

# THE PROMPT PAYMENT ACT AND SOVEREIGN IMMUNITY

Texas City Attorney's Association Newsletter

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## **THE PROMPT PAYMENT ACT AND SOVEREIGN IMMUNITY**

On January 16, 2009, the Dallas Court of Appeals issued a significant opinion in *McMahon Contracting L.P. vs. City of Carrollton*, 2009 Tex. App. LEXIS 311 (Tex. App.—Dallas, January 16, 2009). This case is significant because it effectively shields cities from enforcement actions related to Prompt Payment Act interest and attorney's fees.

The dispute between McMahon and Carrollton arose out of a contract for street replacement work McMahon had agreed to perform for Carrollton. McMahon filed a claim against the city based on its contention that it had performed extra work. Eventually, in 2003, McMahon filed suit to collect damages. The City responded by filing a plea to the jurisdiction asserting that sovereign immunity from suit had not been waived. In attempting to overcome the sovereign immunity defense from Carrollton, McMahon relied on local government code, section 51.075 which stated governmental entities could sue and be sued.

The trial court granted the Plea and McMahon appealed. During the appellate process, the Supreme Court decided *Tooke v. City of Mexia*, 197 S.W.3d 325 (Tex. 2006) wherein it concurred that the sue and be sued language could not be deemed an express waiver of sovereign immunity from suit. However, also during the pendency of the appeal, the legislature passed and enacted sections 271.151-160 of the local government code which contained an express waiver of sovereign immunity for public contracts. Accordingly, the Supreme Court remanded the *McMahon vs. Carrollton* case to the trial court for determination of the plea to the jurisdiction and other issues in light of the legislature's enactment.

After remand, Carrollton filed an amended plea to the jurisdiction arguing that interest and attorneys' fees claimed by McMahon under the Prompt Payment Act were barred by sovereign immunity because the legislature has not included language in the statute expressly waiving a municipality's immunity from suit. Carrollton compared the Prompt Payment Act's language to the language in chapter 271 of the local government code waiving sovereign immunity for breach of contract cases. Because the Prompt Payment Act does not have similar language, Carrollton succeeded in convincing the trial court and the Dallas Court of Appeals that the Prompt Payment Act could not be enforced against it absent an express waiver of sovereign immunity.

The appellate court also ruled that McMahon's quantum meruit claims were likewise untenable. Quantum meruit is an equitable remedy found in tort. Absent an express waiver of immunity for quantum meruit claims, a city cannot be sued for damages arising out of work performed under a quantum meruit theory. Because chapter 271 does not apply to McMahon's quantum meruit claims, the appellate court held that Carrollton was immune from those claims as well.

The appellate court did overturn the trial court's granting of summary judgment in favor of Carrollton on McMahon's breach of contract claims. While this aspect of the decision allows McMahon to continue to pursue some recourse against Carrollton, the potential exposure to liability for Carrollton has been greatly reduced by the decision as chapter 271 specifically precludes from recovery both consequential damages and attorney's fees.

In the decision, the court lets the Prompt Payment Act stand on its own and treats the claims arising under the Act as a separate cause of action. As a separate and independent cause of action or claimed right of recovery, the Act must contain an express waiver of sovereign immunity. Because the Act clearly does not contain that waiver, the court upheld the plea to the jurisdiction.

The court's view of the Act differs from the alternative argument that the Prompt Payment Act cannot stand on its own island. The alternative theory is that the Act merely provides additional remedies to contractors who claim a city has breached an agreement by nonpayment. The breach of contract, under this theory, would be the cause of action. Chapter 271 waives immunity from suit for breaches of contract. According to this theory, the Act only affords additional remedies arising from a breach of contract.

The practical effect of the *McMahon v. Carrollton* decision guts the Prompt Payment Act as a potential cause of action or remedy for contractors against governmental entities. Technically, a municipality is still liable for additional interest and attorneys' fees under the Act in the event of late or nonpayment. However, contractors whose claims contain interest and attorney's fees will have no means by which to enforce those aspects of their claims. Of course, the decision is only controlling on the Dallas Court of Appeals until it is adopted by the supreme court or other intermediate courts of appeals. Nevertheless, the case should be cited as persuasive authority elsewhere in the state.

This decision is obviously significant for both municipalities and contractors with whom municipalities do business. As it stands now, contractors may be

stripped of their ability to argue that additional remedies may be afforded to them pursuant to the Prompt Payment Act. Municipalities should argue that the Prompt Payment Act is free standing as a cause of action and, as such, much contain an express waiver of sovereign immunity. Because the legislature has not included that waiver, municipalities should always file a plea to the jurisdiction challenging any claim for additional interest and attorney's fees under the Act.

This decision provides a significant tool for city attorneys when faced with contractor claims that include Prompt Payment Act interest and attorneys' fees. Prior to this decision, contractors have been able to argue that some of their attorney's fees were recoverable under the Prompt Payment Act for breaches of contract even though chapter 271 of the local government code prevents claimants from recovering attorneys' fees. The conflicting language between the Act and chapter 271 was a clear problem for both sides. With this new decision, the Dallas Court of Appeals has stated that the Prompt Payment Act must be viewed independently of Chapter 271 regardless of conflicting language and attorneys' fees, and that, until the legislature acts to expressly waive sovereign immunity from suit for Prompt Payment Act violations, contractors have no means by which to enforce these remedies in courts of law.