No. 14-25-00161-CV

In the Court of Appeals for the Fourteenth District of Texas

TEXAS MATERIALS GROUP, INC.,
Appellant
v.

HARRIS COUNTY, TEXAS;
LINA HIDALGO, COUNTY JUDGE;
RODNEY ELLIS, COMMISSIONER, PRECINCT 1;
ADRIAN GARCIA, COMMISSIONER, PRECINCT 2;
TOM S. RAMSEY, P.E., COMMISSIONER, PRECINCT 3;
LESLEY BRIONES, COMMISSIONER, PRECINCT 4
Appellees

Appeal from the 125th District Court, Harris County, Texas
Trial Court Case No. 2024-79911

BRIEF OF APPELLEES

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ORAL ARGUMENT NOT REQUESTED

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County Judge Lina Hidalgo

Commissioner Rodney Ellis

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STATEMENT REGARDING ORAL ARGUMENT

In accordance with Texas Rules of Appellate Procedure 38.1(e), 39.1, and 39.7, Appellees do not request oral argument. The facts and legal arguments are adequately presented in the briefs, and the decisional process would not be significantly aided by oral argument because this case involves the undisputed facts and the straightforward determination of jurisdiction and immunity.

RECORD AND PARTY REFERENCES AND CITATIONS

Appellees use the following references, with specific page numbers in brackets, unless otherwise noted.

Record References

The Clerk's record consists of one volume, referenced as follows:

Clerk's Record, filed April 2, 2025	C.R. [page]

The Report's record consists of one hearing, referenced as follows:

Reporter's Record for hearing held December 6, 2024	R.R. [page]

STATEMENT OF THE CASE

Nature of the case: In 2023, Harris County adopted a Contractor Safety Policy requiring that contractors found by the Occupational Safety and Health Administration to have committed a Serious, High Gravity violation wait three years before bidding on certain public works projects valued over $500,000. This policy was adopted under Tex. Gov't Code § 2269.055, which permits counties to consider a contractor's safety record, proposed personnel, experience, and reputation when evaluating their bids. Texas Materials received at least four adjudicated Serious, High Gravity citations in the prior three years, which disqualified it from two Harris County bids.

Course of proceedings: Texas Materials filed the underlying suit and a First Amended Petition to stop Harris County from moving forward with two projects based on its disagreement with the Safety Policy. It also sought declaratory relief and attorney's fees. Harris County filed a plea to the jurisdiction and supplemental plea to the jurisdiction.

Trial Court Disposition: After oral argument, the district court granted Harris County's plea to the jurisdiction on December 6, 2024. C.R. 817. Texas Materials filed a motion for reconsideration, which was denied.

STATEMENT OF JURISDICTION

For the reasons explained in the Brief below, Appellees contend that the Legislature has not waived immunity from suit in this case and that the courts lack jurisdiction over this claim. However, Appellees agree that this Court has jurisdiction to make that determination.

RESPONSE TO ISSUES PRESENTED

Appellees respectfully suggest that the following more accurately reflects the issues presented in this case:

1. Did the district court properly grant Harris County's plea to the jurisdiction for Texas Materials Group's claims under Chapter 262 of the Local Government Code and Chapter 2269 of the Texas Government Code when Texas Materials failed to conclusively show that the Texas Legislature waived immunity under these circumstances?

2. Did the district court properly grant Harris County's plea to the jurisdiction under the State Equal Protection Clause and Uniform Declaratory Judgment Act when Texas Materials failed to plead a claim or establish a waiver of jurisdiction under these provisions?

3. Did the district court properly deny Texas Materials' motion for reconsideration when it had no new evidence or arguments, and nothing changed the underlying analysis?

4. Did the district court properly deny Texas Materials' request to file a third petition when it would have been futile and Texas Materials failed to explain how an amendment could save its case?

TO THE HONORABLE JUSTICES:

Appellees Harris County, Texas, Lina Hidalgo, County Judge, Rodney Ellis, Commissioner, Precinct 1, Adrian Garcia, Commissioner, Precinct 2, Tom S. Ramsey, P.E., Commissioner, Precinct 3, and Lesley Briones, Commissioner, Precinct 4, respectfully represent:

STATEMENT OF THE FACTS

I. Facts

Texas counties provide their residents with essential public works such as roads, buildings, and parks. To accomplish this, the Legislature grants county commissioners courts the authority to enter into contracts with vendors who best meet the counties' needs based on criteria in Texas Government Code chapter 2269.

Section 2269.055 permits a county to award contracts based on, *inter alia*, the offeror's safety record, proposed personnel, and experience and reputation. Tex. Gov't Code § 2269.055. To objectively evaluate these criteria, Harris County adopted a Contractor Safety Record Policy on January 10, 2023 that requires contractors and subcontractors bidding for certain contracts to certify that they have a good safety record. C.R.51-70. In particular, contractors must certify they have "not been sanctioned with an OSHA [Occupational Safety and Health Administration] Citation and Notification of Penalty classified as . . . (1) 'Serious'

with a Gravity finding of 'High' within the last three years." C.R.56-57.

This Safety Policy was based on the Harris County Commissioners Court's finding that 5,000 working people are killed on the job each year and nearly three million suffer a serious injury or illness. C.R.54. In 2020, these injuries resulted in $163.9 billion in total costs and 99 million lost days of work. C.R.54. The Commissioners Court found that hiring safe contractors would "substantially improve the quality of Harris County construction projects by reducing direct and indirect costs, minimizing employee absences and other time lost as a result of injury, and increase productivity." C.R.54. The Commissioners Court also found this policy was likely to result in higher quality work for the County. C.R.54.

The Safety Policy applies only to work contracts put out for bid after March 1, 2023 with a contract value of $500,000 or more and procured under Texas Government Code Chapter 2269. C.R.54. The Policy requires contractors to answer a Safety Record Questionnaire (C.R.61-63) and advises them that the County has the right to verify these responses and deem a bid "nonresponsive" if the contractor answers falsely. C.R.59-60.

In 2023, Harris County sought bids for projects around the county. Texas Materials Group, Inc. ("Texas Materials") was the lowest bidder on two of these projects. The first was to rehabilitate Van Road in the northeast part of the county.

The second was to improve drainage in the Timberlake Estates subdivision in the northwest part of the county. C.R.47.

On July 26, 2024, Texas Materials submitted a Safety Record Questionnaire for each of these two bids. The second of five questions asked it to certify whether it received any "Serious" OSHA violations within the last three years that met certain criteria—including being "High Gravity." C.R.79-82; C.R.95-98.

The "Severity" and "Gravity" of OSHA violations are terms of art explained in the April 14, 2020 United States Department of Labor issued Directive Number CPL 02-00-164 ("OSHA Instruction"). C.R.118-126. That directive defines a Gravity of Violation based on the "severity of the injury or illness which could result from the alleged violation" and the "probability that an injury or illness could occur as a result of the alleged violation." C.R.121. A "High Severity" means that the violation risks "[d]eath from injury or illness; injuries involving permanent disability; or chronic, irreversible illness." C.R.121. The OSHA Instruction includes a table showing that an OIS Code of 10 indicates a matter has a High Severity and High Gravity:

Table 6-1: Serious Violations

Severity	Probability	Gravity	OIS Code
High	Greater	High	10
Medium	Greater	Moderate	5
Low	Greater	Moderate	5
High	Lesser	Moderate	5
Medium	Lesser	Moderate	5
Low	Lesser	Low	1

C.R.123.

For both bids, Texas Materials answered the following question as "True":

CERTIFICATION TWO

The Contractor, or the firm, corporation, partnership, or institution represented by the Contractor, has ***not*** been sanctioned with an OSHA Citation and Notification of Penalty classified as one of the following types (if the OSHA Citation is contested, then its classification is based on the Settlement with OSHA or OSHA Final Order) within the three (3) years preceding the date of this certification: (1) "Serious" with a Gravity finding of "High" (2) "Willful or Repeated"; (3) "Failure to Abate"; (4) "Posting Requirements" with a Gravity finding of "High".

TRUE _x_ FALSE ____ [1]

[1] Certification Two for the Van Road bid is at C.R.79-80 and Certification Two for the Timberlake bid is at C.R.95-96 (footnotes in original text omitted).

Texas Materials waived any confidentiality to its OSHA records and certified that it understood Harris County would investigate its answers:

> I am aware that the information I have provided in this Safety Record Questionnaire will be investigated, with my full permission, and that any misrepresentations or omissions may cause my bid to be rejected or the County to pursue any of the remedies found in Section VIII of the Safety Record Policy.
>
> 
> Signature
>
> July 26, 2024
> Date [2]

While reviewing the bids, Harris County learned from the official OSHA government website that Texas Materials had at least four "Serious" citations from OSHA with gravity findings of "10" (High Gravity) that were closed matters for which OSHA made a final finding and Texas Materials had no right to appeal:

[2] The verification for the Van Road bid is at C.R.82 and the verification for the Timberlake bid is at C.R.98.

Violation Detail

Standard Cited: 19101053 C

Inspection Nr: 1678809.015
Issuance Date: 10/30/2023
Report ID: 0626600
Citation: 01005A
Nr Instances: 1
Contest Date:
Citation Type: Serious
Nr Exposed: 1
Final Order: 12/01/2023
Abatement Date: 04/29/2024 2
Related Event Code (REC): C
Emphasis:
Initial Penalty: $9,844.00
Gravity: 10
Current Penalty: $6,890.80

Penalty and Failure to Abate Event History

Type	Latest Event	Event Date	Penalty	Abatement Due Date	Citation Type	Failure to Abate Inspection
Penalty	I: Informal Settlement	12/01/2023	$6,890.80	04/29/2024	Serious	
Penalty	Z: Issued	10/30/2023	$9,844.00	11/17/2023	Serious	

C.R.106 (Citation 01005A) (emphasis added).

Violation Detail

Standard Cited: 19101053 F01

Inspection Nr: 1678809.015
Issuance Date: 10/30/2023
Report ID: 0626600
Citation: 01005B
Nr Instances: 1
Contest Date:
Citation Type: Serious
Nr Exposed: 1
Final Order: 12/01/2023
Abatement Date: 04/29/2024 2
Related Event Code (REC): C
Emphasis:
Initial Penalty: $0.00
Gravity: 10
Current Penalty: $0.00

Penalty and Failure to Abate Event History

Type	Latest Event	Event Date	Penalty	Abatement Due Date	Citation Type	Failure to Abate Inspection
Penalty	I: Informal Settlement	12/01/2023	$0.00	04/29/2024	Serious	
Penalty	Z: Issued	10/30/2023	$0.00	11/17/2023	Serious	

C.R.107 (Citation 01005B) (emphasis added).

Violation Detail

Standard Cited: 19101053 D03 IV

Inspection Nr: 1678809.015
Issuance Date: 10/30/2023
Report ID: 0626600
Citation: 01006A
Nr Instances: 1
Contest Date:
Citation Type: Serious
Nr Exposed: 1
Final Order: 12/01/2023
Abatement Date: 04/29/2024 2
Related Event Code (REC): C
Emphasis:
Initial Penalty: $9,844.00
Gravity: 10
Current Penalty: $9,844.00

Penalty and Failure to Abate Event History

Type	Latest Event	Event Date	Penalty	Abatement Due Date	Citation Type	Failure to Abate Inspection
Penalty	I: Informal Settlement	12/01/2023	$9,844.00	04/29/2024	Serious	
Penalty	Z: Issued	10/30/2023	$9,844.00	11/17/2023	Serious	

C.R.108 (Citation 01006A) (emphasis added).

Violation Detail

Standard Cited: 19101053 F02 I

Inspection Nr: 1678809.015
Issuance Date: 10/30/2023
Report ID: 0626600
Citation: 01006B
Nr Instances: 1
Contest Date:
Citation Type: Serious
Nr Exposed: 1
Final Order: 12/01/2023
Abatement Date: 04/29/2024 2
Related Event Code (REC): C
Emphasis:
Initial Penalty: $9,844.00
Gravity: 10
Current Penalty: $0.00

Penalty and Failure to Abate Event History

Type	Latest Event	Event Date	Penalty	Abatement Due Date	Citation Type	Failure to Abate Inspection
Penalty	I: Informal Settlement	12/01/2023	$0.00	04/29/2024	Serious	
Penalty	Z: Issued	10/30/2023	$9,844.00	11/17/2023	Serious	

C.R.109 (Citation 01006B) (emphasis added).

Citations 1005A, 1005B, 1006A, and 1006B stem from a July 25, 2023 incident where Texas Materials exposed its employees to airborne concentrations of respirable crystalline silica at 75 ug/m3 over an eight-hour time-weighted average. This is 150% of the allowed level. C.R.106-109. Further, when Texas Materials learned about the exposure, it "did not repeat such monitoring within three months of the most recent monitoring" as required. C.R.106-109. This violated 29 CFR 1910.1053(c), 29 CFR 1910(f)(1), 29 CFR 1910.1053(d)(3)(iv), and 29 CFR 1910.1052(f)(2)(i). C.R.106-109.[3]

Because Texas Materials' safety record fell below the standard required by the Safety Policy, Harris County deemed the bids "nonresponsive." C.R.47-49. This disqualified Texas Materials from bidding on County projects until three years after the closure of its most recent OSHA Serious violation with High Gravity. C.R.105.

Texas Materials appealed this decision to the Harris County Economic Equity and Opportunity Department.[4] First, Texas Materials argued that at the time it

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[3] While it is not in the record, the official OSHA website shows that Texas Materials had five serious citations issued on October 30, 2023 and five non-serious citations. OSHA assessed penalties of $53,439, which Texas Materials negotiated to $37,126. See "Inspection: 1678809.015" at https://www.osha.gov/ords/imis/establishment.inspection_detail?id=1678809.015 (retrieved May 24, 2025).

[4] Section IX of the Safety Policy provides contractors an opportunity to appeal bid decisions to the Harris County Economic Equity and Opportunity Department (identified in the Policy by the acronym DEEO ("Department of Economic Equity and Opportunity")). C.R.60.

completed the Safety Questionnaire, some of the OSHA violations were on appeal. However, OSHA had upheld those violations by the time Texas Materials appealed to the Harris County Economic Equity and Opportunity Department. C.R.104.

Second, Texas Materials argued that because it negotiated a lower monetary penalty with OSHA, its violations should not be defined as "High Gravity." Estella Gonzalez, Executive Director of the Harris County Economic Equality and Opportunity Department, responded to Texas Materials by explaining:

> **Definition of Gravity and its Relation to Monetary Penalties:** Monetary penalties do not define the "high gravity" classification. Penalties are only a starting point for OSHA to assess fines, which fluctuate over time due to factors irrelevant to the Policy, such as company size or violation history. "High Gravity" refers to violations with both "High" severity—indicating death, permanent disability, or irreversible illness—and "Greater" probability, meaning the likelihood of injury or illness is relatively high. These violations carry an "OIS Code" of "10," as reflected in Exhibit A, which lists four such penalties.

C.R.104-105; C.R. 111-112.

Third, Texas Materials argued it should not be responsible for these violations because they were committed by a different department within its company. Ms. Gonzalez explained:

> **Texas Materials Group's Civil Construction Group:** The fact that the violations pertain to one of your concrete facilities, rather than your civil construction group, does not exempt your company from the Policy. The Policy does not distinguish between departments within your organization.

C.R.105; C.R.112.

The Harris County Economic Equity and Opportunity Department then invited Texas Materials to provide documentation to dispute the OSHA findings or show a different gravity for the citations; however, Texas Materials failed to do so. C.R.48. At oral argument on Harris County's plea to the jurisdiction, Texas Materials claimed that despite certifying that it complied with Harris County's Safety Policy and that it had no high gravity citations (C.R.79-80; C.R.95-96), it was not familiar with the Policy and "had no reason to even know that a gravity of a penalty meant anything." R.R.7.

Harris County did not penalize Texas Materials for making a false statement, but it advised Texas Materials to mark "False" for Certification No. 2 on the Safety Contractor Record Questionnaire until October 30, 2026.[5] The Harris County Commissioners Court awarded the Van Road contract to Hayden Paving, Inc. C.R. 127. The Commissioners Court chose not to move forward with the Timberlake drainage project and withdrew its request for bids. C.R.135.

[5] C.R.105; C.R.112. While not in the record, the OSHA website shows two new citations issued on February 23, 2024, which may further impact Texas Materials' ability to bid on contracts. See https://www.osha.gov/ords/imis/establishment.inspection_detail?id=1719550.015 (retrieved May 24, 2025).

II. Procedural History

On November 12, 2024, Texas Materials sought a temporary restraining order and injunction to stop Harris County from completing these projects, declaratory relief, and attorney's fees. C.R.4-18. The district court denied the temporary restraining order and set a hearing for the temporary injunction on November 22, 2024. C.R.19-20. The hearing was reset to December 6, 2024. C.R.21-27.

On November 27, 2024, Harris County filed a plea to the jurisdiction. C.R.28-141. On December 3, 2024, Appellees[6] answered the suit, subject to the plea to the jurisdiction. C.R.142-146. On December 4, 2024, Harris County responded to Texas Materials' Application for Temporary Injunction. C.R.147-792.

On December 5, 2024, Texas Materials filed a First Amended Petition asking for an injunction to stop Harris County from completing these projects, declaratory relief, a declaration that any contracts awarded to other vendors is void, and a declaration that the Safety Policy is "improper and/or arbitrary." C.R.793-808. This live pleading contains claims under Local Government Code Chapter 262, Texas Government Code Chapter 2269, the Equal Protection Clause of the Texas

[6] The procedural history differentiates between pleadings filed by Appellees and those by Harris County. As explained in Section II of the Argument below, the individuals were sued in their official capacities, and Harris County is the only actual defendant/appellee.

Constitution, and the Uniform Declaratory Judgment Act. C.R.793-808.

Harris County supplemented its plea to the jurisdiction and asserted that Texas Government Code Chapter 2269 governs, and the Legislature has not waived immunity under that act, Chapter 262, the Uniform Declaratory Judgment Act, or Equal Protection Clause under these circumstances. C.R.809-816.

On December 6, 2024, the Honorable Kyle Carter conducted a hearing and granted Harris County's plea to the jurisdiction. C.R.817. On January 6, 2025, Texas Materials moved for reconsideration, or alternatively, for a new trial or to file a Second Amended Petition. C.R.825-842. Harris County responded on January 16, 2025 (C.R.843-859) and Texas Materials replied on January 20, 2025. C.R.860-870.

On March 4, 2025, Texas Materials filed a notice of appeal. C.R.874-876. On March 7, 2025, the district court denied Texas Materials' motion for reconsideration. C.R.879. On April 11, 2025, this Court issued a Notice of Dismissal advising that it lacked jurisdiction to consider Texas Materials' appeal because the notice was untimely. On April 18, 2025, Texas Materials responded.[7]

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[7] Appellees do not dispute that the district court's grant of Harris County's plea to the jurisdiction is a final judgment, rather than an interlocutory appeal. See *Saifi v. City of Texas City*, No. 14-13-00815-CV, 2015 WL 1843540, at *2-3 (Tex. App.—Houston [14th Dist.] Apr. 23, 2015, no pet.).

SUMMARY OF THE ARGUMENT

Procurement statutes such as Tex. Gov't Code § 2269.055(5) authorize Harris County to consider a contractor's safety record when evaluating bids and provides it with discretion in how to do so. Harris County created an objective policy to screen contractors based on their OSHA violation history, and Texas Materials failed that screening because of multiple serious, high gravity OSHA violations with an OIS code of 10 in the last few years. Rather than take steps to avoid these violations so it can comply with this policy in the future, Texas Materials asks this Court to rewrite the policy and circumvent Harris County's concerns about its safety record.

The Legislature has not authorized courts to do this, and they lack jurisdiction to veto commissioners courts' policies or micromanage counties' contract decisions. The cases cited by Texas Materials either establish the lack of jurisdiction in similar cases or involve local government steering a contract to a particular vendor based on favoritism. Texas Materials does not plead any facts to suggest favoritism, and its first issue for review fails because the Legislature has not waived immunity for its claims under Texas procurement statutes.

In its second issue for review, Texas Materials confuses the burdens of proof and asserts that Harris County had a duty to anticipate arguments never pleaded and provide facts to refute those arguments. The burden is on the plaintiff to show the

Legislature waived immunity in a particular case. *Town of Shady Shores v. Swanson*, 590 S.W.3d 544, 550 (Tex. 2019).

The parties submitted undisputed jurisdictional evidence about what the Harris County Safety Policy requires and that Texas Materials violated it. Nothing else is relevant to determine jurisdiction. When a court has the facts necessary to resolve a jurisdictional question, it should do so. See, *Texas Department of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004); *University of Texas v. Poindexter*, 306 S.W.3d 798, 806 (Tex. App.—Austin 2009, no pet.).

In its third issue, Texas Materials claims the trial court improperly denied its motion for reconsideration. A motion for reconsideration exists to present previously undiscovered evidence and help a trial court avoid error. *Kapur v. Wilcrest Park Townhome Owners' Association, Inc.*, No. 01-22-00564-CV, 2024 WL 2981289, at *4 n. 18 (Tex. App.—Houston [1st Dist. June 13, 2024, pet. denied) (mem op.). Texas Materials' motion did neither—it rehashed old arguments, made untimely new ones, and submitted new arguments disguised as "supplemental evidence."

Texas Materials' final issue is that it should have been permitted to file a Second Amended Petition. Texas Materials never explained to the trial court or on appeal what a Second Amended Petition might say, why it is important, or how it might create jurisdiction.

ARGUMENT

I. Standard of review

A. Standard for a plea to the jurisdiction.

A trial court should determine whether it has jurisdiction at the earliest opportunity before moving on with litigation. *Miranda*, 133 S.W.3d 217 at 226, 229 (Tex. 2004). If a court lacks subject matter jurisdiction, a party may file a plea to the jurisdiction to have the case dismissed. *McLane Champions, LLC v. Houston Baseball Partners* LLC, No. 21-0641, 2023 WL 4306378, at *3 (Tex. June 30, 2023), citing *Buzbee v. Clear Channel Outdoor, LLC*, 616 S.W.3d 14, 22 (Tex. App.—Houston [14th Dist.] 2020, no pet.). A plea to the jurisdiction can challenge (1) the plaintiff's pleadings regarding the allegation of jurisdictional facts or (2) an evidentiary challenge to the existence of jurisdictional facts. *Piney Point Homes, LLC v. Burgess*, No. 14-24-00137-CV, 2025 WL 1162711, at *3 (Tex. App.—Houston [14th Dist.] Apr. 22, 2025, no pet. h.).

A plaintiff has the burden of showing that the trial court has jurisdiction and establishing a waiver of sovereign immunity. *Town of Shady Shores v. Swanson*, 590 S.W.3d 544, 550 (Tex. 2019). If the pleadings negate jurisdiction, a plea to the jurisdiction may be granted without allowing an opportunity to amend. *Miranda*, 133 S.W.3d at 227. An appellate court reviews these findings *de novo*. *Id.* at 226.

B. Standard for evaluating immunity.

Sovereign immunity has two components: immunity from suit and immunity from liability. *City of Houston v. Williams*, 353 S.W.3d 128, 134 (Tex. 2011), citing *General Services Commission v. Little–Tex Insulation Co.,* 39 S.W.3d 591, 594 (Tex. 2001). The State retains immunity from suit unless the Legislature expressly waived it for a particular claim. *Federal Sign v. Texas State University,* 951 S.W.2d 401, 405 (Tex.1997) (superseded by statute on other grounds). Even when the Legislature gives consent to sue, public entities are still shielded from judgments based on immunity from liability. *Little–Tex,* 39 S.W.3d at 594.

When a statute purportedly waives immunity, "special rules of construction apply, as the Legislature has mandated that no statute should be construed to waive immunity absent 'clear and unambiguous language.'" *State v. Oakley*, 227 S.W.3d 58, 62 (Tex. 2007). Typically, this requires the Legislature to use "magic words" such as stating that "sovereign immunity to suit is waived." *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 696-97 (Tex. 2003). Only on "rare occasions" will the Supreme Court find that the Legislature waived immunity without these "magic words." *Id.* In those cases, a plaintiff has a heavy burden to show:

(1) that the statute waives the State's immunity "beyond doubt",

(2) if there is any ambiguity, the court must find no waiver of immunity, and

(3) if a statute waives immunity, it should also have "simultaneous measures to insulate public resources from the reach of judgment creditors." See, e.g., Tex. Civ. Prac. & Rem. Code §§ 101.023-024; Tex. Gov't Code §§ 554.003, 2007.023.

Taylor, 106 S.W.3d at 697.

It is not enough for a statute to permit individuals and public entities to "sue and be sued," "plead and be impleaded," "prosecute and defend," "defend or be defended," "answer and be answered," or "complain and (or) defend." Although these words may appear to waive immunity, they do not unless there is strong supporting context. As the Supreme Court explains:

> Scores of Texas statutes provide, variously, that individuals and entities, public and private, may "sue and (or) be sued", "(im)plead and (or) be impleaded", "be impleaded", "prosecute and defend", "defend or be defended", "answer and be answered", "complain and (or) defend", or some combination of these phrases, in court. The phrases are also used in municipal charters and ordinances and in corporate articles and bylaws. Read in context, they sometimes waive governmental immunity from suit, sometimes do not, and sometimes have nothing whatever to do with immunity, referring instead to the capacity to sue and be sued or the manner in which suit can be had (for example, by service on specified persons). Because immunity is waived only by clear and unambiguous language, and because the import of these phrases cannot be ascertained apart from the context in which they occur, we hold that they do not, in and of themselves, waive immunity from suit.

Tooke v. City of Mexia, 197 S.W.3d 325, 328-29 (Tex. 2006).

II. The claims against the Harris County commissioners and county judge are claims against the County.

Texas Materials filed suit against Harris County and its commissioners and county judge. These employees are identified by their titles, and the claims against them are based on their official capacities as county officials.

An official capacity suit is "a suit against the municipality the official represents." *Gomez v. Housing Authority of the City of El Paso*, 148 S.W.3d 471, 482 (Tex. App.—El Paso 2004, pet. denied). See also, *San Jacinto County v. Nunn*, 203 S.W.3d 905, 906 n.1; *Hallmark v. City of Fredericksburg*, 94 S.W.3d 703, 708 (Tex. App.—San Antonio 2002, pet. denied); *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985); *Esteves v. Brock*, 106 F.3d 674, 677 (5th Cir. 1997); *Franka v. Velasquez*, 332 S.W.3d 367, 382–83 (Tex. 2011) ("Generally, a government employee sued in his official capacity has the same governmental immunity, derivatively, as his government employer.")

Thus, Harris County is the only defendant in this case, and the parties and district court treated this claim as if it were against only Harris County. See Plea to the Jurisdiction at C.R.40-41. Texas Materials acknowledges in its April 18, 2025 letter to this Court that the case was dismissed "in its entirety . . . as to all parties and claims." Texas Materials April 18, 2025 Letter at 1-2. Accordingly, this brief addresses claims against Harris County as the sole defendant/appellee.

III. Response to Issue 1: The Texas Legislature did not waive immunity for Texas Materials' statutory claims, and the district court properly granted Harris County's plea to the jurisdiction.

(Response to Texas Materials Brief at 5-16.)

A. Texas Materials failed to show a waiver of immunity because it pled no facts to suggest that commissioners court acted illegally, unreasonably, or arbitrarily in a manner that subjected the public treasury to corruption or incompetence.

When contracting to provide services to their constituents, counties are market participants vested with "the same right, interest, or action that would vest in any other person if the contract had been made with that other person." Tex. Loc. Gov't Code § 262.004. Unless the Legislature has clearly stated otherwise, a public entity may bind "itself like any other party to the terms of agreement. . ." *Jubilee Academic Center, Inc. v. School Model Support, LLC*, No. 04-21-00237-CV, 2022 WL 1479039, at *3 (Tex. App.—San Antonio May 11, 2022, pet. denied), quoting *Tooke v. City of Mexia*, 197 S.W.3d 325, 332 (Tex. 2006). Like private parties, a county may use any criteria to select a vendor as long as the decision does not violate law or public policy. *In re Prudential Insurance Company of America*, 148 S.W.3d 124 (Tex. 2004). This freedom of contract includes the freedom to define the nature and scope of a business relationship in a way that forecloses the imposition by courts of duties inconsistent with the parties' agreement. *Pitts v. Rivas*, No. 23-0427, 2025 WL 568114, at *8 (Tex. Feb. 21, 2025).

To the extent procurement statutes such as Texas Government Code Chapter 262 and Local Government Code Chapter 2269 limit Harris County's ability to contract, they are about "[e]nsuring that taxpayers receive value for contracts awarded by governmental entities and . . . protect[ing] the public treasury from corruption or incompetence," and not about providing a remedy for losing bidders. *City of Dallas v. Gadberry Construction Company, Inc.*, No. 05-22-00665-CV, 2023 WL 4446291, at *5 (Tex. App.—Dallas July 11, 2023, no pet.) (citations omitted). Even if a court disagrees with a county's reasoning, metrics, or choice of contractor, it has no jurisdiction to substitute its judgment for that of a commissioners court. *Schawe v. Caldwell County*, No. 14-23-00243-CV, 2024 WL 3578275, at *3 (Tex. App.—Houston [14th Dist.] July 30, 2024, no pet.) (memo. op.).

A court's jurisdiction is limited to "discerning whether the Commissioners Court acted 'illegally, unreasonably, or arbitrarily.'" *Commissioners Court of Titus County v. Agan*, 940 S.W.2d 77, 80 (Tex. 1997). To avoid dismissal, Texas Materials was required to allege facts showing that Harris County acted illegally, unreasonably, or arbitrarily and subjected the public treasury to corruption or incompetence. *Gadberry*, 2023 WL 4446291, at *5. As shown below, Texas Materials' live pleading alleges only that it disagrees with the metrics Harris County uses to evaluate contractors' safety records. See C.R. 793-808. That is not enough to waive immunity.

B. Chapter 2269 of the Texas Government Code applies to this case.

The County Purchasing Act (Tex. Loc. Gov't Code §§ 262.021, *et seq.*) permits commissioners courts to select one of three options when placing items for bid over $50,000:[8]

> (1) comply with the competitive bidding or competitive proposal procedures prescribed by this subchapter;
>
> (2) use the reverse auction procedure, as defined by Section 2155.062(d), Government Code, for purchasing; or
>
> (3) comply with a method described by Chapter 2269, Government Code.

Tex. Loc. Gov't Code § 262.023(a).[9]

Harris County selected the third option in this case, which is an "alternative contracting procedure for construction projects." 52 Tex. Jur. 3d Municipal Corporations § 379. Once Harris County elected to use this alternative method, § 2269.003 relieved it of any duty to comply with conflicting law relating to the

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[8] It is undisputed that the proposed expenditures on the two bids in this case each exceeded $50,000.

[9] An "item" is broadly defined as "any service, equipment, good, or other tangible or intangible personal property. . ." Tex. Loc. Gov't Code § 262.022(5). An "item" necessarily includes public work contracts because the third bidding option in § 262.023 refers to Texas Government Code chapter 2269, which "[a]pplies to a public work contract made by a governmental entity by state law to make a public work contract. . . " Tex. Gov't Code § 2269.002. Chapter 2269 expressly applies to counties. Tex. Gov't Code § 2269.002 (2)(a).

proposed public work contracts. ("This chapter prevails over any other law relating to a public work contract." Tex. Gov't Code § 2269.003). Texas Materials understood it was bound by Chapter 2269 because it certified compliance with the Contractor Safety Record Policy, which refers to Chapter 2269 at least fifteen times. C.R.72; C.R.74-76; C.R.79; C.R.83.

On appeal, Texas Materials refers to Chapter 262 as the "Permitting Statute" and Chapter 2269 of the Texas Government Code as the "Proxy Statute" and argues that it can bring suit under either. To the contrary, courts must strictly construe the Legislature's waiver of immunity, and the waiver of a right under one chapter cannot waive immunity under another. See, *Zachry Construction Corp. v. Port of Houston Authority of Harris County*, 449 S.W.3d 98, 109 (Tex. 2014); *Securtec, Inc. v. County of Gregg*, 106 S.W.3d 803, 812-813 (Tex. App.—Texarkana 2003, pet. denied) (procurement statutes are not interchangeable and must be analyzed precisely).

Texas Materials has not provided any contrary authority. First, Texas Materials cites *Hudman* for the proposition that "Texas courts have consistently rejected such selective interpretations that allow governmental entities to evade statutory obligations through incomplete or arbitrary compliance with chosen procurement statutes." Texas Materials Brief at 14. However, *Hudman* has nothing to do with procurement statutes. It involved police and firefighters who filed suit

against a city that held an election to repeal collective bargaining rights without obtaining the necessary signatures to call the election. *City of Sherman v. Hudman*, 996 S.W.2d 904 (Tex. App.—Dallas 1999), review granted, judgment vacated, and remanded by agreement, No. 99-0769, 2000 WL 36750990 (Tex. Feb. 3, 2000).

Hudman addressed the question of whether Chapter 174 of the Local Government Code preempted Chapter 277 of the Election Code. The Court concluded there was no preemption or conflict because the two chapters were complementary. The Local Government Code permitted the city to call the election, while the Election Code aided that process by instructing the city how to verify the accuracy of petition signatures for the election. *Hudman*, 996 S.W.2d at 913-914. While the statutes in *Hudman* are read *in pari materia*—with each contributing guidance on how and when to conduct the election—Chapter 2269 of the Texas Government Code provides an "alternate" process that displaces Chapter 262.[10]

Next, Texas Materials cites *Dallas County v. Cedar Springs Investments, L.L.C.* In that case, Dallas County awarded a contract to copy county books and records without following any bid process at all. *Dallas County v. Cedar Springs Investments,*

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[10] Compare Tex. Loc. Gov't Code § 262.027(a) with the eight factors that can be considered under Tex. Gov't Code § 2269.055.

L.L.C., 375 S.W.3d 317 (Tex. App.—Dallas 2012, no pet.). Texas Loc. Gov't. Code § 118.025(g) requires that projects to preserve and restore county records comply with Chapter 262, but Dallas County argued that the vendor it selected was not subject to any procurement rules because it was "vetted on a national scale" through U.S. Communities, a nonprofit cooperative agency. See brief at *Dallas County, Texas and Gtsi Corp., Appellants, v. Cedar Springs Investments, LLC, Business Resources Corporation, and Brown's River Marotti Co.*, Appellees., 2010 WL 3135281, at *2-3.

The appellate court found that Dallas County completely failed to follow section 262.027(a) of the Local Government Code and that the Legislature waived immunity as to that specific provision. *Dallas County v. Cedar Springs Investments, L.L.C.*, 375 S.W.3d at 321 ("The Legislature has waived sovereign immunity to the extent a party seeks to enjoin performance of a contract made in violation of section 262.027(a) of the local government code."). However, this case is distinguished because Harris County never claimed that the procurement process does not apply, and it followed Chapter 2269.

Texas Materials concedes that its Chapter 262 claim depends on showing that Harris County "arbitrarily or improperly applied the Proxy Statute [Chapter 2269]." Texas Materials Brief at 14. As shown below, Harris County complied with both Chapter 2269 (which resolves this case) and Chapter 262.

C. The Legislature did not waive immunity under Chapter 2269 under these circumstances.

For Texas Materials to show that the Legislature waived immunity under Chapter 2269, it must first show that Harris County violated Chapter 2269. Chapter 2269 requires that public works contracts be awarded to the "lowest responsible bidder." Tex. Gov't Code § 2269.101. In determining who is a responsible bidder:

> . . . the governmental entity may consider:
>
> (1) the price;
> (2) the offeror's experience and reputation;
> (3) the quality of the offeror's goods or services;
> (4) the impact on the ability of the governmental entity to comply with rules relating to historically underutilized businesses;
> (5) the offeror's safety record;
> (6) the offeror's proposed personnel;
> (7) whether the offeror's financial capability is appropriate to the size and scope of the project; and
> (8) any other relevant factor specifically listed in the request for bids, proposals, or qualifications.

Tex. Gov't Code § 2269.055.[11]

Harris County exercised its authority to evaluate contractors under Tex. Gov't Code § 2269.055(a)(2) (experience and reputation), (a)(5) (safety record), and (a)(6) (proposed personnel) by creating its Safety Policy. This decision was made after

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[11] Chapter 262 also permits a county to consider a bidder's safety record when determining whether the bidder is offering the best responsible bid. See, Tex. Loc. Gov't Code § 262.0275.

Harris County Commissioners Court found that hiring safe contractors would substantially improve the quality of public works projects and reduce the cost of injury and lost productivity. C.R.54. To act as a good steward of the public fisc and set consistent standards, Harris County adopted an objective metric to disqualify contractors with recent, serious, high-gravity OSHA violations, as defined by an OSHA OIS code of 10.[12]

Texas Materials never pleaded that Harris County corruptly created or implemented the Safety Policy to steer business away from the most qualified contractor based on favoritism, or that Harris County subjected the public treasury to corruption or incompetence. See *Gadberry*, 2023 WL 4446291, at *5. Texas Materials simply disagrees with the Safety Policy and asks this Court to force the County to stop using OSHA's OIS Code and rely instead on the amount of money a contractor ultimately pays in fines. Texas Materials Brief at 6-7. That is precisely the kind of micromanaging of county contracts that courts lack jurisdiction to do.

It does not matter whether Texas Materials agrees with OSHA's OIS codes, because Harris County has the right to reasonably reach its own conclusions about its contractors' safety records. Even without the Safety Policy, Harris County could have determined that Texas Materials' four serious OSHA violations disqualified it

[12] See table on page 4, *supra*.

as a responsible bidder under Tex. Gov't Code § 2269.055(5) in a county that values hiring safe contractors. C.R.123; C.R.104-105; C.R.106-109; C.R.111-112.

Assuming, *arguendo*, that the Court had jurisdiction to veto Harris County's Safety Policy and allow Texas Materials to rewrite it, that would be a grave mistake that renders § 2269.055 meaningless and places local government at the mercy of contractors. As Harris County explained during the bidding process, OSHA fines are fluid and negotiable, which makes them unsuitable to evaluate the gravity of a violation. OIS codes are more reliable because they are based on the risk that the violation poses, rather than the other factors that determine a final fine.[13]

It is not illegal, unreasonable, or arbitrary to use the OSHA OIS chart to help evaluate a contractor's safety record, and Harris County applied this metric equally to all bidders. The Legislature has not authorized courts to rewrite county safety policies to use the criteria favored by a particular contractor, and Texas Materials failed to plead facts sufficient to show a clear waiver of immunity.

Texas courts have held that the Legislature has not waived immunity under

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[13] C.R.104-105; C.R. 111-112. Texas Materials' own evidence establishes that OSHA monetary penalties are often based on factors other than the severity or gravity of the violation. See, e.g., Texas Materials' OSHA document discussing the flexibility that a director has in suggesting a penalty, such as permitting a penalty of $14,502 for a non-serious violation if a director "determines that it is appropriate to achieve the necessary deterrent effect." C.R.238.

chapter 2269 even when a public entity lacks an objective policy such as Harris County's Safety Policy and rejects a low bid based on ambiguous criteria such as the government's perception of the bidder's experience. In *Gadberry*, the City of Dallas and Texas Department of Transportation received bids from six contractors to construct a series of walking trails called the Hi Line Connector Trail. *Gadberry*, 2023 WL 4446291, at *1. The bid documents reserved the City's right to reject a bid if it believed a contractor lacked the necessary experience to complete a project and reserved the right to research the contractor's finances, equipment, personnel, and experience. *Id.*

While Gadberry Construction Company had the lowest bid, Dallas rejected Gadberry's bid because the company had limited experience on trail projects. *Id.* Gadberry—like Texas Materials—protested the decision and claimed it was "unaware of the addendum and its requirement to demonstrate relevant, equivalent experience on projects within the last three years" and "if it had known of this requirement, it would have submitted additional information to demonstrate its suitability." *Id.*, 2023 WL4446291, at *2.

This mirrors the arguments made by Texas Materials. At oral argument on Harris County's plea to the jurisdiction, Texas Materials represented:

> . . . Texas Materials had no reason to even know that a gravity of a penalty meant anything. Now, going forward from this day . . . they

> would have an understanding they know when they were cited by OSHA that they needed to address this issue. Nobody knew it at the time. And so these citations happened at a time that they weren't aware of the policy . . . however, they didn't know that the policy existed. They didn't know that they needed to be looking at this issue of gravity because nobody ever heard of it.[14]

Texas Materials' ignorance of Harris County's Safety Policy is irrelevant and contradicted by the record. Texas Materials received bid documents explaining the criteria used to award the bids, and those documents "cautioned contractors" that their bids could be rejected if they received an OSHA citation of high gravity within the prior three years. See C.R.59-62; *Gadberry*, 2023 WL 4446291, at *7.

Gadberry—like Texas Materials—was invited to submit additional information to appeal the rejection of its bid. Gadberry provided a list of nearly 40 additional projects it completed, but Dallas determined this was still not enough. *Gadberry*, 2023 WL4446291, at *2. In contrast, Texas Materials submitted no additional documents to Harris County's Department of Economic Equality and Opportunity and does not dispute that the OSHA violations occurred. C.R.48.

Gadberry filed suit claiming that because it was the lowest bidder and had

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[14] R.R.7-8. Texas Materials was certainly aware of this policy when it certified that it had complied with it prior to submitting the two bids at issue in this case. See, C.R.79-80; C.R.95-96.

extensive experience, Dallas's award violated Chapter 2269 of the Texas Government Code and that it was entitled to injunctive relief under Chapter 252 of the Texas Local Government Code. The district court granted Gadberry a temporary injunction, and Dallas appealed. *Gadberry*, 2023 WL4446291, at *3.

The Dallas Court of Appeals held that the Legislature did not waive immunity unless there was evidence of "graft, cronyism, or other unlawful purpose":

> Thus, before immunity will be waived for alleged violations of the lowest responsible bidder process, we have usually insisted on allegations and evidence that the governing body's procurement power was used illegally or fraudulently. "It is only in cases of very extreme and arbitrary conduct on the part of the [government] that the courts are authorized to lay hands on" this facet of the procurement process and interfere with the sound exercise of governmental discretion. *See Sterrett*, 240 S.W.2d at 519. As we interpret lowest responsible bidder provisions, only evidence of a governing body's abuse of its discretion to reject bids will waive its immunity. If indicia of graft, cronyism, or other unlawful purpose are absent, and if the record otherwise supplies some rational basis for the decision, a court should not interfere in the governing body's decision to reject a bid under Texas Local Government Code section 252.043(f).

Gadberry, 2023 WL 4446291, at *6.

Texas Materials does not plead facts to suggest "graft, cronyism, or other unlawful purpose." *Id.* Harris County canceled one of the two bids that Texas Materials lost, and there are no facts to suggest that the other bid was awarded based on anything other than Harris County's good-faith belief that the other contractor had a better safety record.

Last year, this Court considered another case where a losing bidder failed to meet the high burden of establishing jurisdiction in a procurement claim. In *Schawe*, Caldwell County sought bids for a road construction project. This case was analyzed under Chapter 262—rather than Chapter 2269—but the result was the same.

The two lowest bids were rejected, and the company whose bid was accepted failed to follow the County's bidding process because its Statement of Bidder Qualifications was not notarized. *Schawe*, 2024 WL 3578275, at *4 (Tex. App.—Houston [14th Dist.] July 30, 2024, no pet.). This Court held that Caldwell County's failure to require the high bidder to submit a notarized statement was a county requirement, rather than one mandated by statute, and "is not sufficient to establish jurisdiction under the County Purchasing Act." *Schawe*, at *4. Similarly, this Court lacks jurisdiction to force Harris County to interpret its own policy regarding OSHA violations in a way that Texas Materials prefers.

The unsuccessful bidder in *Schawe* also claimed Caldwell County failed to follow its own policies by not providing clear justification for rejecting the bid. Caldwell County's reasons included vague findings of an "inadequate credit limit," "concerns about equipment availability with multiple project sites and other ongoing projects," and "limited years in business (4 years)." *Schawe*, at *5. This Court held:

> The County Purchasing Act does not require that 'clear justifications' be provided when the lowest-priced bidder is rejected—rather, the Act

> mandates only that a contract be awarded to "the responsible bidder who submits the lowest and best bid." The "lowest and best bid" is defined as the bid that "provide[s] the best value considering associated direct and indirect costs. . . "

Schawe, 2024 WL 3578275, at *5.

Although Harris County was not required to give Texas Materials "clear justification" for rejecting its bid, it did. One of Texas Materials' central arguments is that it did not understand the concept of a high gravity OSHA violation or the OSHA OIS Code. R.R.7. Texas Materials admits that it now understands and knows how to remain eligible to bid on Harris County public works projects. R.R.7-8. Thus, it does not need "judicial clarification" of this policy. See Texas Materials Brief at 12.

D. The Legislature did not waive immunity under Chapter 262 under these circumstances.

Assuming, *arguendo*, that Chapter 262 of the Local Government Code controlled, this Court would still lack jurisdiction because Texas Materials has not alleged any facts to suggest that Harris County violated any provision of this chapter.

Section 262.007(a)(1) of the Purchasing Act requires counties to accept the "responsible bidder who submits the lowest and best bid." The Texas Constitution establishes commissioners courts as the governing bodies to determine which bidders are responsible and which bids are best using factors such as the contractor's safety record. See Tex. Loc. Gov't Code § 262.0275; *Commissioners Court of Titus*

County v. Agan, 940 S.W.2d 77, 79 (Tex. 1997).

Tex. Loc. Gov't Code § 262.0275 provides commissioners courts guidelines to evaluate contractor safety records. Although Chapter 262 does not apply to this case, Harris County would have easily met its requirements. A county must have written criteria to determine a bidder's safety record (which Harris County would have satisfied with its Safety Policy at C.R.51-70), notice to prospective bidders that their safety record may be considered (which Harris County would have satisfied by sending documents to bidders in the record at C.R.79-82 and C.R.95-98), and the county's determinations should not be arbitrary or capricious. For the reasons explained, *supra*, it is not arbitrary or capricious to rely on a company's history of OSHA safety violations to evaluate its safety record or to use the OSHA OIS codes to do so. C.R.123. Further, Harris County provided Texas Materials the opportunity to respond to the County's findings and provide additional evidence, but it declined to do so. C.R.48.

Texas Materials' cases are inapposite because they involve disputes governed by either Local Government Code Chapters 262 or 271 and contain facts very different from the ones at bar. To the extent these cases are relevant, they support Harris County's position. In *Labrado*, El Paso County sought two bids for transportation services under Chapter 262. LULAC Project Amistad, Inc. was the

lowest bid on both projects. El Paso County accepted, even though LULAC did not meet the essential requirements of the bid, such as owning a garage to maintain vehicles or having the necessary state license. *Labrado v. County of El Paso*, 132 S.W.3d 581 (Tex. App.—El Paso 2004, no pet.).

The unsuccessful bidders filed suit, and the El Paso Court of Appeals found that it had jurisdiction to consider their claims under Chapter 262 because there was a fact issue that the County spent public funds to select an unqualified bidder who might be unable to perform the contract. That is precisely the type of threat to the public treasury that might invoke jurisdiction under Chapter 262.

As the El Paso court explained, the County Purchasing Act was not enacted for the benefit of contractors—it "was enacted for the benefit of the public, to protect taxpayers from fraud and favoritism in the expenditure of government funds." *Labrado v. County of El Paso*, 132 S.W.3d 581, 587 (Tex. App.—El Paso 2004, no pet.). If LULAC lacked a license to operate transportation services or lacked a garage to reliably maintain its vehicles, the public would receive an inferior service.

Labrado reinforces Harris County's point. Harris County determined that the public is entitled to safe contractors, and it enforced its bid requirements to protect the public from paying for contractors with a history of safety violations. If Harris County had overlooked Texas Materials' OSHA violations and awarded the contracts

in question, the public would not have received the benefit of its bargain.

In *Securtec*, two companies—Securtec and Correctional Maintenance—bid on renovations to the Gregg County Jail. Gregg County signed a contract with Correctional Maintenance without providing Securtec the evaluation criteria, inviting it to a negotiating session, or permitting it to bid on a revised proposal. *Securtec, Inc. v. County of Gregg*, 106 S.W.3d 803, 807, 813-814 (Tex. App.—Texarkana 2003, pet. denied). The Texarkana Court of Appeals held that this violated Local Government Code § 262.027.[15]

The theme in *Labrado* and *Securtec* is that a government cannot engage in favoritism. In *Labrado*, El Paso County favored a company that did not meet the bid's qualifications. In *Securtec*, Gregg County provided more information to one company than its competitor, which prevented the public from having two competitive bids. In both cases, the public either paid a benefit to an unqualified company[16] or was deprived of the benefit of a competitive process.

Texas Materials' other cases are not relevant at all. In *Urban Electrical*, the

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[15] The Court also explained that procurement statutes are not interchangeable and must be analyzed precisely. *Securtec.*, 106 S.W.3d at 812-813. Thus, this holding is limited to Tex. Loc. Gov't Code § 262.030.

[16] In this case, Harris County is bargaining for a company with a clean safety record.

low bidder for a school baseball field lighting system filed suit when a higher bidder was awarded the contract. The Eastland Court of Appeals affirmed the dismissal of the case. In doing so, it held that Chapter 271 of the Local Government Code permitted the school to "reject any and all bids" and that the "school district conducted the requisite hearing and chose not to accept Urban's bid." *Urban Electric Services, Inc. v. Brownwood Independent School District*, 852 S.W.2d 676, 678 (Tex. App.—Eastland 1993, no writ). The court never reached the merits of Urban Electric's case because it was improperly pleaded. *Id.*

DRT Mechanical filed a federal lawsuit under 42 U.S.C. § 1983 after a higher bidder on a county construction contract won the bid. The Eastern District of Texas discussed the interplay between Local Government Code Chapters 262 and 271 and concluded that it lacked jurisdiction to consider the federal civil rights case because DRT had no property interest in its bid. In considering DRT's promissory estoppel claim, the Court noted that under Texas law, a county reserves the right "to reject any and all bids." *DRT Mechanical Corporation v. Collin County, Texas*, 845 F. Supp. 1159, 1163 (E.D. Tex. 1994).

Finally, in *4 Families of Hobby*, the plaintiff had provided food and beverage services to the Houston Airport system for 20 years when the City of Houston solicited bids for a new provider. *City of Houston v. 4 Families of Hobby, LLC*, 702

S.W.3d 698 (Tex. App.—Houston [1st Dist.] 2024, pet. filed). 4 Families bid to keep the contract, but the City selected a different vendor, and 4 Families filed suit alleging that the City violated procurement statutes.

The First Court of Appeals held that Chapter 252 of the Texas Local Government Code did not apply because 4 Families could not show that the City was spending more than $50,000 for maintenance, utilities, and personnel necessary for the vendors to operate. Thus, it reversed the district court's denial of the City's plea to the jurisdiction. *4 Families*, 702 S.W.3d at 712. The remainder of the case involved the question of whether 4 Families stated a claim under Texas Local Government Code Chapter 271, which applies when a government breaches an existing written contract, and the Open Meetings Act.[17] Texas Materials does not allege that Harris County breached an existing contract or violated the Open Meetings Act.

[17] *4 Families* also addressed the Equal Protection Clause and Declaratory Judgment Act, which are discussed, *infra*.

E. Texas Materials failed to plead an Equal Protection claim.
(Response to Texas Materials Brief at pages 16-18.)

The district court properly dismissed Texas Materials' Equal Protection claim because its live pleading failed to identify any similarly situated contractor receiving better treatment for the bids in question. The Texas Constitution authorizes injunctive relief for violations of the Texas Bill of Rights. *4 Families*, 702 S.W.3d at 720, citing *City of Beaumont v. Bouillion*, 896 S.W.2d 143, 148–49 (Tex. 1995) (citing Tex. Const. art. I § 29); *City of Houston v. Downstream Environmental, LLC.*, 444 S.W.3d 24, 38 (Tex. App.—Houston [1st Dist.] 2014, pet. denied). But this limited waiver of immunity exists only to the extent a plaintiff pleads a viable constitutional claim. *Downstream Environmental*, 444 S.W.3d at 38.

Under Art. I, § 3 of the Texas Constitution, "[a]ll freemen, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services." Tex. Const. Art. I, § 3.[18] To state a claim under this provision, Texas Materials must show that "it was treated differently from other similarly situated parties without a

[18] Section 3a provides that "[e]quality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin." Tex. Const. Art. I, § 3a. Texas Materials has not specified how it was treated differently, why it was treated differently, or whether it was treated differently under § 3 or § 3a. However, the same analysis applies under both sections.

reasonable basis." *4 Families*, 702 S.W.3d at 720-721, citing *Downstream Environmental*, 444 S.W.3d at 38. This requires pleading specific facts, and it is not enough for a plaintiff to make a conclusory statement that it was treated differently. In *Starnes*, the San Antonio Court of Appeals held:

> Other than a conclusory statement that it was treated differently from others similarly-situated, Starnes failed to allege, in its amended petition, any facts describing the parties similarly situated or the nature of the different treatment. Therefore, the trial court erred in denying appellants' plea to the jurisdiction on Starnes's equal protection claim.

City of Floresville v. Starnes Investment Group, LLC, 502 S.W.3d 859, 868 (Tex. App.—San Antonio 2016, no pet.).

Texas Materials' live pleading contains only three short, conclusory paragraphs about its Equal Protection claim that do not identify who the similarly situated parties are or how they were treated better. C.R.800, ¶¶ 28-30. Texas Materials does not (and cannot) allege that it was the only contractor subjected to the Safety Policy, or that Harris County awarded the bid to a company with recent serious OSHA violations that were high gravity with an OIS code of 10 while declining to award the contract to Texas Materials based on the same violations.

On appeal, Texas Materials vaguely alleges that other bidders were not subjected to similar adverse determinations, but it provides no facts to support this. Its brief cites the first 18 paragraphs of its First Amended Petition, which identifies

its own experience with the bidding process, but never shows how anyone else was treated differently. Texas Materials' Brief at 16, citing C.R.795-798.

Texas Materials' reliance on *4 Families* is misplaced. In that case, a city councilmember stated on the record that the City's decision to select another vendor was motivated by wanting "fresh blood," which was not a stated or reasonable evaluation criterion. 4 Families also alleged that it was in first place by 2.4 points during the evaluation process until the scores were adjusted so that the competitor won by 0.6 points. These facts suggest a bias that caused 4 Families to be denied the bid simply because the evaluators did not want to do business with the company.

Texas Materials acknowledges that it not only had the burden of pleading facts to show that it was treated differently, but also that the disparate treatment was "arbitrary, irrational, or capricious." Texas Materials Brief at 16, citing *4 Families*, 702 S.W.3d at 721-723. As explained, *supra*, Harris County's Safety Policy is a reasonable measure to evaluate the safety records of contractors under Tex. Gov't Code § 2269.055(a)(5). That also forecloses on Texas Materials' Equal Protection claim.

F. Texas Materials failed to plead a claim under the Uniform Declaratory Judgment Act.

(Response to Texas Materials Brief at pages 18-23.)

The district court properly dismissed Texas Materials' claim under the Uniform Declaratory Judgment Act for the same reasons it dismissed its claims under the procurement statutes, and Harris County incorporates those arguments here. Because the Legislature has not waived immunity under Chapter 2269 of the Government Code in this case, Texas Materials cannot use the Declaratory Judgment Act to manufacture jurisdiction to get the same relief.

The Declaratory Judgment Act authorizes courts "to declare rights, status, and other legal relations whether or not further relief is or could be claimed." Tex. Civ. Prac. & Rem. Code § 37.003(a). While the Declaratory Judgment Act waives sovereign and governmental immunity for certain claims, "it is not a general waiver of sovereign immunity." *Gant v. Abbott*, 574 S.W.3d 625, 633 (Tex. App.—Austin 2019, no pet.), quoting *City of El Paso v. Heinrich*, 284 S.W.3d 366, 370 (2009).

"Consequently, sovereign immunity will bar an otherwise proper DJA claim that has the effect of establishing a right to relief against the State for which the Legislature has not waived sovereign immunity." *Id.* "The DJA does not enlarge a trial court's jurisdiction, and a party's request for declaratory relief does not alter the suit's underlying nature." *Board of Trustees of Galveston Wharves v. O'Rourke*,

405 S.W.3d 228, 234-235 (Tex. App.—Houston [1st Dist.] 2013, no pet.).

On appeal, Texas Materials cites *Labrado* and *Securtec* for the proposition that the Declaratory Judgment Act is "an appropriate vehicle to determine the legality of a governmental entity's procurement conduct under Chapter 262." Texas Materials Brief at 19. As discussed in Section D above, *Labrado* and *Securtec* are distinguished because they involve local governments ignoring their bidding procedures to steer contracts to companies they prefer.

As discussed, in *Labrado*, the low bidder was awarded a contract despite not meeting the minimum qualifications, and in *Securtec*, a qualified bidder was not provided an opportunity to bid. The Legislature waived immunity under those circumstances, but it has not waived immunity when a government follows its procedures and disqualifies a bidder who does not meet objective criteria established under Tex. Gov't Code § 2269.055.

IV. Response to Issue 2: Texas Materials failed to meet its burden of establishing jurisdiction.

(Response to Texas Materials Brief at pages 27-31.)

Texas Materials' second issue is that Harris County failed to provide facts to conclusively negate jurisdiction. However, the burden is on the plaintiff to show that the Legislature waived immunity in a particular case—it is not the government's burden to show that the Legislature has not waived immunity:

> A plaintiff has the burden to affirmatively demonstrate the trial court's jurisdiction. *Heckman v. Williamson County*, 369 S.W.3d 137, 150 (Tex. 2012). That burden encompasses the burden of establishing a waiver of sovereign immunity in suits against the government.

Swanson, 590 S.W.3d at 550.

A plea to the jurisdiction can challenge the allegation of jurisdictional facts or make an evidentiary challenge to the existence of jurisdictional facts. *Piney Point*, 2025 WL 1162711, at *3. When a defendant challenges jurisdiction, a court may consider evidence necessary to resolve the jurisdictional issues raised. *Swanson*, 590 S.W.3d at 550.

In this case, Texas Materials' sole complaint is that it disagrees with Harris County's method for evaluating contractors' safety records under Tex. Loc. Gov't Code § 2269.055(5). The parties submitted limited jurisdictional evidence, and there are no factual disputes about how Harris County performed the evaluations. The parties agree that the Harris County Safety Policy prohibits contractors from bidding on county contracts for three years after receiving a serious, high-gravity OSHA citation and that Harris County considers a citation to be high-gravity when OSHA assigns it an OIS code of 10. C.R.48. There is also no dispute that Texas Materials received serious citations from OSHA within three years that met this criterion because they were assigned an OIS code of 10. C.R.48.

With this established, the only question is whether the Legislature waived

immunity to permit courts to force Harris County to change this policy. All necessary facts to resolve this question are undisputed, and neither party needed to provide any additional evidence. See, *Miranda*, 133 S.W.3d at 226; *University of Texas v. Poindexter*, 306 S.W.3d 798, 806 (Tex. App.—Austin 2009, no pet.) ("If, however, the facts relevant to jurisdiction are undisputed, the court should make the jurisdictional determination as a matter of law based solely on those undisputed facts.").

On appeal, Texas Materials claims Harris County had a duty to conclusively prove that it: (1) applied this policy to all bidders, (2) correctly interpreted OSHA's policies on high gravity citations, and (3) the Safety Policy is clear and unambiguous. Texas Materials Brief at 28. There is no requirement that Harris County do any of this.

First, Harris County is not required to prove that it applied this policy to all bidders because Texas Materials' First Amended Petition never provides facts alleging otherwise. The live pleading made a single, vague, conclusory statement that the Safety Policy was not uniformly applied. C.R.800, ¶ 29. As discussed in Harris County's analysis of Texas Materials' Equal Protection claim, *supra*, this is so lacking in detail that it fails to state a claim.

If Texas Materials believed Harris County inconsistently applied its policy by

awarding one of its competitors a public works contract despite having a serious, high gravity OSHA violation, it had a duty to plead that. If those facts existed, they would have been easy to find because the names of winning bidders and their OSHA citation history are publicly available. Texas Materials never met its burden, and Harris County has no duty to refute claims that have not been made.

Second, Harris County has no duty to prove that it should have interpreted OSHA's policies based on the amount of a negotiated fine rather than an OIS code. See Texas Materials Brief at 29. Harris County's duty under Local Government Code Chapter 2269 is simply to "consider . . . the offeror's safety record." Tex. Loc. Gov't Code § 2269.055(5) (emphasis added). Harris County can use any reasonable criteria that it wants when making this consideration, and it chose to use the criteria explained above. It has no duty to "conclusively disprove" Texas Materials' allegation that "the violations do not amount to a gravity rating of High." C.R. 797, ¶ 16; Texas Materials Brief at 29.

Finally, Tex. Loc. Gov't Code § 2269.055(5) does not require Harris County to articulate its Safety Policy in any particular way. Texas Materials pleads that Harris County "improperly implemented or caused to be improperly implemented certain policies in bid evaluations resulting in a probable, imminent, and irreparable harm." C.R. 799, ¶ 22. Based on this cryptic sentence, it alleges that Harris County

had to produce evidence that "conclusively clarif[ies] or demonstrate[s] the absence of ambiguity" in the Safety Policy. Texas Materials Brief at 30.

It is unclear what Texas Materials is asking for, and the sentence referenced in paragraph 22 of its petition does not state a cause of action or trigger a duty for Harris County to "conclusively clarify" its policy. As explained in Section III (D), *supra*, this Court held in *Schawe* that Texas procurement laws do not require a county to provide an unsuccessful bidder "clear justification" for losing a bid. *Schawe*, 2024 WL 3578275, at *5.

Further, Harris County did explain to Texas Materials why it lost its bids (C.R.46-49; C.R.104-105; C.R. 111-112), and Texas Materials admitted in the court below that it understands the Safety Policy and knows how to bid on Harris County public works projects in the future. R.R.7-8. There is nothing left to clarify about this policy.

For the reasons explained above, the district court had all the facts needed to rule on Harris County's plea to the jurisdiction, and it correctly granted it because Texas Materials' live petition failed to plead facts sufficient to show that the Legislature waived immunity to provide the relief it requests.

V. Response to Issue 3: The trial court properly denied Texas Materials' motion for reconsideration.

(Response to Texas Materials Brief at pages 31-45.)

After the district court granted Harris County's plea to the jurisdiction, Texas Materials moved for reconsideration based on many of the same arguments already addressed in the district court and now addressed on appeal. See motion at C.R.825-842; response at C.R.843-859; reply at C.R.860-870.

Texas Materials also claims to have used its motion to provide "supplemental evidence demonstrating that Harris County selectively omitted enforcement of its Policy from other contemporaneous solicitations." Texas Materials Brief at 34. The first problem is that Texas Materials never established that it was entitled to introduce new evidence after judgment was granted.

A motion for rehearing, motion for reconsideration, and motion for new trial are fundamentally equivalent. *Adams v. Ross*, No. 01-15-00315-CV, 2016 WL 4128335, at *2 (Tex. App.—Houston [1st Dist.] Aug. 2, 2016, no pet.) (mem. op.); *Hill v. Bellville General Hospital*, 735 S.W.2d 675, 677 (Tex. App.—Houston [1st Dist.] 1987, no writ). The purpose of a motion for new trial is to provide an opportunity for the trial court to cure any errors. *Old Republic Insurance Co. v. Scott*, 846 S.W.2d 832, 833 (Tex. 1993). Thus, a motion for new trial is not "a means by which the case may be tried over or tried differently" *Sandoval v. Rattikin*, 395

S.W.2d 889, 891-892 (Tex. App.—Corpus Christi 1965, writ ref'd n.r.e.). Similarly, new arguments cannot be raised for the first time. *Kapur v. Wilcrest Park Townhome Owners' Association, Inc.*, No. 01-22-00564-CV, 2024 WL 2981289, at *4 n. 18 (Tex. App.—Houston [1st Dist. June 13, 2024, pet. denied) (mem op.).

The exception is that a court may permit a new trial if there is "newly discovered evidence." Tex. R. Civ. P. 324(b)(1). But the trial court can deny the motion if the evidence is not newly discovered and the movant had time to develop that evidence at the hearing on the merits. *Sandoval*, 395 S.W.2d at 892; *Mushinski v. Mushinski*, 621 S.W.2d 669, 670 (Tex. App.—Waco 1981, no writ) (denying motion for a new trial where movant "readily admitted that none of this evidence was 'newly discovered,' and that it was all known by him and available to him at the hearing on the merits."). Texas Materials never explained to the district court or on appeal what new jurisdictional evidence it found, or why it could not have presented that evidence in its response to Harris County's plea to the jurisdiction.

Even more confusing is that Texas Materials never actually provided any evidence. On appeal, it claims to have provided evidence that Harris County selectively enforced its Safety Policy. Texas Materials Brief at 34. However, all it did was argue in its motion for reconsideration that "[t]he County currently has projects out for bid which inexplicably do not require the Policy provisions." C.R.830. That

is not evidence, and Texas Materials did not even attach a copy of these alleged bids.

As explained in Section IV, Harris County's bids are public, the names of the winners are public, and OSHA violations are public. Texas Materials has all the data it needs to determine whether any winning bidders had serious, high-gravity OSHA violations within the last three years. It could not find this jurisdictional evidence.

Texas Materials also claims that Harris County has "threatened" to "retroactively apply the Policy to contracts already executed with TMG [Texas Materials], potentially canceling them." Texas Materials Brief at 35, citing C.R. 831. Again, Texas Materials provided no evidence of this—it simply speculates about what Harris County might do in the future. Assuming this speculation was correct and created a viable cause of action, the claim would not be ripe and is certainly not evidence in this appeal.

Next, Texas Materials asserts that the Legislature's recent amendment of Tex. Gov't Code § 2252.909 supports its position. Texas Materials Brief at 35 & 41. As discussed, this case is governed by Chapter 2269, which "prevails over any other law relating to a public work contract." Tex. Gov't Code § 2269.003.

Assuming § 2252.909 applied, the statute contradicts Texas Materials' central argument. Texas Materials claims that § 2252.909 "suggests the legislature itself recognizes metrics like the Policy as unreliable and arbitrary." Texas Materials

Brief at 35. The relevant portion of Tex. Gov't Code § 2252.909 simply says that certain public contracts should not be "based on the employer's past loss experience." Tex. Gov't Code § 2252.909(a)(3)(c).

Texas Materials admits that this refers to an actuarial term and cites a committee report discouraging counties from using financial losses such as workers compensation payments to evaluate a company's safety record. Texas Materials Brief at 35, fn. 3. Harris County does not use financial losses or penalties to evaluate contractor safety records—it uses OSHA's violation history and OIS codes, which define the gravity of a violation based on "severity of the injury or illness which could result from the alleged violation" and the "probability that an injury or illness could occur as a result of the alleged violation." C.R.121.

Ironically, Texas Materials urges this Court to reject this and adopt a method that determines whether a violation is high gravity based on the amount of fine that a contractor paid:

> As previously mentioned, none of TMG's penalties within the relevant three-year timeframe exceeded $9,844, thus placing all TMG's OSHA violations at worst within the "Moderate Gravity" category. . .

Texas Materials Brief at 11. Texas Materials advocates exactly what it says the Legislature prohibits—using financial loss experience to determine a contractor's safety record.

Texas Materials also claims its motion for reconsideration presented evidence that "Harris County's Policy favored contractors who participated in drafting the Policy itself." Texas Materials Brief at 37, citing C.R.834-835. Other than that single conclusory sentence, Texas Materials has no evidence of this. It does not name any contractors it alleges participated in drafting the policy, explain how they participated, or explain how that affected the bids that are the subject of this appeal.

This "insider favoritism argument" (Texas Materials Brief at 41) was made for the first time in Texas Materials' motion for reconsideration without any explanation of what newly discovered evidence prompted this, or why that evidence could not have been presented earlier. Yet, Texas Materials claims that Harris County had the burden of supplying "procurement committee rosters, meeting minutes, disclosures, or sworn testimony" to disprove a theory that was not pleaded, not timely raised, and for which there is not a hint of evidence. Texas Materials Brief at 42. That is not how a motion for reconsideration works, and it runs afoul of the purpose of a plea to the jurisdiction, which is to determine as early as practical whether a court has subject matter jurisdiction and avoid placing parties through prolonged, unnecessary discovery. *Miranda*, 133 S.W.3d at 226, 229.

For these reasons, the district court correctly denied Texas Materials' motion for reconsideration.

VI. Response to Issue 4: The trial court properly denied Texas Materials an opportunity to file a third petition because it would have been futile and Texas Materials failed to explain how an amendment could save its case.

(Response to Texas Materials Brief at pages 46-50.)

Nothing could save Texas Materials' case, yet its final issue for review is that it should have been allowed to file a Second Amended Petition. A court may grant a plea to the jurisdiction without allowing a party to amend if the pleadings negate jurisdiction—as they do in this case. *Miranda*, 133 S.W.3d at 227.

Texas Materials never filed a proposed Second Amended Petition, and even on appeal, never explains what such a petition might say to create jurisdiction. Instead, Texas Materials complains about the short timeframe between filing its petition on November 12, 2024 and the court signing the plea to the jurisdiction on December 6, 2024, and it contends it should have been given more time to research and develop the record.

Texas Materials admits that the "trial court retained plenary jurisdiction through and beyond March 7, 2025" and it took advantage of that time to file a motion for reconsideration that supposedly developed its jurisdictional "facts." Texas Materials Brief at 47-48. But there were no facts, and if Texas Materials were given an opportunity to amend again, there would still be no facts to show a waiver of immunity to create jurisdiction.

CONCLUSION AND PRAYER

Appellant Texas Materials Group, Inc. failed to show that the Texas Legislature waived immunity for its claims, and the trial court properly dismissed the case. Appellees respectfully request that the judgment of the court below be affirmed in all respects, with costs of appeal taxed against Appellant.

Respectfully submitted,

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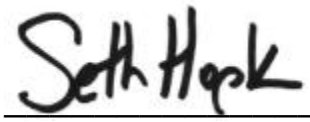

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/s/ Seth Hopkins
Seth Hopkins

CERTIFICATE OF SERVICE

I hereby certify that pursuant to TEX. R. APP. P. 9.5, a true and correct copy of the foregoing instrument was served electronically through the electronic filing manager on the 1st day of July, 2025, to the following counsel of record:

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