

Opinion No. 66-78

June 20, 1966

BY: OPINION OF BOSTON E. WITT, Attorney General Paul J. Lacy, Assistant Attorney General

TO: Honorable George D. Amaya, State Senator, McKinley County, P. O. Box 70, Gallup, New Mexico

QUESTION

QUESTIONS

1. When a local school board refuses to renew an existing contract with a school bus operator, has the school bus operator's contract been "terminated" within the meaning of Section 73-19-7 (D) New Mexico Statutes Annotated, 1953 Compilation?
2. What are the grounds for which an existing school bus contractor's contract can be terminated?
3. If a local school board is in any way implicated in the violation in performance of the existing contract, does this prevent the board from terminating an existing school bus contractor's contract?
4. What recourse does the existing contractor have if a succeeding contractor should want to purchase his equipment at the appraised value arrived at under Section 73-19-7 (D), supra, and the existing contractor feels the appraised value of his equipment is unreasonably low?
5. Can the existing school bus contractor disqualify any or all appraisers as set forth under Section 73-19-7 (D), supra?
6. What constitutes a qualified appraiser under Section 73-19-7 (D), supra?
7. What recourse does an existing school bus contractor have if he feels that the termination of his contract is not justified?

CONCLUSIONS

1. No.
2. See analysis.
3. See analysis.

4. See analysis.

5. No.

6. See analysis.

7. See analysis.

OPINION

{*101} ANALYSIS

Section 73-19-7 (D), supra, the statute which is drawn into question in this opinion request provides as follows:

"D. In the event a school bus operator's contract is terminated, his buses shall be appraised by three qualified appraisers appointed by the local board of education and approved by the state transportation director. The succeeding operator shall purchase said equipment at the appraised value providing the terminated operator agrees."

In answering the first question we are concerned with the legal definition of the word "terminated" as it is found in the quoted section. Without exception the courts have construed the word "termination" in the context of contract law to contemplate the right of one contracting party to cease further performance because of a breach of the contract on the part of another party, **B. L. Metcalf {*102} General Contractor, Inc., v. Earle Earne, Inc.**, 212 C.A.2d 689, 28 Cal.Reptr. 382, 386. Therefore, when a contract expires automatically by its own terms it is not "terminated" within the meaning of this statute. See **Haberle v. R. F. C.**, 104 F. Supp. 636, 638. Since the action of the local school board in relation to the existing contract is merely a refusal to renew an existing contract which has come to an end by its terms then that contract has not been "terminated".

In answering your second question we would initially point out that the power of termination does not give a local school board the right to arbitrarily end a school bus contract. The power to terminate a contract is not one which may be exercised at will. The power may only be exercised for legal cause. **Vogel v. Pathe Exchange**, 254 N.Y.S. 881, 886, 142 Misc. 502. With this in mind we proceed to point out that a breach of any material element of a contract to provide school bus service may probably be made a basis for terminating a school bus contractor's contract. This would also include an anticipatory breach of the contract when it is seen that performance by the contractor will be impossible.

We cannot give a specific answer to your third question because the facts of each case could result in a different conclusion.

In answering your fourth question we need only note, under the terms of Section 73-19-7 (D), supra, that the existing contractor must **agree** to sell the equipment at the appraised value to the succeeding operator before the succeeding operator may purchase the equipment at the appraised price. If the terminated operator is of the opinion that the appraised value of his equipment is unreasonably low, his recourse is to refuse to sell the equipment at that price.

In answering your fifth question we point out that the appraisers are to be appointed by the local board of education and approved by the State Transportation Director. There is no provision by which the existing contractor may disqualify any of the appraisers. In the absence of such statutory provisions, the terminated operator may not disqualify the appraisers.

In the absence of specific provisions in the contract which outline the qualifications required of an appraiser the case law is clear that an appraiser to be qualified must be one who is "disinterested, impartial or indifferent". **Poole v. Hennessee**, 39 Iowa 192, 195, 18 Am. Rpts. 44. Also, to be qualified, an appraiser must be competent. He must be capable of giving a just and fair award which honestly and fairly represents the value of the goods appraised. He must have an understanding of the normal values of the goods and services which he is appraising, an understanding which would qualify him as expert in that area. **Hartford National Fire Insurance Company v. O'Brien**, 75 Ark. 198, 87 S.W. 129, 5 Ann. Cas. 334. Also, see **Application of Guaranty Trust Company of New York** (S. Ct., Special Term, New York County, Part I), 81 N.Y.S.2d 632, 634 and the cases collected therein. Therefore, if the person selected as an appraiser under Section 73-19-7 (D), supra, is disinterested, impartial or indifferent as well as competent, then he is a "qualified appraiser" within the meaning of that section.

If an existing contractor's school bus service contract has been wrongfully terminated by the school board, he has recourse in the form of a legal action against the school board for wrongful breach of contract under Section 22-23-1, New Mexico Statutes Annotated, 1953 Compilation (P.S.).