

**CONTRACTING AND PERFORMANCE OF CONSTRUCTION WORK FOR  
GOVERNMENTAL ENTITIES**

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## **I. CONSTRUCTION WORK FOR GOVERNMENTAL ENTITIES**

Construction work for governmental entities has historically presented its own specific challenges, including issues associated with both the contracting and procurement process and those associated with the actual performance of the work and disputes arising therefrom. With the economic stimulus package and other initiatives the amount of governmental work has and is anticipated to increase significantly. Thus, the requirements unique to such work, and the challenges presented when contracting to perform such work are as relevant as ever.

### **A. Types of Work**

Construction work performed for governmental entities is often referred to generally as “public works.”<sup>1</sup> The list of the various public works and construction projects performed for governmental entities is long and basically includes all endeavors to construct things that will be of benefit to the community at large. Such structures can include improvements to infrastructure and transportation such as canals; erosion control and drainage projects; dams and reservoirs; water and sewer projects; highways and freeway expansion, roads and bridges; airports; rail and fixed-link projects; parking garages; industrial parks; electric, power and gas projects; and government buildings including courthouses and administrative offices; prisons and jails; and police and fire stations.

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<sup>1</sup> Although many Texas statutes refer to “public works,” only the Texas Water Code provides a definition. The Texas Water Code defines “public works” to mean any project to acquire, construct, improve, repair, or otherwise provide any buildings, structures, facilities, equipment, or other real or personal property or improvements designed for public use, protection, or enjoyment undertaken by a political subdivision and paid for, in whole or in part, out of public funds. Tex. Water Code § 15.602(11).

Other types of “public works”<sup>2</sup> projects may be for the general improvement of society or the improvement of some specific segment of the society or its economic development. General society improvement includes construction of K-12 schools; universities; medical and nursing schools; hospitals and health clinics; drug treatment centers; libraries; parks and recreation centers; swimming pools; fairgrounds; cemeteries and historic sites. Economic development focused projects include construction of public housing; retirement homes; resorts; and convention and tourist centers.

Public works projects can also be targeted to more specific societal goals such as improving the environment through the building of alternative energy production facilities such as wind and solar energy projects, and emphasis on sustainable “Green Construction.” Additionally, public works projects also include department of defense related projects, including military bases and homes.

### **B. Governmental Entities Involved**

The types of “governmental entities”<sup>3</sup> that typically contract for the performance of construction work include the state agencies, counties, municipalities, political subdivisions, school districts and universities, hospital districts, navigation districts and port authorities, defense base development authorities, and other special purpose districts. Depending upon which type of governmental entity involved, different rules apply to the contract procurement process and the process for asserting claims against the governmental entity arising out of construction disputes.

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<sup>2</sup> Construction projects performed for governmental entities are often generally referred to as “public works” projects. However, the term “public work” is defined by multiple Texas statutory provisions and therefore, in certain contexts, may have specific statutory significance. *See*

<sup>3</sup> Though often used generically, in Texas, the terms “governmental entity” and “local governmental entity” are similarly defined in various Texas statutory provisions.

### **C. Unique Challenges Presented**

Depending on the type of work and governmental entity involved, contracting to perform construction work for governmental entities can present various unique challenges and requirements, including issues related to available project delivery methods, stringent bond and insurance requirements, and statutory anti-indemnity provisions. Performance of construction work for governmental entities may also involve issues related to the doctrine of sovereign immunity, payment related claims and statutes, and statutory criminal background check requirements.

## **II. AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009 – THE “STIMULUS” BILL**

The American Recovery and Reinvestment Act of 2009 (“ARRA”), known by many as the “Stimulus” bill, was passed by Congress on February 13, 2009 and signed into law by President Obama on February 17, 2009. In its final form, the ARRA encompassed upwards of 787 billion dollars in tax credits, contracts, grants and loans, and entitlements. The ARRA was passed as a direct response to the economic crisis and its stated three immediate goals were: (1) create new jobs as well as save existing ones; (2) spur economic activity and invest in long-term economic growth; and (3) foster unprecedented levels of accountability and transparency in government spending.

To accomplish these goals, the ARRA allocated distribution of the \$787 billion in funds as follows: (1) \$288 billion in tax benefits; (2) \$275 billion in contracts, grants, and loans; and (3) \$224 billion in entitlements.<sup>4</sup> As of October 30, 2009, the status of the 56,986 total awards of funds under the ARRA was as follows: 4,110 of the awards are complete, 5,063 are more than 50% complete, 25,932 are less than 50% complete, and 21,881 have not been started.<sup>5</sup> The ARRA also requires recipients of funds to report quarterly on certain items including: (1)

<sup>4</sup> See <http://www.recovery.gov/Pages/home.aspx> (citing US Treasury, Federal Agency Financial and Activity Reports as sources of information).

<sup>5</sup> *Id.*

the amount of monies spent; (2) the status of the project; and (3) the number of jobs created and/or saved. All such information reported is posted on [www.recovery.gov](http://www.recovery.gov).

### **A. The ARRA’s Stimulus Package and Other Initiatives**

The ARRA allocated significant financial aid for education, including some directly to local school districts. The ARRA also targeted infrastructure development and enhancement. The ARRA also directed investment towards the domestic renewable energy industry and the weatherizing of 75 percent of federal buildings as well as more than one million private homes around the country. Significant funds were also directed to construction and repair of roads and bridges.

While many of ARRA projects were focused on immediately jumpstarting the economy, others, especially those involving infrastructure and transportation improvements should require several years to commence and complete given the sheer size of both the money allocated and the scope of the projects.

### **B. ARRA Funds Allocation to Texas and Potential Areas of Increase of Governmental Entity Construction Work**

Of the total federal funds available, about \$16 billion is directed at Texas, according to the Texas Legislative Budget Board. The funds are divided into eight broad categories: (1) Health and Human Services: \$4.7 billion; (2) State Fiscal Stabilization Funds: \$4 billion; (3) Education: \$2.3 billion; (4) Transportation: \$2.7 billion; (5) Labor: \$1 billion; (6) Criminal Justice: \$169.3 million; (7) Housing and Infrastructure: \$1.1 billion; and (8) Homeland Security: Not Applicable.<sup>6</sup>

The Texas Comptroller’s website contains a detailed estimation of the impact of the ARRA stimulus package on the State of Texas.<sup>7</sup>

<sup>6</sup> See <http://texasbudgetsource.com/stimulus-transparency>.

<sup>7</sup> See <http://window.state.tx.us/recovery/transparency/docs/EstimatedStimulusImpactonTexas.pdf>

Information from Senate Bill 1, General Appropriations Act, 81st Legislature, Regular Session showing the State of Texas' appropriation of the ARRA funds it received is also available at the Comptroller's website.<sup>8</sup> As can be seen from these documents, some of the primary governmental construction work that can be anticipated to increase due to the ARRA includes work performed for school districts and the construction of roads and bridges.

### III. CONTRACTING/CONTRACT PROCUREMENT ISSUES

The procurement of construction contracts by governmental agencies at all levels in Texas is primarily governed by voluminous and complex series of legislative enactments. Thus, identification of the relevant law at the outset is a must. At the state level, the relevant law consists of statutes and regulations. At the local level, the relevant law consists of state statutes, municipal charters, and local ordinances and resolutions.

#### A. State and State Agency Statutes and Regulations

Contract procurement by state agencies is primarily governed by the State Purchasing and General Services Act ("SPGSA").<sup>9</sup> Under the SPGSA "state agency" means "a department, commission, board, office, or other agency in the executive branch of state government created by the state constitution or a state statute; the supreme court, the court of criminal appeals, a court of appeals, or the Texas Judicial Council; or a university system or an institution of higher education as defined by Section 61.003, Education Code, except a public junior college."<sup>10</sup>

The basic statutory structure set forth by the SPGSA is augmented by detailed implementing regulations adopted by the Texas Building and Procurement Commission ("TBPC").<sup>11</sup> The

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<sup>8</sup> See [http://window.state.tx.us/recovery/transparency/docs/TX\\_ARRA-FundsAppropriated.pdf](http://window.state.tx.us/recovery/transparency/docs/TX_ARRA-FundsAppropriated.pdf)

<sup>9</sup> See Tex. Gov't Code § 2151.001 et seq.; Tex. Gov't Code § 2155.061 et seq. (general purchasing procedure).

<sup>10</sup> Tex. Gov't Code § 2251.002(1)-(3).

<sup>11</sup> See 1 Tex. Admin. Code § 113.1(a).

SPGSA, along with the companion regulations promulgated by the TBPC, describe in detail the procedures that must be followed by all the parties involved in government contracting. Such provisions include those governing advertisements for bids, bid evaluation, the award of contracts, and specifications for goods.<sup>12</sup> Additionally, the Professional Services Procurement Act ("PSPA") governs the procurement of professional services and it applies to both state and local governmental agencies.<sup>13</sup>

The TBPC is charged with instituting and maintaining an effective and economical system to handle basic procurement responsibilities for all state agencies.<sup>14</sup> However, there are some notable exceptions to the TBPC's authority and responsibility for state agency procurement activity include: professional services covered by the PSPA;<sup>15</sup> and when gift or grant funds, including industrial and federal research grants and contracts, are used.<sup>16</sup>

The TBPC administers all state-owned public buildings, including administration of real property acquisition, new building planning and design, and building construction projects.<sup>17</sup> However, only the Legislature may authorize a project,<sup>18</sup> and Legislative appropriations for a project are directed to the particular agency unless the project is to be constructed by the TBPC.<sup>19</sup> Notably however, the TBPC's authority for state construction project contracting does not extend to the following: (1) projects constructed by and for the Texas Department of Transportation;<sup>20</sup> (2) projects constructed by and for state institutions of higher education;<sup>21</sup> (3) projects constructed by the

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<sup>12</sup> See Tex. Gov't Code §§ 2156.002, 2156.007; 1 Tex. Admin. Code §§ 113.6, 113.31 et seq.

<sup>13</sup> See Tex. Gov't Code §§ 2254.001-2254.005.

<sup>14</sup> See Tex. Gov't Code § 2155.061.

<sup>15</sup> Tex. Gov't Code § 2155.001

<sup>16</sup> Tex. Gov't Code § 2155.140.

<sup>17</sup> See Tex. Gov't Code §§ 2165.001, 2166.051 et seq., 2166.052 et seq.

<sup>18</sup> Tex. Gov't Code § 2166.251(a).

<sup>19</sup> Tex. Gov't Code § 2166.251(b).

<sup>20</sup> Tex. Gov't Code § 2166.003(a)(1)

<sup>21</sup> Tex. Gov't Code § 2166.003(a)(2)

Texas Parks and Wildlife Department;<sup>22</sup> (4) projects constructed by or under the supervision of any Texas public authorities;<sup>23</sup> (5) projects that are state-aided local government projects of any character whatsoever;<sup>24</sup> (6) projects limited to repair and rehabilitation, unless a major renovation is involved;<sup>25</sup> (7) an action taken by the Texas Natural Resource Conservation Commission under Subchapter F or I, Chapter 361, Health and Safety Code;<sup>26</sup> and (8) a repair, rehabilitation, or construction project on property owned by the Texas Department of Housing and Community Affairs or the Texas State Affordable Housing Corporation.<sup>27</sup>

## **B. Statutes Related to Counties, Municipalities, and Other Local Governmental Entities**

The procurement and contracting practices of local governments are mainly governed by Title 8 of the Local Government Code.<sup>28</sup> Different portions of Title 8 apply depending on whether the local governmental entity is a municipality (Chapter 252), county (Chapter 262 and portions of Chapter 271) or other local governmental entity (Chapter 271).

However, as to Chapter 271, application is not uniform. By way of example, Subchapter A of Chapter 271 provides for the basic authorization to procure and finance the procurement of personal property; and, Subchapter B of Chapter 271 provides for the basic authorization and procedure for entering into public works contracts for improvements to real property. However, Subchapter A applies to: (1) all kinds of school districts (independent, common, community college, junior college, or regional college); (2) conservation and reclamation districts; (3) hospital districts and authorities; and (4) all political subdivisions of the state,<sup>29</sup> while Subchapter B applies only to (1) common and independent school districts;

(2) hospital districts and authorities; (3) counties; and (4) housing authorities.<sup>30</sup>

## **C. Available Project Delivery Methods**

Traditionally, procurement of public works projects involved mandatory competitive bidding requirements which, if not followed, resulted in a void and unenforceable contract.<sup>31</sup> However, this rule has been changed over time and currently the following project delivery methods are allowed: (1) competitive sealed proposals;<sup>32</sup> (2) a design-build contract;<sup>33</sup> (3) a construction manager, either agent or at risk;<sup>34</sup> (4) a job order contract for the minor construction, repair, rehabilitation, or alteration of a facility;<sup>35</sup> (5) a catalog purchase;<sup>36</sup> (6) the reverse auction procedure;<sup>37</sup> (7) a request for proposals, for services other than construction services;<sup>38</sup> (8) an interlocal contract;<sup>39</sup> and (9) the formation of a political subdivision corporation.<sup>40</sup>

With regard to construction of facilities, some local governmental entities, including municipalities, counties, river authorities, and defense base development authorities established under a neighborhood empowerment zone, must first determine which project delivery method will provide the “best value” for the project.<sup>41</sup> The “best value” determination is not required if the method used is competitive bidding.<sup>42</sup>

### 1. Competitive bidding

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 an addition

<sup>22</sup> Tex. Gov’t Code § 2166.003(a)(4)

<sup>23</sup> Tex. Gov’t Code § 2166.004(1)

<sup>24</sup> Tex. Gov’t Code § 2166.004(2)

<sup>25</sup> Tex. Gov’t Code § 2166.003(a)(5)

<sup>26</sup> Tex. Gov’t Code § 2166.003(a)(8)

<sup>27</sup> Tex. Gov’t Code § 2166.003(a)(9).

<sup>28</sup> See Tex. Local Gov’t Code § 251.001 et seq.

<sup>29</sup> See Tex. Loc. Gov’t Code §§ 271.002, 271.003.

<sup>30</sup> See Tex. Loc. Gov’t Code §§ 271.021, 271.024.

<sup>31</sup> See, e.g., Tex. Loc. Gov’t Code 271.028.

<sup>32</sup> Tex. Gov’t Code § 2156.121.

<sup>33</sup> Tex. Loc. Gov’t Code § 271.113.

<sup>34</sup> Tex. Loc. Gov’t Code §§ 271.117 to 271.118.

<sup>35</sup> Tex. Loc. Gov’t Code § 271.113.

<sup>36</sup> Tex. Gov’t Code §§ 2157.061 to 2157.068.

<sup>37</sup> Tex. Gov’t Code § 2155.062(a)(4).

<sup>38</sup> Tex. Gov’t Code § 2156.122.

<sup>39</sup> Tex. Gov’t Code § 791.001 et seq.

<sup>40</sup> Tex. Loc. Gov’t Code § 304.001.

<sup>41</sup> See Tex. Loc. Gov’t Code § 271.113(b).

<sup>42</sup> *Id.* at § 271.114(a).

to real property on the basis of competitive bids, and if the contract requires the expenditure of more than \$25,000, the entity must follow certain bidding procedures.<sup>43</sup> A contract awarded in violation of these procedures is void and unenforceable.<sup>44</sup>

“Governmental entities” subject to these competitive bidding requirements may include: (1) counties; (2) school districts; (3) hospital districts or authorities; (4) housing authorities; (5) or agencies or instrumentalities of these four types of entities.<sup>45</sup>

## 2. Competitive sealed proposals

Certain “governmental entities” may select a contractor for construction, rehabilitation, alteration, or repair services for a facility by using competitive sealed proposals. Competitive sealed proposals are similar to competitive bidding. They are designed to provide selection flexibility and to have a single point of responsibility for construction of a defined project scope. Their procedures are codified in several places in the Texas statutes.

The competitive sealed proposal delivery method is available to the following governmental entities: (1) the state; (2) counties; (3) municipalities; (4) school districts; (5) institutions of higher education; (6) river authorities; (7) defense base development authorities; and (8) navigation districts or port authorities.

## 3. Design-build

Design-build is a method wherein a single design-build firm is contracted to provide both design and construction services. The design-build firm contracts directly with the subcontractors and is responsible for the delivery of the project.

The design-build method is available to the following governmental entities: (1) the state; (2) counties; (3) municipalities; (4) school districts; (5) institutions of higher education; (6) river authorities; (7) defense base development

authorities established under a neighborhood empowerment zone and (8) navigation districts or port authorities. Notably, the Texas Department of Transportation does not have use of this method.

## 4. Construction manager-agent

The construction manager-agent delivery method utilizes a construction manager that serves as an agent for the governmental entity and provides design phase, pre-construction services, as well as certain construction services. The construction manager does not contract directly with trade contractors nor does it provide project bonding for the construction; rather, the multiple trade contractors contract directly with the governmental entity.

The design-build method is available to the following governmental entities: (1) the state; (2) counties; (3) municipalities; (4) school districts; (5) institutions of higher education; (6) river authorities; (7) defense base development authorities established under a neighborhood empowerment zone; and (8) navigation districts or port authorities.

## 5. Construction manager-at risk

Construction manager-at risk is a delivery method wherein the construction manager assumes the risk for construction, re-habilitation, alteration, or repair of a facility at a contracted price as a general contractor and provides consultation to the public body regarding construction during and after the design of the facility. The construction manager-at-risk assists in evaluating costs, schedule implications of alternative designs, systems and materials during design, and serves as a single point of responsibility for construction by contracting directly with the trade contractors.

The construction manager-at-risk method is available to the following governmental entities: (1) the state; (2) counties; (3) municipalities; (4) school districts; (5) institutions of higher education; (6) river authorities; (7) defense base development authorities established under a neighborhood empowerment zone; and (8) navigation districts or port authorities.

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<sup>43</sup> *Id.* at § 271.024.

<sup>44</sup> *Id.* at § 271.028.

<sup>45</sup> *Id.* at § 271.021.

6. Job order contracts

Another project delivery method for the minor construction, repair, rehabilitation, or alteration of a facility is a job order contract.

This method is available to the following: (1) counties; (2) municipalities; (3) school districts; (4) institutions of higher education; (5) river authorities; (6) defense base development authorities established under a neighborhood empowerment zone; and (7) navigation districts or port authorities.

**D. Performance and Payment Bond Requirements**

Liens are not allowed on public property; thus, public construction projects are beyond the reach of the constitutional mechanic's lien and statutory liens to the extent the liens attach to real property.<sup>46</sup> Accordingly, a governmental entity that makes a public work contract with a prime contractor shall require the contractor, before beginning the work, to execute to the governmental entity: (1) a performance bond if the contract is in excess of \$100,000; and (2) a payment bond if (A) the contract is in excess of \$25,000, and the governmental entity is not a municipality or a joint board created under Subchapter D, Chapter 22, Transportation Code; or (B) the contract is in excess of \$50,000, and the governmental entity is a municipality or a joint board created under Subchapter D, Chapter 22, Transportation Code.<sup>47</sup> On Texas public projects with a governmental entity other than a municipality or a joint board created under Subchapter D, Chapter 22, Transportation Code, in which the prime contract is \$25,000 or less, the prime contractor is not required to provide a

payment bond but a lien is allowed against funds held by the contracting public entity.<sup>48</sup>

1. Performance Bond

The performance bond is: (1) solely for the protection of the state or governmental entity awarding the public work contract; (2) in the amount of the contract; and (3) conditioned on the faithful performance of the work in accordance with the plans, specifications, and contract documents.<sup>49</sup> A bond executed for a public work contract with the state or a department, board, or agency of the state must be payable to the state and its form must be approved by the attorney general.<sup>50</sup> A bond executed for a public work contract with another governmental entity must be payable to and its form must be approved by the awarding governmental entity.<sup>51</sup>

2. Payment Bond

The payment bond is: (1) solely for the protection and use of payment bond beneficiaries who have a direct contractual relationship with the prime contractor or a subcontractor to supply public work labor or material; and (2) in the amount of the contract.<sup>52</sup>

3. Statutory Definitions

For purposes of Chapter 2253, "governmental entity" means a governmental or quasi-governmental authority authorized by state law to make a public work contract, including: (A) the state, a county, or a municipality; (B) a department, board, or agency of the state, a county, or a municipality; and (C) a school district or a subdivision of a school district.<sup>53</sup>

What constitutes a "public work" is not defined. However, "public work contract" means a contract for constructing, altering, or repairing a public building or carrying out or completing any public work.<sup>54</sup> "Public work

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<sup>46</sup> *National Bank of Denison v. Coleman*, 151 S.W. 1123 (Tex.Civ.App.–Dallas 1912, writ ref'd); *Quincy Lee Co. v. Lodal & Bain Engineers Inc.*, 602 S.W.2d 262 (Tex. 1980).

<sup>47</sup> Tex. Gov't Code § 2253.021(a)(1)-(2) (as amended effective for contracts entered on or after September 1, 2009). For contracts entered before September 1, 2009, a payment bond is required if the contract is in excess of \$25,000. This change would appear to apply primarily to municipalities and joint airport boards, such as the Dallas/Fort Worth International Airport.

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<sup>48</sup> Tex. Gov't Code § 2253.021; Tex. Prop. Code § 53.231.

<sup>49</sup> Tex. Gov't Code § 2253.021(b)(1)-(3).

<sup>50</sup> Tex. Gov't Code § 2253.021(e).

<sup>51</sup> *Id.*

<sup>52</sup> Tex. Gov't Code § 2253.021(c)(1)-(2).

<sup>53</sup> Tex. Gov't Code § 2253.001(1)(A)-(C).

<sup>54</sup> Tex. Gov't Code § 2253.001(4).

labor” means labor used directly to carry out a public work.<sup>55</sup> “Public work material” means: (A) material used, or ordered and delivered for use, directly to carry out a public work; (B) specially fabricated material; (C) reasonable rental and actual running repair costs for construction equipment used, or reasonably required and delivered for use, directly to carry out work at the project site; or (D) power, water, fuel, and lubricants used, or ordered and delivered for use, directly to carry out a public work.<sup>56</sup>

“Prime contractor” means a person, firm, or corporation that makes a public work contract with a governmental entity.<sup>57</sup> “Subcontractor” means a person, firm, or corporation that provides public work labor or material to fulfill an obligation to a prime contractor or to a subcontractor for the performance and installation of any of the work required by a public work contract.

#### 4. Attempted Statutory Compliance

A bond furnished by a prime contractor in an attempt to comply with Chapter 2253 will be construed to so comply regarding the rights created, limitations on those rights, and remedies provided.<sup>58</sup> However, a provision in a bond furnished by a prime contractor in an attempt to comply with this chapter that expands or restricts a right or liability under this chapter shall be disregarded, and this chapter shall apply to that bond.<sup>59</sup>

#### 5. Federal Law

Similarly, state law mechanics’ liens do not attach to property of the United States Government. Instead, the federal Miller Act requires contractors on federal projects to obtain payment bonds to protect the rights of subcontractors and suppliers.<sup>60</sup>

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<sup>55</sup> Tex. Gov’t Code § 2253.001(5).

<sup>56</sup> Tex. Gov’t Code § 2253.001(6)(A)-(D).

<sup>57</sup> Tex. Gov’t Code § 2253.001(3).

<sup>58</sup> Tex. Gov’t Code § 2253.023(a).

<sup>59</sup> *Id.* at § 2253.023(b).

<sup>60</sup> Miller Act § 1 et seq., 40 U.S.C.A. § 270a et seq.; *Tacon Mech. Contractors v. Aetna Cas. & Sur. Co.*, 860 F. Supp. 385 (S.D. Tex. 1994).

#### E. **Insurance Requirements**

Workers’ compensation insurance is specifically required of the general contractor and all subcontractors on all public works projects in Texas.<sup>61</sup> The general contractor is required to provide the governmental entity with a written certificate that the general contractor has provided workers’ compensation insurance coverage for all employees of the contractor employed on the public project.<sup>62</sup> A subcontractor on the project must also provide a certificate to the general contractor related to the coverage of the employees of the subcontractor, and the general contractor must provide a copy of the subcontractor’s certificate to the governmental entity.<sup>63</sup>

#### F. **Anti-Indemnity Statutes**

Although Texas has adopted the express negligence doctrine, there are statutory exceptions to the assumption of responsibility for another party’s negligence.

##### 1. Government Code Chapter 2252

Texas prohibits hold harmless and indemnification clauses on state public building contracts, except those clauses that arise in the employment context.<sup>64</sup> Specifically, Section 2252.902 of Texas Government Code prohibits indemnity agreements contained in a construction agreement involving the construction of a “state public building” or “carrying out or completing any state public work” that purport to indemnify a person against all or a portion of loss caused by sole, joint or concurrent negligence of an indemnitee. Section 2252.902 of the Texas Government Code provides as follows:

##### **Sec. 2252.902. Indemnity Provisions in Construction Contracts.**

(a) In this section, “construction contract” means a contract or agreement made and entered into by a state governmental entity, contractor, construction manager, subcontractor,

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<sup>61</sup> Tex. Lab. Code § 406.096(a).

<sup>62</sup> Tex. Lab. Code § 406.096(b).

<sup>63</sup> Tex. Lab. Code § 406.096(b).

<sup>64</sup> Tex. Gov’t Code § 2252.902.

supplier, or equipment lessor, concerning the construction, alteration, or repair, of a state public building or carrying out or completing any state public work.

(b) Except as provided by Subsection (c), a covenant, promise, or agreement contained in a construction contract, or in an agreement collateral to or affecting a construction contract, is void and unenforceable to the extent that it indemnifies a person against all or any portion of loss or liability for damage that:

(1) is caused by or results from the sole, joint, or concurrent negligence of the indemnitee, its agent, employee, or another independent contractor directly responsible to the indemnitee; and

(2) arises from:

- (A) personal injury or death;
- (B) property damage;
- (C) a fine, penalty, administrative action, or other action assessed by a governmental entity directly against the indemnitee, its agent or employee, or an independent contractor directly responsible to the indemnitee; or
- (D) any other loss, damage, or expense that arises from an occurrence described by Paragraph (A), (B), or (C).

(c) A covenant, promise, or agreement, contained in a construction contract, or in an agreement collateral to or affecting a construction contract, may provide for a person to indemnify, hold harmless, or defend another person against loss or liability for damage that is caused by or results from the sole, joint, or concurrent negligence of the indemnitee or its agent or employee and arises from the bodily injury or death of an employee of:

- (1) the indemnitor;
- (2) the indemnitor's subcontractor, supplier, or equipment lessor;
- (3) any lower-tier subcontractor, supplier, or equipment lessor of the indemnitor's subcontractor; or

(4) any independent contractor directly responsible to a person described in Subdivisions (1)-(3).

(d) This chapter does not affect the validity and enforceability of:

- (1) an insurance contract;
- (2) benefits and protections under the workers' compensation laws of this state; or
- (3) any statutory right of contribution.

(e) This section may not be waived by contract or otherwise.<sup>65</sup>

Notably, Section 2252.902 only prohibits indemnification; it does not prevent insuring against such liability. However, one potential problem with the language of the statute is the neither the term "state public building" nor "state public work" are defined. However, state public works most likely do not include local municipalities.

## 2. Government Code Chapter 2254

The Professional Services Procurement Act also contains an anti-indemnity provision which provides as follows:

### **Sec. 2254.0031. Indemnification.**

A state governmental entity may require a contractor selected under this subchapter to indemnify or hold harmless the state from claims and liabilities resulting from the negligent acts or omissions of the contractor or persons employed by the contractor. A state governmental entity may not require a contractor to indemnify or hold harmless the state for claims or liabilities resulting from the negligent acts or omissions of the state governmental entity or its employees.<sup>66</sup>

## **IV. WORK PERFORMANCE ISSUES AND UNIQUE REQUIREMENTS**

One of the primary issues encountered in performing work for governmental entities is the doctrine of sovereign immunity, which entities it

<sup>65</sup> Tex. Gov't Code § 2252.902.

<sup>66</sup> Tex. Gov't Code § 2254.0031.

protects and from what, and recent legislative enactments providing limited waivers of such immunity. Additional items include prompt payment statutes, payment and trust fund claims. Further, mandatory criminal background checks are another relatively recent and unique requirement pertaining to school district work.

#### A. Sovereign Immunity

Construction contracts for public works raise unique concerns, because principles of sovereign or governmental immunity are necessarily encountered when a government entity is a contracting party. Sovereign or governmental immunity consists of two separate components: immunity from suit; and immunity from liability.<sup>67</sup> Immunity from suit is jurisdictional and bars actions against the state absent state's express consent to suit.<sup>68</sup> In contrast, immunity from liability, which is not jurisdictional, protects the state from judgment regardless of whether the legislature has expressly consented to suit.<sup>69</sup> Accordingly, by entering into a construction contract, a governmental entity makes itself potentially liable on that contract, and therefore waives its immunity from liability; however, the entity retains its immunity from suit on the contract unless that immunity has been specifically waived.<sup>70</sup> The mere entry into the contract itself cannot be a waiver of immunity from suit; instead, a specific legislative enactment is required to waive a governmental entity's immunity from suit.<sup>71</sup> The legislative waiver of

immunity must be by clear and unambiguous language.<sup>72</sup>

#### 1. "Clear and Unambiguous" Statutory Waiver of Immunity to Suit

Section 311.034 of the Texas Government Code provides that "[i]n 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."<sup>73</sup> The Texas Supreme Court has recently held that language in a statute referencing a governmental entity's ability to "sue and be sued" or to "plead and be impleaded" simply relates to the governmental entity's capacity to sue or be sued in its own name, and is therefore insufficient, standing alone, to constitute a clear and unambiguous waiver of the entity's immunity to suit.<sup>74</sup> In so deciding, the Court expressly overruled long established precedent that had construed "sue and be sued" to waive immunity to suit.<sup>75</sup> However, in *Tooke*, the Court noted that if "sue or be sued" or similar statutory language is accompanied by other provisions providing a clear waiver of immunity, such context may be sufficient to constitute an express legislative waiver of immunity to suit.<sup>76</sup>

As to units of local government, however, statutory provisions set forth in Chapters 262 and 271 of the Texas Local Government Code, which were adopted in 2003 and 2005, respectively, effectively waive immunity from suit on many contracts, including construction contracts, made by units of local government.<sup>77</sup> Despite waiving immunity to suit, Chapters 262

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<sup>67</sup> See *Tooke v. City of Mexia*, 197 S.W.3d 325 (Tex. 2006); *Catalina Dev., Inc. v. County of El Paso*, 121 S.W.3d 704, 705 (Tex. 2003); *General Services Comm'n v. Little-Tex Insulation Co., Inc.*, 39 S.W.3d 591, 594 (Tex. 2001).

<sup>68</sup> See *Texas Dept. of Transp. v. Jones*, 8 S.W.3d 636, 638 (Tex. 1999).

<sup>69</sup> See *Texas Dept. of Transp. v. Jones*, 8 S.W.3d 636, 638 (Tex. 1999); *Federal Sign v. Texas Southern Univ.*, 951 S.W.2d 401, 405 (Tex. 1997).

<sup>70</sup> See *General Services Comm'n v. Little-Tex Insulation Co.*, 39 S.W.3d 591, 594-597 (Tex. 2001).

<sup>71</sup> See *Texas Natural Resource Conserv. Comm'n v. IT-Davy*, 74 S.W.3d 849, 856-858 (Tex. 2002).

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<sup>72</sup> See Tex. Gov't Code § 311.034; *City of LaPorte v. Barfield*, 898 S.W.2d 288, 291 (Tex. 1995).

<sup>73</sup> Tex. Gov't Code §311.034.

<sup>74</sup> *Tooke v. City of Mexia*, 197 S.W.3d 325, 333-343 (Tex. 2006).

<sup>75</sup> See *Missouri P. R. Co. v. Brownsville Navigation Dist.*, 453 S.W.2d 812, 813 (Tex. 1970), *overruled*, *Tooke v. City of Mexia*, 197 S.W.3d 325 (Tex. 2006).

<sup>76</sup> See *Tooke v. City of Mexia*, 197 S.W.3d 325, 340 (Tex. 2006) (citing section Texas Education Code § 76.04 as example of statute that clearly and unambiguously waives immunity to suit).

<sup>77</sup> See Tex. Loc. Gov't Code §§ 262.007; 271.152.

and 271 also contain provisions that limit the available damages and other remedies that may be recovered.<sup>78</sup> Chapter 262 applies to counties while Chapter 271 applies to most political subdivisions of the state, other than counties, and includes municipalities, school districts, and various kinds of utility districts.<sup>79</sup>

When it was originally enacted, Chapter 271 limited recovery of attorneys' fees to situations where the contract both expressly so provided, and referenced the statute permitting the award of fees.<sup>80</sup> That limitation was repealed in 2009, however, and for contracts entered into on or after June 19, 2009; the statute now reflects the general rule and authorizes the award of reasonable and necessary attorney's fees that are equitable and just, without any requirement that the contract expressly authorize the award.<sup>81</sup> However, one Court of Appeals decision decided under the former version of the statute has allowed recovery of attorneys' fees as direct damages despite the lack of a contract expressly referencing the statutory provision.<sup>82</sup>

Additionally, the waiver of immunity in Chapter 271 is limited to suits for "breach" of contract,<sup>83</sup> and does not apply to tort claims related to the contract,<sup>84</sup> to claims for the extra-contractual remedy of quantum meruit,<sup>85</sup> or to claims for declaratory relief relating to the

contract.<sup>86</sup> Further, any prerequisites to recovery stated or incorporated into the contract, including provisions for notice, arbitration, or other alternative dispute resolution procedures, are applicable despite the waiver of immunity from suit,<sup>87</sup> though the local government unit may waive those provisions either expressly or by conduct.<sup>88</sup> If the government unit has not waived these prerequisites to recovery, they constitute an affirmative defense to liability for breach of contract, and do not affect the court's jurisdiction over the claims.<sup>89</sup>

## 2. Waiver of Immunity to Suit by Assertion of Affirmative Claims

A governmental entity's assertion of affirmative claims for relief against a private party waives the governmental entity's immunity from suit for related claims and defenses.<sup>90</sup> The assertion of affirmative claims waives the governmental entity's immunity to suit regardless of whether the governmental entity is the plaintiff,<sup>91</sup> an intervenor,<sup>92</sup> or a defendant.<sup>93</sup>

<sup>78</sup> See Tex. Loc. Gov't Code §§ 262.007; 271.153.

<sup>79</sup> See Tex. Local Gov't Code § 271.151(3).

<sup>80</sup> See former Tex. Local Gov't Code § 271.159 (repealed by Acts 2009, 81st Leg., R.S., ch. 1266, § 16).

<sup>81</sup> See Tex. Local Gov't Code § 271.153(a)(3) (as amended by Acts 2009, 81st Leg., R.S., ch. 1266).

<sup>82</sup> See *City of Houston v. Allco, Inc.*, 238 S.W.3d 849, 854-855 (Tex.App.–Houston [1st Dist.] 2007, pet. denied) (attorney's fees sought by contractor for defense of federal restraining order were recoverable because they were direct damages for breach of contract and contractor never claimed fees as prevailing party on breach of contract claim).

<sup>83</sup> See Tex. Local Gov't Code § 271.152.

<sup>84</sup> Tex. Local Gov't Code § 271.157.

<sup>85</sup> *City of Houston v. Petroleum Traders Corp.*, 261 S.W.3d 350, 359-360 (Tex.App.–Houston [14th Dist.] 2008, no pet.); *City of Houston v. Swinerton Builders, Inc.*, 233 S.W.3d 4, 12-13 (Tex.App.–Houston [1st Dist.] 2007, no pet.).

<sup>86</sup> *Olympic Waste Servs. v. City of Grand Saline*, 204 S.W.3d 496, 500 (Tex.App.–Tyler 2006, no pet.).

<sup>87</sup> Tex. Local Gov't Code § 271.154.

<sup>88</sup> See, e.g., *City of Houston v. Allco, Inc.*, 238 S.W.3d 849, 851-852 (Tex.App.–Houston [1st Dist.] 2007, pet. denied).

<sup>89</sup> *City of Mesquite v. PKG Contracting, Inc.*, 263 S.W.3d 444, 447-448 (Tex.App.–Dallas 2008, pet. filed).

<sup>90</sup> See *Reata Constr. Co. v. City of Dallas*, 197 S.W.3d 371, 376-377 (Tex. 2006); *Kinnear v. Texas Comm'n on Human Rights*, 14 S.W.3d 299, 300 (Tex. 2000) (per curiam).

<sup>91</sup> See *State v. Fidelity & Deposit Co.*, 223 S.W.3d 309, 310-311 (Tex. 2007) (per curiam) (when state sued surety on performance bond issued to secure performance of construction contract, state waived immunity from surety's counterclaims that were sufficiently related to bond enforcement claim); *Anderson, Clayton & Co. v. State ex rel. Allred*, 62 S.W.2d 107, 110 (Tex. 1933).

<sup>92</sup> *Reata Constr. Co. v. City of Dallas*, 197 S.W.3d 371, 377 (Tex. 2006).

<sup>93</sup> See *City of Irving v. Inform Constr., Inc.*, 201 S.W.3d 693, 694 (Tex. 2006) (per curiam); *City of Dallas v. Bargman*, 207 S.W.3d 926, 930-932 (Tex.App.–Dallas 2006, no pet.); *DeQuire v. City of Dallas*, 192 S.W.3d 663, 665-667 (Tex.App.–Dallas

A waiver of immunity to suit by way of assertion of affirmative claims extends only to claims germane to, connected with, and properly defensive to the governmental entity's claims, and only to the extent that any recovery on such claims otherwise subject to immunity will offset any recovery by the governmental entity.<sup>94</sup> A governmental entity's request for attorney's fees and other sanctions for filing a frivolous suit is not a claim for affirmative relief that waives immunity to suit.<sup>95</sup>

When multiple claims are asserted by a private party, each claim must be examined to determine which, if any, arise from the government entity's waiver of immunity to suit, and recovery on any such related claims is limited to the extent they act to offset the governmental entity's recovery.<sup>96</sup> Thus, the mere filing of a counterclaim for breach of contract does not in and of itself act to completely waive a government entity's immunity from suit on such contract.<sup>97</sup> Further, it may be possible for a governmental entity to reinstate immunity to suit that was previously waived via the bringing of affirmative claims by dismissing such affirmative claims.<sup>98</sup>

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2006), *rev'd on other grounds*, 249 S.W.3d 428 (Tex. 2008).

<sup>94</sup> See *Reata Constr. Co. v. City of Dallas*, 197 S.W.3d 371, 376-377 (Tex. 2006).

<sup>95</sup> See *LaMesa Indep. School Dist. v. Booe*, 251 S.W.3d 831, 833-834 (Tex.App.–Eastland 2008, no pet. h.) (school district's response to allegedly frivolous suit by requesting attorney's fees is not claim for affirmative relief on underlying contract, so no waiver of immunity to suit)

<sup>96</sup> *State v. Fidelity & Deposit Co.*, 223 S.W.3d 309, 311 (Tex. 2007) (per curiam).

<sup>97</sup> See *City of Angleton v. USFilter Operating Servs.*, 201 S.W.3d 677, 678 (Tex. 2006) (per curiam) (error to hold that city's counterclaim for breach of contract operated to completely waive immunity on contract); *Port Neches-Groves Ind. Sch. Dist. v. Pyramid Constructors, L.L.P.*, 201 S.W.3d 679, 681 (Tex. 2006) (per curiam) (same)

<sup>98</sup> See *City of Dallas v. Martin*, 214 S.W.3d 638, 642-643 (Tex.App.–Dallas 2006, pet. filed).

## **B. Prompt Payment Statute and Chapter 162 Trust Fund Claims**

### **1. Chapter 2251 of Texas Government Code (Prompt Payment Statute)**

Chapter 2251 applies to all public contracts. Under the terms of the Act the government and contractors are under a statutory duty to issue prompt payments for work performed under a government contract. Under the Chapter, payment is due by a governmental entity within thirty days of the date the government: (1) receives the goods; (2) the date performance of the service is complete; or (3) the date an invoice is received, whichever is later.<sup>99</sup> However, if the governmental body meets once a month or less, then payment is due within forty-five days of the later event mentioned above.<sup>100</sup> A public owner is not required to pay any amount subject to a good faith dispute provided that all required notices are provided by the owner.<sup>101</sup> A contractor or subcontractor must pay its subcontractors an appropriate share of the payment it receives from the governmental body no later than ten (10) days after it receives payment.<sup>102</sup> Interest begins to accrue on all payments the day after the payment is due at a rate of one percent per month.<sup>103</sup>

### **2. Chapter 162 Trust Fund Claims**

Effective September 1, 2009, the legislature amended Chapter 162 of the Texas Property Code to provide that regardless of whether a construction contract is covered by a statutory or common law payment bond, Chapter 162 will still apply to both public and private construction contracts for the improvement of specific real property Texas.<sup>104</sup> This legislature's intent in amending Chapter 162 was apparently to overrule prior cases which had held that a bond claim under Texas Government Code Chapter 2253 was the exclusive remedy by which laborers and suppliers could recover for

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<sup>99</sup> Tex. Gov't Code § 2251.021.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at § 2251.001.

<sup>102</sup> *Id.* at §2251.022.

<sup>103</sup> *Id.* at § 2251.025.

<sup>104</sup> Tex. Prop. Code § 162.004(c).

non-payment on a public project.<sup>105</sup> Specifically, these cases held that a supplier or subcontractor could not bring a trust fund claim under Chapter 162 of the Texas Property Code, when the full amount of the contract was covered by a payment bond.<sup>106</sup>

Additionally, the Texas Supreme Court recently issued an opinion “clarifying” that a Chapter 2253 claim is merely the exclusive claim on the bond itself.<sup>107</sup> That is, there is no independent right to sue on the provisions of the bond itself, as a contract, apart from compliance with the provisions of Chapter 2253.<sup>108</sup> On the other hand, in *Dealers Electrical* the Texas Supreme Court also clarified that Chapter 2253 does not preclude other common law or contract claims for labor and materials, independent of the bond, such as Chapter 162 trust fund claims, or claims based on other contracts such as a joint-check agreement.<sup>109</sup> Laborers and suppliers may still assert a Chapter 162 trust fund claim on a public works project, even though a bond is in place and the laborer or supplier fails to comply with the requirements of Government Code Chapter 2253.<sup>110</sup> In sum, laborers and materialmen (generally subcontractors and sub-subcontractors) may still assert Chapter 162 trust fund claims against upstream contractors on public work projects, even when a payment bond is procured for their protection in accordance with Chapter 2253 of the Government Code.

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<sup>105</sup> See *Truckers, Inc. v. South Texas Construction Co.*, 561 S.W.2d 855, 859 (Tex.App.–Corpus Christi 1977, no writ); *Econ. Forms Corp. v. Williams Bros. Construction Co.*, 754 S.W.2d 451, 457 (Tex.App.–Houston [14th Dist.] 1988, no writ).

<sup>106</sup> See *Truckers, Inc. v. South Texas Construction Co.*, 561 S.W.2d 855, 859 (Tex.App.–Corpus Christi 1977, no writ); *Econ. Forms Corp. v. Williams Bros. Construction Co.*, 754 S.W.2d 451, 457 (Tex.App.–Houston [14th Dist.] 1988, no writ).

<sup>107</sup> See *Dealers Elec. Supply Co. v. Scoggins Constr. Co.*, 292 S.W.3d 650 (Tex. 2009).

<sup>108</sup> *Id.* (clarifying the prior holdings of *Commercial Union Insurance Co. v. Spaw-Glass Corp.*, 877 S.W.2d 538 (Tex.App.–Austin 1994, writ denied) and *Bunch Electric Co. v. Tex-Craft Builders, Inc.*, 480 S.W.2d 42 (Tex.Civ.App.–Tyler 1972, no writ).

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

### C. Criminal Background Checks

The Texas Legislature enacted SB 9 on June 15, 2007, amended the Texas Education Code to require criminal background checks of a contractor’s employees under certain circumstances.<sup>111</sup> As enacted, SB 9 provided that contractors performing work for school districts and open-enrollment charter schools were required to conduct criminal background checks on every person who on or after January 1, 2008, was offered employment on such work by a contractor if (1) the employee or applicant has or will have continuing duties related to the contracted services; and (2) the employee or applicant has or will have “direct contact” with students.<sup>112</sup> Specific procedures are set forth for the contractor and school district in conducting the criminal background check, if the employee or applicant meets the quoted criteria. Further, a contracting or subcontracting entity may not permit an employee to provide services at a school who has been convicted of a felony or a misdemeanor offense that would prevent a person from obtaining a teacher certification.

Unfortunately, these statutory provisions are somewhat ambiguous. The statute does not define “continuing duties” or “direct contact.” It would seem that the “direct contact” requirement excludes contractors constructing brand new facilities from the criminal background check requirement. Further, it would appear that construction employees who perform irregular or non-continuing tasks, such as cleanup or specialty work, would not be considered to have “continuing duties.” However, if the work area is fenced off or otherwise separated from the ongoing school activities, would the workers be considered in potential “direct contact” with students?

Another problem with the statute, as it was originally enacted, is that it arguably required contractors to be responsible for obtaining criminal background information on all of their own employees and all of its subcontractors’ and sub-subcontractors’ employees. This problem was addressed in the last regular legislative

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<sup>111</sup> See Tex. Educ. Code § 22.0834.

<sup>112</sup> Tex. Educ. Code § 22.0834(a).

session, which amended the statute to add language requiring contractors to obtain criminal background checks on their own employees and, as to subcontractors' and sub-subcontractors' employees, to merely obtain the subcontractor's certification that the subcontractor has performed such checks on its own employees (and that the subcontractor has obtained similar certifications from each of its sub-subcontractors).<sup>113</sup> Unfortunately, there were no amendments providing definitions of "continuing duties" or "direct contact."

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<sup>113</sup> See Tex. Educ. Code § 22.0834.