

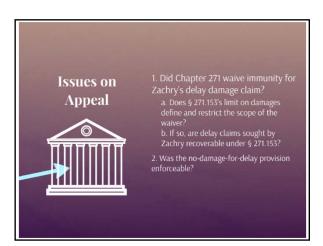


#### **Key contractual provisions:**



- Zachry solely responsible for the manner and method of construction
- No-damages-for delay
  - Zachry shall receive no financial compensation for delay or hindrance to the Work . . . EVEN IF SUCH DELAY OR HINDRANCE RESULTS FROM, ARISES OUT OF OR IS DUE, IN WHOLE OR IN PART TO THE NEGLIGENCE, BREACH OF CONTRACT OR OTHER FAULT OF THE PORT.





## The Good

§ 271.153 defines scope of waiver

- 271.152: A local governmental entity that enters into a contract subject to Chapter 271, waives "immunity to suit for the purpose of adjudicating a claim for breach of the contract, subject to the terms and conditions of this subchapter.
- · "Subject to" language modifies "waives"
- Terms & conditions = other nine sections of Chapter 271 waiver.
- Conclusion: Immunity only waived if plaintiff seeks damages recoverable under Chapter 271.

## The Bad

Delay claims are recoverable under § 271.153 even if disclaimed in the contract.

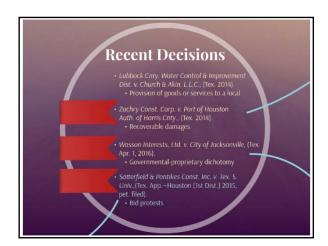
- "[B]alance due and owed . . . under the contract" = amount of damages payable and unpaid.
   All common-law, direct damages qualify
- Damages do not need to be ascertainable from contract
- Proof = delay damages
- DID NOT consider no-damages-for-delay clause



# **Practice Points**

Assert PTJ for any damage claims or remedies that are not available under statutes

- Example: injunctive relief
- Don't expect that a PTJ will be granted based on contract limits
- Include contractual limitations of liability anyway
- Watch: City of Colleyville v. Newman, 2016 WL 1314470 (Tex. App.-Fort Worth Mar. 31, 2016).















Does immunity apply to contract claims arising from a city's exercise of a proprietary function?

No "proprietary immunity."

# **Opinion Highlights**

- First issue is whether immunity exists, not whether it is waived Courts decide existence. Legislature decides waiver.
- City immunity is derivative of state immunity
  - Governmental: Immunity applies when city acts under state authority-i.e., performs act mandated by the state for the benefit of "the people."
  - Proprietary: Immunity does not apply when city does not act on state's behalf i.e., voluntarily performs an act for benefit of its citizens

  - Chapter 271 does not alter common law
     Dichotomy "well-established" jurisprudence
    - No express abrogation
  - $\bullet$  TTCA list of governmental and proprietary functions is to guide courts.

# **Impact on Cities**

- No immunity
  - All causes of action possible
- No statutory limit on damages
- Increased litigation
- More fact finding to decide PTJs













# Argument and Decision • Satterfield – immunity does not apply because DJ does not seek to control state action. Relied on Tex. Highway Comm'n v. Tex. Ass'n of Steel Importers. • Court – Suit to void a specific contract does seek to control state action • Satterfield – Competitive bidding statutes waive immunity – any other reading would render them meaningless • Court – No express waiver, TSU immune. • Satterfield – Allow us to amend • Court – No, moot.



