



Stacey Allison Steinbach, Executive Director

January 8, 2024

Blake A. Hawthorne
Clerk of the Court
The Supreme Court of Texas
Supreme Court Building
201 West 14th Street, Room 104
Austin, Texas 78701

Re: No. 22-0649; In the Supreme Court of Texas; *San Jacinto River Authority v. City of Conroe, Texas and City of Magnolia, Texas*
Letter Brief of the Texas Water Conservation Association, Tarrant Regional Water District, Trinity River Authority of Texas, and Upper Trinity Regional Water District

Dear Mr. Hawthorne:

To the Honorable Justices of the Supreme Court of Texas:

Amici curiae the Texas Water Conservation Association (“TWCA”), the Trinity River Authority of Texas, Tarrant Regional Water District, and Upper Trinity Regional Water District come forward as friends of the court in support of the Petitioner, San Jacinto River Authority (“SJRA”) in the above-captioned matter.¹

TWCA is a 501(c)(4) association of water professionals and organizations in Texas. Its members include river authorities, navigation and flood control districts, water control and improvement districts, drainage and irrigation districts, utility districts, municipalities, groundwater conservation districts, all kinds of water users, and general/environmental water interests. TWCA’s members collectively provide wholesale and/or retail water and/or wastewater services to the vast majority of

¹ Texas Water Conservation Association, Tarrant Regional Water District, and Trinity River Authority of Texas have not paid any fees and will not pay any fees for the preparation of this brief. Upper Trinity Regional Water District will pay fees to counsel related to the preparation of this brief. Tex. R. App. P. 11(c).

Texans and include most large public water suppliers in the State. TWCA serves as a leader and advocate for sound water policy in Texas, engaging on state-wide and broad water issues that may affect its members. TWCA does not engage in individual or local water issues, except where those matters may have wide-ranging effects.

The additional *Amici* are members of TWCA and provide water and/or wastewater services to municipalities on a wholesale basis. Those services are sometimes furnished under contracts that do not specify the quantity of water to be delivered or wastewater to be treated, and which often provide a formula for price setting or incorporate a rate by reference. These contracts form the wholesale backbone for retail service to millions of Texans and contain all “essential terms” for purposes of Texas Local Government Code Chapter 271.

In this litigation, the Cities of Conroe and Magnolia (the “Cities”) have argued that their contract with SJRA is insufficiently definite to waive their governmental immunity under Chapter 271. Without engaging on the other issues before the Court, the *Amici* urge the Court to clarify that a contract that fixes the price for goods or services by formula or by reference meets the definition a “contract subject to this subchapter” under Local Government Code Section 271.151(2)(A). In fact, contracts may exclude a fixed price or quantity term and still state “the essential terms of the agreement” for purposes of this section.

Contracts for the sale of water and treatment of wastewater often exclude fixed price or quantity terms for both practical and statutory reasons. A finding that the absence of fixed price and quantity terms renders those contracts too indefinite to waive governmental immunity ignores general contract law principles, fails to account for the specific nature of wholesale contracts for the sale of water or for wastewater treatment, and poses an immediate threat to the stability of water supply in Texas.

1. A contract that includes a variable price term or incorporates one by reference must waive governmental immunity under Texas Local Government Code Chapter 271.

Local governmental entities that enter into contracts subject to Texas Local Government Code Chapter 271, Subchapter I waive sovereign immunity to suits for breach of the contract. TEX. LOC. GOV'T CODE § 271.152. The definition of a “contract

subject to [subchapter I]” does not include the term “fixed price.” TEX. LOC. GOV’T CODE § 271.151(2)(A). Instead, it only requires that the “essential terms” of the contract be stated. A contract, including water and wastewater contracts, must be sufficiently definite in its terms to enable a court to understand the contractual obligations it creates. *Bendalin v. Delgado*, 406 S.W.2d 897, 899 (Tex. 1966). Essential terms are stated when “the names of the parties, property at issue, and basic obligations are clearly outlined.” *Kirby Lake Dev., Ltd. v. Clear Lake City Water Auth.*, 320 S.W.3d 829, 838 (Tex. 2010) (emphasis added).

A contract with a price term satisfies that standard even if that price term is not fixed for the life of the contract. Parties may compare the amount charged to the price term in the contract and understand whether the two are consistent—nothing more is required. In fact, many contracts do not set a fixed price for the life of the contract and instead incorporate a rate by reference or fix a rate through a calculation based on the “cost of service.”² Indeed, the latter is the prevailing model in contracts for both wholesale water supply and wholesale wastewater treatment provided to municipalities like the Cities. That model is common because the use of a non-fixed price term is both practically and legally necessary.

Wholesale water supply contracts, especially for municipal supply, are often decades long and in some instances may be of a duration of 100 years. Anticipating the financial requirements to provide water or wastewater treatment to municipal customers decades into the future is simply not possible. It is without question, however, that those services will be needed. The use of non-fixed price terms addresses this conundrum by giving sellers and buyers the flexibility to (1) meet current costs today, (2) adjust future obligations to meet future requirements, and (3) raise funds for capital costs through bond issuance. That is why non-fixed price terms are ubiquitous in wholesale water supply contracts—they provide much-needed operational and financial stability.

There is another, statutory reason for long-term water supply contracts to use something other than a fixed price. Under the Texas Water Code, rates charged to

² Stated simply, “cost of service” utility ratemaking determines a customer’s financial obligations based on the revenue required by the seller to meet, among other costs, operation and maintenance costs and the costs associated with debt service. Each customer’s financial obligation is then based on its respective volume of use.

like customers must be “without discrimination.” TEX. WATER CODE § 11.036(b); see also, TEX. WATER CODE § 13.043(j) (providing that a rate charged for treated water or wastewater treatment services cannot be “unreasonably preferential, prejudicial, or discriminatory”). Non-fixed price terms allow rates to be adjusted equally and simultaneously among like customers, so that those rates are always consistent, *i.e.*, without unreasonable discrimination. Therefore, in addition to being practically necessary, non-fixed price terms are legally necessary under the Texas Water Code.

If a contract for water supply or wastewater treatment must include a set price to be enforceable under Chapter 271, it would undermine the ability of buyers and sellers to make contracts of long duration. That, in turn, would negatively affect the cost of capital available for system maintenance and expansion, and it would imperil the operational and financial stability of the model underlying wholesale water supply and wholesale water treatment across Texas. Ultimately, it would increase the cost to end users: Texans, businesses, and industry.

2. A contract does not need to include a fixed quantity to waive governmental immunity under Texas Local Government Code Chapter 271.

Contracts for water delivery and wholesale wastewater treatment service often provide that the seller will meet all of the buyer’s needs, within limits, without specifying an exact contract quantity. Texas law has long recognized that an agreement to furnish or deliver the quantity of goods or services the buyer may need during the contract term—a requirements contract—“is sufficiently definite and certain to bind the parties.” *McCall v. Texas Dragline Svc. Co.*, 188 S.W.2d 243, 245 (Tex. Civ. App.—Galveston 1945, writ ref’d w.o.m.) (citing *Tampa Shipbuilding & Eng’g Co. v. Gen. Const. Co.*, 43 F.2d 309, 312 (5th Cir. 1930)).

As with flexible price terms, the use of contracts that do not include a fixed quantity for furnishing water or wastewater treatment services is also a practical necessity. The amount of water required by a municipality in any year, whether next year or fifty years in the future, is quantifiable only in hindsight. Water demands and the quantity of wastewater generated by a municipality vary significantly depending on weather conditions and other considerations such as population growth and water conservation efforts.

Because demands for water and wastewater treatment cannot be forecast with precision, even in the near term, it is unsurprising that contracts for those services commonly do not specify an exact contract quantity. If that form of contract is insufficiently definite to invoke the statutory waiver of a municipal purchaser's governmental immunity under Chapter 271, this again would undermine the stability of those contracts and lead to higher costs of capital. Ultimately, that would result in higher rates for the millions of Texans who rely upon municipal water and wastewater services in municipalities that depend upon special districts like the *Amici* for water supply and wastewater treatment.

For the reasons set forth herein, the *Amici* respectfully request that the Court opine on the issue of the governmental immunity in this case and find that non-fixed price and quantity terms are sufficiently definite to waive governmental immunity under Chapter 271.

Respectfully submitted,

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