

**NO. 17-0423**

**In the Supreme Court of Texas**

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**HAYS STREET BRIDGE RESTORATION  
GROUP,**

**Petitioner**

**v.**

**CITY OF SAN ANTONIO,**

**Respondent**

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On Petition for Review from the Fourth Court of Appeals at San Antonio,  
Cause No. 04-14-00886 and the 73rd District Court for Bexar County,  
Honorable David A. Canales, Cause No. 2012-CI-19589

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**PETITION FOR REVIEW**

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## STATEMENT OF THE CASE

- Nature of the case:** This is an action for breach of a written contract for services, brought by the Hays St. Bridge Restoration Group, a broad-based community organization, against the City of San Antonio.
- Trial Court:** 73rd District Court for Bexar County, Honorable David A. Canales, Cause No. 2012-Cl-19589. Following a jury trial, Judge David C. Canales, 76th Judicial District Court, Bexar County, entered final judgment in favor of the Hays St. Bridge Restoration Group on its breach of contract claim and issued an order of specific performance against the City. Judge Canales' Judgment is available at *Hays Street Bridge Restoration Group v. City of San Antonio*, 2014 WL 5113713 (Tex. Dist. Sept 19, 2014) and is Tab A in the Appendix.
- Court of Appeals:** Fourth Court of Appeals, San Antonio
- Disposition:** Justice Marialyn Barnard authored the Court of Appeals' opinion for a panel that included Justices Barnard, Angelini, and Martinez. The Court of Appeals rendered judgment dismissing the case for want of jurisdiction, misinterpreting Local Government Code Section 271.153 as an exclusive list of remedies available in a breach of contract action as to which governmental immunity is waived by section 271.152, and erroneously holding that the City entered the disputed fundraising contracts pursuant to its governmental responsibilities. Hays St. Bridge Restoration Group timely filed Motions for Rehearing and Rehearing en Banc. Both motions were denied on April 18, 2017. The Court of Appeals' opinion is available at *City of San Antonio v. Hays St. Bridge Restoration Group*, 04-14-00886-CV, 2017 WL 776112 (Tex. App.—San Antonio Mar. 1, 2017) and is Tab C in the Appendix.

## **STATEMENT OF JURISDICTION**

This Court has jurisdiction pursuant to Texas Government Code sections 22.001(a)(3), and (a)(6).

This Court has jurisdiction under Government Code section 22.001(a)(3) because the outcome in this case turns on the construction of Texas Local Government Code sections 271.152 and 271.153, provisions that define the legislative waiver of immunity to suit of Texas local governments for governmental contracts involving goods and services.

This Court has jurisdiction under Government Code section 22.001(a)(6) because the Court of Appeals' decision imposes an erroneous interpretation of the clear language of Local Government Code Section 271.153, engrafting a rule that severely undercuts the purposes of section 271.152, disregards basic contract law, and lacks support in municipal law generally. This error is of great importance to Texas jurisprudence, as uncertainty over the scope of contractual immunity for local government entities continues to generate a large volume of litigation.

## **ISSUE PRESENTED**

Was the Court of Appeals correct in disregarding the clear language of Texas Local Government Code sections 271.152 and 271.153 and holding that section 271.152 does not waive governmental immunity for breach of contract claims seeking the remedy of specific performance?

TO THE HONORABLE SUPREME COURT OF TEXAS:

This case illustrates the corrosive effects of governmental immunity on popular trust in our government and government officials. As Professor Paul Gowder explains,

The key problem is that “immunity” may shade too easily into “impunity”—the power to violate the acknowledged law without consequences. ... What are citizens to think about a [government] that has, and exercises, such a power? One thing they might reasonably think is that their legislature is not to be trusted--that its members might well hold the rights of their fellow citizens in sufficient disregard to use their power not for the public interest, but to help their friends and punish their enemies. This is, after all, the classic fear about power, especially the absolute kind: it corrupts. ... [W]hy should citizens be confident that they will be secure from [this] power in the future?

Paul Gowder, *The Rule of Law Against Sovereign Immunity in a Democratic State*, 93 Tex. L. Rev. 247, 253 (2015). The Court of Appeals decision in this case undercuts the legislative waiver of governmental immunity set forth in Local Government Code section 271.152 and, if left uncorrected, will generate needless confusion and injustice in this important area of law.

This case involves a contract between the City of San Antonio and a diverse group of public-spirited San Antonians who generously committed their time and expertise for over ten years to preserve an important cultural and engineering landmark for the city’s residents and visitors. In exchange, the City promised that the fruits of their work would be allocated to the Hays Street Bridge Restoration

Project. After the Group had fully performed its part of the contract, the City broke its commitment, transferring land that the Group had acquired for Bridge visitors' parking, restroom, and educational facilities to a private company for its commercial use. The Court of Appeals held that the City is immune from suit for this breach of contract, essentially because the Group did not seek money damages and the contractual "payment due" was not monetary. Surely this result, contradicted by the clear language of Local Government Code sections 271.151–271.153, sends a cynical message of disregard to those who generously seek to contribute to their communities.

The Court of Appeals reached this result by disregarding the clear language of section 271.153 and inserting a limitation on the waiver of immunity that is purely of its own invention: that the waiver extends only to cases in which monetary damages are sought. In effect, the Court of Appeals rewrote section 271.153 to be an exclusive list of remedies for which immunity is waived. This is a significant misinterpretation that needs correction by this Court.

## **STATEMENT OF FACTS**

The Court of Appeals correctly stated the nature of the case, with some errors in the particulars.<sup>1</sup> The Hays Street Bridge is a viaduct consisting of two wrought iron

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1. The Court of Appeals appears to have conflated the Group's breach of contract claim with a second cause of action, which alleged violation of Texas Local Government Code §253.001(b), (f) (Sale of Park Land, Municipal Building Site, or Abandoned Roadway). The

truss spans (one Phoenix Whipple 225-ft span, and one Pratt 130-ft span), which were built in 1881. In 1910, the structure was moved to San Antonio to provide passage over the railroad tracks east of San Antonio's downtown. Under Jim Crow laws and practices, the eastside was one of the few areas where African-Americans were permitted to buy homes, and the Hays Street Bridge became the iconic gateway to the city's Black community. 4 RR 77-78, 4 RR 173-174, 4 RR 178-179 It was owned by the Union Pacific and its predecessor railroad companies until 2008.

Around 1982, the City ordered the bridge closed to vehicular and pedestrian traffic due to its deteriorated condition, and in the 1990s, Union Pacific made plans to demolish it. 4 RR 85 In response, a diverse group of San Antonians, including engineers, eastside residents, community activists, and historic preservationists joined together to work for the public benefit, seeking to educate, encourage, cajole, and enable the City of San Antonio to acquire and restore this important cultural and engineering landmark for the enjoyment and education of San Antonio residents and visitors (the "Hays Street Bridge Restoration Project" or the "Project"). 4 RR 90-91 By 2000, this group had organized themselves in the Hays Street Bridge Restoration Group (hereinafter, "Hays St. Group" or "Group"). *Id.*

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Group effectively abandoned this claim on the eve of trial, for a variety of reasons not relevant here.

The Group's goal was to preserve the bridge and to restore it for community use. In 2000, the Group entered into discussions with the City about the restoration project, which included plans to acquire the Bridge from Union Pacific and the adjoining land at 803 N. Cherry St., recently vacated by and owned by the Dawson family (hereinafter, the "Cherry St. Land" or "Land"). Throughout the next ten years, as the Hays Street Bridge Restoration Project (hereinafter the "Hays St. Bridge Project" or the "Project") came to fruition, the Cherry St. Land was treated by both the City and the Group as integral to the Project, providing space for parking, restroom, and educational facilities necessary to public access and appreciation of the historic bridge structure. 4 RR 191-205

The first step was to earn a federally-funded grant. The Group co-authored the grant application (including the solicitation of in-kind services from historic restoration experts) proposing to acquire and restore the Bridge as part of a "hike and bike" trail. 4 RR 175-176 Group members then worked tirelessly to educate and persuade state and local officials. These efforts were successful and the Project was offered a \$2.9 million grant. 4 RR 176 At that point, however, the City refused to accept the grant unless the Group signed a written, legally binding agreement, drafted by the City Attorney and City Staff. 4 RR 261 Under the agreement, the Group promised "to raise matching funds through grant applications and other private resources" and to transfer such funds—both cash and in-kind contributions—

to the City. In exchange, the City promised that all donations solicited by the Group would be allocated to the Project. See Appendix Tab G

Over the next ten years, the Group fully performed its obligations under the contract, generating cash donations of more than \$189,000 and in-kind donations that included the Bridge and the adjoining land at 803 N. Cherry St. 4 RR 103-104, 4 RR 189-191, 4 RR 202-205 Appendix Tab B, Jury Finding 5 In 2012, however, a new City administration arranged, without competitive bidding or other public process, to transfer the Cherry St. Land to the Alamo Beer Company for commercial use. 4 RR 205-215, 217-219 The “Alamo Beer package” approved by City Council included “sale” of the Land to Alamo Beer for \$295,000 and a grant of \$295,000 to Alamo Beer, which was to be funded by the sale of the Cherry St. Land. From any reasonable perspective, this was a giveaway that breached the City’s agreement with the Hays St. Group. 5 RR 152 See Appendix Tab B, Jury Finding 6

The Group then filed this suit for breach of contract. The trial court denied the City’s plea to the jurisdiction and its motion for summary judgment, and the case was tried to a jury. The jury found: (1) the parties agreed to the terms of the Memorandum with the intent that it be legally binding (2) the word “funds” in the Memorandum included both money and in-kind donations; (3) the Cherry Street Property was subject to the terms of the Memorandum; and (4) the City failed to

comply with the terms of the Memorandum with respect to the Cherry Street Property. See Appendix Tab B.

On September 19, 2014, the trial court rendered judgment on the jury's verdict and ordered specific performance in accordance with the contract. See Appendix Tab A. In defiance of the trial court's order, the City reenacted most terms of the "Alamo Beer package" and recorded a deed transferring the Cherry St. Land. On December 18, 2014, the Group filed a Motion for Order to Show Cause alleging violation of the Judgment and Order. On the same day, the City filed its notice of appeal, and the district court stayed the motion, pending final decision on appeal. The contempt motion remains stayed in the district court.

### **SUMMARY OF THE ARGUMENT**

Read within the context of basic contract law, the clear language of Local Government Code sections 271.151–271.153 provides that the waiver of governmental immunity in section 271.152 includes breach of contract actions seeking specific performance. Yet the Court of Appeals reached a contrary decision in this case. If left uncorrected, the Court of Appeals' decision will produce more confusion and injustice. Moreover, the Court of Appeals' decision rest on two errors that are likely, if not corrected, to plague the law of contract remedies as well as that of governmental immunity.

Of course, the remedy of specific performance is available only if there is no adequate monetary remedy and if, in the trial court's guided discretion, specific performance is appropriate in the particular circumstances of the case. However, there is no general common law doctrine or principle that precludes a judgment of specific performance against government entities, and Texas courts have entered such judgments for many years.

Not surprisingly, every court that has had occasion to consider the possibility of specific performance in a breach of contract claim as to which governmental immunity is waived by Local Government Code section 271.152 has concluded that 271.153 presents no bar to such a remedy.

## **ARGUMENT**

### **1. Local Government Code section 271.152 clearly and unambiguously waives the City's governmental immunity in this case.**

Section 271.152 of the Texas Local Government Code states:

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.

Tex. Loc. Gov't Code Ann. §271.152 (emphasis added).

The Legislature enacted section 271.152 "to loosen the immunity bar so that all local governmental entities that have been given or are given the statutory authority

to enter into contracts shall not be immune from suits arising from those contracts.” *Ben Bolt–Palito Blanco Consol. Indep. Sch. Dist. v. Tex. Political Subdivisions Property/Casualty Joint Self–Ins. Fund*, 212 S.W.3d 320, 327 (Tex.2006). The statute waives immunity from suit for some contracts: “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. ...” Tex. Loc. Gov't Code §271.152. (emphasis added) A contract is “subject to this subchapter” if it “is 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 §271.151(2)(A). The fundraising agreement in the case at bar clearly is subject to the subchapter under discussion. The City argued that the agreement was not a contract because the writing was entitled “Memorandum of Understanding,” but the Court of Appeals did not evaluate this argument. See Appendix Tab C.

Section 271.152 provides that governmental immunity to suit is waived “for the purpose of adjudicating a claim for breach of the contract.” In section 271.151(1), “adjudication” is defined as “the bringing of a civil suit and prosecution to final judgment in county or state court ...” Tex. Loc. Gov't Code §271.151(1). Under long-standing Texas contract doctrine, when a breach of contract claim is brought

and successfully prosecuted to final judgment in county or state court, the plaintiff is entitled to compensatory monetary damages or, in the alternative and subject to the trial court’s discretion, an order of specific performance. See generally, *McMullen v. Kelso*, 4 Tex. 235, 236 (1849) (reciting the alternative contract remedies of money damages and specific performance); *Durst v. Swift*, 11 Tex. 273, 278 (Tex. 1854) (discussing the alternative contract remedies of money damages or specific performance in the context of a venue statute). Accordingly, the waiver of immunity from suit in section 271.152 necessarily encompasses both breach of contract claims seeking monetary damages and claims seeking specific performance.

The final phrase in section 271.152—“subject to the terms and conditions of this subchapter”—was carefully explained by this Court in *Zachry Const. Corp. v. Port of Houston Auth. of Harris County*, 449 S.W.3d 98, 106 (Tex. 2014): “‘The “terms and condition of this subchapter’ referred to in Section 271.152 are found in the Act’s other nine sections,” including section 271.153.

The text of Section 271.153(a) begins<sup>2</sup>

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<sup>2</sup> The Hays Street Group’s claim arose in 2012, when the City transferred the land at 803 N. Cherry to the Alamo Beer Company in violation of its 2002 contract with the Hays Street Group. Section 271.153(c) was enacted in 2013, with the express provision that it would not apply to contracts executed before June 14, 2013. 2013 Tex. Sess. Law Serv. Ch. 1138 (H.B. 3511), Section 4(c). The version of §271.153 applicable to this case is as follows:

§ 271.153. Limitations on Adjudication Awards

(a) The total amount of money awarded in an adjudication brought against a local governmental entity for breach of a contract subject to this subchapter is limited to the following:

- (1) 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;

The total amount of money awarded in an adjudication brought against a local governmental entity for breach of a contract subject to this subchapter is limited to the following ...

The meaning of these words is crystal clear: section 271.153(a) limits the types of money damages that can be awarded in a breach of contract claim as to which immunity is waived by section 271.152 must conform to the limitations in section 271.153 and, as this Court concluded in *Zachry*, “the Act does not waive immunity on a claim for damages not recoverable under Section 271.153” *Id.* at 110. This provision applies to monetary damages, one of the two forms of relief available in a breach of contract adjudication. It does not apply to the alternative remedy of specific performance.

## **2. The Court of Appeals Decision is Clearly Erroneous and Needs Correction**

The Court of Appeals decided that Local Government Code section 271.152 does not waive the City’s governmental immunity in this case because the Group did not seek money damages. This decision rests on two serious errors. First, the Court of Appeals treats specific performance as a form of monetary damages: “the only damages claimed by the Group (and the only damages awarded by the trial

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- (2) the amount owed for change orders or additional work the contractor is directed to perform by a local governmental entity in connection with the contract; and
  - (3) interest as allowed by law, including interest as calculated under Chapter 2251, Government Code.
- (b) Damages awarded in an adjudication brought against a local governmental entity arising under a contract subject to this subchapter may not include:
- (1) consequential damages, except as expressly allowed under Subsection (a)(1);
  - (2) exemplary damages; or
  - (3) damages for unabsorbed home office overhead.

court) was specific performance” *City of San Antonio v. Hays St. Bridge Restoration Group*, 04-14-00886-CV, 2017 WL 776112, at \*5 (Tex. App.—San Antonio Mar. 1, 2017). Second, the Court of Appeals misinterprets this Court’s analysis in *Zachry, supra*. The Court of Appeals describes the Court’s holding in *Zachry* as follows:

In that case, the supreme court held the scope of section 271.152's waiver of immunity was limited by the damages provided in section 271.153. *Id.* at 109 (“Section 271.152 merely uses Section 271.153 to further define to what extent immunity has been waived.”). In other words, “the waiver does not allow recovery beyond that permitted by section 271.153.” *Id.* at 108.

*City of San Antonio v. Hays St. Bridge Restoration Group*, 04-14-00886-CV, 2017 WL 776112, at \*5 (Tex. App.—San Antonio Mar. 1, 2017).

Reasoning from this misinterpretation, the Court of Appeals decides that immunity is not waived for a claim that does not seek monetary damages:

Nowhere in section 271.153 is the recovery of specific performance permitted. Yet, the only damages claimed by the Group (and the only damages awarded by the trial court) was specific performance. Accordingly, because the Group did not claim damages within section 271.153's limitations, we hold the City's immunity from suit on the Group's breach of contract claim has not been waived.

*Id.*

The Court of Appeals is wrong in both of these points, and the conclusion derived from these errors severely distorts the plain meaning of section 271.153 and

undermines the legislative intent clearly and unambiguously expressed in section 271.152.

***(a) Specific Performance is not a Form of Monetary Damages***

As discussed above, Texas, along with every other common law jurisdiction, recognizes two distinct types of remedies for breach of contract. *McMullen v. Kelso, supra* at 236; *Durst v. Swift, supra* at 278. *See generally*, Restatement (Second) of Contracts §345 (1981) (“Although a judgment awarding a sum of money as damages is the most common judicial remedy for breach of contract, other remedies, including equitable relief in the form of specific performance or an injunction, may be available.”).

As Professor Farnsworth explained,

The relief available to the promisee is of two main kinds. It is said to be “specific” when it is intended to secure for the promisee the very benefit that he was promised, as where the court confers the promised benefit on the injured party or orders the defaulting promisor to do so. It is said to be “substitutional” when it is intended to provide him with something in substitution for that benefit, as where the court awards the injured party money damages.

E. Allan Farnsworth, *Legal Remedies for Breach of Contract*, 70 *Colum. L. Rev.* 1145, 1149–50 (1970). The Court of Appeals is simply wrong to suggest that the remedy of specific performance is a type of monetary damages and therefore is

encompassed by the introductory clause in section 271.153 “the total amount of money awarded in an adjudication ... is limited to the following.”

***(b) Zachry did not hold that the waiver of immunity to suit in section 271.152 extends only to claims that seek monetary damages.***

In *Zachry Const. Corp. v. Port of Houston Auth. of Harris Cty.*, 449 S.W.3d 98 (Tex. 2014) this Court sorted out the gnarly question of the interplay between sections 271.152 and 271.153. Zachry had sued the Port of Houston for breach of contract, seeking money damages to compensate Zachry for more than \$18 million lost because of delays caused by the Port’s intentional, bad faith misconduct. Justice Hecht, writing for the Court, framed the first issue presented as “whether the Act’s limitations on recovery help define and restrict the scope of the waiver of immunity.” Carefully reconciling the Court’s earlier decisions in *Tooke v. City of Mexia*, 197 S.W.3d 325 (Tex. 2006) and *Kirby Lake Development, Ltd. v. Clear Lake City Water Authority*, 320 S.W.3d 829 (Tex. 2010), Justice Hecht explained that the limitations on recovery in section 271.153 do help define the scope of the waiver of immunity in section 271.152. *Zachry, supra* at 108-110. Specifically, if a breach of contract claim seeks money damages, immunity is waived only if the money damages sought are among those permitted by section 271.153: “We conclude that the Act does not waive immunity from suit on a claim for damages not recoverable under Section 271.153.” *Id.* at 110. (emphasis added).

Throughout the *Zachry* opinion, this Court carefully limits its analysis to “claims for money damages” or “claims for damages.” *See id.* at 105-119. It is therefore astounding that the Court of Appeals in this case eschewed this Court’s explicit “conclusion” and cherry-picked another phrase that suggests a very different result. Instead of quoting the final line of this Court’s analysis, “We conclude that the Act does not waive immunity from suit on a claim for damages not recoverable under Section 271.153.” *Id.* at 110, the Court of Appeals pulled the words “the waiver does not allow recovery beyond that permitted by section 271.153” from an earlier paragraph illustrating the correct reading of section 271.152. The complete paragraph that appears in *Zachry* is as follows:

The “subject to the terms and conditions” phrase in Section 271.152 incorporates the other provisions of the Act to define the scope of its waiver of immunity. The waiver does not extend to tort suits, suits in federal court, or allow recovery beyond that permitted by Section 271.153. But Section 271.152, as qualified by this “subject to” phrase also does not preclude other defenses or other contractual procedures, or confer immunity or suggest joint enterprise. The “subject to” phrase most reasonably refers to “waives”, thus making the provisions of the Act limitations on the waiver of immunity. Section 271.152 must be read as follows: “A local governmental entity ... waives sovereign immunity to suit ... subject to the terms and conditions” of the Act.

*Zachry supra* at 108.

Having plucked this phrase, the Court of Appeals then disregards the actual holding in *Zachry* and concludes that the Group’s breach of contract claim, which

seeks specific performance and not money damages, is not actionable because specific performance is not among the types of monetary damages permitted under 271.153. This error needs to be corrected.

**3. There is no general prohibition against orders of specific performance against local government entities.**

A long-standing tenet of municipal law is that local government entities generally incur the same contractual duties and liabilities as those incurred by private persons or corporations. 10A McQuillin Mun. Corp. § 29:131 (3d ed.) (“Action for Breach of Contract”) (“Municipal contracts are measured by the same tests and are subject to the same rights and liabilities as are other contracts.”). If governmental immunity does not apply, or if it has been waived, then adjudication of a contract dispute is governed by the normal rules of contract formation, performance, and breach. *Id.*; *City of Georgetown v. Lower Colorado River Auth.*, 413 S.W.3d 803, 807 (Tex. App.—Austin 2013, pet. dism'd) (if contract enforcement is not barred by governmental immunity, then the city has “the same duties and liabilities as those incurred by private persons or corporations.”).

If a city has breached a contract, the court may order the city to specifically perform the contract “where the legal remedies are inadequate or where other grounds for equitable relief are alleged.” 10A McQuillin Mun. Corp. § 29:135 (3d ed.) (“Specific Performance and Injunction”) (*citing Simms-Wylie Co. v. City of*

*Ranger*, 224 S.W.2d 265 (Tex. Civ. App.—Eastland 1949) and *City of Wichita Falls v. Bruner*, 165 S.W.2d 480 (Tex. Civ. App.—Fort Worth 1942), writ refused w.o.m., (Jan. 6, 1943). “Hence, if the contractor has fully performed the contract, he or she sometimes may compel specific performance on the part of the city.” *Id.* See also, *Interstate Materials Corp. v. City of Houston*, 236 S.W.2d 653, 656 (Tex. Civ. App.—Galveston 1951, writ ref’d n.r.e.) (rendering judgment “in favor of appellant, Interstate Materials Corporation, and against appellee, City of Houston, granting specific performance ... as prayed for by appellant.”).

**4. None of the several courts presented with claims seeking specific performance, have suggested that the waiver of immunity in section 271.152 would not apply to such claims.**

Although money damages is the preferred remedy in most contract cases, several courts have considered the question whether the waiver of immunity in Local Government Code §271.152 extends to claims seeking specific performance. In all of these cases, the courts concluded that it does.

*Dallas Area Rapid Transit v. Monroe Shop Partners, Ltd.*, 293 S.W.3d 839 (Tex. App.—Dallas 2009) involved a “Contract of Sale and Development” in which Dallas Area Rapid Transit (“DART”), a regional transit agency authorized under Chapter 452 of the Texas Transportation Code, promised to sell, and Monroe Shop Partners, Ltd. (“Monroe”) promised to purchase and develop, certain historically significant property near a DART rail station. In December 2007, DART terminated the

Contract, contending Monroe failed to obtain the required financing. Monroe sued DART for breach of the contract, seeking monetary damages or, in the alternative, specific performance. *Dallas Area Rapid Transit, supra* at 840, 842. DART filed an interlocutory appeal from the trial court’s denial of its plea to the jurisdiction, asserting, among other points, that “Subchapter I of Chapter 271 of the Local Government Code does not purport to waive immunity to a suit for specific performance.” Brief for Appellant at 12, *Dallas Area Rapid Transit*, (05-08-01526-CV), 2009 WL 380859. DART’s argument is very similar to the decision of the Court of Appeals in this case. The Court of Appeals in *Dallas Area Rapid Transit* rejected this argument. *Dallas Area Rapid Transit, supra* at 842. (The limitation in “Section 271.153 addresses only money damages, not equitable remedies like specific performance.”).

Similarly, in *City of N. Richland Hills v. Home Town Urban Partners, Ltd.*, 340 S.W.3d 900, 904 (Tex. App.—Fort Worth 2011), Hometown Urban Partners et al. sued the City of North Richland Hills, alleging breach of a Development Agreement, among other claims. The Court of Appeals held that the City’s governmental immunity had been waived for breach of contract claim, because the contract was one for goods or services under Local Government Code §271.151 and because the plaintiff sought monetary damages for amounts due and owing under the contract or specific performance, both of which are permitted under sections 271.151-271.158.

*Id.* at 910 (“Appellees pleaded that there are amounts due and owing under the Development Agreement and that they seek specific performance of the Development Agreement, ... Appellees' pleadings are sufficient to invoke the trial courts' subject matter jurisdiction.”).

Indeed, this Court appeared to reach a similar conclusion in *Sharyland Water Supply Corp. v. City of Alton*, 354 S.W.3d 407, 423 (Tex. 2011) in which this Court held that specific performance was not appropriate in that case because there was an adequate remedy at law and declined to adopt the City’s assertion that a government entity can never be subjected to an order of specific performance. *See also, City of McAllen v. Casso*, 13-11-00749-CV, 2013 WL 1281992, at \*15 (Tex. App.—Corpus Christi Mar. 28, 2013) (Memorandum Opinion) (“The award of specific performance was ... in violation of the one-satisfaction rule.”).

**5. The appropriate remedy for the City’s breach of contract in this case is an order of specific performance.**

This case satisfies every requirement for entry of specific performance. By the nature of this contract, an award of money damages would be inadequate. The Group did not enter this contract in order to make money. There is no way to calculate the value of the many hours of work and expertise contributed by Group members.

Moreover, the Group had fully performed its obligations under the contract when the City breached its part of the agreement. The only part of the contract left to be done is the City's "payment" of its consideration under the contract. The only thing left to be done is for the City to perform its part. This is what the district court ordered in its judgment of September 19, 2014.

### **PRAYER**

Rarely does such a readily correctable error implicate such serious public policy concerns. The Court of Appeals' erroneous holding disregards the clear language of the legislative waiver of governmental immunity, thereby violating this Court's guidance on the separate roles of the judiciary and the legislature on matters of sovereign or governmental immunity. The Court of Appeals' decision injects an invidious distinction into governmental immunity law, privileging parties who contract with local government entities to make money and over those who contact in order to contribute to their communities. The consequences of the Court of Appeals' errors require this Court's intervention.

WHEREFORE, Petitioner, Hays Street Bridge Restoration Group prays the Court grant its Petition, reverse the Court of Appeals' judgment and affirm the judgment entered by the District Court.

Petitioner further requests any such further relief to which it may be entitled.

Respectfully submitted,



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(210) 338-8668 – Fax  
amykastely@fastem.com  
Counsel for Petitioner

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Petition for Review has been delivered via e-mail transmission on this 19th day of June 2017, to the following attorneys for Respondent:

Deborah Lynne Klein  
Office of the City Attorney  
Litigation Division  
Frost Bank Tower  
100 West Houston Street  
San Antonio, TX 78205  
[deborah.klein@sanantonio.gov](mailto:deborah.klein@sanantonio.gov)

Dan Pozza  
Pozza & Whyte, PLLC  
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San Antonio, TX 78205  
[danpozza@pozzaandwhyte.com](mailto:danpozza@pozzaandwhyte.com)

  
\_\_\_\_\_  
Amy Kastely, Attorney for Petitioner

## CERTIFICATE OF COMPLIANCE

In compliance with Texas Rule of Appellate Procedure 9.4(i)(2)(D), I certify that this petition contains 4,456 words, excluding the portions exempted by Rule 9.4(i)(1).

  
\_\_\_\_\_  
Amy Kastely, Attorney for Petitioner

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## APPENDIX TO PETITION FOR REVIEW

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### Contents of the Appendix

- Tab A      Trial Court Judgment, 2014 WL 5113713 (Tex. Dist. Sept 19, 2014)
- Tab B      Jury Charge and Verdict, 2014 WL 5113713
- Tab C      Court of Appeals Judgement and Decision, 04-14-00886-CV, 2017 WL 776112 (Tex. App.—San Antonio Mar. 1, 2017)
- Tab D      Court of Appeals Orders Denying Motions for Rehearing and Rehearing En Banc 04-14-00886-CV, 2017 WL 776112 (Tex. App.—San Antonio April 18, 2017)
- Tab E      Texas Local Government Code §§271.151 – 271.153, as applicable to this case (pre-2009 version, incorporating 2011 amendment)
- Tab F      Current Version of Local Government Code §§271.151 – 271.153, with Amending Legislation from 2009, 2011, and 2013, showing retroactive application, if any
- Tab G      Memorandum of Understanding between City of San Antonio and the Hays Street Bridge Restoration Group, June 2002

**Tab A**



**CAUSE NO. 2012-CI-19589**

**HAYS STREET BRIDGE  
RESTORATION GROUP AND  
BEATRIZ VALADEZ**

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**IN THE DISTRICT COURT**

**V.**

**73RD JUDICIAL DISTRICT**

**CITY OF SAN ANTONIO AND  
SHERYL SCULLEY**

**BEXAR COUNTY, TEXAS**

**JUDGMENT**

On July 7, 2014, the Court called this cause for trial.

Plaintiffs Hays Street Bridge Restoration Group and Beatrice Valadez appeared in person and through their attorneys of record and announced ready for trial.

Defendant City of San Antonio appeared in person and through their attorneys of record and announced ready for trial.

Defendant Leticia Vacek appeared through her attorney of record and moved for continuance of the trial of this cause.

The Court considered Defendant Vacek's motion for continuance, the evidence and the arguments of counsel, and granted the motion.

Thereafter, Plaintiffs announced on the record a non-suit with prejudice against Defendant Vacek and this matter proceeded to trial.

The Court determined, as a matter of law, that the Memorandum of Understanding between Plaintiff Hays Street Bridge Restoration Group and Defendant City of San Antonio was ambiguous as to the word "funds" in Article III, Department of Planning, section 3 of the Memorandum of Understanding and it was the duty of the jury to interpret the word "funds."

A jury was impaneled and sworn in. The jury heard evidence and arguments of counsel. On July 11, 2014, Defendant City of San Antonio moved for instructed verdict on the Plaintiffs' causes of action. The motion was granted only as to Plaintiff Beatrice Valadez and all claims of Plaintiff Beatrice Valadez were dismissed. The Court then submitted the Charge of the Court with questions, definitions, and instructions to the jury. The jury returned a verdict and the Court received, filed and entered the verdict in the record. The questions submitted to the jury and the jury's findings are attached as Exhibit "A," and incorporated by reference herein.

On July 22, 2014, Plaintiff Hays Street Bridge Restoration Group filed its Motion for Entry of Judgment. On July 23, 2014, Defendant City of San Antonio filed its Motion to Disregard the Jury Findings and Motion to Enter Judgment. On August 7, 2014, the Court heard

COMMUNIST PARTY USA

the motions. Plaintiff's Motion for Entry of Judgment is granted in part and denied in part, Defendant's Motion for Entry of Judgment is granted in part and denied in part, and Defendant's Motion to Disregard the Jury Findings is denied.

Based on the jury's verdict and the Court's application of the law, the Court finds that:

1. The unique purpose and circumstances of the Memorandum of Understanding cannot be adequately remedied by monetary damages; and

2. An order of specific performance is appropriate to remedy Defendant City of San Antonio's failure to comply with the Memorandum of Understanding with respect to the property located at 803 North Cherry Street.

**IT IS THEREFORE ORDERED AND ADJUDGED** that Defendant City of San Antonio shall allocate, apply and use all funds raised by Plaintiff Hays Street Bridge Restoration Group, including the property located at 803 North Cherry Street, by applying said funds directly to the approved City of San Antonio Budget for the Hays Street Bridge project costs.

**IT IS FURTHER ORDERED** that, as the jury found that the property located at 803 North Cherry Street was not "owned, held or claimed as a park" within the meaning of Texas Local Government Code §253.001(f), Plaintiff Hays Street Bridge Restoration Group's request for Declaratory Judgment is denied.

**IT IS ORDERED** that Plaintiff's request for costs and attorney's fees is denied and the Defendant's request for costs is denied.

The Court **ORDERS** execution to issue for this Final Judgment.

This judgment finally disposes of all parties and all claims and is appealable. All other relief not granted in this judgment is **DENIED**.

**SIGNED** on September 19, 2014.



**JUDGE PRESIDING**

1-11-2014 10:00 AM

**Tab B**

**ORIGINAL**

CAUSE NO. 2012-CI-19589



**HAYS STREET BRIDGE  
RESTORATION GROUP AND  
BEATRIZ VALADEZ**

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**IN THE DISTRICT COURT**

**V.**

**73RD JUDICIAL DISTRICT**

**CITY OF SAN ANTONIO AND  
SHERYL SCULLEY**

**BEXAR COUNTY, TEXAS**

**CHARGE OF THE COURT**

**MEMBERS OF THE JURY:**

2014 JUL 11 PM 4: 22

DEPUTY  
*[Signature]*

FILED  
DONNA KAY MCKINNEY  
DISTRICT CLERK  
BEXAR COUNTY

After the closing arguments, you will go to the jury room to decide the case, answer the questions that are attached, and reach a verdict. You may discuss the case with other jurors only when you are all together in the jury room.

Remember my previous instructions: Do not discuss this case with anyone else, either in person or by any other means. Do not do any independent investigation about the case or conduct any research. Do not look up any words in dictionaries or on the Internet. Do not post information about this case on the Internet. Do not share any special knowledge or experiences with the other jurors. Do not use your phone or any other electronic device during your deliberations for any reason. You have already been given a number where others may contact you in case of an emergency.

Any notes you have taken are for your own personal use. You may take your notes back into the jury room and consult them during deliberations, but do not show or read your notes to your fellow jurors during your deliberations. Your notes are not evidence. Each of you should rely on your independent recollection of the evidence and not be influenced by the fact that another juror has or has not taken notes. You must leave your notes with the bailiff when you are not deliberating. The bailiff will give your notes to me promptly after collecting them from you. I will make sure your notes are kept in a safe, secure location and not disclosed to anyone. After you complete your deliberations, the bailiff will collect your notes. When you are released from jury duty, the bailiff will promptly destroy your notes so that nobody can read what you wrote.

In discharging your responsibility on this jury, you will observe all the instructions which have previously been given you. I shall now give you instructions in addition to those that I have previously given you. You should carefully and strictly follow all of my instructions during your deliberations.

1. Do not let bias, prejudice or sympathy play any part in your deliberations.
2. Base your answers only on the evidence admitted in court and on the law that is in these instructions and questions. Do not consider or discuss any evidence that was not admitted

in the courtroom.

3. You are to make up your own minds about the facts. You are the sole judges of the credibility of the witnesses and the weight to give their testimony. But on matters of law, you must follow all of my instructions.

4. If my instructions use a word in a way that is different from its ordinary meaning, use the meaning I give you, which will be a proper legal definition and which you are bound to accept in place of any other meaning.

5. All the questions and answers are important. No one should say that any question or answer is not important.

6. Answer "yes" or "no" to all questions unless you are told otherwise. A "yes" answer must be based on a preponderance of the evidence. Whenever a question requires an answer other than "yes" or "no," your answer must be based on a preponderance of the evidence.

7. Do not decide who you think should win before you answer the questions and then just answer the questions to match your decision. Answer each question carefully without considering who will win. Do not discuss or consider the effect your answers will have.

8. Do not answer questions by drawing straws or by any method of chance.

9. Some questions might ask you for a dollar amount. Do not agree in advance to decide on a dollar amount by adding up each juror's amount and then figuring the average.

10. Do not trade your answers. For example, do not say, "I will answer this question your way if you answer another question my way."

11. The answers to the questions must be based on the decision of at least ten (10) out of the twelve (12) jurors. The same ten (10) jurors must agree on every answer. Do not agree to be bound by a vote of anything less than ten (10) jurors, even if it would be a majority.

As I have said before, if you do not follow these instructions, you will be guilty of juror misconduct, and I might have to order a new trial and start this process over again. This would waste your time and the parties' money, and would require the taxpayers of this county to pay for another trial. If a juror breaks any of these rules, tell that person to stop and report it to me immediately.

## INSTRUCTIONS AND DEFINITIONS

You are instructed that:

**“PREPONDERANCE OF THE EVIDENCE”** means the greater weight and degree of credible testimony or evidence introduced before you and admitted in evidence in this case. A preponderance of the evidence is not measured by the number of witnesses or by the number of documents admitted into evidence. For a fact to be proven by a preponderance of the evidence, you must find that the fact is more likely true than not true.

**“CIRCUMSTANTIAL EVIDENCE”** means that a fact may be established by direct evidence or by circumstantial evidence or both. A fact is established by direct evidence when proved by documentary evidence or by a witness or witnesses who saw the act done or heard the words spoken. A fact is established by circumstantial evidence when it may be fairly and reasonably inferred from other facts proved.

The abbreviation **“MOU”** as used herein refers to the Memorandum of Understanding dated June 4, 2002.

You are further instructed that:

To form a valid contract, the parties must have the same understanding of the subject matter of the contract and all its essential terms. To be enforceable, a contract must be reasonably definite and certain.

The only way a City can act is by and through its governing body. A City’s governing body may act only by resolution or ordinance and may not delegate the right to make decisions affecting the transaction of city business.

**QUESTION NO. 1**

Did the Hays Street Bridge Restoration Group and the City of San Antonio agree to the terms outlined in the MOU?

Answer "Yes" or "No":

Yes

Instruction: In answering this question, you must consider the facts and circumstances surrounding the making and signing of the MOU as well as the specific terms in the MOU. You may consider what the parties said and did in light of the surrounding circumstances. You may not consider the parties' unexpressed thoughts or intentions.

**Instruction for Question No. 2: If you answered “Yes” to Question No. 1, then answer Question No. 2. Otherwise, do not answer Question No. 2.**

**QUESTION NO. 2**

Did the Hays Street Bridge Restoration Group and the City of San Antonio sign the MOU with the intent that it be a mutual and binding agreement?

Answer “Yes” or “No”:                     Yes                    

Instruction: In answering this question, you must consider the facts and circumstances surrounding the making and signing of the MOU as well as the specific terms in the MOU. You may consider what the parties said and did in light of the surrounding circumstances. You may not consider the parties’ unexpressed thoughts or intentions.

**Instruction for Question No. 3: If you answered “Yes” to Question No. 2, then answer Question No. 3. Otherwise, do not answer Question No. 3.**

**QUESTION NO. 3**

Did the Hays Street Bridge Restoration Group and the City of San Antonio intend that the word “funds” in Article III, Department of Planning, section 3 of the MOU included only donations of money?

Answer “Yes” or “No”: NO

Instruction: In answering this question, it is your duty to interpret the term “funds.” You must decide its meaning by determining the intent of the parties at the time of the agreement. Consider all of the facts and circumstances surrounding the making of the agreement, the interpretation placed on the agreement by the parties, and the conduct of the parties. You may not consider the parties’ unexpressed thoughts or intentions.

**Instruction for Question No. 4: If you answered “Yes” to Question No. 3, then do not answer Question No. 4. Otherwise, answer Question No. 4.**

**QUESTION NO. 4**

Did the Hays Street Bridge Restoration Group and the City of San Antonio intend that the word “funds” in Article III, Department of Planning, section 3 of the MOU included donations of money and in-kind contributions?

Answer “Yes” or “No”: Yes

Instruction: In answering this question, it is your duty to interpret the term “funds.” You must decide its meaning by determining the intent of the parties at the time of the agreement. Consider all of the facts and circumstances surrounding the making of the agreement, the interpretation placed on the agreement by the parties, and the conduct of the parties. You may not consider the parties’ unexpressed thoughts or intentions.

**Instruction for Question No. 5: If you answered "Yes" to Question No. 4, then answer Question No. 5. Otherwise, do not answer Question No. 5.**

**QUESTION NO. 5**

Do you find that the property located at 803 North Cherry Street was subject to the terms of the MOU?

Answer "Yes" or "No": Yes

**Instruction for Question No. 6: If you answered "Yes" to Questions Nos. 1, 2 and 5, then answer Question No. 6. Otherwise, do not answer Question No. 6.**

**QUESTION NO. 6**

Do you find that the City of San Antonio failed to comply with the MOU with respect to the property located at 803 North Cherry Street?

Answer "Yes" or "No":

Yes

**Instruction for Question No. 7: If you answered "Yes" to Question No. 6, then answer Question No. 7. Otherwise, do not answer Question No. 7.**

**QUESTION NO. 7**

Do you find that the Hays Street Bridge Restoration Group complied with the MOU up until the time of the City's failure to comply?

Answer "Yes" or "No":

Yes

**QUESTION NO. 8**

Do you find that the City of San Antonio owned, held or claimed the property located at 803 North Cherry Street as a park?

Answer "Yes" or "No":

No

## PRESIDING JUROR

1. When you go into the jury room to answer the questions, the first thing you will need to do is choose a presiding juror.
2. The presiding juror has these duties:
  - a. have the complete charge read aloud if it will be helpful to your deliberations;
  - b. preside over your deliberations, meaning manage the discussions, and see that you follow these instructions;
  - c. give written questions or comments to the bailiff who will give them to the judge;
  - d. write down the answers you agree on;
  - e. get the signatures for the verdict certificate; and
  - f. notify the bailiff that you have reached a verdict.

After you have retired to consider your verdict, no one has any authority to communicate with you except the bailiff of this Court. You should not discuss the case with anyone, not even with other members of the jury, unless all of you are present and assembled in the Jury Room. Should anyone attempt to talk to you about the case before the verdict is returned, whether at the Courthouse, at your home, or elsewhere, please inform the Judge of this fact.

When you have answered all the questions you are required to answer under the instructions of the Judge, and your Presiding Juror has placed your answers in the spaces provided and signed the verdict as Presiding Juror or obtained the signatures, you will advise the Bailiff at the door of the jury room that you have reached a verdict, and then you will return into Court with your verdict.

Do you understand these instructions? If you do not, please tell me now.

**Instructions for Signing the Verdict Certificate:**

1. You may answer the questions on a vote of ten jurors. The same ten jurors must agree on every answer in the charge. This means you may not have one group of ten jurors agree on one answer and a different group of ten jurors agree on another answer.

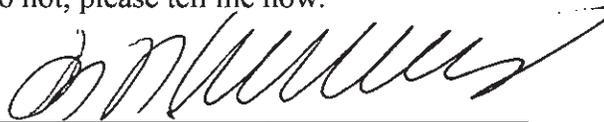
2. If ten jurors agree on every answer, those ten jurors sign the verdict.

If eleven jurors agree on every answer, those eleven jurors sign the verdict.

If all twelve of you agree on every answer, you are unanimous and only the Presiding Juror signs the verdict.

3. All jurors should deliberate on every question. You may end up with all twelve of you agreeing on some answers, while only ten or eleven of you agree on other answers. But when you sign the verdict, only those ten or eleven who agree on every answer will sign the verdict.

Do you understand these instructions? If you do not, please tell me now.



**JUDGE PRESIDING**



**Tab C**



**Fourth Court of Appeals**  
**San Antonio, Texas**

**JUDGMENT**

No. 04-14-00886-CV

**CITY OF SAN ANTONIO,**  
Appellant

v.

**HAYS STREET BRIDGE RESTORATION GROUP,**  
Appellee

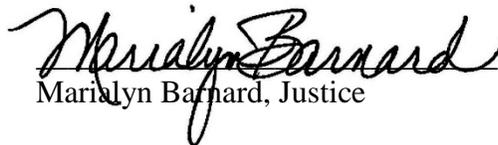
From the 73rd Judicial District Court, Bexar County, Texas  
Trial Court No. 2012-CI-19589  
Honorable David A. Canales, Judge Presiding

BEFORE JUSTICE ANGELINI, JUSTICE BARNARD, AND JUSTICE MARTINEZ

In accordance with this court's opinion of this date, the judgment of the trial court is REVERSED and judgment is RENDERED dismissing this cause for want of jurisdiction.

It is ORDERED that appellant City of San Antonio recover its costs of this appeal from appellee Hays Street Bridge Restoration Group.

SIGNED March 1, 2017.

  
Marilyn Barnard, Justice



**Fourth Court of Appeals**  
**San Antonio, Texas**

**MEMORANDUM OPINION**

No. 04-14-00886-CV

**CITY OF SAN ANTONIO,**  
Appellant

v.

**HAYS STREET BRIDGE RESTORATION GROUP,**  
Appellee

From the 73rd Judicial District Court, Bexar County, Texas  
Trial Court No. 2012-CI-19589  
Honorable David A. Canales, Judge Presiding

Opinion by: Marialyn Barnard, Justice

Sitting: Karen Angelini, Justice  
Marialyn Barnard, Justice  
Rebeca C. Martinez, Justice

Delivered and Filed: March 1, 2017

**REVERSED, RENDERED, AND DISMISSED FOR WANT OF JURISDICTION**

This is an appeal from a judgment in a breach of contract action. The underlying dispute involves property located at 803 North Cherry Street near the Hays Street Bridge (“the Cherry Street Property”) in San Antonio, Texas. Appellee, the Hays Street Bridge Restoration Group (“the Group”), sued appellant, the City of San Antonio (“the City”), alleging the City breached a Memorandum of Understanding (“the Memorandum”), by failing to develop a park on the Cherry Street Property. The City filed a plea to the jurisdiction asserting governmental immunity from the Group’s breach of contract claim. The trial court denied the plea and the case proceeded to

trial. The trial court ultimately rendered judgment on the jury's verdict against the City and ordered specific performance in accordance with the terms of the Memorandum. On appeal, the City argues its immunity from suit on the Group's breach of contract claim had not been waived. The City further contends that even if its immunity from suit had been waived, the Memorandum is not a contract as a matter of law, or in the alternative, the evidence is legally insufficient to establish a breach of contract or injury. Because we conclude the City's immunity from suit was not waived, we reverse the trial court's judgment and render judgment dismissing this cause for want of jurisdiction.

### **BACKGROUND**

The Hays Street Bridge is a historical landmark in San Antonio.<sup>1</sup> Around 1982, the City closed the bridge to vehicular and pedestrian traffic due to its deteriorated condition. Thereafter, discussions about demolishing the bridge and either replacing or relocating it began. In response, a number of community groups and leaders formed what is now known as the Hays Street Bridge Restoration Group — the Group. The Group's goal was to restore and ultimately preserve the bridge for community use. Its members worked together with various engineers and architects to produce design concepts and gather construction estimates in an effort to raise money to restore the bridge.

In 2000, the Group entered into discussions with the City about the restoration project, and according to the Group, these discussions included conversations about not only restoring the bridge, but also developing the Cherry Street Property into a park. The Cherry Street Property

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<sup>1</sup> The bridge's historical significance has been recognized by numerous groups, including: (1) the State of Texas, recognizing the bridge as a Texas Historic Civil Engineering Landmark; (2) the City of San Antonio, recognizing the bridge as a historic structure; and (3) the Heritage Bridge Foundation and Texas Historical Commission, recognizing it as a historic bridge. Most recently, the bridge was designated as part of the National Register of Historical Places.

consists of 1.7 acres and is located near the northeast side of the bridge. At the time the development discussions occurred, the Dawson family owned the Cherry Street Property.

It is undisputed that the City, with the help of the Group, applied for a federally-funded, state-administered grant under the Transportation Equity Act to restore the bridge. The application for the grant was approved, and the City received \$2.89 million for the bridge restoration project, which funded eighty percent of the total project cost. Under the terms of the grant, the City was required to provide twenty percent of the total project cost — either in cash or in-kind contributions.

Before the City formally accepted the funding, the City and the Group executed the Memorandum, outlining the parties' responsibilities with regard to fund raising for the project. The Memorandum provided that the Group, via the San Antonio Area Foundation, was responsible for “[c]ontinu[ing] to raise matching funds through grant applications and other private resources” and timely transferring such funds to the City. In exchange, the City was responsible for “[e]nsur[ing] that any funds generated by [the Group] for the Hays Street Bridge go directly to the approved City of San Antonio budget, as authorized by TxDOT [Texas Department of Transportation], for the Hays Street Bridge project costs via the San Antonio Area Foundation’s Hays Street Bridge Restoration Fund.”

Once the Memorandum was executed, the Group focused on raising funds — both in cash and in-kind contributions — to fulfill its obligation under the Memorandum. Its efforts included obtaining the Cherry Street Property for park use. In 2007, the Dawsons donated the Cherry Street Property to the City and the City subsequently sold the property to Alamo Beer Company for commercial use. According to the City, the property was not part of the Hays Street Bridge project; rather, the bridge project was solely for purposes of restoring the bridge, not for developing a park. The City further contended that although park development was not part of the project, it submitted

a second application seeking state funding for the development of the Cherry Street Property for park use. However, the second application was denied.

When the Group discovered the Cherry Street Property had been sold to Alamo Beer Company, the Group sued the City, alleging the City breached its contract — the Memorandum — by failing to develop the Cherry Street Property into a park as part of the restoration project. It is undisputed that as damages, the Group sought only specific performance. The Group also sought a declaration that the City violated section 253.001(f) of the Texas Local Government Code (“the Code”) when it contracted to sell the property to Alamo Beer Company because the property was “held, owned or claimed” as a park within the meaning of the statute. *See* TEX. LOC. GOV’T CODE ANN. § 253.001(f) (West 2016).

The City filed a plea to the jurisdiction, asserting that to the extent the Memorandum was a contract, its immunity from suit had not been waived because the Local Government Contract Claims Act (“the Act”), codified in the Code, does not provide for a waiver of immunity from suit for claims seeking specific performance. *Id.* §§ 271.152, 271.153. In response, the Group argued claims seeking specific performance do not preclude waiver of immunity from suit as set out in the Act. *Id.* § 271.152. The trial court ultimately denied the City’s plea to the jurisdiction as well as its subsequent motion for summary judgment, and the parties tried the case to a jury.

Once the Group completed its presentation of evidence, the City moved for a directed verdict, a motion that essentially mirrored its prior plea to the jurisdiction and summary judgment motion. The trial court denied the motion for directed verdict, and the jury ultimately found: (1) the parties agreed to the terms of the Memorandum; (2) the word “funds” in the Memorandum included both money and in-kind donations; (3) the Cherry Street Property was subject to the terms of the Memorandum; and (4) the City failed to comply with the terms of the Memorandum with respect to the Cherry Street Property. The trial court rendered judgment on the jury’s verdict and

ordered specific performance in accordance with the Memorandum. The City then perfected this appeal.

### ANALYSIS

On appeal, the City raises four interrelated issues, one of which implicates subject matter jurisdiction. According to the City, assuming the Memorandum is a contract, then neither the trial court nor this court has subject matter jurisdiction over this matter because the Act does not waive immunity from suit on a breach of contract claim seeking the recovery of specific performance. In the event we reject the City’s jurisdictional argument, the City alternatively contends the trial court erred in denying its motion for directed verdict because: (1) the Memorandum is not a contract as a matter of law, or (2) the evidence is legally insufficient to establish a breach of contract because the Cherry Street Property was not subject to the terms of the contract and the Group did not suffer an injury.

#### *Governmental Immunity*<sup>2</sup>

We begin by addressing the City’s contention regarding waiver of immunity. This is because “[i]mmunity ‘implicates a court’s subject matter jurisdiction over pending claims,’ and ‘[w]ithout jurisdiction, the court cannot proceed at all in any cause; it may not assume jurisdiction for the purpose of deciding the merits of the case.’” *Zachary Constr. Corp. v. Port of Houston Auth. of Harris Cnty.*, 449 S.W.3d 98, 108 (Tex. 2014) (quoting *Rusk State Hosp. v. Black*, 392 S.W.3d 88, 95 (Tex. 2012); *Fin. Comm’n of Tex. v. Norwood*, 418 S.W.3d 566, 578 (Tex. 2013)).

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<sup>2</sup> Parties, and sometimes courts, use the phrases “sovereign immunity” and “governmental immunity” interchangeably. However, the phrase “sovereign immunity” applies to various divisions of state government, e.g., agencies, boards, hospitals, and universities. *Ben Bolt-Palito Blanco Consol. Indep. Sch. Dist. v. Tex. Political Subdivisions Prop./Cas. Joint Self-Ins. Fund*, 212 S.W.3d 320, 324 (Tex. 2006); *City of San Antonio v. Valemas, Inc.*, No. 04-11-00768-CV, 2012 WL 2126932, at \*3 n.2 (Tex. App.—San Antonio June 13, 2012, no pet.) (mem. op.). On the other hand, the phrase “governmental immunity” is applicable to political subdivisions of the state, e.g., cities, counties, and school districts. *Ben Bolt-Palito Blanco*, 212 S.W.3d at 324; *Valemas*, 2012 WL 2126932, at \*3. Because the City is the relevant party in this appeal, we will use the phrase “governmental immunity” when discussing immunity. *Ben Bolt-Palito Blanco*, 212 S.W.3d at 324; *Valemas*, 2012 WL 2126932, at \*3.

Therefore, assuming the Memorandum is a valid contract breached by the City when it failed to develop the Cherry Street Property into a park, we must first decide whether the Act waives the City's immunity from suit on a breach of contract claim for specific performance. *See id.*

The City contends there has been no waiver of immunity from suit because the relief sought by the Group is for specific performance, which is not a permissible award under section 271.153 of the Act. Specifically, the City argues that under the plain language of subsection (c) of section 271.153, the Legislature waived immunity from suit for breach of contract claims seeking specific performance only when the written contract concerned the sale or delivery of certain reclaimed waters. *See* TEX. LOC. GOV'T CODE ANN. § 271.153(c). Because the Memorandum did not concern the sale or delivery of reclaimed waters, there was no waiver of immunity. In response, the Group contends the City's reference to subsection (c) is inapplicable because subsection (c) was not in effect when the Memorandum was executed. Rather at that time, section 271.153 was silent on the recovery of specific performance, and thus, it did not prohibit the recovery of specific performance.

#### *Standard of Review*

Because governmental immunity from suit defeats a trial court's subject matter jurisdiction, it is properly asserted in a plea to the jurisdiction. *State v. Holland*, 221 S.W.3d 639, 642 (Tex. 2007); *Tex. Dep't of Pub. Safety v. Alexander*, 300 S.W.3d 62, 69 (Tex. App.—Austin 2009, pet. denied) (citing *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 224–26 (Tex. 2004)). “A plea questioning the trial court's jurisdiction raises a question of law that we review de novo.” *Holland*, 221 S.W.3d at 642. In conducting our de novo review, we look to the plaintiff's petition to determine whether the facts as pled affirmatively demonstrate whether jurisdiction exists. *Id.* at 642–43. We must accept the allegations in the petition as true, construe them in favor of the pleading party, and examine the pleader's intent. *Miranda*, 133 S.W.3d at

226; *Univ. of Tex. Health Sci. Ctr. at San Antonio v. Stevens*, 330 S.W.3d 335, 337 (Tex. App.—San Antonio 2010, no pet.). We also consider any evidence relevant to jurisdiction without considering the merits of the claim beyond the extent necessary to determine jurisdiction. *Miranda*, 133 S.W.3d at 226–27. When a plea to the jurisdiction challenges the pleadings, we determine if the pleader has alleged facts affirmatively demonstrating the trial court’s jurisdiction to hear the matter. *Id.* at 226. If the relevant evidence fails to raise a fact question on the jurisdictional issue, the trial court rules on the plea as a matter of law. *Id.* at 228. In the event the pleadings are insufficient to establish jurisdiction yet do not affirmatively demonstrate an incurable defect, then the plaintiff should be afforded an opportunity to replead. *Holland*, 221 S.W.3d at 642.

#### *Applicable Law*

Absent an express waiver of governmental immunity, a local government entity is generally immune from suit. *Id.* “[I]t is the Legislature’s sole province to waive or abrogate sovereign immunity.” *Tex. Nat. Res. Conservation Comm’n v. IT-Davy*, 74 S.W.3d 849, 853 (Tex. 2002); *see also Tooke v. City of Mexia*, 197 S.W.3d 325, 332 (Tex. 2006). Legislative consent to sue must be expressed in clear and unambiguous language. *IT-Davy*, 74 S.W.3d at 854; *MRSW Mgmt. LLC v. Tex. Dep’t of Pub. Safety*, 403 S.W.3d 503, 506 (Tex. App.—San Antonio 2013, pet. denied); *see* TEX. GOV’T CODE ANN. § 311.034 (West 2013) (codifying this standard by stating, “In order to preserve the legislature’s interest in managing state fiscal matters through the appropriations process, a statute shall not be construed as a waiver of sovereign immunity unless the waiver is effected by clear and unambiguous language.”). The Texas Supreme Court has stated that in determining whether the Legislature has clearly and unambiguously waived immunity, courts should: (1) determine whether the statute that allegedly waives immunity does so beyond doubt, although the statute need not be a model of “perfect clarity;” and (2) resolve ambiguities in

favor of immunity. *MRSW Mgmt.*, 403 S.W.3d at 506 (citing *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 695 (Tex. 2003)).

Pertinent to this case, “[t]he Act waives immunity from contract suits for local government entities,” like the City. *Zachry*, 449 S.W.3d at 106. Section 271.152 of the Act 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 sovereign immunity to suit for the purpose of adjudicating a claim for breach of contract, subject to the terms and conditions of this subchapter.

TEX. LOC. GOV’T CODE ANN. § 271.152; *Zachry*, 449 S.W.3d at 106. A contract is subject to the foregoing if the contract (1) is in writing, (2) contains the essential terms of the agreement; (3) is for the provision of goods or services to the local governmental entity, and (4) is properly executed on behalf of the local governmental entity. TEX. LOC. GOV’T CODE ANN. § 271.151(2)(A); *Zachry*, 449 S.W.3d at 106.

The “terms and conditions” referenced in section 271.152 can be found in the nine other sections of the Act. *See Zachry*, 449 S.W.3d at 106. Specifically, section 271.153 of the Act sets out the types of awards available to a party in an action pursuant to section 251.152. *See* TEX. LOC. GOV’T CODE ANN. § 271.153; *Zachry*, 449 S.W.3d at 106. Section 271.153 was amended several times in 2009, 2011, and 2013 to allow for additional types of recovery; therefore, for the purposes of this opinion, we will reference the version in effect at the time the suit was filed on December 6, 2012.<sup>3</sup> *See Sharyland Water Supply Corp. v. City of Alton*, 354 S.W.3d 407, 412 n.5 (Tex. 2011). At that time, subsection (a) of section 271.153 limited recovery to “the balance due

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<sup>3</sup> We note that during the pendency of this case, section 251.153 was amended in 2013 to allow for the recovery of specific performance in breach of contract claims concerning the sale or delivery of certain reclaimed waters; however, that amendment is inapplicable to this case because it took effect on June 14, 2013, and applies only to contracts executed on or after that date. *See* Act of May 24, 2013, 83rd Leg., R.S., ch. 1138, § 3, 2013 Tex. Gen. Laws 2756, 2758 (codified at TEX. LOCAL GOV’T CODE ANN. § 271.153(c)). Here, it is undisputed the Memorandum was executed on June 4, 2002.

and owed . . . under the contract,” “the amount owed for change orders or additional work . . . in connection with the contract,” and “interest, as allowed by law . . .” TEX. LOC. GOV’T CODE ANN. § 271.153(a). Subsection (b) of section 271.153 further limited recovery by excluding certain “consequential damages,” “exemplary damages,” or “damages for unabsorbed home office overhead.” *Id.* § 271.153(b).

To determine whether section 271.153 provided for the recovery of specific performance — and therefore, waived governmental immunity — we must also consider the rules of statutory construction. When construing a statute, courts must give effect to the Legislature’s intent. *BCCA Appeal Grp., Inc. v. City of Houston, Tex.*, 496 S.W.3d 1, 8 (Tex. 2016). To determine the Legislature’s intent, courts must start with the plain language of the statute and view the statute as a whole — not simply review isolated provisions. *Id.*, *Molinet v. Kimbrell*, 356 S.W.3d 407, 411 (Tex. 2011). The plain meaning of the text is the best expression of legislative intent. *BCCA Appeal Grp., Inc.*, 496 S.W.3d at 8; *Molinet*, 356 S.W.3d at 411. Moreover, when a statute is unambiguous, courts “adopt the interpretation supported by the plain language unless such an interpretation would lead to absurd results.” *TGS-NOPEC Geophysical Co.*, 340 S.W.3d at 439.

#### *Application*

Here, section 271.153 plainly defines the type of awards a party may recover, i.e., for which immunity is waived. Subsection (a) sets out the types of awards available to a party while subsection (b) excludes the types of awards available to a party. TEX. LOC. GOV’T CODE ANN. §§ 271.153(a), (b). There is nothing in the plain language of section 271.153 that provides for a waiver of immunity from a suit seeking to impose specific performance for breach of a contract. *See id.* Resolving any ambiguities in favor of immunity, we conclude that by not permitting the recovery of specific performance, the Act does not clearly or unambiguously waive immunity from

suit for breach of contract claims seeking specific performance. *See IT-Davy*, 74 S.W.3d at 854; *MRSW Mgmt.*, 403 S.W.3d at 506.

This interpretation is supported by the supreme court’s recent decision in *Zachary Constr. Corp. v. Port of Houston Auth. of Harris Cnty.* 449 S.W.3d at 108. In that case, the supreme court held the scope of section 271.152’s waiver of immunity was limited by the damages provided in section 271.153. *Id.* at 109 (“Section 271.152 merely uses Section 271.153 to further define to what extent immunity has been waived.”). In other words, “the waiver does not allow recovery beyond that permitted by section 271.153.” *Id.* at 108. Nowhere in section 271.153 is the recovery of specific performance permitted. Yet, the only damages claimed by the Group (and the only damages awarded by the trial court) was specific performance.<sup>4</sup> Accordingly, because the Group did not claim damages within section 271.153’s limitations, we hold the City’s immunity from suit on the Group’s breach of contract claim has not been waived. *See id.*

### ***Remand or Render***

In the event we hold immunity is not waived for the Group’s breach of contract claim seeking the recovery of specific performance, the Group asserts we must remand the case to allow it an opportunity to amend its petition. For support, the Group relies on *Wasson Interests, Ltd. v. City of Jacksonville*, 489 S.W.3d 427 (Tex. 2016), which holds a city does not have immunity from suit for proprietary acts. According to the Group, based on that holding, it should be afforded an

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<sup>4</sup> We recognize that in the Group’s first amended petition, the Group requested monetary damages. However, nowhere in its response to its plea to the jurisdiction, its appellate brief, or during oral argument does the Group mention its request for monetary damages or specify the type of monetary damages sought, particularly whether those damages fall within subsection (a)’s limitations. *See* TEX. LOC. GOV’T CODE ANN. § 271.153(a) (stating only monetary damages available under the Act are limited to the “the balance due and owed . . . under the contract,” “the amount owed for change orders or additional work . . . in connection with the contract,” and “interest, as allowed by law . . .”). Rather, in its brief, the Group argues the only relief sought was specific performance, and such recovery falls within the Act, which provides for waiver of immunity. Moreover, in its prayer on appeal, the Group requests this court to uphold the jury verdict — which awarded specific performance. *See G&H Towing Co. v. Magee*, 347 S.W.3d 293, 298 (Tex. 2011); *Garza v. Cantu*, 431 S.W.3d 96, 108 (Tex. App.—Houston [14th Dist.] 2013, pet. denied) (stating appellate court may only grant relief clearly requested in appellate brief). Accordingly, we construe the Group’s request for relief as limited to the relief awarded by the jury — specific performance.

opportunity to amend its petition to demonstrate how the City's functions under the Memorandum were proprietary. We disagree.

The proprietary-governmental dichotomy referred to by the Group has long been used to determine a municipality's immunity from suit. *See Wasson*, 489 S.W.3d at 434; *Tooke*, 197 S.W.3d at 343. In *Tooke v. City of Mexia*, the supreme court stated: "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." 197 S.W.3d at 343. *Wasson* extended this distinction to breach of contract claims. *See* 489 S.W.3d at 439. The supreme court has also reasoned that when determining whether a function is governmental or proprietary, we may look to the functions listed in the Texas Tort Claims Act even in cases involving breach of contract claims. *See Tooke*, 197 S.W.3d at 343–44 (pointing out that for purposes of tort liability, the Legislature has statutorily defined governmental functions, and "we see no reason to think that the classification would be different under the common law.").

The Texas Tort Claims Act lists thirty-six functions as governmental, including "bridge construction and maintenance" and "community development or urban renewal activities." *See* TEX. LOC. GOV'T CODE ANN. §§ 101.0215(4), (34); *Tooke*, 197 S.W.3d at 343-44. We conclude these functions describe the City's obligations as set forth in the Memorandum. Here, the City agreed to ensure the funds generated by the Group were dedicated to the Hays Street Bridge project — in other words, the restoration of the Hays Street Bridge, even assuming that project included park development. Accordingly, remand would serve no legitimate purpose because the mere pleading of more facts would not overcome the governmental nature of the City's functions under the Memorandum. *See Tex. A&M Univ. Sys. v. Kosev glo*, 233 S.W.3d 835, 840 (Tex. 2007). We therefore hold that because the City's functions under the Memorandum are purely governmental, the City is immune from suit.

Accordingly, because the City's argument — that there is no waiver of immunity — is dispositive, we need not address the remainder of the City's issues.

#### **CONCLUSION**

Based on the foregoing, we hold that even assuming the Memorandum was a contract the City breached by failing to develop the Cherry Street Property into a park, the City's immunity from suit on the Group's breach of contract claim was not waived under the Act because the Group did not claim recovery within the Act's limitations. We further hold that because the Memorandum concerned a governmental function as opposed to a proprietary function, the City was immune from suit on the Group's breach of contract claim, and remanding for repleading could not cure the jurisdictional defect. Accordingly, we reverse the judgment of the trial court and render judgment dismissing this cause for want of jurisdiction.

Marialyn Barnard, Justice

**Tab D**



**Fourth Court of Appeals  
San Antonio, Texas**

April 18, 2017

No. 04-14-00886-CV

**CITY OF SAN ANTONIO,**  
Appellant

v.

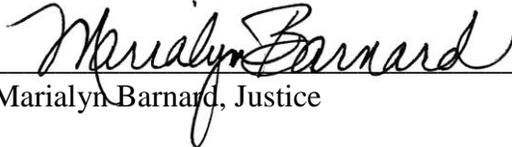
**HAYS STREET BRIDGE RESTORATION GROUP,**  
Appellee

From the 73rd Judicial District Court, Bexar County, Texas  
Trial Court No. 2012-CI-19589  
Honorable David A. Canales, Judge Presiding

**O R D E R**

Sitting: Sandee Bryan Marion, Chief Justice  
Karen Angelini, Justice  
Marialyn Barnard, Justice  
Rebeca C. Martinez, Justice  
Patricia O. Alvarez, Justice  
Luz Elena D. Chapa, Justice  
Irene Rios, Justice

The panel has considered the Appellees' Motion for Rehearing En Banc Reconsideration, and the motion is DENIED.

  
Marialyn Barnard, Justice

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said court on this 18th day of April, 2017.



  
Keith E. Hottle  
Clerk of Court



**Fourth Court of Appeals  
San Antonio, Texas**

April 18, 2017

No. 04-14-00886-CV

**CITY OF SAN ANTONIO,**  
Appellant

v.

**HAYS STREET BRIDGE RESTORATION GROUP,**  
Appellee

From the 73rd Judicial District Court, Bexar County, Texas  
Trial Court No. 2012-CI-19589  
Honorable David A. Canales, Judge Presiding

**O R D E R**

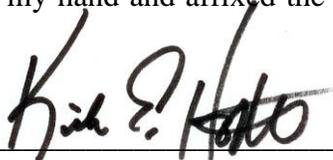
Sitting: Karen Angelini, Justice  
Marialyn Barnard, Justice  
Rebeca C. Martinez, Justice

The panel has considered the Appellees' Motion for Rehearing, and the motion is DENIED.

  
Marialyn Barnard, Justice

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said court on this 18th day of April, 2017.



  
Keith E. Hottle  
Clerk of Court

# **Tab E**

**Version of Texas Local Government Code §§271.151 – 271.153 Applicable to this Case (pre-2009 version with addition of 2011 Amendment)**

**§ 271.151. Definitions**

In this subchapter:

(1) “Adjudication” of a claim means the bringing of a civil suit and prosecution to final judgment in county or state court and includes the bringing of an authorized arbitration proceeding and prosecution to final resolution in accordance with any mandatory procedures established in the contract subject to this subchapter for the arbitration proceedings.

(2) “Contract subject to this subchapter” means 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.

(3) “Local governmental entity” means a political subdivision of this state, other than a county or a unit of state government, as that term is defined by Section 2260.001, Government Code, including a:

(A) municipality;

(B) public school district and junior college district; and

(C) special-purpose district or authority, including any levee improvement district, drainage district, irrigation district, water improvement district, water control and improvement district, water control and preservation district, freshwater supply district, navigation district, conservation and reclamation district, soil conservation district, communication district, public health district, emergency service organization, and river authority.

CREDIT(S)

Added by Acts 2005, 79th Leg., ch. 604, § 1, eff. Sept. 1, 2005.

### **§ 271.152. Waiver of Immunity to Suit for Certain Claims**

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.

CREDIT(S)

Added by Acts 2005, 79th Leg., ch. 604, § 1, eff. Sept. 1, 2005.

### **§ 271.153. Limitations on Adjudication Awards**

(a) The total amount of money awarded in an adjudication brought against a local governmental entity for breach of a contract subject to this subchapter is limited to the following:

- (1) 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;
- (2) the amount owed for change orders or additional work the contractor is directed to perform by a local governmental entity in connection with the contract; and
- (3) interest as allowed by law, including interest as calculated under Chapter 2251, Government Code.

(b) Damages awarded in an adjudication brought against a local governmental entity arising under a contract subject to this subchapter may not include:

- (1) consequential damages, except as expressly allowed under Subsection (a)(1);
- (2) exemplary damages; or
- (3) damages for unabsorbed home office overhead.

CREDIT(S)

Added by Acts 2005, 79th Leg., ch. 604, § 1, eff. Sept. 1, 2005, *with 2011 Amendment*

**Tab F**

## **Current Version of Texas Local Government Code §§271.151 – 271.153**

### **§ 271.151. Definitions**

In this subchapter:

(1) “Adjudication” of a claim means the bringing of a civil suit and prosecution to final judgment in county or state court and includes the bringing of an authorized arbitration proceeding and prosecution to final resolution in accordance with any mandatory procedures established in the contract subject to this subchapter for the arbitration proceedings.

(2) “Contract subject to this subchapter” means:

(A) 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; or

(B) a written contract, including a right of first refusal, regarding the sale or delivery of not less than 1,000 acre-feet of reclaimed water by a local governmental entity intended for industrial use.

(3) “Local governmental entity” means a political subdivision of this state, other than a county or a unit of state government, as that term is defined by Section 2260.001, Government Code, including a:

(A) municipality;

(B) public school district and junior college district; and

(C) special-purpose district or authority, including any levee improvement district, drainage district, irrigation district, water improvement district, water control and improvement district, water control and preservation district, freshwater supply district, navigation district, conservation and reclamation district, soil conservation district, communication district, public health district, emergency service organization, and river authority.

### **Credits**

Added by Acts 2005, 79th Leg., ch. 604, § 1, eff. Sept. 1, 2005. Amended by Acts 2013, 83rd Leg., ch. 1138 (H.B. 3511), § 2, eff. June 14, 2013.

### **§ 271.152. Waiver of Immunity to Suit for Certain Claims**

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.

### **Credits**

Added by Acts 2005, 79th Leg., ch. 604, § 1, eff. Sept. 1, 2005.

## **§ 271.153. Limitations on Adjudication Awards**

(a) Except as provided by Subsection (c), the total amount of money awarded in an adjudication brought against a local governmental entity for breach of a contract subject to this subchapter is limited to the following:

- (1) 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;
- (2) the amount owed for change orders or additional work the contractor is directed to perform by a local governmental entity in connection with the contract;
- (3) reasonable and necessary attorney's fees that are equitable and just; and
- (4) interest as allowed by law, including interest as calculated under Chapter 2251, Government Code.

(b) Damages awarded in an adjudication brought against a local governmental entity arising under a contract subject to this subchapter may not include:

- (1) consequential damages, except as expressly allowed under Subsection (a)(1);
- (2) exemplary damages; or
- (3) damages for unabsorbed home office overhead.

(c) Actual damages, specific performance, or injunctive relief may be granted in an adjudication brought against a local governmental entity for breach of a contract described by Section 271.151(2)(B).

### **Credits**

Added by Acts 2005, 79th Leg., ch. 604, § 1, eff. Sept. 1, 2005. Amended by Acts 2009, 81st Leg., ch. 1266, § 8, eff. June 19, 2009; Acts 2011, 82nd Leg., ch. 226 (H.B. 345), § 1, eff. Sept. 1, 2011; Acts 2013, 83rd Leg., ch. 1138 (H.B. 3511), § 3, eff. June 14, 2013.

2009 Tex. Sess. Law Serv. Ch. 1266 (H.B. 987) (VERNON'S)

VERNON'S TEXAS SESSION LAW SERVICE 2009  
Eighty-First Legislature, 2009 Regular Session

Additions are indicated by **Text**; deletions by  
~~Text~~ . Changes in tables are made but not highlighted.

CHAPTER 1266  
H.B. No. 987  
COMPETITIVE PROCUREMENT REQUIREMENTS FOR LOCAL GOVERNMENTS

AN ACT relating to competitive procurement requirements for local governments.

Be it enacted by the Legislature of the State of Texas:

SECTION 1. Section 44.031(a), Education Code, is amended to read as follows:

<< TX EDUC § 44.031 >>

(a) Except as provided by this subchapter, all school district contracts, except contracts for the purchase of produce or vehicle fuel, valued at ~~\$50,000~~ ~~\$25,000~~ or more in the aggregate for each 12-month period shall be made by the method, of the following methods, that provides the best value for the district:

- (1) competitive bidding;
- (2) competitive sealed proposals;
- (3) a request for proposals, for services other than construction services;
- (4) an interlocal contract;
- (5) a design/build contract;
- (6) a contract to construct, rehabilitate, alter, or repair facilities that involves using a construction manager;
- (7) a job order contract for the minor construction, repair, rehabilitation, or alteration of a facility;
- (8) the reverse auction procedure as defined by Section 2155.062(d), Government Code; or
- (9) the formation of a political subdivision corporation under Section 304.001, Local Government Code.

SECTION 2. Subchapter B, Chapter 44, Education Code, is amended by adding Section 44.0313 to read as follows:

<< TX EDUC § 44.0313 >>

**Sec. 44.0313. PROCEDURES FOR ELECTRONIC BIDS OR PROPOSALS.** (a) A school district may receive bids or proposals under this chapter through electronic transmission if the board of trustees of the school district adopts rules to ensure the identification, security, and confidentiality of electronic bids or proposals and to ensure that the electronic bids or proposals remain effectively unopened until the proper time.

(b) Notwithstanding any other provision of this chapter, an electronic bid or proposal is not required to be sealed. A provision of this chapter that applies to a sealed bid or proposal applies to a bid or proposal received through electronic transmission in accordance with the rules adopted under Subsection (a).

SECTION 3. Section 262.003(a), Local Government Code, is amended to read as follows:

<< TX LOCAL GOVT § 262.003 >>

(a) Any law that requires a county to follow a competitive **procurement bidding** procedure in making a purchase requiring the expenditure of **\$50,000** ~~\$25,000~~ or less does not apply to the purchase of an item available for purchase from only one supplier.

SECTION 4. Section 262.023(a), Local Government Code, is amended to read as follows:

<< TX LOCAL GOVT § 262.023 >>

(a) Before a county may purchase one or more items under a contract that will require an expenditure exceeding **\$50,000** ~~\$25,000~~ , the commissioners court of the county must:

- (1) comply with the competitive bidding or competitive proposal procedures prescribed by this subchapter;
- (2) use the reverse auction procedure, as defined by Section 2155.062(d), Government Code, for purchasing; or
- (3) comply with a method described by Subchapter H, Chapter 271.

SECTION 5. Section 262.0245, Local Government Code, is amended to read as follows:

<< TX LOCAL GOVT § 262.0245 >>

Sec. 262.0245. **COMPETITIVE PROCUREMENT BIDDING PROCEDURES ADOPTED BY COUNTY PURCHASING AGENTS.** A county purchasing agent shall adopt procedures that provide for competitive **procurement bidding** , to the extent practicable under the circumstances, for the county purchase of an item ~~under a contract~~ that is not subject to competitive **procurement bidding** ~~under Section 262.023~~ .

SECTION 6. Section 271.024, Local Government Code, is amended to read as follows:

<< TX LOCAL GOVT § 271.024 >>

Sec. 271.024. **COMPETITIVE PROCUREMENT BIDDING PROCEDURE APPLICABLE TO CONTRACT.** If a governmental entity is required by statute to award a contract for the construction, repair, or renovation of a structure, road, highway, or other improvement or addition to real property on the basis of competitive bids, and if the contract requires the expenditure of more than **\$50,000** ~~\$25,000~~ from the funds of the entity, the bidding on the contract must be accomplished in the manner provided by this subchapter.

SECTION 7. Section 271.054, Local Government Code, is amended to read as follows:

<< TX LOCAL GOVT § 271.054 >>

Sec. 271.054. **COMPETITIVE PROCUREMENT BIDDING REQUIREMENT.** Before the governing body of an issuer may enter into a contract requiring an expenditure by or imposing an obligation or liability on the issuer, or on a subdivision of the issuer if the issuer is a county, of more than **\$50,000** ~~\$25,000~~ , the governing body must submit the proposed contract to competitive **procurement bidding** .

SECTION 8. Section 271.153(a), Local Government Code, is amended to read as follows:

<< TX LOCAL GOVT § 271.153 >>

(a) The total amount of money awarded in an adjudication brought against a local governmental entity for breach of a contract subject to this subchapter is limited to the following:

- (1) 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;
- (2) the amount owed for change orders or additional work the contractor is directed to perform by a local governmental entity in connection with the contract; ~~and~~
- (3) **reasonable and necessary attorney's fees that are equitable and just;** and

(4) interest as allowed by law.

SECTION 9. Section 271.9051(b), Local Government Code, is amended to read as follows:

<< TX LOCAL GOVT § 271.9051 >>

(b) In purchasing under this title any real property, personal property that is not affixed to real property, or services, if a municipality receives one or more competitive sealed bids from a bidder whose principal place of business is in the municipality and whose bid is within five percent of the lowest bid price received by the municipality from a bidder who is not a resident of the municipality, the municipality may enter into a contract for an expenditure of less than \$100,000 with:

(1) the lowest bidder; or

(2) the bidder whose principal place of business is in the municipality if the governing body of the municipality determines, in writing, that the local bidder offers the municipality the best combination of contract price and additional economic development opportunities for the municipality created by the contract award, including the employment of residents of the municipality and increased tax revenues to the municipality.

SECTION 10. The heading to Section 281.047, Local Government Code, is amended to read as follows:

<< TX LOCAL GOVT § 281.047 hd. >>

Sec. 281.047. CONTRACTS OVER \$50,000 ~~\$10,000~~ .

SECTION 11. Section 281.047(a), Local Government Code, is amended to read as follows:

<< TX LOCAL GOVT § 281.047 >>

(a) This section applies to a contract that is for materials for, or construction of, facilities and that is for an amount greater than \$50,000 ~~\$10,000~~ .

SECTION 12. Section 351.137(b), Local Government Code, is amended to read as follows:

<< TX LOCAL GOVT § 351.137 >>

(b) Construction contracts requiring an expenditure of more than \$50,000 ~~\$15,000~~ may be made only after competitive bidding as provided by Subchapter B, Chapter 271.

SECTION 13. Section 375.221, Local Government Code, is amended to read as follows:

<< TX LOCAL GOVT § 375.221 >>

Sec. 375.221. COMPETITIVE BIDDING ON CERTAIN PUBLIC WORKS CONTRACTS. (a) A contract, other than a contract for services, for more than \$50,000 ~~\$15,000~~ for the construction of improvements or the purchase of material, machinery, equipment, supplies, and other property, except real property, may be entered into only after competitive bids. Notice of the contract for the purpose of soliciting bids shall be published once a week for two consecutive weeks in a newspaper with general circulation in the area in which the district is located. The first publication of notice must be not later than the 14th ~~15th~~ day before the date set for receiving bids. The board may adopt rules governing receipt of bids and the award of the contract and providing for the waiver of the competitive bid requirement if:

(1) there is an emergency;

(2) the needed materials are available from only one source;

(3) in a procurement requiring design by the supplier competitive bidding would not be appropriate and competitive negotiation, with proposals solicited from an adequate number of qualified sources, would permit reasonable competition consistent with the nature and requirements of the procurement; or

(4) after solicitation, it is ascertained that there will be only one bidder.

(b) If a proposed contract for works, plant improvements, facilities other than land, or the purchase of equipment, appliances, materials, or supplies is for an estimated amount of more than ~~\$50,000~~ \$15,000 but less than ~~\$25,000~~ or for a duration of more than two years, competitive sealed proposals bids shall be asked from at least three persons.

SECTION 14. Section 54.054(a), Transportation Code, is amended to read as follows:

<< TX TRANSP § 54.054 >>

(a) Except as otherwise provided by this chapter, the board may award a contract involving the expenditure of funds in excess of the amount applicable to an expenditure of funds by a municipality under Section 252.021(a), Local Government Code, ~~more than \$25,000~~ only by competitive bidding.

<< Repealed: TX EDUC § 44.033 >>

SECTION 15. Section 44.033, Education Code, is repealed.

<< Repealed: TX LOCAL GOVT § 271.159 >>

SECTION 16. Section 271.159, Local Government Code, is repealed.

<< Note: TX EDUC § 44.031 >>

SECTION 17. The change in law made by this Act applies only to a claim that arises under a contract executed on or after the effective date of this Act. A claim that arises under a contract executed before the effective date of this Act is governed by the law as it existed immediately before the effective date of this Act, and that law is continued in effect for that purpose.

SECTION 18. This Act takes effect immediately if it receives a vote of two-thirds of all the members elected to each house, as provided by Section 39, Article III, Texas Constitution. If this Act does not receive the vote necessary for immediate effect, this Act takes effect September 1, 2009.

Passed by the House on April 15, 2009: Yeas 146, Nays 1, 1 present, not voting; the House concurred in Senate amendments to H.B. No. 987 on May 31, 2009: Yeas 143, Nays 0, 2 present, not voting; passed by the Senate, with amendments, on May 21, 2009: Yeas 31, Nays 0.

Approved June 19, 2009.

Effective June 19, 2009.

TX LEGIS 1266 (2009)

2011 Tex. Sess. Law Serv. Ch. 226 (H.B. 345) (VERNON'S)

VERNON'S TEXAS SESSION LAW SERVICE 2011

Eighty-Second Legislature, 2011 Regular Session

Additions are indicated by **Text**; deletions by ~~Text~~ .

Vetoed are indicated by ~~Text~~ ;

stricken material by ~~Text~~ .

CHAPTER 226

H.B. No. 345

LIMITATIONS ON AWARDS IN AN ADJUDICATION BROUGHT AGAINST  
A LOCAL GOVERNMENTAL ENTITY FOR BREACH OF CONTRACT

AN ACT

relating to limitations on awards in an adjudication brought  
against a local governmental entity for breach of contract.

Be it enacted by the Legislature of the State of Texas:

SECTION 1. Section 271.153(a), Local Government Code, is amended to read as follows:

<< TX LOCAL GOVT § 271.153 >>

(a) The total amount of money awarded in an adjudication brought against a local governmental entity for breach of a contract subject to this subchapter is limited to the following:

- (1) 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;
- (2) the amount owed for change orders or additional work the contractor is directed to perform by a local governmental entity in connection with the contract;
- (3) reasonable and necessary attorney's fees that are equitable and just; and
- (4) interest as allowed by law, **including interest as calculated under Chapter 2251, Government Code.**

<< Note: TX LOCAL GOVT § 271.153 >>

SECTION 2. **The change in law made by this Act applies only to an adjudication commenced on or after the effective date of this Act. An adjudication commenced before the effective date of this Act is governed by the law applicable to the adjudication immediately before the effective date of this Act, and the former law is continued in effect for that purpose.**

SECTION 3. This Act takes effect September 1, 2011.

**LIMITATIONS ON AWARDS IN AN ADJUDICATION..., 2011 Tex. Sess. Law...**

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Passed by the House on April 19, 2011: Yeas 142, Nays 0, 2 present, not voting; the House concurred in Senate amendments to H.B. No. 345 on May 19, 2011: Yeas 140, Nays 0, 2 present, not voting; passed by the Senate, with amendments, on May 17, 2011: Yeas 31, Nays 0.

Approved June 17, 2011.

Effective September 1, 2011.

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2013 Tex. Sess. Law Serv. Ch. 1138 (H.B. 3511) (VERNON'S)

VERNON'S TEXAS SESSION LAW SERVICE 2013

Eighty-Third Legislature, 2013 Regular Session

Additions are indicated by **Text**; deletions by ~~Text~~ .

Vetoed are indicated by ~~Text~~ ;

stricken material by ~~Text~~ .

CHAPTER 1138

H.B. No. 3511

ADJUDICATION OF CERTAIN CLAIMS UNDER A WRITTEN CONTRACT WITH A  
SPECIAL-PURPOSE DISTRICT OR AUTHORITY OR LOCAL GOVERNMENTAL ENTITY

AN ACT

relating to the adjudication of certain claims under a written contract  
with a special-purpose district or authority or local governmental entity.

Be it enacted by the Legislature of the State of Texas:

SECTION 1. Title 5, Civil Practice and Remedies Code, is amended by adding Chapter 113 to read as follows:

T. 5 Ch. 113

**CHAPTER 113. WATER SUPPLY CONTRACT CLAIM AGAINST LOCAL DISTRICT OR AUTHORITY**

<< TX CIV PRAC & REM § 113.001 >>

**Sec. 113.001. DEFINITIONS. In this chapter:**

(1) "Adjudicating a claim" means the bringing of a civil suit and prosecution to final judgment in court and includes the bringing of an authorized arbitration proceeding and prosecution to final resolution in accordance with any mandatory procedures established in the contract that is the subject of the dispute under Section 113.002.

(2) "Local district or authority" means a special-purpose district or authority, including a levee improvement district, drainage district, irrigation district, water improvement district, water control and improvement district, water control and preservation district, fresh water supply district, navigation district, special utility district, and river authority, and any conservation and reclamation district.

<< TX CIV PRAC & REM § 113.002 >>

**Sec. 113.002. WAIVER OF IMMUNITY TO SUIT FOR CLAIM REGARDING WATER SUPPLY CONTRACT.** A local district or authority that enters into a written contract stating the essential terms under which the local district or authority is to provide water to a purchaser for use in connection with the generation of electricity waives sovereign immunity to suit for the purpose of adjudicating a claim that the local district or authority breached the contract by not providing water, or access to water, according to the contract's terms.

<< TX CIV PRAC & REM § 113.003 >>

**Sec. 113.003. REMEDIES.** (a) Except as provided by Subsection (b), remedies awarded in a proceeding adjudicating a claim under this chapter may include any remedy available for breach of contract that is not inconsistent with the terms of the contract, including the cost of cover and specific performance.

(b) Remedies awarded in a proceeding adjudicating a claim under this chapter may not include consequential or exemplary damages.

<< TX CIV PRAC & REM § 113.004 >>

**Sec. 113.004. NO WAIVER OF OTHER DEFENSES.** This chapter does not waive a defense or a limitation on damages available to a party to a contract other than sovereign immunity to suit.

<< TX CIV PRAC & REM § 113.005 >>

**Sec. 113.005. NO WAIVER OF IMMUNITY TO SUIT IN FEDERAL COURT.** This chapter does not waive sovereign immunity to suit in federal court.

<< TX CIV PRAC & REM § 113.006 >>

**Sec. 113.006. NO WAIVER OF IMMUNITY TO SUIT FOR TORT LIABILITY.** This chapter does not waive sovereign immunity to suit for a cause of action for a negligent or intentional tort.

<< TX CIV PRAC & REM § 113.007 >>

**Sec. 113.007. NO NEW OR ADDITIONAL WATER RIGHTS.** This chapter does not grant any user of water any new or additional rights to water or any new or additional priority to water rights. This chapter does not confer any rights inconsistent with the terms of the contract that is the subject of a dispute under Section 113.002.

<< TX CIV PRAC & REM § 113.008 >>

**Sec. 113.008. AUTHORITY OF REGULATORY AGENCIES; COMPLIANCE WITH REGULATORY ORDER.** (a) This chapter does not limit the authority of the Texas Commission on Environmental Quality or any other state regulatory agency.

(b) Compliance with an order of the Texas Commission on Environmental Quality or any other state regulatory agency that expressly curtails water delivery to a specific electric generating facility is not considered a breach of contract for the purposes of this chapter.

<< TX CIV PRAC & REM § 113.009 >>

**Sec. 113.009. NO THIRD-PARTY BENEFICIARIES. (a) This chapter waives sovereign immunity only for the benefit of:**

- (1) a party to the contract that is the subject of a dispute under Section 113.002; or**
- (2) the assignee of a party to the contract, if assignment of an interest in the contract is permitted by the terms of the contract.**

**(b) Except for an assignment described by Subsection (a)(2), a party authorized by this chapter to sue for a cause of action of breach of contract may not transfer or assign that cause of action to any person.**

SECTION 2. Section 271.151(2), Local Government Code, is amended to read as follows:

<< TX LOCAL GOVT § 271.151 >>

(2) “Contract subject to this subchapter” means:

- (A) 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; or**
- (B) a written contract, including a right of first refusal, regarding the sale or delivery of not less than 1,000 acre-feet of reclaimed water by a local governmental entity intended for industrial use.**

SECTION 3. Section 271.153, Local Government Code, is amended by amending Subsection (a) and adding Subsection (c) to read as follows:

<< TX LOCAL GOVT § 271.153 >>

**(a) Except as provided by Subsection (c), the [The ] total amount of money awarded in an adjudication brought against a local governmental entity for breach of a contract subject to this subchapter is limited to the following:**

- (1) 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;
- (2) the amount owed for change orders or additional work the contractor is directed to perform by a local governmental entity in connection with the contract;
- (3) reasonable and necessary attorney's fees that are equitable and just; and
- (4) interest as allowed by law, including interest as calculated under Chapter 2251, Government Code.

**(c) Actual damages, specific performance, or injunctive relief may be granted in an adjudication brought against a local governmental entity for breach of a contract described by Section 271.151(2)(B).**

<< Note: TX CIV PRAC & REM § 113.001 >>

SECTION 4. (a) Chapter 113, Civil Practice and Remedies Code, as added by this Act, applies only to a cause of action that accrues on or after the effective date of this Act. A cause of action that accrues before the effective date of this Act is governed by the law in effect immediately before that date, and that law is continued in effect for that purpose.

<< Note: TX CIV PRAC & REM § 113.001 >>

(b) Chapter 113, Civil Practice and Remedies Code, as added by this Act, does not waive sovereign immunity to suit for any claims related to or arising out of a contract that was the subject of litigation that was adjudicated or dismissed on the basis of sovereign immunity prior to the effective date of this Act.

<< Note: TX LOCAL GOVT §§ 271.151, 271.153 >>

(c) Sections 271.151(2) and 271.153, Local Government Code, as amended by this Act, apply to a claim that arises under a contract executed on or after the effective date of this Act. A claim that arises under a contract executed before the effective date of this Act is governed by the law in effect on the date the contract was executed, and the former law is continued in effect for that purpose.

SECTION 5. This Act takes effect immediately if it receives a vote of two-thirds of all the members elected to each house, as provided by Section 39, Article III, Texas Constitution. If this Act does not receive the vote necessary for immediate effect, this Act takes effect September 1, 2013.

Passed by the House on May 2, 2013: Yeas 147, Nays 0, 2 present, not voting; the House concurred in Senate amendments to H.B. No. 3511 on May 24, 2013: Yeas 144, Nays 0, 2 present, not voting; passed by the Senate, with amendments, on May 22, 2013: Yeas 31, Nays 0.

Approved June 14, 2013.

Effective June 14, 2013.

**Tab G**

**Memorandum  
of Understanding**

**Hays Street Bridge**

This agreement is entered into this 4th day of June, 2002, by and between the City of San Antonio, represented by the Planning Department and the Hays Street Bridge Restoration Group, hereinafter referred to as "the Restoration Group," through the San Antonio Area Foundation.

WITNESSETH, THAT:

WHEREAS, advocates of the restoration of the Hays Street Bridge approached the City of San Antonio Planning Department for assistance in preparing a Special Study that became an application for the Statewide Transportation Enhancement Program (STEP), which is the State of Texas' program for the Transportation Equity Act for the 21<sup>st</sup> Century (TEA-21);

WHEREAS, the City of San Antonio, as the sponsoring entity for the Hays Street Bridge Rehabilitation and Bicycle and Pedestrian Route project, authorized that the STEP application be submitted through Ordinance #93876 on May 3, 2001;

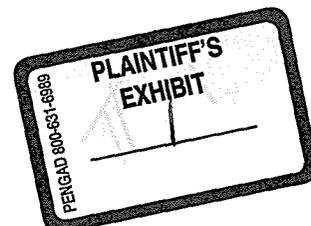
WHEREAS, Ordinance 93876 was adopted by City Council on May 3, 2001 and stated that "No financial obligation for the City is authorized... Any contribution by the City shall be addressed by a separate ordinance." The corresponding briefing memo stated that the City's support of this project would bring credibility to fundraising efforts by the bridge restoration supporters to obtain underwriting from private foundations, nonprofits, and corporations for the match money to be in place by the time the TEA-21 enhancement projects were selected;

WHEREAS, Resolution 2001-30-32 was adopted on August 16, 2001 to reaffirm the TEA-21 application to TxDOT and authorized the use of \$279,000 in Certificates of Obligation;

WHEREAS, the project was accepted by the Texas Department of Transportation (TxDOT) on January 31, 2002 to receive \$2.89 million in Federal Highway Administration funding as part of the Transportation Equity Act for the 21<sup>st</sup> Century (TEA-21);

WHEREAS, the provisions in TxDOT's Statewide Transportation Enhancement Program guide require the sponsoring entity to fund the different phases of the TEA-21 project up front for an eighty (percent) reimbursement and require the sponsoring entity to fund any cost overruns in their entirety;

WHEREAS, the Total Project Cost is estimated at \$3.59 million, which leaves an estimated twenty (20) percent match requirement totaling \$718,114;



**Memorandum  
of Understanding**

**Hays Street Bridge**

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WHEREAS, the estimated value of the in-kind contributions total \$369,398 (for bridge and land conveyed by Union Pacific);

WHEREAS, the Restoration Group is responsible for making every effort to raise the estimated amount of \$348,716 to reimburse the City over the length of time required to complete the construction of the Hays Street Bridge project;

WHEREAS, the City of San Antonio reaffirmed the use of \$279,000 in certificates of obligation upon acceptance of the TEA-21 application by TxDOT in resolution 2001-30-32 from August 16, 2001 to fund the initial phases of the project and is subject to reimbursement by funds raised by the Restoration Group and held in the San Antonio Area Foundation's Hays Street Bridge Restoration Fund (as referenced in Attachment A).

**I. Background**

As the sponsoring entity for the Hays Street Bridge Rehabilitation and Bicycle and Pedestrian Route project, the City of San Antonio is ultimately responsible for all project costs. The Restoration Group represents a diverse group of community supporters for the project and has diligently obtained financial pledges from the private sector to help fund the project. As such, a contract between the Restoration Group, as represented by the Fund Committee, and the San Antonio Area Foundation to hold any private donations in a foundation account has been executed (see Attachment A).

**II. Purpose**

Both the Restoration Group and the City of San Antonio are in agreement that a Memorandum of Understanding (MOU) is necessary to outline each party's responsibilities.

**III. Responsibilities**

The following is a general list of responsibilities for the private funds raised:

**Department of Planning (Historic Preservation and Neighborhood and Urban Design Divisions)**

1. Coordinate with the Finance Department to monitor the cash flow mechanism for the 20% match.
2. Coordinate meetings for status reviews of fundraising efforts and of the MOU.
3. Ensure that any funds generated by the Restoration Group for the Hays Street Bridge go directly to the approved City of San Antonio budget, as authorized by TxDOT, for the Hays Street Bridge project costs via the San Antonio Area Foundation's Hays Street Bridge Restoration Fund (as named in Attachment A).

**Other City Departments**

Manage the design and construction phases of the project.

**The Hays Street Bridge Restoration Group through the San Antonio Area Foundation**

1. Continue to raise matching funds through grant applications and other private resources.
2. Timely transfer of privately donated funds from the Hays Street Bridge Restoration Fund to the approved City of San Antonio budget.

**Article I - Payment Details**

- A. The Restoration Group, through the San Antonio Area Foundation, shall apply all funds raised towards the twenty (20) percent match of the Total Project Cost less any in-kind contributions (appraised value of the bridge and land given by Union Pacific, as approved by TxDOT).

**Memorandum  
of Understanding**

**Hays Street Bridge**

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- B. Payments are to be made on a monthly basis and should be received by the last day of each month.
  - 1. Once the cost or bid has been received by the City to commence each phase of the project, a monthly payment schedule will be developed based upon the percentage of the estimated total project cost for which the Restoration Group is responsible.
  - 2. The Restoration Group Fund Committee chairperson will then receive written notification by U. S. mail from the City of San Antonio detailing the payment schedule 15 days prior to the due date of the first payment.
  
- C. If the Restoration Group is unable to make timely payments due to exhaustion of donated private funds, they must notify the City's Director of Planning in writing by U. S. mail.
  - 1. Appropriate adjustments to the payment schedule and amount may then be made by City staff as an addendum to the MOU.

**Article II - Frequency of Fundraising Status Review**

- A. A meeting to review the status of the fundraising efforts and the articles of the MOU will take place quarterly between the designated City staff and the Restoration Group's Fund Committee members.
  
- B. The Restoration Group shall request a status report from the San Antonio Area Foundation for every quarterly meeting, if not monthly, summarizing the transactions, interest earned, and balance for the Hays Street Bridge account. The report shall also include remaining outstanding pledges and an updated schedule for receiving those remaining pledges.
  
- C. A final status report summarizing the account will also be requested by the City and the Restoration Group from the San Antonio Area Foundation upon completion of the project.

**Article III - Project Status Review**

- A. The City of San Antonio will give an oral update to the Restoration Group on the project progress at each quarterly meeting.
  
- B. The City of San Antonio will issue a report after the completion of each phase of the project summarizing the project costs.

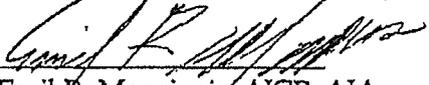
**Article IV - Additional Provisions**

- A. Additional provisions are provided in the attached Addendum.

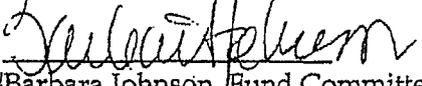
Memorandum  
of Understanding

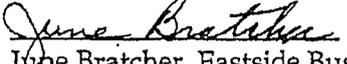
Hays Street Bridge

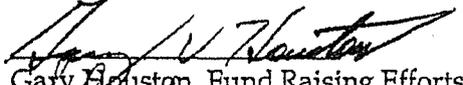
CITY OF SAN ANTONIO

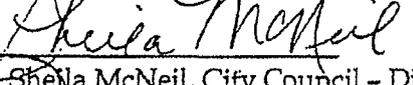
  
Emil R. Moncivais, AICP, AIA  
Director, Planning Department

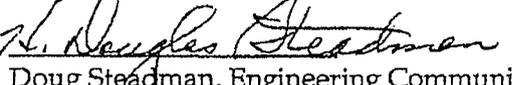
HAYS STREET BRIDGE RESTORATION GROUP, FUND COMMITTEE:

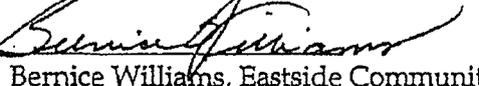
  
Barbara Johnson, Fund Committee Chairperson

  
June Bratcher, Eastside Business Community Representative

  
Gary Houston, Fund Raising Efforts Representative

  
Sheila McNeil, City Council - District 2 Representative

  
Doug Steadman, Engineering Community Representative

  
Bernice Williams, Eastside Community Representative

## ADDENDUM TO MEMORANDUM OF UNDERSTANDING

This is an Addendum to the Memorandum of Understanding ("MOU") dated June 4, 2002 by and between the City of San Antonio and the Hays Street Bridge Restoration Group.

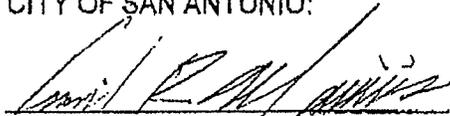
Whereas, the parties desire to clarify matters set forth in the MOU;

Now, therefore, the MOU is clarified as follows:

1. No individual member of the Hays Street Bridge Restoration Group ("Restoration Group") shall be individually liable for any deficiencies in the event the Restoration Group is unable to meet fund-raising goals.
2. The requests for payments made by the Restoration Group to the San Antonio Area Foundation shall be subject to the rules and regulations of the San Antonio Area Foundation regarding Donor Advised Funds.
3. That portion of the private donations that is represented by the \$50,000.00 donated by the San Antonio Conservation Society for restoration of the bridge, shall be used solely for bricks and mortar and shall not be used for professional fees, administrative costs or other soft costs.

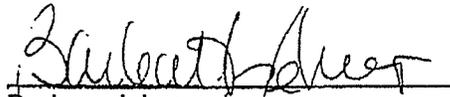
All other matters set forth in the MOU shall remain as written in the MOU.

CITY OF SAN ANTONIO:

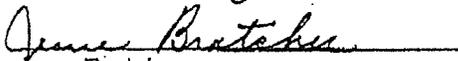


Emil R. Mancivais, AICP, AIA  
Director, Planning Department

HAYS STREET BRIDGE RESTORATION GROUP,  
FUND COMMITTEE:

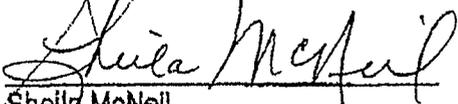


Barbara Johnson  
Fund Committee Chairperson



June Bratcher,  
Eastside Business Community Representative

  
Gary Houston,  
Fund Raising Efforts Representative

  
Sheila McNeil,  
City Council - District 2 Representative

  
Doug Steadman  
Engineering Community Representative

  
Bernice Williams  
Eastside Community Representative

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