

# ASSIGNMENT OF CONTRACT RIGHTS AND WAIVING SOVEREIGN IMMUNITY

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The Third Court of Appeals recently issued an opinion that discussed the waiver of sovereign immunity found in Texas Local Government Code Section 271.152 and how that waiver might be affected by an assignment of contractual rights.<sup>1</sup> This short paper will discuss that opinion and ways to preserve sovereign immunity.

In *First Citizens Bank & Trust Company v. Austin Independent School District*, the court examined the scope and breadth of the waiver of immunity from suit when a governmental entity enters into a contract. Section 271.152 does not create a cause of action for a party who contracts with a local governmental entity.<sup>2</sup> Rather, the statute provides an express waiver of immunity from suit for a party who already possesses contract rights, or a breach of contract cause of action, against a local governmental entity by way of a contract.<sup>3</sup>

In the case, AISD and another governmental entity, Greater Austin Area Telecommunications Network, (collectively AISD) contracted with a vendor to provide cabling. The vendor then assigned its accounts receivable to First Citizens Bank (the Bank). AISD made payments on the vendor contract to the Bank for some time, but then breached the contract by stopping payment to the Bank.

The Bank then filed suit and pleaded jurisdictional facts based on the assignment of the contract and the waiver of immunity from suit found in Section 271.152. AISD responded with a plea to the jurisdiction, claiming immunity was not waived because the Bank was not a contracting party and the accounts receivable were sold rather than assigned. AISD also argued in the alternative that, if an assignment had occurred, it was nullified by a “no assignment” clause in the contract.

In asserting that the vendor’s accounts receivable were sold to the Bank rather than assigned, AISD argued that the vendor’s contractual rights did not transfer to the Bank. Thus, without contractual rights, the Bank lacked standing to sue and had no method to bypass

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<sup>1</sup> See *First Citizens Bank & Trust Company v. Austin Independent School District*, 318 S.W.3d 560 (Tex. App.—Austin 2010).

<sup>2</sup> *Id.* at 567.

<sup>3</sup> *Id.*

AISD's immunity. However, the court noted that sales contract between the vendor and the Bank stated that the vendor "agrees to sell and assign" to the Bank "obligations owed to [the vendor] for goods sold and services rendered." As such, the court held that a valid assignment had occurred.

AISD then argued that contract had a "no assignment" clause. However, in an error that might have proven fatal, AISD failed to attach the contract containing the "no assignment" provision to its plea to the jurisdiction. Without the contract to examine, the court dismissed that argument. In the alternative, AISD argued that the Bank could not sue based on the waiver in Section 271.152 because, as an assignee, it was not a party to the contract.

The Court began the discussion on this point by noting that public policy in Texas favors the assignability of contracts.<sup>4</sup> It then examined the language of Section 271.152 to determine whether the legislature intended to limit the waiver contained therein to contracting parties. Citing a 2006 Supreme Court of Texas case, the Third Court stated that the legislature enacted Section 271.152 to loosen the immunity bar so that local governmental entities that can enter into contracts would not be immune from suits arising from those contracts.<sup>5</sup> Extending that reasoning, the court concluded that it would be inconsistent with the legislature's intent, and the plain language of the statute, to bar suits by assignees of local government contracts.<sup>6</sup> Essentially, the waiver of immunity follows the contract and the contractual rights established by the contract. If the contract is assigned and the contractual rights held by a contracting party are transferred to another, that assignee can still enforce the contract by filing suit if necessary.

Of significant importance for municipalities is the fact that the court did not have the opportunity to evaluate the "no assignment" clause AISD claimed was in the contract. While Texas law strongly favors the assignability of contracts, agreements between contracting parties forbidding the assignment of contractual rights are enforceable.<sup>7</sup> As a practical matter, if an argument for immunity exists based on the contract, legal counsel must be certain to create a solid record for review and include the contract as part of that record.

In thinking about this case, municipalities should consider the value and benefit of a "no assignment" clause. Without such a clause, the municipality may be subject to suit from a variety of entities with whom it never anticipated a relationship. However, assignability of contracts can serve legitimate and beneficial purposes. Assignability can promote completion or continued performance if the contracting party cannot sustain performance for any number of reasons, and assignability can facilitate flexibility. However, as *First-Citizens Bank v. AISD* demonstrates, assignability might expose a municipality to risks of suit by parties who might be in a better position to sue than a struggling contractor. In times of economic hardship, parties that fit this description might include banks, factoring

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<sup>4</sup> *Id.* at 566; citing *State Farm Fire & Cas. Co. v. Gandy*, 925 S.W.2d 696, 706-07 (Tex. 1996).

<sup>5</sup> *Id.* at 568, citing *Ben Bolt-Palito Banco Consol. Indep. Sch. Dist. v. Texas political Subdivision Prop./Cas. Joint Self-Ins. Fund*, 212 S.W.3d 320, 327 (Tex. 2006).

<sup>6</sup> *Id.*

<sup>7</sup> See *Texas Develop. Co. v. Exxon Mobil Corp.*, 119 S.W.3d 875, 880 (Tex. App.—Eastland 2003).

companies, or suppliers for vendors who have encountered financial difficulties. Thus, a contract problem that might have gone away could become a substantially larger headache for the municipality.

If the municipality is considering a non-assignability clause in its contracts, be aware that the scope of the clause can be shaped to meet the desires and needs of the contracting parties. Such clauses might strictly prohibit assignment or they might allow assignment only after the express consent of the non-assigning party. Each choice has its benefits for a municipality so it should be left to the attorneys drafting these contracts to evaluate the risks of an assignment and the parties' preferences regarding assignment.