



STATE OF ARIZONA
OFFICE OF THE ATTORNEY GENERAL

<p>ATTORNEY GENERAL OPINION</p> <p>by</p> <p>TERRY GODDARD ATTORNEY GENERAL</p> <p>October 29, 2010</p>	<p>No. I10-007 R10-018</p> <p>Re: Length of Written Guarantee of Qualified Provider Under A.R.S. § 15-213.01</p>
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To: James T. Giel
Gust Rosenfeld, P.L.C.

Pursuant to Arizona Revised Statutes (“A.R.S.”) § 15-253(B), you submitted for review an opinion that you prepared for the Queen Creek Unified School District Governing Board (“District”) regarding a proposed guaranteed energy cost-savings contract. This opinion revises your conclusion regarding qualified providers’ written guarantees. This Office declines to review the remainder of your opinion; thus, the District may act in reliance on those portions of your opinion.

Question Presented

Under A.R.S. § 15-213.01(J), must the “written guarantee of the qualified provider” be in effect for the entire life of the energy cost-savings measures or only for the first three years?

Summary Answer

An energy cost-savings contract between a school district and a qualified provider must include the qualified provider's written guarantee that either the energy or the operational costs savings—or both—will meet or exceed the expenses of the energy cost-savings measures implemented over the expected life of those measures or within twenty-five years, whichever time period is shorter.

Background

Section 15-213.01 allows a school district to enter into a contract with a qualified provider for the purpose of implementing energy cost-savings measures. A qualified provider is a “person or a business experienced in designing, implementing or installing energy cost savings measures.” A.R.S. § 15-213.01(R)(7). Implementing energy cost-savings measures is intended to reduce energy consumption or operating costs for the school district. A.R.S. § 15-213.01(R)(3). As a part of the cost-savings contract, the qualified provider must provide a written guarantee that the cost of implementing the energy savings measures will result in the school district spending less money than it otherwise would have spent on energy consumption or operating costs over the expected life of the measures. A.R.S. § 15-213.01(J). If the guaranteed energy cost savings are not achieved, the qualified provider must reimburse the district on an annual basis for any shortfall. A.R.S. § 15-213.01(J)(2). Specifically, A.R.S. § 15-213.01(J) provides as follows:

The guaranteed energy cost savings contract shall include a written guarantee of the qualified provider that either the energy or operational costs savings, or both, will meet or exceed the costs of the energy cost savings measures over the expected life of the energy cost savings measures implemented or within twenty-five years, whichever is shorter. The qualified provider shall:

1. For the first three years of savings, prepare a measurement and verification report on an annual basis in addition to an annual reconciliation of savings.

2. Reimburse the school district for any shortfall of guaranteed energy cost savings on an annual basis.

The school district may use the money that it saves as a result of the energy cost-savings measures to pay for implementing the contract and the project. A.R.S. § 15-213.01(B).

Before the cost-savings contract is implemented, the qualified provider must perform a study to determine “the exact scope of the cost savings contract, the fixed cost savings guaranteed amount, and the methodology for determining actual savings” that are to be guaranteed. A.R.S. § 15-213.01(E). The statute specifies that to determine whether the guaranteed energy savings have been achieved, the energy baseline before installing or implementing the energy savings-cost measures must be compared to the energy that will be consumed and the operational costs that will be avoided after installing or implementing those measures. A.R.S. § 15-213.01(F).

Section 15-213.01 was enacted in 1996. 1996 Ariz. Sess. Laws, ch 212, § 1. The Legislature revised it in 2009 to facilitate the spending of federal funds for energy-efficiency projects in schools. *See generally* 2009 Ariz. Sess. Laws, 1st Reg. Sess., ch. 101, § 1. The revised statute will remain in effect until June 30, 2013. On July 1, 2013, it will revert to its prior version unless the Legislature takes other action.¹

The current statute differs in several ways from the previous version. The only difference pertinent to this analysis is the requirement that the qualified provider prepare a measurement and verification report as well as an annual reconciliation of savings on an annual basis for the first three years of the contract. A.R.S. § 15-213.01(J)(1). The measurement and verification report provides a method of determining the actual energy savings A.R.S. § 15-213.01(F)

¹ Unless otherwise specified, all citations in this opinion are to the current version of the statute.

requires. This provision did not exist in the statute's previous version,² but that version did require the qualified provider to perform an energy audit one year after the energy cost-savings measures were implemented or installed and every three years after that for the length of the contract. A.R.S. § 15-213.01(F) (effective July 1, 2013). These audits provided a different mechanism for determining whether the guaranteed cost savings had been achieved, and they will be required again in 2013 unless the Legislature takes other action.

The District proposes to enter into a cost-savings contract with a qualified provider. The District contends that the qualified provider may provide the written guarantee that A.R.S. § 15-213.01(J) requires for as few as three years, provided that it makes a sufficient lump-sum payment at the end of the guarantee's term.³ The District bases its conclusion that only a three-year time frame is required on A.R.S. § 15-213.01(J)(1), which mandates that the qualified provider prepare a measurement and verification report annually for the first three years of savings.

Analysis

The primary goal of statutory interpretation is to find and give effect to the Legislature's intent. A statute's language is the best indicator of that intent. *State v. Getz*, 189 Ariz. 561, 563,

² The previous version of A.R.S. § 15-213.01(J) that will again become effective on July 1, 2013, states as follows:

The guaranteed energy cost savings contract shall include a written guarantee of the qualified provider that either the energy or operational costs savings, or both, will meet of the energy cost savings measures over the expected life of the energy cost savings measures implemented or within twenty-five years, whichever is shorter. The qualified provider shall reimburse the school district for any shortfall of guaranteed energy cost savings on an annual basis or exceed the costs.

³ The opinion submitted for review does not discuss the term of the energy savings measures and does not indicate that such term is three years. This opinion's analysis is based upon the understanding that the three-year time limit proposed by the District for the written guarantee required by A.R.S. § 15-213.01(J) is not based on the term of the energy savings measures but is instead based upon the time frame established in A.R.S. § 15-213.01(J)(1), for the measurement and verification report.

944 P.2d 503, 505 (1997). When the statutory language is plain and unambiguous, it must generally be followed as written. *Zamora v. Reinstein*, 185 Ariz. 272, 275, 915 P.2d 1227, 1230 (1996). “When the statute’s language is not clear, [courts] determine legislative intent by reading the statute as a whole, giving meaningful operation to all of its provisions, and by considering factors such as the statute’s context, subject matter, historical background, effects and consequences, and spirit and purpose.” *Id.* A statute’s individual provisions must be considered in the context of the statute as a whole to achieve a consistent interpretation. *State v. Gaynor-Fonte*, 211 Ariz. 516, 518, ¶13, 123 P.3d 1153, 1155 (App. 2005).

Section 15-213.01 authorizes a school district and a qualified provider to enter into a guaranteed energy cost-savings contract and mandates certain terms that the contract must contain. The contract must include a written guarantee of the energy cost savings that the school district will achieve over the expected life of the energy cost savings measures. A.R.S. § 15-213.01(J). As set forth above, the statute states that the “contract shall include a written guarantee of the qualified provider that either the energy or operational costs savings, or both, will meet or exceed the costs of the energy cost savings measures *over the expected life of the energy cost savings measures implemented or within twenty-five years, whichever is shorter.*” *Id.* (emphasis added). The statute’s language makes it clear that the qualified provider’s written guarantee cannot cover less than the expected life of the energy cost-savings measures implemented or twenty-five years, whichever time period is shorter. Under the statute, the written guarantee could be limited to three years only if that is the expected life of the cost-savings measures.

In your opinion, you correctly noted that under the current statute, the qualified provider must prepare the measurement and verification report and annual reconciliation of savings for

the first three years only. You reason that, because the measurement and verification report and the annual reconciliation of savings are required only for the first three years, the qualified provider need not determine annually any shortfall after the first three years. But the statute's language contradicts this conclusion. It requires the provider to give a "written guarantee . . . over the expected life of the energy cost savings measures implemented or within twenty-five years, whichever is shorter." A.R.S. § 15-213.01(J). It further requires the qualified provider to reimburse the district for any shortfall "on an annual basis." A.R.S. § 15-213.01(J)(2).

Your opinion states that there is no mechanism for the qualified provider to calculate the guaranteed amount after the first three years. The statute, however, requires the provider to prepare a study that details the fixed cost-savings guarantee amount and the methodology for determining actual savings before the installation of equipment. A.R.S. § 15-213.01(E). This requires the provider to have and use a methodology that would cover more than the first three years (for any installation that has a life expectancy of more than three years). Furthermore, A.R.S. § 15-213.01(F) sets out the methodology for determining whether the projected energy or operational cost savings have been achieved. Accordingly, there is no support for limiting the guarantee of the energy cost-savings measures to the first three years based on the three-year requirement for the annual reconciliation of savings and the measurement and verification report.⁶

⁶ This conclusion is further supported by comparing the current version of the statute to its previous version (which will become effective again in July 2013 unless the Legislature takes other action). The statute's previous version did not require the qualified provider to prepare a measurement and verification report or an annual reconciliation of savings. It did require, however, that the qualified provider include a written guarantee of the cost savings over the expected life of the energy cost-savings measures implemented or within twenty-five years, whichever time period is shorter, and to reimburse the school district for any shortfall on an annual basis. A.R.S. § 15-213.01(J) (effective July 1, 2013).

Based on your opinion that the qualified provider may provide a guarantee for less than the life of the energy cost-savings measures, you state that the provider must provide for a lump-sum payment of any shortfall before the guarantee terminates. The statutory language, however, requires the qualified provider to reimburse the school district for any shortfall *on an annual basis*. A.R.S. § 15-213.01(J)(2). There is no statutory authority for the qualified provider to reimburse the school district on any basis other than annually. Therefore, the qualified provider is not authorized to make a lump-sum payment.

Conclusion

Section 15-213.01 requires the qualified provider to provide a written guarantee of the energy cost savings over the expected life of the cost savings measures or twenty-five years, whichever time period is shorter.

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