



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

MEMORANDUM OPINION

No. 04-16-00535-CV

SAN ANTONIO RIVER AUTHORITY,
Appellant

v.

AUSTIN BRIDGE & ROAD, L.P. and HAYWARD BAKER INC.,
Appellees

From the 38th Judicial District Court, Medina County, Texas

Trial Court No. 15-12-23406-CV

The Honorable Camile G. Dubose, Judge Presiding

Opinion by: Marialyn Barnard, Justice

Sitting: Karen Angelini, Justice
Marialyn Barnard, Justice
Luz Elena D. Chapa, Justice

Delivered and Filed: August 9, 2017

REVERSED AND RENDERED IN PART; AFFIRMED IN PART

This is an appeal from a final order denying appellant's, San Antonio River Authority ("the River Authority"), motion to stay arbitration and motion for summary judgment. Appellees, Austin Bridge and Road, L.P. ("Austin Bridge") and Hayward Baker, Inc. ("Hayward Baker"), initiated an arbitration proceeding against the River Authority, alleging the River Authority breached a construction contract regarding a repair project involving the Medina Lake Dam (the "Medina Lake Dam Project"). Thereafter, the River Authority filed a declaratory judgment action, seeking a declaration that appellees' breach of contract claim asserted against it in arbitration is

barred by governmental immunity. Both parties filed competing motions for summary judgment, and the River Authority filed a motion to stay the arbitration proceedings. The trial court ultimately rendered an order denying the River Authority's motion to stay arbitration on the basis that the parties agreed to submit the question of immunity to the arbitrator. The trial court also granted appellee's motion for summary judgment and denied the River Authority's motion for summary judgment. On appeal, the River Authority argues the trial court erred in denying its motions because: (1) it is not authorized to agree to binding arbitration; and (2) section 271.152 of the Texas Local Government Code does not waive its immunity from suit.

After reviewing the trial court's order, we reverse the portion of the trial court's order denying the River Authority's motion to stay arbitration, and we render judgment declaring the matter of governmental immunity an issue that must be determined by the trial court. We also affirm the portion of the trial court's order granting appellees' motion for summary judgment and denying the River Authority's motion for summary judgment. We further remand this cause to the trial court with instructions to enter an order compelling arbitration and staying all other proceedings pending the outcome of the arbitration.

BACKGROUND

The underlying matter arises out of a construction contract dispute concerning the Medina Lake Dam Project. Medina Lake Dam is a dam located in Medina County and is operated by Bexar-Medina-Atascosa Counties Water Control and Improvement District No. 1 ("BMA"). In late 2000, BMA determined the dam needed certain repairs — specifically, the structure needed to be stabilized. As a result, BMA sought state funding for the repairs. Estimating the repairs would cost approximately \$10 million, the Legislature appropriated \$4 million to the Texas Water Development Board for a grant to BMA to pay for a portion of the estimated cost. In addition to this appropriation, the Legislature proposed House Bill 1741, which directed four local

governmental entities — BMA, the Edwards Aquifer Authority, the Bexar Metropolitan Water District, and the River Authority — to enter into a cooperative interlocal agreement and to work together on planning, funding, and implementing the Medina Lake Dam Project. The bill also indicated any other local entity with the ability to assist in the project could be included in the interlocal agreement. House Bill 1741 further defined the duties of each of the entities with regard to the project. Specifically, it designated the River Authority as the project manager and contract administrator for the project.

On April 12, 2010, the four designated entities and Bexar County signed the interlocal agreement. In addition to the \$4 million appropriated by the Legislature,¹ BMA and Bexar County each contributed \$3 million to the project. Under the signed interlocal agreement, the River Authority, acting as project manager and contract administrator, was responsible for obtaining construction bids for the project and executing a contract with the lowest bidder subject to the approval of BMA, Bexar County, and the Bexar Metropolitan Water District in the event the bid exceeded \$10 million. The River Authority ultimately awarded a unit-price contract² to Austin Bridge and executed a construction agreement with Austin Bridge (the “Agreement”).

The Agreement identified the River Authority as the “manager” of the Medina Lake Dam Project and Austin Bridge as the contractor of the project. Under the terms of the Agreement, Austin Bridge was responsible for substantially completing the Medina Lake Dam Project within one year. The Agreement also provided the River Authority would be responsible for paying Austin Bridge in accordance with a project management schedule. The Agreement further outlined the parties’ responsibilities to each other and identified twelve documents as the “Contract

¹ Although House Bill 1741 directed the above named governmental entities to work together and enter into an interlocal agreement with regard to the Medina Lake Dam Project, the \$4 million in funding appropriated by the Legislature was secured by the passage of House Bill 4586.

² A unit price contract compensates a contractor based on a price per quantity of work provided.

Documents,” stating they comprised the entire agreement between the River Authority and Austin Bridge.

Pertinent to this appeal, the Agreement included the following statement at the top of the first page: “THIS CONTRACT IS SUBJECT TO ARBITRATION UNDER THE TEXAS GENERAL ARBITRATION ACT.” Section 17.1 of the General Conditions, one of the twelve Contract Documents identified as comprising part of the entire agreement, included the following arbitration clause:

All claims, disputes and other matters in question between OWNER and CONTRACTOR arising out of, or relating to the Contract Documents or the breach thereof except for claims which have been waived by the making or acceptance of final payment as provided by paragraph 14.16, shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then obtaining subject to the limitations of this Article 16. This agreement so to [sic] arbitration and any other agreement or consent to arbitrate entered into in accordance herewith as provided in this Article 16 will be specifically enforceable under the prevailing arbitration law of any court having jurisdiction.

After executing the Agreement, Austin Bridge subcontracted with Hayward Baker to perform portions of the repair work. According to appellees, Hayward Baker had to utilize more labor and materials, specifically cement, than it originally had anticipated for the repair project because some of the cement leaked out of the cavities in the dam’s embankments. As a result, appellees maintain that because the Agreement was a unit price contract, the River Authority is responsible for compensating Austin Bridge for the total cost of materials and labor provided. The River Authority, however, disagreed and declined to pay Austin Bridge for the additional costs.

On February 11, 2014, Hayward Baker initiated arbitration proceedings against Austin Bridge for its extra labor and materials claims. Thereafter, Austin Bridge initiated arbitration proceedings against the River Authority for breach of contract, alleging the River Authority breached the Agreement by failing to pay for the additional labor and materials provided for the

project. In response, the River Authority filed a motion to dismiss arbitration, asserting the defense of governmental immunity. The arbitrator ultimately denied the River Authority's motion, and six months later, the River Authority filed a petition seeking declaratory and injunctive relief. In its suit, the River Authority sought a declaration that appellees' breach of contract claim was barred by governmental immunity. The River Authority argued section 271.152 of the Texas Local Government Code does not waive its immunity from suit because: (1) the Agreement does not constitute a contract within the requirements of the section, and (2) appellees did not claim damages within limitations of the section. *See TEX. LOC. GOV'T CODE ANN. § 271.152* (West 2016) (providing for a limited waiver of governmental immunity in breach of contract claims). The River Authority also sought a temporary restraining order to enjoin appellees from participating any further in the pending arbitration proceeding until a final adjudication of its declaratory judgment claim by the trial court.

Appellees filed a joint motion for summary judgment, arguing the trial court should dismiss the River Authority's suit against them and allow the matter to proceed in arbitration. In its motion, appellees argued the issue of whether its breach of contract claim against the River Authority is barred by governmental immunity is a matter for the arbitrator — not the trial court — to determine as a matter of law, and in this case, the arbitrator determined Austin Bridge's claim is not barred. According to appellees' motion, this preliminary question is a matter of procedural arbitrability for the arbitrator. Appellees further asserted in their motion that in the event this preliminary question is a matter of substantive arbitrability, then there is clear and unmistakable evidence the parties intended to submit all disputes, including matters related to jurisdiction, to the arbitrator. The motion also asserted that even if waiver of governmental immunity is a matter for the trial court to decide, section 271.152 of the Texas Local Government Code waives the River

Authority's immunity from suit as a matter of law because the Agreement constitutes a contract under section 271.152 and the damages claimed are recoverable under the section's limitations.

In response, the River Authority filed a cross motion for summary judgment, reiterating the arguments set forth in its petition — it has governmental immunity from the breach of contract claim asserted against it in arbitration. The River Authority specifically argued that section 271.152 does not waive its immunity from suit because the Agreement does not constitute a contract under the section and appellees did not claim damages within the section's limitations. The River Authority further argued the question of governmental immunity should be decided by the trial court.

The River Authority also filed a motion to stay arbitration, arguing there is no valid arbitration agreement because it is essentially not a party to the Agreement. In its motion, the River Authority argued it is not a party to the Agreement because it is not authorized to agree to binding arbitration under section 2009.005(c) of the Texas Government Code. *See TEX. GOV'T CODE ANN. § 2009.005(c)* (West 2016). It also argued in its motion that it is immune from suit and the question of governmental immunity should be decided by the trial court.

After reviewing the motions, the trial court granted appellees' motion for summary judgment and denied the River Authority's motion for summary judgment. The trial court also denied the River Authority's motion to stay arbitration. A month later, the trial court rendered another order, specifying the reasons for denying the River Authority's motions. The trial court specifically found the Agreement contained a valid arbitration clause and the parties agreed to submit questions of both substantive and procedural arbitrability to the arbitrator. The trial court further found that any ruling on the amount and type of damages that may be awarded was premature and should be determined by the arbitrator. The trial court ultimately dismissed the

River Authority's declaratory judgment action against appellees. The River Authority then perfected this appeal.

ANALYSIS

On appeal, the River Authority argues the trial court erred in denying its motion to stay arbitration and motion for summary judgment. With regard to its motion to stay arbitration, the River Authority contends the trial court erred because there is no valid arbitration agreement as it is not a party to the agreement. According to the River Authority, it is not a party to the agreement to arbitrate because it is not authorized to agree to binding arbitration under section 2009.005(c) of the Texas Government Code. *See Tex. Gov't Code Ann. § 2009.005(c)*. As part of this argument, the River Authority also argues it is immune from suit.

With regard to its motion for summary judgment, the River Authority reiterates its immunity defense, specifically arguing the trial court erred because section 271.152 does not waive its immunity from suit. According to the River Authority, its immunity is not waived because the Agreement does not constitute a contract under section 271.152 and the damages sought by appellees are not recoverable under the section's limitations.

Governmental Immunity

We first address the issue of the River Authority's immunity. In addressing this issue, we first consider whether the immunity issue should be resolved by the trial court or the arbitrator.

A. Whether Governmental Immunity is a Matter for the Trial Court or Arbitrator

1. *Standard of Review — Motion to Stay Arbitration*

Section 171.023(a) provides, "A court may stay an arbitration commenced or threatened on application and a showing that there is not an agreement to arbitrate." TEX. CIV. PRAC. & REM. CODE ANN. § 171.021 (West 2011). Whether a valid arbitration agreement exists is a legal question subject to de novo review. *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 227 (Tex.

2003); *Leyendecker Const., Inc. v. Berlanga*, No. 04-13-00095-CV, 2013 WL 4009752, at *1 (Tex. App.—San Antonio Aug. 7, 2013, no pet.) (mem. op.). In deciding whether a valid arbitration agreement exists, we apply ordinary state contract law principles. *Leyendecker Const., Inc.*, 2013 WL 4009752, at *1 (citing *Garcia v. Huerta*, 340 S.W.3d 864, 869 (Tex. App.—San Antonio 2011, pet. denied)). As pointed out by this court, one of these universally accepted principles is that an individual must be a party to a contract in order to be bound by it. *Leshin v. Oliva*, No. 04-14-00657-CV, 2015 WL 4554333, at *5 (Tex. App.—San Antonio July 29, 2015, no pet.) (mem. op.) (citing *Rapid Settlements, Ltd. v. Green*, 294 S.W.3d 701, 706 (Tex. App.—Houston [1st Dist.] 2009, no pet.)).

2. *The River Authority’s Arguments*

As indicated above, the River Authority contends it is not a party to the arbitration agreement because it is immune from suit. According to the River Authority, because it is immune from suit, there is no enforceable agreement to arbitrate, and the trial court erred in denying its motion to stay arbitration. As part of its immunity argument, the River Authority contends the trial court erred in determining the immunity issue should be decided by the arbitrator as opposed to the trial court because the question of immunity implicates subject matter jurisdiction that should be determined by the trial court.

In support of its argument that immunity is an issue to be determined by the trial court, the River Authority cites *Kansas City S. v. Port of Corpus Christi Auth. of Nueces Cty.* 305 S.W.3d 296 (Tex. App.—Corpus Christi 2009, pet. denied). In that case, the Thirteenth Court of Appeals addressed whether arbitration or the trial court was the proper forum for determining whether a governmental entity is immune from a claim asserted in an arbitration proceeding. *Id.* at 303–04. There, Kansas City Southern appealed a final judgment, which granted Port of Corpus Christi Authority of Nueces County’s (“PoCCA”) request to stay an arbitration proceeding and declared

the PoCCA's immunity had not been waived. *Id.* at 303. On appeal, Kansas City Southern argued the PoCCA's immunity from suit should be decided in arbitration. *Id.* In addressing this issue, the Thirteenth Court of Appeals recognized the lack of authority regarding whether governmental immunity from suit should be decided by the trial court or in arbitration. *Id.* The court ultimately concluded it was the judiciary's primary responsibility to decide whether an arbitration respondent's immunity has been waived because sovereign immunity is jurisdictional in nature. *Id.* The court reasoned if a party's immunity is not waived, not only would the trial court lack jurisdiction to adjudicate the claims, but it would also lack jurisdiction to compel the party to participate in arbitration or to enforce any arbitration award entered against the party. *Id.* The court then held the question of immunity was properly addressed by the trial court. *Id.* at 304.

3. Appellees' Arguments

Appellees, however, argue the question of governmental immunity involves an application of the law regarding arbitrability. In support of their position, appellees point out that courts, including this court, have stated that the determination of whether an entity is a party to an arbitration agreement is a question of arbitrability. *Leshin*, 2015 WL 4554333, at *5 (citing *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943–44 (1995)). Texas courts have further stated that the question of arbitrability encompasses what claims may be submitted to arbitration and, as is the case here, who can be bound to an arbitration agreement. *Leshin*, 2015 WL 4554333, at *5 (citing *Saxa Inc. v. DFD Architecture Inc.*, 312 S.W.3d 224, 229 (Tex. App.—Dallas 2010, pet. denied)).

In *Howsam v. Dean Witter Reynolds, Inc.*, the United States Supreme Court established a framework for determining what matters should be decided by the arbitrator and what matters should be decided by the trial court. *W. Dow Hamm III Corp. v. Millennium Income Fund, L.L.C.*, 237 S.W.3d 745, 753-54 (Tex. App.—Houston [1st Dist] 2007, no pet.) (citing *Howsam*, 537 U.S.

at 84–85). When explaining this framework, the *Howsam* Court discussed these threshold questions in terms of substantive and procedural arbitrability. *See id.*

The *Howsam* Court concluded that, under this framework unless an arbitration agreement provides otherwise, a court may determine only matters of substantive arbitrability, i.e., whether a particular dispute falls within the scope of an arbitration provision, as well as the threshold question of whether that provision is enforceable. In contrast, the Court also determined that the arbitrator, rather than the court, should determine matters of procedural arbitrability, i.e., those matters that grow out of the dispute and bear on its final disposition.

Id. (internal quotations omitted).

With these principles in mind, appellees assert the determination of whether the River Authority is immune from arbitration is a question of procedural arbitrability to be resolved by the arbitrator. Appellees further contend that even if immunity is a question of substantive arbitrability, the arbitration agreement’s incorporation of American Arbitration Association rules is clear and unmistakable evidence of the parties’ intent to submit the issue to the arbitrator.

4. Application

After considering the parties’ arguments, we agree with the River Authority that the issue of immunity should be decided by the trial court. As reasoned by the Thirteenth Court of Appeals, questions of governmental immunity implicate jurisdiction, and we must have jurisdiction in order to stay arbitration. *See Kansas City S.*, 305 S.W.3d at 303. Although the Thirteenth Court of Appeals did not cite any authority to support its holding, we look to federal court decisions to aid our analysis. *See W. Dow Hamm III Corp.*, 237 S.W.3d at 754 (looking to federal courts when state courts are silent on matters concerning whether res judicata should be determined by trial court or arbitrator).

Most recently, in *Lower Colorado River Authority v. Papalote Creek II, L.L.C.*, the Fifth Circuit rejected the contention — asserted by appellees in this case — that the determination of whether a jurisdictional issue should be resolved by the arbitrator or the trial court turns on whether

the jurisdictional issue is a question of procedural or substantive arbitrability. *See* 858 F.3d 916, 923-24 (5th Cir. 2017). The Fifth Circuit reasoned the distinction need not be addressed because “it does not change the fact that the district court must have jurisdiction in the first instance to compel arbitration.” *Id.* Likewise, whether the question of immunity is a matter of procedural or substantive arbitrability does not change the fact that the trial court must have jurisdiction to stay arbitration. *See id;* *Kansas City S.*, 305 S.W.3d at 303. Accordingly, we hold the question of immunity must be determined by the trial court.

B. Is the River Authority Immune?

Having concluded the trial court should have determined the preliminary question of whether the River Authority is immune from Austin Bridge’s breach of contract claim, we now turn to the merits of the parties’ motions for summary judgment. This is because the crux of the parties’ motions for summary judgment relate to whether section 271.152 of the Texas Local Government Code waives the River Authority’s immunity from suit.³

On appeal, the River Authority argues the trial court erred in denying its motion for summary judgment because section 271.152 of the Texas Local Government Code does not waive its immunity from suit as a matter of law. Specifically, the River Authority argues the Agreement does not constitute a contract under section 271.152 because it does not provide for the provision of goods or services to the River Authority. The River Authority further argues its immunity from suit is not waived under section 271.152 because appellees did not claim damages within the section’s limitations.

³ During oral argument, appellees asserted that in the event we conclude immunity is an issue for the trial court, we should remand the cause to the trial court for further proceedings. We disagree. Because the parties filed competing motions for summary judgment on the immunity issue, we must review both motions and render the judgment the trial court should have rendered. *See BCCA Appeal Grp., Inc. v. City of Houston*, 496 S.W.3d 1, 6 (Tex. 2016).

1. Standard of Review — Motion for Summary Judgment

We review a trial court's grant of summary judgment de novo. *Katy Venture, Ltd. v. Cremona Bistro Corp.*, 469 S.W.3d 160, 163 (Tex. 2015); *City of San Antonio v. Greater San Antonio Builders Ass'n*, 419 S.W.3d 597, 600 (Tex. App.—San Antonio 2013, pet. denied). Traditional summary judgment is proper only when the movant establishes there is no genuine issue of material fact and it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *BCCA Appeal Grp., Inc.*, 496 S.W.3d at 6; *Greater San Antonio Builders Ass'n*, 419 S.W.3d at 600–01. We take all the evidence favorable to the nonmovant as true, and we indulge every reasonable inference and resolve any doubts in favor of the nonmovant. *BCCA Appeal Grp., Inc.*, 496 S.W.3d at 6; *Katy Venture, Ltd.*, 469 S.W.3d at 163; *Greater San Antonio Builders Ass'n*, 419 S.W.3d at 600. Once the movant meets this burden of establishing each element of its claim as a matter of law, the burden shifts to the nonmovant to disprove or raise a fact issue as to at least one the elements of the movant's claim. *Katy Venture, Ltd.*, 469 S.W.3d at 163. When, as is the case here, both parties move for summary judgment and the trial court grants one motion but denies the other, we review both motions and render the judgment the trial court should have rendered. *BCCA Appeal Grp., Inc.*, 496 S.W.3d at 6; *Tex. Mun. Power Agency v. Pub. Util. Comm'n of Tex.*, 253 S.W.3d 184, 192 (Tex. 2007).

2. Applicable Law – Waiver of Governmental Immunity

It is undisputed that the River Authority is a local governmental entity. See TEX. LOC. GOV'T CODE ANN. § 271.151(3)(C). Absent an express waiver of governmental immunity, a local government entity is generally immune from suit. *Id.* “[I]t is the Legislature's sole province to waive or abrogate sovereign immunity.” *Tex. Nat. Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 853 (Tex. 2002); see also *Lubbock Cty. Water Control & Imp. Dist. v. Church & Akin, L.L.C.*, 442 S.W.3d 297, 301 (Tex. 2014); *Tooke v. City of Mexia*, 197 S.W.3d 325, 332 (Tex.

2006). Legislative consent to sue must be expressed in clear and unambiguous language. *IT-Davy*, 74 S.W.3d at 854; *MRSW Mgmt. LLC v. Tex. Dep’t of Pub. Safety*, 403 S.W.3d 503, 506 (Tex. App.—San Antonio 2013, pet. denied); *see* TEX. GOV’T CODE ANN. § 311.034 (West 2013) (codifying this standard by stating, “In order to preserve the legislature’s interest in managing state fiscal matters through the appropriations process, a statute shall not be construed as a waiver of sovereign immunity unless the waiver is effected by clear and unambiguous language.”); *Lubbock Cty. Water Control & Imp. Dist.*, 442 S.W.3d at 301; *Tooke*, 197 S.W.3d at 332. The Texas Supreme Court has stated that in determining whether the Legislature has clearly and unambiguously waived immunity, courts should: (1) determine whether the statute that allegedly waives immunity does so beyond doubt, although the statute need not be a model of “perfect clarity;” and (2) resolve ambiguities in favor of immunity. *MRSW Mgmt.*, 403 S.W.3d at 506 (citing *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 695 (Tex. 2003)).

In this case, the parties dispute whether the Legislature has waived the River Authority’s immunity from appellees’ breach of contract claim under section 271.152 of the Texas Local Government Code. Section 271.152 provides for a limited waiver of immunity. *Lubbock Cty. Water Control & Imp. Dist.*, 442 S.W.3d at 301; *see* TEX. LOC. GOV’T CODE ANN. § 271.152. It 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 contract, subject to the terms and conditions of this subchapter.

TEX. LOC. GOV’T CODE ANN. § 271.152. A contract is subject to the foregoing if the contract (1) is in writing, (2) contains the essential terms of the agreement; (3) is for the provision of goods or services to the local governmental entity, and (4) is properly executed on behalf of the local governmental entity. TEX. LOC. GOV’T CODE ANN. § 271.151(2)(A); *Zachry*, 449 S.W.3d at 106.

a. Whether the Agreement is for the Provision of Goods and Services

The parties first dispute whether the Agreement is for the provision of goods or services to the River Authority. According to the River Authority, the Agreement is for the provision of services to BMA, the owner of the Medina Lake Dam, as opposed to the River Authority, which is only the project manager of the project. Specifically, the River Authority asserts, “None of the activities that [a]ppellees contracted to provide, being the modifications of Medina Lake Dam, were a service to the River Authority.” Appellees counter that they, particularly Austin Bridge, provided services to the River Authority under the Agreement because the River Authority directly benefited under the terms of the Agreement. Appellees contend that by them agreeing to undertake the Medina Lake Dam project, the River Authority enjoyed the direct benefit of fulfilling its responsibilities and duties required by the interlocal agreement.

The Texas Supreme Court has stated that a “written contract that triggers [section 271.152’s] waiver of immunity is one that states the essential terms of an agreement to provide goods or services to the local governmental entity, regardless of the document’s title and even if the provision of goods and services is not the primary purpose of the contract.” *Lubbock Cty. Water Control & Imp. Dist.*, 442 S.W.3d at 302 (emphasis added); *N. Cent. Tex. Council of Governments v. MRSW Mgmt., LLC*, 405 S.W.3d 364, 371 (Tex. App.—Austin 2013, pet. denied) (The plain language of section 271.151 limits its reach to agreements “for providing goods or services to the local governmental entity.”). Chapter 271 does not provide a definition for “services,” yet the Texas Supreme Court has noted that “the term is broad enough to encompass a wide array of activities.” *Kirby Lake Dev., Ltd. v. Clear Lake City Water Auth.*, 320 S.W.3d 829, 839 (Tex. 2010). In determining whether such services are provided to a local governmental entity, the Texas Supreme Court has further pointed out that the services must be performed for the direct benefit of the local government entity. See *Kirby Lake Dev., Ltd.*, 320 S.W.3d at 839; *N. Cent.*

Tex. Council of Governments, 405 S.W.3d at 371; *see also Berkman v. City of Keene*, 311 S.W.3d 523, 527 (Tex. App.—Waco 2009, pet. denied) (“[T]he statute does not apply to contracts in which the benefit that the local governmental entity would receive is an indirect, attenuated one.”) (quotations omitted). Contracts that confer some type of attenuated, indirect benefit on a governmental entity do not constitute a contract for “service” under the plain meaning of section 271.152’s limitations. *See E. Houston Estate Apartments, L.L.C. v. City of Houston*, 294 S.W.3d 723, 736 (Tex. App.—Houston [1st Dist.] 2009, no pet.).

After reviewing the relevant authorities, we find the recent Texas Supreme Court decision in *Byrdson Servs., LLC v. S. E. Tex. Reg’l Planning Comm’n*, 516 S.W.3d 483 (Tex. 2016) persuasive. In *Byrdson*, the State contracted with the Regional Planning Commission to provide the Commission with \$95 million in exchange for disaster relief and home restoration services. *Id.* at 484. The Commission’s contract with the State authorized the Commission to subcontract the repair work. *Id.* Thereafter, the Commission contracted with Byrdson Services to perform the work. *Id.* When a payment dispute arose, the Commission argued it had not waived its sovereign immunity defense under Chapter 271 because the beneficiaries of Byrdson’s repair work were the homeowners, not the Commission. *Id.* at 485. The supreme court rejected this argument, holding Byrdson performed the services the Commission was obligated to perform under its contract with the State. *Id.* at 485-87. The court held the benefit to the Commission — satisfying its contractual obligation to the State — was sufficiently direct and concrete for the contract to fall within the Chapter 271 waiver even if the primary purpose of the agreement was to benefit the homeowners. *Id.* at 487. (“The Commission subcontracted with Byrdson, and thereby relieved itself of contractual obligations it had under its contract with the State. For this reason the Byrdson agreements provided real and direct services to the Planning Commission that bring the agreements within chapter 271.”).

In this case, the River Authority, along with BMA and other governmental entities, entered into an interlocal agreement in order to work together and plan, fund, and implement the Medina Lake Dam Project. Under both House Bill 1741 and the interlocal agreement, the River Authority was designated as the project manager and contract administrator and thus, given the responsibility to obtain a contractor for the project. It is undisputed the River Authority entered into the Agreement with Austin Bridge, wherein Austin Bridge agreed to perform the work in exchange for payment. Although BMA, as owner of the Medina Lake Dam, directly benefited from the work performed by Austin Bridge under the Agreement, the River Authority also directly benefited from the Agreement, which allowed the River Authority to fulfill its duties and responsibilities under both House Bill 1741 and the interlocal agreement. Therefore, we conclude the Agreement constitutes a contract for “services to a local governmental entity” under the plain meaning of section 271.152’s limitations. Just as the Texas Supreme Court stated in *Byrdson*, the Agreement “provided real and direct services” to the River Authority by relieving the River Authority of the obligations it had under House Bill 1741 and the interlocal agreement. *See id.* Accordingly, because the Agreement is a contract for the provision of goods and services to a local government entity under section 271.152, we hold the Agreement falls within section 271.152’s waiver as a matter of law.

b. Whether the Damages Claimed are Recoverable under Section 271.152

The parties next dispute whether the damages claimed by appellees are recoverable under the limitations of section 271.152 — and thus, whether immunity has been waived. As indicated above, section 271.152 provides for a limited waiver of immunity subject to certain “terms and conditions.” *Lubbock Cty. Water Control & Imp. Dist.*, 442 S.W.3d at 301; *see TEX. LOC. GOV’T CODE ANN. § 271.152*. One of the “terms and conditions” referenced in section 271.152 is found in section 271.153 of the Local Government Code, which sets out the types of damages available

to a party in an action pursuant to section 251.152. *See TEX. LOC. GOV'T CODE ANN. § 271.153; Zachry Const. Corp. v. Port of Houston Auth. of Harris Cty.*, 449 S.W.3d 98, 106 (Tex. 2014). For section 271.152's waiver of immunity to apply, a party must claim damages within the limitations set out in section 271.153. *See Zachry*, 449 S.W.3d at 110–11. As recently stated by the Texas Supreme Court, “the Act does not waive immunity from suit on a claim for damages not recoverable under [s]ection 271.153.” *Id.* at 110.

Under Section 271.153(a)(1), the “amount of money awarded … for breach of contract” includes “the balance due and owed … under the contract” as amended, “including any amount owed as compensation for the increased cost to perform the work as a direct result of owner-caused delays.” *See TEX. LOC. GOV'T CODE ANN. § 271.153(a)(1); Zachry*, 449 S.W.3d at 106. Section 271.153(b) precludes recovery of consequential damages, “except as expressly allowed under Subsection (a)(1).” *See TEX. LOC. GOV'T CODE ANN. § 271.153(b); Zachry*, 449 S.W.3d at 106.

The River Authority contends the damages claimed by appellees are consequential damages, and thus, precluded under section 271.153(b). According to the River Authority, the damages sought by appellees are not part of the balance due and owed under the Agreement, but rather are costs incurred by Hayward “due to breach of implied warranty of plans and specifications, defective design, constructive change orders, and changed conditions.” The River Authority asserts these costs constitute consequential damages.

Appellees argue, however, the damages sought are “due and owed” because they are monies due for work performed by Hayward on the repair project. Specifically, appellees established \$255,000 was due and owed for actual quantities of base contract work performed under the unit-priced items in the Agreement and \$1,314,673 was due and owed for additional work performed by Hayward as a result of the problems it encountered during the completion of the project.

We agree with appellees that the damages they sought are amounts due and owed under the Agreement. The crux of appellees' claim against the River Authority is that they were not paid amounts due and owed under the Agreement. *See Boyer, Inc. v. Trinity River Authority of Tex.*, 279 S.W.3d 354, 359 (Tex. App.—Fort Worth 2008, pet denied.). Whether appellees are correct in that those amounts are required to be paid under the Agreement is a question for the arbitrator; it is not a question that pertains to waiver of immunity. *See id.* (“Whether Boyer is correct that the contract, as modified by the change order, required TRA to pay the damages sought by Boyer is a question for the trial court and one we need not reach.”). We therefore hold the damages sought by appellees are recoverable under section 271.152, and therefore, section 271.152 waived the River Authority’s immunity from suit. Accordingly, because section 271.152 waived the River Authority’s immunity from suit, we also hold the trial court did not err in denying the River Authority’s motion for summary judgment.

Authority to Arbitrate

Having determined the River Authority is not immune from suit, we now turn to the alternate argument asserted by the River Authority in its motion to stay arbitration. In this argument, the River Authority contends it is not a party to the arbitration agreement because it is not authorized to agree to binding arbitration under section 2009.005(c) of the Texas Government Code. Although the River Authority agrees section 2009.002 of the Texas Government Code authorizes governmental entities, like itself, to engage in alternative dispute resolution processes, the River Authority argues binding arbitration is not identified by the Legislature as a permissible method of alternative dispute resolution. For support, the River Authority cites section 2009.005(c) of the Texas Government Code, which provides, “[n]othing in this chapter authorizes binding arbitration as a method of alternative dispute resolution.” *See TEX. GOV’T CODE ANN. § 2009.005(c).* Appellees, however, assert the language of section 2009.005(c) was not intended

to prohibit governmental entities from entering into binding arbitration; rather, the section was enacted to ensure the Governmental Dispute Resolution Act did not operate as a waiver of governmental immunity.

A. Standard of Review and Applicable Law

The Governmental Dispute Resolution Act (“the Act”) was enacted to encourage the peaceable resolution of lawsuits involving governmental bodies in a fair and expeditious manner.

See TEX. GOV’T CODE ANN. § 2009.002; *Abbott v. GameTech Int’l, Inc.*, No. 03-06-00257-CV, 2009 WL 1708815, at *4 (Tex. App.—Austin June 17, 2009, pet. denied) (mem. op.). Under the Act, the Legislature provided that governmental entities should use “alternative dispute resolution procedure[s].” *See* TEX. GOV’T CODE ANN. § 2009.002; *Abbott*, 2009 WL 1708815, at *4. The Act further defines an “alternative dispute resolution procedure” as a procedure, or combination of procedures, described in chapter 154 of the Texas Civil Practice and Remedies Code. TEX. GOV’T CODE ANN. § 2009.003(1); *Abbott*, 2009 WL 1708815, at *4. Chapter 154 of the Texas Civil Practice and Remedies Code identifies the following procedures as alternative dispute resolution procedures: mediation, mini-trial, moderated settlement conference, summary jury trial, and **arbitration**. TEX. CIV. PRAC. & REM. CODE ANN. §§ 154.023–.027 (emphasis added); *Abbott*, 2009 WL 1708815, at *4. “Each of these procedures contemplates the participation of an impartial third party to facilitate the resolution of the dispute.” *Abbott*, 2009 WL 1708815, at *4.

Section 2009.005 of the Act is entitled “Sovereign Immunity.” It provides:

- (a) This chapter does not waive immunity from suit and does not affect a waiver of immunity from suit contained in other law.
- (b) The state’s sovereign immunity under the Eleventh Amendment to the United States Constitution is not waived by this chapter.
- (c) Nothing in this chapter authorizes binding arbitration as a method of alternative dispute resolution.

TEX. GOV’T CODE ANN. § 2009.005.

There is no case law interpreting whether section 2009.005(c) prohibits a governmental entity from engaging in binding arbitration as the River Authority contends. Thus, to determine whether the Act prohibits a governmental entity from engaging in binding arbitration, we must conduct a statutory construction analysis. Statutory construction is a question of law reviewed de novo. *BCCA Appeal Grp., Inc.*, 496 S.W.3d at 8. When construing a statute, we give effect to the Legislature's intent by viewing the statute as a whole and analyzing the plain language of the statute. *Id.; Molinet v. Kimbrell*, 356 S.W.3d 407, 411 (Tex. 2011). The plain meaning of the text is the best expression of legislative intent. *BCCA Appeal Grp., Inc.*, 496 S.W.3d at 8; *Molinet*, 356 S.W.3d at 411.

B. Application

Here, the plain language of the Act provides that governmental entities should engage in alternative dispute resolution procedures, describing such procedures as those identified in chapter 154 of the Texas Civil Practice and Remedies Code. *See TEX. GOV'T CODE ANN. §§ 2009.002, 2009.003(1)*. Chapter 154 of the Texas Civil Practice and Remedies Code identifies a number of procedures as alternative dispute resolution procedures, including arbitration. *See TEX. CIV. PRAC. & REM. CODE ANN. §§ 154.027*. Although the River Authority points to the language in section 2009.005(c) as prohibiting governmental entities from entering arbitration, such a reading would be inconsistent with the Act's statutory scheme. *See TEX. GOV'T CODE ANN. § 2009.002* (observing that the purpose of the ADR Act is to "compel referral" of disputes); *Beldon Roofing Co. v. Sunchase IV Homeowners' Ass'n, Inc.*, 494 S.W.3d 231, 240 (Tex. App.—Corpus Christi 2015, no pet.) (same).

The purpose of section 2009.005 is to ensure the Act is not interpreted as a waiver of sovereign immunity or as having any effect on the waiver of sovereign immunity under other laws. In other words, section 2009.005 provides that a governmental agency's use of alternative dispute

resolution procedures does not constitute a waiver of its immunity. Subsection (c) applies this same concept to arbitration, i.e., the Act does not waive governmental immunity if a governmental agency decides to engage in binding arbitration. Accordingly, we conclude subsection (c) of section 2009.005 does not prohibit the River Authority from engaging in binding arbitration.

CONCLUSION

Based on the foregoing, we hold the issue of whether section 271.152 of the Texas Local Government Code waives the River Authority's immunity from suit is a matter for the court to determine. We therefore reverse the portion of the trial court's order denying the River Authority's motion to stay arbitration and render judgment declaring the matter of immunity should be determined by the trial court. Having concluded section 271.152 waives the River Authority's immunity from suit as a matter of law, we further hold the trial court did not err in granting appellees' motion for summary judgment and denying the River Authority's motion for summary judgment. Accordingly, we affirm the portion of the trial court's order granting appellees' motion for summary judgment and denying the River Authority's motion for summary judgment. We remand the cause to the trial court with instructions to enter an order compelling arbitration and staying all other proceedings pending the outcome of the arbitration.

Marialyn Barnard, Justice