

Cherokee County

RUSK, TEXAS
75785

CRAIG D. CALDWELL
COUNTY ATTORNEY

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20 Aug 04

RQ-D266-GA

AUG 26 2004

OPINION COMMITTEE

CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Ms. Nancy Fuller
Opinion Chair
Texas Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

FILE # ML-43901-04
I.D. # 043901

Re: Prompt Payment Act Section 2251.021 Government Code
ID# ML-43608-04

Dear Ms. Fuller:

The last correspondence I had from you was dated 04 May 04. In that letter you requested that I resubmit the request along with a brief. Please consider this my brief and renewed request concerning the above referenced ID #.

The question was: Based on this fact situation and the written contract signed by the County, does the Prompt Payment Act of Texas govern when the County can be charged late fees or is the County bound by New Jersey law as it relates to the payment of late fees?

The Supreme Court of Texas had this to say about the state when it entered into a contract with a citizen:

So far as a state discharges governmental functions it is a sovereign, but when it becomes a suitor in its own courts or a party to a contract with a citizen, the same law applies to it as under like conditions govern an individual's contracts.

FRISTOE V. BLUM, ET AL, 92 Tex. 76, 45 S.W. 998, May 30, 1898.

Since the counties of Texas were created by the State, I believe the same reasoning would apply to Cherokee County when it entered the equipment lease agreement with Citicorp Vendor Finance (hereinafter "Vendor").

If the county has no special status as a governmental entity when it entered the contract with Vendor, then the paragraph in the equipment lease that subjected the County to New Jersey law in the way the lease is construed effectively took the County out of the protection offered by the Prompt Payment Act.

In the case of *RUSS BERRIE V. GANTT*, 998 S.W. 2ND 713, foot note 7 and 8, (Ct. Appeals, El Paso) August 5, 1999, the court stated the following:

[W]hen a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties.

Texas has adopted Section 187 of the Second Restatement of Conflict of Laws concerning contractual choice of law provisions. Section 187 provides:

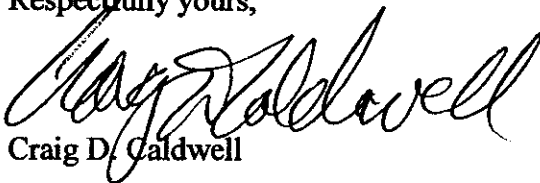
The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.

In that case an individual living in Texas had a written employment contract with an entity in New Jersey. The written contract provided "that the law of New Jersey shall apply in construing the contract." When a controversy arose between the two, the Court of Appeals determined that New Jersey law did apply.

I therefore believe that New Jersey law applies to the lease contract between the Vendor and Cherokee County, and the County contracted away its protection under the Prompt Payment Act.

Please let me know if you have any questions and please advise when I can expect to get your answer to the tendered question.

Respectfully yours,



Craig D. Caldwell

cc: L. H. Crockett, Cherokee County Auditor