

DRAFTING CONTRACTS TO AVOID LITIGATION

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PRESENTED BY:

Steven H. Weller

Partner

Bickerstaff Heath Delgado

Acosta, LLP

(512) 404-7862

steven.weller@bickerstaff.com

[www.bickerstaff.com/attorney/
steven-h-weller/](http://www.bickerstaff.com/attorney/steven-h-weller/)

Daniel J. Olds

Associate

Bickerstaff Heath Delgado

Acosta, LLP

(512) 404-7786

dolds@bickerstaff.com

[www.bickerstaff.com/attorney/
daniel-j-olds/](http://www.bickerstaff.com/attorney/daniel-j-olds/)





CONTRACT TERMS THAT DISCOURAGE LITIGATION

- ◆ Indemnity, Defense, Hold Harmless Clause
- ◆ Insurance Coverage for Vendor
- ◆ Additional Named Insured
- ◆ Alternate Dispute Resolution Clause
- ◆ Forum Selection Clause

1. Indemnification

- ◆ Indemnify – imposes obligation on one party (indemnitor) to pay or compensate the other (indemnitee) for certain legal liabilities.
- ◆ Defend – independent duty to actively defend or fund defense costs.
- ◆ Covenant Not to Sue – promise by indemnitor that it will not institute a lawsuit.



Make Sure Enforceable

- ◆ Fair notice requirements: (1) express negligence doctrine and (2) conspicuousness requirement. *Ethyl Corp. v. Daniel Constr. Co.*, 725 S.W.2d 705 (Tex. 1987); *Dresser Indus., Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505 (Tex. 1993).
 - Typically applies to attempts to indemnify a party for its own future acts, omissions or negligence.
 - The circumstances where fair notice applies are expanding. Recommend compliance at all times out of an abundance of caution.

Make Sure Enforceable

◆ Express negligence doctrine

Intent of the parties to indemnify must be clearly stated and obvious, such that a lay person could understand it. Should be unambiguous.

◆ Conspicuousness

Something must appear on the face of the contract to attract the attention of a reasonable person when he/she looks at it.

- Larger type
- Contrasting colors
- Not buried in unrelated text
- Notice of indemnity clause on first page of contract

Example of Enforceable Indemnity Provision

IN THE EVENT ANY PERSON OR ENTITY, NOT A PARTY TO THIS AGREEMENT, SHALL MAKE ANY CLAIM OR FILE ANY LAWSUIT AGAINST (*Indemnitee*) THAT ARISES OUT OF, RELATES IN WHOLE OR IN PART, OR RELATES IN ANY WAY TO THE SUBJECT OF THIS AGREEMENT IN ANY RESPECT, (*Indemnitor*) AGREES TO INDEMNIFY, DEFEND, AND HOLD (*Indemnitee*) HARMLESS FROM ANY AND ALL SUCH CLAIMS AND LAWSUITS INCLUDING THE PAYMENT OF ALL DAMAGES, EXPENSES, COSTS, AND ATTORNEYS' FEES, EVEN WHEN CAUSED IN WHOLE OR IN PART BY THE ACTS, OMISSIONS, NEGLIGENCE, GROSS NEGLIGENCE OR OTHER LEGAL DEFAULTS OF (*Indemnitee*).



2. Liability Insurance

- ◆ Very important that entity you are contracting with carries its own policies to cover itself.
 - General Liability – bodily injury and property damage to others.
 - Employer liability – workers' compensation insurance.
 - Professional Liability / E&O – professional errors on services.
 - ✓ Design Professionals – ask for \$2-3 million in coverage.

3. Additional Named Insured

- ◆ Require that your city be listed as an additional named insured on the other party's insurance policy.
- ◆ Mandate the receipt of policy endorsements naming your city as an insured prior to execution of the contract.
- ◆ Carefully review endorsement language for exclusions.
 - Limitations on amounts of coverage.
 - Exclusion for incidents not the result of primary insured's negligence.
 - Ongoing operations, completed operations, or both?



4. ADR Clause

- ◆ Include mandatory alternate dispute resolution (ADR) clause that requires parties to engage in ADR before filing suit.
 - Arbitration clause. TEX. CIV. PRAC. & REM. CODE, Chap. 171.
 - Mediation clause. Completion of pre-suit mediation is a contractual prerequisite to filing suit.
 - Preselect your preferred local mediator.

4. ADR Clause

- ◆ What happens if party does not engage in mediation prior to filing suit?
 - Dismissal without prejudice—not just abatement.
 - Any expenses associated with dismissal will be paid by the other party.

5. Forum Selection Clause

- ◆ Any dispute will be subject to mandatory venue provisions in the district courts of your county or local federal courts.
- ◆ “Forum-selection clauses are generally enforceable and presumptively valid.”

In re Laibe Corp., 307 S.W.3d 314, 316 (Tex. 2010).



Example of Forum Selection Clause

This agreement shall be interpreted under the laws of the State of Texas. Any litigation arising from this agreement shall be resolved in the trial courts of _____ County, State of Texas.



6. Attorneys' Fees and Costs

- ◆ Attorneys' fees and costs to city if other party does not prevail.
- ◆ Attorneys' fees and costs will be awarded to city if a pre-suit settlement offer is rejected and later not exceeded.

Cities Cannot Indemnify Other Party

- ◆ Article XI, Sec. 7 of Texas Constitution

- “No debt for any purpose shall ever be incurred in any manner by any city or county unless provision is made, at the time of creating the same, for levying and collecting a sufficient tax to pay the interest thereon[.]”

Cities Cannot Indemnify Other Party

- ◆ Texas Attorney General Opinion MW-475

“A contractually imposed obligation of indemnity creates a ‘debt’ in the constitutional sense unless at the time of the agreement it is within the lawful and reasonable contemplation of the parties that it will be satisfied out of current revenues or some currently available fund.”

“[A] state agency will ordinarily be unable to execute an enforceable indemnity agreement in favor of another party.”

Cities Cannot Indemnify Other Party

- ◆ Basically, indemnity provision would create a debt on behalf of the city, so it is prohibited.
- ◆ Often causes confusion among parties because this is unique to governmental entities.



OTHER METHODS FOR CITIES TO AVOID OR QUICKLY RESOLVE LITIGATION

1. TEX. LOC. GOV'T CODE, Chap. 271

- ◆ For a waiver of governmental immunity to exist there must be a written, executed, and duly authorized contract for goods or services to be provided to the governmental entity.

1. TEX. LOC. GOV'T CODE, Chap. 271

- ◆ Five elements a contract must meet in order for it to be a contract subject to Section 271.152's waiver of immunity:
 - 1) the contract must be in writing;
 - 2) state the essential terms of the agreement;
 - 3) provide for goods or services;
 - 4) to the local governmental entity; and,
 - 5) be executed on behalf of the local governmental entity

City of Houston v. Williams, 353 S.W.3d 128 (Tex. 2011).



No Waiver By Conduct or Acceptance

- ◆ No waiver-by-conduct exception to Chapter 271's requirements.
- ◆ Texas Supreme Court has reaffirmed this; the requirement for a written, executed, properly approved contract is an absolute precondition to waiver of governmental immunity for a breach of contract claim.

Tex. Nat. Res. Conservation Comm. v. IT-Davy, 74 S.W.3d 849 (Tex. 2002); *Sharyland Water Supply Corp. v. City of Alton*, 354 S.W.3d 407 (Tex. 2011).



No Waiver By Conduct or Acceptance

- ◆ “Because we have consistently held that only the Legislature can waive sovereign immunity from suit, allowing other governmental entities to waive immunity by conduct that includes accepting benefits under a contract would be fundamentally inconsistent with our established jurisprudence and with the existing legislative scheme. Accordingly, we reject IT–Davy’s argument that we should fashion such a waiver-by-conduct exception in a breach-of-contract suit against the State.” *Tex. Nat. Res. Conservation Comm’n v. IT-Davy*, 74 S.W.3d 849, 857 (Tex. 2002).



No Waiver By Conduct or Acceptance

- ◆ Previously, Texas courts had recognized a judicially imposed, equitable waiver of immunity by conduct such as accepting of benefits under a contract for goods and services.
- ◆ However, the Texas Supreme Court expressly disavowed those exceptions.



No Waiver By Conduct or Acceptance

- ◆ *Tex. Nat. Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849 (Tex. 2002) (contractor sued TNRCC for non-contract based extra work and costs to clean up hazardous waste sites in Houston. Court stated “we decline” to fashion a waiver-by-conduct exception).
- ◆ *Vantage Systems Design, Inc. v. Raymondville Independent School District*, 290 S.W.3d 312 (Tex. App.—Corpus Christi 2009, pet. denied) (school district did not waive governmental immunity even though contractor has submitted a formal proposal to school district and school board had written a letter to the contractor indicating acceptance of the contractor’s proposal, where the school district never executed a written contract).



No Waiver By Conduct or Acceptance

- ◆ *City of Oak Ridge North v. Mendes*, 339 S.W.3d 222 (Tex. App.—Beaumont 2011, pet. denied) (former city manager’s claim for incentive pay was barred by governmental immunity, even though the city council had orally approved incentive pay compensation during meeting).
- ◆ *ICI Const., Inc. v. Orangefield ISD*, 339 S.W.3d 235 (Tex.App.-Beaumont 2011, no pet.) (despite the fact that repair work had already been performed, a series of purchase orders, pay applications, checks, and admissions of OISD's Superintendent, when read together, still did not contain essential terms of parties’ agreement under Chapter 271).



2. Presuit Notice

- ◆ TEX. CIV. PRAC. & REM. CODE § 101.101

- Governmental unit is entitled to receive notice of tort claim no later than 6 months after claim occurred.
- Requirements of notice: (1) the damage or injury claimed; (2) the time and place of the incident; and (3) the incident.

- ◆ Why is pre-suit notice required?

“The purpose of the notice requirement is to ensure prompt reporting of claims in order to enable governmental units to gather information necessary to guard against unfounded claims, settle claims, and prepare for trial.” *Cathey v. Booth*, 900 S.W.2d 339, 341 (Tex. 1995).



2. Presuit Notice

- ◆ Pre-suit notice is jurisdictional. The denial of a PTJ on lack of pre-suit notice = interlocutory appeal. TEX. CIV. PRAC. & REM. CODE § 51.014
- ◆ Failure to comply with notice requirement is a jurisdictional bar to recovery.

Univ. of North Tex. Health Science Ctr. v. Walton, No. 02-19-00193-CV, 2020 WL 241383 (Tex. App.—Fort Worth 2020, no pet.).



2. Pre-suit Notice

- ◆ Only applies to tort claims, not breach of contract or federal causes of action.
- ◆ City can adopt shorter pre-suit notice requirement in city charter per Section 101.101(b) of Texas Civil Practice & Remedies Code.



Example of Pre-suit Notice

“The City shall not be liable to any person for injuries suffered . . . Unless the injured person, or someone on his behalf, shall within ninety days or within six months for good cause shown from the date the damage occurred or the injury was received, give notice in writing to the mayor[.]”

Steven H. Weller

Partner

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Acosta, LLP

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sweller@bickerstaff.com

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steven-h-weller/](http://www.bickerstaff.com/attorney/steven-h-weller/)

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