

affirming the trial court's summary judgment in the county's favor. ___ S.W.3d ___.

I

On January 27, 1993, the El Paso County Commissioners Court passed a motion providing that a 381.90-acre parcel of county land would be subject to sale by sealed bids. In September 1993, the County advertised the proposed sale in the local newspaper. Gregory Collins and Catalina Development, Inc. (collectively "Collins") submitted a \$2,554,000 bid, along with a \$5,000 earnest money check. In October 1994, a majority of the commissioners court voted to accept Collins's bid. The County deposited the earnest money check, and Collins deposited \$2,554,961.72 with a title company to obtain title to the land. The commissioners court placed a motion on the November 30th agenda authorizing the county judge to sign the deed over to Collins, but the court tabled the motion for one week. On December 7th, the motion failed and was again tabled. On December 14th, the commissioners voted to table the motion for six weeks. That same day, an assistant county attorney sent Collins a warranty deed and affidavit, which were to be used to close the transaction. Collins signed the documents, and the county attorney placed the motion authorizing the deed's execution on the agenda for the court's next meeting. Before that meeting, two commissioners and the county judge-elect filed suit to enjoin the court from approving the sale and signing the deed over to Collins. The district court issued a temporary restraining order on December 20th.

On January 1, 1995, the newly elected commissioners court took office. The new court never signed the property over to Collins, and Collins sued El Paso County for breach of contract and specific performance. The trial court granted the County's motion for summary judgment based on its immunity from suit. The court of appeals affirmed. ___ S.W.3d ___. We granted Collins's petition for review to

consider whether, by its conduct, the County waived immunity from suit.

II

“A county is a governmental unit protected by the doctrine of sovereign immunity.” *Travis County v. Pelzel & Assocs., Inc.*, 77 S.W.3d 246, 248 (Tex. 2002). Generally, a governmental unit possesses both immunity from liability and immunity from suit. *Id.* When the governmental unit contracts with a private party it waives immunity from liability, but not immunity from suit. *Id.* The governmental unit waives immunity from suit only through its express consent. *Id.*

It is undisputed that El Paso County did not expressly waive its immunity from suit here. In *Federal Sign*, we noted that there might be circumstances “where the State may waive its immunity by conduct other than simply executing a contract,” although under the facts of that case, it was not necessary to indicate what those circumstances might be. *Federal Sign v. Texas S. Univ.*, 951 S.W.2d 401, 408 n.1 (Tex. 1997). Since *Federal Sign*, we have had several occasions to consider circumstances that were urged to constitute a waiver by conduct. *See Pelzel*, 77 S.W.3d at 251-52 (county withheld money due under a construction contract pursuant to contract’s liquidated-damages clause); *Texas Natural Res. Conservation Comm’n v. IT-Davy*, 74 S.W.3d 849, 856-57 (Tex. 2002) (contractor sought to recover cost overruns allowed by contract’s equitable-adjustments clause); *Gen. Servs. Comm’n v. Little-Tex Insulation Co., Inc.*, 39 S.W.3d 591, 595 (Tex. 2001) (contract disputes regarding cost overruns for completed work, and to recover for work partially performed under a contract that was subsequently terminated). We held that the facts these cases presented did not support an equitable waiver by conduct of the governmental entities’ immunity.

Relying on *Federal Sign*, Collins claims that the facts presented here support a finding that El Paso County, by its conduct, waived immunity from suit. Specifically, Collins asserts that the County waived immunity by advertising for bids to sell the land, accepting Collins's bid, accepting and depositing Collins's earnest money, and sending Collins an earnest money contract to sign. The County responds that these activities constitute nothing more than acts of contract formation, which this Court has already stated do not, by themselves, waive immunity from suit. *Pelzel*, 77 S.W.3d at 248; *Federal Sign*, 951 S.W.2d at 408. We agree with El Paso County.

The actions that El Paso County took are the kind that are necessary and expected during contract formation. Soliciting for bids in the local paper allowed the County to determine who might be interested in purchasing the land, and was a required act under Texas law. TEX. LOC. GOV'T CODE § 272.001(a). Accepting Collins's bid and earnest money, and sending Collins a contract, were steps in forming a contract between the parties. Collins describes nothing in El Paso County's conduct that falls outside the realm of contract formation. And we have made clear that contract formation, by itself, is not sufficient to waive a governmental unit's immunity from suit. *Pelzel*, 77 S.W.3d at 248; *Federal Sign*, 951 S.W.2d at 408.

Collins argues that this case is factually distinguishable from *Federal Sign* because Collins fully performed under the contract. *See Federal Sign*, 951 S.W.2d at 412-13 (HECHT, J., concurring) (questioning whether the result would have been different had *Federal Sign* tendered performance). Collins claims that his actions, including forwarding the earnest money to the County and depositing money with the title company, fulfilled his obligations to the County and constituted full performance. But Collins ignores an important distinction between *Federal Sign* and this case. In *Federal Sign*, the State was the buyer of commercial goods, while here the County is the seller of government land. Collins does not seek

to recover for goods already conveyed. Instead, Collins wishes to force a sale of land that belongs to the people of El Paso County. Although in *Federal Sign* we suggested that some circumstances might warrant recognizing a waiver by conduct, the equitable basis for such a waiver simply does not exist under this set of facts.

Indeed, the facts presented here illustrate a fundamental reason why immunity exists – to prevent governmental entities from being bound by the policy decisions of their predecessors. See *IT-Davy*, 74 S.W.3d at 854 (stating that “legislative control ensures that current policymakers are neither bound by, nor held accountable for, policies underlying their predecessors’ long-term contracts”) (citing Harold J. Krent, *Reconceptualizing Sovereign Immunity*, 45 VAND. L. REV. 1529, 1538 (1992)). In this case, the County, upon an electoral change in the commissioners court, determined that selling the property to Collins was a poor decision. Rather than lock El Paso County residents into a contract not in their best interest, the court acted within its discretion to protect the perceived interests of the public by rejecting the contract. In doing so, the County did not profit unfairly at Collins’s expense.¹

We note that the bidding statute under which the sale of the County’s land was conducted further supports our conclusion. See TEX. LOC. GOV’T CODE § 272.001. Section 272.001(d) provides that a governmental entity acting under the statute is not required “to accept any bid or offer *or to complete a sale or exchange.*” *Id.* (emphasis added). Here, although the County had taken a number of steps toward closing the sale, it ultimately declined to complete the transaction. Section 272.001(d) makes clear that

¹ In his brief and at oral argument, Collins pointed out that El Paso County had kept the \$5,000 earnest money deposit even after it became clear that the County had no intention of approving the contract. We note that when this point was raised before the trial court, the County returned the money with interest. Because the issue is moot, we do not address what relief Collins might have been entitled to had the County continued to retain the deposit.

the County was under no statutory obligation either to accept any potential bids or to complete a transaction if it did decide to accept a bid.

Finally, we have reviewed Collins's additional complaints and conclude that they were waived for failure to raise them below.

III

We hold that El Paso County did not, by its conduct, waive its immunity in this case. Accordingly, we affirm the judgment of the court of appeals.

Harriet O'Neill
Justice

OPINION DELIVERED: May 8, 2003.