Note from the Attorney General's Office:

1933 Op. Att'y Gen. No. 33-1981 was overruled in part by 1981 Op. Att'y Gen. No. 81-011.

1980.

APPROVAL, NOTES OF PAYNE VILLAGE SCHOOL DISTRICT, PAULDING COUNTY, OHIO, $3,553.00.

COLUMBUS, OHIO, December 9, 1933.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

1981.

BOARD OF EDUCATION—CONTRACT WITH PRIVATE CORPORATION TO PURCHASE COAL MAY BE AMENDED OR RESCINDED WHEN—WITHDRAWAL OF BID—EFFECT OF NATIONAL INDUSTRIAL RECOVERY ACT—MEMBER THEREOF MAY NOT BE MANAGER OF SAID COAL COMPANY—COMPETITIVE BIDDING UNNECESSARY.

SYLLABUS:

1. *There is no provision of law requiring boards of education to advertise for competitive bids for the purchase of coal.*

2. *A contract made by a private corporation with a board of education for the sale of coal to such board may be renunciated by such company so as to allow the said board to declare the contract rescinded by an oral communication made by the company manager to the clerk of such board of education, if such oral communication embraces a distinct, unequivocal and absolute refusal to perform the contract or to recognize it as binding upon the company. Such rescission might render the contractee liable to respond for damages caused thereby, if any.*

3. *A bid submitted to a board of education for the sale of coal to such board by a private person, partnership or corporation may be withdrawn by such person, partnership or corporation if it is not accepted within a reasonable time after its submission.*

4. *A board of education may not amend a contract made with a private corporation for the purchase of coal so as to allow an increase in the contract price when such corporation so requests, because of increased costs due to the operation of the National Industrial Recovery Act.*

5. *Where a contract is made by a board of education with a private corporation for the purchase of coal and the manager of such corporation, who is also a stockholder therein, is elected a member of such board of education, such manager and stockholder may not qualify as a member of such board of education unless he terminates his services with the said company and sells or otherwise disposes of his stock therein.*

COLUMBUS, OHIO, December 9, 1933.

HON. JAMES M. HOWSARE, *Prosecuting Attorney, Eaton, Ohio.*

DEAR SIR:—Your recent communication reads as follows:

"I respectfully request your opinion upon the following set of facts: May 13, 1933, the Board of Education of the Eaton Village School District, notified the public that sealed bids would be received for six

(6) car loads, more or less, of Pocahontas No. 3 nut coal, to be delivered into the basement of the new school building in Eaton; two (2) car loads to be delivered about October 1, 1933, two (2) about December 1, 1933, and two (2) about February 1, 1934. On May 23, the following bid was accepted, it being the lowest bid of five (5) responsible bidders:

'May 18, 1933, we submit the following bid on six (6) cars Pocahontas No. 3 nut coal delivered into the basement of the New School Building in Eaton, Ohio. Two cars Oct. 1st, two about Dec. 1st 1933 and two cars about Feb. 1st 1934, at $4.67 per ton.

(Signed) Eaton Farmers Equity Co.
per Wm. Johnson Mgr.'

On September 7, 1933, the Board of Education received the following request from the Eaton Farmers Equity Company:

'To the Eaton Board of Education:

Please attach to our bid which has been submitted:

Under the mine situation and the N. R. A. plans, which are different from what they were when we submitted our bid for the coal we must enter these conditions:

Any increase or decrease in the wage cost of producer brought about by increase or decrease in rate of wages or by limitation of hours or other regulations imposed by either state or federal government shall correspondingly increase or decrease the price for the coal thereafter shipped hereunder; any tax imposed by state or federal statute or the mining or sale of coal covered by this contract, to be added to contract price.

The Eaton Farmers Equity Company
Eaton, Ohio'

On September 19, 1933, the said Board of Education refused to amend the bid as requested by the Farmers Equity Company on the theory that the offer for bids and the acceptance of the Farmers Equity Company's bid constituted a contract between the Board of Education and the bidders and the Farmers Equity Company was notified of the Board's action.

On October 1, 1933, two (2) car loads of coal were delivered as per contract into the basement of the Eaton School Building by the Farmers Equity Company. On November 9, 1933, the Clerk of the Eaton Board of Education was notified orally by the manager of the Eaton Farmers Equity that since there had been an advancement of twenty-five ($.25) per ton on coal, the Farmers Equity Company would refuse to deliver any more coal under the contract.

On November 7, 1933, William Johnson was duly elected a member of the Board of Education of the Eaton Village School District to take office January 1, 1934, the said William Johnson being the manager and a stockholder in the Farmers Equity Company, one of the contracting parties in the foregoing.

The following questions arise:

First: Whether the oral notification of a refusal on the part of the Eaton Farmers Equity Company to deliver any more coal under the contract constitutes sufficient breach on the part of said company to warrant a rescission of the conract by the Board of Education.

Second: If the Board rescinds the contract and is compelled to enter into a new contract, whether or not the bids received from other bidders in the original letting could be accepted, or would the Board be required to ask for bids again and enter into a new contract on the new bids placed.

Third: If the Board of Education should accept the proposal to amend the contract and pay twenty-five ($.25) a ton more than the contract price for the remaining four (4) car loads, would the contract be void after the first of January when the said William Johnson, manager and stockholder of the contracting party, became a member of the Board of Education.

We hope to receive your opinion at the earliest possible date, that the proper action may be taken by the present Board of Education before its personnel changes."

A board of education is required under the terms of section 7620, General Code "to provide fuel for schools", but there is no provision of law making it necessary that coal be bought only after competitive bidding.

In the case of *Gosline* vs. *Toledo Board of Education, et al.,* 11 C. C. (N. S.) 195, it was specifically held that it was unecessary for a board of education to advertise for bids for the purchase of coal for schools. Section 3988 of the Revised Stautes, now section 7623, General Code, was stated in such case not to require competitive bidding for the purchase of coal. This holding of the Gosline case has been quoted with approval in the later cases of *State ex rel. Bartholomew* vs. *Witt, Treas.,* 30, App., 414, 418, and *Fahl* vs. *Board of Education,* 23 N. P. (N. S.) 309, 412.

However, even though a board of education is not required to have competitive bidding for purchase of coal, there is nothing to prevent such a practice. If competitive bidding is had for the purchase of coal, the contract when let is subject to the same construction as is a contract entered into without competitive bidding.

Taking up your first question, it may be stated that a public contract is governed by the same laws that control natural persons in contract matters, whether it be the nation, state, municipality or other political subdivision. See *Donnelly on Public Contracts,* Section 82; and Opinions of the Attorney General for 1932, volume III, page 1717.

Such being the case, it is necessary to examine the authorities to discover whether or not a contract may be renunciated by one of the parties to a contract by means of an oral communication. In *Page on "The Law of Contracts",* 2nd, Edit., Vol. 5, sections 2901 and 2902, pages 5121, 5122, it is stated:

"It is not necessary that a party who attempts to repudiate a contract should do so in any set or definite form. Any expression of his intent to renounce a contract, either by word or act is sufficient * * *

To operate as a renunciation, however, the party who renounces the contract must do so by a distinct, unequivocal and absolute refusal to perform the contract or to recognize it as binding upon him * * *."

Applying the above doctrine to the case at hand, it would appear to be clear that the oral notification of the manager of the Eaton Farmers Equity Company to the clerk of the Eaton Board of Education would constitute renunciation of the contract on the part of the company and permit the said board of education

to treat the contract as breached if the said oral communication embraced a distinct, unequivocal and absolute refusal further to perform the contract or to further recognize it as binding upon the company. Such contractor might be held to respond for damages caused by reason of such breach, if any. See section 8447, General Code. As the manager signed the contract for the company, he undoubtedly had authority as a managing agent of the company to renounce it also. Since the facts presented in your communication do not show the exact language of the oral communication, it is not possible to decide definitely whether or not such oral communication embraced a distinct, unequivocal and absolute refusal further to perform the contract.

As for your second question, if the borad decides to no longer recognize the contract as existing and enter into a new contract for the supply of coal, there is no doubt that the board could now enter into contract with any one of the other bidders based on its bid submitted last May, if such bidder or bidders are now willing to be bound by such bids.

In the case of *Mulcahy* vs. *Board of Education,* 25 O. A., 492, it was stated at page 495:

> "A bid is an offer, and, where the time that such offer shall remain open is not provided in the bid, or by law, or in the advertisement or specifications, it of course remains open for acceptance a reasonable time, and what is a reasonable time depends upon the circumstances in each case, and if the bid is not accepted within a reasonable time, the offer may be considered by the bidder as withdrawn and the public body receiving the bid cannot thereafter hold such bidder to his bid."

In the foregoing case it was held that a period of five and one-fourth months constituted more than a reasonable time. Inasmuch as the bids in the case at hand were received last May, it is obvious that more than five and one-fourth months have elapsed and therefore the other bidders' bids may be withdrawn by them. However, if any of the other bidders are willing to treat their bid as still open, there is nothing to prevent the board of education from entering into a legal contract at this time based on such a bid.

As it was pointed out in the first portion of this opinion that boards of education are not required by law to advertise for bids for the purchase of coal, it follows that the board of education of Eaton Village School District need not advertise for new bids, but can contract with whomsoever it pleases. However, there is nothing to prevent the calling for new bids.

Coming now to your third question, I may say that the borad of education is unauthorized to amend the contract so as to pay twenty-five cents ($.25) a ton more than the contract price for the remaining four car loads of coal.

Article II, Section 29 of the Ohio Constitution provides as follows:

> "No extra compensation shall be made to any officer, public agent, or contractor, after the service shall have been rendered, or the contract entered into; nor, shall any money be paid, on any claim, the subject matter of which shall not have been provided for by pre-existing law, unless such compensation, or claim, be allowed by two-thirds of the members elected to each branch of the General Assembly."

In the case of *The State* vs. *Williams,* 34 O. S. 218, it was stated, with respect to the first clause of the foregoing section, at pages 219, 220:

"The first clause of the section quoted inhibits the allowance of extra compensation *to any* officer, public agent, or *contractor after* the services shall have been rendered or *the contract entered into.*

This language is very broad, and was intended to embrace all persons who may have rendered services for the public in any capacity whatever, in pursuance of law, and in which the compensation for the services rendered is fixed by law, as well as persons who have performed or agreed to perform services in which the public is interested, in pursuance of contracts that may have been entered into in pursuance of law, and in which the price or consideration to be received by the contractor for the thing done, or to be done, is fixed by the terms of the contract." (Italics mine.)

While the particular facts of the foregoing case involved personal services, nevertheless the above language of the court shows that the wording of the constitutional section is very broad and prevents any public contractor from receiving extra compensation after the contract is entered into.

The argument might be presented that the foregoing constitutional section is an inhibition against the state legislature providing for extra compensation only, inasmuch as Article II of the Constitution is entitled "Legislative."

However, the language of the Supreme Court in the Williams case, supra, does not appear to warrant such a narrow construction; and an opinion of a former Attorney General, reported in Opinions of the Attorney General for 1919, volume I, page 66, held, as disclosed by the second paragraph of the syllabus:

"Such resolution (of the board of control of the city of Cleveland, adopted March 5, 1918, increasing compensation of certain employes, effective January 1, 1918) is ineffective in law to authorize payment for such previously rendered services, being within the inhibition of section 29, article II of said constitution."

In a recent opinion, addressed to the Governor of New York, under date of August 1, 1933, the Attorney General of such state held that the state of New York could not legally absorb the increased costs to state contractors arising from the application of the National Industrial Recovery Act and permit the contractors to add the increased costs to their invoices to the State. See paragraph 18,090, under the topic "Current Matter" (September 20, 1933), appearing in Prentice-Hall's Federal Trade and Industry Service.

The opinion of the New York Attorney General was based largely on the provisions of Article III, Section 28 of the New York Constitution, which reads:

"The legislature shall not, nor shall the common council of any city, nor any board of supervisors, grant any extra compensation to any public officer, servant, agent or contractor."

New York court decisions were cited to show that it would be a violation of the above constitutional provision for contractors, who were caught by increased costs due to conditions at the time of the World War, to be paid extra compensation. It is obvious that the reasoning of such opinion and cases are applicable in the case you present, as the New York constitutional provision is

very similar to that of the Ohio constitution, hereinbefore quoted, and conditions arising out of the World War are comparable with conditions which give rise to the application of the National Industrial Recovery Act.

As for the latter part of your third question, I may say that the contract, if the board does not treat it as breached beforehand, will not be voided after January 1, 1934, by reason of the fact that the manager of the Eaton Farmers Equity Company will take office as a member of the board of education at that time, under the terms of section 4745, General Code.

In Opinions of the Attorney General for 1931, volume III, page 1498, it was held, as disclosed by the syllabus:

> "1. A person who has been elected as a member of a board of education and has a contract with said board to transport pupils can not legally qualify as a member thereof without surrendering his rights under the contract.
>
> 2. Upon the failure of a person elected as a member of the board of education to qualify as required by law, a vacancy is created which the remaining members of the board are required to fill at its next regular or special meeting or as soon thereafter as possible."

After quoting section 4757, General Code, which provides that "no member of the board (of education) shall have directly or indirectly any pecuniary interest in any contract of the board or be employed in any manner for compensation by the board of which he is a member except as clerk or treasurer", the then Attorney General said:

> "By reason of the plain terms of the above section, it is evident that no member of a board of education shall have a pecuniary interest in a contract such as you desccribe, during the time he is a member of said board. In some instances statutes prohibit the making of a contract by public officers during the term of office and for a designated period therafter, but the statute under consideration states in positive language that no member of the board shall have an interest in any contract of the board. It follows that Mr. B. can not qualify for the office unless he renounces his rights under the contract."

In another opinion of the Attorney General, reported in Opinions of the Attorney General for 1918, volume I, page 20, it was held as disclosed by the syllabus:

> "A member of a board of education cannot have an interest in a contract for the transportation of pupils with the board of which he is such member.
>
> One who has a contract for transportation with a board of education relinquishes his interest in such contract when he qualifies and takes his place on such board after being elected thereto."

In the case under discussion herein the manager is not himself the contracting party as was the case in the foregoing opinions. However, the manager being also a stockholder in the contracting company has a "pecuniary interest" in the contract with board of education, and the principle of the foregoing opinions

would prevent him from qualifying as long as he retained a pecuniary interest in the contract of the company with the board of education. It is obvious that Mr. Johnson could qualify if he renounced his rights under the contract, i. e., if he sold or otherwise disposed of his stock in the company and terminated his services with the said company as manager. If Mr. Johnson should qualify by acting as above suggested, the contract of the company with the board would in no way be affected.

Respectfully,
JOHN W. BRICKER,
Attorney General.

1982.

APPROVAL, NOTES OF PLAIN TOWNSHIP RURAL SCHOOL DISTRICT, FRANKLIN COUNTY, OHIO, $1,020.00.

COLUMBUS, OHIO, December 9, 1933.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

1983.

SURETY — NOT LIABLE FOR FAILURE OF DEPOSTORY TO PAY FUNDS OF TAXING SUBDIVISION WHEN—LIABILITY OF TOWNSHIP TRUSTEES WHERE FUNDS TRANSFERRED WITHOUT KNOWLEDGE OR CONSENT OF SURETY — LIABILITY OF CLERK OF BOARD OF EDUCATION IN SUCH CASE—RESTRICTED BANK DEPOSITS.

SYLLABUS:

1. *When a taxing subdivision, by virtue of an agreement between the county treasurer and its depository, causes a portion of the undivided tax funds to be transferred from the desopitory account of such subdivision in the same bank, without the knowledge or consent of the sureties on the depository bond of such subdivision, the sureties on such bond are not liable for the loss in the event that the depository bank fails to pay such funds on demand.*

2. *When a board of township trustees has caused to be transferred to it that portion of the undivided tax funds of a county due and owing to it, at the time of the settlement between the county treasurer and the county audtior, from the depository account of the county which has been restricted as to payment by authority of Section 710-107-a General Code, but without the knowledge or consent of the surety on the township depository bond, such township trustees, by reason of the provisions of Section 3326, General Code, are liable for any loss which may result to the township by reason of such depository's failure to pay such moneys on demand.*

3. *When a clerk of a board of education, without the knowledge or consent of the sureties on the bond of its depository, has caused that portion of the undivided tax funds due and owing to the board of education, at the time of a settlement between the county treasurer and county auditor, from the depository account of the*