



OFFICE OF THE ATTORNEY GENERAL OF TEXAS
AUSTIN

0-5629
GERALD C. MANN
ATTORNEY GENERAL

Honorable Phillip M. Stevenson, President
State Board of Education
Austin, Texas

Dear Sir:

Opinion No. 0-5629

Re: Under the facts submitted has the failure of each of the publishers in question to file samples with the State Superintendent of Public Instruction within the time required by Article 2848, R.C.S., precluded the State Board of Education at its adoption meeting, beginning October 11, 1943, from considering for adoption as free textbooks the books submitted by each of these publishers?

We have your inquiry of the 23d instant reading as follows:

*Article 2848, Revised Civil Statutes of Texas, provides, among other things, as follows:

*'Deposits of Samples. --At least thirty days prior to the date of the meeting of the said Commission, every person, firm or corporation desiring to submit bids shall file with the State Superintendent of Public Instruction nine copies of each book on which a bid will be submitted, . . .'

*Hoover Brothers, Incorporated, home office in Kansas City, Missouri, and Johnson Publishing Company, home office in Richmond, Virginia, did not file with the State Super-

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intendent of Public Instruction the required copies of books on which each desires to submit bids until a date subsequent to thirty days prior to the date of the meeting set by the State Board of Education for the purpose of adopting textbooks. The copies of the books each company is offering are now on file. I presume that each company has qualified as an eligible bidder, unless disqualified because the copies were not filed within the legal time. In the case of Hoover Brothers, Incorporated, we have a sworn statement made to Mr. Clarence McGuire, General Manager, by George L. Towne, President of The University Publishing Company, that the samples of the books Hoover Brothers, Incorporated, desires to submit were mailed to Texas on September 4th, 1943, and that by some queer fate these samples were returned to The University Publishing Company, having been sent to Austin, Minnesota, instead of Austin, Texas. The samples reached Austin, Texas, September 21st, 1943, ten days after the last legal date for the filing of the samples. In the case of Johnson Publishing Company, I do not have the facts reciting reasons for its untimely filing. I presume that some extenuating circumstance evidently caused its failure. The required samples were filed by Johnson Publishing Company on September 13th, 1943, two days subsequent to the last legal date for filing.

"You are respectfully requested to answer the following inquiry:

"Has the failure of each of these publishers to file samples with the State Superintendent of Public Instruction within the time required by the Article referred to, and under the circumstances stated, precluded the State Board of Education at its adoption meeting beginning October 11th, 1943, from considering for adoption as free textbooks the books submitted by each of these publishers?"

"The Textbook Advisory Committee commences its official hearings in Austin, Texas, on Mon-

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day next, and it could better write its final report to the State Board of Education if your opinion upon this matter were supplied to it by Tuesday, September 29th, 1943. Please mail a copy of your opinion to Mr. H. A. Glass, Director, Textbook Division, and a copy to me. If you can supply the opinion within the time requested, considerable time can be saved and confusion averted."

Article 2846 provides as follows:

* * *

"At least thirty days prior to the date of the meeting of the said Commission, every person, firm or corporation desiring to submit bids shall file with the State Superintendent of Public Instruction nine copies of each book on which a bid will be submitted, in each of which copies there shall be printed or stamped a statement of the price at which such book and special editions thereof are sold in other places under State or county adoptions, and the minimum quantities in which it will be sold at such prices, and there shall also be printed or stamped in such books a statement of the publisher's catalogue price of the same and special editions thereof, together with trade discounts and the conditions under which, and the purchasers to whom, such discounts are allowed, and the place of delivery. There shall also be printed or stamped in each book the price at which it is offered to Texas, f. o. b. the Publisher's Texas depository, with and without exchange. There shall also be printed or stamped in each book the minimum wholesale price at which such book, and special editions thereof, are sold f. o. b. the shipping point of the publisher and the name of the shipping point shall also be stated."

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Ordinarily, whether or not a statute is mandatory or directory only may be readily determined from a literal consideration, but such is not always the case.

In all statutory construction the intention of the Legislature when discoverable from the Act as a whole is the controlling consideration in determining the question of mandatory or directory nature of the language.

When Article 2846 is read in the light of other pertinent portions of the statute, we think it is clear the requirement of the Article with respect to the depositing of sample books was inserted solely for the benefit of the Commission, to the end that the members could acquaint themselves with the books upon which the bids are made. To the extent that the Commission may disregard any bid of one failing to comply therewith the statute is mandatory. There, however, the Commission has had the privilege of examination, and has satisfied itself with respect to the merits of such books, it would appear the purpose of the requirement for exhibition of samples has been met, and there appears to be no reason why the Commission does not have the power to act upon the bid precisely as though the statute had been literally complied with by the bidder. The requirement of thirty days' submission of sample, therefore, is to that extent directory. In other words, such submission for the full time mentioned is not mandatory in the sense that without it the Commission is deprived of power to consider the books and bid.

It is easily conceivable that a bidder who has failed to comply literally with the requirement of samples, for even a short time, may nevertheless submit books which the Commission after a full examination and appraisalment of their merits would find them to be the most acceptable, and to deny it the power to accept them would be a disservice to the State and not a service, as contemplated by the statutes.

The construction we have given to the statute is accentuated by the language of Article 2847, which contains provisions requiring each bidder to file with the Secretary of the Commission on the day that the Commission meets, an affidavit to the effect that certain

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taxes have been paid, and further containing certain other information, followed by the language, "No publisher who cannot and does not comply with these provisions shall be eligible to bid."

It will be seen that Article 2846 makes no such emphatic provision with respect to the depositing of samples of books offered.

The case of Federal Crude Oil Co. v. Yount-Lee Oil Co., 52 S. W. (2) 56, illustrates the rule of construction we have here announced. It is there said:

" * * *. The rule in this regard is well stated by Mr. Sutherland in his Work on Statutory Construction (2d Ed.) § 612, p. 1117: 'Provisions regulating the duties of public officers and specifying the time for their performance are in that regard generally directory. Though a statute directs a thing to be done at a particular time, it does not necessarily follow that it may not be done afterwards. In other words, as the cases universally hold, a statute specifying a time within which a public officer is to perform an official act regarding the rights and duties of others is directory, unless the nature of the act to be performed, or the phraseology of the statute, is such that the designation of time must be considered as a limitation of the power of the officer.' "

What we have said above is sufficient to indicate our opinion that the Board has the power to consider and to accept, if it sees fit to do so, the bid of a publisher who has failed to comply with the literal requirement of Article 2846 of the statutes with respect to the submission of samples of books for the period of time there mentioned.

RECEIVED SEP 28, 1943

Very truly yours

ATTORNEY GENERAL OF TEXAS

By C. F. Gibson

C. F. Gibson
Assistant

CPG-MR

