



## **Governmental Entities Compelled to Arbitration. But wait, there's more**

Last month, the Texas Supreme Court issued an opinion that directly impacts contractors' ability to timely arbitrate claims against governmental entities. These entities include cities, counties, MUDs, school districts, and other political subdivisions. Specifically, the Court ruled that local governments who have agreed to arbitration clauses may be forced into arbitration; however, the judiciary, not the arbitrator, retains the exclusive authority to decide whether a local government has waived its immunity.

In *San Antonio River Authority v. Austin Bridge & Road, L.P. and Hayward Baker, Inc.*, the Texas Supreme Court held that an arbitrator does not have the power to decide whether a governmental entity has waived immunity. Instead, that power lies exclusively with the judiciary, regardless of the government's consent to arbitration.

The River Authority contracted with Austin Bridge to perform certain repair work to the Medina Lake Dam. During the course of construction, the cost of the repairs exceeded the initial projections and disagreements arose regarding the scope of work and payment.

Per the terms of the contract, Austin Bridge made a demand for arbitration. The River Authority promptly cited a governmental immunity bar against the claim and moved to dismiss the arbitration proceeding. After the arbitrator denied the River Authority's plea, the River Authority sued Austin Bridge in state court, requesting the court enjoin the arbitration proceeding and declare Austin Bridge's claims as barred.

Austin Bridge argued that the River Authority's governmental immunity was waived pursuant to Local Government Code Chapter 271, which provides that certain local government entities may waive their immunity from suit when they enter into a contract subject to Chapter 271. The trial court denied the River Authority's contention and ruled that the arbitration provision was enforceable. The trial court's decision was partially reversed by the San Antonio Court of Appeals, which found that a court, not an arbitrator, has the exclusive authority to determine whether a governmental entity is immune from claims. However, the Court of Appeals also determined that, in this case, the River Authority had waived its immunity and could be compelled to arbitration.

Of course, the River Authority appealed this decision to the Texas Supreme Court. The Supreme Court ruled that "it is the non-delegable role of the judiciary to determine whether governmental immunity exists, whether such immunity has been waived, and to what extent." After making this determination, the Court found that the River Authority had, in fact, waived its immunity under Local Government Code Chapter 271. After years of fighting in the courts over the issue of immunity, the parties finally returned to arbitration to litigate the merits of the dispute.

In short, legal proceedings against local government entities under Chapter 271 have turned into a two-pronged system. Plaintiffs must win both: 1) a jurisdictional battle in the courts and 2) a meritorious battle in arbitration. This process raises significant questions and concerns regarding a plaintiff's strategy in contracting with government entities and how to bring legal action against them. For instance, governmental entities enjoy an immediate right to appeal immunity issues. As such, a governmental entity can, at any time before or after (potentially before AND after) an arbitration, raise the issue of immunity with the court and drag out the dispute for years. While arbitration is generally regarded as an expedited and cost-friendly forum for resolving disputes between private parties, the same may not be true when dealing with governmental entities.

While the *Austin Bridge* case is strictly in the context of Chapter 271, the groundwork has been laid for the issue to arise in any dispute with a state, county, or other governmental entity. Parties contracting with a governmental entity should take special caution in negotiating their contract and decide whether or not arbitration is the best forum for recovery. In light of the potential delays, increased costs, and multi-forum dispute, contractors may in fact be better served to remain at the courthouse.

[Andrews Myers](#) has extensive experience in issues involving litigation and arbitration against governmental entities. For assistance with any disputes or potential disputes against a governmental entity, please contact us.

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