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ARIZONA ATTORNEY GENERAL

April 30, 1986

The Honorable Debbie McCune  
Arizona State Representative  
State Capitol - House Wing  
Phoenix, Arizona 85007

Re: I86-013 (R85-151)

Dear Representative McCune:

We have reviewed and revised Ariz. Atty. Gen. Op. 186-013. The enclosed opinion replaces the opinion previously issued on February 5, 1986. That opinion is withdrawn and should be disregarded.

Sincerely,

A handwritten signature in cursive script that reads "Bob Corbin".

BOB CORBIN  
Attorney General

BC:gm



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Phoenix, Arizona 85007

Robert H. Corbin

April 30, 1986

The Honorable Debbie McCune  
Arizona State Representative  
State Capitol - House Wing  
Phoenix, Arizona 85007

Re: I86-013 (R85-151)  
Revised

Dear Representative McCune:

You have asked whether A.R.S. § 34-221(A)(3) requires a contractor electing to post securities in lieu of retention to deposit the full amount of those securities at the time the contract is executed and before the work begins, or may the contractor deposit those securities monthly in the amount of 10% of each pay estimate or progress payment, which is normally made on a monthly basis? We conclude that the contractor may deposit securities in lieu of retention of 10% of each progress payment in an amount equal to 10% of each payment rather than the full amount of the contract.

A.R.S. § 34-221(A)(2) and (3) provide in pertinent part:

2. The owner by mutual agreement may make progress payments as provided for in this paragraph. Payment to the contractor on the basis of a duly certified and approved estimate of the work performed during the preceding calendar month under such contract may include payment for material and equipment but to insure the proper performance of such contract, the owner shall retain ten per cent of the amount of each estimate until the final

completion and acceptance of all material,  
equipment and work covered by the contract.

. . . . .

3. Ten per cent of all estimates shall be retained by the agent as a guarantee for complete performance of the contract, to be paid to the contractor within sixty days after completion or filing notice of completion of the contract. In lieu of the retention . . . the agent shall, at the option of the contractor, accept as a substitute an assignment of [securities] . . . in an amount equal to ten per cent of all estimates which shall be retained by the agent as a guarantee for complete performance of the contract.<sup>1/</sup>

(Emphasis added.)

In construing a statute, we must give it a sensible construction that will accomplish the legislature's intent in enacting the statute and avoid an absurd result. State v. Arthur, 125 Ariz. 153, 155, 608 P.2d 90, 92 (App. 1980). This is accomplished by looking at the words used in the statute, the policy behind it, the context of the statute, the purpose it was designed to accomplish and its effects and consequences. Kriz v. Buckeye Petroleum Co., Inc., 145 Ariz. 374, 377, 701 P.2d 1182, 1185 (1985); Calvert v. Farmers Ins. Co., 144 Ariz. 291, 294, 697 P.2d 684, 687 (1985); Arizona Newspapers Ass'n., Inc. v. Superior Court, 143 Ariz. 560, 562, 694 P.2d 1174, 1176 (1985).

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<sup>1/</sup>This statute applies only to an "agent" as defined by A.R.S. § 34-101, which currently excludes the state and includes:

Any county, city or town, or officer, board or, commission thereof, and irrigation, power, electrical, drainage and flood control districts, tax levying public improvement districts, and county or city improvement districts.

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There is some ambiguity about what is intended in A.R.S. § 34-221(3) because the legislature used the words "each estimate" in subsection 2 of A.R.S. § 34-221, providing for retention of 10% of each estimate, while it used slightly different terminology -- "all estimates" -- in subsection 3 which provides for the posting of securities in lieu of retention of 10% of all estimates. A general rule of statutory construction is that use of different terminology within the same legislation is evidence of intentional differentiation. Tafoya v. U.S. Department of Justice, Law Enforcement Assistance Administration, 748 F.2d 1389 (10th Cir. 1984); Lankford v. Law Enforcement Assistance Administration, 620 F.2d 35, 36 (4th Cir. 1980). Applying this technical rule would suggest that if the legislature had meant to require posting securities in lieu of retention of 10% of "each estimate," it would have said so, as it said in A.R.S. § 34-221(A)(2), but by using different words in subsection 3, "all estimates" was not intended to mean the same thing as "each estimate" and, therefore, securities in the amount of 10% of the entire contract amount might be what the legislature intended to require.

Pragmatic construction of a statute is required, however, where technical construction would lead to an absurdity. State v. Weible, 142 Ariz. 113, 118, 688 P.2d 1005, 1010 (1984). The purpose of the provision for retention of 10% of each estimate set out in subsection 2 of A.R.S. § 34-221 and the in-lieu-of-retention provision set out in subsection 3 is stated in the text of the statute and is the same: to guarantee complete and proper performance of the entire contract. The legislature, in subsection 2, expressed a policy that retention of 10% of a progress payment at the time a payment was due would be sufficient to assure this proper performance of the contract.

In subsection 3, the legislature used the term "all estimates" rather than "full contract amount." A pay estimate is an estimate of the value of work completed. Often the total amount paid to a contractor -- the total of all estimates -- exceeds the base contract price due to provisions such as a cost overrun clause. Thus, while the contract amount will be known before any work is started, the amount of all estimates often will not be known until the contract is completed. Therefore if the in-lieu-of-retention provision was construed to require depositing money before work has commenced, it would

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be impossible to give effect to this section because, in many contracts, the amount of "all estimates" is not known prior to commencement of the work.

Additionally, when the legislature amended the statute, it provided an option to be exercised by the contractor, not the owner/agent. A.R.S. § 34-221. If the contractor chooses to post securities in lieu of retention, the owner/agent "shall" accept them. A.R.S. § 34-221(A)(3). This suggests that the provision was designed to benefit contractors, especially smaller contractors with less working capital, and give them some relief from the burden of having 10% of their progress payment retained and withheld from their use and benefit while still serving the purpose of assuring proper completion of the project. Requiring the contractor to post securities in an amount equal to 10% of the entire contract amount prior to earning any money on the project (which might provide the finances for obtaining securities to post) would tie up much more of the contractor's capital at an earlier time. Under this construction of the statute, smaller contractors could not exercise this option, even though the statute was apparently enacted for their benefit. This would also give the agent even greater assurance for completion of the contract than the legislature found adequate in providing for retention of 10% of progress payments at the time they are owed to the contractor. It is more logical to assume the legislature meant for the same assurance for completion to be provided to the owner -- 10% at the time each progress payment is due.

It is also appropriate to look at legislative historical background when interpreting a statute. City of Mesa v. Killingsworth, 96 Ariz. 290, 394 P.2d 410 (1964). Legislative intent is illustrated in the Summary Analysis of H.B. 2235 (which amended A.R.S. § 34-221 to permit deposit of securities in lieu of retention) prepared by the Research Division of the Arizona Legislative Council in February, 1974:

Summary Analysis of H.B. 2235

As introduced, H.B. 2235 would authorize state or local public agencies to accept from contractors certain securities or certificates of deposit in an amount equal to ten percent of a contract estimate as a guarantee for

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complete performance of the contract. The contractor would, however, be entitled to any interest or income earned by such securities during the time they are held by the public agency. All securities would be returned to the contractor within 45 days after completion of the contract if the contractor furnishes satisfactory receipts for all labor and material billed and waivers of liens for persons holding claims against the work.

This holding of securities by the agency would be in lieu of the existing requirement that the public agency retain ten percent of the contractor's estimate as a guarantee for complete performance of the contract.

(Emphasis added.) Use of the singular term "a contract estimate" indicates that the legislature was referring to posting securities for individual progress payments rather than for the total of all progress payments at one time, which would have required use of a plural term.

Also, where statutory meaning is ambiguous, the construction placed on it by the executive body that administers it will be followed unless that interpretation is clearly erroneous. Dupnik v. MacDougall, 136 Ariz. 39, 44, 664 P.2d 189, 194 (1983); Long v. Dick, 87 Ariz. 25, 347 P.2d 581 (1959). When the legislature reenacts a statutory provision after there has been administrative interpretation of it, the legislature is presumed to be aware of this interpretation and to have adopted it. Carriage Trade Management Corp. v. Arizona State Tax Commission, 27 Ariz.App. 584, 585-586, 557 P.2d 183, 184-185 (1976). The vast majority of the agents, as defined by A.R.S. § 34-101, who administer this provision have, since its enactment in 1974, interpreted it to permit the posting of securities at the same time they would be required to withhold 10% of the payment due. Because this provision has been reenacted when other portions of the statute were amended by Laws 1979, Ch. 53, § 1, we presume the legislature has acquiesced in this interpretation of the statute.

Finally, it is appropriate to refer to other statutes dealing with the same subject matter. The Arizona Supreme Court has stated as follows:

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As they must be construed as one system governed by one spirit and policy, the legislative intent therefor must be ascertained not alone from the literal meaning of the wording of the statutes but also from the view of the whole system of related statutes. This rule of construction applies even where the statutes were enacted at different times, and contain no reference one to the other, and it is immaterial that they are found in different chapters of the revised statutes.

State ex rel. Larson v. Farley, 106 Ariz. 119, 122, 471 P.2d 731, 734 (1970). Pertinent portions of the Arizona Procurement Code which apply to state purchasing provide:

Ten per cent of all construction contract payments shall be retained by this state as insurance of proper performance of the contract or, at the option of the contractor, a substitute security may be provided by the contractor in an authorized form . . .

A.R.S. § 41-2576 (emphasis added).

Progress payments may be made by this state to the contractor on the basis of a duly certified and approved estimate of the work performed during a preceding period of time as set by regulation, except that a percentage of all estimates shall be retained as provided in § 41-2576.

A.R.S. § 41-2577 (emphasis added). In Title 41, the same system for retention of 10% of progress payments and for substitute security is provided for state purchasing as is provided for the governmental entities covered by A.R.S. § 34-221. In Title 41, however, the legislature used the words "all . . . payments" and "all estimates" even when it discussed the 10% retention provision where it had used the words "each estimate" in discussing payment retention in A.R.S. § 34-221(A)(2). After examining these statutes together, it appears that the legislature has simply used "all estimates"

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and "each estimate" interchangeably without intending for the phrases to have different meanings.

Therefore, even though the legislature refers to retention of 10% of "each estimate" in A.R.S. § 34-221(A)(2) and "all estimates" in A.R.S. § 34-221(A)(3), in light of the purpose, policy and historical background behind the statute, the terms must be construed to mean the same thing. Therefore, we conclude that contractors may choose to post securities in the amount of 10% of the amount of an estimate at the time each progress payment is made.

Sincerely,



BOB CORBIN  
Attorney General

BC:JGF:kmc



# Attorney General

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The Honorable Debbie McCune  
Minority Whip  
Arizona House of Representatives  
1700 West Washington Street  
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Re: I86-013 (R85-151)

Dear Representative McCune:

You have asked whether A.R.S. § 34-221(A)(3) requires a contractor electing to post securities in lieu of retention to deposit the full amount of those securities at the time the contract is executed and before the work begins, or may the contractor deposit those securities monthly in the amount of 10% of each pay estimate, which is normally made on a monthly basis? We conclude that the contractor must deposit 10% of the full contract amount in lieu of retention before work begins under the contract.

A.R.S. § 34-221(A)(3) requires in pertinent part:

In lieu of the retention . . . the agent shall . . . accept as a substitute an assignment of [securities] . . . in an amount equal to ten per cent of all estimates which shall be retained by the agent as a guarantee for complete performance of the contract.<sup>1/</sup>

---

<sup>1/</sup>This statute applies only to an "agent" as defined by A.R.S. § 34-101, which currently excludes the state and includes:

Any county, city or town, or officer, board or, commission thereof, and irrigation, power, electrical, drainage and flood control districts, tax levying public improvement districts, and county or city improvement districts.

Unless a statute is ambiguous, its plain meaning must be followed and the question of legislative intent is not reached. See, e.g., Dennis Development Co., Inc. v. Department of Revenue, 122 Ariz. 465, 595 P.2d 1010 (App. 1979). The plain language of the statute provides that the agent shall accept "an amount equal to ten per cent of all estimates." (Emphasis supplied). An analysis of the terms "an," "amount" and "all estimates" leads to the conclusion that the contractor must provide one amount equal to 10% of all estimates in lieu of retention.

In A.R.S. § 34-221(A)(2), the legislature required the owner to "retain ten per cent of the amount of each estimate," while in A.R.S. § 34-221(A)(3), the subsection dealing with in lieu of retention, the legislature required the retention of "an amount equal to ten per cent of all estimates." (Emphasis added.) Use of different terminology within the same legislation is evidence of intentional differentiation. Tafoya v. U.S. Department of Justice, Law Enforcement Assistance Administration, 748 F.2d 1389 (10th Cir. 1984); Lankford v. Law Enforcement Assistance Administration, 620 F.2d 35, 36 (4th Cir. 1980). Accordingly, we presume that if the legislature had meant to require the in lieu of retention of 10% of "each estimate," it would have said so, as it said in A.R.S. § 34-221(A)(2), instead of using different terminology and requiring the express in lieu of retention of "all estimates," as it did in A.R.S. § 34-221(A)(3).

Furthermore, use of the words "an" and "amount" in subsection (A)(3) also supports our conclusion that the legislature intended of the total of all estimates rather than 10% of each individual estimate. In analyzing the meaning of "an", the Kansas Supreme Court has stated:

The word implies a single entity, has been held to preclude a number more than one, or a series; and is seldom used to denote plurality. It has been defined as any; one.

State v. Martin, 175 Kan. 160, 258 P.2d 1000, 1002 (1953) (emphasis added). Black's Law Dictionary (1968) also defines "amount" as "the effect, substance or result; the total or aggregate sum." (Emphasis added.)

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Putting these definitions together with the requirement that the one amount must be equal to 10% of "all estimates," the unambiguous language of this statute requires that the aggregate amount of retention, which is 10% of the contract, must be provided by the contractor in lieu of retention before the work begins. Monthly installments are neither contemplated nor allowed.

Accordingly, we conclude that the owner/agent, which is to say a county, city or town, or special district listed in A.R.S. § 34-101, is required at the contractor's option to accept securities before the contract is signed, in an amount not less than 10% of the total contract.

Sincerely,



BOB CORBIN  
Attorney General

BC:DR:lfc