LETTER OPINION
2002-L-65

November 14, 2002

Honorable Matthew M. Klein
State Representative
1815 7th Street NW
Minot, ND 58703-1314

Dear Representative Klein:

Thank you for your third letter concerning school districts and guaranteed energy savings contracts.

Your first question asks whether the term "capital avoidance" is a proper component of "operating" or "operation" costs under the guaranteed energy savings contract statutes (N.D.C.C. §§ 48-05-09 through 48-05-13). The statutes in question do not define any of the terms you ask about for purposes of guaranteed energy savings contracts in North Dakota. Further, the term "capital avoidance" has not been defined by any state or federal court. The terms themselves are so broad that referring to mere dictionary definitions would not be helpful. N.D.C.C. § 1-02-02.

In my first opinion to you, in response to your first two letters on this subject, I noted:

> The authority of the governmental unit to contract is based on its findings of fact from its review of the report from the qualified provider. After receiving the evaluation, the governmental unit has discretion to make its own findings. The terms of the statute are designed to protect the public with the requirements of a written guarantee from the qualified provider supported by a bond that covers all work under the contract, including the written guarantee of the provider that energy cost savings will meet or exceed the costs of the system installed. The statute does not regulate the quality of the information the governing board receives, nor how the board interprets the information. These are factual determinations for the board to make. It is the policy of this office not to make factual determinations in legal opinions. 2002 N.D. Op. Att'y Gen. L-36, fn. 6.

2002 N.D. Op. Att'y Gen. L-42.

Consequently, what is "a proper component" of operating costs under the statute is a matter for determination by the governing body based on its review of the facts.

Your second question notes an architect did not address certain items in a qualified provider's report under the guaranteed energy savings contract statute because the architect believes the matters related to health and safety issues rather than energy conservation. You ask if the governing board may consider those matters as energy conservation measures in light of the architect's report.

"Energy conservation measure" is defined in N.D.C.C. § 48-05-09(1). It means "a training program or facility alteration intended to reduce energy consumption or operating costs." Id. Whether certain work under the contract constitutes an "energy conservation measure" is a question of fact. It is the school board's duty to ensure that all work performed under a guaranteed energy savings contract meets the definition of "energy conservation measure" under N.D.C.C. § 48-05-09(1). Whether certain work under the contract constitutes an "energy conservation measure" is factual in nature, and I will therefore not express an opinion on this matter.

Your third question refers to my prior opinion concerning the fact that the contract form that you provided did not comply with the intent of N.D.C.C. §§ 48-05-09 through 48-05-13. You ask if that portion of the contract is therefore void or voidable.

Void provisions are generally identified by statute or the Constitution. See Martin v. Allianz Life Ins. Co., 573 N.W.2d 823, 828 (N.D. 1998). Chapter 9-08, N.D.C.C., provides that certain contractual provisions are void. Void provisions include ones making a construction contractor liable for errors or omissions of the owner in the plans and specifications (N.D.C.C. § 9-08-02.1), imposing penalties for nonperformance (N.D.C.C. § 9-08-03), restricting enforcement rights (N.D.C.C. § 9-08-05), restraining business (N.D.C.C. § 9-08-06), and restraining marriage (N.D.C.C. § 9-08-07). Certain other provisions are classified as voidable, such as a personal injury settlement made within 30 days of injury or under certain other circumstances. N.D.C.C. § 9-08-08.

None of the guaranteed energy savings contract provisions in statute declare any matters to be void or voidable if agreed to, and I do not believe the omission of certain matters called for by statute will make the contract void. "Persons entering into contractual relations with municipal corporations or their officers are chargeable with notice of the extent of and limitations upon their powers." Megarry Bros. v. City of St. Thomas, 66 N.W.2d 704, 704 (N.D. 1954).

"Existing law at the time a contract is entered into, covering the subject-matter of a contract, becomes a part of such contract and must be read into it as if its provisions were set out in full in the instrument itself." Storbeck v. Oriska School District No. 13, 277 N.W.2d 130, 134 (N.D. 1979) (quoting Schue v. Jacoby, 162 N.W.2d 377, 382 (N.D. 1968)). See also Megarry Bros., 66 N.W.2d at 710.

In a guaranteed energy savings contract, the contractor (qualified provider) must guarantee that "the energy and operating cost savings will meet or exceed the costs of the system." N.D.C.C. § 48-05-11. This guarantee, based on the court cases cited in the preceding paragraph, is part of any guaranteed energy savings contract. If that guarantee is not met, the contractor will be required to repay to the school district, and the district will be required to collect from the contractor, any amounts by which the costs of the system installed exceed the energy and operational savings over the term in question.[1]

I understand the issues you have inquired about regarding the award of guaranteed energy savings contracts are important. At this point, however, it seems the best way to address any perceived deficiencies in the statute would be through amendment of the statutory language by the Legislature. I am attaching to this opinion a copy of portions of the Kentucky statutes that deal with, among other things, the definition of "capital cost avoidance," which may assist you if you decide to undertake any legislative action on this issue.

Sincerely,

Wayne Stenehjem
Attorney General

rel/pg
Enclosure

[1] It is noteworthy that the copy of the request for proposal (RFP) you included in some of the documents you sent with your letters includes this requirement. However, it appears the provisions of the RFP itself were not incorporated into the actual contract documents.