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THE SUM OF THE PARTS: MUNICIPALITIES TAKE AIM AT GHOST GUNS

GUN CONTROL ACT OF 1968•MAGAZINE SIZE LIMITS BACKGROUND CHECKS•MAYOR AND CITY COUNCIL OF BALTIMORE V. POLYMER80 LLC LIMITATIONS ON MAGAZINE SIZE•SECOND AMENDMENT•UNDETECTABLE FIREARMS ACT OF 1988•ASSAULT WEAPONS BANS•PROTECTION OF LAWFUL COMMERCE IN ARMS ACT•CITY OF CINCINNATI V. BERETTA USA, INC.•STRICT SCRUTINY PEOPLE OF CALIFORNIA V. POLYMER80 LLC•RED FLAG LAWS•FEDERAL FIREARMS ACT OF 1938 HELLER V. DISTRICT OF COLUMBIA•ATF FINAL RULE•CONDITIONS ON CONCEALED OR OPEN CARRY•MCDONALD V. CITY OF CHICAGO•STATE PREEMPTION•NEW YORK PISTOL AND RIFLE ASSOCIATION V. BRUEN•GUN SHOW LOOPHOLE POLYMER80 V. SISOLAK

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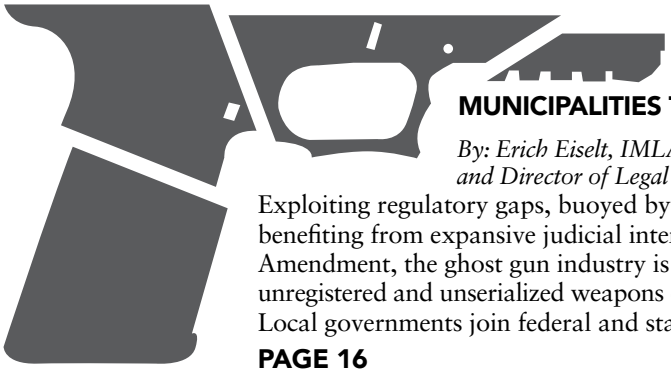

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The Follow-Through Matters: Contracts with Governmental Entities Must be "Properly Executed" Now to Waive Immunity Later

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Editor's Note: Contracting with the government raises different legal issues from those found in private contracts for similar goods, services and projects. The question of authority to contract, which may be implied or apparent in the private context, usually does not apply in government contracts where actual authority must exist. While this article deals with another aspect of government contracting that differs from the private sector – immunity, its discussion of authority extends to jurisdictions across the country. Some states, such as Texas, retain the concept of immunity in contract, others do not. Regardless of the status of immunity in a state, local government attorneys from around the country can benefit from learning how the Texas courts have addressed the question of immunity and the question of authority discussed in this article and from the helpful suggestions of the author, our 2023 $5,000 IMLA Local Government Law Scholarship recipient.

I. An Introduction to Contracting with Governmental Entities in Texas.

Businesses do not simply enter into contracts with governmental entities that are sufficient to waive immunity in later suits—waiving immunity takes deliberate action.[1] To waive governmental immunity in Texas, contracts must satisfy general contract requirements and the waiver of immunity provision in Tex. Loc. Gov't Code § 271.152.[2]

The waiver of immunity provision calls for contracts to comply with the five elements found in Tex. Loc. Gov't Code § 271.151. Under § 271.151, a contract must (1) be in writing, (2) state the essential terms of the agreement, (3) provide for goods or services (4) to the local government entity, and (5) be properly executed on behalf of the local governmental entity. If the contract does not comply with these elements, governmental immunity is not waived.

As such, contracts with governmental entities can be unenforceable for all sorts of reasons that do not apply to contracts between non-governmental entities. For example, contracts with governmental entities are unenforceable when they are not contracts for "goods or services" or when the contract does not "state the essential terms of the agreement."[3]

This paper focuses on the fifth element of § 271.151—"properly executed on behalf of the local governmental entity." Generally, "properly executed" is all about the follow-through once there is deal in place. It is about whether the contract has to be signed or approved by a particular person. Parts II – V discuss four important cases where Texas courts have interpreted this phrase. Part VI then synthesizes a rule for these holdings and provides a list of extra holdings that attorneys should keep in mind when contracting on behalf of governmental entities.

II. The Contract in *City of Houston v. Williams* was "Properly Executed."

The Texas Supreme Court first analyzed the phrase "properly executed on behalf of the local governmental entity" in *City of Houston v. Williams*.[4] There, 540 former Houston firefighters alleged wrongful underpayment of lump sums due upon termination of their employment.[5] The

firefighters argued that certain Houston ordinances constituted a written employment contract between the City and the firefighters for which immunity was waived under section 271.152.[6]

The City did not deny that the ordinances were duly "enacted," but challenged whether they were "executed."[7] When analyzing whether the ordinances were "executed," the Court pointed out that: "Section 271.151(2) does not define 'executed.'"[8]

The Court, however, noted that "execute" means to "finish" or to "complete" and stated that it is not necessary to sign an instrument in order to execute it, unless the parties agree that a signature is required.[9] Then the Court explained that no agreement between the City and the Firefighters had established that a signature was required, so the Court held that the ordinances, when duly enacted by the City with the intent to be bound, were "executed" under § 271.151(2).[10]

In this case, the phrase "properly executed on behalf of the local governmental entity" did not necessarily require a signature for a contract—here, an ordinance—to be executed but required the contract to be duly enacted by the governmental entity with the intent to be binding on the parties.

III. The Contract in *City of Dallas v. Arredondo* was "Properly Executed."

Following *Williams*, the Dallas Court of Appeals addressed a similar situation in *City of Dallas v. Arredondo*, where former police officers, firefighters, and rescue officers (Officers) alleged that the City breached its contract with them regarding pay.[11] There, the City passed an ordinance raising salaries,[2] but years later the Officers accused the City of failing to pay as required by the ordinance.[13] The Officers sued.[14] The City filed pleas to the jurisdiction asserting that it had governmental immunity.[15] Eventually, the Dallas Court of Appeals addressed whether the Officers had pleaded jurisdictional facts sufficient to waive governmental immunity under § 271.152.[16]

The City contended that it had not "properly execute[d]" the contract because none of the documents were signed or approved by the appropriate people.[17] Unlike the ordinances in *Williams*, the Dallas charter did require public contracts to be signed by city manager and approved by city attorney.[18]

Nevertheless, the court disagreed with the City for two reasons.[19] First, it stated that in adopting the ordinance, the City had stated it was "valid and binding," which was sufficient to evidence its intent to act in a specified way.[20] Second, requiring the city manager's signature on the ordinance to make its terms valid and binding would have rendered the charter and the ordinance meaningless because the charter stated that when the electors vote in favor of a proposed ordinance, the ordinance becomes "a valid and binding ordinance of the city, and . . . cannot be repealed or amended except by a vote of the people."[21]

The court concluded that the Officers' contract had satisfied the waiver of immunity requirements for its breach of contract claims.[22]

Thus, the court's interpretation of the phrase "properly executed" aligned with the Texas Supreme Court's decision in *Williams*—the contract must be duly enacted by the governmental entity with the intent to be binding. Though the City's public contracts required the city manager's signature and the city attorney's approval, the City's ordinances were valid and binding regardless of signature or approval.

In sum, the ordinances could constitute a contract sufficient to waive immunity so long as the ordinance was duly enacted with intent to be binding.

IV. The Contract in *Amex Props., LLC* was Not "Properly Executed."

Nine years after analyzing the phrase "properly executed" in *Williams*, the Texas Supreme Court readdressed it in *El Paso Educ. Initiative, Inc. v. Amex Props., LLC*.[23]

There, Amex Properties, LLC, through one its owners, signed a contract to lease space to the Charter School District.[24] The president and superintendent of the District signed on behalf of "The El Paso Education Initiative, Inc.," and a notary attested that the president had "executed the instrument on behalf of the El Paso Education Initiative, Inc."[25] The final paragraph of the contract even stated that each signatory "represents and warrants" that they have the authority to execute the lease and that it is "binding upon the entity."[26]

Despite these representations, Amex understood that the District's board still had to approve the lease in order to finalize it.[27] However, the District's president did not present the lease to the District's board for its approval.[28] At a May 28 board meeting, the president reported that the Amex negotiations had been "unsuccessful."[29] Even though the board had not approved the contract, Amex secured a construction contract and its builder commenced construction.[30] The District repudi-

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ated the contract and Amex ultimately had to lease the property to another tenant at a lower rate.[31]

Amex sued the District for anticipatory breach of the lease.[32] The District filed multiple pleas to the jurisdiction, asserting that it was immune from this suit on the grounds that the lease was not "properly executed" because the District's governing board had never approved the lease as required by TEA regulations, nor had the board delegated its authority through an amendment to the school's charter approved by the Commissioner of Education.[33]

The Court noted that the adjective "properly" limited the verb "executed" so that "not all executed contracts qualify for Chapter 271's waiver."[34] It held, in effect, that a contract is only properly executed when it was "executed in accord with the statutes and regulations prescribing that authority."[35]

The Court pointed out that the statute did not require the contract to be executed "by" the governmental entity, but rather required the contract be executed on the entity's "behalf," which was notable because it acknowledged that contracts with governmental entities are "not typically signed by all members of the entity's governing authority."[36] But in the same way that a government official cannot bind the government to a contract based on apparent authority, an agent acting on behalf of a charter-holder cannot bind it in a way that exceeds its statutory grant of authority to enter into contracts."[37]

The Court agreed with the District, holding that "[a]bsent board approval or a charter amendment delegating the board's authority to [its President], the lease was not 'properly executed on behalf of' the district because the board did not approve it."[38] The Court explained that the President acted as the board's authorized negotiator, but she lacked the power to "properly execute" the lease "on behalf of" the board without board approval.[39]

Put another way, a governmental entity's agent cannot bind the governmental entity where the contract requires approval. In those instances, the contract will not be duly enacted because the agent will have exceeded its statutory grant of authority to enter contracts. As a result, the contract would not be properly executed on behalf of the governmental entity.

In contrast to *Houston* and *Arredondo*, this case did not involve ordinances enacted by the entity—*Amex* involved traditional contracts negotiated and signed by an agent without authority to do so.

V. The Contract in *City of Port Isabel v. Meza* was "Properly Executed."

Recently, the Corpus Christi Court of Appeals examined whether a severance agreement between the City and its former city manager, Edward Meza, had been properly executed sufficient to waive immunity after Meza sued for breach of contract when the City rescinded Meza's severance agreement.[40]

There, the court held that Meza raised a fact question as to whether the severance agreement was properly executed, and thus the trial court was correct in denying the City's plea to the jurisdiction.[41]

In stating the rule for "properly executed" under § 271.151, the court followed the Texas Supreme Court's language in *Amex* nearly verbatim.[42]

The City argued that Meza's severance agreement, though the city commission approved it, was not "properly executed" because it was never brought before the city commission for final approval, or in the alternative, it was rescinded during the meeting on May 26, 2015.[43] Meza countered by stating that the severance agreement was "properly executed" because it was approved by the city commission in July 2010 and signed by the mayor.[44]

The court examined the minutes from July 2010, which showed that the commission discussed a "severance package" for Meza in closed session and subsequently approved certain requirements in an open session.[45] The court also found that the severance agreement contained the mayor's signature, which under the city charter gave the mayor the authority to sign all ordinances and resolutions.[46] The court held that the trial court correctly denied the City's plea to the jurisdiction because Meza raised a fact question as to whether the severance package was "properly executed."[47]

In contrast to *Amex*, where the signing party did not have the authority to bind the governmental entity, the mayor in *Meza* did have the authority to sign a contract and bind the parties.

VI. Conclusion

Together, these holdings show that the phrase "properly executed on behalf of a governmental entity" is all about the follow-through by the governing entity. In other words, does the contract have to signed or approved by a particular person other than the agent?

First, these cases show that a contract does not necessarily require a signature to be properly executed. As such, municipal attorneys should be cognizant of whether or not a governmental entity's charter or constitution requires contracts to be signed by one of its officials (e.g., the mayor, city manager, or another member). Suppose a municipal attorney mistakenly believes a contract is not enforceable unless signed. In that case, it may result in an enforceable contract before the governmental entity is ready to be bound

because the contract or ordinance only need be duly enacted by the governmental entity with the intent to be binding on the parties. For similar reasons, a municipal attorney should be cognizant of whether the governmental entity's charter or constitution requires its contracts to be approved in some capacity by the city attorney, the board, or the council.

Second, these cases show that a contract negotiated and signed by an agent cannot bind the governmental entity if the agent exceeds its statutory grant of authority. For governmental entities, an agent may only have authority if the board or council gives the agent authority. As such, municipal attorneys should understand how a particular agent receives authority, whether simply under common law or by a specific statute. If a municipal attorney mistakenly believes an agent does not have full authority to bind the governmental entity during negotiations, it may result in an enforceable contract before it is ready to be bound.

Though not exhaustive, other court rulings to keep in mind when contracting on behalf of a governmental entity are listed below:

- It is the duty of the successful bidder to verify that all of the requirements of the statute are met before work commences. Any contractor who starts work without a purchase order does so at its own peril.[48]
- A city or county may contract only upon the express authorization of the city council or commissioners court by a vote of that body reflected in the minutes.[49]

But compare this latter holding with the following holding:

- A governmental entity may be estopped to deny the validity of a contract which it had authority to make, but which was executed by an officer without authority, was entered into without the required formalities, and even where the records of the city do not show that such a contract was ever entered into, if the governmental entity accepts performance from the other party and enjoys the benefits accruing to it.[50]

In sum, even though it does take a significant effort to enter into binding contracts that are sufficient to waive immunity in future lawsuits, the lesson is that municipal attorneys should be aware that the requirements for properly executing a contract are not one-size-fits-all. ML

Notes

1. In a podcast hosted by Lloyd Gosselink, attorneys Stefanie Albright and James Parker talk about the different aspects of immunity issues that might arise in contracts with governmental entities. James Parker notes that governmental contracts "require more than just a regular lawyer who writes contracts because these are a special type of contract, and it is full of pitfalls for the unwary." Listen In With Lloyd Gosselink, *Episode Five – Governmental Immunity and Contract Provisions*, at 25:01–25:15 (May 26, 2021, 8:00 AM) (accessed using Apple Podcasts). *See also* Bradford E. Bullock, *2022 Advanced Government Law CLE: Tips for Drafting Government Contracts and Documents*, 2022 TXCLE-AGL 7 POWERPOINT, 2022 WL 3142791 ("There are a variety of pitfalls the unwary practitioner can trip over when shepherding government contracts through the drafting and approval process.").
2. USAA Tex. Lloyds Co. v. Menchaca, 545 S.W.3d 479, 501 n.21 (Tex. 2018) (stating that a plaintiff must prove the existence of a valid contract by establishing that (1) an offer was made; (2) the other party accepted in strict compliance with the terms of the offer; (3) the parties had a meeting of the minds on the essential terms of the contract (mutual assent); (4) each party consented to those terms; and (5) the parties executed and delivered the contract with the intent that it be mutual and binding). Tex. Loc. Gov't Code § 271.151.
3. *See e.g.*, Big Blue Props. WF, LLC v. Workforce Res., Inc., No. 02-21-00135-CV, 2022 Tex. App. LEXIS 3740, at *1 (Tex. App.—Fort Worth June 2, 2022, pet. denied) (concluding that the contract did not meet the requirements of § 271.152 to waive its immunity because it was not an agreement for the provision of goods or services to the governmental entity); W. Travis Cty. Pub. Util. Agency v. Travis Cty. Mun. Util. Dist. No. 12, 537 S.W.3d 549, 557 (Tex. App.—Austin 2017, pet. denied) (holding that by failing to state terms for price and time of performance, the contract did not "state the essential terms" of an agreement by MUD 12 to provide services to the Agency and thus did not waive immunity under § 271.152).
4. *See* 353 S.W.3d 128 (Tex. 2011).
5. *Id.* at 131.
6. *See id.* at 131, 135.
7. *Id.* at 139.
8. *Id.*
9. *Id.*
10. *Id.*
11. 415 S.W.3d 327, 339 (Tex. App.—Dallas 2013, pet. denied).
12. *Id.*
13. *Id.* at 339–40.
14. *Id.* at 340.
15. *Id.*
16. *See id.*
17. *Id.* at 349.
18. *See* id. (*citing* Dallas, Tex., Charter, ch. XXII, § 1 (2006)).
19. *Id.* at 349.
20. *Id.*

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21. *Id.*
22. *Id.* at 350.
23. 602 S.W.3d 521 (Tex. 2020).
24. *Id.* at 524–25.
25. *Id.* at 525.
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.* at 525–26.
32. *Id.* at 526.
33. *Id.* at 526, 531. The Court cites 19 Tex. Admin. Code §§ 100.1033(a)-(b), .1101(b)-(c) for a Charter School's delegation of powers and duties.
34. *Id.* at 532.
35. *Id.*
36. *Id.* at 533.
37. *Id.*
38. *Id.*
39. *Id.*
40. *See* City of Port Isabel v. Meza, No. 13-19-00070-CV, 2020 Tex. App. LEXIS 5031, at *3–4, *7–8 (Tex. App.—Corpus Christi July 2, 2020, pet. denied).
41. *See id.* at *3–4, *12–13.
42. *See id.* at *8–9.
43. *Id.* at *7–8.
44. *Id.*
45. *Id.* at *12.
46. *Id.*
47. *Id.* at 12–13.
48. Richmond Printing v. Port of Hous. Auth., 996 S.W.2d 220, 224 (Tex. App.—Houston [14th Dist.] 1999, no pet.).
49. City of Bonham v. Sw. Sanitation, 871 S.W.2d 765, 767 (Tex. App.—Texarkana 1994, writ denied).
50. Panhandle Const. Co. v. Spearman, 89 S.W.2d 1053, 1055 (Tex. App.—Amarillo 1935, no writ).

Homelessness *cont'd from page 8*

there are shelter beds available, the City will enforce its camping ordinances.

VI. Legislative Tools

In addition to providing numerous services, it is important to have local ordinances regulating criminal behavior that sometimes occurs during interactions with people experiencing homelessness. These quality-of-life ordinances are necessary to assist the community and the municipal government find solutions. In Colorado, municipal ordinance violations are misdemeanor offenses with penalties capped at not more than $2,500, imprisonment of not more than 189 days, probation, or a combination thereof.[59] In 2010, the City Council passed an ordinance making it "unlawful for any person to camp on any public property, except as may be specifically authorized by the appropriate governmental authority."[60] A similar ordinance is also in effect regarding camping on City parks property, including parking and camping in a house trailer or camper trailer after the parks' closing time.[61] These ordinances are enforced when low barrier shelter bed capacity is available.

One of the more significant recent ordinances adopted by Colorado Springs is titled "Camping and Waste Deposit Within Public Stream/Public Stream Riparian Zone Prohibited."[62] In 2018, following water quality sampling conducted by the U.S. Geological Survey, the Colorado Department of Public Health and the Environment's Water Quality Control Commission determined that Fountain Creek, which traverses the length of the City, contained undesirable levels of *e. coli.* In response, the City Council adopted an ordinance making it illegal to camp within a stream, streambank, or within 100 feet from the edge of a streambank.[63] Additionally, there is specific language regarding dumping of waste within the riparian zone.[64] This ordinance was drafted and adopted to address the water quality concerns brought to the City's attention by the State and after citizens and City staff witnessed individuals urinating, defecating, and bathing within the City's streams. Mayor John Suthers stated, "[t]hat is truly a health, safety and wellness measure, trying to make sure we aren't polluting our waters."[65] Another concern is frequent flash flooding that has occurred and led to injuries and deaths through drowning.[66]

Also in 2018, the City extended its prohibition on extended parking of recreational vehicles in residential areas to all public rights-of-way.[67] The City Code makes illegal "[a]ny recreational vehicle parked on . . . a public right-of-way for a period of time greater than that necessary for the expeditious loading and unloading of passengers or property."[68] This ordinance was passed following an observation that many recreational vehicles were congregating on City streets just outside of residential areas in the downtown part of the City. Violation of this ordinance is not a criminal offense—instead, it results in a parking ticket with escalating fines up to, and including, potential impoundment of the recreational vehicle after multiple offenses.

Another traffic safety ordinance that the City of Colorado Springs has adopted relates to the use of medians on certain roadways in the City. Solicitation from medians was a dangerous safety concern throughout the mid-2010s in Colorado Springs. It was not uncommon to see people on medians soliciting for money at very crowded intersections with fast-moving vehicles. In 2017, the City Council passed an ordinance at the request of the City Traffic Engineer that made it unlawful to, "access, use, occupy, congregate or assemble on or about any median that has been posted with a sign pursuant to this section prohibiting such access, use or occupancy."[69] To ensure this code provision was narrowly tailored to