



**THE ATTORNEY GENERAL  
OF TEXAS**

**AUSTIN 11, TEXAS**

**PRICE DANIEL  
ATTORNEY GENERAL**

May 21, 1947

Hon. L. A. Woods  
State Superintendent of Public Instruction  
Department of Education  
Austin, Texas

Opinion No. V-213

Re: Maximum price the State  
may pay for school text-  
books, and related fact  
questions.

Dear Sir:

We refer to your letter of May 1, 1947, from  
which we quote in part:

"Article 2852, R. C. S., provides  
in part as follows: ". . . The maximum  
price at which the Texas State Text Book  
Commission shall contract to pay f.o.b.  
the Texas depository of the publisher,  
for any books to be used in the public  
schools of this State shall not exceed  
the minimum price at which the publisher  
sells such books in wholesale quantities,  
f.o.b. the publisher's publishing house,  
after all discounts have been deducted. . ."

"Section 4 of the Official Texas  
Textbook Contract Form prepared by the  
Attorney General's office provides as  
follows: 'It is hereby expressly stip-  
ulated that the prices hereby contracted  
to be paid the publisher f.o.b. its Texas  
depository for the books herein described  
and to be used in the public schools of  
this State shall never exceed the minimum  
price at which the publisher sells such  
books in wholesale quantities f.o.b. the  
publisher's publishing house, after all  
discounts have been deducted. The said

publisher covenants and agrees to file in the office of the State Superintendent of Public Instruction between June 1 and June 15 of each year, a sworn statement listing the lowest net wholesale price and terms of sale of all books herein contracted for when sold to other states, counties, dealers, depositories, schools, individual purchasers, or other purchasers. And the said publisher further covenants and agrees that if at any time during the period of this contract any book or books herein named or any editions thereof substantially similar to the official samples on file in the office of the State Superintendent shall be sold at a lower net wholesale price f.o.b. publisher's shipping point to any state, county, dealer, depositories, school, individual, or others than the price agreed upon in this contract, then such lower price shall immediately become the contract price between the publisher and the State of Texas, provided the State desires to accept such books in the revised or changed edition.'

"Two books were adopted in another State in May, 1946 at a price of \$.84 per copy for each of the books. The contract was effective as of July 1, 1946. In November, 1946 these same books as far as content is concerned were offered to the Texas State Board of Education and a contract was awarded at \$.90 per copy for each of the two books. The only differences we have been able to find in the books offered in both states relates to the design on the covers. The pagination is identical and the content the same. The contract which was awarded by the Texas State Board of Education is effective as of September 1, 1947. We have only recently discovered that the books were being supplied to another state at the present time at the lower price. . .

"In view of the foregoing statutory

provisions and terms of the contractual agreement, we desire to submit for your consideration and request your opinion on the following questions:

"1) Is the State of Texas entitled to purchase these books at the price of \$.84 per copy which is the price at which they are being supplied to public schools in a neighboring state, or must the State of Texas pay the price of \$.90 stipulated in its contract?

"2) If a textbook is under contract in another state for a five-year period at a stipulated price, may the State of Texas contract to purchase this book or substantially similar editions thereof at a higher price at any time during the period in which the book is under contract in the other State?"

There being no statement in the submitted facts to the contrary, we assume for the purposes of this opinion that requirements, conditions and provisions of Articles 2842, as amended by Acts 1945, 2846, 2847, 2848, 2849, 2851, 2853, 2854 and 2856, V. C. S., have been met and that there exists by reason thereof a contract effective September 1, 1947, as approved by the Board of Education and the publisher of the two textbooks in question executed in accordance with Article 2675b-5 and 2854, V. C. S.

The price which the Board of Education may contract to pay for textbooks adopted for use in the public schools of Texas is governed by Article 2852, V. C. S. It provides that the maximum price f.o.b. the Texas depository of the publisher shall not exceed the minimum price at which the publisher sells such book in wholesale quantities f.o.b. the publisher's publishing house, after all discounts have been deducted. Furthermore, it provides that any contract made for such book at a higher price than the maximum herein fixed shall be void.

Section 4 of the Official Texas Contract Form, hereinabove quoted, incorporates in substance the fixed maximum price provision of Article 2852. Under said contract form, the publisher further agrees that if at any time during the period of the contract any books named therein or substantially similar to the official samples on file in the office of State Superintendent

shall be sold at a lower net wholesale price f.o.b. publisher's shipping point to any State, etc., than the price agreed upon in the contract, then such lower price shall immediately become the contract price between the publisher and the State of Texas. (Emphasis ours)

It is our opinion that the phrase, "minimum price at which the publisher sells such book in wholesale quantities, f.o.b. the publisher's publishing place, after all discounts have been deducted" as employed in Article 2852, should be construed to mean that minimum price, whatever it may be, as evidenced on the sample copies of the books offered for sale and submitted to the Board of Education pursuant to the provisions of Article 2846, and on the basis of which said offer the State Board of Education and the publisher execute their contract.

If, in fact, on the date the contract was consummated between the Board of Education and the publisher, the publisher's minimum price for the textbook in question, or books substantially similar, is the lowest net price at which they are sold or offered for sale in wholesale quantities f.o.b. the publisher's publishing house to other States, counties or other purchasers, then, in our opinion, the price contracted for is in conformity with the provisions of Article 2852. If, however, subsequent to the consummation of the contract, the publisher offers and sells said textbook, or substantially similar books, at a lower net price than provided for in the contract, then the terms of the contract specifically provide that such lower price shall immediately become the contract price between the publisher and the State of Texas.

Stated in another manner, we do not believe that the minimum price clause in Article 2852 can properly be construed to mean that lowest net price at which like textbooks were offered and contracted for in wholesale quantities, f.o.b. the publisher's publishing house, at a time prior to that date when the like textbooks were offered for sale to the State of Texas and on the basis of which said offer a contract has been consummated.

Referring now to your first question based on facts submitted, if the publisher's minimum net sale price for the textbooks in question, or books substantially similar thereto, was 90¢ per copy for each of the books at the date the contract was consummated between the Board of Education and the publisher, the State must pay the price stipulated in the contract for books furnished thereunder, unless and until the publisher reduces its price when, under the terms of the contract, the lower price will immediately and automatically become the contract price between the State and the publisher.

Accordingly, our answer to your second question is in the affirmative assuming the contract made in the other State for a five-year period was consummated at a time prior to the Texas contract and assuming the lower minimum sales price offer of the publisher made to the other State was made at a time prior to the time it submitted its samples and bid to the State of Texas.

#### SUMMARY

Based on the submitted facts, the State of Texas must pay 90¢ per copy per textbook or books substantially similar thereto as stipulated in its textbook contract, provided the contract price did not exceed the minimum price at which the publisher sold said book in wholesale quantities, f.o.b. the publisher's publishing house, after all discounts have been deducted, at the time the Board of Education and the publisher consummated the contract; and provided the publisher does not reduce its minimum price therefor during the term of the contract.

The existence of a long term contract between a publisher and another State providing for the sale of textbooks at a certain fixed price would not preclude the Texas State Board of Education from contracting with said publisher for similar textbooks at a higher price, when

the higher price at the time the Board consummates the contract does not exceed the minimum price at which the publisher sells such books in wholesale quantities, f.o.b. the publisher's publishing house, after all discounts have been deducted.

Very truly yours

ATTORNEY GENERAL OF TEXAS

*Chester E. Ollison*

By Chester E. Ollison  
Assistant

CEO:djm

APPROVED May 21, 1947

*Price Daniel*  
ATTORNEY GENERAL OF TEXAS