

- SUBJECT:** Waiving local government sovereign immunity for contract disputes
- COMMITTEE:** Civil Practices — committee substitute recommended
- VOTE:** 7 ayes — Nixon, Rose, P. King, Madden, Raymond, Strama, Woolley  
0 nays  
2 absent — Martinez Fischer, Talton
- WITNESSES:** For — Gregory Cokinos, AGC – Texas Building Branch; Anna Farris, Associated Builders and Contractors of Greater Houston and ABC of Texas; Richard Ringo, RBR Construction; Tom Vaughn, Vaughn Construction; John R. Ward, Texas Surety Federation; Paul Workman, Workman Commercial  
  
Against — Todd Clark, Texas Association of School Boards and Council of School Attorneys; Keith Stretcher, City of Midland
- BACKGROUND:** The doctrine of sovereign immunity precludes a party from asserting an otherwise meritorious cause of action against a government entity unless the government consents. The Legislature has waived sovereign immunity for both the state and for counties in contract lawsuits. There is disagreement as to whether sovereign immunity has been waived for other local government entities (such as cities and school districts) in contract cases. The Texas Supreme Court is currently considering several cases that deal with the issue.
- DIGEST:** CSHB 2039 would waive sovereign immunity for local government entities for claims arising under contracts that the entity entered into. The bill would apply to political subdivision of the state, other than a county or a unit of state government, and would include a municipality, a public school district or junior college district, and a special-purpose district, such as a navigation district.  
  
A plaintiff could sue the entity in either county or state court for a claim arising under a written contract for goods or services. The plaintiff would not be able to sue the entity in federal court as the bill expressly would maintain sovereign immunity against suits brought in federal court.

The bill would limit a judgment against the entity to the following:

- the balance owed by the entity under the contract, including any amount owed for increased costs borne by the plaintiff to perform the contract caused by the entity either delaying the plaintiff's performance or accelerating the contract;
- the amount owed for change orders or additional work required to carry out the contract; and
- interest allowed by law.

The bill would not allow the following damage awards:

- consequential damages (losses that did not flow directly from the defendant's wrongful act) except for an amount owed for increased costs borne by the plaintiff to perform the contract caused by the entity either delaying the plaintiff's performance or accelerating the contract;
- exemplary damages (damages awarded in addition to actual damages when the defendant acted with recklessness, malice, or deceit and meant to punish and thereby deter blameworthy conduct); or
- damages for unabsorbed home office overhead.

Adjudication procedures agreed to in the contract (including a requirement for serving notice to the other party or engaging in alternative dispute resolution before bringing a suit) between the plaintiff and the entity would be enforceable unless they conflicted with another provision in the bill.

The bill state that it is not intended to affect in any way the sovereign immunity of a local government entity for a lawsuit arising from a contract executed before September 1, 2005. The bill would take effect September 1, 2005, and would apply to contracts executed on or after that date.

**SUPPORTERS  
SAY:**

CSHB 2039 would bring fairness to business relationships between contractors and local government entities, thus encouraging top contractors to take on government contracts. Under current law, a plaintiff cannot sue a local government entity for a claim that arises from a contract. This creates a fundamentally unfair situation that denies redress, for example, to a contractor who completed a project for a city that refused to pay. As a result, to protect themselves from potentially irrecoverable

losses, certain contractors do not bid for local government contracts. Some of the best and most experienced contractors choose to bid only on other contracts while small contractors effectively are shut out of the bidding process because they cannot afford the risk of contracting with local governments. In the end, all that local government entities may be left with to receive bids are sub-par contractors.

Another problem resulting from the inability of a contractor to bring suit against government entities is that contractors often submit bids that are artificially high or perform substandard work. They do this to provide themselves with an informal type of insurance — if they overcharge enough local government entities or save money on each job by cutting corners, contractors financially are better equipped to absorb losses from government entities that refuse to pay. This creates a situation where local government entities often pay more for a contract job than the fair market value. CSHB 2039 would provide reasonable assurance to contractors that they would receive payment, or at least the opportunity to seek redress, in exchange for performing competent work at a fair price.

**OPPONENTS  
SAY:**

The bill's provision stating that sovereign immunity would be waived for any claim “arising under the contract” is too broad. It is unclear from this language whether a plaintiff could bring a claim only for breach of contract, or whether the plaintiff could bring any claim — such as fraud — based on the contract. Government Code, ch. 2260, which allows a contractor to bring a claim against the state, limits a contractor to breach of contract claims. It would be fair and reasonable to include a similar limitation in this bill.

Local Government Code, sec. 262.007, which waives the sovereign immunity of counties in claims arising from contracts they entered, waives a county’s sovereign immunity only for claims involving a contract for engineering, architectural, or construction services or for goods related to those contracts. By not limiting the type of contract for which a local government entity could be sued, local government entities would be exposed to a vast amount of liability based on any contracts they entered.

**OTHER  
OPPONENTS  
SAY:**

The bill should allow recovery for attorney’s fees. Local Government Code, sec. 262.007, which waives sovereign immunity for certain contract claims against counties, allows for the recovery of attorney’s fees. A contractor should be able to collect attorney’s fees against a city or other local governmental entity also.

NOTES:

The bill as introduced would have allowed for the recovery of attorney's fees from the local government entity as part of the plaintiff's judgment award.