

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA
PROCUREMENT REVIEW PANEL

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SC Court of Appeals

Appellate Case No. 2020-000859

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

APPELLANT'S INITIAL BRIEF

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	II
STATEMENT OF ISSUES ON APPEAL	1
STATEMENT OF THE CASE.....	2
STATEMENT OF FACTS	3
STANDARD OF REVIEW	6
ARGUMENT	7
CONCLUSION.....	22

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
Act No., 181 in 1993	17
<i>Berkebile v. Outen</i> ,	
331 S.C. 50, 426 S.E.2d 760 (1993)	13, 17
<i>Brooks v. South Carolina State Bd. of Funeral Service</i> ,	
271 S.C. 457, 247 S.E.2d 820 (1978)	7
<i>Bunch v. Cobb</i> ,	
273 S.C. 445, 257 S.E.2d 225 (1979)	7
<i>City of Columbia v. Bd. of Health & Env'tl. Control</i> ,	
292 S.C. 199, 355 S.E.2d 536, (1987)	7
<i>City of Rock Hill v. S.C. Dep't of Health & Env'tl. Control</i> ,	
302 S.C. 161, 394 S.E.2d 327 (1990)	7
<i>Hitachi Data Sys. Corp. v. Leatherman</i> ,	
309 S.C. 174, 420 S.E.2d 843 (1992)	7, 17
<i>Hodges v. Rainey</i> ,	
341 S.C. 79, 533 S.E.2d 578 (2000)	8, 13
<i>In Re: Appeal by Short Counts, LLC RFP No. 5400006878 Traffic Data Collection Services for the South Carolina Department of Transportation, Case No., (2015), 2015 WL 851746</i>	10
<i>Kennedy v. S.C. Ret. Sys.</i> ,	
345 S.C. 339, 549 S.E.2d 243 (2001)	9
<i>Keonig v. South Carolina Dept. of Public Safety</i> ,	
325 S.C. 400, 480 S.E.2d 98 (Ct. App. 1996).....	17
<i>Kiawah Development Partners, II v. South Carolina Dept. of Health and Env't'l Control</i> ,	
411 S.C. 16, 766 S.E.2d 707 (2014)	7
<i>Lester v. S.C. Workers' Compensation Comm'n</i> ,	
328 S.C. 535, 493 S.E.2d 103 (1997)	6
<i>Lite House, Inc. v. J.C. Roy Co.</i> ,	
309 S.C. 50, 419 S.E.2d 817 (Ct. App. 1992).....	9
<i>Miller v. Doe</i> ,	
312 S.C. 444, 441 S.E.2d 319 (1994)	8
<i>Multi-Cinema, Ltd. v. S.C. Tax Comm'n</i> ,	
292 S.C. 411, 357 S.E.2d 6 (1987)	17
<i>Paschal v. State Election Comm'n</i> ,	
317 S.C. 434, 454 S.E.2d 890 (1995)	8
<i>Perry v. Bullock</i> ,	
409 S.C. 137, 761 S.E.2d 251 (2014)	11, 14
<i>Sloan v. Department of Transportation</i> ,	
379 S.C. 160.....	22, 23
<i>Smith v. Tiffany</i> ,	
419 S.C. 548, 799 S.E.2d 479 (2017)	9

<i>South Carolina Elec. and Gas Co. v. Public Serv. Comm'n</i> , 275 S.C. 487, 272 S.E.2d 793 (1980)	7
<i>State ex. rel. McLeod. v. Montgomery</i> , 244 S.C. 308, 136 S.E.2d 778 (1964)	15
<i>Tall Tower v. S.C. Procurement Review Panel</i> , 294 S.C. 225, 363 S.E.2d 683 (1987)	7
<i>Tilley v. Pacesetter Corp.</i> , 355 S.C. 361, 585 S.E.2d 292 (2003)	8
<i>Timmons v. S.C. Tricentennial Comm'n</i> , 254 S.C. 378, 175 S.E.2d 805 (1970)	8
<i>Transp. Ins. Co. v. S.C. Second Injury Fund</i> , 389 S.C. 422, 699 S.E.2d 687 (2010)	8

Statutes

S. C. Code Ann. § 11-35-710(A)(1)	<i>Passim</i>
S. C. Code Ann. § 11-35-20(1)	9
S. C. CODE ANN. § 57-3-110(A)(1)	1, 16
S.C. Code Ann. 11-35-20(2)	9
S.C. Code Ann. § 11-35-4420	2
S.C. Code Ann. § 11-35-2710	5, 12, 13, 17
S.C. Code Ann. § 11-35-4410	7
S.C. Code Ann. § 11-35-510	10
S.C. Code Ann. § 11-35-2610	13, 17
S.C. Code Ann. § 11-35-4410(1)(b)	<i>Passim</i>
S.C. Code Ann. § 11-35-40(1)	8
S.C. Code Ann. § 11-35-310(18)	9
S.C. Code Ann. § 11-35-310(25)	22
S.C. Code Ann. § 57-1-490(B)	19, 20
S.C. Code Ann. § 57-3-110(1)	17
S.C. Code Ann. §§ 11-35-10	2
S.C. Code Ann., § 11-35-4410(6)	6
S.C. Code Ann § 57-5-1620	22, 23
S.C. Code § 1-23-380	6
S.C. Code § 11-35-710	9, 10, 11
S.C. Code § 57-3-110	10, 17, 18
S.C. Code § 57-1-490	19
Title 57 of the S.C. Code	5

Regulations

S.C. Code Ann. Reg. 19-445.2065	16
S.C. Code Ann. Reg. 19-445.2070	16
S.C. Code Ann. Reg. 19-445.2140(4)	13, 16, 22
S.C. Code Reg. 19-445-2140(B)	18

STATEMENT OF ISSUES ON APPEAL

- I. DOES THE SOUTH CAROLINA PROCUREMENT REVIEW PANEL THE HAVE STATUTORY AUTHORITY TO HEAR THE REQUEST FOR REVIEW OF THE SCDOT'S PROPOSED SPECIFICATIONS?
- II. DOES THE FACT THAT THE PROPOSED SPECIFICATIONS WOULD BE INCLUDED IN FUTURE CONTRACTS EXEMPT THE SCDOT FROM COMPLYING WITH ARTICLE 7 OF THE CODE?
- III. DOES READING S. C. CODE ANN. § 57-3-110(A)(1) IN HARMONY WITH THE CODE AUTHORIZED THE PANEL TO CONDUCT THE REQUEST FOR REVIEW.
- IV. THE PANEL'S RELIANCE ON THE ANNUAL AUDITS CONDUCTED BY THE MATERIALS MANAGEMENT OFFICE IS MISPLACED?
- V. THE PHRASE "PROCURED IN ACCORDANCE WITH THE PROVISIONS OF 'THE PROCUREMENT] [C]ODE" DOES NOT DEPRIVE THE PANEL OF JURISDICTION TO HEAR THE ADS REQUEST FOR REVIEW?

STATEMENT OF THE CASE

This appeal arises from the South Carolina Procurement Code, S.C. Code Ann. §§ 11-35-10 et seq. (2019) (“Code”) and is an issue of first impression both before this Court and the South Carolina Procurement Panel (“Panel”). Does the South Carolina Department of Transportation’s (“SCDOT”) statutory exemption from the purchasing process for “construction, maintenance and repair of highways and bridges” contained in S. C. Code Ann. § 11-35-710(A)(1) (“710 Exemption” or “SCDOT Exemption”) include specifications for permanent culverts for roads and bridges, and, if so, does the exemption from the purchasing process deprive the Panel of the statutory authority to hear Advanced Drainage System, Inc.’s (“ADS”) request for review pursuant to § 11-35-4410(1)(b) (“Request for Review”).

Section 11-35-710(A)(1) exempts SCDOT the following from the purchasing provisions of Code: “the construction, maintenance, and repair of bridges, highways, and roads ... by the Department of Transportation” Section 11-35-4410(1)(b) charges the Panel with the responsibility of hearing “(b) requests 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” In other words, § 11-35-4410(1)(b) applies to decisions made by state agencies relating to or concerning procurement of construction under the code but not the actual purchasing process itself.

On April 1, 2020, Advanced Drainage System, Inc. (“ADS” or “Appellant”), filed its Request for Review of the South Carolina Department of Transportation Proposed Changes to SC-M-714, 714 Series Standard Drawings, and PCDM—5” with Panel. On April 3, 2020, the Panel *sua sponte* raised the issue of whether it had jurisdiction to hear the request for review and asked ADS and SCDOT to brief the issue. PRP Record, p. 266. Pursuant to S.C. Code Ann. § 11-35-

4420, the Chief Procurement Officer for Construction (“CPOC”) determined to participate in the Panel’s review. On April 17, 2020, ADS filed its Memorandum in Support of the Panel’s jurisdiction and the SCDOT and the CPOC each filed Memorandum in Opposition to the Panel’s jurisdiction and Motions to Dismiss. On April 24, 2020, ADS and SCDOT filed their respective responsive memoranda. Due to COVID-19, on April 30, 2020, the Panel held a telephonic hearing on the sole issue of the Panel’s statutory authority to hear ADS’ Request for Review.

At the end of arguments, the Panel went into executive session for the receipt of legal advice. After emerging from executive session, the Panel voted that it did not have jurisdiction to hear the request for review because the 710 Exemption exempted SC-M-714, 714 Series Standard Drawings, and PCDM—5 from the purchasing provisions of the Procurement Code.¹ PRP Record, p 274. (Order) The Panel issued its written order granting Respondents’ Motions to Dismiss on May 14, 2020, concluding it lacked jurisdiction to hear ADS’ Request for Review. This appeal followed on June 9, 2020. PRP Record, pp. 265-272. (Ex. 2). (Collectively COPC, SCDOT and Panel are referred to as “Respondents”)

STATEMENT OF FACTS

The current SCDOT drainage pipe standards (Current Specifications) were put in place in 2009. PRP Record, pp. 57-125 (Ex. 2.) Since 2009, the Current Specifications have allowed the use of corrugated High-Density Polyethylene (“HDPE”) pipe, Concrete pipe, Corrugated Aluminum Alloy Pipe (“CAAP”) and Spiral Rib Aluminum pipe (“SRAP”) for storm drainage applications interstate highways and SCDOT designated evacuation routes (collectively “Major Roads”). *Id.* Exhibit 2, Current Specifications. For more than ten (10) years, ADS has been a supplier of thermoplastic materials on the SCDOT supplier list and has submitted quotes to

¹ The Panel did not have a court reporter present to hear to arguments.

general contractor submitting bids for invitation for bids for roads that include permanent pipe culvert (pipe drainage) construction.

The SCDOT develops its highway standard specifications internally through the Design Standards Office, SCDOT. Record, PRP011, 025 - 055. The SCDOT's Standard Specifications for Highway Construction Manual, Section 101.3.65, defines specification as:

Specifications is the general term that includes these Standard Specifications, the Supplemental Specifications, Supplemental Technical Specifications, Special Provisions, and all documents of any description including notes on the Plans that provide directions, provisions, and requirements pertaining to the method and manner of performing the work, the quality and quantity of materials to be furnished, and the measurement and payment of work required to satisfactorily complete the project.²

PRP Record, 4/17/20 filing, pp. 2.

The Current Specifications (SC-M-714) is a supplemental technical specification and contains the allowable specifications for of permanent pipe culverts for construction. Specifically, the first section of the Specification SC-PRP Record, pp. 246-247. M-714 provides:

Description

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. (Emphasis added)

The Standard Drawings for SC-M-714 are for construction purposes and are stamped as follows:

² SCDOT 2007 Standard Specification of Highway Construction, page 13.
(https://www.scdot.org/business/pdf/2007_full_specbook.pdf)

THIS DRAWING IS ONLY VALID FOR CONSTRUCTION WHEN
SEALED AND SIGNED BY A PROFESSIONAL ENGINEER REGISTERED
IN THE STATE OF SOUTH CAROLINA.

On March 16, 2020, SCDOT sent out an email to industry members with proposed revisions to SCDOT's SC-M-714, 714 Series Standard Drawings, and PCDM-05, construction specification on Permanent Pipe Culverts, related Standard Drawings, and the Preconstruction Design Memorandum (collectively "Proposed Specifications"). PRP Record, pp. 10-55 (DOT Brief 4/17, p. 1.) SCDOT stated that "[t]hese documents were being provided as a courtesy prior to the planned implementation in the July 2020 letting. *Id.*, pp. 1-2.

In its Request for Review, ADS contends that the Proposed Specifications limit the type material that can be used for pipe drainage system installation to one material—concrete—and are arbitrary, capricious and unduly restrictive in violation of the legislative policies and purposes of the Code and S.C. Code Ann. § 11-35-2710—2730.

The Panel liberally and broadly determined the SCDOT 701 Exemption and concluded that the SCDOT Proposed Specifications are "contemplated within the meaning of §11-35-710(A)(1) and are exempt from review under the Procurement Code because [Proposed] Specification are [would be] contract terms. The Panel also determined that even if the Proposed Specifications are not exempt under § 11-35-710(A)(1), the Panel did not have the authority to hear the Request for Review because the "procurement of construction contracts for the state highway system is governed by Title 57 of the S.C. Code of Laws and are therefore not 'procured in accordance with the provisions of [the Code].'" Record, Order, pp. 9-10.

STANDARD OF REVIEW

S.C. Code Ann., § 11-35-4410(6) provides for right of judicial review of a Panel Decision pursuant to S.C. Code § 1-23-380 of the South Carolina Administrative Procedures Act (“APA”).

Section 1-23-380 provides, in pertinent part:

(2) Except as otherwise provided in this chapter, the serving and filing of the notice of appeal does not itself stay enforcement of the agency decision. ...

(4) The review must be conducted by the court and must be confined to the record. ...

(5) *The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact.* The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision *if substantial rights of the appellant have been prejudiced* because the administrative findings, inferences, conclusions, or decisions are:

(a) in violation of constitutional or statutory provisions;

(b) in excess of the statutory authority of the agency;

Emphasis added. The Panel’s Order misapprehended and misconstrued the breath of SCDOT 710 Exemption *vis a vis* its application to specifications as opposed to “construction, maintenance and repair.”

The Court may reverse an agency where the decision is affected by an error of law. *Lester v. S.C. Workers’ Compensation Comm’n*, 328 S.C. 535, 493 S.E.2d 103 (1997) reh’g denied, cert. granted, aff’d in part, rev’d in part on other grounds.

Interpreting and applying statutes and regulations administered by an agency is a two-step process. First, a court must determine whether the language of a statute or regulation directly speaks to the issue. If so, the court must utilize the clear meaning of the statute or regulation. ... If the statute or regulation “is silent or ambiguous with respect to the specific issue,” the court then must give deference to the agency’s interpretation of the statute or regulation, assuming the interpretation is worthy of deference. (citations omitted)

Kiawah Development Partners, II v. South Carolina Dept. of Health and Envnt’l Control, 411 S.C. 16, 32, 766 S.E.2d 707, 717 (2014). Our courts have given considerable judicial deference to

a responsible administrative body's consistent mode of applying a statute considerable judicial deference in the construction of ambiguous statutes. *Bunch v. Cobb*, 273 S.C. 445, 452, 257 S.E.2d 225, 228 (1979).

The Panel, like SCDOT, is an agency of the State and is part of the executive branch of government. The Panel is the agency charged with making a *de novo* determination regarding a Request for Review of an agency determination under the Code. S.C. Code Ann. § 11-35-4410. As a creature of statute, the Panel is possessed only with those powers that are specifically delineated by law or are a necessary implication thereof. See *Hitachi Data Sys. Corp. v. Leatherman*, 309 S.C. 174, 420 S.E.2d 843 (1992); *South Carolina Elec. and Gas Co. v. Public Serv. Comm'n*, 275 S.C. 487, 272 S.E.2d 793 (1980); see also *City of Rock Hill v. S.C. Dep't of Health & Envtl. Control*, 302 S.C. 161, 394 S.E.2d 327 (1990); *City of Columbia v. Bd. of Health & Envtl. Control*, 292 S.C. 199, 355 S.E.2d 536, (1987); *Brooks v. South Carolina State Bd. of Funeral Service*, 271 S.C. 457, 247 S.E.2d 820, 822 (1978). The Panel is bound by the provisions of the Code, and S.C. Code Ann. 19-445.2010, et seq. (Supp. 2017) (Regs.). The Panel cannot impose or utilize review requirements that are not contained in the Code or Regs. *Hitachi Data Sys. Corp. v. Leatherman*, 309 S.C. 174, 420 S.E.2d 843 (1992)'; Cf. *Tall Tower v. S.C. Procurement Review Panel*, 294 S.C. 225, 234, 363 S.E.2d 683, 687-88 (1987) (invalidating the South Carolina Procurement Review Panel's imposition of a procedural requirement not provided for by statute or regulation).

ARGUMENT

- I. THE SOUTH CAROLINA PROCUREMENT REVIEW PANEL THE HAS STATUTORY AUTHORITY TO HEAR THE REQUEST FOR REVIEW OF THE SCDOT'S PROPOSED SPECIFICATIONS.

The Panel misconstrued the 710 Exemption by finding as a matter of law that the Proposed Specifications are contemplated within the meaning of the 710 Exemption and are therefore exempt from Panel review under S.C. Code Ann. § 11-35-4410(1)(b).

A. The Procurement Code Establishes Centralized Procurement Practices for Governmental Bodies. With only limited exceptions, the Procurement Code is the uniform law enacted by the General Assembly applicable to “*contracts solicited or entered into after the effective date of this code ...*” (emphasis added) S.C. Code Ann. § 11-35-40(1). The General Assembly’s intent, in enacting the Code was and is to establish a centralized materials management authority for the State’s governmental bodies.

All parties agree that the application of the breath of the SCDOT 710 Exemption from the Procurement Code is a question of first impression before the Panel. In interpreting our state’s statutory law, the cardinal rule of construction is to give meaning to the legislative purpose of its duly enacted laws.

It is axiomatic that statutory interpretation begins (and often ends) with the text of the statute in question. See *Timmons v. S.C. Tricentennial Comm'n*, 254 S.C. 378, 401, 175 S.E.2d 805, 817 (1970) (“If a statute is clear and explicit in its language, then there is no need to resort to statutory interpretation or legislative intent to determine its meaning.”); see also *Transp. Ins. Co. v. S.C. Second Injury Fund*, 389 S.C. 422, 429, 699 S.E.2d 687, 690 (2010) (“The text of a statute as drafted by the legislature is considered the best evidence of the legislative intent or will.” (citing *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000))). Absent an ambiguity, there is nothing for a court to construe, that is, a court should not look beyond the statutory text to discern its meaning. “[T]here is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning” unless a statutory provision is ambiguous. *Paschal v. State Election Comm'n*, 317 S.C. 434, 436, 454 S.E.2d 890, 892 (1995) (citing *Miller v. Doe*, 312 S.C. 444, 441 S.E.2d 319 (1994)); see also *Tilley v. Pacesetter Corp.*, 355 S.C. 361, 373, 585 S.E.2d 292, 298 (2003) (observing that unless a statute is ambiguous, “the application of standard rules of statutory interpretation is unwarranted”). Only “[w]here the language of an act gives rise to doubt or uncertainty as to legislative intent” may the construing court “search for that intent beyond the borders of the act itself.” *Kennedy v. S.C. Ret. Sys.*, 345 S.C. 339, 348,

549 S.E.2d 243, 247 (2001) (citing *Lite House, Inc. v. J.C. Roy Co.*, 309 S.C. 50, 53, 419 S.E.2d 817, 819 (Ct. App. 1992)).

Smith v. Tiffany, 419 S.C. 548, 555-556, 799 S.E.2d 479, 483 (2017).

The Code “must be construed and applied to promote underlying purposes and policies”.

S. C. Code Ann. § 11-35-20(1). The purposes and policies of Chapter 35 include:

(a) to provide increased economy in state procurement activities and to maximize to the fullest extent practicable the purchasing values of funds while ensuring that procurements are the most advantageous to the State and in compliance with the provisions of the Ethics Government Accountability and Campaign Reform Act;

(b) to foster effective broad based competition for public procurement within the free enterprise system; ...

(d) to consolidate, clarify, and modernize the law governing procurement in this State and permit the continued development of explicit and thoroughly considered procurement policies and practices; ...

(f) to ensure the fair and equitable treatment of all persons who deal with the procurement system which will promote increased public confidence in the procedures followed in public procurement;

(g) to provide safeguards for the maintenance of a procurement system of quality and integrity with clearly defined rules for ethical behavior on the part of all persons engaged in the public procurement process;

S.C. Code Ann. 11-35-20(2). In determining whether the Legislature intended to exempt SCDOT from complying with the requirements of the Code in drafting the Proposed Specifications, the Court must consider these clear and unambiguously enacted legislative purposes in reaching its conclusion.

Except as provided in S.C. Code § 11-35-710, the Code is applicable to ALL governmental bodies, as defined by S.C. Code Ann. § 11-35-310(18). See Record: PRP Order, p. 3. Section 11-35-710 exempts certain agencies in *toto* from the Code (South Carolina State Ports Authority, Division of Public Railways of the Department of Commerce, South Carolina Public Service Authority and the South Carolina Research Authority), other agencies partially (SCDOT and the Department of Public Safety, the South Carolina Department of Corrections and the South

Carolina Arts Commission and South Carolina Museum Commission) and exempts otherwise covered agencies from the Code purchasing procedures for certain types of goods and supplies (livestock, fresh foods, published books, etc.).

Article 3 sets forth the “Procurement Organization” for Chapter 35. Article 3 provides, in pertinent part:

All rights, powers, duties, and authority relating to the procurement of supplies, services, and information technology and to the management, control, warehousing, sale and disposal of supplies, construction, information technology, and services now vested in or exercised by a state governmental body pursuant to the provisions of law relating thereto, and regardless of source of funding, are *hereby vested in the appropriate chief procurement officer*, or with regard to Article 15, as provided therein. This vesting of authority is subject to *Section 11-35-710 (Exemptions)*, Section 11-35-1250 (Authority to Contract for Auditing Services), Section 11-35- 1260 (Authority to Contract for Legal Services), Section 11-35-1550 (Small Purchases), Section 11- 35-1560 (Sole Source Procurement), Section 11-35-1570 (Emergency Procurements), Section 11- 35-3230 (Exception for Small Architect Engineer, and Land Surveying Services Contracts), and Section 11-35-3620 (Management of Warehouses and Inventory).

S.C. Code Ann. § 11-35-510. Section 11-35-710(A)(1) is the only exemption in the Code granted to SCDOT from the policies, purposes and requirements of the Code.³ *See, e.g.: Appeal by Short Counts, LLC, In Re: Appeal by Short Counts, LLC RFP No. 5400006878 Traffic Data Collection Services for the South Carolina Department of Transportation, Case No. 2014-4 (2015), 2015 WL 851746.*

Exemptions for the competitive requirements of the Code are the exception, not the rule. Clearly, the legislative intent is to err on the side of the applying the Code requirements to a state agency as opposed to exempting it from the requirements.

Based on the legislative purposes of the Code, the Panel erred in expanding the SCDOT 710 Exemption to include the Proposed Specifications to thwart the Legislature’s mandate in § 11-

³ As is discussed below, Respondents contend that S.C. Code § 57-3-110 provides SCDOT a separate exemption from the Procurement Code.

35-4410(1)(b) that the Panel review agency policies or procedures, such as the Proposed Specifications, that unduly restrict competition.

B. The Proposed Specifications Are Not Subject to the 710 Exemption Since It is Not Developed Through the SCDOT Purchasing Process.

Section 11-35-710 reads, 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 from 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. (Emphasis added).

Neither the word “purchasing” nor the phrase “purchasing procedures” is defined in the Code. An undefined statutory term it is to be given its plain and ordinary meaning. *See: Perry v. Bullock*, 409 S.C. 137, 140-141, 761 S.E.2d 251, 253 (2014) (“When interpreting an undefined statutory term, the Court must look to its usual and customary meaning.”) “Purchase” is defined as: “to obtain by paying money or its equivalent: buy”. <https://www.merriam-webster.com/dictionary/purchase> (last consulted October 14, 202). The SCDOT’s Proposed Specifications are admittedly not purchased (contracted for) but developed internally by SCDOT staff. Record, PRP267, Order p.3. Therefore, the Proposed Specifications are not purchased.

The plain and unambiguous language of § 11-35-710(A)(1) only exempts SCDOT from the purchasing process of “construction, maintenance, and repair of bridges, highways, and roads” through the process of buying the goods or services. SCDOT’s development of internal

specifications is not part of SCDOT's purchasing process for "construction, maintenance, and repair of bridges, highways, and roads" and the Panel erred in so finding.

C. The Proposed Specifications Do Not Fall Within the Meaning of "the Construction, Maintenance, and Repair".

Our Courts have long observed the statutory construction principle of "*expressio unius est exclusio alterius*". The Panel's Order does not address the fact that the 710 Exemption only exempts the "construction, maintenance and repair" and does not include specifications. Instead, the Order adopted the argument of the SCDOT and CPOC "that the construction specifications [Proposed 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 thus are exempt from all other Code provisions, including the specification requirements in S.C. Code § 11-35-2710. Record, PRP, p. 267 (order, p. 3).

This conclusion is contrary to the cardinal rule of statutory construction—ascertaining and following the intent of the legislature.

The canon of construction "*expressio unius est exclusio alterius*" or "*inclusio unius est exclusio alterius*" holds that "to express or include one thing implies the exclusion of another, or of the alternative." *Black's Law Dictionary* 602 (7th ed. 1999). Section 1-3-240(C) does not specifically exempt the Santee Cooper Board of Directors from its operation, as it does ten other boards. The fact that the Santee Cooper Board of Directors was not included in the list of exclusions implies that the General Assembly intended for section 1-3-240(B) to apply to the Board. "The enumeration of exclusions from the operation of a statute indicates that the statute should apply to all cases not specifically excluded. Exceptions strengthen the force of the general law and enumeration weakens it as to things not expressed." *Norman J. Singer, Sutherland Statutory Construction* § 47.23 at 227 (5th ed. 1992) (citations omitted).

Hodges v. Rainey, 341 S.C. 79, 86-87, 533 S.E.2d 578, 587 (2002).

Section 11-35-710(A)(1) does not list "specifications" within the exemption granted to SCDOT. While "construction," "maintenance" and "repairs" are not defined terms in the Code,

“specifications” is. Article 7 of the Code regulates the development of specifications. “Specifications” is defined as “any technical or purchase description or other description of the physical or functional characteristics, or of the nature of a supply, service, or construction item. It may also include a description of any requirement for inspecting, testing, or preparing a supply, service, or construction item for delivery.” S.C. Code Ann. § 11-35-2610. Respondents do not contend that the Proposed Specifications do not fall within the Code’s definition of “specifications.”

Section 11-35-2710 authorizes the State Fiscal Accountability Authority (“Board”) to promulgate regulations governing the development of specifications. S.C. Code Ann. Reg. 19-445.2140(4). Reg. 19-445.2140(5) defines “Specification for a Common or General Use Item” as *“a specification which has been developed and approved for repeated use in procurement.”* (Emphasis added) Obviously, since the Proposed Specifications will apply to all construction for all Major Highways in South Carolina, they clearly fall within the definition of “Specification for a Common or General Use Item”.

The Legislature is charged with knowledge of its laws. *Berkebile v. Outen*, 331 S.C. 50, 53, 426 S.E.2d 760, 762 (1993) (“A basic presumption exists that the legislature has knowledge of previous legislation when later statutes are passed on a related subject.”). If the Legislature had meant to include “specifications” within the 710 Exemption, it would have included the word in the listing of SCDOT activities exempted from the purchasing provisions of the Code. It did not and the drafting of the Proposed Specifications” are not exempted from review pursuant to the 710 Exemptions and the Panel erred in so finding.

The Panel further erred in subsuming “specifications” within the terms “construction”, “maintenance” and “repair”. When words in a statute are not defined, they are to be given their

plain and ordinary meaning. *Perry*, 409 S.C. 137, 140-141, 761 S.E.2d 251, 253 (2014). “Construction” is defined as “the process, art, or manner of constructing something.” *Construction of the new bridge will begin in the spring.* <https://www.merriam-webster.com/dictionary/construction> (Lasted visited October 15, 2020). “Maintenance” is defined as “the act of maintaining: the state of being maintained: SUPPORT The building has suffered from years of poor *maintenance*.” <https://www.merriam-webster.com/dictionary/maintenance> Last visited October 15, 2020. And, “repair” is defined as “to restore by replacing a part or putting together what is torn or broken: FIX *repair* a shoe”. <https://www.merriam-webster.com/dictionary/repair> Last visited October 15, 2020. Clearly, “specifications” is not synonymous with or subsumed in the terms “construction”, “maintenance,” or “repair.” The drafting of specifications is a distinct act the Code mandates and the Panel erred in interpreting § 11-35 710(A)(1) so as to deprive it of jurisdiction to hear ADS’s Request for Review.

Obviously, while drafting specifications, in certain instances, is a precursor to construction, repair and maintenance, drafting specifications is not the activity of construction, repair or maintenance of highways, roads or bridges and the Panel erred in concluding that the Legislature contemplated that the drafting of specifications was to be included within the 710 Exemption.

II. THE FACT THAT THE PROPOSED SPECIFICATIONS WOULD BE INCLUDED IN FUTURE CONTRACTS DOES NOT EXEMPT THE SCDOT FROM COMPLYING WITH ARTICLE 7 OF THE CODE.

The Panel’s Order concluded as a matter of law 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.’” Record, PRP270, Order p. 6. The Panel’s conclusion again misapprehends the fact that

the plain and unambiguous language of § 11-35-710(A)(1) does *not* include the statutorily defined term “specifications” while including, construction, maintenance and repair. The 710 Exemption, on its face, exempts the purchasing process (the solicitation of contracts) for the construction, maintenance and repair of highways and bridges, not the internal development of specifications. The Panel’s conclusion nullifies and makes meaningless the Article 7 requirement for development of specifications and specifically specifications that are not unduly restrictive. *See State ex. rel. McLeod. v. Montgomery*, 244 S.C. 308, 314, 136 S.E.2d 778, 782 (1964) (finding that a court must presume that the legislature “intended by its action to accomplish something and not to do a futile thing”).

The Panel’s Order relies on the provision of the Supplemental Technical Specification SC-M-714 (“This specification establishes requirements for the materials, construction, measurement, and payment ...”)⁴ for its contention that the Proposed Specifications become part of the contract terms for construction and are therefore exempt from the Code requirements, including § 11-35-4410(1)(b) review. For construction projects, specifications will always be a part of or incorporated into the solicitation and resulting contract. However, this does not change the fact that the Code unambiguously treats the development of specifications as a separate and distinct activity from contracts, whether they be for construction of highways, bridges, buildings, information technology systems. For example, invitations for bids may be cancelled because the specifications cited in the IFB are inadequate or have been changes. S.C. Code Ann. Reg. 19-445.2065. Individual bids may be rejected if they do not conform to the bid specifications. S.C. Code Ann. Reg. 19-445.2070 Rejection of Individual Bids. *See also*: 19-445.2085 Correction or Withdrawal of Bids; Cancellation of Awards; 19-445.2097 Rejection of Proposals.

⁴ See also, Record, PRP, Preconstruction Design Memorandum, PRP025, paragraph 1 and “Specifications for Culvert Pipe Used in SCDOT Highway Applications, PRP127-129.

The Panel's Order completely misapprehends the statutory purpose for specifications.

The purpose of a specification is to serve as a basis for obtaining a supply, service, information technology, or construction item adequate and suitable for the State's needs in a cost effective manner, taking into account, to the extent practicable, the cost of ownership and operation as well as initial acquisition costs. It is the policy of the State that specifications permit maximum practicable competition consistent with this purpose. Specification shall be drafted with the objective of clearly describing the State's requirements. All specifications shall be written in a non-restrictive manner as to describe the requirements to be met.

S. C. Code Ann. Reg. 19-445.2140(B). Certainly, the General Assembly is charged with knowledge of the statutory purposes of specifications and their interplay with contract solicitation and actual construction activities. The Panel erred in determining that because specifications are included in a highway construction contract, the Legislature meant to exempt SCDOT's development of "specifications" from all of the requirements of the Code, including its ability to review the unduly restrictive provisions of the Proposed Specifications.

III. READING S. C. CODE ANN. § 57-3-110(A)(1) IN HARMONY WITH THE CODE AUTHORIZED THE PANEL TO CONDUCT THE REQUEST FOR REVIEW.

The Panel also relies on S.C. Code Ann. § 57-3-110(A)(1) in support of its conclusion that the 710 Exemption deprives the Panel of jurisdiction to hear ADS's Request for Review of the Proposed Specifications. Record, PRP270, Order, p. 6. Statutes do not stand alone and must be read in context of a code as a whole. "A statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent. Consequently, each part or section should be construed in connection with every other part or section so as to produce a harmonious whole." *Sutherland Statutory Construction*, 5th Ed., § 46.05, p. 103 (1992). See also *Keonig v. South Carolina Dept. of Public Safety*, 325 S.C. 400, 480 S.E.2d 98 (Ct. App. 1996). The statutory language in question must also "be read in a sense which harmonizes with its subject matter [the Code] and accords with its general purposes." *Hitachi*, 420 S.E.2d 846 citing *Multi-Cinema, Ltd.*

v. *S.C. Tax Comm'n*, 292 S.C. 411, 357 S.E.2d 6 (1987). Finally, the legislature is presumed to know and have taken into account existing law when enacting subsequent legislation, particularly when the amendment is as to the same code provisions. Our legislature is presumed to have knowledge of prior court decisions and to have taken them into consideration when enacting later laws. *Berkebile*, 311 S.C. 50, 53, 426 S.E.2d 760, 762 (1993).

As noted above, Article 7 governs the drafting of specifications. Clearly, the Proposed Specifications fall within the § 11-35-2610 definition of “specifications.” The State Fiscal Accountability Authority (Board) is required to promulgate regulations governing preparation, maintenance and content of specifications. S.C. Code Ann. § 11-35-2710, amended by Act No. 376, 2006. Section 11-35-2720 sets forth the duties of the respective chief procurement officers *vis a vis* specifications and provides that the officers “may prepare or review, issue, revise and maintain the specifications for ... construction required by the State.” Further, the Code requires that “[a]ll specifications shall be drafted so as to assure cost effective procurement of the state’s actual needs and shall not be unduly restrictive.” § 11-35-2730, amended by Act No. 153, 1997. (Emphasis added). S.C. Code Ann. § 57-3-110 enumerates the powers and duties of SCDOT and provides, in pertinent part, that SCDOT has the authority 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(1). (Emphasis added). Section 57-3-110 was passed by Act No. 181 in 1993. Section 11-35-2720 was last amended in 2006 by Act No. 376 § 39. Thus, § 11-35-2720 was amended after § 57-3-110 and the General Assembly is presumed to have had knowledge of the fact that § 11-35-2720 requires that ALL specifications must be drafted “so as to assure cost effective procurement of the state’s actual needs and shall not be unduly restrictive.”

Reading §§ 57-3-110 and 11-35-2720 together and harmonizing the requirements for development of road construction specifications in the State, § 57-3-110 simply dictates that SCDOT, and not the CPOs, are responsible for the development of specifications for construction, maintenance and repair of highways and the CPOs have no role in the preparation or review, issuance, revision or maintenance of specifications for construction, maintenance and repair of highways and bridges. Nowhere does § 57-3-110 exempt specification development from the requirements of § 11-35-2730 or the purpose of specification development in S.C. Code Reg. 19-445-2140(B).⁵

Obviously, the Code and regulatory provisions at issue here were amended later in time than S.C. Code Ann. § 57-3-110. As a general rule, later legislation controls. In this matter, clearly the Article 7 and § 57-3-110 can be read together and harmonized, not by erroneously concluding that the Proposed Specifications will become part of a highway construction contract. The effect of § 57-3-110 provides exclusive authority to the SCDOT to prepare and revise its highway specifications without oversight from the CPOs. No provision Title 57, including § 57-3-110, or the Code exempts SCDOT from the § 11-35-2730 that specifications “shall be drafted so as to assure cost effective procurement of the state’s actual needs and shall not be unduly restrictive.” So it is clearly a written determination that this Panel has jurisdiction to hear pursuant to S.C. Code Ann. § 11-35-4410(1)(b).

IV. THE PANEL’S RELIANCE ON THE ANNUAL AUDITS CONDUCTED BY THE MATERIALS MANAGEMENT OFFICE IS MISPLACED.

While recognizing that the Material Management Office’s (“MMO”) findings are not binding on the Panel, it still relied on MMO’s annual audits of SCDOT’s procurement practices

⁵ Section 11-35-2730 was last amended in 1997, after § 57-3-110 was amended in 1993. Reg. 19-445-2140 was last amended in 2017.

under the 710 Exemption in support of its legal conclusion that the Proposed Specifications are exempted from Panel review pursuant to § 11-35-4410(1)(b). These audits were conducted pursuant to S.C. Code § 57-1-490, which was repealed by Act 41 of 2019. Prior to its repeal in 2019, S.C. Code Ann. § 57-1-490(B) required the Materials Management Office of the Budget and Control Board to audit annually the [SCDOT] internal procurement operations to ensure that the department has acted properly with regard to the department's exemption contained in Section 11-35-710 and authorized "administrative penalties for violations found as a result of the audit." Section 11-35-1240 authorized the Board to establish administrative penalties for violation of Chapter 35. Certainly, written determinations of violation of administrative penalties are subject to review under § 11-35-4410(1)(b).

In its first audit conducted pursuant to § 57-1-490(B), the MMO stated, in pertinent part:

DOT is exempt from using the Procurement Code for all contracts for the construction, maintenance, and repair of bridges, highways, and roads; As noted by the Attorney General, this exemption "is not artfully drafted and ... susceptible to various interpretations." For 27 years, MMO and DOT have often disagreed about the use of this exemption. Attempts to reach agreement on its meaning have generally been unsuccessful in achieving a long term solution. Our audit sample of DOT's expenditures for the period of June 27, 2007 through June 30, 2008 confirms that this failure persists. While our audit was limited and, thus identified only a limited number of exceptions, it confirms that DOT continues to conduct procurement as exempt that are covered by the Procurement Code.

Audit Report by the 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). P. 1. (2008 MMO Audit)
<https://www.procurement.sc.gov/files/DOT08.pdf> (last visited April 17, 2020).

In the last audit conducted before § 57-1-490(B) was repealed, the MMO wrote: "of primary concern is the meaning of the phrase 'construction, maintenance, and repair of bridges, highways and roads,' and what each word encompasses." Examination Report South Carolina

Department of Transportation’s Internal Procurement Operations with Regard to the Department’s Exemption from the Consolidated Procurement Code, p. 4 (2018 Audit) <https://www.procurement.sc.gov/files/DOT18.pdf>. (last visited 4/17/2020). The 2018 Audit stated that to understand the Highway Exemption, one had to read the Code definitions of “construction”, “services”, “Architect-engineer and land surveying services” and Construction Management Services” together. As the 2018 Audit stated:

Read together, these definitions clearly distinguish constructions services from non-construction services, both those related to construction and those not. Narrowly looking at these definitions, one might conclude DOT’s exemption for construction does not extend to any construction related professional services because the term construction does not include architectural and engineering, construction management, and land surveying services.” However as explained in the October 15, 2008 audit report, MMO applies a broader definition of construction to DOT’s exemption.⁶ MMO concluded the exemption includes construction related professional design services, as defined by law.

Id., p. 5. Of note, is that the discussions in the 2008 Audit and the 2019 Audit include many of the sections and articles in Chapter 35—but not Article 7 regulating “specifications.”

Importantly, and a distinction not recognized by the Panel’s Order, the MMO concluded that the phrase “construction, maintenance, and repair of bridges, highways and roads,” read together, “clearly distinguish constructions services from non-construction services, both those related to construction and those not.” The MMO audits neither discussed nor identified “specifications” as relating in any way to the exemption for “construction, maintenance, and repair of bridges, highways and roads.” The Panel erred in relying on the MMO audits in support of its determination that the 710 Exemption applies to the Proposed Specifications and it does not have authority to hear the Request for Review pursuant to § 11-35-4410(1)(b).

⁶ See: 2008 Audit, pp. 14-17.

The Panel also found that since the MMO audits were filed with the General Assembly annually, the General Assembly, if it disagreed with MMO interpretation of the 710 Exemption, could simply have amended § 11-35-710(A)(1) and it did not do so. Again, this argument is in error. None of the audits relied on by the Panel even put the General Assembly on notice that specifications, as defined in the Code, were an issue considered by the MMO in its annual audits of the SCDOT procurement practices under the 710 Exemption.

- v. THE PHRASE “PROCURED IN ACCORDANCE WITH THE PROVISIONS OF ‘THE PROCUREMENT’ [C]ODE” DOES NOT DEPRIVE THE PANEL OF JURISDICTION TO HEAR THE ADS REQUEST FOR REVIEW.

The Panel determined that even if the “Proposed Specifications” are not subject to the 710 Exemption, it still does not have jurisdiction to hear the Request for Review. Specifically, the Panel held that it only has authority to hear requests for review of 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 ...*”. Record, PRP _____. Thus, since § 11-35-4410(1)(b) only authorizes the Panel to conduct a “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”. The Panel misapprehends the legislative use of the term “procurement” in the section.

The Code defines “procurement” to mean

buying, purchasing, renting, leasing, or *otherwise acquiring* any supplies, services, information technology, or construction. It also includes all functions that pertain to the obtaining of any supply, service, information technology, or construction, including description of requirements, selection, and solicitation of sources, preparation and award of contracts, and all phases of contract administration.

S.C. Code Ann. § 11-35-310(25). By definition, procurement or procure includes “all functions that pertain to the obtaining of ... construction.” The use of the phrase “otherwise acquiring” indicated that the Legislature did not limit “procurement” just to purchased services. Specifications constitute a function that pertains to the obtaining of a contract. The Code distinguishes between “procure” and “purchase. Section 11-35-710 limits the exemptions to purchasing and § 11-35-4410(1)(b) authorizes the Panel to review written determinations otherwise procured under the Code. While not purchased, the Proposed Specifications are procured under the Code pursuant to Article 7 of the Code and S.C. Code Ann. Reg. 19-445.2140.

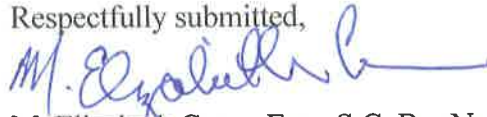
To the contrary, § 11-35-710(A)(1) uses the words “purchasing” and “purchasing procedures” and not the words “procurement” or “procure.” If the Legislature had met to use the words procurement or procure in § 11-35-710(A)(1), it would have done so. The Panel erred in concluding, as a matter of law, that because the Proposed Specifications were not “procured” under the Code, it did not have jurisdiction to hear ADS’s Request for Review.

Finally, the Panel relies on *Sloan v. Department of Transportation*, 379 S.C. 160, 171, 666 S.E. wd 236, 241 (2008) that “the procurement of construction contracts for the state highway system is governed by S.C. Code Ann § 57-5-1620). The issue here is not the procurement of a construction contract but the development of Proposed Specifications for design of culverts for highways and roads. The requirements of S.C. Code § 57-5-1620 are not implicated in this matter. The Panel’s reliance on *Sloan* is misplaced

CONCLUSION

For the reasons in this Initial Brief, Appellant respectfully requests this Court overturn the Panel’s Order and remand the case to the Panel for a hearing on the merits of the Request for Review.

Respectfully submitted,



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Columbia, South Carolina

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA
PROCUREMENT REVIEW PANEL

Appellate Case No. 2020-000859

RECEIVED

Oct 16 2020

SC Court of Appeals

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

CERTIFICATE OF SERVICE

I, Ann Shuler, an employee of Burr & Forman, LLP, hereby certify that a true and correct copy of the **Appellant's Initial Brief** and **Appellant's Designation of Matter to be Included in the Record on Appeal** were served upon counsel for the Respondent in the above-captioned matter, via email at the email addresses listed below, and by causing a copy of same to be deposited in the United States Mail, first class postage prepaid, this 16th day of October, 2020, addressed as follows:

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