

SUBJECT: Waiving sovereign immunity for certain claims related to state contracts

COMMITTEE: State Affairs — committee substitute recommended

VOTE: 8 ayes — Cook, Menendez, Gallego, Harless, Hilderbran, Huberty, Smithee, Turner

2 nays — Craddick, Frullo

1 present not voting — Oliveira

2 absent — Geren, Solomons

WITNESSES: For — Andrew Koebel, Associated Builders and Contractors of Texas, Kunz Construction Co., Inc.; Steve Nelson, Texas Building Branch - Associated General Contractors; Tom Vaughn, Vaughn Construction; Michael White, Texas Construction Association; (*Registered, but did not testify:* Michael Chatron, AGC Texas Building Branch; Jon Fisher, Associated Builders and Contractors of Texas; Bill Hammond, Texas Association of Business; David Marwitz, Texas Surety Federation; Jim Sewell, Gallagher Construction; Phil Thoden, Austin Chapter AGC)

Against — None

BACKGROUND: Title 5 of the Civil Practice and Remedies Code addresses governmental liability. Ch. 2260 of the Government Code applies to the resolution of certain contract claims against Texas. Sec. 2260.002 excludes personal injury or wrongful death claims arising from contract breaches, and contracts executed or awarded before August 30, 1999, from the applicability of the chapter.

DIGEST: CSHB 1041 would add a new chapter 114 to Title 5 of the Civil Practice and Remedies Code governing lawsuit claims that stemmed from certain contracts with state agencies.

Under the bill, a state agency that was legally authorized to enter into contracts and did so would waive sovereign immunity to suit for breach of express or implied provisions of the contract. The bill would apply only to

breach of contract claims in which the matter in controversy exceeded \$250,000, excluding interest.

CSHB 1041 would limit awards to:

- balances due and owed by the state, including payments for increased work costs due to owner-caused delay or acceleration;
- amounts owed for change orders or additional work to fulfill the contract; and
- interest, as allowed by law.

Damages could not include consequential damages, exemplary damages, or damages for unabsorbed home office overhead.

The bill would not waive a defense or a limitation on damages available to a party to the contract, except the bar to a suit based on sovereign immunity. CSHB 1041 would not waive immunity to suit in federal court or immunity to suits based on negligence. CSHB 1041 would not apply to an employment contract between a state agency and an employee.

The bill would not permit the award of attorney's fees unless the state agency had entered into a written agreement allowing otherwise.

Unless the procedures conflicted with provisions in the bill, contractual adjudication procedures would be enforceable under CSHB 1041. The bill would allow suits to be filed in Travis County or in a county where the events underlying the claim occurred.

Ch. 2260 of the Government Code would not apply to claims for breach of contract covered by the new ch. 114 created by the bill.

The bill would provide definitions of "adjudication," "contract subject to this chapter," and "state agency."

CSHB 1041 only would apply to claims under contracts executed on or after September 1, 2011. The bill would take effect September 1, 2011.

**SUPPORTERS
SAY:**

CSHB 1041 would attempt to ensure fairness when state agencies have breached certain contracts. The State Office of Administrative Hearings has procedures to address contracts below \$250,000, but additional guidance is necessary. Contractors, subcontractors, and service providers

should be able to recover for services delivered and supplies purchased to fulfill a state agency contract, just as they would for other contractual agreements. State agencies should not be able to use sovereign immunity to receive benefits that otherwise would not be covered under the contracts. CSHB 1041 would eliminate the independent ability of the state to breach, disavow, or abuse its contracts.

The bill would encourage companies to bid on state projects. There currently is no redress available to a company when a state agency breaches a contract covered by the bill, so many companies are hesitant to enter into agreements with the state. Small companies especially could suffer tremendously from one breach. Since companies would have more confidence in seeking state business because of the opportunity for redress, CSHB 1041 would bring more competition to the bidding process. Increased competition would also lower costs for state projects.

CSHB 1041 would not open the floodgates to litigation against the state. Counties, cities, and school districts have not experienced greatly increased rates of litigation as a result of a similar waiver of immunity. State agencies are the last form of government that continues to claim sovereign immunity on contracts covered under the bill. The state should honor its agreements, and CSHB 1041 would help to ensure that.

**OPPONENTS
SAY:**

The immunity of the state should not be waived any further than it already has been. CSHB 1041 would require Texas to waive immunity in a blanket fashion, and would set a bad precedent for issues arising from state contracts in the future.

NOTES:

The fiscal note anticipates a significant, indeterminate fiscal cost to the state under CSHB 1041 due to the inability to predict filed lawsuits or increased contract disputes with the state.

The companion bill, SB 562 by Wentworth, was referred to the Senate State Affairs Committee on February 17.