SUBJECT: Authorizing contract claims against counties

COMMITTEE: Civil Practices — committee substitute recommended

VOTE: 5 ayes — Gattis, Capelo, Y. Davis, Hartnett, King

1 nay — Rose

3 absent — Nixon, Krusee, Woolley

SENATE VOTE: On final passage, April 23 — voice vote

WITNESSES: No public hearing

BACKGROUND: The sovereign immunity doctrine precludes a party from asserting an otherwise meritorious cause of action against a government entity unless the government consents. Local Government Code, sec. 89.004(a) states that a person may not sue on a claim against a county unless the person has presented the claim to the commissioners court and the commissioners court neglected or refused to pay all or part of it.

In *Travis County v. Pelzel & Associates*, 77 S.W.3d 246 (2002), the Texas Supreme Court ruled that a county is a governmental unit protected by the doctrine of sovereign immunity. Because sec. 89.004 does not clearly and unambiguously waive immunity from suit, a plaintiff cannot make a claim for breach of contract against a county.

DIGEST: CSSB 1017 would authorize a person to file suit against an elected or appointed county official in that person's official's capacity if the commissioners court neglected or refused to pay all or part of the claim before the 60th day after the date it was presented.

The bill specifically would permit claims against a county that was a party to a written contract for the sale of goods or for engineering or construction services. The county could sue or be sued, plead or be impleaded, or defend or be defended on a claim arising from such a contract. The total amount of

money recoverable from a county on a claim for breach of contract could not exceed an amount equal to the sum of:

- the balance due and owed by the county under the contract, including any amount owed as compensation for the owner-caused delays or acceleration;
- the reasonable value of change order or additional work performed; and
- reasonable attorney's fees.

An award of damages could not include consequential or exemplary damages. CSSB 1017 would stipulate that it did not waive a limitation on damages available to a party to a contract or waive a county's defenses, other than its bar against suit based on sovereign immunity.

The bill would take effect September 1, 2003.

SUPPORTERS SAY:

CSSB 1017 appropriately would hold counties accountable for certain damages they caused by breaching contracts with building contractors and others. Counties that cost businesses, whether inadvertently or on purpose, should not enjoy broad protection from standards that allow aggrieved people to recover damages from breaching parties. Under Government Code, sec. 2260.105, the state is subject to liability damages of less than $250,000 for breach of contract. The bill would create an exception to sovereign immunity consistent with common law and previous enactments of the Legislature and would treat counties in a way similar to individuals and the state.

Together with existing law, the bill would safeguard counties from excessive liability caused by their contracting activities. It would allow parties to seek only damages that could result from negotiated terms, not exemplary or consequential damages, and it would not prohibit counties from negotiating contractual terms that limited their liability to certain dollar amounts. Also, Local Government Code, sec. 89.004(b) stipulates that if a plaintiff does not recover more from a county than the commissioners court offered earlier to settle the plaintiff's claim, the plaintiff must pay the costs of the suit. The bill's authorization of reasonable legal fees for plaintiffs simply would help equalize their treatment.

CSSB 1017 could result in savings for counties by drawing more qualified competitors for government contracts. Well qualified contractors often avoid entering county contracts because they lack legal recourse if the county breaches its contract. Businesses who do bid on county contracts typically include a "risk premium" in their proposals as a manner of hedging against possible damages arising from a breach. By giving contractors legal recourse, CSSB 1017 would make county contracts more attractive to many businesses.

In addition, the bill would designate the proper process for administering contract claims against counties. Resolving contract breach claims requires gathering and presenting evidence and the fact-specific inquiries that follow — activities best undertaken by courts. Businesses cannot afford to rely on resolutions or other authorized but ill suited legislative interventions that often result in time consuming and inconclusive inquiries concerning the merits of individual cases. The bill would serve both the interests of justice and the Legislature by shifting the burden of handling these claims to courts.

The sponsor plans to offer a floor amendment that, among other provisions, would specify that the bill would apply only to claims arising under a contract or other agreement entered into on or after its effective date.

OPPONENTS SAY:

CSSB 1017 wrongly would treat counties differently from the state by removing counties' protection from contract breach claims, thus exposing them to new litigation costs and unlimited judgments at a time when counties and their taxpayers cannot afford additional expenses.

Government Code, ch. 2260, provides only a narrow framework for resolving contract-related disputes with the state that does not waive the state's immunity from suit or liability. Any finding of state liability under ch. 2260 can be satisfied only by specific appropriation. Also, statutes that waive government's immunity from suit also limit its potential liability. Under Civil Practices Code, sec. 102.003, a local government's liability cannot exceed $100,000 for any one person, $300,000 for a single occurrence in the case of personal injury or death, or $10,000 in most cases for a single occurrence of property damage. Sec. 104.003 provides similar liability protections for the state. CSSB 1017 would deny counties immunity and reasonable limitations on damages a plaintiff could recover.

Also, the bill wrongly would expose counties to cases that arose before its effective date because it contains no provision allowing only prospective application. As a result, counties could be forced to defend against sometimes frivolous claims arising from events at least four years old — the statute of limitations for alleged breach of contract claims. Litigants might revive even older claims against the state under the theory that enactment of CSSB 1017 meant that the Legislature always had intended Local Government Code, ch. 89, or another statute, to authorize breach of contract claims against counties.

CSSB 1017 would burden counties with new liability allegations they likely could not address. Counties finance most projects that could give rise to claims of contract breach using bond issuances that provide them fixed sums of money to complete projects and do not contemplate the potential for large losses caused by legal actions. The limited capacity of counties to tax residents to pay for this additional expense, especially in light of stagnating household incomes and the prospect of shouldering more services due to state cuts, could fail to offset the cost of defending more suits and satisfying judgments that could result. Also, existing law governing attorney's fees does not clearly authorize a county to collect the fees after defending successfully against an allegation of contract breach.

OTHER OPPONENTS SAY:

CSSB 1017 wrongly would authorize suits by all prospective litigants against all counties in the state. Rather than permitting more litigation against counties, the Legislature should authorize suits for alleged breaches of contract by concurrent resolution under Civil Practice and Remedies Code, ch. 107, which governs permission to sue the state. Also, to the extent that parties could sue counties for alleged contract breaches, counties should be given more leeway than allowed by current law to choose the parties with whom they contract.

NOTES:

SB 1017, as amended and engrossed by the Senate, would not have specified the types of damages a plaintiff could or could not seek from counties.

Rep. Nixon plans to offer a floor amendment that would:

- require a party that sued under the statute to sue only in a state court of the defendant's county;
- limit compensation for costs springing from owner-caused delays or

acceleration only to those caused as a "direct result" of the delay or acceleration;

- authorize plaintiffs to sue counties under the statute for costs caused by change orders or additional work required to carry out the contract and interest as allowed by law;
- prohibit damages for unabsorbed home office overhead under the statute;
- amend the prohibition against suing for consequential damages under the statute;
- stipulate that the county did not waive sovereign immunity for suits brought in federal court; and
- specify that the statute would apply only to claims arising under a contract or other agreement entered into on or after September 1, 2003.

HCR 223 by Hartnett, which would authorize Guerrero-McDonald and Associates (formerly Pelzel and Associates) to sue Travis County under Civil Practice and Remedies Code, ch. 107 for an amount not exceeding $3,000,000, was referred to the Civil Practices Committee on May 1.