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Honorable Greg Abbott
Attorney General of Texas
P.O. Box 12548
Austin, TX 78711

Via Hand Delivery

RQ-0354-GA

Dear General Abbott:

We are requesting an opinion on the following question:

> If the elements of a quantum meruit cause of action are present, can the commissioners court approve, in the nature of a settlement, a claim for payment from a vendor who has rendered goods or services to the county and who otherwise, for whatever reason, does not have an enforceable contract with the county?

Our brief is attached. Thank you for your consideration of this issue.

Sincerely,

MIKE STAFFORD
County Attorney

By: David B. Brooks
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Approved:

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BRIEF

Texas courts for decades have approved the doctrine of quantum meruit both in the private sector and in the public sector. Quantum meruit is an equity cause of action designed to prevent unjust enrichment and it requires good faith and clean hands. The doctrine of quantum meruit, as it applies to local government, is well supported in the general legal literature. Am. Jur. 2d, *Municipal Corporations, Counties, and Other Political Subdivisions*, §§ 473, 478 (2000); 72 C.J.S. Supp., *Public Contracts*, § 20 (1975); 64 Tex. Jur. 3d, *Restitution and Constructive Trusts*, § 20 (2003); Brooks, 36 Texas Practice, *County and Special District Law*, § 18.35 (2002).

Texas Supreme Court

Over the years on several occasions, the Texas Supreme Court has recognized the obligation of counties and other local governments to compensate a vendor on a quantum meruit basis. In 1912, the court affirmed a judgment in a lawsuit brought against a county to recover "reasonable compensation" for services in connection with a sale of more than 17,000 acres of county school land. The county had contracted with the plaintiff for a term of six months to secure a sale upon specified terms. After the sale, the county's contracted agent sought his commission, which the county resisted in paying because it contended that the agreement constituted an unconstitutional debt, and secondly, that payment out of school funds was contrary to state law. The court found that there was no "debt" under the state Constitution and further construed the agreement so as not to require payment of a commission directly from the school land sale proceeds. In doing so, the court left the agreement between the county and the agent with no express provision for compensation. The court held that the county had an obligation to pay "a reasonable sum" to the agent, notwithstanding that "the compensation to be paid was not fixed by the terms of the written contract." Nevertheless, the court observed: "Quite a number of witnesses testified that 5 per cent on the gross sale was a customary and a reasonable consideration for services rendered by Sandifer to Foard County . . . ." *Foard County v. Sandifer*, 151 S.W. 523, 525 (Tex. 1912).

In a lawsuit against the City of Houston seeking compensation for architectural services for a new city hall, the supreme court held in 1942 that the city was obligated to pay the architect for "plans, sketches, and specifications" furnished under "oral employment." The city contended that the oral contract was unenforceable. The supreme court held that the city was obligated to compensate the architect.

> It is the settled law in this State as established by the decisions of this Court, that where a municipality knowingly receives property or services on an agreement which it had power to enter into as a contract, but which was not legally entered into so as to make it binding as a contract, it will be compelled to pay the reasonable value of the property or services so received, as on an implied contract. In such instances it is not correct to say that the municipality is estopped

> to deny that the illegal agreement, as such, is a binding contract. The rule correctly stated is that in such instances the municipality is liable on an implied contract to pay the reasonable value of the property or services furnished to and accepted by it. In the instances under discussion, the illegal agreement is not enforced as a contract. To the contrary, the illegal agreement as such is not enforced at all. The contract that is enforced is one that the law implies, because justice demands that a municipality shall not be permitted to receive and retain benefits on an agreement without paying the reasonable value of such benefits. [citations] [emphasis added].

City of Houston v. Finn, 161 S.W.2d 776, 777 (Tex. 1942). The court restated the proposition:

> It is the law, as applied to an implied contract resulting in a case where a municipality knowingly receives property or services on an agreement which it had power to enter into as a contract, but which in fact was not legally entered into so as to make it a binding contract, that the obligation on the part of the municipality to pay the reasonable value of such property or services accrues when the same are furnished and received. [citations].

Id. at 778.

In a 1928 decision involving the acquisition of a municipal gas plant by San Antonio, the court held that the city was obligated to compensate bond counsel hired by the mayor. The mayor's agreement was not authorized, nevertheless, "it appears from the evidence that [bond counsel] Judge Sluder's services in these matters were rendered with the full knowledge, consent, and acquiescence of at least a majority of the members of the board of city commissioners, as well as the mayor." Judge Sluder sought recovery on an implied contract. The city charter required any contract to be entered into by ordinance. The city contended that the agreement was absolutely void and precluded any recovery by the bond attorney. The court noted that since an 1891 decision also involving the City of San Antonio, rendered by the supreme court, that Texas

> courts have uniformly announced the doctrine that where a county or municipality receives benefits under a contract, illegal because not made in conformity with the Constitution or statute of the state, or charter provision of the city, it will be held liable on an implied contract for the reasonable value of the benefits which it may have received. In other words, while such contracts are void, and no recovery is permitted thereon, our courts hold that common honesty and fair dealing require that a county or municipality should not be permitted to receive the benefit of money, property, or services, without paying just compensation therefor. Under such circumstances, a private corporation would clearly be liable under an implied contract. There can be no sound reason why the same obligation to do justice should not rest upon a municipal corporation.
>
> . . . .

> The rule thus firmly established by the courts of this state rests upon the obligation of a municipality to do justice when it has received money, property, or services of another. Under such circumstances, the plainest principles of justice require that it should not be permitted to receive and retain the benefits of a contract without paying the reasonable value thereof. The principle is, we think, supported by the great weight of authority.

Sluder v. City of San Antonio, 2 S.W.2d 841, 842, 844 (Tex. Comm'n App. 1928, judgm't adopted).

The court further stated that it would be "manifestly unjust and inequitable" to allow the city to escape its obligation to pay for services rendered.

> [I]f the officials of the city remain silent and permit the full performance of a contract which the city has the power to make under the charter, it ought not, in all good conscience, be heard, after receiving such benefits, to refuse to pay the reasonable value thereof.

Id. at 845.

In the 1891 case relied upon in *Sluder*, the court held that the City of San Antonio was implicitly obligated to pay for the use of a room rented by the city after the lease had expired and not renewed. The plaintiff contended that the city was a holdover tenant, and in doing so, renewed the lease on an annual basis. The court held that the city was obligated to pay only for the time during which the city occupied the premises.

> [W]hen a municipal corporation has received the benefit of a contract, which it had the power to make, but which was not legally entered into, it may be compelled to do justice, and to pay the consideration, or at least to pay for what it has received. In such cases it is said that the law will imply a contract . . . . [T]he city is bound to pay for the rooms for the time its officers occupied them.

City of San Antonio v. French, 15 S.W. 440, 441 (Tex. 1891).

In a frequently cited case, the court approved a 1931 holding in which a county was obligated under an implied contract theory to compensate an audit company whose contract with the county did not comply with state statutes governing county audits.

> In our opinion West Audit Company cannot recover upon the written contract made with Yoakum County to audit its books . . . .
>
> No issue of fraud on the part of West Audit Company getting the contract with the county has been raised, nor is it questioned that the work on the audit was accurately and efficiently performed . . . .
>
> It is the well-settled rule in this State that when a county has received the benefit of a contract which it had power to make, but which was not legally

> entered into, it may be compelled to do justice and to pay the consideration or at least to pay for what it has received. In such cases the law will imply a contract. [citations].

West Audit Co. v. Yoakum County, 35 S.W.2d 404, 406, 407 (Tex. Comm'n App. 1931, holding approved).

Intermediate Appellate Courts

There have been several intermediate appellate decisions in Texas likewise recognizing the quantum meruit obligations of local governments. In a decision from 2003, an appeals court restated the doctrine of quantum meruit in a lawsuit brought by developers against a water district seeking compensation for water services.

> Alternatively, appellees argue that they should be allowed to recover on their quantum meruit claim. Quantum meruit is an equitable remedy which does not arise out of a contract, but is independent of it. [citation]. To recover under quantum meruit, a claimant must prove that: (1) valuable services were rendered or materials furnished; (2) for the person sought to be charged; (3) which services and materials were accepted by the person sought to be charged, used and enjoyed by him; (4) under such circumstances as reasonably notified the person sought to be charged that the plaintiff in performing such services was expecting to be paid by the person sought to be charged.

Clear Lake City Water Authority v. Kirby Lake Development, Ltd., 123 S.W.3d 735, 753 (Tex. App. – Houston [14th Dist.] 2003, no pet.).

In a 1995 case, Jefferson County was sued by a contractor for the sale of road surfacing stabilizer material, the invoices for which were rejected by the county. The contractor sued on both a contract and a quantum meruit basis of recovery. The $8,300 worth of invoices were rejected on the basis that the County Purchasing Act was not followed. A judgment rendered by the trial court against the county on the basis of quantum meruit was affirmed by the appellate court. At issue on appeal was the recovery of attorney fees and prejudgment interest by the plaintiff. *Base-Seal, Inc. v. Jefferson County, Texas*, 901 S.W.2d 783 (Tex. App. – Beaumont 1995, writ denied).

In a 1999 case, the Port of Houston Authority was sued by a successful bidder on a printing contract, which had never been executed by the Authority's officials. Breach of contract was alleged. The port authority contended that the $225,000 contract for a monthly magazine publication was void and unenforceable. A summary judgment in favor of the Port Authority as to the contract was granted by the trial court and affirmed on appeal. As to quantum meruit, the vendor was paid in full for two months worth of work before notification that the contract was not going to be recognized. The appeals court found that this payment satisfied the obligations of an implied contract, or quantum meruit.

> Where a governmental entity receives benefits under a void contract because it was not made in conformity with the Constitution or a state statute, it will be liable on an implied contract for the reasonable value of benefits. [citation].

Richmond Printing v. Port of Houston Authority, 996 S.W.2d 220, 224 (Tex. App. – Houston [14th Dist.] 1999, no pet.).

In another case in 1977, Harris County was sued for unpaid consulting services. The suit was premised on an implied contract. A trial court judgment against the county was affirmed. Two successive written employment contracts had been executed by the county under which consultation services were rendered to the county's Manpower project. A third contract was prepared but remained unexecuted by the Harris County Commissioners Court. The plaintiff was not paid for work under this anticipated third contract. Harris County contended that it did not knowingly accept the benefits of the plaintiff's services. The appeals court held that there was sufficient evidence that county officials, including the county judge, knowingly accepted the plaintiff's services. The appeals court relied on the *Sluder* and the *French* cases, discussed above. The appeals court said:

> Where a county or a municipality receives benefits under a contract, illegal because not made in conformity with the Constitution or statute of the state, or charter provision of a city, it will be liable on an implied contract for the reasonable value of the benefits which it may have received.

Harris County v. Emmite, 554 S.W.2d 203, 204 (Tex. Civ. App. – Houston [1st Dist.] 1977, writ dism'd.). The appeals court in *Emmite* also relied on a 1959 case that presented a "question similar" to the Harris County case, and which concerned the City of Houston. In this case, the issue was whether the city officials had sufficient notice that the plaintiffs were expecting extra compensation for extra surveying work on a "water supply project known as Lake Houston." *Id* at 205. In this case, the director of the city's public utilities was held to have accepted the benefits of the extra surveying work, and the city was therefore liable. Relying on the *Finn* case discussed above, the court stated:

> Although an agent of a municipal corporation cannot bind the city on a contract, oral or written, which does not comply with statutory requirements governing valid municipal contracts, the city may become liable on an implied contract to pay the reasonable value of services rendered when it accepts the benefits of such services and of the contract made by its employee.

City of Houston v. Howe & Wise, 323 S.W.2d 134, 150-51 (Tex. Civ. App. – Houston 1959, writ ref'd. n.r.e.).

In a 1992 case, a municipality was sued by developers in connection with proposed subdivisions. At issue in this case were escrowed funds to be used by the city for the improvement of a county road contemplated for annexation with the subdivisions. The appeals court found that the developers were entitled to restitution of the escrowed

money, to prevent unjust enrichment: "Quantum meruit is an equitable remedy grounded in the principle of unjust enrichment, ..." *City of Harker Heights, Texas v. Sun Meadows Land, Ltd.*, 830 S.W.2d 313 (Tex. App. – Austin 1992, no writ). The court further stated:

> Indeed, the principle of unjust enrichment suggests that restitution is an appropriate remedy in circumstances where the agreement contemplated is unenforceable, impossible, not fully performed, thwarted by mutual mistake, or void for other legal reasons.

Id at 319.

In another case, decided in 2001, an auditing firm was held to be entitled to recovery from a city on the basis of quantum meruit. The auditing firm had furnished services in connection with franchise fees owed the city by a telephone company. The auditing firm sued on the basis of both an express contract as well as an implied contract and quantum meruit. The trial court withdrew from consideration the latter basis of recovery, which the appeals court held to be error. Largely at issue in this case was the applicability of the state Professional Services Procurement Act, particularly regarding contingency fee agreements, which are declared void by the Act. The court held that the plaintiff "is entitled to recovery under its quantum meruit claim. To hold otherwise would unjustly enrich Denton." *City of Denton v. Municipal Administrative Services, Inc.*, 59 S.W.3d 764, 772 (Tex. App. – Fort Worth 2001, no pet.).

In another reported case, another appeals court held that a county was liable for paying the cost of publishing a delinquent tax list, notwithstanding the irregularity of the contract. Suit was initiated by taxpayers of Montgomery County against the county treasurer seeking to enjoin payment. The newspaper publication agreement was contested because of the lack of competitive bidding. The court wrote that "Montgomery county cannot, in good conscience, be permitted to dispute the claim of Etheridge for work and labor admittedly performed by him under a contract with its commissioners' court though irregularly made."

> The rule seems to be well established in this state that, when a county has received the benefit of a contract which it had power to make, but which was not legally entered into, it may be compelled to do justice and to pay the consideration, or at least to pay for what it has received under the contract. In such cases it is said the law will imply a contract.

Womack v. Carson, 38 S.W.2d 184, 185 (Tex. Civ. App. – Beaumont 1931), affirmed, 65 S.W.2d 485 (Tex. Comm'n App. 1933, judgm't adopted).

In other early cases, it was held that Fannin County could be liable under quantum meruit for the value of road culverts sold to the county, but without the required statutory bid specifications, and that Liberty County could be liable for the value of gravel used for road construction secured without competitive bids. In the former case, it was found that

competitive bidding procedures were followed after the fact and that the "plaintiff was relegated to a suit against the county upon an implied contract for the reasonable value of the benefits which Fannin County received from the use of these culverts. *Wyatt Medal & Boiler Works v. Fannin County*, 111 S.W.2d 787, 790 (Tex. Civ. App. – Texarkana 1937, writ dism'd.). In the latter case, Liberty County conceded that it would be liable for the reasonable value of gravel "being dumped on the county road" notwithstanding a lack of competitive bidding. *East Texas Const. Co. v. Liberty County*, 139 S.W.2d 669, 670 (Tex. Civ. App. – Beaumont 1940, no writ).

In 1939, a *quantum meruit* judgment against Harris County for the value of wrongfully used gravel was affirmed. A county commissioner had appropriated gravel owned by a railroad company, which the county "converted to its own use and benefit. "[I]mplied knowledge" was imputed to the other members of the commissioners court. The ruling was also premised on the takings clause of the state constitution. *Harris County v. Texas & N.O.C.O.*, 131 S.W.2d 109, 110, 113 (Tex. Civ. App.-Galveston 1939, writ dism'd judgm't cor.)

In a 1948 case, Waller County was found liable for the "plans and specifications for the proposed courthouse" prepared by an architect, who "was entitled to recover in quantum meruit." The underlying contract was found to be an unconstitutional debt. *Waller County v. Freelove*, 210 S.W.2d 602 (Tex. Civ. App.-Galveston 1948, writ ref'd n.r.e.). The county unsuccessfully argued that the architect had constructive notice of the law governing county contracts.

Courts from other states have similarly sanctioned quantum meruit liability of municipalities notwithstanding a lack of statutory competitive bidding. See generally, annotation, *Liability of Municipality on Quasi Contract for Value of Property or Work Furnished Without Compliance With Bidding Requirements*, 33 A.L.R. 3d 1164 (1970).

Attorney General Opinions

In addition to judicial determinations, more than one attorney general has approved the notion of quantum meruit liability of counties, cities, and other local governments in Texas. In a 1967 opinion, the district attorney of Harrison County was advised that the commissioners court could approve a payment for the purchase of road equipment notwithstanding that the county engineer had not supplied his recommendation as required by the Harrison County road law and regulations adopted by the commissioners court under that law. Op. Tex. Att'y Gen. No. M-164 (1967)("[W]here a county receives benefits under a contract not made in conformity with the Constitution or statute of the State, the county will be held liable on an implied contract for the reasonable value of the benefits which the county may have received. [citations].").

In 1974, the district attorney of Jefferson County was advised that the county could be liable for labor and materials supplied to the county asphalt plant as requested by a county commissioner, but without commissioners court or purchasing agent

approval. Op. Tex. Att'y Gen. No. H-482 (1974)("Though the illegal contract cannot be ratified, where a county receives benefits under a contract not made in conformity with the statutes, it is sometimes held liable under a theory of unjust enrichment - - a contract implied in law - - for the value of the benefits received.").

In 1979, the district attorney of Upshur County was advised that a water agreement reached with a subdivision owner by the City of Gilmer without competitive bids would not preclude recovery. Op. Tex. Att'y Gen. No. MW-91 (1979)("Although this contract should have been put out to competitive bids, the provider of materials may be able to recover his costs on a quantum meruit theory.").

In a 1989 letter opinion, the county attorney of Reagan County received an opinion recognizing the possible liability of the county for legal services of a law firm employed by the district attorney's office for the prosecution of appeals. Op. Tex. Att'y Gen. No. LO-89-16 (1989)("A county may not be held liable upon an implied contract or under the theory of quantum meruit unless the commissioners court was authorized to make the contract sought to be implied.").

In a 1989 opinion to the Frio County attorney, the attorney general recognized the possible liability of the county for road emulsion material acquired without requisite competitive bidding. Op. Tex. Att'y Gen. No. JM-1027 (1989)("It would appear, however, as you suggest, that if the county has received the benefits of the contract, even though the contract is void for irregularities, the county could be held liable in quantum meruit for the reasonable value of the benefits received. [citations].").

A 1990 opinion to the Johnson County attorney underscored the requirement that any payment in quantum meruit must be for goods or services that could have been legally contracted for by the county. Op. Tex. Att'y Gen. No. JM-1262 (1990)("Unless the commissioners court had been authorized ab initio to make such a contract no recovery in quantum meruit would have been allowed.").

In Conclusion

A quantum meruit request or demand for payment is a cause of action not unlike a tort claim against the county or a takings claim under article I, section 17 of the Texas Constitution. A quantum meruit demand is separate and apart from the underlying contract, which may be otherwise void and unenforceable. A quantum meruit cause of action does not rely on the contract as a basis for payment, as demonstrated by the cases and opinions discussed above. A demand for a quantum meruit payment from the county is based on a judicial doctrine of equity. Opinion GA-247 mischaracterizes quantum meruit compensation as "quantum meruit payments on a contract." Rather, any payments are based in equity, and not on a contract.

Any payments approved by the commissioners court do not require a lawsuit and judicial order to the county to pay. None of the above authority has so held. Such claims should be subject to settlement without suit just like any other claim against the county. A

county is authorized to pay a valid quantum meruit claim without awaiting a final judgment for such claim.