

# ARE CITIES IMMUNE FROM PROMPT PAY ACT CLAIMS? IN SHORT: YES

**Jeffrey S. Chapman**  
**FORD NASSEN & BALDWIN PC**  
**111 Congress Ave.; Suite 1010**  
**Austin, Texas 78701**  
**(512) 236.0009 telephone**  
**(512) 236.0682 facsimile**  
[jschapman@fordnassen.com](mailto:jschapman@fordnassen.com)

When cities contract for construction services, the funds payable to prime contractors, subcontractors, and suppliers are subject to interest penalties under the Texas Public Prompt Payment Act if amounts are not paid in a timely manner.<sup>1</sup> If payments are not promptly made in accordance to the timeframes established by the Act, a contractor is entitled to the principal amounts owed plus interest at a rate of prime plus one.<sup>2</sup> In addition, the Prompt Pay Act makes cities liable for attorney's fees in any judicial action brought by a contractor to collect an overdue payment and interest.<sup>3</sup>

However, according to a recent court decision, judicial actions seeking to enforce Prompt Payment Act remedies against cities are prohibited by sovereign immunity from suit. In *City of San Antonio v. KGME, Inc.*, the Fourth Court of Appeals held that the Prompt Pay Act does not contain clear and unambiguous language expressly waiving sovereign immunity from suit.<sup>4</sup> Because the Act does not contain an express statement that "the governmental entity waives sovereign immunity to suit for the purpose of adjudicating a claim under the Act", the court held that cities are immune from suit for Prompt Pay Act claims.<sup>5</sup>

Therefore, while the Prompt Pay Act has clear and unambiguous language that subjects cities to liability for late or nonpayment (and even contains language that anticipates administrative and judicial actions to enforce its provisions), contractors have no means to enforce the provisions in the courts.

---

<sup>1</sup> TEX. GOV'T CODE Ann. § 2251.001 *et seq.*

<sup>2</sup> TEX. GOV'T CODE Ann. § 2251.025

<sup>3</sup> TEX. GOV'T CODE Ann. § 2251.043 ("In a formal administrative or judicial action to collect an invoice payment or interest due under this chapter, the opposing party, which may be the governmental entity or the vendor, shall pay the reasonable attorney fees of the prevailing party.")

<sup>4</sup> *The City of San Antonio v. KGME, Inc.*, No. 04-10-00263-cv, 2011 Tex. App. LEXIS 1079 (Tex. App.—San Antonio February 16, 2011).

<sup>5</sup> *Id.* at \*7 (citing language from local government code section 271.152)

Of course, the protection provided by immunity can be waived by conduct.<sup>6</sup> In fact, that waiver is what happened in *KGME, Inc.* In the case, KGME sued San Antonio for breach of contract and nonpayment of contractual retainage. In so doing, KGME plead waiver of immunity based on section 271.152 of the Local Government Code.<sup>7</sup> San Antonio filed counterclaims for breach of contract against KGME.

After filing its counterclaim, the city filed a plea to the jurisdiction arguing that it was immune from Prompt Pay Act claims because the statute did not have the clear and express language sufficient to waive immunity from suit. The trial court denied the plea and the city appealed. The appellate court held that the Prompt Pay Act did not contain the appropriate language and immunity from suit is not waived by statute.<sup>8</sup>

However, the city *was still subject to Prompt Pay Act claims because it had filed a counterclaim against the contractor.* After the contractor filed suit for breach of contract and nonpayment for work performed pursuant to the contract and delay damages, the city counterclaimed, alleging that the contractor breached the contract by nonperformance. Because the city's counterclaims were related to the performance for which the Prompt Pay Act claims were based, the contractor argued that the city had waived immunity for those claims under *Reata*.<sup>9</sup> Thus, rather than relying on a statute for a waiver of immunity, the claimant relied on the city's conduct as the source of the waiver. Because the claimant's Prompt Pay Act claims were "germane to, connected with, and properly defensive" the City's counterclaim, the City waived immunity.<sup>10</sup>

By waiving immunity through a counterclaim, the City also exposed itself to liability for attorney's fees incurred by the claimant. (The Prompt Pay Act allows for recovery of attorney's fees.<sup>11</sup>) Because the contract at issue in this case was subject to the previous version of section 271.153 of the Local Government Code, the city would have been immune from potentially paying for the claimant's attorney's fees absent a waiver under the Prompt Pay Act.<sup>12</sup>

Cities that become involved in litigation should be mindful of this holding. If a city faces a Prompt Pay Act claim, under *KGME, Inc.*, the city retains immunity from that claim. This retention of immunity, depending on the types of claims being asserted, may also protect the city from liability for attorney's fees.

---

<sup>6</sup> See *Reata Construction Corp. v. City of Dallas*, 197 S.W.3d 371, 376-77 (Tex. 2006).

<sup>7</sup> TEX. LOC. GOV'T CODE ANN. § 271.152

<sup>8</sup> *San Antonio v. KGME, Inc.*, at \*15

<sup>9</sup> *Id.* at \*10

<sup>10</sup> *Id.* at \*15

<sup>11</sup> 2251.043

<sup>12</sup> In 2009, the Legislature amended section 271.153 to allow for the recovery of attorney's fees on contract claims. The prior versions of the act specifically prohibited their recovery. The contract between San Antonio and KGME was signed in 2004, prior to the new act going into effect.