

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF RICHLAND )  
 )  
 )  
 )  
IN RE: Request for Review by Advanced )  
Drainage Systems, Inc. of SCDOT Proposed )  
Changes to SC-M-714, 714 Series Standard )  
Drawings, and PCDM-05 )  
 )  
 )  
 )

BEFORE THE SOUTH CAROLINA  
PROCUREMENT REVIEW PANEL

ORDER

Case No. 2020-2

**RECEIVED**

**Jun 09 2020**

**SC Court of Appeals**

---

This matter came before the South Carolina Procurement Review Panel (the “Panel”) for a hearing by conference call on April 30, 2020 pursuant to a request for review filed by Advanced Drainage Systems, Inc. (“ADS”) under §11-35-4410(1)(b) of the Consolidated Procurement Code (the Procurement Code). ADS seeks review of South Carolina Department of Transportation (“SCDOT”) construction specifications.<sup>1</sup> The Panel requested the parties to brief and present oral argument on the issue of jurisdiction under the Procurement Code to review the request of ADS, and SCDOT and the Chief Procurement Officer for Construction (“CPOC”) also each filed Motions to Dismiss. The Panel heard oral argument via conference call. Present and participating in the hearing before the Panel were ADS, represented by M. Elizabeth Crum, Esquire; SCDOT, represented by Barbara M. Wessinger, Esquire; and the CPOC, represented by Manton M. Grier, Jr, Esquire.

### **Background**

On March 16, 2020, SCDOT sent industry members, to include ADS<sup>2</sup>, the agency’s proposed changes to construction specifications on permanent pipe culverts, specifically SC-M-

---

<sup>1</sup> This request for review does not involve an appeal to a decision or determination made by the CPOC. However, the CPOC was given the opportunity to participate in this request for review pursuant to S.C. Code Ann. §11-35-4420.

<sup>2</sup> Advanced Drainage Systems, Inc. (ADS) is a major manufacturer of high-density polyethylene pipe (HDPE) and has been a supplier of products to the state of South Carolina since 2009. Record at PRP002, n. 1.

714, 714 Series Standard Drawings, and PCDM-05 (collectively “Proposed Specifications”<sup>3</sup>). Record at PRP010-055. The Proposed Specifications prohibit the use of flexible pipe culverts on all Interstate and SCDOT Evacuation Routes and require the use of only rigid permanent pipe culverts, limiting the permitted material to only Reinforced Concrete Pipe (RCP).<sup>4</sup> On March 31, 2020, ADS filed a petition directly to the Panel alleging the SCDOT Proposed Specifications constitute a written determination, decision, policy or procedure arising from or concerning the procurement of construction under §11-35-4410(1)(b), which is arbitrary, capricious and unduly restrictive in violation of S.C. Code Ann. §11-35-2730 and S.C. Code Ann. Reg. 19-445.2124 (Supp. 2019).<sup>5</sup> Record at PRP001-008. ADS further requests the Panel remand the Proposed Specifications to SCDOT with the directive that the agency develop specifications for drainage pipe standards that are not arbitrary, capricious or unduly restrictive. *Id.* ADS noted that §11-35-710(A)(1) provides an exemption for SCDOT, however argues it does not apply.

On April 3, 2020, the Panel requested the parties submit written briefs regarding the Panel’s jurisdiction. On April 17, 2020, ADS filed a Memorandum in Support of the Panel’s jurisdiction to hear the request for review. On the same day, SCDOT and the CPOC filed their briefs with the Panel, and also each filed Motions to Dismiss for lack of jurisdiction arguing the SCDOT construction specifications are exempt from the Procurement Code under S.C. Code Ann. §11-35-710(A)(1). On April 24, 2020, ADS and SCDOT each filed responsive briefs. The hearing on the sole issue of the Panel’s jurisdiction to hear ADS’s petition was heard on April 30, 2020.

---

<sup>3</sup> The specifications at issue in this case are referred to as “Proposed Specifications,” because they are not scheduled to take effect until the July 2020 letting.

<sup>4</sup> This is a change from the SCDOT construction specifications for permanent pipe culverts that are currently in place, which allows flexible pipes like Corrugated Aluminum Alloy Pipe (CAAP), Spiral Ribbed Aluminum Pipe (SRAP), and High-Density Polyethylene Pipe (HDPE) for use on Interstate and SCDOT Evacuation Routes. Record at PRP 056-125. RCP is considered “rigid” pipe. Under the Proposed Specifications flexible pipe would still be permitted for Non-Interstate Routes. *See* 714.1 of SC-M-714 (07/20). Record at PRP033.

<sup>5</sup> ADS cites to S.C. Code Ann. Reg. 19-445.2124 in its filings, however ADS appears to be referencing Reg. 19-445.2140.

Based on the written and oral arguments of the parties, and the applicable law, the Panel now issues this order to memorialize the decision announced by email on April 30, 2020 with the consent of the parties.

### **Discussion**

The issue presented is whether the exemption under S.C. Code Ann. §11-35-710(A)(1) deprives the Panel of jurisdiction to review SCDOT construction specifications pursuant to §11-35-4410(1)(b). ADS argues that the exemption under §11-35-710(A)(1) does not apply to SCDOT construction specifications, because construction specifications are developed internally and are not purchased. Highlighting the language of §11-35-710(A), ADS contends that the use of the words “purchasing” and “purchasing procedures” support its interpretation that the plain and unambiguous language of the statute “only applies when SCDOT obtains construction, maintenance, and repair of bridges, highways, and roads through the process of buying the goods or services.” (internal quotations omitted) Record at PRP005. SCDOT and the CPOC disagree, arguing that the construction specifications at issue are used for contractual services for construction, maintenance and repairs of highways, roads and bridges which falls squarely within the exemption, and therefore are exempt from all other provisions of the Procurement Code, including §11-35-2710. For the reasons discussed below, the Panel agrees with SCDOT and the CPOC that the exemption under §11-35-710(A)(1) applies and the Panel lacks jurisdiction to address the request for review by ADS.

Generally speaking, the Procurement Code applies to all state agencies and public contracts. *See* S.C. Code Ann. §11-35-40; *see also*, S.C. Code Ann. §11-35-310(18). However, §11-35-710 expressly sets forth exemptions and provides in pertinent part:

(A) The board, upon the recommendation of the chief procurement officer, may exempt governmental bodies from purchasing certain items through the

respective chief procurement officer's area of responsibility. The board may exempt specific supplies, services, information technology, or construction from the purchasing procedures required in this chapter and for just cause by unanimous written decision limit or may withdraw exemptions provided for in this section. ***The following exemptions are granted in this chapter:***

- (1) the construction, maintenance, and repair of bridges, highways, and roads; vehicle and road equipment maintenance and repair; and other emergency-type parts or equipment utilized by the Department of Transportation or the Department of Public Safety;

S.C. Code Ann. §11-35-710(A)(1) (2019) (emphasis added).

The Panel recently interpreted §11-35-710 in *In Re Appeal by Coast Enterprises*, Panel Case No. 2019-4. That case involved a contract controversy arising out of a solicitation issued under the raw materials exemption provided in §11-35-710(A)(2).<sup>6</sup> *Id.* The Panel found that the language of §11-35-710 “plainly and unambiguously creates two types of exemptions.” First, an “administrative exemption” is created, which allows the State Fiscal Accountability Authority (SFAA)<sup>7</sup> to “exempt certain purchases from the purchasing procedures of the Procurement Code;” and second, “legislative exemptions” are expressly enumerated by the General Assembly in subsections (A)(1) through (A)(15), which exempt certain agencies and certain types of purchases from the entirety of the Procurement Code.<sup>8</sup> *Id.* (“[T]his chapter’ means Chapter 35 of Title 11 or, in other words, the entirety of the Procurement Code.”); *see also*, S.C. Code Ann. §11-35-10 (2019). The Panel concluded that because the contract was solicited and awarded pursuant to the exemption of §11-35-710(A)(2), the contract was “exempt from all other provision of the Procurement Code,” and held that neither it nor the CPO had jurisdiction to resolve the parties’ contractual dispute. *Id.*

---

<sup>6</sup> Due to Act No. 41 of 2019, S.C. Code Ann. §11-35-710(2) (2011), now codified as §11-35-710(A)(2).

<sup>7</sup> *See* S.C. Code Ann. §11-35-310(2) (defining “Board” as the “governing body of the State Fiscal Accountability Authority”).

<sup>8</sup> The case states, “[T]he General Assembly created fourteen express, or “legislative” exemptions....,” however S.C. Code Ann. §11-35-710 was amended by Act No. 41 of 2019 to include a fifteenth exemption.

Consistent with *Coast Enterprises*, the Panel finds that §11-35-710(A)(1) is a “legislative exemption” that exempts “the construction, maintenance, and repair of bridges, highways, and roads” (“Highway Exemption”) from “all other provisions of the Procurement Code.”<sup>9</sup> Therefore, the Panel must determine whether the Proposed Specifications fall within the meaning of the Highway Exemption under §11-35-710(A)(1), because if the Procurement Code does not apply, the Panel does not have jurisdiction. *See In Re: Protest of Wometco Food Services, Inc.*, Panel Case No. 1991-14 (“The question whether the Procurement Code applies in this case goes directly to the jurisdiction of the Panel”).

When examining statutes, the cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). The statutory language in question must “be read in a sense which harmonizes with its subject matter and accords with its general purposes.” *Hitachi Data Systems Corp. v. Leatherman*, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992). In construing a statute, the Court may consider other statutes relating to the same subject matter. *Multi-Cinema, Ltd. v. S.C. Tax Comm’n*, 292 S.C. 411, 413, 357 S.E.2d 6, 8 (1987). Finally, the legislature is presumed to have knowledge of previous legislation as well as judicial decisions construing that legislation when later statutes are

---

<sup>9</sup> While SFAA has the authority to limit or withdraw the legislative exemptions listed in §11-35-710 “for just cause,” there is no indication that §11-35-710(A)(1) has been limited or withdrawn. ADS makes several arguments in its briefs regarding the “purchasing” and “purchasing procedures” language found in §11-35-710(A), and how it applies to SCDOT’s Highway Exemptions. These arguments fail, because they are contrary to the finding in *In Re: Coast Enterprises*, Panel Case No. 2019-4, which provides:

The Panel finds that the language of section 11-35-710 plainly and unambiguously creates two types of exemptions. First, the provision authorizes the State Fiscal Accountability Authority (SFAA) to exempt *certain purchases from the purchasing procedures* of the Procurement Code. This type of exemption is limited in scope and is best described as an *administrative exemption*. Second, the General Assembly created *fourteen express, or “legislative,” exemptions* which exempt certain agencies and certain types of purchases from “this chapter.” “[T]his chapter” means Chapter 35 of Title 11, or, in other words, *the entirety of the Procurement Code.*” (emphasis added)(citations omitted).

enacted concerning related subjects. *Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 572, 743 S.E.2d 778, 784 (2013).

For the reasons below, the Panel finds that SCDOT construction specifications for construction, maintenance, and repair of bridges, highway, and roads are contemplated within the meaning of §11-35-710(A)(1) and therefore are exempt from review under the Procurement Code.

The South Carolina Supreme Court has provided that “[c]ontracts for the construction, maintenance, and repair of highways and roads are specifically exempted from the South Carolina Consolidated Procurement Code” under §11-35-710(A)(1)). *Sloan v. Department of Transportation*, 379 S.C. 160, 171, 666 S.E.2d 236, 241 (2008). The General Assembly has tasked SCDOT with the duty and power to “lay out, build, and maintain public highways and bridges, including the *exclusive authority to establish design criteria, construction specifications, and standards required to construct and maintain highways and bridges.*” S.C. Code Ann. §57-3-110(A)(1) (emphasis added). The Panel finds that §11-35-710(A)(1) and §57-3-110(A)(1) cover the same subject matter—construction and maintenance of highways and bridges. Harmonizing the two, the Panel concludes that the Proposed Specifications are exempt under §11-35-710(A)(1), because they are “required to construct and maintain highways,” or in other words, they are performance obligations that become part of a highway construction contract.

ADS argues that the Proposed Specifications do not involve a contract, however this is only true because of the timing of ADS’s request for review.<sup>10</sup> While there may not be an active contract involving the Proposed Specification, it is clear these construction specifications are

---

<sup>10</sup> Surprisingly, none of the parties raised arguments of ripeness regarding the Proposed Specifications not taking effect until July 2020. Regardless, the Panel is without jurisdiction to hear ADS’s request for review for the reasons provided.

contract terms, because the first section of Supplemental Technical Specification SC-M-714 (07/20) provides:

This specification *establishes requirements for the materials, construction, measurement, and payment* for furnishing reinforced concrete pipe culverts (RCP)[,] corrugated aluminum alloy pipes and pipe arches (CAAP), spiral ribbed aluminum pipe (SRAP), and high density polyethylene pipe culvert (HDPE) of the size, shape, type, and dimensions indicated on the plans and installing them to provide drainage structures at places designated on the plans or by the RCE in accordance with these specifications and true to the lines and grades shown on the plans or otherwise given by the RCE. This work includes the furnishing and installing of tee, wye, elbow, and bend joints, and making connections to existing and/or new structures, including drilling, and chipping as necessary to complete the work.

(emphasis added) Record at PRP033. The Proposed Specifications are essentially contract requirements conveying how a contractor is to perform the work, the quality and quantity of the materials to be provided, and how SCDOT will measure, accept, and pay for the work performed. *See* SCDOT 2007 Standard Specifications of Highway Construction, p. 13.

The Panel also finds the annual audits conducted by the Materials Management Office under S.C. Code Ann. §57-1-490 (2016) (amended 2019) important to note in support of the Panel's determination in this matter. The MMO performed annual audits from 2008 to 2018 relating specifically to SCDOT's exemption at §11-35-710(A)(1) before Act 41 of 2019 repealed the MMO audit provision in §57-1-490(B)(2016). It provided in relevant part:

(B) The Materials Management Office of the State Fiscal Accountability Authority annually must audit the department's internal procurement operation *to ensure that*

*the department has acted properly with regard to the department's exemptions contained in Section 11-35-710.* The audit must be performed in accordance with applicable state law, including, but not limited to, administrative penalties for violations found as a result of the audit. The results of the audit must be made available by October fifteenth to the Department of Transportation Commission, the State Auditor, the Governor, the Chairmen of the Senate Finance and Transportation Committees, and the Chairmen of the House of Representatives Ways and Means and Education and Public Works Committees. The costs and expenses of the audit must be paid by the department out of its funds.

S.C. Code Ann. § 57-1-490 (2016) (amended 2019) (emphasis added). Citing several of the audits, SCDOT and the CPOC note the MMO concluded that “DOT has very broad exemptions from the Procurement Code.”<sup>11</sup> Both SCDOT and MMO have agreed that “the exemption applies to all contractual services in preparation for and during construction, maintenance, and repair of bridges, highways and roads.”<sup>12</sup>

While the MMO’s findings are not binding on the Panel, these audits were performed at the direction of the General Assembly, specifically regarding the application of the exemption in this case, and provided to the legislature each year. It is also instructive that in its final and most recent audit, the MMO noted that SCDOT acted properly in its application of the exemption under 11-35-710(A)(1), and then the audit provision was repealed.<sup>13</sup> The General Assembly had every opportunity to act if it felt necessary to further clarify the scope of the exemption under §11-35-710(A)(1), however it has not chosen to do so. *See Hodges*, 341 S.C. 79, 88–89, 533 S.E.2d 578

---

<sup>11</sup> Audit Report by Materials Management Office of the State Budget and Control Board Regarding the South Carolina Department of Transportation’s Exemption from the Consolidated Procurement Code under Section 11-35-710(1), dated October 10, 2013, p.7 (found at <https://www.procurement.sc.gov/files/DOT13.pdf>) (last visited May 11, 2020).

<sup>12</sup> Audit Report by Materials Management Office of the State Budget and Control Board Regarding the South Carolina Department of Transportation’s Exemption from the Consolidated Procurement Code under Section 11-35-710(1), dated October 15, 2008, p.7 (2008 MMO Audit Report)(found at <https://www.procurement.sc.gov/files/DOT08.pdf>) (last visited May 11, 2020).

<sup>13</sup> Examination Report South Carolina Department of Transportation’s Internal Procurement Operations with Regard to the Exemptions from the Consolidated Procurement Code, dated October 15, 2018, p. 14 (2018 MMO Audit Report) (found at <https://www.procurement.sc.gov/files/DOT18.pdf>) (last visited May 11, 2020).

583 (noting the Legislature is presumed to be familiar with prior legislation, and if it intends to repeal or amend existing laws it would expressly do so).

Because the Proposed Specifications are contract terms for the construction, maintenance, and repair of highways and roads, the Panel holds that the Proposed Specifications are exempt from review under the Procurement Code pursuant to the Highway Exemption under S.C. Code Ann. §11-35-710(A)(1). Therefore, the Panel lacks jurisdiction to address ADS's request for review.

Even if the Proposed Specifications were not exempt under §11-35-710(A)(1), the Panel would still lack jurisdiction under §11-35-4410(1)(b). Section 11-35-4410(1)(b) authorizes the Panel to conduct a de novo review of:

[R]equests for review of other written determinations, decisions, policies, and procedures arising from or concerning the procurement of supplies, services, information technology, or construction procured in accordance with the provisions of this code and the ensuing regulations; except that a matter which could have been brought before the chief procurement officers in a timely and appropriate manner pursuant to Sections 11-35-4210, 11-35-4220, or 11-35-4230, but was not, must not be the subject of review under this paragraph. Requests for review pursuant to this paragraph must be submitted to the Procurement Review Panel in writing, setting forth the grounds, within fifteen days of the date of the written determinations, decisions, policies, and procedures.

S.C. Code Ann. § 11-35-4410(1)(b) (2019). Under the clear terms of §11-35-4410(1)(b), the Panel has only been delegated the authority to and only has jurisdiction to hear, without prior review by the CPO, "requests for review of other written determinations, decisions, policies, and procedures arising from or concerning the procurement of supplies, services, or construction *procured in accordance with the provisions of [the Procurement] [C]ode ...*" that could not otherwise have been brought before a CPO under Sections 11-35-4210, 4220 or 4230. S.C. Code Ann. §11-35-4410(1)(b) (emphasis added); *Lottery In Re: Petition for Administrative Review GTECH Corporation v. South Carolina Education*, Panel Case No. 2002-4(II). Because the

procurement of construction contracts for the state highway system is governed by Title 57 of S.C. Code of Laws and are therefore not “procured in accordance with the provisions of [the Procurement Code],” the Panel would lack jurisdiction to review SCDOT’s construction specifications under §11-35-4410(1)(B). *See Sloan v. Department of Transportation*, 379 S.C. 160, 171, 666 S.E.2d 236, 241 (2008) (noting the procurement of construction contracts for the state highway system is governed by S.C. Code §57-5-1620); *In Re: Protest of Charleston Equities, Inc.; Appeal by Charleston Equities, Inc.*, Panel Case No. 1997-1 (“CCAA did not conduct the procurement under the SC Consolidated Procurement Code, therefore, the Panel does no[t] have jurisdiction in this case under S.C. Code Ann. §11-35-4410(1)(b)”).

**Conclusion**

Therefore, for the reasons set forth herein, the Panel hereby grants the Motions to Dismiss of SCDOT and the CPOC and dismisses ADS’s request for review for lack of jurisdiction.

**IT IS SO ORDERED.**

**SOUTH CAROLINA PROCUREMENT REVIEW PANEL**



**BY:** \_\_\_\_\_

**C. BRIAN MCLANE, SR., CHAIRMAN**

This 14th day of May, 2020.

Columbia, South Carolina