

IN THE SUPREME COURT OF TEXAS

No. 99-1015

GENERAL SERVICES COMMISSION, PETITIONER

v.

LITTLE-TEX INSULATION COMPANY, INC., RESPONDENT

- consolidated with -

No. 99-1071

TEXAS A&M UNIVERSITY AND BOARD OF REGENTS OF TEXAS A&M
UNIVERSITY, PETITIONERS

v.

DALMAC CONSTRUCTION COMPANY, INC., RESPONDENT

ON PETITIONS FOR REVIEW FROM THE
COURT OF APPEALS FOR THE THIRD DISTRICT OF TEXAS

Argued on September 20, 2000

JUSTICE ABBOTT, concurring.

I join the Court's opinion except for Part III(B), and write separately to elaborate on DalMac's constitutional-taking claim. As an alternative to its breach of contract claim, which is

barred by sovereign immunity, DalMac argues that TAMU violated the Texas Constitution's taking clause by taking DalMac's labor and materials without paying for them. *See* TEX. CONST. art. I, § 17. In rejecting this argument, the Court summarily holds that "the State does not have the requisite intent under constitutional-takings jurisprudence when it withholds property or money from an entity in a contract dispute." ___ S.W.3d at ___. The effect of this language is that a private party may never assert a taking claim when it has contracted with the State. In other words, the State may avoid payment simply by pointing to the existence of the contract, even if the private party has already fully performed. But when deciding whether a taking has occurred, courts must determine more than whether a contract exists. I agree with those courts that have inquired whether the State is acting under a colorable contract right to the extent it has a good faith belief that its actions are justified under the contract. But because DalMac has not asserted that TAMU was acting outside a good faith exercise of its colorable contractual rights, I concur in the Court's judgment.

Although the State has the right to take, damage, or destroy private property for public use, that power is subject to the right of the owner to adequate compensation for the taking, damaging, or destruction. *State v. Hale*, 146 S.W.2d 731, 736 (1941); TEX. CONST. art. I, § 17. It is a well-established rule that the State cannot override the constitutional requirement to provide adequate compensation by asserting sovereign immunity. *See Steele v. City of Houston*, 603 S.W.2d 786, 791 (Tex. 1980). But under the Court's opinion today, the State can seemingly circumvent this rule simply by pointing to the existence of the contract, labeling its actions a "contract dispute," and asserting sovereign immunity. Although the Court does not so much say this, it is the practical effect of its opinion.

Although DalMac asserts a claim only under the Texas Constitution, we are guided by federal authority in interpreting our Constitution. *See Republican Party of Tex. v. Dietz*, 940 S.W.2d 86, 89, 91 (Tex. 1997). This is especially true when limited Texas authority exists and the provisions in the State and Federal Constitutions are similar. *Id.* Although sparse, there is some federal authority considering taking claims in relation to breach of contract claims.

I agree with those authorities that make it clear that more than the mere existence of a contract is required to overcome a taking claim: “[T]aking claims are not presumed to be foreclosed by claims for breach of express contract merely because the claims share the same factual background.” *Integrated Logistics Support Sys. Int’l, Inc. v. United States*, 42 Fed. Cl. 30, 34 (1998). Instead, courts must determine whether the State is acting in good faith pursuant to its bargained-for contractual rights. *See, e.g., J.D. Hedin Constr. Co. v. United States*, 456 F.2d 1315, 1329 (Ct. Cl. 1972) (finding no taking because the government’s action was taken in good faith in accordance with the contract). Because the private party agreed to those rights in bargaining for the contract, it cannot assert a taking claim when the State exercises those rights, and any remedy lies in the contract. *See Sun Oil Co. v. United States*, 572 F.2d 786, 818 (Ct. Cl. 1978) (“[T]he concept of a taking as a compensable claim theory has limited application to the relative rights of party litigants when those rights have been voluntarily created by contract.”). But when the State retains property without payment under some authority other than a good faith assertion of these bargained-for contractual rights, a valid taking claim exists. The broad language of Article I, Section 17, was intended to protect against this sort of arbitrary government activity.

Even what little Texas authority there is supports this approach. In *Green International, Inc.*

v. State, 877 S.W.2d 428, 434 (Tex. App.—Austin 1994, writ dism'd by agr.), the Third Court of Appeals summarized the law as follows:

In contractual situations, when the government acts within the procedures outlined in the contract for the withholding of materials and equipment, the government has shown no intent to take under eminent domain. In addition, whenever the government acts within a color of right to take or withhold property in a contractual situation, the government cannot be said to have effected a taking because there was no intent to take, only an intent to act within the scope of the contract. Even if the government were to withhold property or payment it believed to be due the other party, the government would still be acting within the color of right *to the extent it had a good faith belief that its actions were justified* due to disagreements over payment due or performance under the contract.

Id. (emphasis added) (citations omitted). And, in *TRST Corpus, Inc. v. Financial Center, Inc.*, 9 S.W.3d 316, 323 n.4 (Tex. App.—Houston [14th Dist.] 1999, writ denied), the Fourteenth Court of Appeals reiterated this standard. I agree with this approach because it appropriately protects private contractors from governmental takings in those situations when it cannot be said that the government is asserting its bargained-for contractual rights in good faith.

By effectively limiting its inquiry to whether a contract exists, the Court goes too far and strips private parties of their constitutional protection from governmental takings without adequate compensation even when the State is not acting pursuant to a good faith exercise of its contractual rights. Accordingly, I cannot join Part III(B) of the Court's opinion. Because DalMac does not assert that TAMU was acting other than within a good faith exercise of its colorable contractual rights, however, I concur in the Court's judgment.

GREG ABBOTT
JUSTICE

OPINION DELIVERED: February 1, 2001