



**Fourth Court of Appeals**  
**San Antonio, Texas**

**MEMORANDUM OPINION**

No. 04-14-00429-CV

**CITY OF SAN ANTONIO,**  
acting through City Public Service Board of San Antonio a/k/a CPS Energy,  
Appellant

v.

**CASEY INDUSTRIAL, INC.,**  
Appellee

From the 408th Judicial District Court, Bexar County, Texas  
Trial Court No. 2008-CI-06252  
Honorable Michael E. Mery, Judge Presiding

Opinion by: Sandee Bryan Marion, Chief Justice  
Concurring opinion by: Patricia O. Alvarez, Justice

Sitting: Sandee Bryan Marion, Chief Justice  
Patricia O. Alvarez, Justice  
Jason Pulliam, Justice

Delivered and Filed: January 27, 2016

**AFFIRMED**

On July 1, 2015, the court issued its opinion and judgment in this appeal. Although a motion for reconsideration en banc is pending, the panel, on its own motion, withdraws its opinion and judgment of July 1, 2015, and substitutes this opinion and judgment in their stead.

Casey Industrial, Inc. sued CPS Energy<sup>1</sup> alleging various causes of action, including breach of contract. CPS Energy filed a motion to dismiss for lack of jurisdiction, seeking to dismiss Casey's suit on the grounds that CPS Energy's immunity from suit was not waived. The trial court denied the motion to dismiss, and CPS Energy filed this interlocutory appeal. We affirm the trial court's order.

### BACKGROUND

In August 2004, CPS Energy contracted with Casey and Wheelabrator Air Pollution Control, Inc., to add pollution control systems to one of CPS Energy's coal-fired power stations (occasionally referred to herein as the "three-party contract"). After some disputes between the parties, Casey sued CPS Energy for, inter alia, breach of contract and quantum meruit. *City of San Antonio ex rel. City Pub. Serv. Bd. of San Antonio v. Casey Indust., Inc.*, 381 S.W.3d 589, 591 (Tex. App.—San Antonio 2012, pet. denied). Casey sought to recover additional compensation under the contract based on Wheelabrator's default. *Id.* Casey moved for partial summary judgment on the ground that the three-party contract was void and its quantum meruit claim should be tried. *Id.* The trial court granted Casey's motion, *id.*, but, in a prior interlocutory appeal, a panel of this court reversed the judgment, *id.* at 596-97. We concluded the contract was not void, dismissed Casey's quantum meruit claim for want of jurisdiction, and remanded the cause to the trial court. *Id.*

After remand, CPS Energy filed a motion to dismiss, asserting Casey's breach of contract claim is outside the contract, CPS Energy's immunity from suit is not waived for an "extra-contractual" claim, and Casey's breach of contract claim must be dismissed. The trial court denied the motion, and CPS Energy appeals.

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<sup>1</sup> Appellant identifies itself as the City of San Antonio acting through the City of Public Service Board of San Antonio (CPS Energy).

### STANDARD OF REVIEW

“Immunity from suit deprives a trial court of jurisdiction.” *City of Houston v. Williams*, 353 S.W.3d 128, 133 (Tex. 2011). “Whether a trial court possesses jurisdiction is a question of law we review de novo.” *Id.*

“When a plea to the jurisdiction challenges the pleadings, we determine if the pleader has alleged facts that affirmatively demonstrate the court’s jurisdiction to hear the cause. We construe the pleadings liberally in favor of the plaintiffs and look to the pleaders’ intent.” *City of El Paso v. Heinrich*, 284 S.W.3d 366, 378 (Tex. 2009) (quoting *Tex. Dept. of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004)). However, “if a plea to the jurisdiction challenges the existence of jurisdictional facts, we consider relevant evidence submitted by the parties when necessary to resolve the jurisdictional issues raised, as the trial court is required to do.” *Heinrich*, 284 S.W.3d at 378 (quoting *Miranda*, 133 S.W.3d at 227). “If there is no question of fact as to the jurisdictional issue, the trial court must rule on the plea to the jurisdiction as a matter of law.” *Id.* “If, however, the jurisdictional evidence creates a fact question, then the trial court cannot grant the plea to the jurisdiction, and the issue must be resolved by the fact finder.” *Id.* “This standard mirrors our review of summary judgments, and we therefore take as true all evidence favorable to [Casey], indulging every reasonable inference and resolving any doubts in [its] favor.” *Id.*

### DISCUSSION

“The [Local Government Contract Claims] Act waives immunity from contract suits for local governmental entities,” like CPS Energy. *Zachry Const. Corp. v. Port of Houston Auth. of Harris Cty.*, 449 S.W.3d 98, 106 (Tex. 2014); *see also Tooke v. City of Mexia*, 197 S.W.3d 325, 345 (Tex. 2006) (“A local government entity is defined to include a municipality.”); TEX. LOC. GOV’T CODE ANN. §§ 271.152, 271.153 (West 2005). In order for the Act’s immunity waiver to apply, “a specific type of contract” must exist, and the claim must be for “certain kinds of

damages.” *Zachry Const. Corp.*, 449 S.W.3d at 109. “The waiver does not depend on the outcome” or whether the plaintiff “will prevail.” *Id.* at 109-10. Instead, the plaintiff establishes the Act’s waiver of immunity by “plead[ing] facts with some evidentiary support that constitute a claim for which immunity is waived.” *Id.* at 110.

A. Specific Type of Contract

Section 271.152 of the Act states:

A local governmental entity that is authorized by statute or the constitution to enter into a contract and that enters into *a contract subject to this subchapter* waives sovereign immunity to suit for the purpose of adjudicating a claim for breach of the contract, subject to the terms and conditions of this subchapter.

TEX. LOC. GOV’T CODE ANN. § 271.152. A “contract subject to this subchapter” includes “a written contract stating the essential terms of the agreement for providing goods and services to the local governmental entity that is properly executed on behalf of the local governmental entity.” *Id.* at § 271.151(2)(A). The three-party contract between Casey, CPS Energy, and Wheelabrator qualifies. *See Zachry Const. Corp.*, 449 S.W.3d at 106.

B. Certain Kinds of Damages

The “kinds of damages” for which immunity is waived are set forth in section 271.153(a) of the Act. *Id.* at 110 (stating “the Act does not waive immunity from suit on a claim for damages not recoverable under [s]ection 271.153(a)”). Under section 273.153(a)(1), immunity is waived for a claim seeking to recover the “balance due and owed by the local governmental entity under the contract.” TEX. LOC. GOV’T CODE ANN. § 271.153(a)(1). However, section 271.153(a)(1) “does not require the ‘balance due and owed ... under the contract’ to be ascertainable from the contract ....” *Zachry Const. Corp.*, 449 S.W.3d at 111. Instead, “[a] ‘balance due and owed ... under a contract’ is simply the amount of damages for breach of contract payable and unpaid.

Direct damages for breach — the necessary and usual result of the defendant’s wrongful act — certainly qualify.” *Id.* (internal citations omitted).

#### 1. Damages Sought by Casey

In the instant case, Casey asserts a breach of contract claim seeking to recover damages due and owed under the contract as “the necessary and usual result” of CPS Energy’s wrongful refusal to pay Casey for its “Claims” under the contract which arose as a result of Wheelabrator’s default. *Id.* The question then becomes whether Casey has shown a substantial claim by providing some evidentiary support for the facts alleged in its pleadings. *See id.* at 110.

#### 2. Relevant Contractual Provisions

Given the unique circumstances of this three-party contract, Casey expressly negotiated a contractual provision detailing its rights in the event of a default by Wheelabrator. In the event a default by Wheelabrator “result[ed] in an impairment or frustration of [Casey’s] Work, through no fault of [Casey],” section 14.1 of the contract provided the default “shall be considered a ‘Force Majeure’ event and will entitle [Casey] to request . . . additional compensation by Notice to [CPS Energy] as required in Section 9.1.3” of the contract. If notice is provided as required by section 9.1.3, the contract required CPS Energy to determine if it agreed with any request by Casey for an adjustment to the scope of work, project schedule, or contract price. If CPS Energy agreed with the requested adjustments, section 9.1.3 of the contract required CPS Energy to issue a change order. If CPS Energy disagreed with the requested adjustments, section 9.1.3 of the contract provided:

. . . , the Parties shall attempt to negotiate an equitable resolution, failing which the Parties shall resolve such disagreement in accordance with Article 15. Pending such resolution, [CPS Energy] shall issue a Construction Change Directive in accordance with Section 9.2.<sup>2</sup>

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<sup>2</sup> The parties appear to agree no Construction Change Directive was issued. If CPS Energy was required to issue a Construction Change Directive under section 9.2 and CPS Energy refused to pay for the work performed by Casey

As referenced in section 9.1.3, section 15.1.1 of the contract outlined the following dispute resolution procedure:

15.1.1 In the event a dispute arises between [CPS Energy] and [Casey] regarding the application or interpretation of this Agreement, [CPS Energy's] Project Manager and [Casey's] Project Manager shall use their Best Efforts in good faith to reach a reasonable and equitable resolution of the matter. If [CPS Energy's] Project Manager and [Casey's] Project Manager are unable to resolve the matter within thirty (30) Days, either Party may refer the matter by written Notice to the senior officers of the Parties. If such senior officers cannot resolve the matter, the Parties shall use their Best Efforts in good faith to agree upon an appropriate method of non-judicial dispute resolution, including mediation, mini-trial, or arbitration. In any event, neither Party shall seek judicial resolution of any dispute until thirty (30) Days after the matter has been referred in writing to the Parties' senior officers. In the event of a dispute, each of the Parties hereto shall make available to the other such data and information as may reasonably be requested.

### 3. Evidentiary Support

The evidence presented by Casey establishes that Casey and CPS Energy engaged in the negotiation of "Claims" under sections 9.1.3 and 15.1.1 of the contract. This evidence includes the following:

- references to recurring project status meetings, including references to such meetings in Casey's December 30, 2005 letter and CPS Energy's January 3, 2006 letter;
- CPS Energy's January 3, 2006 letter notifying Wheelabrator that Wheelabrator was in default, which, as previously noted, constituted a "Force Majeure" event under section 14.1, thereby entitling Casey to request additional compensation pursuant to section 9.1.3 of the contract;
- CPS Energy's July 27, 2007 letter to Casey "request[ing] that Casey formally indicate all items in dispute as outlined in Article 15.1.1" and stating "the dispute resolution period for resolution by the Project Managers [as expressly referenced in Article 15.1.1] shall commence" upon CPS Energy's receipt of the "dispute issues letter from Casey;"
- Casey's August 3, 2007 letter listing its various claims and stating that it was owed \$12,275,646 in "additional compensation," which is the term used

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under the Construction Change Directive, Casey likely could have pursued a claim for damages under section 271.153(a)(2) of the Act.

in section 14.1 of the contract as the additional amounts that could be due and owed to Casey in the event of a default by Wheelabrator; and

- CPS Energy's letter dated October 12, 2007, recognizing Casey has submitted "Claims" which CPS Energy was rejecting.

With regard to CPS Energy's October 12, 2007 letter, section 15.4.4 of the contract states, "The approval or rejection of a Claim by [CPS Energy] shall be subject to dispute resolution as outlined in Section 15.1 prior to litigation." CPS Energy's letter acknowledges this in stating, "Please provide proposed dates upon which you would wish to participate in an Executive meeting as required under the Dispute Resolution process under the Contract." As quoted above, section 15.1.1 of the contract requires that matters which are not resolved by the parties' project managers be referred to the parties' senior officers before the parties may seek judicial resolution. CPS Energy's letter appears to acknowledge that the parties' disagreement had reached that level in the dispute resolution process.

Although CPS Energy contends Casey's letters did not constitute proper or timely notice under the contract, strict compliance with contractual notice provisions can be waived. *See Roma Indep. Sch. Dist. v. Ewing Constr. Co.*, No. 04-12-00035-CV, 2012 WL 3025927, at \*2 (Tex. App.—San Antonio July 25, 2012, pet. denied) (noting "any provision in a contract can be waived, including contractual provisions detailing the procedures to be followed to be paid for additional work"). Because "[w]aiver is primarily a function of intent," waiver generally presents a question of fact. *Crosstex Energy Servs., L.P. v. Pro Plus, Inc.*, 430 S.W.3d 384, 393-94 (Tex. 2014). Therefore, whether Casey complied with the contractual notice requirements or whether CPS Energy waived strict compliance with the notice provisions are fact issues which cannot be decided in resolving a plea to the jurisdiction. *See Miranda*, 133 S.W.3d at 227-28 ("If the evidence creates a fact question regarding the jurisdictional issue, then the trial court cannot grant the plea to the jurisdiction, and the fact issue will be resolved by the fact finder."). In the limited context of this

appeal, we hold the facts pled and the evidentiary support supplied by Casey establish a claim for the recovery of amounts “due and owed ... under the contract” under section 271.153(a)(1).<sup>3</sup>

### CONCLUSION

Although the three-party contract contemplates traditional change orders, the force majeure provision in section 14.1 which entitles Casey to seek “additional compensation” provides an alternative method for establishing additional amounts “due and owed” under the contract. As previously noted, CPS Energy’s waiver of immunity does not depend on whether Casey will prevail on its claim. *Zachry Const. Corp.*, 449 S.W.3d at 110. Because Casey has shown “a substantial claim that meets the Act’s conditions,” the trial court properly denied CPS Energy’s motion to dismiss, and the trial court’s order is affirmed. *Id.* at 109.

Sandee Bryan Marion, Chief Justice

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<sup>3</sup> Because we hold CPS Energy’s immunity was waived under section 271.153(a)(1), we need not address whether CPS Energy’s immunity was also waived under section 271.153(a)(2). *See* TEX. R. APP. P. 47.1 (providing opinion should address only issues necessary for final disposition).