against immunity was a guiding principle when a majority of the cases cited by the Third Court were decided. *See City of Georgetown*, 413 S.W.3d at 810 n.4. In fact, the Third Court's own previous decision applying the governmental-proprietary distinction to contracts expressly noted that it was "strictly construing

the doctrine of municipal immunity against the municipality…" in holding that the City of Austin was not immune. *Bailey v. City of Austin*, 972 S.W.2d 180, 192 (Tex. App.—Austin 1998, pet. denied) (*citing City of Gladewater*, 724 S.W.2d at 519).[2]

The presumption applied by the *Bailey* court is dead. This Court's opinions in *City of Galveston v. State* and *Tooke* turned that presumption on its head. *City of Galveston v. State*, 217 S.W.3d 466, 471 (Tex. 2007) ("[C]ourts should be very hesitant to declare immunity nonexistent in any particular case."); *Tooke*, 197 S.W.3d at 332-33 ("[A] waiver of immunity must be clear and unambiguous."). As noted by the Third Court in *City of Georgetown*, today "courts generally presume that governmental immunity applies." *City of Georgetown*, 413 S.W.3d at 808 (*citing Nueces Cnty. v. San Patricio Cnty.*, 246 S.W3d 651, 652 (Tex. 2008)). Considering this about-face in determining immunity, cases decided before 2006 hold little if any precedential value. This is particularly true where, as here, the contrary opinions offer virtually no reasoning for extending the governmental-proprietary distinction to contracts, but simply ***presume*** immunity does not apply. *See, e.g.*, *City of Georgetown*, 413 S.W.3d at 808.

[2] *See also City of Houston v. Sw. Concrete Constr., Inc.*, 835 S.W.2d 728, 731 (Tex. App.—Houston [14th Dist.] 1992, writ denied) ("[T]he Texas Supreme Court has previously mandated that the doctrine of municipal immunity is to be strictly construed against the municipalities.") (*citing City of Gladewater*, 727 S.W.2d at 519).

Second, the post-*Tooke/Galveston* cases cited by LCRA and the Third Court also are not instructive here because they are based on questionable precedent. Three of those cases do not even attempt to decide whether the governmental-proprietary distinction should apply to contract cases. *E. Houston Estate Apts., L.L.C. v. City of Houston*, 294 S.W.3d 723, 731-32 (Tex. App.—Houston [1st Dist.] 2009, no pet.); *City of Weslaco v. Borne*, 210 S.W.3d 782, 790 (Tex. App.—Corpus Christi 2006, pet. denied); *City of Deer Park v. Ibarra*, No. 01.10-00490-CV, 2011 WL 3820798, at *4 (Tex. App—Houston [1st Dist.] Aug. 25, 2011, no pet.); *Smith v. City of Blanco*, No. 03-8-00784-CV, 2009 WL 3230836, at *3 (Tex. App.—Austin Oct. 8, 2009, no pet.). Instead, they simply apply "even if" reasoning, holding that even if the governmental-proprietary distinction applied to contract claims, the city would still be immune because the act at issue was governmental. *Id.*

The other cases cited by LCRA go farther, but not much. In *Casso*, the court stated that "a municipality is not immune from suit when it engages in the exercise of proprietary functions," but did not explain why that proposition is true. *See Casso v. City of McAllen*, No. 13-08-00618-CV, 2009 WL 781863, at *4 (Tex. App.—Corpus Christi Mar. 26, 2009, pet. denied). Further, the court cited *Tooke*, *Federal Sign v. Texas Southern University*, and *Temple v. City of Houston* in support of its assertion. *Id*. All are problematic authority. *Tooke* is not helpful

because it expressly noted it was not deciding that issue (and never had before). *Tooke*, 197 S.W.3d at 343. *Federal Sign* is not dispositive because it does not address municipal immunity or the governmental-proprietary distinction. *Fed. Sign v. Tex. S. Univ.*, 951 S.W.2d 401, 403, 405 (Tex. 1997). In fact, a city was not even involved in the case. *Id*. Finally, *Temple* is not instructive because it was decided when municipal immunity was disfavored, and it relies on *Federal Sign*, which again does not address the distinction. *Temple v. City of Houston*, 189 S.W.3d 816, 819 (Tex. App.—Houston [1st Dist.] 2006, no pet.).

LCRA's reliance on *Hudson v. City of Houston*, 392 S.W.3d 714, 721-22 (Tex. App.—Houston [1st Dist.] 2011, pet. denied) is also misplaced. First, the *Hudson* court never considered whether the governmental-proprietary distinction applies to contract-related claims. *Id*. at 722-24. Instead, it simply made the general statement that "governmental immunity does not protect a city from suit when the claim arises from the performance of a proprietary function" and that "[a]s a result, a city is liable to the same extent as a private party if it is ***negligent*** while engaged in the performance of a proprietary function." *Id*. at 722 (emphasis added). This analysis is not useful here because it is expressly focused on torts not contracts. Further, like *Casso* it is based on shaky precedent—two tort cases,

Tooke, and *Gates v. City of Dallas*, which dealt only with immunity from ***liability***.[3] *Id*. (*citing Tooke*, 197 S.W.3d at 343; *Gates v. City of Dallas*, 704 S.W.2d 737, 739 (Tex. 1986); *Dilley*, 222 S.W.2d at 993 (distinction applied to tort case); *Martinez v. City of San Antonio*, 220 S.W.3d 10, 14 (Tex. App.—San Antonio 2006, no pet.) (same)). In short, *Casso* and *Hudson* do not have a precedential leg to stand on. At best, they demonstrate the flawed reasoning and follow-the-leader-without-independent-analysis approach that the appellate courts have applied in extending the governmental-proprietary distinction to contract related claims.

LCRA next argues that the governmental-proprietary distinction should apply to contract-related claims because courts have applied it in the context of estoppel. But, an important distinction exists between estoppel and breach-of-contract claims. Estoppel is a defense to liability. It is not an affirmative claim for relief nor does it have any relation to whether a city is immune from ***suit***, which is the issue to be decided here. None of the four estoppel cases cited by LCRA address whether the city was immune from suit in the first instance. *See Tex. Dept. of Transp. v. A.P.I. Pipe & Supply, L.L.C.*, 397 S.W.3d 162, 171 (Tex. 2013); *City of White Settlement v. Super Wash, Inc.*, 198 S.W.3d 770, 773 (Tex. 2006); *City of Corpus Christi v. Gregg*, 289 S.W.2d 746, 749-50 (Tex. 1956); *City of Lubbock v.*

[3] *Gates* did not decide that the governmental-proprietary distinction precluded immunity from suit in contract cases. *See Gates v. City of Dallas*, 704 S.W.2d 737, 739 (Tex. 1986); *see also Tooke*, 197 S.W.3d at 343, n. 89. Instead the case merely considered the distinction in determining whether a city was immune from ***liability*** (not suit) for attorney fees. *Gates*, 704 S.W.2d at 739.

Phillips Petroleum Co., 41 S.W.3d 149, 163 (Tex. App.—Amarillo 2000, no pet.) (city is subject to estoppel because it acted in its proprietary capacity). This is not surprising considering that three of those cases were decided during the period of time when immunity from suit was disfavored. *City of White Settlement*, 198 S.W.3d at 773; *Gregg*, 289 S.W.2d at 749-50; *Phillips Petroleum*, 41 S.W.3d at 163. The only post-*Tooke/Galveston* case cited by LCRA did not consider the governmental-proprietary distinction in any context, but merely found that a governmental function would be impaired. *A.P.I. Pipe & Supply*, 397 S.W.3d at 171. The application of the governmental-proprietary distinction to estoppel is neither relevant to the issue of immunity from suit, nor is it instructive in a legal landscape that favors immunity.

C. Many "principled reasons" exist to limit application of the governmental-proprietary distinction to torts.

1. *A limited application is consistent with the principles of governmental immunity articulated by this Court.*

This Court is responsible for defining the boundaries of immunity and for determining "under what circumstances [governmental] immunity exists in the first instance." *City of Galveston*, 217 S.W.3d at 471. And, it has articulated a number of principles that weigh in favor of finding that it does.

First, the Court has repeatedly expressed a heavy presumption in favor of immunity. *See, e.g.*, *City of Galveston*, 217 S.W.3d at 469; *Nueces Cnty.*, 246

S.W.3d at 653; *Tooke*, 197 S.W.3d at 332. Second, it has recognized that "waiving immunity or finding it nonexistent have precisely the same effect." *City of Galveston*, 217 S.W.3d at 471. And thus it cautioned courts against declaring immunity nonexistent because the Legislature is better equipped to balance the policy decisions involved in determining when the government should be shielded from suit. *See id.*

Since articulating these principles, the Court has held immunity nonexistent in only two situations: (1) when the government brings suits for money damages; and (2) when the suit alleges ultra vires action by government officials. *See Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371, 377 (Tex. 2006); *City of El Paso v. Heinrich*, 284 S.W.3d 366, 373 (Tex. 2009). Both instances are readily distinguished from the present case because they did not implicate the policy concerns that weigh in favor of leaving immunity decisions to the Legislature. Specifically, neither threatened the public fisc. *See Heinrich*, 284 S.W.3d at 375 ("[T]he modern justification for immunity [is] protecting the public fisc."). In *Reata*, damages were limited to an offset of the government's claim for money damages, and thus "the general public stands to lose nothing." *See City of Galveston*, 217 S.W.3d at 471. And in *Heinrich*, the available remedy was limited to prospective relief (i.e. an injunction requiring that officials follow the law). *Heinrich*, 284 S.W.3d at 375-377.

Finding immunity non-existent would have far different implications in this case. When a person sues a city for breach of contract, "a substantial part of the public will no longer be shielded 'from the costs and consequences of improvident actions of their governments.'" *City of Galveston*, 217 S.W.3d at 472. Again, the issue of who can and should bear these losses is more suited for the Legislature than the courts. *Id.; see also Tooke*, 197 S.W.3d at 332 ("'[T]he handling of contract claims against the government involved policy choices more complex than simply waiver of immunity,' including whether to rely on administrative processes and what remedies to allow.")

By enacting section 271.152 of the Texas Local Government Code, the Legislature has made that decision, and in doing so struck "a balance between the rights of parties that contract with local governments and the State's interest in protecting public resources from unjustified burdens." *Tooke*, 197 S.W.3d at 346. The Legislature waived immunity for "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." Tex. Loc. Gov't Code Ann. § 271.151(2)(A) (West Supp. 2013). Contracts executed by a city, whether for governmental or proprietary purposes, fall within the plain language of that waiver.

No principled reason supports throwing open the public fisc for contracts involving a city's provision of electricity to its citizens, when it is shielded for contracts related to the provision of water. *See* Tex. Civ. Prac. & Rem. Code Ann. § 101.0215(a)(32) (West 2011). Further, if the governmental-proprietary distinction is applied here, it will mean that LCRA can sue Boerne on their contract, but that Boerne cannot sue LCRA. Such a result would be fundamentally unfair. *See City of Galveston*, 217 S.W.3d at 472 (holding that it would be "fundamentally unfair" to find immunity nonexistent because it would mean the state could sue a city, but a city could not sue the state). Thus, the Court should find that the governmental-proprietary distinction does not apply to contract-related claims.

2. *The policy considerations that prompted creation of the governmental-proprietary distinction in the tort context do not apply to contracts.*

The governmental-proprietary distinction was created to remedy the unfairness that total immunity caused in the tort context. *See* Joe R. Greenhill & Thomas V. Murto III, *Governmental Immunity*, 49 Tex. L. Rev. 462, 463 (1971). It did so by providing recourse for tort victims injured ***through no fault of their own*** by the unreasonable conduct of a city. *See, e.g.*, *Posnainsky*, 62 Tex. at 134-135. In *Posnainsky*, for example, the distinction allowed a child crippled by a fall into an uncovered and unguarded city street drain to recover for her injuries. *Id.* at

120, 135. Because tort law arises from a paradigm of societal reasonableness and involves duties created and defined by courts, it makes some sense for courts to intervene in tort cases to uphold principles of fairness. *See* William Powers, Jr., *Border Wars*, 72 Tex. L. Rev. 1209, 1210 (1994) (explaining the constructs underlying tort claims). The same does not hold true in the contract context.

Unlike torts, contracts arise from the ideology of individual freedom and consent—the idea that "individuals are in the best position to know what is good for them" and that courts should let them organize their lives. *Id.* at 1214. Thus, contract duties do not arise from the courts, but from parties' individual agreements. *Id.* Because of the difference in the paradigms torts and contracts are built on, the law often treats them differently. *See, e.g.*, *Sw. Bell Tel. Co. v. DeLanney*, 809 S.W.2d 493, 494-95 (Tex. 1991). For example, egregious torts may result in an award of exemplary damages, whereas a breach of contract—which by its very nature cannot be egregious, reckless, or malicious—can not. *See Jim Walter Homes, Inc. v. Reed*, 711 S.W.2d 617, 618 (Tex. 1986).

The distinction between contract and tort law is critical in the immunity context. Contracts, unlike torts, involve consensual relationships. Business and people are free to enter into contracts with cities—or not. If they choose to do so, they assume the risk of loss associated with the city's immunity (and may seek additional compensation or contractual terms to help offset this risk). Thus,

judicial exceptions to immunity in the contract context do no protect innocent victims. They simply save contracting parties from their voluntary agreement to bear certain risks. This is contrary to the ideals of contract law, and thus no "principled reason" justifies extending the governmental-proprietary exception to contracts.

3. *The governmental-proprietary distinction is unworkable in the contract context.*

Application of the governmental-proprietary distinction has been fraught with inconsistencies and challenges since its conception. *City of Trenton v. State of New Jersey*, 262 U.S. 182, 191-92 (1923) (*cited by* Greenhill, *supra*, at 463). But, it becomes even more unworkable when applied to contracts. Tort claims almost always arise out of a specific act or failure to act. Thus, torts are limited to a specific time and place associated with a function. For example, if a fire truck negligently hits a pedestrian, a tort occurred in the exercise of a governmental function; but if the truck belonged to the city's electric utility, the city was engaged in a proprietary act.

While contract claims often arise out of a specific act or failure to act (i.e., a breach), the contracts themselves may be broader in nature and purpose. For example, imagine a city has a three-year contract for the delivery of gravel to its supply yard. It uses some of the gravel to surface its streets and some to pave the parking lot for its electric utility. After two years and a change of council

members, the city determines that it no longer has the budget to buy gravel and discontinues the contract. What function was it exercising when it breached? Was it governmental so that the gravel supplier may only recover damages for gravel it already supplied and some limited expenses consistent with the Section 271.152 waiver and *Tooke*? Or was the city exercising a proprietary function entitling the supplier to all damages, including lost profits? Should the answer depend on what percentage of the contract's purpose was proprietary in nature? Perhaps the courts would decide that any relationship to a proprietary act, even a single pebble in the parking lot, would avoid the limitations of immunity. These practical considerations exemplify the fact that "the handling of contract claims against the government involve[] policy choices more complex than simply waiver of immunity…." *Tooke*, 197 S.W.3d at 332.

II. Immunity has not been waived for LCRA's declaratory-judgment claims.

LCRA argued to the trial court and court of appeals that even if immunity existed, it had been waived by either the Uniform Declaratory Judgment Act ("UDJA") or by Sections 271.151-.160 of the Texas Local Government Code ("Chapter 271") (attached as Appendix C). Neither waiver applies to LCRA's declaratory-judgment claims.

A. The UDJA does not waive immunity for LCRA's declaratory-judgment claims.

The UDJA waives immunity for declaratory-judgment claims that challenge or seek to construe a statute or ordinance—nothing more, nothing less. *See Heinrich*, 284 S.W.3d at 373 n.6 (*citing* Tex. Civ. Prac. & Rem. Code § 37.006(b) (attached as Appendix D)). Declaratory-judgment actions to determine a contract's validity, enforce performance under a contract, or impose contractual liabilities against a governmental entity are barred by immunity. *Tex. Natural Res. Conserv. Comm'n v. IT-Davy*, 74 S.W.3d 849, 855-56 (Tex. 2002).

LCRA has sought a series of declarations that ask a court to indirectly declare that Boerne's termination of its contract was improper, and thus actionable. *See* CR 81-83. LCRA's artful pleading does not change the nature of the relief LCRA ultimately seeks: damages and/or continued performance of the contract by Boerne. This is exactly the kind of back-door pleading that the Court has held fails to circumvent immunity. *IT-Davy*, 74 S.W.3d at 856, 860.

B. Section 271.152 of the Texas Local Government Code does not waive immunity for declaratory-judgment claims.

Chapter 271 waives immunity from suit ***only*** "for the purpose of adjudicating a claim for breach of contract." Tex. Loc. Gov't Code Ann. § 271.152 (West 2005). Immunity is not waived by this statute regarding LCRA's declaratory-judgment claim because that claim is not "for the purpose of

adjudicating a claim for *breach of contract.*" *Id*. (emphasis added). Breach of contract is a defined cause of action, and the Legislature's choice of that term must be granted its plain and common meaning. *In re Entergy Corp.*, 142 S.W.3d 316, 322 (Tex. 2004). Further, any waiver of immunity affected by such construction must be narrowly construed. *Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653, 655 (Tex. 2008).

A breach-of-contract claim includes (1) a breach by the defendant and (2) damages. *New York Life Ins. Co. v. Miller*, 114 S.W.3d 114, 121 (Tex. App.—Austin 2003, no pet.). But, LCRA has expressly denied that it seeks to hold Boerne liable for money damages based on a breach of the contract through its declaratory-judgment action. CR 81. Thus, although LCRA's declaratory-judgment claim is related to the contract, it is missing a key element necessary for adjudicating a claim for "breach of contract," and Chapter 271 does not apply. *See Wheelabrator*, 381 S.W.3d at 602; *McCandless v. Pasadena Indep. Sch. Dist.*, No. 03-09-00249-CV, 2010 WL 1253581, at *3 (Tex. App.—Austin Apr. 2, 2010, no pet.).

LCRA is trying to have it both ways. On one hand, it insists that it is not bringing a breach-of-contract claim through its requested declaratory relief because it is not seeking to hold Boerne liable for damages. On the other hand, it argues that it is permitted to assert its declaratory-judgment claim because, really, it is a

claim for adjudication of breach of contract. The reason is simple, LCRA hedged its bets by trying to establish waiver under two mutually exclusive waiver statutes—one that is inapplicable to declarations to establish breach of contract, and one that is *only* applicable to claims for breach of contract—and in doing so, pled itself out of both. As such, the Court should hold that governmental immunity bars LCRA's declaratory-judgment claims.

PRAYER

The City of Boerne respectfully requests that the Court deny this Petition for Review. In the alternative, Boerne requests that the Court grant the petitions for review in both this appeal and the *City of Georgetown* appeal, affirm the judgment as to *Boerne*, and reverse the court of appeal's judgment in *City of Georgetown* that immunity did not apply to the LCRA's claims. The City of Boerne also prays for any other relief to which it may be justly entitled.

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CERTIFICATE OF COMPLIANCE

I, Amy M. Emerson, attorney for Petitioner City of Boerne, Texas, certify that this document was generated by a computer using Microsoft Word 2010, which indicates that the word count of this document is 4,376 per Tex. R. App. P. 9.4(i).

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been sent to the following counsel of record, in accordance with the Texas Rules of Appellate Procedure, as indicated on this 27th day of February, 2014:

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