SUBJECT: Limiting sovereign immunity in certain contract claims

COMMITTEE: Civil Practices — committee substitute recommended

VOTE: 7 ayes — Gray, Hilbert, Bosse, Goodman, Nixon, Roman, Zbranek

0 nays

2 absent — Alvarado, Dutton

WITNESSES: For — Durward Curlee, Texas Association of General Contractors; David Lancaster, Society of Professional Architects

Against — None

On — Delmar Cain, Texas A&M University System; Nelly Herrera, Attorney General's Office; Carl Reynolds, Texas Board of Criminal Justice; Bobbie Templeton, Texas Department of Transportation

BACKGROUND: The doctrine of sovereign immunity protects the state from the kinds of lawsuits that are routinely brought against private citizens and businesses. The protection of sovereign immunity is based on a common law rule that courts could not hear claims against the sovereign without the sovereign's consent. The officers and servants of the sovereign also were shielded from suits, no matter what harm they had done.

Sovereign immunity protects the state in two ways: by being immune from being sued and by being immune from liability when sued. In order for the state to be sued without constitutional or general law authority already granted for the suit, the Legislature must adopt a concurrent resolution granting a specific entity permission to sue. If the state is sued and has a judgment awarded against it, the state is still immune from liability if it does not wish to pay the judgment. In order for the plaintiff to receive any damages awarded, the Legislature must appropriate the money to pay the judgment.

When the state enters into a contract claim, the contract usually waives the state's immunity from liability but not waive immunity from being sued.

Plaintiffs in contract claims are usually allowed under the terms of the contract to recover damages from a successful suit, but only if the state agrees to let them bring such a suit.

The 74th Legislature considered 28 resolutions for permission to sue the state and granted permission in seven of those cases; the governor subsequently vetoed one claim.

The federal government waived its sovereign immunity in contract cases under the 1978 Contract Disputes Act. Generally, businesses that contract with federal agencies have an automatic right to sue, although damage awards must then be appropriated by Congress.

DIGEST:

CSHB 172 would partially waive sovereign immunity and allow claimants to bring a suit against a unit of state government alleging breach of contract for goods or engineering or construction services, so long as the suit was brought to recover money damages or compel alternative dispute resolution.

The total amount of damages a claimant could receive in a contract case would be limited to the amount the claimant was to receive under the contract. CSHB 172 would expressly prohibit awards of consequential or punitive damages in such cases. It would allow prejudgment interest, but at a rate no higher than six percent.

A contract claim suit would have to be brought in Travis County. The claimant would be required to serve all required citations with the attorney general and the unit of state government that executed the contract. The attorney general would be authorized to settle any contract claim.

If a judgment were awarded or a settlement agreed to, the unit of state government would be authorized to pay the claim from money appropriated for the goods or services. If such money was not available, the judgment or settlement could only be paid from money appropriated by the Legislature. A judgment award would not authorize execution on state property.

CSHB 172 would take effect on September 1, 1997, and apply only to contracts executed or renewed on or after that date.

SUPPORTERS SAY:

A significant majority of states, as well as the federal government, have abandoned the outdated notion of sovereign immunity for contract disputes, at least to some degree. The House Civil Practices Committee conducted an interim study of issues related to sovereign immunity in contract disputes. CSHB 172 is the product of the deliberations of that interim study and work done by the committee this session.

Sovereign immunity is not needed in contract claims. In such claims, the rights and duties of each party are clearly set out, unlike in tort claims, which are much more unpredictable and can often result in awards not based on the conduct that occurred. In contract claims, however, there is a finite amount of money set in the terms of the contract that has often already been appropriated by the Legislature. Prohibiting contractors from recovering for legitimate claims from this finite amount is an abuse of state power. Even when the state is clearly wrong in its actions, the state is not required to pay such claims unless it chooses to.

The state has the right to sue the contractor for any breach of the contractor's duties under the contract, but the contractor has no such right to sue the state. This often places the state in the unfair position of being able to demand from the contractor additional goods or services not specified under the contract. The contractor is required to comply with such demands or face being taken to court by the state. However, even if such demands place an unfair burden on the contractor, the contractor has no reciprocal right to sue the state for the breach of its duties under the contract.

The requirement that the judgment be paid out of money appropriated for the contract would help to ensure that the state complied with the contracts it makes. Most breach of contract cases claim that the state government changed the specifications of the contract, thus increasing the cost. Such changes after the contract has been executed constitute a breach. In most cases, the contractor is more than willing to complete the contract as specified for the amount of money specified in the contract. If the state refuses to pay for such work completed, the contractor should be entitled to recover the money contracted for so long as it had fulfilled its obligations under the contract.

CSHB 172 would limit the liability of the state to the amount already agreed to in the contract; no additional state money would be used to pay such judgments unless specifically appropriated. The bill would not authorize automatic payment, but simply the right to sue. In order to receive an award, the claimant would still have to prove that the state breached its duty under the contract.

State agencies would benefit from lower contract costs with the passage of CSHB 172. Currently, contractors that contract with the state must include in the price the risk of not being paid on legitimate contract claims. If contractors had a right to sue for legitimate breaches of contact, the cost of such contracts should fall.

Some agencies, including the Texas Department of Transportation (TxDOT), have been using claims procedures to resolve contract claims without going to court. Any claims processes that are currently in use could be written into any contracts executed by an agency. TxDOT claims procedures have been very successful in reducing the cost of contracts as well as helping to quickly resolve any disputes so that state construction projects remain on schedule and within their budgets. Extending the ability to resolve contract disputes to other agencies would help bring these benefits to all units of state government.

The attorney general is the attorney for the state of Texas and all units of state government under Art. 4, sec. 22 of the Texas Constitution. Because of the office's historic role in resolving and defending contract claims the Legislature has allowed to be brought, the attorney general should retain the authority to defend and settle suits on behalf of units of state government. Any agency that wished to have the opportunity to settle claims without the involvement of the attorney general could specify other dispute resolution procedures in the contract.

OPPONENTS SAY:

The state of Texas, because of its size and its reliance on the tax dollars of its citizens, should be afforded additional protections by the doctrine of sovereign immunity. The state should not open itself up to being sued in even a limited number of cases.

Under CSHB 172, the state may be forced to appropriate additional money for goods or services if it is sued for the amount of the contract and the contract has not been performed or must be performed by another contractor.

The attorney general should not be given unilateral authority to settle claims. Because the money used to settle such claims would come from money appropriated to the state agency, the agency should have some say in the settlement. In such cases, the agency is essentially the client of the attorney general. When settlement offers are made in private civil suits, the client must authorize the settlement, not the attorney.

Under CSHB 172, the state's litigation costs could increase from defending a potentially large number of suits that would be filed for contract claims.

NOTES:

The committee substitute restricted claims to those of goods and construction or engineering services; specified that total damages could not exceed the value of the contract; provides venue for such suits in Travis County; eliminated a limitation period of four years; and capped prejudgment interest at 6 percent.

A related bill, SB 694 by Brown, would allow state agencies to develop and use alternative dispute resolution procedures for resolving disputes, including contract claims, without waiving sovereign immunity. SB 694 passed the Senate on March 20 and has been reported favorably by the House Judicial Affairs Committee.