

SUBJECT: Resolving breach-of-contract claims against the state

COMMITTEE: Civil Practices — committee substitute recommended

VOTE: 7 ayes — Bosse, Janek, Clark, Hope, Martinez Fischer, Smithee, Zbranek
0 nays
2 absent — Dutton, Nixon

WITNESSES: None

BACKGROUND: The 76th Legislature enacted HB 826 by Greenberg, adding Government Code, ch. 2260, which establishes administrative procedures for resolving contract disputes between state agencies and their private contractors. Chapter 2260 requires contractors to make their claims to the agency within 180 days of a breach and requires the contractor and agency to negotiate regarding the dispute for at least six months. If the agency and contractor cannot reach a negotiated settlement, the contractor may request a contested case hearing before the State Office of Administrative Hearings (SOAH), where a hearing officer hears the case and makes a finding of whether the contractor has a valid claim.

If the claim is valid and is worth less than \$250,000, the agency must pay the claim. If a valid claim is worth \$250,000 or more, the hearing officer must submit recommendations to the Legislature on whether to pay the claim and whether to give the contractor consent to sue under Civil Practice and Remedies Code, ch. 107. That statute establishes requirements for use of a legislative resolution allowing a person to sue the state, such as requiring the suit to occur in state court, to be brought within a certain period, and not to seek punitive damages. Otherwise, governmental entities are immune from liability under the doctrine of sovereign immunity.

Any amount owed the state agency for work not performed by the contractor must be deducted from the amount of money recoverable on a claim for breach of contract. After this deduction, the recoverable amount may not

exceed the balance due and owing on the contract price, including orders for additional work.

Chapter 2260's procedures are the exclusive remedy for contractors and are a prerequisite to seeking the Legislature's consent to sue under chapter 107.

DIGEST:

CSHB 2312 would specify that Government Code, ch. 2260 is not to be interpreted as limiting the Legislature's ability to grant or deny a contractor the right to sue a state agency on any terms that the Legislature deems appropriate.

The bill would modify chapter 2260 to establish that all state agency contracts must include a provision requiring the parties to use the state's administrative dispute-resolution procedures. It would limit the application of chapter 2260 to contracts executed or awarded after August 30, 1999, and would make chapter 2260 inapplicable to contracts that failed to include the provision requiring use of the dispute-resolution procedures.

CSHB 2312 would specify that orders for additional work that could be included in the amount recoverable from the state would have to represent the fair market value of work orders made by the state and that the work actually would have to have been performed.

The bill would take immediate effect if finally passed by a two-thirds record vote of the membership of each house. Otherwise, it would take effect September 1, 2001. Its provisions would apply only to contracts executed on or after the effective date, except as provided otherwise.

SUPPORTERS
SAY:

CSHB 2312 is necessary to preserve the Legislature's authority to grant parties permission to sue in the face of a Texas Supreme Court opinion that appears to hold otherwise. In *General Services Commission v. Little-Tex Insulation Co.*, No. 99-1071 (February 2001), the court said that a party's compliance with Government Code, chapter 2260 "is a necessary step before a party can petition to sue the State." This can be read to imply that the Legislature may not grant permission to sue the state unless the party seeking permission has gone through chapter 2260's administrative process and that the courts should dismiss suits based on permission to sue that was obtained without first exhausting the administrative procedures. Such a rule not only

denigrates the Legislature's authority, but is illogical. A legislature cannot legislate against the actions of a future legislature.

The fact that the court left open the possibility that the Legislature might enact "a special statute conferring consent" does not lift the constraint the court has placed on the Legislature's ability to act. A concurrent resolution allowing suit under chapter 107 is the Legislature's primary means of waiving the state's immunity from suit. The Legislature generally does not use special statutes to grant permission to sue because they could be challenged as constitutionally prohibited special laws. The Legislature seldom uses general statutes to waive immunity from suit, since there is no desire to waive immunity in every case. Thus, the only remaining option is a concurrent resolution. Because the Supreme Court's opinion appears to limit the Legislature's ability to use concurrent resolutions, CSHB 2312 is essential to preserve the Legislature's authority.

CSHB 2312 also would add a needed provision requiring state agencies to include a clause in their contracts in which the parties would agree to use the Chapter 2260 procedures. This would guarantee that the contractors were on notice of the state's contract dispute procedures and could not oppose being forced to use them.

CSHB 2312 would add specificity to the statutes that delineate what amounts are recoverable against state agencies when additional work not included in the contract later is requested by the agency. This provision would protect both contractors and state agencies. Contractors who perform extra work at an agency's request without a written contractual provision would be protected against an agency's refusal to pay. Agencies who request additional work without agreeing to a price term in writing would be protected from a contractor who might wish to charge above-market "hostage" prices assuming that the agency has little choice but to pay the excessive rates.

OPPONENTS
SAY:

CSHB 2312 is unnecessary. The Supreme Court's opinion did not dismiss a court suit that the Legislature had authorized in purported "violation" of chapter 2260, nor did it direct lower courts to dismiss such suits. Instead, the court simply held that since the plaintiffs had not obtained the Legislature's permission to sue, their suits in state court should be

dismissed. Though one plaintiff in that case, Dal-Mac, had received a concurrent resolution permitting it to bring its claims before SOAH for resolution by an administrative law judge, neither of the plaintiffs had received the legislature's permission to sue in court, which was the issue before the Supreme Court. Thus, the Supreme Court's opinion does not affect the Legislature's authority to waive sovereign immunity and grant consent to sue regardless of the contractor's compliance with chapter 2260. In fact, the court explicitly left open the possibility that the Legislature itself might circumvent chapter 2260, stating that "[a]part from a special statute conferring consent, a party simply cannot sue the State for breach of contract absent legislative consent under Chapter 107."

NOTES:

The committee substitute altered the filed version by adding the provision that would limit recovery on orders for additional work to those actually performed and to the fair market value of those orders.