

AND THE GOVERNMENT WINS AGAIN

By Jessica Alley and Anthony D. Whitley (as seen in *Texas Construction* April 2009)

Governmental entities, including cities and counties, have long enjoyed the benefits of sovereign immunity. Sovereign immunity is a legal doctrine that provides a shield to suits by contractors against governmental entities. Texas contractors simply cannot sue governmental entities unless this sovereign immunity is waived, either by the governmental entity or a legislative enactment.

In certain circumstances the legislature has recognized the need to hold governmental entities accountable to contractors. For example, in 2005 the legislature enacted Texas Local Government Code §271.152, allowing contractors who enter into goods and services contracts to sue governmental entities for breach of contract. This legislation was the result of intense pressure from contracting lobbies to level the playing field and undo the harsh effect of sovereign immunity. However, the recent decision in *McMahon Contracting, L.P. v. The City of Carrollton*, 2009 Tex. App. Lexis 311 (Tex. App. – Dallas 2009) demonstrates that legislation such as § 271.152 does not always have its intended effect, and sovereign immunity can rear its ugly head despite the best of intentions.

Ten years before §271.152 was enacted, the legislature attempted to provide similar accountability and waiver of sovereign immunity when it enacted Texas Government Code Chapter 2251, also known as the Prompt Pay Act. The Act requires governmental entities to timely pay contractors for the purchase of goods and services. If the governmental entity violates the Act, the contractor can recover (a) interest on overdue payments and (b) attorney's fees incurred in collecting payment or interest due per the statute. However, when the legislature drafted the Act, it failed to include the waiver of sovereign immunity language necessary to expose the governmental entity to suit by the contractor. Failure to include this language is the basis for the recent Texas Court of Appeals decision in the *McMahon* case in favor of sovereign immunity; and once again, it is the government who wins.

In the *McMahon* case, the contractor entered into a street replacement contract with the City of Carrollton. The contractor sued the City for payment of retainage, extra work claims, and pre- and post-judgment interest and attorney's fees under the Prompt Payment Act. The court allowed the contractor's contract claims because of the clear waiver of sovereign immunity in §271.152 for breach of contract actions. However, the court refused to allow the contractor's claims under the Prompt Payment Act because it does not include clear language waiving sovereign immunity.

Taking the common sense approach, the contractor argued that the legislature intended to waive sovereign immunity from suit for violations of the Prompt Pay Act by simply enacting the statute. However, the Court's reasoning relied solely on the fact that the

language in the Prompt Pay Act did not “clearly and unambiguously” waive sovereign immunity. In fact, no provision of the Prompt Pay Act even addresses waiver of sovereign immunity. Seem extreme? The decision is based on long standing Texas jurisprudence that requires waiver of sovereign immunity to be clear and unambiguous.

The Court’s decision that the Prompt Pay Act does not waive sovereign immunity from suit is a decision that defies logic. Just ask this question: what was the legislature’s intent when it enacted the Prompt Pay Act? It is obvious that the legislature would not pass a statute that in effect would have no purpose. The legislative intent was to create a statute to provide remedies for those engaging in work with a governmental entity and to waive sovereign immunity for claims pursuant to the Act. As this Court’s decision currently stands, *the governmental entity suffers no consequences for failure to abide by the Act*. It should be noted that this decision does not impact the ability of a contractor to seek pre- or post-judgment interest as allowed by law for breach of contract claims. However, the rate of judgment interest available under §271.152 is significantly less than interest under the Prompt Payment Act, and there is no mechanism §271.152 for the recovery of attorney’s fees.

The *McMahon* decision will almost certainly be appealed. Until then, contractors should take steps to protect their interests. An obvious (yet impractical) solution would involve the governmental entity voluntarily waiving its sovereign immunity through a contractual provision. It is a rare day that the government will voluntarily subject itself to suit. In reality, contractors are left with no remedy until the Texas Supreme Court steps in or the legislature takes steps to revise the language of the Prompt Pay Act. But keep in mind that contractors can still exercise their stop work rights per the Prompt Pay Act. If the governmental entity fails to pay on time without a bona fide dispute, contractors can still suspend work by following the requirements outlined in the Prompt Pay Act. While suspending work does not solve the past-due payment problem, it does allow contractors to stop extending credit for goods and services when the prospect of future payment is in question.