

## AVAILABILITY OF ATTORNEY'S FEES TO CLAIMANTS IN CONTRACT ACTIONS AGAINST CITIES

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Much has been said about the politics and productivity of the 2009 regular legislative session. While it is true that the number of bills enacted at its conclusion was far less than in previous sessions, certain bills became law that directly affect cities.

One such bill was H.B. 987. Among other things, that bill amended Local Government Code Subchapter I; Adjudication of Claims Arising Under Written Contracts with Local Governmental Entities. TEX. LOC. GOV'T CODE ANN. §§271.151 *et seq.* That subchapter expressly waives sovereign immunity for contract actions against cities and other local governmental entities. The provisions of the subchapter allow contractors on public projects to sue in the event claims arise during the course of performance on a construction project. The significant change made by H.B. 987 involves the recovery of attorney's fees for claimants suing cities. The statute now expressly authorizes contracting parties who adjudicate claims against cities to recover attorney's fees.

Under prior versions of the statute, claimants could recover amounts equal to the balance on a contract, costs for additional work, and interest. The former version of the subchapter included Section 271.159, which specifically prohibited recovery of attorney's fees. That section was repealed by H.B. 987. Allowing claimants the opportunity to recover their legal costs has the potential to expose cities to additional liability in the event of disputes. The change might require consideration of additional strategies in deciding how a city might want to proceed through a dispute with a contractor.

When claimants had no ability to recover legal fees, a city might have been able to handle a dispute in a more forceful or assertive manner. Of course, politics and perception are always important, and the ability to act in a certain manner does not mean that choice was often, or ever, made. Nevertheless, when claimants had no ability to recover attorney's fees, the city certainly had one more card to play in the event of a dispute.

The ability to recover attorney's fees is often a powerful factor in a claimant's decision to pursue litigation. Without the ability to recover its attorney's fees, a potential claimant would have to weigh the cost of litigation against the likely amount of recovery to determine the economic viability of an action. In all but the largest cases, the prohibition against recovery of attorney's fees often meant that

claimants would find a sizeable portion of a potential recovery being consumed by attorney's fees and expenses.

Now claimants will be able to evaluate their claims solely on their merits. The economic decision will change because damages and attorney's fees will no longer be competing with one another. Certainly, the manner in which a claimant's counsel is compensated may still affect economic determination, but claimants will no longer need to weigh those costs directly against claim size. In other words, perhaps some lesser claims might now be brought when those same claims might have been abandoned or more easily negotiated in the past. With this change in the law, cities may find themselves subject to more frequent claims of smaller values.

Despite the availability of attorney's fees, litigation remains expensive. This fact is especially true in construction cases due to the complexity of construction law and the high volume of documents involved in most construction cases. Unlike employment or other commercial contract claims, claims for extra work or wrongful termination that are commonly brought under Section 271.153 typically involve intricate issues of design and performance. These claims often rely heavily on project correspondence and expert opinions that involve large portions of a project file.

Because of the expense, I do not believe cities will face an exponential rise in claims filed against them. Nevertheless, the change in the law certainly introduces additional strategic considerations for cities in working through claims filed by contractors on construction projects.

For cities, the amendment moves public claims more in line with claims in the private sector. (Under the Civil Practices and Remedies Code, prevailing parties in contract actions are entitled to recover attorney's fees if they prevail on an affirmative claim. TEX. CIV. PRAC. & REM. CODE ANN. §38.001.)

In any case, cities should be aware of this significant change in the law. Allowing the recovery of attorney's fees in construction cases can easily increase exposure for a defendant city by \$200,000 to \$500,000 in most significant construction disputes. City staff and management will be able to better serve the citizens by keeping these costs and the new provisions in mind when negotiating with claimants.