

September 20, 1949

Mr. David J. Marks
County Attorney
Cochise County
Bisbee, Arizona

LAW LIBRARY
ARIZONA ATTORNEY GENERAL

Dear Sir:

We have a letter from Richey and Herring, Attorneys at Law, Douglas, Arizona, requesting that we give you an opinion and also their office on the following:

"My client, Smith Brothers Construction Company, a Tucson corporation, was engaged to repair and plaster two or more of the schools in the Douglas School District. At the completion of the work they presented their bill, which was approved by the School Board and recommended by the Superintendent to the County School Superintendent for payment. The County Attorney advised the school Superintendent that Chapter 9 (Section 9-101 et seq.) applied; and presumably Section 9-105 as amended, Laws of 1947, Chapter 115, Section 1, relating to force account would apply, and a cost plus contract for plaster repair would be illegal."

We also have your letter asking whether the provisions of Chapter 9, ACA 1939 apply to work done on public buildings which can be classed strictly as repair jobs rather than erection, additions or alterations of existing buildings, even though the cost of the job exceeds \$2500.00.

Section 9-101, ACA 1939 reads as follows:

"Architect to be employed for construction or alteration.--When by any law of the state, power is given to any state or county officer, board or commission, or any person,

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each herein designated as agent, to erect any state, county or other building or structure, or additions to or alterations of existing buildings or structures, such agent shall employ an architect if the structure, additions or alterations are deemed by such agent to warrant said employment."

It is to be noted from the above section that it applies to erection of State, county or other buildings or structures or additions to or alterations of existing buildings or structures and does not apply to repairs. Section 9-105 ACA 1939, as amended by Chapter 114, Laws of 1949, in part reads as follows:

"4. That the right is reserved to reject any or all proposals or to withhold the award if for any reason it may so determine. * * * If the agent believes the work can be done more advantageously, any building, structure, addition, or alteration, not exceeding twenty-five hundred dollars (\$2,500) in total cost, may be constructed by day's work or force account and advertisement for bids dispensed with."

It is also to be noted that the above applies to construction, building or alteration and not to repairs.

Section 54-416 ACA 1939, subsection (3), reads so far as pertinent to the question:

"The board shall manage and control the school property within their districts; purchase school furniture, apparatus, equipment, library books, and supplies for the use of the schools; rent, furnish, repair and insure the school property of the district; * * * " (Emphasis Supplied)

Section 54-431 ACA 1939 so far as material to the question asked by Mr. Herring reads as follows:

" * * * If a balance remain in the school fund of a district after payment of all outstanding warrants and the expense of main-

taining school for a period of eight (8) months during the school year has been paid, such balance may be expended for repairing the school house or improving the school grounds, or in the purchase of school furniture, fixtures, equipment and supplies, but no part of said money may be used in paying interest or principal of the bonded debts of the district or in the purchase of land for school purposes.
* * * " (Emphasis Supplied)

The first two above quoted sections empower the board of trustees of a school district to repair the building. 36 Words & Phrases, Perm. Ed. at page 956 defines repairs as follows:

"'Repair' means to restore to sound and good condition after injury or partial destruction. *Pittsburg & B. Pass. R. Co. v. City of Pittsburg*, 80 Pa. 72. To repair a building is to replace it as it was, or to restore after injury or dilapidation. *Douglas v. Commonwealth, Pa.*, 2 Rawle, 262, 264. The erection or maintenance of a guard rail, loose slat door, hurdle, or other device is not a matter of repair, falling upon the tenant, in the absence of an agreement to the contrary. *City of Reading v. Reiner*, 31 A. 357, 167 Pa. 41."

"To 'repair' is defined as to restore to a sound or good condition after decay, injury, dilapidation, or partial destruction. New plan of improvement for straightening river incorporated in completed original drainage plan held 'new construction,' not 'repair' of which board of supervisors was without jurisdiction to order, where statutory petition notice, and bond were not filed (Code 1931, §§ 7428, 7430, 7440, 7556-7561). *Maasdam v. Kirkpatrick* (Iowa) 243 N.W. 145, 149."

3 Words and Phrases, Perm. Ed. defines alteration as follows:

"'Alteration of a building' is an addition to its height or to its depth or to the extent of its interior accommodations. It is distinguished from the word 'addition' as that term is used within the meaning of the mechanic's lien law, in that the latter must be a lateral addition and occupy grounds without the limits of the building to which it constitutes an addition. Updike v. Skillman, 27 N.J.L. (3Dutch.) 131, 133."

"An alteration ex vi termini means a change or substitution, one thing for another, and, where it appears that a highway has been altered, a discontinuance of the old highway will be implied. Johnson v. Wyman, 75 Mass. (9 Gray) 186, 189."

"'Alteration of highway' means change of course existing highway, leaving it substantially the same highway as before, but with its course in some respects changed. Huening v. Shenkenberg (Wis.) 242 N.W. 552, 553."

From the law and the definitions of repair and alteration as above set out, we submit that the matter therein stated presents a question for the trustees or contractors to determine rather than being a legal question. It is within the scope of the trustees' duties to determine whether the work done constitutes a repair, alteration or construction.

We would like to point out, however, that the question of whether work done upon a building constitutes "repair" or "alteration" or "construction" is a matter to be determined carefully in each instance. Possibly work in excess of \$2500.00 might be considered in the nature of "repair"; however, if the cost goes that high it might actually be reconstruction or alteration. We would not presume to question the discretion of any board of trustees; however, in view of the obvious intent of the Legislature to require bids for work in the nature of construction, additions, or alterations to public buildings, if this cost is in excess of \$2500.00 the board might be liable if any taxpayer should question the nature of the work and if a court should determine it was not repair work but reconstruction or alteration.

Therefore, if the work to be done is actually in the nature of repairs and not reconstruction, alteration of, or addition to a public building, it is our opinion that the board has authority to have the repair work done under the general powers contained in Section 54-416, subsection 3, and Section 54-431, supra. We are of the opinion that Chapter 9 does not apply to actual repairs as distinguished from construction (which we believe would include reconstruction) and additions or alterations to public buildings.

With regard to your second question, viz., "Do the provisions of Chapter 9, ACA 1939 authorize the exclusion of a cost-plus contract for the erection, addition, alteration or repair of a public building?", we would say that we can find no authority whatever in such Chapter to authorize the letting of a cost-plus contract. Section 9-105 ACA 1939, as amended by Chapter 114, Laws of 1949, subparagraph 4, provides that:

"If the agent believes the work can be done more advantageously, any building, structure, addition, or alteration not exceeding twenty-five hundred dollars in total cost, may be constructed by day's work or force account and advertisement for bids dispensed with."
(Emphasis Supplied)

You will note that this proviso is the only exception to the requirement for calling for bids on construction of, addition to, or alteration of a public building. It provides specifically that such work, if not exceeding \$2500.00, may be done "by day's work or force account." Nowhere can we find any provision for letting a contract for such purposes on any other basis, in any event. The phrase "day's work" is self-explanatory--payment for the work done each day; "force account" has been defined as follows:

"Where the assignee of a construction contract was not paid in accordance with the contract price, but hired men and teams to do the work by the day and was paid on the basis of the time they were employed, it was a 'force account'". *Hottel v. Poudre Valley Reservoir Co.*, 92 P. 918, 920, 41 Colo. 370.

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We cannot see how either phrase can be interpreted as a "cost-plus" contract, which

"means that the contractor is to be reimbursed for the costs of the materials, labor, etc., by the owner and is to receive a fixed fee as his profit or gain."
Standard Oil Co. of Louisiana v. Fontenot,
4 Sou. (2) 634, 198 La. 644.

We are, therefore, of the opinion that Chapter 9 does not authorize the letting of a "cost-plus" contract.

Very truly yours,

FRED O. WILSON
Attorney General

MAURICE BARTH
Assistant Attorney General

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