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The existence of a contract with the government, in and of itself, does not give a contractor the right to sue if the government causes the contractor to incur additional costs. The government must waive its sovereign immunity from suit (i.e., agree to be sued) in order to be subject to legal action. Entering into a contract does not always constitute a waiver of sovereign immunity. But Congress and some states have enacted laws waiving immunity in certain circumstances. Also, some state courts have eliminated, or enacted exceptions to, sovereign immunity.

If immunity always prevented lawsuits against the government for breach of contract, contractors would have to increase their bids to cover the risk of the government causing unrecoverable damages. To avoid this result, most states have altered immunity in some fashion. Immunity typically is not an issue when contracting with the federal government, since Congress has enacted the Contract Disputes Act, created administrative procedures, and created the Federal Claims Court to handle most contractor claims. Some states and local governments have followed the federal government's example in some form.

Is Misrepresentation In The Construction Context Fraud or a Breach of Contract?

But the laws regarding immunity vary state to state, and some governmental entities continue to claim sovereign immunity in response to breach-of-contract claims by contractors. This is especially true when the governmental entity's conduct is fraudulent. Recently in Colorado, for example, Jefferson County (the "County") argued that governmental immunity prohibited a contractor from suing for additional compensation when the government provides defective project drawings, and makes misrepresentations of the site conditions in bidding documents that cause the contractor to incur additional costs. *Camas Colorado, Inc. v. Board of County Commissioners*, 36 P.3d 135 (Colo. App. 2001). The contract was for roadway construction. The bidders were concerned about utility relocations. So in an addendum to the contract, the county stated that it:

is working with the utility companies on the schedule and location of relocated utility lines. [The County] does not feel that utility relocation work will conflict with the roadway construction and should not have a negative impact on the construction schedule.

But utility relocation work did conflict with roadway construction, and negatively impacted the construction schedule. The contractor, in suing to

recover its increased costs, alleged that the County knew that utility relocation work would conflict with its work and impact the schedule. In Colorado, a contractor can sue the government for breach of contract, but not for torts such as fraud or negligent misrepresentation. The County argued that its conduct, as alleged, was so egregious that it constituted fraud or negligent misrepresentation, not a breach of contract. The trial court agreed, and dismissed the contractor's lawsuit, ruling that sovereign immunity protected the County from lawsuits based on misrepresentations.

The Colorado Court of Appeals reversed the trial court's decision, and held that the contractor may maintain a breach-of-contract claim against the County, even if the County's conduct would support a claim for fraud or negligent misrepresentation. The Court of Appeals recognized that the addendum itself was a part of the contract, and that the contract contained specific provisions for payment of additional costs resulting from delays caused by action or inaction by the County. Therefore, the contractor could sue for breach of contract, despite the fraudulent nature of the County's alleged conduct.

The Colorado Court of Appeals previously explored the distinction between contract and tort claims in the context of a failure to disclose in *Grimm Construction Co., Inc. v. Denver Board of Water Commissioners*, 835 P.2d 599 (Colo. App. 1992). There the Denver Board of Water Commissioners ("Board") contracted with Grimm for the replacement of two underground conduits. During the project, the City of Denver ("City") imposed certain traffic restrictions that interfered with Grimm's performance of the contract and increased its costs. Grimm sued both the Board and the City for interference. Grimm also sued the Board for failure to disclose key information to prospective bidders before awarding the contract. The trial court dismissed all of Grimm's claims, concluding that they all could be tort claims.

While affirming the dismissal of the claims against the City, with whom Grimm did not have a contract, the Colorado Court of Appeals held that the trial court erred in dismissing the claims against the Board. The same claims that were properly dismissed as tort claims against the City should not have been dismissed against the Board, because the Board's duty regarding its disclosures to bidders was contractual.

Other states have also addressed the applicability of sovereign immunity in cases where the owner of a public-works project breaches its contractual duties by misrepresenting site conditions. In California, Souza sought to bring claims against the City of Salinas based on a misrepresentation in bidding documents. *Souza & McCue Construction Co., Inc. v. Superior Court*, 57 Cal. 2d 508, 370 P.2d 338 (1962). Souza alleged that the City knew prior to entering into the construction contract that the soil at the site was unstable, that the City failed to inform Souza, that the City represented in the plans that the soil was stable with the intent of inducing Souza to make a low bid, that Souza relied on the misrepresentation, and that, because of the unstable soils, the cost of doing the work was much higher than it otherwise would have been. The City alleged that the claim was barred by governmental immunity. According to the Court:

A contractor of public works who, acting reasonably, is misled by incorrect plans and specifications issued by the public authorities as the basis for bids and who, as a result, submits a bid which is lower than he would have otherwise made may recover in a contract action for extra work or expenses necessitated by the conditions being other than represented. . . . This rule is mainly based on the theory that the furnishing of misleading plans and specifications by the public body constitutes a breach of an implied warranty of their correctness. The fact that a breach is fraudulent does not make the rule inapplicable.

Thus, although based on fraudulent activity, Souza's claim was for a breach of a "contractual duty." The Court held that governmental immunity did not bar Souza's claims, reasoning that:

When the state makes a contract with an individual, it is liable for a breach of its agreement in like manner as an individual, and the doctrine of governmental immunity does not apply.

For several years claims by contractors against the federal government based on misrepresentations have been allowed on the theory that the misrepresentation constitutes a breach of warranty. In *Hollerbach v. U.S.*, 233 U.S. 165, 34 S.Ct. 553 (1914), the government made specific representations regarding the type of material to be excavated from behind a dam. The contract documents also contained a cautionary provision, warning bidders to inform themselves of the conditions of the site. When the contractor undertook the work, it discovered that the material was not as the government represented. The nature of the conditions actually encountered made it much more expensive to do the work than if the conditions had been as represented. Despite the cautionary provision in the contract documents, the Supreme Court of the United States held that the contractor was entitled to additional compensation from the government due to the misrepresentation. According to the Court:

[T]he specifications assured them of the character of the material,--a matter concerning which the government might be presumed to speak with knowledge and authority. We think this positive statement of the specifications must be taken as true and binding upon the government, and that upon it, rather than upon the claimants, must fall the loss resulting from such mistaken representations.

Similar claims have been allowed even when the misrepresentations were willful. See, e.g., *Christie v. U.S.*, 237 U.S. 234, 35 S. Ct. 565 (1915). And today many of these problems are addressed by changed-conditions clauses in government contracts. But sovereign immunity can still bar

breach-of-contract actions in some contexts.

What Waives Immunity In One State May Not Waive Immunity In Another

First, it is not safe to assume that all governmental entities have waived immunity for breach-of-contract suits. In 1997, the Supreme Court of Texas held that the State, by entering into a contract, waives immunity from liability, but not immunity from suit. *Federal Sign v. Texas Southern University*, 951 S.W.2d 401 (Tex. 1997). Texas Southern University ("TSU") hired Federal Sign to construct a basketball scoreboard. Federal Sign later sued TSU for breach of the contract. TSU argued that its sovereign immunity barred the suit because Federal Sign had not obtained legislative consent to sue TSU.

The trial court disagreed, and entered judgment in Federal Sign's favor. TSU appealed, eventually taking the case to the Supreme Court of Texas. In Texas, the state and all of its agencies and officials are immune from suit and immune from liability. Waiver of one does not constitute a waiver of the other. So a waiver of immunity from liability is not enough. Without a waiver of immunity from suit, there is no remedy to enforce the liability. The Supreme Court of Texas held that Federal Sign had no recourse to enforce its contract with TSU, unless the legislature independently gives permission to Federal Sign to sue TSU.

According to the Court, it is up to the legislature, on a case-by-case basis, to waive immunity from suit. Under this rule, Texas and its agencies can avoid contractual responsibility simply by refusing to give permission to be sued, unless perhaps its conduct somehow evidences a waiver of immunity from suit. After *Federal Sign*, the Texas legislature established an administrative procedure for certain breach-of-contract claims against the Texas. See *General Service Commission v. Little-Tex Insulation Company, Inc.*, 39 S.W.2d 591 (Tex. 2001). But there is nothing stopping the legislature from repealing this law.

Indian Tribes Also Enjoy Immunity

Second, many contractors do not realize that federal and state governments and municipalities are not the only entities with sovereign immunity in the United States. Indian tribes also enjoy sovereign immunity. An Indian tribe is not subject to suit in a state court, even for breach of contract involving off-reservation commercial conduct, unless Congress has authorized the suit or the tribe has waived its immunity. So, if a tribe contracts for construction of a project, even on non-reservation land, it enjoys immunity from suit in state courts absent a waiver or authorization from Congress.

The United States Supreme Court recently addressed whether the arbitration provision in a standard AIA contract is sufficient to constitute a waiver of tribal immunity. *C&L Enterprises, Inc. v. Citizen Band of Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 121 S.Ct. 1589, 149 L.Ed.2d 623 (2001). C&L entered into a contract for construction at an off-reservation building with the Citizen Band of Potawatomi Nation (the

"Tribe"). C&L later filed a demand for arbitration, arguing that the Tribe breached its contract. The Tribe refused to participate in the arbitration, asserting sovereign immunity.

The arbitrator entered an award for C&S. C&L later filed suit in an Oklahoma court to enforce the arbitration award. The Tribe filed a motion to dismiss the lawsuit, again asserting sovereign immunity. The key question was whether the contract constituted a waiver of the Tribe's immunity. The contract, a standard AIA form, required that all disputes between the parties related to the contract be arbitrated according to the rules of the American Arbitration Association. Pursuant to the applicable rules of the American Arbitration Association, the parties to such a contract consent that a judgment upon an arbitration award may be entered in any federal or state court having jurisdiction. The contract was governed by Oklahoma law, which states that entering into an agreement providing for arbitration in Oklahoma confers jurisdiction on Oklahoma courts to enforce the agreement and to enter judgment on an arbitration award.

The trial court held that the Tribe waived its sovereign immunity, and entered judgment confirming the award. Later, the court of appeals reversed the trial court, holding that the contract language above did not constitute a clear waiver of sovereign immunity. But the United States Supreme Court disagreed. According to the Court, the Tribe agreed to adhere to certain dispute-resolution procedures. This included submitting all disputes to arbitration, being bound by an arbitration award, and agreeing to enforcement of an arbitration award by a court with jurisdiction. The Tribe argued that the parties agreed to arbitrate, but that no court, federal, state or tribal, has jurisdiction to enforce an arbitration award. The Court was not impressed with this argument, stating that the arbitration agreed to "has a real world objective; it is not designed for regulation of a game lacking practical consequences."

Conclusion

Despite the holding in *C&L Enterprises, Inc.*, it is too risky to assume that an arbitration clause will be a clear waiver of an Indian tribe's sovereign immunity. Instead, the parties should negotiate the issue of sovereign immunity, and include specific language in the contract dealing with the issue. This will avoid ambiguity and future arguments regarding whether or not the tribe waived sovereign immunity.

The cases above demonstrate that special care must be taken when contracting with an entity that has sovereign immunity. States can have dramatically different laws regarding sovereign immunity, and what constitutes a waiver of that immunity in one state does not necessarily constitute a waiver in another. Contractors must know their rights in order to properly assess the risk of non-performance or breach by the owner. This includes whether sovereign immunity applies, how that immunity can be waived, whether there is any administrative claims procedure for disputes arising out of the contract, and whether such procedure is exclusive.

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