

LEGAL REFERENCE SECTION

- i Black's Law Dictionary (7th ed. 1999).
- ii State agency means a department, board, commission or other entity of state government, other than a university system or an institution of higher education as defined by Section 61.003, Education Code, that:
 - 1) has authority that is not limited to a geographical portion of the state;
 - 2) was created by the constitution or a state statute with an ongoing mission and responsibilities;
 - 3) is not the office of the governor or lieutenant governor;
 - 4) is not within the judicial or legislative branch of government; and
 - 5) is not a committee created under state law whose primary function is to advise an agency.
- iii Texas Government Code §572.001(a)
- iv Texas Government Code §572.051
- v Texas Government Code §2113.014(a)
- vi Texas Constitution, Article XVI, Section 21
- vii Texas Government Code §2052.302
- viii All notices requiring publication in the Texas Register, the Electronic State Business Daily, or newspapers should be identified, scheduled and drafted at this stage.
- ix Black's Law Dictionary (7th ed. 1999), defines: standard, n.2. A criterion for measuring acceptability, quality or accuracy. A legal standard that is based on conduct and perceptions external to a particular person. In tort law, for example, the reasonable person standard is considered an objective standard because it does not require a determination of what the defendant was thinking. *Subjective standard.* A legal standard that is peculiar to a particular person and based on the person's individual views and experiences. In criminal law, for example, premeditation is determined by a subjective standard because it depends on the defendant's mental state.
- x See Southwestern Bell Tel Co. V. FDP Corp. 811 S.W. 2d 572,576 (Tex. 1991) ("The UCC recognizes that breach of contract and breach of warranty are not the same cause of action. The remedies for breach of contract are set forth in section 2.711, and are available to a buyer "[w]here the seller fails to make delivery." Tex. Bus. & Com. Code §2.711(a). The remedies for breach of warranty, however, are set forth in section 2.714, and are available to a buyer who has finally accepted goods, but discovers that the goods are defective in some manner. Tex. Bus. & Com. Code §2.714, §2.711 (Comment 1); see also 1 J. White & R. Summers, Uniform Commercial Code 501 (3rd ed. 1988). Indeed, "the whole purpose of the law of warranty is to determine what it is that the seller has in essence agreed to sell." Tex. Bus. & Com. Code § 2.313(Comment 4). No sound reason exists to apply a different standard when the contract is for services instead of goods.")
- xi Generally, a warranty describes then "character, quality or title" of that which is being sold and "by which seller promises or undertakes to insure that certain facts are or shall be as he then represents them." Black's Law Dictionary 1586 (6th ed. 1990). An express warranty is a definitive affirmation of fact or promise which becomes part of the basis for the bargain and upon which the parties rely. See Morris v. Adolph Coors Co., 735 S. W. 578, 587 (Tex.App.-Fort Worth 1987, writ ref'd n.r.e.). Implied warranties are based in tort law and are judicially interjected into agreements whenever necessitated by public policy to ensure that parties receive that for which they bargained. See Melody Home Mfg. Co. v. Barnes, 741 S. W. 2d 349, 353(Tex. 1987); see also Parkway Co. v. Woodruff, 901 S. W. 2d 434, 438 (Tex. 1995). A contract term identifies what is being sold; warranties described the attributes, suitability for a particular purpose and ownership of what is sold. Cf. Donnelley Mktg. v. Lionel Sosa, Inc. 716 S. W. 2d 598, 604 (Tex.App. – Corpus Christi 1986, no writ) (court held supplier's provision of wrong mailing list to advertiser was tantamount to no delivery at all and amounted to breach of contract). See Chilton Insurance Company v. Pate & Pate Enterprises, Inc. 930 S.W.2d 877 (Tex.App.-San Antonio 1996, rehearing overruled).
- xii Warranty of Title and Against Infringement; Buyer's Obligation against Infringement. Tex. Bus & Com. Code §2.312
- xiii Implied Warranty: Merchantability; Usage of Trade. Tex. Bus. & Com. Code §2,314 (merchantability – Goods to be merchantable must be at least such as: 1) pass without objection in the trade under the contract description; and 2) in the case of fungible goods, are of fair average quality within the description, and 3) are fit for the ordinary purposes for which such goods are used; and 4) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and 5) are adequately contained, packaged, and labeled as the agreement may required; and 6) confirm to the

promises or affirmations of fact made on the container or label if any.); Tex. Bus. & Com. Code §2A.212. Implied Warranty of Merchantability (lease of personal property).

xiv Implied Warranty: Fitness for Particular Purpose. Tex. Bus. & Com. Code §2.315 (implied warranty that the goods shall be fit for such purpose, where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods); Tex. Bus. & Com. Code §2A.213 Implied Warranty of Fitness for Particular Purpose (lease of personal property).

xv Texas Government Code, §2155.074, §2155.075, §2156.007, §2157.003 and § 2157.125, and Texas Administrative Code, Title 1, Chapter 113.6

xvi See Tex. Bus. Com. Code §2.607. Effect of Acceptance; Notice of Breach; Burden of Establishing Breach after Acceptance; Notice of Claim or Litigation to Person Answerable Over (1967).

xvii See also Texas Government Code §2254.022(b), which states subchapter B does not discourage state agencies from using consultants if the agencies reasonably foresee the use of consultants will produce a more efficient and less costly operation or project.

xviii Texas Government Code §2254.026; See also General Appropriates Act, 77th Leg., S. B. 1, art. IX, §6.48(2001) (before expending appropriated funds for contracting for a consultant or other private assistance in conducting a legislatively mandated study that includes statistical or demographic data analysis, the state agency must determine if the resources of the Texas Legislative Council are available to perform this work).

xix Texas Government Code §2254.025. Note: A waiver will not be granted if the agency was negligent in foreseeing the occurrence of the emergency. See §2254.025(e).

xx Texas Government Code §2254.024©; See also 34 TAC §5.54 (The Office of the Comptroller of Public Accounts has rules regarding consultants, but the dollar thresholds reflect lower amounts as prescribed in previous versions of the statute).

xxi Texas Government Code §2254.002(2). See also Atty Gen. Op. JC-0374 (2001). The issue addressed by this opinion was: "whether a registered professional surveyor may provide a competitive bid to the primary contractor of a contract with a government entity."

... the Professional Services Act applies whenever a governmental entity awards a contract that includes professional services as a component part; we turn to the question of whether a surveyor may submit competitive bids to a prime contractor in connection with a governmental contract. The Professional Services Procurement Act does not impose any legal obligation on a professional to refrain from providing a competitive bid to a governmental entity. The prohibition against competitive bidding in section §2254.003 applies to a governmental entity rather than a professional. See Texas Government Code Ann. §2254.003 (Vernon 2000) ("*a governmental entity may no select a provider of professional services or a group or association of providers or award a contract for the services on the basis of competitive bids submitted for the contract or for the services. . . .*") (emphasis added). Similarly, the requirements for procuring architectural, engineering, and land survey services apply to the governmental entity rather than the architect, engineer or surveyor or prime contractor. See id §2254.004(a) ("*In procuring architectural, engineering, and land survey services, a governmental entity shall . . .*") (emphasis added).

xxii Texas Government Code §2254.003(e).

xxiii Texas Government Code §2254.004

xxiv C & H Transportation Company v. Wright, 396 S. W. 2d 443, 446 (Civ App.-Tyler 1965, ref. n.r.e.).

xxv Foster v. Wagner, 343 S. W. 2d 914, 927 (Civ.App.-El Paso 1961, ref. n.r.e.).

xxvi See the following excerpt from AG Opinion JC-0131 (1999).

"There are numerous limitations on the contracting authority of state officers and employees pertinent to your inquiry. First and foremost, no one has the authority to make a contract binding on the state unless authorized to do so by the constitution or by statute. See State v. Ragland Clinic-Hosp. 159 S.W.2d 105, 106 (Tex. 1942); Vitapro Foods, Inc. v State, 969 S.W.2d 84, 88 (Tex. App.-Texarkana 1998, pet granted). Normally authority to bind the state is given by the legislature to entities such as the governing boards of state agencies and to state officers, rather than to employees. In some instances, contracting authority granted to a governing board may be delegated to other officers or employees. For example, the Education Code allows the University of Houston board of trustees to delegate its contracting authority: "All contracts of the university shall be approved by a majority of the board. However, the board is authorized to adopt reasonable rules that delegate to the president or his authorized representatives the authority to negotiate, approve and execute contracts." Tex. Educ. Code Ann. §111.34 (Vernon 1991). Similarly, under the Government Code, "[t]he Texas Transportation Commission may delegate to one or more employees of the Texas Department of Transportation the authority to approve vouchers for expenditures from the state fund and the authority to approve and sign contracts and other documents." Tex. Gov't Code Ann. §2103.064 (Vernon Supp. 1999). All state officers and employees are potentially able to bind the state, but to do so they must be able to point to some constitutional or statutory authority for their actions."

"Apparent authority is not enough to make an obligation binding upon the state; an officer or employee must have actual authority to do so. VitaPro, 969 S.W.2d at 88. In a contract between private parties, an agency who has no actual authority to bind his principal can nevertheless bind the principal if the principal leads the other party to believe that the agency had the authority to act on the principal's behalf. See Moodey v. E.M.C. Servs., Inc. 828 S.W.2d 237, 241 (Tex. App. - Houston [14th Dist.] 1992, writ denied). In such a case, the principal is estopped from claiming that the agent had no authority to act on the principal's behalf. Id. But the powers of state officers are set by law and all persons dealing with them are charged with notice of the limits of their authority and are bound at their peril to ascertain whether a contemplated contract is within the power conferred. Ragland Clinic-Hosp., 159 S.W. 2d at 107; VitaPro, 969 S.W.2d at 88. Thus, even if a state officer or employee appears to have authority to bind the state, the state will not be bound unless the officer or employee had actual authority to bind the state."

"Second, the subjects of state contracts, the procedure for entering into contracts, and the general policy relating to contracts are all within the power of the legislature to establish. See Texas Nat'l Guard Armory Bd., 126 S.W.2d at 637. Although an oral contract is normally just as binding and enforceable as a written contract, See Ward v. Strickland, 177 S.W.2d 79, 82 (Tex.Civ.App.-Dallas 1943, writ ref'd), the authority of a person or entity to enter into an oral contract on behalf of the state may be restricted by the constitution or by statute or regulation."

xxvii State v. Ragland Clinic-Hosp., 138 Tex. 393, 159 S.W. 2d 105 (1942).; State ex rel. Dept. of Criminal Justice v. VitaPro Foods, Inc. 8 S.W.3d 316, 322 (Tex. 1999). Rehearing overruled.

xxviii Tex. Gov't. Code §2155.061 Commission Purchasing System.

(a) The commission shall acquire by purchase, lease rental or another manner all goods and services for a state agency, including a purchase that does not require a competitive bid or a spot purchase.

(b) The commission shall operate an effective and economical system for purchasing goods and services.

xxix Tex. Gov't Code §2162.105. Exemption from Purchasing Laws.

xxx Tex. Gov't Code § 2155.134

xxxi Tex. Gov't Code § 2155.135

xxxii Tex. Gov't Code § 2155.136

xxxiii Tex. Gov't Code § 2155.138

xxxiv Tex. Gov't Code § 2155.139

xxxv Tex. Gov't Code § 2155.140

xxxvi Tex. Gov't Code § 2155.141

xxxvii Tex. Gov't Code § 2155.142

xxxviii Tex. Gov't Code § 2155.143

xxxix Tex. Gov't Code § 2155.144

xl Tex. Gov't Code § 2155.1441

xli Tex. Gov't Code § 2155.146

xliv Tex. Gov't Code § 2155.202

xlvi Tex. Gov't Code § 2155.203

xlviii Tex. Gov't Code § 2155.204

xlv State ex rel. Dept. of Criminal Justice v. VitaPro Foods, Inc., 8 S.W.3d 316, 322 (Tex. 1999) rehearing overruled.

xlvi Tex. Gov't Code § 2155.132(f); 1 T.A.C. §113.11 (3). For items that are required by statute to be purchased from a particular source, See Government Code §497.024 et seq. (if the Texas Department of Criminal Justice produces an article or product under the Prison Made Goods Act, state agencies may purchase the article or product only from the Department). For definitions of 'scheduled purchase' and 'term contract purchase', See 1 T.A.C. §113.2 (55) (a 'scheduled purchase' is a purchase with a pre-scheduled bid opening date, allowing the Commission to combine orders for goods); (62) (a 'term contract purchase' is a purchase under a term contract, which established a source of supply for particular goods at a given price for a specified period).

xlvii See Buxani v. Nussbaum, 940 S. W. 2d 350, 352 (Tex App.-San Antonio 1997, no writ); and Hallmark v Hand, 885 S.W.2d 471, 476 (Tex.App.-El Paso 1994, writ denied); see also McCulley Fine Arts Gallery, Inc. v "X" Partners, 860 S.W.2d 473, 477 (Tex. App. - El Paso, 1993, no writ).

xlviii See Roark v. Stallworth Oil and Gas Inc., 813 S.W.2d 492,496 (Tex. 1991); and see also Federal Sign v. Texas Southern University, 951 S.W.2d 401,408 (Tex. 1997) rehearing of cause overruled (Oct 02, 1997).

xlix Restatement (Second) of Contracts §24 (1981).

I Restatement (Second) of Contracts §50 (1) (1981).

li United Concrete Pipe Corp. v Spin-Line Co., 430 S.W.2d 360, 364 (Tex. 1968).

lii Antonini v. Harris County Appraisal Dist. 999 S.W.2d 608, 611 (Tex.App.-Houston [14th Dist] 1999, no pet.)

liii Weynand v Weynand, 990 S.W.2d 843, 846 (Tex. App.-Dallas 1999, pet. denied).

liv Copeland v Alsobrook, 3 S.W.2d 598, 604 (Tex. App. - San Antonio 1999, pet. denied).

lv Wiley V. Bertelson, 770 S.W.2d 878,882 (Tex. App.-Texarkana 1989, no writ).

lvi Gulf Coast Farmers Co-op v. Valley Co-op Oil Mill. 572 S.W.2d 726, 737(Tex. Civ. App. - Corpus Christi 1978, no writ).

lvii Runnells v. Firestone 746 S.W.2d 845, 849 (Tex. App. - Houston [14th Dist.] 1988), writ denied per curiam, 870 S.W.2d 240 (Tex. 1988).

lviii Copeland, 3 S.W.3d at 605

lix T.O. Stanley Boot Co. v. Bank of El Paso, 847 S.W.2d 218, 221 (Tex. 1992).

lx Komet v. Graves, 40 S.W.3d 596, 602 (Tex. App.-San Antonio 2001, no pet.); Hardin Constr. Group, Inc. v Strictly Painting, Inc. 945 S. W. 2d 308, 313 (Tex App. - San Antonio 1997, orig. proceeding); Texas Oil Co. v. Tenneco Inc., 917 S.W.2d 826, 830 (Tex. App.- Houston [14th Dist.] 1994), rev'd on other grounds sub nom. Morgan Stanley & Co., Inc. v. Texas Oil Co., 958 S.W.2d 178 (Tex. 1997).

lxi T.O. Stanley Boot Co., 847 S.W.2d at 221; Scott v. Ingle Bros. Pac., Inc. 489 S.W. 2d 554, 555 (Tex. 1972); Texas Oil Co, 917 S.W.2d at 830; Komet, 40 S.W.3d at 602.

lxii Texas Oil Co., 917 S.W.2d at 830.

lxiii T.O. Stanley Boot Co. v Bank of El Paso, 847 S.W.2d 218, 221 (Tex. 1992).

lxiv Fort Worth Indep. Sch. Dist. V. City of Fort Worth, 22 S.W.3d 832, 846 (Texas. 2000) (quoting Texas Oil Co. v. Tenneco Inc., 917 S.W. 2d 826, 830 (Tex. App.-Houston [14th Dist] 1994), rev'd on other grounds, 958 S.W.2d 178 (Tex. 1997)).

lxv T.O. Stanley Boot Co., 847 S.W.2d at 221.

lxvi Scott v. Ingle Bros. Pacific., Inc., 489 S.W.2d 554, 555 (Tex. 1972); City of Fort Worth v. Gene Hill Equip. Co., 761 S.W.2d 816, 820 (Texas.App.-Dallas, 1991).

lxvii Texas Oil Co., 917 S.W.2d at 830.

lxviii When a contract leaves open the time and place of performance, the law may imply that the time of performance was to be reasonable time. Moore v. Dilworth, 142 Tex. 538, 542 179 S.W.2d 940, 942 (1944). What is reasonable depends on the facts and circumstances as they existed at the date of the contract. Heritage Resources, Inc. v. Anschutz Corp., 689 S.W.2d 952, 955 (Tex.App.-El Paso 1985, writ ref'd n.r.e.). See also Solomon v. Greenblatt, 812 S.W.2d 7 (Tex.Appl.-Dallas, 1991) (court implied the time and place of performance in a 'consulting services' contract for management consulting.).

lxix Smith v. Renz, 840 S.W. 2d 701, 704 (Tex.App.-Corpus Christi 1992, writ denied).

lxx Roark, 813 S.W.2d at 496.

lxxi Solomon V. Greenblatt, 812 S.W.2d 7, 15(Tex.App.-Dallas 1991, no writ).

lxxii City of Crystal City v. Crystal City County Club, 486 S.W.2d 887,888 (Tex.Civ.App.-Beaumont 1972, writ ref'd n.r.e.); see also Jennings v. Radio Station KSCS, 96.3 FM, Inc., 708 S.W.2d 60, 61 9Tex.App.-Forth Worth 1986) rev'd on other grounds, 750 S.W.2d 760 (Texas 1988) (plaintiff/listener entitled to collect contest proceeds; consideration to radio station was gain in new listeners who hoped to win contest).

lxxiii Texas Business & Commerce Code §2.2.07 Sales, may be applicable in certain types of transaction.

§2.207. Additional Terms in Acceptance or Confirmation

- (a) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.
- (b) The additional terms are to be construed as proposal for addition to the contract. Between merchants such terms become part of the contract unless:
 - a. The offer expressly limits acceptance to the terms of the offer;
 - b. They materially alter it; or
 - c. Notification of objection to them has already been given or is given within a reasonable time after notice of them is received.
- (c) Conduct by both parties which recognized the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case, the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provision of this title.

Ixxiv Texas Government Code §2251.

Ixxv Attorney General Opinion No. MW-296 (MW-296)

Ixxvi Attorney General Opinion No V-981 (V-981)

Ixxvii Attorney General Opinion No. MW-296 (MW-296)

Ixxviii Niles v. Harris County Fresh Water Supply District No. 1A, 336 S.W.2d 637 (Tex. Civ. App.--Waco 1960, writ ref'd)

Ixxix Texas Administrative Code §113.9(d) 1.

Ixxx **Elements for Breach of Contract.** The essential in a suit for breach of contract are: (1) the existence of a valid contract; (2) that the plaintiff performed or tendered performance; (3) that the defendant breached the contract; and (4) that the plaintiff was damaged as a result of the breach. Landrum v. Devenport, 616 S.W.2d 359, 361 (Tex. Civ. App. – Texarkana 1981, no writ); Bradley v. Houston State Bank, 588 S.W.2d 618, 624 (Tex. App. – Houston[14th Dist.] 1979, writ ref'd n.r.e.); Hussong v. Schwan's Sales Enterprises, Inc., 896 S.W.2d 320, (Tex. App – Houston[1st Dist.] 1995, no writ); Wright v. Christian & Smith, 950 S.W.2d 411, 412 (Tex. App. – Houston [1st Dist] 1997, no writ); McCulley Fine Arts Gallery, Inc. v. "X" Partners, 860 S.W.2d 473, 477 (Tex. App.- El Paso 1993, no writ).

Elements for Breach of an Express Warranty. In order to recover for the breach of an express warranty, a plaintiff must prove: (1) an express affirmation of fact or promise by the seller relating to the goods;(2) that such affirmation of fact or promise became a part of the basis of the bargain; (3) that the plaintiff relied upon said affirmation of fact or promise; (4)that the goods failed to comply with the affirmations of fact or promise; (5) that the plaintiff was injured by such failure of the product to comply with the express warranty; and (6) that such failure was the proximate cause of plaintiff's injury. General Supply and Equipment Co., Inc. v Phillips, 490 S.W.2d 913, 917 (Tex. Civ. App. – Tyler 1972, writ ref'd n.r.e.); Tex Bus. & Com. Code Ann. Sec. 2.313 (Vernon 1968).

Privity of Contract. It is a fundamental rule of law that only the person whose primary legal right has been breached may seek redress from an injury. Nobles v. Marcus, 533 S.W.2d 923, 927 (Tex. 1976); Sherry Lane National Bank v. Bank of Evergreen, 715 S.W.2d 148, 152 (Tex. App. – Dallas 1986, writ ref'd n.r.e.). Stated another way, one may not maintain an action based upon the harm suffered by another. Texas Industrial Traffic League v. Railroad Commission of Texas, 628 S.W.2d 187, 191 (Tex. App. – Austin 1982), rev'd on other grounds, 633 S.W.2d 821 (Tex. 1982).

In contract actions, privity of contract is an essential element of recovery. Republic National Bank v. National Bankers Life Ins. Co., 427 S.W.2d 76, 79 (Tex. Civ. App. – Dallas 1977, no writ). In order to maintain an action to recover damages flowing from the breach of a written agreement, there must be ordinarily be a privity existing between the party damaged and the party south to be held liable for the repudiation of the agreement. Id. "A well defined exception to the general rule thus stated is that one who is not privy to the written agreement may demonstrate satisfactorily that the contract was actually made for his benefit and that the contracting parties intended that he benefit by it so that he becomes a third-party beneficiary and eligible to bring an action on such agreement." Id. By its very definition, however, such a third party beneficiary exception arises when on party asserts that it is the third-party beneficiary of a written agreement and, therefore, does not have to be in privity of contract with another party to bring an action against that party for breach of contract. See Exchange Bank & Trust v. Lone Star Life Ins. Co., 546 S.W.2d 948, 953 (Tex.

Civ. App. – Dallas 1977, no writ); Briercroft Sav. & Loan Ass'n. v. Foster Fin. Corp., 833 S.W.2d 898, 902 (Tex. Civ. App. – Eastland 1976, writ ref'd n.r.e.).

Substantial Performance. Generally, a party to a contract who is itself in default cannot maintain a suite for its breach. See Dobbins v. Redden, 785 S.W.2d 377, 378 (Tex. 1990). The doctrine of substantial performance has ameliorated this rule by allowing a contract action by a builder who has breached, but nevertheless substantially completed, a building contract. *Id.* The doctrine is an equitable action that allows a contractor who has substantially performed a construction contract to sue on the contract rather than being relegated to his cause of action for quantum meruit. See Vance v. My Apartment Steak House of San Antonio, Inc., 677 S.W.2d 480, 482 (Tex. 1984). The doctrine does not permit the contractor to recover the full consideration provided in the contract because, by definition, the doctrine recognized that the contractor is in breach of the contract. *Id.* Although the contractor is allowed to sue on the contract, his recovery is decreased by the cost of remedying those defects for which he is responsible. *Id.*

A contractor seeking recovery on a substantial performance theory has the burden to please substantial performance, to provide that he did substantially perform, and to prove the consideration due him under the contract, and the cost of remedying the defects due to his errors or omissions. *Id.* at 483. Carr v. Norstok Bldg. Systems, Inc., 767 S.W.2d 936, 940 (Tex. App. – Beaumont 1989, no writ). A finding that a contract has been substantially completed is the legal equivalent of full compliance, less any offsets for remediable defects. Uhlir v. Golden Triangle Development Corp., 763 S.W. 2d 512, 515, (Tex. App. – Fort Worth 1988, writ denied).

To establish substantial performance of a contract, the defendant must show that the essential elements of the parties' contract were performed and that the defects in performance did not prevent the parties from accomplishing the purpose of the contract. Matador Drilling Co. v. Post, 662 F.2d 1190, 1195 (5th Cir. 1981). Acceptance of performance alone does not constitute substantial performance, although it is a factor to be considered in determining whether there was substantial performance. Measday v. Kwik Kopy Corp., 713 F.2d 118, 124-25 (5th Cir. 1983).

Condition Precedent. A contract may include conditions precedent that must be satisfied before a vendor has an obligation of performance. A condition precedent may be either a condition to the formation of the contract or to an obligation to perform an existing agreement. Hohenberg Bros. Co. v. George E. Gibbons & Co., 537 S.W.2d 1, 3 (Tex. 1976). To make performance conditional, terms such as "if", "provided that", "on condition that", or some similar phrase of conditional language must normally be included, although there is no requirement to utilize such language. Criswell v. European Crossroads Shopping Ctr., Ltd., 792 S.W.2d 945, 945 (Tex. 1990).

Promissory Estoppel. The doctrine of promissory estoppel is derived from § 90 of the Restatement of Contracts, which states: A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does not induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. Restatement (Second) of Contracts § 90 (1971); Aubrey v. Workman, 384 S.W.2d 389, 393 (Tex. Civ. App. – Fort Worth 1964), writ ref'd n.r.e.). Promissory estoppel does not operate to create liability where it does not otherwise exist. Hruska v. First State Bank of Danville, 747 S.W. 2d 783, 785 (Tex. 1988). Promissory estoppel does not create a contract where none existed before, but only prevents a party from insisting upon his strict legal rights when it would be unjust to allow him to enforce them. "Moore" Burger, Inc. v. Phillips Petroleum Co., 492 S.W.2d 934, 937 (Tex. 1972).

The requisites of promissory estoppel in Texas are: (1) a promise; (2) foresee ability of reliance thereon by the promisor; and (3) substantial reliance by the promisee to his detriment. English v. Fischer, 660 S.W.2d 521, 524, (Tex. 1983). When promissory estoppel is raised to bar the application of the statute of frauds, there is an additional requirement that the promisor promised to sign a written document complying with the statute of frauds. Nagle v. Nagle, 633 S.W.2d 796, 800 (Tex. 1982); "Moore" Burger, 492 S.W.2d at 936-37 (Tex. 1972); Margin v. Norwest Mortgage, Inc. 919 S.W.2d 164, 167 (Tex. App. – Austin 1996, no writ); Coastal Corp. v. Atlantic Richfield Co., 852 S.W.2d 714, 718 (Tex. App. – Corpus Christi 1993, no writ); Cobb v. West Tex. Microwave Co., 700 S.W. 2d 615, 616 (Tex. App. – Austin 1985, writ ref'd n.r.e.).

Revocation of Acceptance (UCC). Under the UCC, a buyer may reject or revoke acceptance of non-conforming goods. Tex. Bus. & Com. Code Ann. §2.608 (Vernon 1994). Otherwise known as the "perfect tender" rule, a buyer may reject non-conforming goods in whole or in part. Tex. Bus. & Com. Code Ann. §2.608 (Vernon 1994). Rejection or revocation of acceptance will impose additional duties on a buyer.

Anticipatory Breach. The term anticipatory breach is a term that is described as a basis to avoid performance. To prove that affirmative defense of anticipatory breach of a contract, the defendant must show either words or actions by the plaintiff that indicate an intention to not perform the contract according to its terms. Builders Sand, Inc. v. Torture, 678 S.W.2d 115, 120 (Tex. App. – Houston [14th Dist.] 1984, no writ). The plaintiff must have distinctly, unequivocally, and absolutely refused to perform either the whole contract or a covenant which affects the whole consideration. American Bankers Inc. Co. v. Moore, 73 S.W.2d 620, 622 (Tex. Civ. App. – Fort Worth 1934, no writ). The refusal to perform must be unexcused. Taylor Pub. Co. V. Systems Mktg. Inc. 686 S.W.2d 213, 217 (Tex. App. – Dallas 1984, writ ref'd n.r.e.).

Ixxxi Texas Administrative Code §113.9

Ixxxii §2261.102. Liability Insurance Coverage Required. Each state agency shall, when feasible, include provisions in each of its contracts for goods or services that are subject to this chapter that require the contractor to carry director or officer liability insurance coverage in an amount not less than the value of the contract that is sufficient to protect the interests of the state in the event an actionable act or omission by a director or officer of the contractor damages the state's interests.

Ixxxiii Texas Government Code §2261.101 Remedies and Sanctions Schedules. (a) Each state agency shall create and incorporate in each of its contracts for goods or services that are subject to this chapter a remedies schedule, a graduated sanctions schedule, or both, for breach of the contract or substandard performance under the contract. (b) State agencies shall design fair and feasible standards that will hold contractors accountable for breach of contract or substandard performance under a contract without diminishing the number of able providers who are willing to contract with the state.

Ixxxiv Texas Government Code §2155.4441. Preference Under Service Contracts.

Ixxv Texas Government Code §572.051. Standards of Conduct; Texas Government Code §2155.003. Conflict of Interest

Ixxvi Texas Government Code §2252.901. Contracts with Former or Retired Agency Employees; Texas General Appropriations
Article IX, Section 9-6.27.

Ixxvii Tex. Bus. Corp. Act §2.45

