



**THE ATTORNEY GENERAL  
OF TEXAS**

**JOHN BEN SHEPPERD**  
ATTORNEY GENERAL

**AUSTIN 11, TEXAS**  
May 2, 1955

Hon. James A. Bethea, M.D.  
Executive Director  
State Board of Texas Hos-  
pitals & Special Schools  
Box S, Capitol Station  
Austin, Texas

Opinion MS-208  
Re: Validity of invoices  
submitted under con-  
tracts for purchase  
of milk used by the  
State.

Dear Dr. Bethea:

You have requested an opinion concerning the validity of certain claims of Metzger's Dairy of San Antonio, Texas. The facts concerning these claims are as follows:

In October, 1954, payment in the amount of \$5,219.09 was withheld by the State Board of Control from Metzger's Dairy because the invoices did not show the cost of milk pursuant to specifications of the current contract which was a cost-plus contract rather than a unit price contract. The dairy company agreed with the Board of Control that their invoices were improper but stated that invoices with previous contracts were likewise improper because all previous contracts called for a cost-plus basis. Therefore, a complete audit was made of all contracts involved and the dairy company then submitted corrected invoices which have been approved by the State Board of Control. It is the validity of these invoices on which you now request our opinion.

In Weaver v. Weaver, 171 S. W. 2d 898 (Tex.Civ. App. 1943, error ref.), the court stated certain principles of law which are applicable to the contracts in question as follows:

"To be enforceable, a contract must be reasonably definite and certain in its terms. 10 Tex. Jur. 175. Absolute and

positive certainty is not required; reasonable certainty is sufficient. That is certain which can be made certain. As a rule extrinsic evidence is admissible to remove the uncertainty of showing the intention of the parties. 10 Tex. Jur. 176,177. The purpose of rules of construction is to enable the court to ascertain from the language used in a contract the manner and extent to which the parties intended to be bound. 10 Tex. Jur. 271. The cardinal rule in construing a contract is to ascertain and give effect to the intention of the parties, as expressed in the language which they have used, provided that such intention is not in conflict with the rules of law; and this is the general purpose of all rules for the construction of contracts. 10 Tex. Jur. 272. The general and leading purpose should control minor inharmonious provisions. If two purposes or intents may be inferred from the language used and the main purpose clearly appears, such main purpose will control. 10 Tex. Jur. 273. The intention of the parties to a contract is to be gathered from a consideration of the entire instrument, taken by its four corners. In other words, the contract must be read, considered and construed as a whole, and all of its provisions must be taken into consideration and construed together in order to ascertain its meaning and effect. 10 Tex. Jur. 282. It is a settled rule that language used in expressing their agreement will be construed in the light of the facts and circumstances surrounding the parties when the contract was made, the terms of the contract being ambiguous or doubtful. 10 Tex. Jur. 290. In construing a contract the court may put itself in the place of the parties who made it at the time when it was made, and may consider their situation and the subject matter of the contract, with which it will be conclusively presumed that the

parties were familiar. Provisions in a contract which are apparently conflicting are to be reconciled and harmonized, if possible, by any reasonable interpretation, and the contract as a whole given effect. To determine whether this can be done the court will look to the entire instrument, in the light of the attending circumstances. In case of a variance between clauses, the one which contributes most essentially to the contract is entitled to the most consideration. 10 Tex. Jur. 311. The above statements are quotations from the texts cited, and are amply supported by the decisions of the courts."

In determining the validity of these invoices, this office can only determine the proper construction of the contracts in question in accordance with the principles of law announced above. These contracts provide:

"Bidders shall quote a price based on their local raw milk shed cost plus processing and delivery cost. The successful bidder shall certify monthly on his invoice what his average raw milk cost was during the month. The State Hospital Board shall have the right, if it is deemed necessary to request the successful bidder to furnish evidence of his raw milk cost and the successful bidder shall be required to furnish such evidence as may be deemed necessary by the State Hospital Board."

It is our opinion that the above quoted specifications call for a cost-plus contract and no award could be made that was contrary to the specifications. On two of the contracts involved, there is no question but that the bid was the cost of the milk, plus the processing and delivery charge of the bidder. On one contract dated September 1, 1953, the bid form furnished all bidders was the form used for unit price contracts rather than cost-plus contracts and, therefore, the bidder only filled in the unit price of the milk.

In making the corrected invoices on this contract cost of the milk at the time the bid was submitted has been subtracted from the unit price, thereby arriving at the processing and delivery charge of the bidder. We believe that this method of invoice is in conformity with the specifications calling for a cost-plus contract.

It is, therefore, our opinion that the corrected invoices are in compliance with the contractual obligations of the State and are, therefore, valid.

Yours very truly,

APPROVED:

J. C. Davis, Jr.  
County Affairs Division

Enos T. Jones  
Reviewer

J. A. Amis, Jr.  
Reviewer

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By

  
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JR:zt